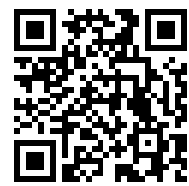

AN

INTRODUCTION

TO

THE LAW,

RELATIVE TO

Trials at Nisi Prius.

By SIR FRANCIS BULLER, Bart.

LATE ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF COMMON PLEAS.

WITH

COPIOUS ANNOTATIONS,

FURTHER EXPLAINING

THE RULES AND PRINCIPLES

OF THAT BRANCH OF THE LAW

WHICH IS

THE SUBJECT MATTER OF THE ORIGINAL WORK.

By RICHARD WHALLEY BRIDGMAN, Esq.

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EDITOR'S ADVERTISEMENT.

ALMOST forty-six years have now elapsed since this valuable Work was first put to press; and, nearly twenty-six years since the sixth and last Edition. In the later reprints, some additions were made, the chief of which seem to have been "The Rules respecting Patents;" it is to be lamented, however, that sufficient attention has not been paid to the correction of errors discoverable in the former Editions, and that the Cases which the learned Author originally treated as Manuscript Cases, which have been since reported, should have been reprinted without the necessary references to such Reports.

The Editor of the present Edition has endeavoured to keep the original objects of the Author in view, by directing his chief attention to general rules and principles, being aware that "*The Introduction to the Law of Nisi Prius*" was never intended to be a digest of Cases determined in the *Nisi Prius* Courts, but rather as a collection of the Rules and Principles by which Cases before a judge and jury should be governed, and as a Circuit Companion for gentlemen attending the assizes.

The following are the principal alterations and corrections made by the Editor in the present Edition of this valuable Work, and he trusts they will be considered as improvements.

The references to the adjudged Cases are transferred from the margin to the body of the work, and those heretofore referred to by figures only, are now distinguished by their respective names, where such names could be discovered; the obvious liability to error in figured references, was his motive for this alteration. The periods of adjudication also are uniformly added, except in the notes, where, for brevity's sake, they are omitted; references

to Reports, hitherto omitted, are now annexed; there is one however which, at first, was not easy to be understood, and that is to *Oct. Str.*; it was made by the learned Author in the first impression of his work, and has been copied in every reprint without explanation; but it has lately been suggested to the Editor, that the Author meant to refer to a small Work printed in *Octavo* in 1754, under the title of "*Select Cases relating to Evidence, by a late Barrister "at Law.*" That Book, it seems, was suppressed, on the ground that its contents had been surreptitiously obtained from the MSS. of Sir *John Strange*, whose Reports at large were printed by his Son in the following year, in which most of the Cases in that Volume are introduced.

The paging of the later Editions is carefully preserved, and the known difference which exists between the first and subsequent Editions of *Douglas*'s Reports is noticed by placing the pages of the latter within a parenthesis. The Editor, in the notes also, has added many subsequent authorities, and introduced such old ones as appeared applicable to the subject.

The Repertorium of Cases is very considerably extended, embracing all that are cited in the text and notes.

Lastly, A very copious Table of Principal Matters is substituted, which, it is hoped, will materially assist each reference to the text, especially to those Cases which, in many instances, are so diffuse as to have rendered it difficult for the Editor to determine upon the appropriate disposal of the notes.

In conclusion, it may be fairly submitted, that the labours of the Editor, in preparing this Work for publication, after the lapse of so considerable an interval since its last appearance, have been far from inconsiderable; the result of them he now fearlessly confides to the candid judgment of the reader, encouraged by a grateful remembrance of the very favorable reception afforded to his former endeavours to diminish labour and facilitate research.

R. W. B.

BATH,
January, 1817.

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REPERTORIUM.

THE Reader will please to observe, that such of the Cases in this Table as are printed in Roman Letters, and are marked with an Asterisk * were referred to in all the former Editions of this Work *by the Volume and Page of the Reporter only*, in the present Edition they are *named*, but those which are printed in Roman Letters, without any distinguishing Mark, were named in the former Editions. The Cases which are printed in *Italic* Characters are only to be found in the *Notes* to this Edition, and where those Cases occur, an Italic Key-letter (within a Parenthesis) *precedes* the Page.

It is further to be observed, that all Ejectment Cases are indexed by the Name of the Lessor of the Plaintiff, and where the King or Attorney-General is Plaintiff, then by the Name of the Defendant.

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ERRATA.

From page 1 to 20, where the pages of the original text are repeated, the key letters a, b, &c. are not added, but they are indexed in the corrected state.
For Holt v. *Isterfield*, 6 T. Rep. 634 a. 3 a. read Holt v. *Scholefield*, 6 T. Rep. 691.
For Stawell v. Caume, 2 *Lev.* 50. read 3 *Lev.* 50, &c. in n. (*b*) 4 b.
To Robinson v. Hildredon, in n. (*a*) pa. 5 a. add *Cro. Jac.* 66.
In pa. 7 a. line 2, for Charlter v. Barrett, *Peake* 221, read *Peake* 22.
In that part of n. (*a*) to pa. 22 a. which stands under pa. 22 c. for Boyce v. *Campbell*, read Boyce v. *Douglas*.
In pa. 46 a. line 20, for 29, read 29 *Eliz.*
——— 62 b. line 7, for *Homer* read *Horner*.
The commencement of pa. 101, of the original text, being omitted, place it against line 23, in pa. 100 a.
In pa. 121 a. line 31, Webb's Case, 8 *Co.* 49, read 8 *Co.* 90, and again in n. (*a*) of same page.
In pa. 136 b. line 5, add (a), and prefix (a) to the note.
——— 139 a. n. (*a*) line 6, for *assignees* read *lessor*.
——— 142 a. line 19, for *Ride* v. *Buelock*, read *Reds* v. *Berelock*.
——— 145 b. line 6, for *have* read *raise*.
To pa. 156. n. (*b*) after *Pitt* v. *Morley*, ib. 362, read "it was held that a tender "may be pleaded after a judge's order for time to plead."
In pa. 174, n. (*b*) line 6, for *evidence*-bond, read *evidence* a bond.
In pa. 189, n. (*b*) line 4, after "defeat" add "the plaintiff."
——— 190, n. (*b*) for Scott v. *Carey*, read Scott v. *Airey*, and after "in Scacc." add 3 Gwil. 1174.
In pa. 232 b. line 5, for *Charges* read *Clarges*.
In that part of n. (*a*) to pa. 249 a. which stands under pa. 249 b. after "Welch v. Richards," read *Barnes* 468.
In pa. 271 a. line 21, for "*drawee*" read "*payee*."
——— 321, line 4, for 2 Stra. 1023, read 2 Stra. 1006.
——— 329 a. n (*c*) line 3, for "*found*" read "*founded*."
——— 329 b. line 3, after "impounding" add *Moor* v. *Hall*, T. 1 Geo. I.

AN

INTRODUCTION

TO THE

Law at Nisi Prius.

PART I.

CONTAINING THREE BOOKS OF

ACTIONS FOUNDED UPON TORTS.

INTRODUCTION

TO

PART THE FIRST.

IT was for their mutual conveniency and defence that men first entered into society, thereby submitting themselves to be governed by certain laws, that they might in return enjoy the benefit and protection of them. *Legum denique idcirco omnes servi sumus, ut liberi esse possimus.*—Cic. pro Cluent.

Hence the end of the law is to preserve men's persons and properties [2] from the violence and injustice of others; and for that purpose it does, in all instances of an injury being committed, either inflict a punishment upon the party offending, or give a recompence to the party injured.

The method prescribed by the Law for getting at such recompence is what is properly termed an action: therefore leaving Criminal Prosecutions, by which punishments are inflicted, to the disquisition of

 others,

others, I will, in this First Part of my work, take notice of the Injuries for which an Action may be brought, and by what Evidence it may be supported; and also consider what Defence may be made by the person against whom the Action is brought, and what is the proper Manner of taking advantage of it.

BOOK

BOOK I.

FOR WHAT INJURIES AFFECTING THE PERSON AN ACTION MAY BE BROUGHT.

THE injuries on account of which an action may be brought, are such as either affect the person, or the property of the party.

Those which affect the person are,

1. Slander.
2. Malicious Prosecution.
3. Assault and Battery.
4. False Imprisonment.
5. Injuries arising from Negligence or Folly.
6. Adultery.

CHAPTER I.

OF SLANDER.

SLANDER is defaming a man in his reputation *(a)* by speaking or writing words which affect his life, office, or trade; or which tend to his

(a) Slander may be by *words* maliciously spoken in the presence of others, or by a *writing* delivered over to another to scandalize a man, or by *painting* a man ignominiously, or by *signs*, as by affixing a gallows over a man's door. *Case de libellis famosis*, 5 Co. 125.

The important distinction between *words spoken* and *libels* was fully established in *Villers* v. *Monsley*, 2 Wils. 403, *viz.* That whatever renders a man ridiculous, or lowers him in the esteem of the world, amounts to a libel; though the same words, if spoken, would not have been a defamation of him.

As to *slander by words:* Where the words spoken bring a man into danger of legal punishment, they will support this action, but they must charge a fact to have been committed, for it is not enough to charge him with an evil intention only. *Harrison* v. *Stratton*, 4 Esp. N. P. Ca. 218.

So *adjective* words are actionable, if they presume an act committed, as to call a man "a *perjured* old knave," for *perjured* implies an act committed. *Secus*, if a man be called "a *seditious* or *thevish* knave," for that only imports an inclination to the crime. *Brittridge's Ca.* 4 Co. 18.

And indeed any words which may subject a man to prosecution are actionable. *Morgan* v. *Williams*, 1 Stra. 142. *Cuddington* v. *Wilkins*, Hob. 81. *Carpenter* v. *Tarrant*, Ca. temp. Hardw. 339, cited by *Ellenborough*, C. J. in *Roberts* v. *Camden*, 9 East, 97.

So words which operate to exclude a man from society, are actionable, as charging him with having

his loss of preferment in marriage or service; or to his disinheritance; or which occasion any other particular damage. *(a)*

If slander be spoken of a peer or other great man, it is called by a particular name, *Scandalum Magnatum*, and is punishable in a particular manner, *viz.* by imprisonment, by *Westm.* 1. *c.* 34. as well as rendering damages to the person injured, to be recovered in an action founded
[*4] upon the 2d of *R.* 2. *tam pro* **Domino rege quam pro seipso.* And this statute is a general law of which the court will take notice, and therefore it need not be recited in the declaration, (yet if the plaintiff undertake to recite it, and mistake in a material point, it is incurable:)

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ing an infectious disease. *Taylor* v. *Perr*, 1 Rol. Abr. 44. *Taylor* v. *Perkins*, Cro. Jac. 144. *Crittal* v. *Horner*, Hob. 219. *James* v. *Rutlech*, 4 Co. 17. But the words must charge him with being then infectious, and not with having been so. *Carslake* v. *Mapledoram*, 2 T. Rep. 473. *Taylor* v. *Hall*, 2 Stra. 1189.

So words which hinder a man in his profession or trade, are actionable. *Byrchley's Ca.* 4 Co. 16. *Day* v. *Buller*, 3 Wils. 59. *Phillips* v. *Janson*, 2 Esp. N. P. 624. *Roberts* v. *Camden*, 9 East, 93. *Hardwicke* v. *Chandler*, Stra. 1138. *Upsheer* v. *Betts*, Cro. Jac. 578. *Kemp's Ca.* Dy. 72 (b). Sed Vide *Com. Dig. Act. on Ca.* tit. *Defamation*, (D) 24. 259. (F) 9. 269, for these cases at large. The general rules of construction, as to slanderous words, is to construe them in their plain and popular sense, and such in which an ordinary hearer would have understood them at the time they were spoken. *Harman* v. *Delany*, Fitzg. 254. *Roberts* v. *Camden*, 9 East, 93.

(a) Words not otherwise actionable, become so when applied to a man's trade or profession; and words published in writing are actionable, which would not be so from a bare speaking of the same words; because a libel disperses and perpetuates the scandal. *Harman* v. *Delany*, Fitzg. 253: therefore to print of any one, that he is a *swindler* is a libel, and actionable; and a *justification* of such a charge must state the *particular instances* of *fraud*, by which defendant means to support it. *I'Anson* v. *Stuart*, 1 T. Rep. 749.

In *Surmon* v. *Skilleto*, 3 Bur. 1688, the words "Thou hast cheated me of several pounds" were held actionable; but it should seem there was a *colloquium* in the same count about the plaintiff's trade, although none is mentioned as being in that count, either by the reporter or the bench. In *I'Anson* v. *Stuart*, sup. *Askhurst*, J. said, that "which affects liberty," is to charge a man with having committed an indictable offence; *quære tamen*, for *Eyre*, C. J. expressly says, that calling a man a cheat, is not actionable, and yet *he is* indictable as a cheat;* and, in his opinion, the words must impute a felony: the old cases, he said, were irreconcileable on this point, but the following appeared to him to be the leading principles, *viz.* words are *actionable* which impute to a man the crime of felony, or a disease which may drive him from society, or any thing which imports a something equally noxious in its effect. So words not actionable in themselves, may become so from the person to whom they are addressed, and sometimes a *colloquium* may be supposed, but in other cases they are not actionable, except for *particular damage;* therefore "thou art *forsworn*" is not equivalent to *perjured*, without a *colloquium* as to some judicial proceeding. *Holt* v. *Isterfield*, 6 T. R. 634. *Onslow* v. *Horne*, 3 Wils. 186.

* This seems a mistake; for a man is not indictable as a *cheat*, but as a *common cheat*.

but

but it must be shewn that the plaintiff was *unus magnatum* at the time of speaking the words, else the action will not be maintainable. *(a)* (*Lord Cromwell* v. *Denny*, 20 Eliz. 4 Co. 12, 13. *E. of Shaftsbury* v. *Lord Digby*, T. 28 Car. 2. 2 Mod. 98. *Ld. Townsend* v. *Dr. Hughes*, H. 28 & 29 Car. 2. 2 Mod. 166. *Lord Say and Sele* v. *Stephens*, T. 4 Car. 1. Cro. Car. 135.) It has been said there is a difference between an action grounded upon the statute *de scand. magn.* and a common action of slander; that the words in the one case should be taken *in mitiori sensu*, and in the other in the worst sense against the speaker, that the honour of such great persons may be preserved: (*E. of Peterborough* v. *Sir John Mordant*, H. 21 & 22 Car. 2. 1 Vent. 60.) But this difference seems no longer to subsist; because the old rule, that words shall be taken *in mitiori sensu* is now exploded, and the rule at this time is, that they shall be taken in the same sense, as they would be understood by those who hear or read them, and for that purpose all the words ought to be taken together.—*Bradley* and *Messon*, M. 10 G. 2. *Ld. Townsend* v. *Hughes*, 2 Mod. 159.

The defendant said to the plaintiff, *I know you very well, how did your husband die?* The plaintiff answered, "*As you may, if it please God.*" The defendant replied, *No, he died of a wound you gave him.* On not guilty, there was a verdict for the plaintiff; and on motion in arrest of judgment, the court held words actionable, for they are in the whole frame of them spoken by way of imputation. *Parker*, C. J. said, it is very odd, that after a verdict a court of justice should be trying whether there may not be a case in which words spoken by way of scandal might be innocently said; whereas if that were in truth the case, the defendant might have justified.—*Ward* v. *Reynold*, P. 12 Ann. Gilb. Rep. K. B. 243. *(b)*

(a) It has been held in the Star Chamber, that if a *Scand. Mag.* be brought on this stat. defendant *cannot* justify, because it is brought *qui tam*, and the king is concerned; but defendant may explain the words, and tell the occasion of speaking them. If they are true, they must not be published, because the stat. was made to prevent discords. *Per North*, C. J. in *Lord Townshend* v. *Dr. Hughes*, sup.

(b) Colloquium was of the *death* of D. D. The words in one count were, "you are *guilty*," (*innuendo* of the death of D. D.) "and rather than you should want a hangman, I will hang you." In another count, "you are guilty," (*innuendo* of the murder of D. D.) After verdict, both counts were held to be actionable, but on motion, in arrest of judgment in C. B. and writ of error in B. R., Lord *Mansfield* said, the words "guilty of the death," bore a very different meaning from "you were the cause of the *death*," for one might be innocently the cause of the death of another. *Peake* v. *Oldham*, Cowp. 278, where this case was cited by *Mansfield*, C. J. as in point.

Yet

Yet perhaps many words would be holden to be actionable in the case of a peer, that would not be deemed so in the case of a private person; as in the Marquis of *Dorchester*'s case, "He is no more to be valued than that dog that lies there." *Probee* v. *Dorchester*, M. 24 Car. 2. B. R. 1 Sid. 233. So in the case of the Earl of *Peterborough* and *Stanton*. "The Earl of *Peterborough* is of no esteem in this country; no man of reputation has any esteem for him; no man will trust him for two-pence; no man values him in the country; I value him no more than the dirt under my feet."—Vide etiam *Winton, Bp.* v. *Markham*, Hetl. 55. S. P.

In offices of profit, words that impute either defect of understanding, ability or integrity, are actionable;*(a)* but in those of credit, words that
[*5] impute only want of ability, are not actionable, *because a man cannot help his want of ability as he can his want of honesty: in either case charging him with inclinations and principles, which shew him unfit, is sufficient without charging him with any act; as to say of a justice of peace, or member of parliament, "he is a Jacobite, and for bringing in the Pretender."—*How* v. *Prinn*, M. 1703. Salk. 695. 7 Mod. 113. 1 Bro. P. C. 97.*(b)*

The charging of another with a crime of which he cannot by any possibility be guilty (as killing a man who is then living) is not actionable, because the plaintiff can be in no jeopardy from such a charge, but such matter must be pleaded specially, and cannot be given in evidence on the general issue, otherwise than in mitigation of damages.—*Snagg* v. *Gee*, H. 39 Eliz. 4 Co. 16.*(c)*

An action lies not for the saying—"Thou art a thief, *for* thou hast stolen such a thing," (*ex. gr.* a tree) the stealing whereof appears to be no felony, for the subsequent words shew the reason of calling him

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(a) To charge a man with having given money to a person in a public trust, is *actionable*, as well by the person said to have given, as by the person charged with having received. *Per* Lord *Mansfield*, in *Purdy* v. *Stacey*, 5 Bur. 2700; because the words would have imported a criminal charge; but in this case it was not charged that he gave the money to the commissioners, and no one was mentioned to whom he was said to have given it, and the words are not made out to be actionable, and the court cannot intend it.

(b) Vide *Stawell* v. *Caume*, 2 Lev. 50. *Aston* v. *Blagrave*, 1 Stra. 617. 2 Ray. 1369. *Stuckley* v. *Bulhead*, 4 Co. 16. S. P. But to impute mere ignorance to a justice of peace is not actionable. *Onslow* v. *Horne*, 3 Wils. 186.

(c) Quære as to the authority of this case, for the man may be put in jeopardy on account of it: suppose the party, although alive, is *out of the kingdom*, or has been missing, &c. Sed vide *Wilner* v. *Hold*, Cro. Car. 489, where it is said, the words shall be taken according to the usual speaking.

thief;

thief;*(a)* but when he says, "Thou art a thief, *and* hast stolen such a thing," the action lies for calling him a thief; and the addition, "Thou hast stolen," is another distinct sentence by itself, and not the reason of the former speech, nor any diminution thereof.—*Minors* v. *Leeford*, H. 1605. Cro. Jac. 114. *(b)*

Though two persons say the same words, you cannot have a joint action; but where an action was brought against two for charging the plaintiff with felony, and procuring her to be indicted, it was holden good: for *crimen imponere* supposes an act, and is a tort; and, like every other tort, may be proved against two, and one only be found guilty.—*Subly* v. *Mott*, 20 Geo. 2. *(c)*

It was formerly holden that the plaintiff must prove the words precisely as laid, (2 Rol. Abr. 718.); but that strictness is now laid aside, and it is sufficient for the plaintiff to prove the substance of them. *(d)*

However,

(a) A. calls B. "*a thief*," but expressly alludes to a breach of trust only. No action will lie. *Thompson* v. *Bernard*, 1 Camp. 48. Vide etiam *Christie* v. *Cowell*, Peake N. P. 4. *Robbins* v. *Hildredon*, and *Minors* v. *Leeford*, Cro. Jac. 66. *Tibbs* v. *Smith*, T. Raym. 33. So in *Morgan* v. *Williams*, 1 Stra. 142, defendant said, "*Thou art a thief.*" "*Of what?*" "*Of every thing.*" After verdict for plaintiff, defendant moved in arrest of judgment, for that stealing fruit from trees was not felony. *Per Cur.* It must be intended of any thing he can be a thief of. Et vide *Harrison* v. *Thornborough*, Gilb. Rep. B. R. 114. that in actions of slander words are not to be taken *mitiori sensú*.

(b) In *Saville* v. *Jardin*, 2 H. Bla. 532, *Eyre*, C. J. said, he could not well account for the decisions; that calling a man a *thief* is actionable, but the calling him a *cheat* is *not* so, unless it be that thief always implies felony, but cheat not always. *Cheat* has been always held not actionable, and *swindler* means no more. *Per Buller*, S. C.

Common cheat, or *common swindler*, it seems, are actionable words, because they are indictable offences, and put the person charged in jeopardy; and *common swindler* is the import of the language used in *I'Anson* v. *Stuart*, 1 T. R. 752, where it is held a libel, and not so held because reduced to writing, which cannot alter the nature of the *words*, though it may aggravate the *offence;* but, in a justification to a declaration of this kind, particular instances must be specified in the plea, that plaintiff may come prepared to answer them.

(c) If words be spoken of partners, whereby they are both injured in their trade, they may bring a joint action, and aver special damage. *Cook* v. *Batchellor*, 3 Bos. and Pull. 150. But two persons cannot join in an action for words spoken of them, for the defamation of one is not the defamation of the other. *Anon.* Dy. 19 (a). pl. 112.

(d) In an action of slander, evidence may be given of other slander, by defendant, than that laid in the declaration to shew, *quo animo*, he spoke those words, which are the subject of the action. *Rustell* v. *Macquider*, Middlesex Sittings after Hil. 1807. 1 Camp. (n). 49. So may other papers in a libel. *Ibid. Mead* v. *Daubigny*, Peake N. P. 128. *contra.* Sed vide *Lee* v. *Hudson*, *ibid.* 166, and *Rex* v. *Pearce*, *ibid.* 75, as to original part. But in *Finnerty* v. *Tippers*, 2 Camp. 72, Sir *James Mansfield*,

However, if the words be laid in the third person, e. g. *He deserves to be hanged for a note he forged on A.* proof of words spoken in the second person, e. g. *You deserve,* &c. will not support the declaration: for there is a great difference between words spoken in a passion to a man's face, and words spoken deliberately behind his back. (*Avarillo* v. *Rogers,* Guildhall Sittings, Trinity Term, 1773, before Lord *Mansfield.*) *(a)* If the *colloquium* alledged be necessary to maintain the action it must be proved; as where words are laid to be spoken of one with respect to his office or trade. (*Savage* and *Roberts,* Salk. 694. *Per Denton,* at *Stafford,* 1729.) So if it be laid that the defendant *in clausa ecclesiæ Litchfield* spoke the words, it has been holden that the place not being laid as a *venue,* but as a description of the offence, it is a circumstance that must be proved; but [*6] if the words are laid to be spoken before *A.* and others, it is sufficient to prove them spoken in the presence of others only.—*Tr. per pais,* 362. *(b)*

In

Mansfield, C. J. held, that such other libels and slanders must be relative, in some measure, to the subject of the indictment or action: and defendant may, for the purpose of reducing the damages, give in evidence libellous matters used against him by the plaintiff. So for a libel. *Tabart* v. *Tipper,* 1 Camp. 350.

(a) Defendant was indicted for saying of a justice of peace, in the execution of his office, "he is a broken-down justice, a perjured justice:" the evidence was, that defendant said, "*you are,* &c." (speaking to the justice, and not of him:) and plaintiff was nonsuited on argument, in K. B. *Rex* v. *Berry,* 4 T. R. 217.

(b) It should seem from the precedents in *Lilly,* as well as the reason of the thing, that no *colloquium* is necessary where the words are obviously injurious to the trader, as to call him "a fellow who cannot pay his debts," but to say "he is an ignorant idle fellow," is not actionable, without some reference to his trade, and in such case the *colloquium* is necessary, as where defendant said "you starved D. to death," in arrest of judgment, no *colloquium* was held good. *Harrison* v. *Eldrington,* 1 Rol. Abr. 63.

As to the colloquium. It was held in *Todd* v. *Hastings,* 2 Saund. 307, that to say to a draper, "you are a cheating fellow, and keep false books, and I will prove it," is not actionable, unless there be some communation respecting the plaintiff's trade: and there seems no doubt but that words not actionable in themselves, but only so when spoken of a man in trade, &c. must be alledged to have been spoken in relation to such trade, &c. otherwise judgment will be arrested. *Harvey* v. *Martin,* T. Raym. 75. *Walmsley* v. *Russell,* 6 Mod. 202. 2 Salk. 696. And plaintiff must prove according to such allegation, or he will be non-suited. Vide 1 *Saund.* 242 (a). continuation of n. (3). But if he aver that he sustained special damage, the declaration would be good on account of such special damage, and entitle him to full costs. So where plaintiff said to a trader, "you are a cheat, and have been a cheat for many years." Upon the first motion, Lord *Holt* said, the words must be understood of his way of living, and there needed no *colloquium,* but afterwards he changed his opinion, and judgment was arrested principally on the authority of *Todd* v. *Hastings,* sup. *Savage* v. *Robery,* 2 Salk. 694. And in *Davis* v. *Miller,*

2 Stra.

In an information for a libel in setting forth a sentence, the word (nor) was inserted for (not), but the sense was not thereby altered; upon not guilty and a special verdict, the court said *Cujus quidem tenor* imports a true copy. 2. This was not a *tenor* by reason of the variance. 3. There is a difference between words spoken and written; of the former there could not be a *tenor*, for want of an original to compare them with; and therefore where one declares for words spoken, variance in the omission or addition of a word is not material, if so many of the words be proved and found as are in themselves actionable: and *per Holt*, there are two ways of describing a libel or other writing in pleading; by the words, or the sense; by the words, as if you declare *Cujus tenor sequitur*, and there if you vary it is fatal: by the sense, that the defendant made a writing, and therein said so and so; in which case, exactness of words is not so material.—*Queen* v. *Drake*, M. 5 Ann. Salk. 660. *Johnson* v. *Browning*, T. 3 Ann. 6 Mod. 216. *(a)*

And note, that it has been holden, that a proof of a libel being sold in a shop by a servant, though the owner know nothing of the contents, or of its coming in or going out, is sufficient to convict the owner of the shop. In *Lake* and *King*, (which was an action for printing a libel) it was holden that an action would not lie for printing a petition to parliament, and delivering it to the members, it being agreeable to the course and proceedings in parliament. (*Rex* v. *Nutt*, 2 G. II. *per* Raymond, Guildhall. 1 Saund. 132.) and *Cutler* and *Dixon*, M. 27 & 28 Eliz. 4 Co. 14. is to the S. P. But where *Oxwood* exhibited a bill in the Star-chamber against Sir *R. Buckley*, and charged him with divers matters examinable in the said court, and further that he was a maintainer of pirates and murderers, and a procurer of piracies and murders, it was holden that an action lay for the words not examinable in the said court.

N. B. If *A.* send a libel to *London* to be printed and published, it is his act in *London*, if the publication be there.—*Rex* v. *Middleton*. *(b)*

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2 Stra. 1169, and *Saville* v. *Jardin*, 2 H. Blac. 531, which are similar cases, a *colloquium* was held necessary. See also 2 Saund. 117 (a). n. and 307 (a). n. (1). upon the subject of a *colloquium*.

(a) Where the misrecited word is in itself a word, though not intelligible with the context, the variance is fatal, but not if the mutilated word does not make any other word. *R.* v. *May*, Dougl. 193, and *R.* v. *Beech*, Cowp. 229. *Turvill* v. *Aynsworth*, 2 Ray. 1515. 2 Stra. 787, there referred to, but the last case seems to be doubted by Dougl.

(b) Where the libel was published in different counties, the court will not change the *venue*, as where it is published in a newspaper, which circulates

If an action be brought for words that are not in themselves actionable, if the plaintiff do not prove the special damage laid in the declaration, he must be nonsuited, because the special damage is the gist of the action;*(a)* but where the words are of themselves actionable, if the words be proved the jury must find for the plaintiff, though no special damage be proved.—*Guest* v. *Loyd.(b)*

[7] But though the words be in themselves actionable, yet the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration.—*Per Lee*, C. J. in *Geare* v. *Britton*, M. 1746.*(c)*

And where he has once recovered damages, he cannot after bring an action for any other special damage, whether the words be in themselves actionable or not: (*Fitter* v. *Veal*, T. 13 W. 3. 12 Mod. 542.) But though he cannot give evidence of any loss or injury not laid in the declaration, yet after he has proved the words as laid, he may give evi-

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circulates every where; besides defendant cannot swear that the cause of action arose in *Dale*, and not elsewhere. *Pinkney* v. *Collins*, 1 T. Rep. 571. *Clissold* v. *Clissold*, *ib.* 647. But where the libel was in a letter written from a place in the county to which it was moved to change the *venue* to another place in the same county, the court changed the *venue*, for the cause of action arose in that county only. *Freeman* v. *Norris*, 3 T. Rep. 306. So where a libel was in a letter written, and sent from *Yorkshire* to a person in *Germany*, the court changed the *venue* into *Yorkshire*, though the actual publication was in *Germany*. *Metcalfe* v. *Markham*, 3 T. Rep. 652.

Indictment for a libel. Evidence: that the letter in question was received at *Windsor* with the *Islington* two-penny post mark; this was held insufficient proof of publication, as the mark might have been forged. Then another letter had been given in evidence, which had been sent to *Windsor*, but was received by the prosecutor, at the Mews in *Westminster;* and Lord *Ellenborough* held that this was evidence of a publication in *Middlesex*, as the defendant, having once put it in circulation, must be taken to have published it in that place in which it was delivered to the person to whom it was addressed. *R.* v. *Watson*, 1 Camp. 215.

(a) Vide *Browne* v. *Gibbons*, 1 Salk. 206,—and the special damage must be the legal and natural consequence of the words spoken, otherwise it does not sustain the declaration. *Vicars* v. *Wilcocks*, 8 East, 1.

(b) If the words are, in their own nature, actionable, the jury ought to consider the damage which the party *may* sustain; but if a particular averment of *special* damage makes them actionable, then the jury are only to consider such damages as are already sustained, and not such as may happen in future; as for such, plaintiff may have a new action. *Per North*, C. J. in *Ld. Townshend* v. *Dr. Hughes*, C. B. H. 28 & 29 Car. 2. 2 Mod. 150.

Where the words spoken are actionable in themselves, the law will imply an injury. *Harwood* v. *Astley*, 1 Bos. and Pull. 47.

(c) Because the defendant, not being apprised, cannot come prepared to answer them; but then defendant may prove the truth of these words, for he had no opportunity of pleading it, and whatever cannot be pleaded may be given in evidence, on the general issue. *Collinson* v. *Loder*, post 10.

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dence of other expressions made use of by the defendant, as a proof of his ill will towards him.—*Geare* v. *Britton.* (*a*)

In an action for words *per quod matrimonium amisit* with *J. S.* for the defendant it was proved that *J. S.* was the plaintiff's aunt, and therefore could not marry him; but *per Raymond* and *Withens*, the right of the marriage shall not now be tried; it is sufficient that they intended to marry, and that the woman for that cause refused: (The Case of Sir *Ch. Gerard*'s Bailiff, at *Nisi Prius*, Trin. 36 Car. 2.) *Tamen Q.* Whether such determination can be supported by any principle of law?

If an action be brought for calling the plaintiff's wife a bawd, *per quod J. S.* has left off coming to the house, the special damage being the gist of the action, it ought not to be laid *ad dammum ipsorum*, (*Coleman* v. *Harcourt*, M. 1665. 1 Lev. 140.) (*b*) but where the action is brought for words in themselves actionable, and no special damage laid, there such conclusion is right, for the action survives: (*Grove and Ux'* v. *Hart*, T. 25 G. 2.) And *note*, That saying generally, *per quod* several persons left his house, without naming any, is not laying a special damage. (*c*)

In an action for these words, "You are a thief, and I will prove you so:" the plaintiff declared, that by reason of these words, one *John Merry*, and divers other persons, who were his customers, left off deal-

(*a*) Vide etiam *Charlter* v. *Barrett*, Peake, 221. S. P. In an action for words, in themselves actionable, with special damage laid, the defendant justified, but no special damage was proved. Lord *Kenyon* observed, that every count had a "*per quod*," and seemed to doubt whether, as the plaintiff had proved no special damage, evidence of the words only would support the declaration so framed; but upon its being suggested to him at the bar, that if the words themselves were actionable, it was not necessary to prove special damage, and that proof or not proving the *per quod* made no difference as to costs, he assented. *Erskine*, for plaintiff, offered evidence as to conversation subsequent to the time of the commitment, when Lord *Kenyon* said, that, with the exception of such words as might themselves be the object of separate "actions," the words stated were for charging the plaintiff with being accessary to a felony; and *Bearcroft* laid it down as a principle, that, though the principal thief had been acquitted of the felony, it would be competent for defendant to go into evidence of his guilt, because, what had passed between other persons, could not affect him; and Lord *Kenyon* assented. *Cook* v. *Field*, M. 1788. 3 Esp. N. P. 133.

(*b*) *Qu. tamen* for calling a woman a bawd is actionable, and wherever the words are actionable, although special damage be laid, it is held an action for the *words*, and not for the *special* damage; and in this case it was rightly held *ad dammum ipsorum*.

(*c*) But this mode of laying may be justified by the necessity of the case, as where *divers* persons ceased bidding at an auction in consequence of slander of title. *Hargrave* v. *Le Breton*, 4 Bur. 2424.

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ing with him. Upon the trial the plaintiff proved the words, and the special damage as to *Merry*, and would have gone on as to the others; but *per Raymond*, C. J. Where the words are not actionable, but the special damage is the gist of the action, this sort of evidence is allowed, though the particular instances of such damages are not specified in the declaration; but where the words are actionable, particular instances of such damages shall not be given in evidence, unless particularized in the declaration. However, he admitted the plaintiff to give *general* evidence of the loss of customers: but modern practice does not seem to warrant this distinction.—*Browning* v. *Newman*, M. 12 Geo. 1. Stra. 666. *(a)*

[8] Where words are spoken in confidence and without malice, no action lies; therefore where *A.* a servant, brought an action against her former mistress for saying to a lady who came to inquire for the plaintiff's character, that she was saucy and impertinent, and often lay out of her own bed; but was a clean girl, and could do her work well; though the plaintiff proved that she was by this means prevented from getting a place; yet *per* Lord *Mansfield*, this is not to be considered as an action in the common way for defamation by words; but that the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved. That it was a confidential declaration, and ought not to have been disclosed. (*Edmondson* v. *Stevenson and Ux'*, Sittings at Westminster after Easter, 6 G. 3. K. B.) But if without ground, and purely to defame, a false character should be given, it would be a proper ground for an action.—*Vanspike* v. *Cleyson*, H. 1591. Cro. Eliz. 541. *(b)*

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(a) No particular instances will now be allowed to be given in evidence, *except those mentioned in the declaration;* for how can defendant contest them by opposite evidence; the plaintiff must know these instances, and ought to disclose them on the record: this seems to be the reasoning in *I'Anson* v. *Stuart*, 1 T. R. 752. and, agreeable to this practice, in a case where the words charged the plaintiff, a horse-dealer, with being privy to stealing certain horses sold by him, (and consequently they were actionable:) after proving the words, the plaintiff's counsel applied for permission to give general evidence of loss of customers, *Sed non alloc. Waterhouse* v. *Gill*, Lanc. Lent Assizes, 1796. *cor.* Buller, C. J. MSS. Ca.

(b) So a servant cannot maintain an action against his former master for words spoken, or a letter written, in giving a character of the servant, unless the servant prove the *malice* as well as the falsehood of the charge, even though the master make specific charges of the fraud. *Weatherston* v. *Hawkins*, H. 1786. 1 T. Rep. 110.

Where a person intending to hire a servant applies to the former master for his character, the master (except express malice is proved) shall not be obliged to prove the truth

So in an action for saying of the plaintiff, who was a tradesman, "He cannot stand it long, he will be a bankrupt soon;" where special damage was laid in the declaration, *viz.* That one *Lane* refused to trust the plaintiff for a horse: *(a)* *Lane*, the person named in the declaration, was the only witness called for the plaintiff; and it appearing on his evidence, that the words were not spoken maliciously, but in confidence and friendship to *Lane*, and by way of warning to him, and that in consequence of that advice he did not trust the plaintiff with the horse. *Pratt*, C. J. directed the jury, that though the words were otherwise actionable; yet if they should be of opinion, that the words were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty, and they did so accordingly.—*Herver* v. *Dowson*, C. B. Sittings after T. 5 Geo. 3. *(b)*

After verdict for the plaintiff, and damages entire, where some of the words are not actionable, the court on motion will grant a *venire facias*

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truth of the character he gives, for in such case the disclosure is not made officially but in confidence, and the facts may happen to rest only in the knowledge of the master and servant. But where the master voluntarily, and without being applied to, speaks defamatory words of his servant, it will be incumbent on him to plead and prove the truth of the words; and Lord *Mansfield* said it was so settled, and that he had frequently ruled it so at N. P. *Lowry* v. *Akenhead*, 8 Geo. 3. K. B. (From a MS. note of Sir *Alan Chambre*.)

No action lies for giving the true character of a servant, upon application made to his former master to inquire into his former character with a view of hiring him, unless there be proof of extraordinary circumstances of malice. *Per* Lord *Mansfield*, in *Hargrave* v. *Le Breton*, 4 Bur. 2424.

So where a letter is written ostensibly to inquire into a servant's character, but in reality to entrap the master into a libellous answer, no action lies. *King* v. *Waring*, 5 Esp. N. P. Ca. 13.

(a) No man, however, can maintain this action for words affecting him as a trader, unless he be so within the meaning of the bankrupt laws. *Clark* v. *Wisdom*, 5 Esp. N. P. Ca. 147. Contra *Dobson* v. *Thornistone*, 3 Mod. 112. *Chapman* v. *Lamphire*, *ib.* 155. 3 Salk. 326, 327. But if upon the face of this declaration it is doubtful whether the trade is within the statutes or not, it may be shewn to have been so carried on as to make the party liable to a commission. *Clark* v. *Wisdom*, sup.

(b) In an action for a libel on the plaintiff in his professional character as a solicitor, held, that a letter written confidentially, and under an impression that its statement was well founded, could not be the subject of an action. *M'Dougall*, one, &c. v. *Claridge*, one, &c. 1 Camp. 267.

For any man may lawfully state in an unreserved manner, by a confidential verbal communication, his opinion of another's conduct and character, whatever the charges may be which he thus imputes to him. *Dunman* v. *Bigg*, 1 Camp. 269 (n). But openly to say of an attorney, "he deserves to be struck off the roll," is actionable, though not so, to say "I have taken out a judge's order to tax his bill; I will bring him to book, and have him struck off the roll." *Philips* v. *Janson*, 2 Esp. N. P. Ca. 624.

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de novo on payment of costs, that the plaintiff may sever his damages.—*Anger* v. *Wilkins*, M. 6 Geo. 2. 1 Barnes, 337.

But if the words be in one count, the court will intend that such as are not actionable were added only to shew the malice of the party, and that the damages were given for what were actionable.—*Osborn's Case*, M. 11 Jac. 1. 10 Co. 130. S. P.

The defendant may justify in an action of *Scandalum Magnatum*, or for a libel, the same as in a common action of slander; (*Lord Cromwell* v. *Denny*, 20 Eliz. 4 Co. 13. *Lord Townsend* v. *Hughes*, H. 28 & 29 Car. 2. 2 Mod. 166. *Lake* v. *King*, H. 19 & 20 Car. 2. 1 Saund. 120(c).) and therefore it is not necessary in either case for the plaintiff to aver, that the words or charge are not true, for that is sup-
[*9] plied by the allegation that the defendant spake or published * them falsely and maliciously, and it lies upon the defendant to plead that the fact was true by way of justification; and he cannot properly give the truth of the fact in evidence upon not guilty in an action for words, otherwise than in mitigation of damages, and that too under many restrictions, (*Carpenter* v. *Farrant*, M. 10 Geo. 2. B. R.); as where the words amount to a charge of felony or treason, for this brings no inconvenience on the defendant who may plead it in bar, and then the time must be ascertained, which might enable the plaintiff to give contrary proof, or to reply several things, of which he would lose the benefit on the general issue; but in such case the defendant may give in evidence the manner and occasion of speaking the words in mitigation, (*Smith* v. *Richardson*, M. 12 Geo. 2.); *(a)* and if the words were spoken through sorrow and concern, and not maliciously, the plaintiff shall be nonsuited, (*Crawford* v. *Middleton*, M. 14 Car. 2. 1 Lev. 82.); so he may give in evidence a confession of the plaintiff of his being an accessary, for he could not plead that in bar; *(b)* besides a confession in the case of a witness may be given in evidence; though you cannot give in evidence any particular crime that he has committed, but only general character. (Cited in *Smith* and *Richardson*, as determined by *Holt*, C. J.) So where the words import a general charge of a crime not capital, the defendant will not be permitted to give the truth in evi-

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(a) Barnes, 195. Comyn. 551. Prac. Reg. 383. S. C. Et vide *Denis* v. *Pawling*, *cor.* Price, B. at Bodmin, T. 1716. S. P.

(b) *i. e.* A confession of plaintiff or defendant, because they cannot be called themselves. But if there was no other evidence, the whole of what he says must be taken, and not that part only which would convict him, as if it be sworn he confessed the debt, but added, at the same time, that he had paid it; this confession is valid, as to the *payment* as well as to his having owed it.

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dence; *(a)* as where the words were "Thou preachest nothing but lies from the pulpit;" (*Bishop of Sarum* v. *Nash, Per Parker*, C. J.) but if the words charge a particular crime upon the plaintiff, which is not capital, *ex. gr.* adultery with *J. S.* it has been holden that the defendant may give that in evidence in mitigation of damages; though he cannot give in evidence the commission of a like crime with any other. (*Smithies* v. *Harrison*, 13 W. 3. *Per Holt*, 1 Raym. 727. 12 Vin. 139.) However, in *Underwood* and *Parks*, M. 17 Geo. 2. Str. 1200. *Lee*, C. J. said, it was now a general rule not to suffer the truth of the words to be given in evidence on not guilty in any case. *(b)*

In the case of *The King* and *Baker*, (T. 13 & 14 G. 2.) which was an information against the defendant, for publishing a libel against Mr. *Swinton*, of *Wadham* college, *Oxon*, accusing him of sodomitical practices, *Lee*, C. J. refused to let the defendant give evidence of his reasons for doing it, *viz.* That the supposed pathic told him so; for he said the only question was, Whether the defendant were guilty of printing and publishing the libel; and though it be offered by way of mitigation only, yet in fact it amounts to a justification; and it has always

(a) If a declaration be upon any slanderous words, charging *generally* any crime, &c. it is not sufficient for the plea to avow the words, and justify, by *generally* alledging their truth, but the plea must state some *particular* ground of justification. *Newman* v. *Bailey*, cited in *I'Anson* v. *Stuart*, 1 T. Rep. 750.

In an action for a libel, any thing may be given in evidence to mitigate the damages, though not to prove the crime, which is charged in the libel. And evidence may therefore be admitted to prove the previous bad character of the plaintiff. *Earl of Leicester* v. *Walter*, 2 Camp. 251.

Action for a libel; plea not guilty; declaration for certain words written by defendant of plaintiff, referring to a certain newspaper, as containing certain charges: "Mr. H. (the defendant) cannot for a moment suppose that Mr. S. is acquainted with the newspaper particulars, relating to the party alluded to (meaning the plaintiff), otherwise it is not probable that Mr. S. would introduce an acknowledged felon, debauchee, and seducer, into the neighbourhood of *Angel-Row*;" Lord *Ellenborough* held, that as the words referred to a newspaper, and were so written as a quotation from such, if the newspaper could be produced, he would admit it as evidence, as having caused the defendant to adopt what he had written in the letter, he having so referred to it. *Mullett* v. *Healton*, 4 Esp. 248.

In an action for words, defendant pleaded not guilty, and offered to prove the words to be true, in mitigation of damages, which the C. J. refused to permit, saying, that at a meeting of all the judges upon a case in the C. P. a large majority of them had determined not to allow it for the future, but that it could be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. That this was a general rule amongst them all, which no judge would think himself at liberty to depart from, and that it extended to all sorts of words. *Underwood* v. *Parks*, Str. 1200.

(b) So held *per Mansfield*, C. J. at Westminster, 1767, as appears from a MS. note of Sir *A. Chambre*.

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been holden that the truth of a libel cannot be given in evidence by way
[*10] of justification; because, *if the person charged with any crime be guilty, he ought to be proceeded against in a legal way, and not reflected upon in this manner.

However, where the plaintiff having brought an action against the defendant for saying, "He was a buggerer, and that he caught him in the fact," after proving the words, gave in evidence the defendant's saying at another time, that "He was guilty of sodomitical practices." Mr. Justice *Burnet*, upon considering the case of *Smith* and *Richardson*, permitted the defendant to give in evidence the truth of those words, for the action not being brought for speaking them, the defendant had no opportunity of pleading that they were true; and therefore, as the plaintiff has proved the speaking of them in aggravation, the defendant ought to be permitted to shew they were true in mitigation.—*Collinson* v. *Loder*, Oxon. 1750.

The defendant may by way of justification plead that the words were spoken by him as counsel in a cause, and that they were pertinent to the matter in question; *(a)* or he may justify the speaking of them through concern, or the reading of them as a story out of a history; or he may shew by the dialogue, that they were spoken in a sense not defamatory; or he may give these matters in evidence upon the general issue, for they prove him not guilty of the words maliciously. (*Brooke* v. *Montague*, M. 1605. Cro. Jac. 91. *Cromwell's Ca.* T. 1578. 4 Co. 13.) But in an action brought by the master of a ship against a merchant at *Bristol*, for saying his vessel was seized and he put into prison at ——— for running corn, Lord C. J. *Lee* held, that proof of the defendant's having heard it read out of a letter, and that he only reported the story, was no justification; but that every person was answerable for the slander he reported of another, and the jury accordingly gave £150 damages. *(b)* *Anon.* 1751.

Note, If the justification be local, as that he stole plate at *Oxon*, the trial ought regularly to be in the same county in which the justification arises. (*Jenning* v. *Hunkin*, H. 26 & 27 Car. 2. 2 Lev. 121.) But this would be aided after a verdict by 16 & 17 Car. 2. c. 8.—*Craft* v. *Boyle*, E. 21 Car. 2. 1 Saund. 247. *(c)*

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(a) Or that they were written or spoken in his defence, to a legal suit. *Astley* v. *Younge*, 2 Bur. 812.

(b) The words of a libel are not to be taken in a more lenient or a more severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. *R.* v. *Lambert & al.* 2 Camp. 403.

(c) 32 Geo. 3. c. 60. On every trial of an indictment or information

Note, By 21 *Jac.* 1. *c.* 16, if the damages be under 40*s.* the plaintiff shall have no more costs than damages; but it has been said, that the jury are not bound by this statute, and therefore may give £10 costs where they gave but 10*d.* damage. However, it does not extend to such cases, where the *consequential damage is the gist of the action; *(a)* as [*11] for calling a woman whore *per quod* she lost her customers. (*Browne* v. *Gibbons*, H. 1702. 1 Salk. 206. 2 Ray. 831.) So for calling a man thief, and causing him to be arrested, if the defendant be found guilty of both.—*Topsall* v. *Edwards*, M. 1629. Cro. Car. 163.

But it has been holden, that where the words are of themselves actionable, and special damages are laid by way of aggravation, though they be proved, yet if the damages recovered are under 40*s.* there shall

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tion for the making and publishing a libel, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and shall not be directed by the judge to find defendant guilty, merely on proof of the publication of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. But the court shall, according to direction, give opinion and directions to the jury on the matter in issue, as in other criminal cases. The jury may find a special verdict, and in case they shall find defendant guilty, defendant may move in arrest of judgment.

Furthermore, upon this subject it has been held, that an advertisement inserted in a newspaper, *bonâ fide* with a view of investigating a fact, in which a party making it is interested, is not libellous, though injurious to the character of another. *Delaney* v. *Jones*, 4 Esp. N. P. C. 191.

Also, that it is not actionable to make a fair critique upon a composition, though it bring the author into ridicule. *Tabart* v. *Tipper*, 1 Camp. 350.

Also, that a newspaper may *fairly* comment on any species or place of public amusement, but it must be done without malice against the proprietors. *Dibdin* v. *Swan et al'*, 1 Esp. N. P. C. 28.

So may one newspaper charge another with scurrility, but he must not assert that the latter is low in circulation. *Heriot* v. *Stuart*, 1 Esp. 437.

And it is not the subject of a criminal or civil proceeding to publish a true account of what passes in a court of justice or in parliament, though injurious to the character of an individual. *Carey* v. *Walter*, 1 Bos. and Pull. 525; or *Curry* v. *Walter*, 1 Esp. N. P. C. 457. *Rex* v. *Wright*, 8 T. Rep. 293. *Jekyll* v. *Moore*, 2 Bos. and Pull. N. R. 341. *Carr* v. *Jones*, 3 Smith, 491. 503; and 7 East, 493. S. C. nom. *Stiles* v. *Nokes*.

In *Curry* v. *Walter*, 1 Esp. N. P. C. 457, it was ruled that the justification of the defendant might be given in evidence under the general issue; but the court of C. P. inclined to think that the facts should have appeared on the record. S. C. Bos. and Pull. 525.

(a) In *Baker* v. *Hearne*, in B. R. in H. 1767, this point was argued by *Dunning* for plaintiff, and *Ashhurst* for defendant, but the distinction was not controverted by plaintiff's counsel, the court being of opinion that the words were actionable, as reflecting on plaintiff in his way of trade; yet they allowed no more costs than damages, the damages being under 40*s.* notwithstanding the special damages laid in the declaration. (MS. note of Sir *Alan Chambre*.)

be no more costs than damages; for it is properly an action for words within the statute 21 *Jac.* 1. *c.* 16.—*Baker* v. *Hearne*, B. R. H. 7 G. 3. Raym. 1588. *(a)*

By the same statute, the action must be commenced in two years after the words spoken; but note, this does not extend to *Scandalum Magnatum*, (*Sherwin* v. *Sherwin's Executors*, T. 1630, Litt. Rep. 342.) nor to cases where the special damage is the gist of the action. But where the words are of themselves actionable, special damage will not take them out of the statute.—*Saunders* v. *Edwards*, M. 1662. 1 Sid. 95. *(b)*

(a) A verdict with *nominal* damages, in an action on the case, carries all the costs. *Sevignac* v. *Roome*, 6 T. Rep. 125.

(b) In actions of slander, battery, trespass, &c. though the plaintiff may reasonably expect large damages, special bail cannot be had unless by order of court, and the process is marked for special bail; nor is it required in actions of account and covenant, except it be to pay money; nor against heirs, executors, &c. for the debt of the testator, unless they have wasted the testator's goods. 1 *Danv. Abr.* 681.

Furthermore as to the cases in which this action has been held maintainable, it was ruled in *Jekyll* v. *Moore*, 6 Esp. N. P. C. 63. 2 Bos. and Pull. N. R. 241, that no action lies against the president of a court martial for publishing a sentence in the usual form, in which, after stating the honourable acquittal of the prisoner, it is declared that the charges are groundless and malicious, and that the conduct of the prosecutor (the plaintiff) is highly injurious to the service.

Neither is it actionable to ridicule and *caricature* an author, with respect to his literary character only. *Carr* v. *Hood*, 1 Camp. 355 (n).

But it is actionable to impute to a bookseller the publication of a silly poem, fabricated by the defendant as a specimen of the plaintiff's productions. *Tabart* v. *Tipper*, 1 Camp. 352. In which case it is laid down, that where separate passages of a libel are set out in the declaration, they should be described as forming distinct parts; but when the passages are not distinguished, if the intervening parts do not affect the sense, the omission is immaterial.

Note, The foregoing are some of the principal cases of *libel*, upon which civil actions have been brought, but there are others of a similar nature, for which the injured party had sought his remedy by indictment, and which do not fall within the compass of this chapter.

CHAPTER II.

OF MALICIOUS PROSECUTIONS.

IN many cases an action will lie for a malicious prosecution: however, there is a great difference between a civil suit and an indictment. It is not actionable to bring an action though there be no good ground for it, because

because it is a claim of right, and the plaintiff finds pledges to prosecute, and is amerciable *pro falso clamore*, and is liable to costs; but an action on the case will lie for suing the plaintiff in the spiritual court *sine aliquâ causâ*, and causing him to be excommunicated *false, fraudulenter et malitiose*, without giving him any notice, *per quod* he was put to great costs. (*Saville* v. *Roberts*, 1 Salk. 14. 1 Raym. 374. Carth. 416.) *(a)* If a man sue in the spiritual court for a matter which appears by his libel not to be suable there, and over which that court has no jurisdiction, an action on the case will lie; *(b)* for it is a suit for vexation: but not if the suit be for a thing demandable there by any thing which appears by the libel, and barred only by the defendant's plea or by collateral matter: as where instituted *for tithe of wood, which is timber. (*Waterhouse* v. *Bawd*, T. 1635. Cro. Jac. 133.) So an action will lie if one who has a cause of action to a small sum, or has no cause of action at all, maliciously sue the plaintiff, with intent to imprison him for want of bail, *(c)* or do him some special prejudice; but then it is not enough to declare generally, but he must shew the special grievance; he must set out, that being indebted to the defendant in so much, he sued out such a writ for so much more, on purpose to hold him to bail. (*Skinner* v. *Gunton*, E. 21 Car. 2. 1 Saund. 228. 1 Vent. 12. S. C. nom. *Skinner* v. *Gunter*.) And if the writ be not returned, he must have a rule on the sheriff to return it, that he may have it to give in evidence. (*Robins* v. *Robins*, Salk. 15.) But if a stranger procure another to sue me causelessly, I may have an action against him generally.—*Saville* v. *Roberts*, sup. *(d)*

[*12]

(a) In this case Lord *Holt* said there were three sorts of actions, any of which would be sufficient ground to support this action. 1st, The damage to a man's fame, as if the matter whereof he is accused be scandalous; 2d, where a man has been put in danger to lose his life, or limb, or liberty; 3d. damage to a man's property, as where he is obliged to expend money in necessary charges to acquit himself of the crime of which he is accused. *Per Holt*, C. J. in *Saville* v. *Roberts*, 1 Raym. 374.

(b) So if a man sue in any court that has no cognizance of the matter. *Goslin* v. *Wilcock*, 2 Wils. 302. So for maliciously suing a man in the Ecclesiastical court, and causing him to be taken on an *excom. cap.* without notice, this action lies. *Hocking* v. *Matthews*, 1 Vent. 86. 1 Lev. 292. S. C. nom. *Hoskins* v. *Matthews*.

(c) Vide *Skinner* v. *Gunton*, 1 Saund. 228. Also *Daw* v. *Swaine*, 1 Sid. 424, in which case plaintiff was held to bail for £5000, when the debt was but £40. But this action lies not for an arrest without cause, unless plaintiff be held to excessive bail. *Neal* v. *Spencer*, 12 Mod. 257. Nor for a detainer in prison after the debt is paid, where defendant neglected to send a discharge, for that was a mere nonfeasance. *Schiebil* v. *Fairbain*, 1 Bos. and Pull. 388; and malice must appear to maintain this action. *Gibson* v. *Chaters*, 2 Bos. and Pull. 129.

(d) Vide *Thurston* v. *Ummons*, Mar. 27. S. P.

Waterer brought an action on the case against *Freeman* for suing a second *fieri facias*, and having his goods taken in execution thereupon, after goods taken upon a former *fieri facias*. The defendant having been found guilty, moved in arrest of judgment, because it was a legal suit. *Hobart*, C. J. delivered the opinion of the court for the plaintiff, but said, *if the defendant had not known* of the cattle first taken, he had not been liable to the action; but now to the main point (says Lord *Hobart*), We hold, that if a man bring an action upon a false surmise in a proper court, he cannot bring an action against him and charge him with it as a fault directly, as if the suit itself was a wrongful act; and cited 43 *E.* 3. 33. The plaintiff brought an action of false imprisonment, the defendant pleaded that he caused him to be imprisoned upon a statute; the plaintiff replied, there was a day given upon defeasance to pay, and that he paid before the day; and yet it was ruled against the plaintiff, because he was imprisoned by due course of law. (*Waterer* v. *Freeman*, M. 15 Jac. 1. Hob. 206. 266.)—But on the contrary, if you charge me with a crime in a court no way capable of the cause, I shall have an action for it. (*Buckley* v. *Wood*, M. 33 & 34 Eliz. 4 *Co.* 14.) So if a man sue me in the spiritual court for a mere temporal cause.—Now to the principal case; if a man sue me in a proper court, yet if his suit be utterly without ground of truth, *and that certainly known to himself*, I may have case against him for the undue vexation and damage that he putteth me unto by his ill practice. But two cautions are to be observed to maintain actions in these cases, 1. The new action must not be brought before the first be determined; because till then it cannot appear that the first was unjust. (*Farrel* v. *Nun*, B. R. T. 5 G. 3. S. P. *Lewis* v. *Farrell*, 1 Str. 114. S. P.) *(a)* 2. That there must be
[*13] not only a thing done amiss, but also a damage, either *already fallen upon the party or else inevitable; and therefore if a man forge a bond in my name, I can have no action till I am sued upon it.

Case for that the defendant *machinans* to deprive him of his liberty, *absque aliqua probabili causa prosecutus fuit quoddam breve de privi-*

(a) Vide *Parker* v. *Langley*, 10 Mod. 209. *Fisher* v. *Bristow*, 1 Dougl. 205. 215. *Morgan* v. *Hughes*, 2 T. R. 225. The want of this averment, however, will be cured by a verdict. *Skinner* v. *Gunton*, 1 Saund. 228, because it will be presumed that it has been proved at the trial. *Per Denison*, J. in *Panton* v. *Marshall*, 28 Geo. 2. MS. Ca.

But it is not always necessary that the suit should be heard and determined before this action can be brought, for sometimes it is brought for vexation only, and without any ground, and a nonsuit follows. Nevertheless the party injured shall have this action. *Esp. N. P. Dig.* 527. Vide etiam *Co. Lit.* 161 (a), n. 4, for the circumstances under which this action will lie.

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legio out of the court of C. B. and after he had put in an appearance, that the defendant knowing he had no probable cause suffered himself to be nonsuited. After verdict on not guilty, it was moved in arrest of judgment, that the action would not lie. *North*, C. J. said the contrary is adjudged in *Waterer* v. *Freeman*, *Hob.* 266, and that upon good reason, and it is in the discretion of the judge to direct the jury, if there be manifest proof that there is no cause of action; and *Ellis* said, that the cause was tried before him, and that it was apparent *the suit was merely vexatious.*—*Martin* v. *Lincoln*, M. 27 Car. 2. *(a)*

If a man be falsely and maliciously indicted of any crime, that may prejudice his fame and reputation, he may bring his action. So if he be indicted of a crime that subjects him to peril of life or liberty. So though it touch neither his fame nor liberty; for it is injurious to his property by putting him to a needless expence. (*Saville* v. *Roberts*, sup.) And the action may be brought as well against one who procures others to indict, as against the prosecutor.—*Anon.* 23 Car. 1. Sty. 10.

Where a man is falsely and maliciously indicted of a crime which hurts his fame, and which is a scandal to him, though the indictment be insufficient, or an ignoramus found; yet an action lies for the slander, because the mischief of that is effected. (*Saville* v. *Roberts*, sup. *Chambers* v. *Robinson*, Str. 691.) *(b)* So if it endangered his liberty, and he were actually imprisoned; though it has been said to be otherwise, where it only concerns his property; for he cannot suffer in that in either of those cases. (*Payne* v. *Porter*, T. 16 Jac. 1. Cro. Jac. 490.) But this diversity between a malicious prosecution upon a good indictment, and a bad one has been denied, (*Jones* v. *Gwin*, H. 12 Anu. Salk. 15. 10 Mod. 214.); and it is now holden that an action will lie as well for damage by expence, as by scandal or imprisonment, though the indictment be insufficient; and therefore it may be brought by a husband for the expence of defending his wife.—*Smith* v. *Hixon*, E. 1734. Stra. 977. *Hickson* v. *Robinson*, H. 12 Geo. 1.

The plaintiff must produce and prove a copy of the acquittal on record, and the substance of the evidence given on the indictment is ma-

(a) In *Belk* v. *Broadbent*, 3 T. R. 185, Lord *Kenyon* held, that if a party be arrested without any cause of action, he has his remedy by action on the case for maliciously holding to bail. And in a justification by officers on an action for *false imprisonment*, that a writ was sued out, and affidavit made to hold to bail, the cause of action *need not be stated*, nor is it traversable.

(b) On the authority of *Chambers* v. *Robinson*, 1 Stra. 691. A bad indictment was held to serve all the purposes of malice, by putting the party to expence, and exposing him, but that it served no purpose of justice in bringing the party to punishment, if he were guilty. *Wicks* v. *Fentham*, 4 T. Rep. 247.

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terial, and the charges of the acquittal, and the circumstances which shew the prosecution was malicious and without probable cause; he may likewise give in evidence the circumstances of the defendant, in order to increase the damages.—*Clayton* v. *Nelson*, E. 1712. *Parker*, C. J. Midd. *(a)*

[14] In an action for maliciously holding to bail, the court held, 1st, that it was not necessary to prove that there was any affidavit to hold to bail, for the indorsement on the writ is sufficient: 2dly, that if the declaration had averred that such an affidavit had been made, an office copy of it would have been sufficient. But if it were stated to have been made by the defendant himself, perhaps the original affidavit must be produced and proved.—*Croke* v. *Dowling*, East. 22 G. 3.

If the action be brought against several, and one only be found guilty, it is sufficient; for there is a great difference between this action on the case in nature of a conspiracy, and a writ of conspiracy at common law; for in this case the damage sustained is the ground of the action. *Saville* v. *Roberts*, Carth. 416. *(b)*

He that gets off upon a *non pros* does not get off at all on the merits of the cause; and to maintain a conspiracy, it is necessary to lay and prove an acquittal; and therefore a *nolle prosequi* will not maintain the declaration, *(c)* but if he plead not guilty, and the attorney-general confess it, that will do.—*Goddard* v. *Smith*, M. 3 Ann. Salk. 21. 6 Mod. 261.

The defendant's name upon the back of the bill is a sufficient evidence, and the best of the defendant's being sworn to the bill: but it may be proved that he was a witness without having the bill; but a person's name being indorsed on the indictment, is no evidence of his being

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(a) In an action against a justice for *malicious commitment, where no charge of felony was made*, the declaration stated that the plaintiff had been *discharged;* this was held not sufficient to prove the want of *probable cause*, such as the throwing out of the bill by the grand jury, or *acquitted*, (a word of different meaning.) In an action for maliciously holding to bail, plaintiff must shew that the suit *is at an end. Per Buller*, J. in *Morgan* v. *Hughes*, 2 T. R. 232.

(b) And there is also this distinction, that if in an action of conspiracy against two, one is acquitted, judgment shall not go against the other; but in an action in nature of a conspiracy, one only may be found guilty. *Subley* v. *Mott*, 1 Wils. 210. *Pollard* v. *Evans*, 2 Show. 50. And an action of conspiracy must be against several, but in nature of a conspiracy it may be against one only. *Mills* v. *Mills*, Cro. Car. 239. *Marsh* v. *Vacchan*, Cro. Eliz. 701. But Mr. *Selwyn* (N. P. Ab. 935) says, the remedy for a conspiracy is now obsolete, and indeed, when in use, its limits were very confined, for it was framed according to the precise terms of the writ in the register.

(c) But it is evidence of a malicious prosecution. 2 Vin. Abr. 256.

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a prosecutor.—*Girlington* v. *Pitfield*, M. 23 Car. 2. 1 Vent. 47. 12 Vin. Abr. 234. *(a)*

But though an action do lie for a malicious prosecution, yet it is not to be favoured; and therefore if the indictment be found by the grand jury, the defendant shall not be obliged to shew a probable cause: but it shall lie upon the plaintiff to prove express malice.—*Saville* v. *Roberts*, sup. *(b)*

The action ought not to be maintained without rank and express malice and iniquity. (*Per Holt*, C. J. in *Saville* v. *Roberts*, 12 Mod. 208.) The grounds of it are, on the plaintiff's side, innocence; on the defendant's, malice.—*Per Parker*, C. J. in *Jones* v. *Gwyn*, 10 Mod. 217. *(c)*

However, as it may come to be left to a jury, it is adviseable for the defendant to give proof of a probable cause, if he be capable of doing it; and for this purpose proof of the evidence given by the defendant on the indictment is good. (*Cobb* v. *Car*, Midd. Mich. 1746.) And where the facts lie in the knowledge of the defendant himself, he must shew a

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(a) In an action for malicious prosecution by indicting the plaintiff at the quarter sessions, the defendant produced the *original indictment*, which was admitted, but it being objected, that though this was admissible evidence to prove the defendant by the prosecutor, by shewing his name on the back of the bill, yet it is no evidence *as to the caption*, which is a material averment in the declaration, *viz.* that the quarter sessions were held at such a time and place, and before such justices. *Wilmot*, J. was clearly of opinion that this could not be supported by parol evidence of the minutes of the sessions, but that for this purpose a record should have been made up, and an original or a copy produced, so the plaintiff was nonsuited. *Edwards* v. *Williams*, Monmouth Lent Assizes, 1766. Esp. N. P. 535.

(b) Defendant in this case had indicted plaintiff for perjury, but not appearing upon the trial, plaintiff was acquitted. Plaintiff then brought this action, and gave in evidence an examined copy of the record of acquittal, and the non-appearance of the defendant. *Ellenborough*, C. J. asked for further proof of want of probable cause, saying, that there might have been probable cause for preferring the indictment, though a persisting in it might have been the greatest injustice. He then cited *Saville* v. *Roberts*, sup. and the plaintiff was non-suited. *Purcel* v. *M'Namara*, 1 Camp. 199. And the same has been frequently held as to the non-proceeding with a prosecution. *Ibid. in notis.*

(c) An action will not lie for a malicious prosecution by a superior against an inferior officer, before a naval court martial, for an offence cognizable by it, if probable cause appear on the proceedings, for malice, and the want of probable cause, are both necessary to support this action. *Johnstone* v. *Sutton*, 1 T. Rep. 784. And in S. C. it was held, that want of probable cause will imply malice, but express malice does not imply want of probable cause, and both are necessary. The jury find the facts which is evidence of probable cause, and the judge determines whether those facts so found amount to a probable cause. Vide etiam *Farmer* v. *Darling*, 4 Bur. 1794.

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probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice.—*Parrot* v. *Fishwick*, London, after Trinity, 1772. 9 East, 362 (n) more fully stated. *(a)*

If the plaintiff do prove malice, yet if the defendant shew a probable cause, he shall have a verdict, and the judge, not the jury, is to determine whether he had a probable cause; and therefore, where the plaintiff having brought an action against the defendant for a malicious prosecution for perjury obtained a verdict, upon a motion for a new trial the court set it aside (it appearing upon the report of the judge, that there was a probable cause) not as a verdict against evidence, but as a verdict against law.—*Golding* v. *Crowle*, M. 25 G. 2. Say. 1. *(b)*

[15] When the action is for a malicious prosecution for felony, the first part of the defendant's defence must be to prove a felony committed; and therefore if nobody were by at the time of the supposed felony but the defendant or his wife, their oath at the trial of the indictment may be given in evidence to prove the felony.—*Johnson* & *Ux'* v. *Browning*, H. 12 Ann. 6 Mod. 216. *(c)*

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(a) So where a person is acquitted by a jury, malice need not be proved at first on the part of plaintiff, but it is incumbent on the defendant, on the other side, to shew that there was a probable cause, but that where the indictment is quashed, the plaintiff *must* prove express malice. *Per Burnet*, J. in *Hunter* v. *French*, Willes, 520.

(b) Where the indictment was for felony, defendant cannot object that express malice is not proved, but in indictments for misdemeanors it must. *Lilwall* v. *Smallman*, Selw. 933.

Upon an indictment for felony, the jury paused for some time before they acquitted the prisoner, who was not called upon to enter into his defence. This was deemed evidence of probable cause. *Smith* v. *Macdonald*, 3 Esp. N. P. C. 7.

Positive evidence of the want must be given in the absence of probable cause, therefore, where the plaintiff had been indicted for perjury, it was not held sufficient to shew that she was acquitted for want of prosecution, that the facts lay within the knowledge of the defendant, and that the indictment contained many frivolous assignments of perjury, as there was one substantial charge, *Purcel* v. *M'Namara*, 1 Camp. 199. The court therefore refused to set aside the nonsuit in this case. But where A. as attorney for B. sued C. in the Exchequer, and C. indicted A. and B. for a conspiracy, who, on being acquitted, A. brought this action against C. in which he proved that the suit was well founded, and that C. did not appear to prefer his indictment. This was held not sufficient to throw on C. the burthen of shewing probable cause. *Sykes* v. *Dunbar*, 1 Camp. 202 (n). Nor is the abandonment of a prosecution, *coupled with evidence of express malice*, sufficient to throw this burthen on the defendant. *Incledon* v. *Berry*, 1 Camp. 203 (n). Nor an omission to prefer an indictment after a charge on oath for an assault. *Wallis* v. *Alpine*, *ibid.* 204 (n).

(c) But if the action be brought against the officer, he need *not* shew felony committed, as he is justified in taking a man into custody on the charge of another, who alone is answerable. *Samuel* v. *Payne*, 1 Doug. 345,

In an action for a malicious prosecution against the prosecutor and the justice of peace who committed the plaintiff, the jury gave £200 against the prosecutor, and £20 against the justice; and *King*, Chief Justice, ordered the verdict to be so taken. (*Lane* v. *Sainteloe*, H. 4 G. 1. Str. 79.) But in *Lowfield* v. *Bancroft*, T. 5 Geo. 2. (Str. 910.) Lord *Raymond* in the like action, where the jury would have given £800 against one, and £100 against each of the other three, said it could not be done, and there was a verdict against all for £1100. *(a)*

345, (359). Vide etiam *Ledwick* v. *Catchpole*, Cald. 291. *Coupey* v. *Henley*, 2 Esp. N. P. C. 540. *Alcock* v. *Andrews*, *ib. in notis*; but none of the authorities (says *Dougl*.) come up exactly to the case of *Samuel* v. *Payne*, and therefore it may be considered as the first determination on this point, though it was agitated on a demurrer to a special justification so long ago as the reign of Hen. 4. (*Year Book*, 7 Hen. 4. pa. 35.) but that case was adjourned.

(a) Vide *Wynham* v. *Clere*, Cro. Eliz. 230. Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only, but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy. *Per Ashhurst*, J. in *Morgan* v. *Hughes*, 2 T. R. 231. *Buller*, J. assenting.—*Note*. There is no distinction between a malicious commitment and a malicious prosecution. *Per Buller*, J. in S. C.

From all the foregoing authorities this conclusion may be drawn, that the grounds of this action are the *malice* of the defendant, either *express* or *implied*, but if express it must be proved, unless the facts lie within the knowledge of the defendant. *Want of probable cause* (of which, Mr. *Selwyn* says, the slightest evidence is sufficient) and an *injury sustained by the plaintiff*, by reason of the malicious prosecution, either *in his person* by imprisonment, *his reputation* by scandal, *or in his property* by the expence, are also essential to maintain this action. *Selw. N. P. Ab.* 938. S. P.

CHAPTER III.

OF ASSAULT AND BATTERY.

IN treating of the action of assault and battery, it will be necessary to see what the law looks upon as such. *(a)* And *first*, an assault is an attempt

(a) Assault, which is an inchoate violence, differs from *battery*, for to create an assault it is not necessary to touch the person of another. *Finch's Law*, 202. *Genner* v. *Sparkes*, Salk. 79; for it is the *intent*, the *quo animo*, accompanied with a present ability to use violence, that constitutes an assault. *Griffin* v. *Parsons*, Selw. N. P. Ab. 21 (n). And the degree of violence makes no difference. *Per Le Blanc*, J. in *Leame* v. *Bray*, 3 East, 602.

For an assault and battery a man may bring a civil action, and indict defendant at the same time, for they are

tempt or offer, by force or violence, to do a corporal hurt to another, as by pointing a pitchfork at him, when standing within reach; presenting a gun at him; drawing a sword, and waving it in a menacing manner, &c. (*Queen* v. *Ingram*, H. 10 Ann. Salk. 384.) But no words can amount to an assault, though perhaps they may in some cases serve to explain a doubtful action, (1 Hawk. P. C. 133.); as if a man were to lay his hand upon his sword, and say, "if it were not assize time, he would not take such language:" these words would prevent the action from being construed to be an assault, because they shew he had no intent to do him any corporal hurt at that time. (*Tuberville* v. *Savage*, M. 1669. 1 Mod. 3.) *Secondly*, a battery, which always includes an assault, is the actual doing an injury, be it ever so small, in an angry, or revengeful, or rude, or insolent manner; as by spitting in his face, or violently justling him out of the way. But if two by consent play at cudgels, and one hurt the other, it is no battery, (Dalt. cap. 22. tamen vide *Boulter* v. *Clerk*); so if one soldier hurt another in exercise; but if he plead it, he must set forth the circumstances, so as to make it appear to the court that it [*16] was inevitable, and *that he committed no negligence to give occasion to the hurt: for it is not enough to say, that he did it *casualiter et per infortunium, contrà voluntatem suam*, for no man shall be excused a trespass, unless it may be justified entirely without his default, (*Weaver* v. *Ward*, E. 14 Jac. 1. Hob. 134.); and therefore it has been holden, that an action lay where the plaintiff, standing by to see the defendant uncock his gun, was accidentally wounded.—T. 10 Geo. 1. *Underwood* v. *Hewson*, *per Fortescue* and *Raymond*, in Midd. Str. 596.

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are distinct remedies. *Jones* v. *Clay*, 1 Bos. and Pull. 191.

And this action lies for a native *Minorquin* against a governor of *Minorca*, for such injury committed by him in *Minorca*; and such action, if the case require it, may be laid at *Minorca*, viz. at *London*, or it may be laid generally in any English county. *Mostyn* v. *Fabrigas*, Cowp. 161.

But an assault cannot be laid to have been committed at divers days and times, for the assault is one entire individual act. *Michell* v. *Neale*, Cowp. 828. The authority of this case, however, was doubted by the court of C. B. in *Burgess* v. *Freelove*, 2 Bos. and Pull. 425; but its authority was restored by *English* v. *Purser*, 6 East, 395, in which Lord *Ellenborough* distinguished between the words *made an assault*, in *Michell* v. *Neale*, and *assaulted*, in *Burgess* v. *Freelove*, on the ground that the latter might mean different assaults on different days. But the same distinction does not appear to have been taken in *Burgess* v. *Freelove*, which was decided merely on the difference between laying an assault *diversis diebus et vicibus*, and with a *continuando*. But (unless otherwise directed by statute) the venue may be laid in any county. *Corbett* v. *Barnes*, Cro. Car. 444.

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And much more, if a man wantonly do an act by which another man is hurt; as by pushing a drunken man, he will be answerable in an action of assault and battery, but if he intend doing a right act, as to assist such drunken man, or prevent him from going along the street without help, and in so doing, an hurt do ensue, he will not be answerable.—*Short* v. *Lovejoy*, coram *Lee*, C. J. Guildhall, 1752. *(a)*

Where, by a sudden fright, a horse runs away with his rider, and runs against a man, it is no battery, and may be given in evidence on the general issue; but if it were occasioned by any one whipping the horse, such person would certainly be liable in an action upon the case; and, *quære*, in the other case, if the plaintiff were to prove that the horse had been used to run away with his rider, for in such case the rider is not free from blame.—*Gibbons* v. *Pepper*, E. 1696. 4 Mod. 405. 2 Salk. 637.

The plaintiff cannot give in evidence a conviction at the suit of the king for the same battery; for it is a general rule, that no record of conviction or verdict shall be given in evidence, but such whereof the benefit may be mutual, *viz.* such whereof the defendant, as well as plaintiff, might have made use, and given in evidence in case it had made for him.—*Rex* v. *Warden of Fleet*, M. 11 W. 3. 12 Mod. 339. at bar.

In an action of assault and battery, Mr. Serjeant *Hayward* would have proved that the plaintiff and the defendant fought by consent, and insisted that this was evidence on the general issue in bar of the action, for *volenti non fit injuria*. (*Boulter* v. *Clark*, at Abingdon, 1747, ante, Dalt. 22.) But *Parker*, Chief Baron, denied it, and said, the fighting being unlawful, the consent of the plaintiff to fight (if proved) would be no bar to his action, and that he was entitled to a verdict for the injury done him; and cited *Winch*, 49. 2 *Lev.* 174. and *Webb* v. *Bishop*, at Gloucester Lent Assizes, 1731, before Lord Chief Baron *Reynolds*, where, in an action for five guineas on a boxing match, the judge held it an illegal consideration, and the plaintiff was nonsuited. Vide etiam *Matthew* v. *Ollerton*, M. 1694. Comb. 218, where it was said, that if a man license another to beat him, *such licence is void, because it is against the peace; [*17] and thereupon the plaintiff had a verdict, and 30s. damages. *(b)*

(a) So where defendant threw a lighted squib into a market-place, which being tossed about, at last hit the plaintiff, and put out his eye. It was held that this action well lay, for to constitute an assault, the injury need not proceed from the immediate act of the defendant. *Scott* v. *Shepherd*, 3 Wils. 403. 3 Bla. 392.

(b) If the defendant declares for an assault and battery, he may recover for the assault only, 1 Hawk. P. C. 130; but the declaration cannot be for the assault singly.

There

There are three sorts of defence to this action.

1. Inficiation.
2. Matter of excuse.
3. Justification.

Inficiation is the denying of the fact, and that can only be by pleading the general issue, *viz.* not guilty. On which plea in general matter of justification cannot be given in evidence in mitigation of damages. But where an action was brought against the captain of a ship, who pleaded not guilty, the defendant cross examined the plaintiff's witness as to expressions used by the plaintiff, which would have justified the imprisonment, they tending to raise mutiny and disobedience; and though it was objected to by the plaintiff, the evidence of what was said by him *at the time* of the imprisonment was received in mitigation of damages. For every thing which passed *at that time* is part of the transaction on which the plaintiff's action is founded: and he could not be surprised by his evidence.—*Bingham* v. *Garnault*, Sittings in London on 5th April, 1788. cor. *Buller*, J.

Matter of excuse is an admission of the fact; but saying it was done accidentally, and without any default in the defendant; and that (as I have already said) may be either pleaded or given in evidence on the general issue.

Justification is an insisting upon something that made it lawful for him to do the fact laid to his charge; it is therefore to be seen what is sufficient matter of justification. (*Francis* v. *Ley*, E. 1615. Cro. Jac. 367.) The most general matter of justification is, that the plaintiff made the first assault, and if issue be joined thereupon, the defendant may prove an assault on any day before the action brought; and the plaintiff cannot give in evidence a battery at another day, or at another time in the same day, without a novel assignment, which must state the battery to be on the same day mentioned in the declaration, else it will be a departure; *(a)* though on such novel assignment he may give in evidence a battery at any other day, the same as he might if the defendant had pleaded not guilty to the declaration, (*Tyler* v. *Wall*, M. 1632. Cro. Car. 229.); but as the common way is for the plaintiff to have two or three counts in his declaration, so that the defendant is under a necessity of pleading the general issue to some of them (for if he justify two he admits two, and consequently,

(a) On an indictment the party may plead not guilty, and give the special matter in evidence, but in an action he must plead it specially. *Regina* v. *Cotesworth*, 6 Mod. 172.

Where the declaration contained only one count, and defendant pleaded not guilty, only one assault can be proved, and if plaintiff has proved one, he cannot afterwards waive that and prove another. *Stante* v. *Prickett*, 1 Camp. 473.

unless

unless he can prove two justifications, must have a verdict against him) he may prove another battery without being put to make a novel assignment.—*Thornton* v. *Lister*, M. 1689. *Ib.* 514, 515. *(a)*

The memorandum was generally of *Michaelmas* term; and the fact on *son assault* was proved on a day within the term, and on a case made, the court held it well enough; for the plaintiff need have given no evidence on this plea, unless to aggravate damages, and the court will not nonsuit him, because * it is amendable by a new bill. And if this had come out [*18] on the defendant's evidence, who had otherwise proved his plea, he ought to have a verdict, unless the plaintiff prove another battery previous, which in such case ought to be deemed the foundation of the action.—*Guy* v. *Kitchener*, T. 21 Geo. 2. 2 Stra. 1271. *(b)*

If the defendant prove that the plaintiff first lifted up his staff, and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him.

However, every assault will not justify every battery; but it is matter of evidence whether the assault were proportionable to the battery, and therefore, though the plaintiff set out a *maihem* in his declaration, yet the plea of *son assault demesne* is the same; and he need not plead that the plaintiff *maihemasset et vulnerasset* the defendant, *nisi*, &c. (*Cockcroft* v. *Smith*, Salk. 642. *Dance* v. *Lucy*, 1 Sid. 246.) but that must appear in evidence; that is, it must appear that the assault was in some degree proportionable to the *maihem;* and therefore in *Cockcroft* v. *Smith*, (H. 8 & 9 W. 3. 1 Raym. 177 (margine.) 2 Salk. 642), *Holt*, C. J. directed the jury to give a verdict for the defendant, the first assault being by tilting the form on which the defendant sat, whereby he fell; the maim was, that the defendant bit off the plaintiff's finger.

(a) If there be two assaults on the same day, one on the plaintiff's own assault and the other not, if the defendant justify one *de son assault demesne*, plaintiff may make a new assignment of the other battery. *Elwis* v. *Lombe*, 6 Mod. 120.

But if there were two assaults, one of which defendant can justify and the other not, plaintiff must newly assign the assault for which the action was brought, or defendant will have a verdict on his justification. *Walsly* v. *Oakley*, Selw. N. P. Ab. 32.

(b) Note, It is said that an action does not lie before a cause of action accrued; but if the cause of action accrued before the bill was filed, it is good, though the writ issued before. In an action of trespass, the *latitat* was sued out 27th August, 1775, and the trespass proved the 25th September following. Held, that the *bill* was the commencement of the suit, and that the *latitat* was to be considered but as a process. *Foster* v. *Bonner*, Cowp. 454.

By a fiction of law, the memorandum *relates* to the first day of term, and the *latitat* is the commencement of the action, but where the true time of suing it out is material, it may be shewn notwithstanding the *teste*. *Hart* v. *Weston*, 5 Bur. 2586.

If

If the defendant plead *son assault*, and the plaintiff can justify it, he must plead it, for he cannot give it evidence upon the general replication *de injuriâ suâ propriâ*.—*King* & *Ux'* v. *Phippard*, T. 5 W & M. Carth. 280. *(a)*

There are many other matters which may be pleaded in justification: as if an officer having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; so if a parent in a reasonable manner chastise his child, or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner, (1 Hawk. P. C. 130.); or if I beat one who wrongfully endeavours with violence to dispossess me of my lands or goods, *(b)* or who assaults my wife, parent, child, or master: *(c)* but though all these matters may be pleaded in justification, yet they must be pleaded differently; as for example: in assault and battery against husband and wife for a battery by the wife, the defendants may plead that the plaintiff was going to wound her husband, and that she *insultum fecit* to defend him, and to prevent the plaintiff from beating him: in the same manner a servant may justify an assault in defence of his master; *(d)* but not *e con'*, because the master may have an action *per quod servitium amisit*, *(e)* but the ser-
[* 19] vant can have no action * for an assault on his master. (*Leward* v. *Baseley*, 1695, 1 Ld. Raym. 62.) A man cannot justify a battery in defence of his possession; but he ought to say, *molliter manus im-*

(a) Son assault demesne, however, will not justify an assault in a church-yard, for the law will not allow of violence there even in a man's own defence. *Francis* v. *Ley*, sup. pa. 17.

(b) After warning him to desist, and gently striving to remove him, even though he should break down and forcibly enter my close. *Green* v. *Goddard*, 2 Salk. 640, et sup.

(c) A wife may justify an assault in defence of her husband, and a child of his parent. 2 Roll. Ab. 546. D. pl. 3. *Leward* v. *Baseley*, Salk. 407.

(d) But a servant can only strike to prevent an injury, and not to revenge it. *Barfoot* v. *Reynolds*, 2 Stra. 953.

(e) In an action for assaulting plaintiff's son *per quod*, &c. it is enough to shew that the son lived in his father's family, and under his protection, without proving actual service. *Jones* v. *Brown*, Peake N. P. 233. 1 Esp. N. P. C. 217. So may a father maintain *Tr. per quod*, &c. against the seducer of his daughter, by whom all his household work was done, though she was servant to a neighbour, and lived in the neighbour's house. *Sedley* v. *Sutherland*, 3 Esp. N. P. C. 202. Vide *Fores* v. *Wilson*, Peake N. P. 55. *Edmondson* v. *Machell*, 2 T. Rep. 4. Et vide tamen *Gray* v. *Jefferies*, Cro. Eliz. 55. *Barham* v. *Dennis*, ib. 770. *Postlethwaite* v. *Parker*, 3 Burr. 1078. *Bennett* v. *Alcott*, 2 T. Rep. 166. Vide etiam *Weedon* v. *Timbrell*, 5 T. Rep. 360. in which Lord *Kenyon* said that no action can be maintained by a father for the loss of his child's service, unless there be some evidence that she performed acts of service for her father.

posuit:

posuit:(a) so an officer cannot justify more than the assault by virtue of an arrest, without shewing that the plaintiff resisted, or endeavoured to rescue himself, unless it be by way of *molliter manus imposuit*, and in that manner he may justify the beating, without shewing any resistance, or attempt to rescue.—*Williams* v. *Jones*, T. 9 Geo. 2. Str. 1049. Ca. temp. Hardw. 298. S. C. more fully. *Titley* v. *Foxhall*, C. B. T. 31 Geo. 2. Willes, 688. *(b)*

A battery

(a) In assault and battery, replication was that defendant, with all his power, endeavoured to wound and strike the horse of plaintiff's master, (of which horse he had the care) and to defend his said horse he laid his hands on defendant. Objection was, that plaintiff ought to have alledged in fact that defendant had assaulted or beaten the horse before he laid his hands on defendant, which was allowed by the court. *Shingleton* v. *Smith*, 2 Lutw. 1483. cited in *Weaver* v. *Bush*, 8 T. Rep. 81. by *Lawrence*, J. who said, this goes the length of shewing that the party cannot even plead *mol. man. imp.* in defence of his property, unless there has been something more than a mere attempt to beat him.

But a plea of *mol. man. impos.* in order to turn a man out of the house, is no answer to a striking him with repeated blows, and knocking him down. *Gregory* v. *Hill*, 8 T. Rep. 299.

So a churchwarden in office may justify the taking off a hat, if the party refuse to take it off when desired, or laying hands *molliter* on a person disorderly in the church, and he may turn him out for disturbing the congregation. *Hawe* v. *Planner*, 1 Saund. 13.

(b) And in such a justification the bailiff need not shew his warrant, for that must be returned to the sheriff. *Bateman* v. *Woodcock*, Cro. Jac. 372. Vide etiam *Truscott* v. *Carpenter*, Ld. Raym. 229.

In *Titley* v. *Foxall*, (sup.) however, as well as upon a plea of resistance, or an attempt to rescue, it is competent to the plaintiff to reply an unjustifiable or subsequent battery, as suggested by *Kingsmill*, J. in a case, 21 Hen. 8. "*Que puis ccl matter de ses mains le defendant batit le plaintiff.*" Vide *Durnford's* note on this subject in his edition of *Willes* Rep. p. 17, (n.) 6. But before the case of *Titley* v. *Foxhall*, it was doubted whether a defendant could justify a battery, by stating that he gently laid his hand on plaintiff in order to arrest him, and did arrest him, but the doubt in that case being reconciled, the mode of pleading there adopted was held good. So in *Tottage* v. *Petty*, Selw. N. P. Ab. 28, where, to trespass, assault, and battery, defendant pleaded that defendant entered his house without leave, and there disturbed him, whereupon defendant requested plaintiff to quit his house, which he refusing, defendant *gently laid his hands* on him to thrust him out. On demurrer, *Williams* v. *Jones*, (sup.) was cited to shew that the plea was bad, but Lord *Hardwicke* said, "it was not determined in that case that a battery could not be justified by a *mol. man. impos.* but that it could not be justified by merely shewing an arrest." Vide *Greene* v. *Jones*, 1 Saund. 296, *et seq.* where Mr. Serjeant *Williams* has fully set forth the mode of pleading justifications of this kind.

If a justification be *local*, as if a constable of a town in another county arrests a man for breaking the peace, the constable may traverse the county where the declaration is laid. 1 Inst. 282. But he must not only traverse that, but all other places, save the town of which he is constable. *Peacock* v. *Peacock*, Cro. Eliz. 705.

So

A battery cannot be justified, on account of breaking his close, in law, without a request to depart; but it is otherwise, if he come into my close *vi et armis*; for that is but returning violence with violence.—*Green* v. *Goddard*, Salk. 641. *(a)*

In assault and battery, the defendant pleaded that he was seised of the rectory of *D.* in fee, and that the corn was severed from the nine parts, and for that the plaintiff would have carried away his corn, the defendant stood in defence thereof, and kept the plaintiff from carrying it away; so as the harm the plaintiff received was of his own wrong, &c. The plaintiff replied, *de injuria sua propria absque tali causa*; and upon demurrer the replication was holden to be good, because the plaintiff claimed nothing in the land or corn, but only damages for the battery, which is collateral to the title, and therefore a general replication was good; for in assault and battery, the possession can only be material; but it is otherwise when the right may come in question.—*Taylor* v. *Markham*, T. 1609. Cro. Jac. 224. Yelv. 157. S. C.

The defendant may even justify a *maihem*, if done by him as an officer in the army for disobeying orders; and he may give in evidence the sentence of the council at war upon a petition against him by the plaintiff: and if by the sentence the petition is dismissed, it will be conclusive evidence in favour of the defendant.—*Lane* v. *Hegberg*, H. 11 W. 3. per *Treby*, C. J. Guildhall. Salk. MSS.

So if the declaration charge the defendant with assault and battery in *London*, if the defendant justify in defence of his possession at *Waltham*, he ought to traverse every other place but *Waltham*, *Bridgewater* v. *Betheway*, 3 Lev. 113; but to traverse the parish, and not the county, will be bad on demurrer. *Johnson* v. *Burton*, Cro. Eliz. 860.

But if a justification be *transitory*, it should follow the place laid in the declaration. 1 Inst. 282. Et vide *Bridgewater* v. *Betheway*, sup. And a battery in a man's own house is not local, but it may be justified in every place, consequently such a justification must follow the place laid in the declaration. *Purset* v. *Hutchings*, Cro. Eliz. 842.

If a justification be *at the same time and place*, it is needless to aver that it is the same trespass. *King* v. *Phippard*, Carth. 281; therefore where defendant pleads a *local* justification, plaintiff may vary in his replication, either in time or place, from the time or place laid in the declaration. *Serle* v. *Darford*, Ld. Raym. 120. Lutw. 1435.

(a) And a man may resist and oppose force by force in defence of his possession if necessary, and if the resistance be excessive, the plaintiff may shew that in a new assignment. Dict. per *Kenyon*, C. J. in *Weaver* v. *Bush*, 8 T. R. 81.

In a justification in defence of a man's property, defendant need not set forth his title, but only his possession, for that is only an inducement to the substance of his plea. *Skevill* v. *Avery*, Cro. Car. 138.

Whenever

Whenever the defendant justifies a battery, he must confess it, otherwise on demurrer the plaintiff will have judgment.—*Gibbon* v. *Pepper*, E. 7 W. 3. Salk. 637.

Where there is an express battery laid, it is not enough to justify the imprisonment (though that includes a battery), but he must likewise justify the battery.

A former recovery in assault and battery is a good plea, notwithstanding subsequent damages; *(a)* for the consequence of the battery is not the ground of the action, but the measure of the damages.—*Fetter* v. *Beale*, T. 13 W. 3. Salk. 11.

So if a battery be committed by several, and a recovery be had against [20] one, such recovery may be pleaded in bar to an action for the same battery brought against another.—*Broome* v. *Wooton*, T. 3 Jac. 1. Yelv. 63.

If the defendant justify the assault, and plead not guilty to the battery and wounding, and both pleas are found against him, there shall be but one damages given, for the assault is included in the battery. (*Candish's Ca.* M. 8 Jac. 1. Cro. Jac. 251.)*(b)* So if the action be brought against two, and one plead not guilty, and the other *son assault*, and both issues are found for the plaintiff, there shall be but one damages assessed, (Sir *J. Heydon's Ca.* T. 10 Jac. 1. 11 Co. 6, 7.); and it would be the same if one of the defendants had pleaded specially, and there had been a demurrer, which had been determined in favour of the plaintiff: for it is a maxim that where the inquest is taken by the issues of the parties, by the same inquest shall the damages be taxed for all. (*Headly* v. *Mildmay*, T. 14 Jac. 1. 1 Rol. R. 395. *Candish's Ca.* sup.) If the jury assess damages severally, *viz.* £1000 against *A.* and £50 against *B.* the plaintiff may enter a *nolle prosequi* as to *B.* and take judgment against *A.* only for the £1000, for as the plaintiff might have brought his action jointly or severally, he may have the same election as to the damages; or he may take execution against both for the greater damages; so if one of the defendants confess the action, a writ of inquiry shall be awarded, but shall not issue, because he shall be contributory to the damages taxed by the inquest on the issue of the parties, if they shall find for the plaintiff; and if they shall find against the plaintiff, then the writ shall

(a) But the court may encrease damages already given *super visum vulneris*. Post 21.

(b) In an action against *A.* and *B.* plaintiff proved a trespass against *A.* only, he cannot afterwards offer evidence of a *joint* trespass. *Sedley* v. *Sutherland*, 3 Esp. N. P. C. 202. So in trespass against two, the jury should give a *joint* verdict for the amount they think the most culpable ought to pay. *Brown* v. *Allen*, 4 Esp. N. P. C. 158.

issue forth. (*Rodney* v. *Strode*, M. 3 Jac. 2. Carth. 19. Post. 94.) It is the constant practice now to let the writ issue so that the same jury tries the issue and assesses the damages; and in case the defendant who pleaded is acquitted, yet the plaintiff shall go on to assess damages against the others, (*Cressy* v. *Webb*, H. 18 Geo. 2. Str. 1222.) (*aliter* if the plaintiff be nonsuited. *Snow* v. *Como*, Str. 507.)*(a)* So if one defendant appear, and the plaintiff declare against him *simul cum*, &c. who pleads and is found guilty by the inquests to damages; and afterwards, the other comes and pleads, and is found guilty, he shall be charged with the damages taxed by the former inquest; for the trespass, which the plaintiff has made joint, cannot be severed by the jury, if the jury find the trespass to be done by all at one and the same time; but if the jury find one guilty at one time, and the other at another time, their several damages may be assessed.—*Heydon's Ca.* sup. *(b)*

Trespass by baron and feme for the battery of both, defendant pleaded not guilty, and found guilty, and damages assessed for the battery of
[*21] the baron by itself, and for the battery of the *feme by itself; and judgment was given for the damages for the battery of the feme; and the writ abated for the residue. (9 Ed. 4. 51. *Buckley* v. *Hallett*, 1622. Cro. Jac. 655.*(c)* Note, the defendant cannot in such action give evidence that the man has a former wife, for that ought to be pleaded, that he may be apprised of the defence, and be prepared to answer it. (*Dickenson* and *Ux'* v. *Davis*, M. 8 Geo. 1. *per Pratt*, C. J. 1 Str. 480.) In assault and battery, the defendant gave in evidence his marriage with the plaintiff; to encounter which she proved a former marriage to one *Westbrooke*, who was alive at the time of her second marriage: for the defendant it was insisted, she ought not

(a) In *Snow* v. *Como*, sup. (where there appears to have been only one defendant) there was a demurrer to one count and an issue on the other, and a *venire* to try the issue and assess contingent damages, and plaintiff being nonsuited on the issue, the judge would not go on to assess damages, saying, he had no power to do so, plaintiff being out of court.

(b) Where the count is of a joint trespass, and the jury find the defendants guilty of a joint trespass, they cannot sever the damages. *Hill* v. *Goodchild*, 5 Burr. 2792. Vide etiam *Chapman* v. *Howse*, Stra. 1140, with the editor's note.

(c) When the debt or cause of action will survive to the wife, the husband and wife are regularly to join in action, as in the recovery of debts due to the wife before marriage. So in actions relating to her freehold and inheritance, or injuries done to the person of the wife, 1 Rol. Ab. 347. 1 Danv. Ab. 709. *Frosdick* v. *Sterling*, 2 Mod. 269.

If baron and feme are sued, the baron must put in bail for both, but if the husband does not appear upon the arrest, the wife must file common bail before she can be discharged, for otherwise the plaintiff could not proceed to judgment. *Edwards* v. *Rourke*, 1 T. Rep. 486.

to

to give felony in evidence to support her action, but Lord *King* admitted it.—*Westbrooke* v. *Stretvil*, H. 4 Geo. 1. Str. 79.

In an action by husband and wife, for a battery on her, *per quod* the husband's business remained undone; on motion in arrest of judgment it was holden good, because the battery itself is actionable, and the *per quod* only aggravation; and *Holt* said he would not intend the judge suffered that to be given in evidence.—*Russell* v. *Corne*, H. 2 Ann. Salk. 119. *Smalley* v. *Kerfoot*, T. 11 Geo. 2. Str. 1094. *(a)*

If there be a maim, or if the wound be apparent though not a maim, the court may encrease the damages upon view of the plaintiff. (*Cook* v. *Beal*, H. 8 & 9 W. 3. 1 Raym. 176.) But in order for it, it seems necessary that the judge of *nisi prius* should indorse upon the *postea* what maim or wound was proved; unless the cause were tried before a judge of the same court where the motion is made to encrease the damages. (*Hooper* v. *Pope*, Latch. 223.) It likewise seems necessary that the manner of wounding should be set forth in the declaration.—*Vin. Ab.* tit. Damages, K. pl. 47. *Jervis* v. *Lucas*, M. 1652. Sty. 345.

In *Smallpiece* v. *Bockingham*, M. 27 Car. 2. C. B. upon a motion to encrease damages *super visum vulneris*, the court said, it was necessary that it should be proved to be the same wound for which the damages were given, and ordered notice to be given to the defendant, who appeared, and witnesses on the one part and on the other were examined, and several of the jurymen, who all said that no evidence was given to them that any blow was given upon the eye, or that he had lost his eye by the battery; and for this reason the court would not encrease the damages: for new evidence ought not to be given, for this is a censure on the first verdict, and a correction of it.

In *Burton* v. *Baynes*, M. 7 Geo. 2. C. B. 1 Barnes, 106, upon view of the party, and examination of the surgeon *ore tenus* in open court, and hearing counsel on both sides, (after a rule to shew cause) the damages were encreased from £11. 14*s*. to £50.

It may not be useless here to remark, that by the Jewish constitution he that hurt his neighbour was responsible on five * accounts, 1. For the damages. 2. For the pain. 3. For the cure. 4. For the cessation of work. 5. For the affront or disgrace. [*22]

(a) In an action for personal abuse of the wife, she must join with her husband, he not having sustained any damage; but if the husband has been damnified, as by tearing her clothes, &c. then he alone must sue. So in the cases of child and servant, unless injury accrues to the parent or master, the child or servant must sue.

It is proper to take notice, that by the 21 *Jac.* 1. *c.* 16, an action for an assault and battery must be brought within four years. But this must be taken advantage of by pleading, and therefore where the plaintiff by mistake pleaded *non culp. infra sex annos,* upon demurrer it was holden to be an ill plea.—*Blackmore* v. *Tidderly,* H. 1705. Salk. 423. Ld. Raym. 1099. *(a)*

(a) But the demurrer in this case must be special. *Macfadzen* v. *Oliphant,* 6 East, 388. As to the costs in this action, see *Selw. N. P. Abr.* 35. 37.

CHAPTER IV.

OF FALSE IMPRISONMENT.

EVERY restraint of a man's liberty under the custody of another, either in a gaol, house, stocks, or in the street, is in law an imprisonment; *(a)* and whenever it is done without a proper authority,

(a) To constitute the offence of false imprisonment, it is necessary to shew what sort of detention has been considered unlawful. First, then, for the arrest of an executor or administrator without a suggestion of a *devastavit,* this action lies not only against the plaintiff, but against the attorney who issued the writ. *Barker* v. *Braham,* 3 Wils. 368. But there is a distinction between persons not liable to arrests and those privileged therefrom, for the latter cannot maintain this action; as a witness returning from the court. *Cameron* v. *Lightfoot,* 2 Bla. 1190; for the officer arresting him was compelled so to do by the compulsory writ, and it is the same with peers, certificated bankrupts, insolvent debtors, &c. *Co. of Rutland's Ca.* 6 Co. 52. *Turleton* v. *Fisher,* Dougl. 666, (671). Yet for an arrest on a *Sunday* this action lies. *Wilson* v. *Tucker,* Salk. 78. *Taylor* v. *Freeman,* Selw. N. P. Ab. 808 (n.)

So for the arrest of a wrong person it lies, though such person affirm himself to have the same name as defendant. *Coot* v. *Lightworth,* Mo. 457. *Flurbane's Ca.* Hard. 323; but in such a case the court will give nominal damages only. *Oxley* v. *Flower,* Selw. N. P. Ab. 806, in which it was laid down by *Kenyon,* C. J. that every imprisonment included a battery; the court, however, in *Emmett* v. *Lyne,* 1 Bos. and Pull. N. R. 255, treated that idea as absurd.

So for an arrest upon process, which is *void* or *irregular,* this action lies. *Barker* v. *Braham,* 2 Bla. 866. 3 Wils. 368. *Burslem* v. *Fern,* 2 Wils. 47. *Parsons* v. *Lloyd,* 2 Wils. 341. 2 Bla. 845. *Philips* v. *Biron,* 1 Stra. 509, in which case a distinction was taken between an *irregular* and an *erroneous* process, *viz.* that if *erroneous* it is the act of the court, and the party shall not suffer by it; but if *irregular,* it is the act of the party or his attorney, against whom this action will lie.

So for an arrest on an informal affidavit. *Smith* v. *Boucher,* 2 Stra. 993. *Reeks* v. *Groneman,* 2 Wils. 226;

thority, is false imprisonment, for which the law gives an action; and this is commonly joined to an assault and battery; for every imprisonment

226; or process, *Johns* v. *Smith*, Cro. Jac. 314. *Allen* v. *Allen*, 2 Bla. 694.

So where an inferior court exceeds its jurisdiction, as the College of Physicians. *Dr. Bonham's Ca.* 8 Co. 114, this action lies, but not against the judge of such a court if of record. *Groenvelt* v. *Burwell*, Str. 474. Comy. 76.

So where an inferior court has no jurisdiction at all. *Higginson* v. *Martyn*, Bull. N. P. 83. So where the proceedings of such a court are irregular. *Crawley's Ca.* Cro. Car. 567. So where such a court proceeds *inverso ordine*, though no action lies against the party suing, or any minister of the court for serving the process, yet as the whole proceedings are *coram non judice*, an action will lie against them all without any regard to the process. *Marshalsea Ca.* 10 Co. 76. And this principle has been recognized in many cases, as *Nichols* v. *Walker*, Cro. Car. 395. *Hill* v. *Bateman*, Stra. 711. *Shergold* v. *Holloway*, Stra. 1002. *Perkin* v. *Proctor*, 2 Wils. 384. *Browne* v. *Compton*, 8 T. Rep. 424.

So against a justice of peace, for a commitment for a penalty without previously issuing his warrant of distress, this action lies. *Hill* v. *Bateman*, sup. and so for a detention for fees not demandable. *Smith* v. *Sibson*, 1 Wils. 153.

And so against commissioners of bankrupt for a commitment not warranted by their authority. *Dyer* v. *Missing*, 2 Blac. 1035. *Miller* v. *Seare*, 2 Blac. 1141. *Battye* v. *Gresley*, 8 East, 319.

But there are cases in which an arrest or detention has been considered legal or justifiable, as where the process issues from a court having cognizance of the cause, but there is a distinction between officers and private persons. If the action be against the sheriff, he may justify by shewing the writ. So in the case of his bailiff, with this difference, that the sheriff must shew the writ returned, if returnable, which his bailiff cannot do; but if the action be against the plaintiff in the arrest, or a stranger, they cannot justify without shewing a judgment as well as an execution. *Britten* v. *Cole*, Salk. 408. *Co. of Rutland's Ca.* 6 Co. 52.

A *second* good justification is where an officer apprehends another upon a charge of felony, (though without a warrant for his apprehension) and carries him before a magistrate, for in such a case he that makes the charge alone is answerable. *Samuel* v. *Payne*, Dougl. (346) 360. *Ledwick* v. *Catchpole*, Cald. 294. S. P.

So a bailiff may justify retaking his prisoner before the return of the writ on mesne process, though he permitted him to go at large. *Atkinson* v. *Mattison*, 2 T. R. 172; but after a voluntary escape, the sheriff cannot retake his prisoner. *Atkinson* v. *Jameson*, 5 T. R. 25. But where the arrest is by warrant, the bailiff must shew that the warrant was legal, 2 Inst. 46, and not a bare warrant of a justice for servants wages. *Shergold* v. *Holloway*, 2 Stra. 1002. But if a constable shews a warrant to a man whom he is going to arrest, and he voluntarily submits to go with him, this is not such an arrest as will enable a man to support this action. *Arrowsmith* v. *Le Mesurier*, 2 Bos. and Pull. N. R. 211. for bare words will not make an arrest. *Genner* v. *Sparks*, Salk. 79.

Thirdly, Secretaries of state may justify a commitment on a suspicion of treason, for it is incident to their office, and a commitment to a messenger is good. *R.* v. *Kendall*, 1 Salk. 347. But they have no power to issue a *general warrant* to arrest the person

prisonment includes a battery, and every battery an assault.—*Co. Lit.* 253. *(a)*

The 21 *Jac.* 1. limits this action to four years; but if an action be brought for detaining the plaintiff in prison, from ——— to ———, and the defendant plead (as he may) as to part not guilty *infra quatuor annos*, the plaintiff may reply that it was one continued imprisonment; and so oust the defendant of the benefit of the statute.—*Coventry* v. *Apsley*, M. 3 W. 3. Salk. 420. Post. 24. S. P. in *Pickersgill* v. *Palmer*.

Declaration of Mich. term, of an assault on the 18th of *October*, and an imprisonment from thence for twenty-five weeks; on motion in arrest of judgment, the court held that the continuance being laid under a *scilicit*, will not vitiate what is properly laid in time, and that this differs from all the cases where the time is affirmatively laid.—*Webb* v. *Turner*, 11 Geo. 2. Stra. 1095.

Trespass against *J. G.* widow; and pending the suit she took husband; after judgment a writ was directed to the sheriff *quod caperet* J. G. *ad satisfaciendum*, upon which the sheriff took the defendant; whose husband, together with her, thereupon brought an action of false imprisonment against the sheriff, who justified under the *ca. sa.* the plaintiff demurred; and *per cur.* If an action be brought against a [*23] widow, *who before judgment takes an husband, yet if she be found guilty, the *ca. sa.* shall be awarded against her, and not against her husband. Judgment for the defendant.—*Doyley* v. *White*, T. 11 Jac. 1. Cro. Jac. 323. *(b)*

Where

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person or seize the papers on a general information. *Entick* v. *Carrington*, 2 Wils. 275.

So may commanding officers in the army or navy put their inferior officers under arrest on good ground, but they must afterwards bring them to a court-martial. *Swinton* v. *Molloy*, cited 1 T. Rep. 537.

So may the captain of an Indiaman imprison a passenger who refuses to take the station assigned to him on the approach of an enemy. *Boyce* v. *Bayliffe*, 1 Camp. 60. And if, while the captain was in the act of putting the plaintiff in irons, another person assaults the plaintiff, he is jointly guilty of the false imprisonment. *Boyce* v. *Campbell*, *ibid.*

So for detaining the mariners of a ship taken as a lawful prize, this action lies not, though she be not afterwards condemned, for the court of admiralty can give damages for the detention. *Le Caux* v. *Eden*, Dougl. 572, (594.)

(a) Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only, but where it is by one person, in consequence of information from another, there an action on the case is the proper remedy. *Morgan* v. *Hughes*, 2 T. Rep. 231. And *per Buller*, J. There is no distinction between a malicious commitment and a malicious prosecution. S. C.

(b) In actions against husband and wife, if the suit be for a debt of the wife *dum sola*, and judgment be for the plaintiff, both may be taken in

Where an officer and another join in the same justification, if it be not sufficient for the officer, neither is it for other, (*Middleton* v. *Price*, E. 16 Geo. 2. Str. 1184.); and wherever an officer justifies an imprisonment under a writ which he ought to return (and all mesne process ought to be returned) he must shew that the writ was returned; but it is otherwise in the case of a subordinate officer, such as a bailiff, for he is only to execute the sheriff's warrant. (*Smith* v. *Boucher*, M. 8 Geo. 2. Str. 993. *(a)* If the action be brought against him who was plaintiff, he cannot justify by virtue of an execution, unless he likewise shew there is a judgment; for the judgment may be reversed, and it ought to be at his peril that he takes out execution afterwards: but it is enough for the sheriff to shew a writ, and if any one come in aid of the officer at his request, he may justify as the officer may do, but such request is traversable.—*Britton* v. *Cole*, Salk. 409. *(b)*

The officer cannot justify an imprisonment for non-payment of taxes, under the general printed warrant which the collectors have, signed by two justices; but he ought to have a special warrant.—*Masters* v. *Boucher*, 11 W. 3. 1 Raym. 740.

The defendant justified an imprisonment for that the plaintiff was indebted to him in a debt of £20, and he took out a *latitat* against him, directed to the sheriff, *&c.* which is the same imprisonment, *&c.* The plaintiff in his replication traversed that he owed him so much money; after verdict for the plaintiff it was moved in arrest of judgment, that the debt being but inducement to the justification was not traversable, and a repleader was awarded.—*Hillyfield* v. *Stanyford*, M. 25 Car. 2. C. B. *(c)*

Note,

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in execution, for that must follow the judgment. *Bardolph* v. *Perry*, Mo. 704. *Wilmot* v. *Butler*, Say. 149. So it may be against both in the wife's assault. *Langstaff* v. *Rain*, 1 Wils. 149. But on all judgments obtained on the wife's contracts, or for her torts *during coverture*, the execution shall go against the husband alone. *Anon.* Cro. Car. 513.

(a) In this case it was said that an officer, by joining with one to whom the process was no justification, forfeited his own justification.

(b) Where a man is arrested for debt, the sheriff is not bound to release him unless he receives a written discharge from the plaintiff; and after receiving such discharge, he may detain him a reasonable time (say twenty-fours) to search the office, for the officer is not bound to make the search till the written discharge arrives. *Taylor* v. *Brander and Another, Sheriffs of London*, 1 Esp. N. P. 45. *Quære tamen*, whether twenty-four hours is not an unreasonable time to search the office in *London*, and whether the plaintiff's discharge, without that of his attorney, will suffice, for in practice the latter is always required.

Note. In the principal case, defendant was detained twenty-six hours after the plaintiff's discharge arrived.

(c) If a party be arrested without any cause of action, he has his remedy

Note, that by 21 *Jac.* 1. *c.* 12, justices of the peace, mayors, bailiffs, churchwardens, and overseers of the poor, constables, and other peace officers, may plead the general issue, and give the special matter in evidence. It likewise enacts, that any action brought against them shall be laid in the proper county; and if upon the general issue pleaded, the fact shall appear to be done in another county, the jury shall find the defendant not guilty.

Note likewise, that by 24 *Geo.* 2. *c.* 44, no writ shall be sued out against a justice for what he shall do in the execution of his office, till notice in writing of such intended writ shall have been delivered to him, or left at the usual place of his abode, a month before; *(a)* and the jus-
[*24] tice may tender * amends, and in case the same is not accepted, plead such tender in bar to the action, together with the plea of not guilty, and any other plea with leave of the court; and if upon issue joined thereon the jury shall find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant. *(b)* It likewise enacts, that no action shall be brought against any constable or other officer, or any other person acting by his order, for any thing done in obedience to a justice's warrant, until demand made of the perusal and copy of such

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medy by an action on the case for maliciously holding him to bail. *Belk* v. *Broadbent*, 3. T. R. 185; and defendant pleading justification under mesne process sued out by him in a cause in which he was plaintiff, may state that the writ issued upon an affidavit to hold to bail, without setting forth the cause of action, *ibid;* for that is not traversable.

(a) No action can be brought against a magistrate for any act done by him in that character, without giving him a month's notice of the writ or process intended to be issued, as well as the cause of action. *Lovelace* v. *Curry*, 7 T. R. 631. *Strickland* v. *Ward*, *ibid.* *(in notis.)* and the statute says a calendar month.

(b) All that this statute requires is, that the notice shall contain two things: 1st. The writ or process which the plaintiff intends to sue out; 2d. The *cause* of action for which he sues. The *form* of action need not be specified. In *Lovelace* v. *Curry*, 7 T. R. 631, the court decided only that there must be a month's notice of the particular process to be sued out, and that it was not enough to say that an action should be commenced against the magistrate *for his said misconduct*. *Per Ellenborough*, C. J. in *Sabin* v. *De Burgh*, 2 Camp. 197, plaintiff cannot give notice of one form of action and declare in another. *Strickland* v. *Ward*, 7 T. R. 631, (n.)

Where a magistrate intends to act as such in a matter within his jurisdiction, however mistaken he may be, he is entitled to notice under this statute. *Weller* v. *Toke*, 9 East, 364.

So where defendant, who was a justice of peace and also lord of a manor, went into the house of a blacksmith in the manor, in company with his gamekeeper, to search for engines to the destruction of game, and took away a gun which had been left to be repaired. It was held, that he should be presumed to have acted as a justice, though he had acted wrong, and therefore that he ought to have received notice. *Briggs* v. *Evelyn*, 2 H. Bla. 114.

warrant,

warrant, and the same has been refused for the space of six days;*(a)* and in case the warrant be shewed and a copy taken, and afterwards an action be brought against the constable, without making the justice a defendant, the jury shall, on producing the warrant, find a verdict for the defendant, notwithstanding any defect of jurisdiction in the justice; and if such action be brought jointly against the justice and him, upon producing the warrant, the jury shall find for him; and if they find against the justice, the plaintiff shall recover the costs he is to pay to such defendant against the justice, with a proviso, that if the judge certify that the injury was wilfully and maliciously committed, the plaintiff shall be entitled to double costs. And a proviso likewise, that such action shall be commenced within six calendar months after the act committed. *(b)*

The officer must prove that he acted in obedience to the warrant; and where the justice cannot be liable, the officer is not within the protection of the act.—*Money* v. *Leach*, T. 5 Geo. 3. 3 Burr. 1766.

If a man be imprisoned by a justice's warrant on the first day of *January*, and kept in prison till the first day of *February*, he will be in time if he brings his action within six months after the first of *February*, for the whole imprisonment is one entire trespass.—*Pickersgill* v. *Palmer*, T. 1 Geo. 3. C. B. Vide *Coventry* v. *Apsley*, Salk. 420. S. P.

The justice having pleaded tender of amends, the plaintiff obtained a rule for the defendant to bring the money into court for the plaintiff to take the same, upon discontinuing his action.—*Lawrence* v. *Cox*, Hil. 33 Geo. 2. K. B.

An overseer of the poor, who distrains for a poor's rate under a justice's warrant, is an officer within the protection of this act.—*Nutting* v.

(a) As to this it was held in *Jory* v. *Orchard*, 2 Bos. and Pull. 39, that a duplicate original of such demand is sufficient evidence, and that a demand signed by attorney is within the meaning of the act.

(b) "By 43 *Geo.* 3. *c.* 141, in all "actions against any justice of "peace on account of any convic- "tion by him under any statute, *&c.* "or by reason of any act, matter, or "thing done, or commanded to be "done, by such justice, for the levy- "ing of any penalty, apprehending "any party, or for carrying any "such conviction into effect, *in case* "*such conviction shall have been* "*quashed*, the plaintiff in such action "(besides the penalty, if levied, *&c.*) "shall not be entitled to recover "more than 2*d.* damages, nor any "costs, unless it shall be expressly "alleged in the declaration in the "action for which the recovery shall "be had, *and which shall be in an ac-* "*tion upon the case only*, that such "acts were done maliciously, and "without any reasonable and pro- "bable cause." But in *Massey* v. *Johnson*, 12 East, 67, it was decided that this statute applies only to cases in which there has been *actually a conviction*.

Under the 13th *Geo.* 3. *c.* 80, which is against shooting game on a *Sunday*, a magistrate may, by parol, legally authorize the defendants to detain the plaintiff in custody till the return of the warrant of distress. *Still* v. *Walls*, 7 East, 535.

Jackson,

Jackson, K. B. E. 18 Geo. 3. *Feltham* v. *Terry*, E. 18 Geo. 3. K. B. *(a)*

Note, the above act extends only to actions of tort: and therefore where an action for money had and received was brought against an officer who had levied money on a conviction by a justice of the peace; the conviction having been quashed, it was holden that a demand of a copy of the warrant was not necessary.

(a) And so in a churchwarden. *Harpur* v. *Carr*, 7 T. Rep. 271.

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CHAPTER V.

OF INJURIES ARISING FROM NEGLIGENCE OR FOLLY.

EVERY man ought to take reasonable care that he does not injure his neighbour; therefore, wherever a man receives any hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly, the law gives him an action to recover damages for the injury so sustained. *(a)*

As

(a) There is a very wide distinction between a mere accidental and involuntary injury done to a man, and one that is the effect of negligence, folly, or culpable carelessness. The *quo animo* of the party who is the cause of the injury is the criterion, and of that the jury are the proper judges. *Beckwith* v. *Shordike*, 4 Burr. 2093.

This actions lie against the owner of a dog accustomed to bite, at the suit of the person bitten; but the declaration must shew that the owner knew his dog was fierce. *Mason* v. *Keeling*, 1 Ld. Raym. 606, (but differently reported in 12 Mod. 332,) for the *scienter* is the gist of the action. *Smith* v. *Pelah*, 2 Stra. 1264. Vide *Buxenden* v. *Sharp*, 2 Salk. 662. *Kinnion* v. *Davies*, Cro. Car. 487. Vide etiam *Jones* v. *Perry*, 2 Esp. N. P. C. 482, where it was held, that the owner of a fierce dog is bound to secure him *without notice* of his ferocity. Contra *Mason* v. *Keeling*, sup.

Under this class of cases may also be ranked those of misfeasance in driving carriages, as to which it has been held, that where there is no other carriage on the road, the coachman may drive on what part of it he pleases. *Aston* v. *Heaven*, 2 Esp. N. P. C. 533. And he is not bound to keep on the left side of the road, provided he leaves sufficient room for other carriages that may meet him on their proper side. *Wordsworth* v. *Willan*, 5 Esp. N. P. C. 273.

So is the driver of a stage coach bound to inform the outside passengers where the way lies under a low and almost impassable gateway. *Dudley* v. *Smith*, 1 Camp. 167. Proof that a stage coach broke down, and that plaintiff, a passenger, was much bruised, is sufficient to raise

As in the case mentioned in the third chapter, where the defendant, by uncocking his gun, accidentally wounded the plaintiff, who was standing by to see him do it. *(a)*

If a man ride an unruly horse in any place much frequented, (such as *Lincoln's-Inn-Fields)* to break and tame him; if the horse hurt another, he will be liable to an action; and it may be brought against the master as well as the servant, for it will be intended that he sent the servant to train the horse there; or it may be brought against the master alone.—*Michael* v. *Alestree & al'*. T. 1676. 2 Lev. 172. *(b)*

The servants of a carman run over a boy in the streets, and maimed him, by negligence; an action was brought against the master, and the plaintiff recovered. (*Anon.* 1 Raym. 739.) And note, that in such case the servant cannot be a witness for his master, without a release, because he is answerable to him.—*Jarvis* v. *Hayes*, M. 11 Geo. 2. Str. 1083. *(c)*

So in the case abovementioned, if one whip my horse, whereby he runs away with me, and runs over a man, the man may bring an action against such person; for the whipping my horse was an act of folly, and therefore he ought to be answerable for the consequence of it. (*Dodwell* v. *Burford*, M. 1669. 1 Mod. 24.) *A fortiori*, I might maintain an action if I received any hurt from my horse's running away, because the consequence is more natural. However it is proper in such cases to prove that the injury was such, as would probably follow from the act done: as that many people were assembled together near the place, at the time of his whipping the horse; or that the person run over was standing near and within sight; yet, as the defendant is only to answer *civiliter* and not *criminaliter*, it does not seem absolutely necessary to give *such proof; though to be sure such circumstances will have [*26] weight in diminishing or increasing the *quantum* of the damages.

So if a man lay logs of wood cross a highway; though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action; for wherever a man suffers a particular injury by a nuisance, he may maintain an action; but then the injury must be direct (such as before mentioned) and not consequential,

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raise a presumption, that the accident arose either from the unskilfulness of the driver, or from the insufficiency of the coach, and it lies on the coach owner to negative these inferences. *Christie* v. *Griggs*, 2 Camp. 79.

(a) Underwood v. *Hewson*, Stra. 596. S. P. et ante, p. 16.

(b) And it is no excuse for the defendant, that the injury was involuntary on his part, if any damage be caused to another from his folly or want of due care and caution. *Esp. N. P. Dig.* 599.

(c) Nor against him without a release. *Miller* v. *Falconer*, 1 Camp. 251.

as

as by being delayed in a journey of importance. (*Paine* v. *Partrick*, T. 3 W. 3. Carth. 194. *Iveson* v. *Moor*, T. 10 W. 3. Ib. 451. *(a)*

So if a *surgeon (b)* undertake to cure a person, and by his negligence and unskilfulness *(c)* miscarry, an action will lie; but if the person undertaking to make the cure be not a common surgeon, there must be an express promise; because if it were not his profession, it was the folly of the plaintiff to trust him, *(d)* unless he were deceived by an express promise; and the law in such case will not raise a promise. The defendant may in either case give in evidence that the plaintiff did not follow his directions, &c.—1 *Danv.* 177.

As I shall have occasion to say more upon this head in the next book, under the title of "Case for Misbehaviour in an Office, Trust, or Duty," and of "Case of consequential Damages," I will only add in this place, That it is a settled distinction, that where the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, &c. trespass *vi et armis* will lie: But where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, &c. trespass *vi et armis* will not lie, but the proper remedy is an action on the case.—*Reynolds* v. *Clark*, T. 1 Geo. 1. 2 Raym. 1402.

(a) This point was adjudged in *Fowler* v. *Sanders*, M. 1617. Cro. Jac. 446, and cited in *Reynolds* v. *Clark*, post. The cases referred to by the text are however to S. P.

To support this action, two things must concur, an obstruction on the road by the fault of the defendant, and no want of ordinary care to avoid it on plaintiff's part. *Per* Lord *Ellenborough*, C. J. in *Butterfield* v. *Forrester*, 11 East, 60.

(b) Physician, surgeon, or apothecary, 11 *H.* 7. *c.* 18.

(c) (or curiosity.)

(d) Vide Doctor *Groenvelt's Ca.* 1 Lord Raym. 214. But want of skill alone will not maintain this action, for there must also be evidence of negligence and carelessness to the evident detriment of the patient. *Searle* v. *Prentice*, 8 East, 348. But where a surgeon unskilfully disunited the callous of the plaintiff's leg, in order to try an experiment, this action was held to lie. *Slater* v. *Baker*, 2 Wils. 359.

CHAPTER VI.

OF ADULTERY.

I AM now come to the last thing for which (as a personal injury) an action will lie, and that is Adultery. And the action lies in this case for the injury done to the husband in alienating his wife's affections; destroying

destroying the comfort he had from her company; and raising children for him to support and provide for. And as the injury is great, so the damages given are commonly very considerable: But they are properly increased or *diminished by the particular circumstances of each case; [*27] the rank and quality of the plaintiff; the condition of the defendant; his being a friend, relation, or dependant of the plaintiff, or being a man of substance; proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant; and her having always borne a good character till then; and proof of a settlement, or provision for the children of the marriage, are all proper circumstances of aggravation. On the other hand, proof that the wife had before eloped with others, or that the husband had turned her out of doors, and refused to maintain her; and that he kept company with other women; (*Cibber* v. *Sloper*, *per Lee*, C. J.) or that he was acquainted with and consented to the defendant's familiarity with her, is proper in mitigation of damages. (*Roberts* v. *Marlston*, at *Hereford*, 1756. *per Willes*, C. J.) So the defendant may give in evidence, that the wife had a bastard before marriage, but he will not be permitted to give evidence of the general reputation of her being (or having been) a prostitute; for that may be occasioned by her familiarity with the defendant; though perhaps, after having laid a foundation by proving her being acquainted with other men; such general evidence may be admitted: (*Rigby* v. *Stephenson*, *Stafford*, 1745. *per Foster*, J.) But for this matter of giving character in evidence, *vide post*, lib. vi. *(a)*

But in an action for *crim. con.* with the plaintiff's wife, Lord *Mansfield* laid it down as clear law, that if a woman be suffered to live as a prostitute, with the privity of her husband, and a man is thereby drawn into *crim. con.* and the husband brings an action, it will not lie: *(b)* It is.

(a) Where the character of the plaintiff or defendant is attempted to be impeached in the cross examination of witnesses produced by the adversary, and those witnesses deny the imputation intended to be conveyed, the adverse party shall not be permitted to go into evidence of the husband's character. *King* v. *Francis*, 3 Esp. N. P. Ca. 116. Should the husband, however, be proved guilty of notorious infidelity, it will be no bar to this action, though it will go far to mitigate his damages. *Bromley* v. *Wallace*, 4 Esp. 237. Vide etiam *Wyndham* v. *Wycombe*, ib. 16. *Hodges* v. *Wyndham*, Peake N. P. 39. And in *Coot* v. *Berty*, 12 Mod. 232, it was held, that even a licence by the husband to his wife to lie with another man, cannot be pleaded in bar to an action of trespass by the husband, nor that she was a notorious lewd woman; but these matters may be given in mitigation of damages. Vide etiam *Duberley* v. *Gunning*, 4 T. Rep. 651. *Howard* v. *Burtonwood*, Selw. N. P. Abr. 10. S. P.

(b) Nor indeed ought the husband to maintain this action where it is grounded on his own turpitude, for

is a damage without an injury. If it be not with the husband's privity, it will not go to the action, let her be ever so profligate, but only to the damages. *Pratt*, C. J. of *C. B.* declared himself of the same opinion in a like case much about the same time. (*Smith* v. *Allison*, Sittings at *Westminster*, B. R. *cor.* Lord *Mansfield*, after Tr. 5 Geo. 3.) However, in the case of *Cibber* v. *Sloper*, *supra*, *(a)* it was holden that the action lay, though the privity and consent of the husband to the defendant's connection with her were clearly proved. *(b)*

Note, In this action it is necessary for the plaintiff to prove a marriage *in fact*; which may be done either by a copy of the register, or by the testimony of one who was present at the ceremony. *(c)* But

It is not necessary to call one of the subscribing witnesses to the register to prove the identity of the persons married, for a copy of the re-

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for the gist of it is not the assault, but *per quod consortium amisit*. Vide *Cook* v. *Sayer*, 2 Burr. 753. *Macfadzen* v. *Oliphant*, 6 East, 388.

(a) Vide *Hoare* v. *Allen*, 3 Esp. N. P. C. 276. Et vide *Duberley* v. *Gunning*, 4 T. R. 655.

So where an action was brought for *crim. con.* evidence of the wife's misconduct with others before the act of adultery alledged, is admissible in mitigation of damages, but not of subsequent acts. *Elsam* v. *Faweet*, 2 Esp. N. P. C. 562.

(b) In *Weedon* v. *Timbrell*, 5 T. Rep. 360, an action was brought for *crim. con.* with plaintiff's wife; it appeared that the plaintiff and his wife had agreed to live separately: plaintiff proved various acts of adultery committed by defendant after separation; but there being no direct proof of any before it, he was nonsuited. On a motion for new trial, *Kenyon*, C. J. held, (the other judges concurring), that the gist of the action was the loss of the comfort and society of plaintiff's wife, and not the criminal conversation. This was a civil action brought to recover satisfaction for a civil injury done to the husband. But what injury can have been done to plaintiff who had voluntarily relinquished his wife? His lordship also held, that in an action by a father for the loss of service of his child, no action can be maintained, unless some evidence be given, that the daughter performed some acts of service for the father: as to which, vide ante, page 18, note (e); vide etiam *Dean* v. *Peal*, 5 T. Rep. 47. In *Chambers* v. *Caulfield*, 6 East, 244, the wife, without the consent of trustees, lived apart from her husband, but that consent had been rendered necessary by a deed which was made with reference to a possible separation; and in an action by the husband for *crim. con.* while she thus lived away from him, it was held by Lord *Ellenborough*, C. J. that such action was maintainable, allowing the doctrine of *Timbrel* v. *Weedon*, sup. in its fullest extent. Vide etiam *Cook* v. *Sayer*, 2 Burr. 753, cited in *Macfadzen* v. *Oliphant*, 6 East, 388. *Bartelot* v. *Hawker*, Peake N. P. 7.

(c) In *crim. con.* the marriage, *in fact*, was proved as to the husband: as to the wife, the witness said, he was at the marriage in *Ireland*, and saw the wife afterwards in *Ireland* at her husband's house, but that he had not seen her for some time past, and did not know whether she was the person mentioned in the declaration. It was proved that defendant called her Mrs. *Hemmings*. The court held this to be good *prima facie* evidence of a marriage. *Hemmings* v. *Smith*, M. 25 Geo. 3. B. R. MS. Ca.

gister

gister is sufficient evidence of the marriage *in fact* between persons of the description there mentioned: and any evidence which satisfies a jury as to the identity of * the plaintiff and his wife being the persons married is sufficient; as if the hand-writing of the husband and wife to the register is proved; or bell-ringers came to the parties and said they rung for the wedding, and were paid by them, or people dined at the wedding dinner; or other circumstances to ascertain the persons.—*Birt* v. *Barlow*, M. 1779. 1 Doug. 162. (171.) *(a)* [*28]

Where the plaintiff proved articles between himself and his wife, purporting to be made after the marriage, of the wife's estate, and which were executed by the plaintiff and his wife, with the privity of her relations, and her uncle was the trustee in the settlement; that she always went by the name of his wife, and was so considered by the relations on both sides; and likewise proved cohabitation, this was holden not to be sufficient.—*Morris* v. *Miller*, K. B. E. 7 G. 3. 4 Burr. 2057. 1 Black. 632.

So where the defendant was surprised at a lodging with the plaintiff's wife, and on being asked where Major *Morris's* wife was, he answered "in the next room;" this was holden not to be sufficient, for it is only a confession of the reputation, and that she went by the name of the defendant's wife, and not a confession *of the fact* of the marriage.—S. C. *(b)*

It

(a) In this case Lord *Mansfield* said, that an action for *crim. con.* has something of penal prosecution in it; for which reason, and because it might be turned to bad purposes by persons giving the name and character of wife to women to whom they are not married; a marriage, *in fact*, must be proved. Marriages are not always registered. There are marriages among particular sorts of dissenters, where the proof by a register would be impossible: and *Denison*, J. in a case of that kind, admitted other proof of an actual marriage. As to the proof of identity: whatever is sufficient to satisfy a jury is good evidence. If neither the minister, nor the clerk, nor any of the subscribing witnesses, were acquainted with the married couple, none of them might be able to prove the identity; but it may be proved in a thousand other ways: suppose the bell-ringers were called, and proved that they rang the bells, and came immediately after the marriage, and were paid by the parties: suppose the hand-writing of the parties was proved, or that persons were called who were at the wedding dinner; or suppose a maid-servant proves that her mistress went by the name of *A.* till the day of marriage, and that she went out on that day; and on her return, and ever since, went by the name of Mrs. *B.*; surely that would be evidence of the identity. *Per Buller*, J. in S. C.

(b) It appeared however by the evidence in this case, that the marriage was, in fact, had at *May Fair* chapel, the register of which could not be received in evidence, under the stat. of 26 *Geo.* 2. *c.* 3. *s.* 14.; and as the minister was transported, and the clerk dead, plaintiff failed in his proof, and was nonsuited.

The *Fleet* books also were produced in evidence of a marriage, but

It has been doubted whether the ceremony must not be performed according to the rites of the church; but as this is an action against a wrong-doer, and not a claim of right, it seems sufficient to prove the marriage according to any form of religion, as in the case of Anabaptists, Quakers, or Jews.—*Woolston* v. *Scott, per Dennison*, J. at *Thetford*, 1753, where plaintiff was an Anabaptist, and recovered £500.

The confession of the wife will be no evidence against the defendant; but a discourse between her and the defendant may be proved. So letters written to her by the defendant may be read as evidence against him, but her letters to him will be no evidence for him.—*Baker* v. *Morley*, Guildhall, 1739.

As the gist of the action is the criminal conversation, and not the assault, the proper plea under the statute of limitation is not guilty within *six* years.—*Cook* v. *Sayer*, M. 32 G. 2. K. B. Burr. 753.

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but rejected by *De Grey*, C. J. in *Howard* v. *Burtonwood*, Esp. N. P. 343; by Lord *Kenyon*, in *Reed* v. *Passer*, Peake N. P. 213; and by *Le Blanc*, J. in *Cook* v. *Lloyd*, Peake Ev. 89. But by *Heath*, J. in *Passingham* v. *Lloyd*, Peake Ev. 89, they were admitted in evidence.

Where plaintiff and defendant were servants, and lived in separate families, Lord *Kenyon* admitted these letters, written before the fact of adultery, as evidence of their connubial affection; but he required very strict proof that these could be no cause of suspicion. *Edwards* v. *Crock*, 4 Esp. N. P. C. 39.

So where the husband called a witness to prove that his wife told him where she was going to previous to her elopement, the court received this evidence as part of the *res gestæ*, to remove all suspicion of the husband's connivance. *Hoare* v. *Allen*, 3 Esp. N. P. C. 276.

So, though *A.* had commenced an action, and recovered damages against *B.* for *crim. con.* with his wife, he is not thereby precluded from suing *C.* who had also carried on an illicit intercourse with her during the same period. *Gregson* v. *M'Taggart*, 1 Camp. 415.

BOOK II.

FOR WHAT INJURIES AFFECTING A MAN'S PERSONAL PROPERTY, AN ACTION MAY BE BROUGHT.

INTRODUCTION.

HAVING in the last book taken notice of the several injuries affecting a man's person for which an action may be brought, I shall now consider in what case an action will lie for injuries affecting his property; and they divide themselves into two sorts:

1. Such as affect his personal property.
2. Such as affect his real property.

The actions that may be brought for injuries affecting his personal property, are,

1. Deceit.
2. Trover.
3. Detinue.
4. Replevin.
5. Rescous.
6. Trespass.
7. Case for Misbehaviour in an Office, Trust or Duty.
8. Case for consequential Damages.

CHAPTER I. [30]

OF DECEIT.

DECEIT properly lies where one man does any thing in the name of another, by which the other is damaged and deceived; as if one without my knowledge purchase a *quare impedit* in my name, returnable *in Banco*, and after cause it to be abated, or me to be nonsuited. So if one forge a statute merchant in my name, and thereupon a *capias* is sued out, upon which I am taken, I may have a writ of deceit against him that forged it, and him that sued the *capias*. (2 *Danv. Ab.* 543, 2, 3). *(a)* But this writ

(a) So where the civil magistrate is deceived, and such deceit is injurious to an individual, such individual may sue out a writ of deceit. The writ is "*falsè et in deceptionem ejusdem curiæ.*" Vide *Rastall's*

writ lies chiefly upon recoveries obtained by covin and deceit: and in such cases where the recovery is of land, it is brought to restore the party to the lands and profits: and in other cases, such as debt, &c. to give him damages: but what I intend to take notice of in the present chapter, are actions upon the case in the nature of a writ of deceit, which lie wherever a person has, by a false affirmation, or otherwise, imposed upon another to his damage, who has placed a reasonable confidence in him; *(a)* as if a man in possession of a horse, (*Sprigwell* v. *Allen*, M. 24 Car. 1. Al. 91.) or a lottery ticket (*Medina* v. *Stoughton*, Salk. 210. 1 Raym. 593. S. C.) sell it to another for his own; for possession of a personal chattel is a colour of title; and therefore it was but a reasonable confidence, which the buyer placed in him, when he affirmed it to be his own. *(b)* But it is incumbent on the plaintiff in such

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Rastall's Ent. 221. It requires the party to answer the king as well as the plaintiff *de falsitate et deceptione prædictis*. The judgment is, *quod querens, ad omnia, quæ per falsitatem, &c. amisit restituatur, et quòd defendens, pro falsitate et deceptione prædictis, capiatur.*

(a) And indeed it is on a breach of the warranty of one party to a contract either *implied* or *express* that this action is grounded. As where a merchant sells cloth to another, *knowing* it to be badly fulled, this action lies, for there is a warranty in law, but there is no authority to shew that the same rule holds if the commodity have a *latent* defect unknown to the seller. *Per Lawrence*, J. in *Parsons* v. *Lee*, 2 East, 323. Et Vide 1 *Rol. Ab.* (Deceit) P. 90.

And the *scienter* is the gist of this action. Where there is no warranty therefore, it must be averred in the declaration that the defendant had sold plaintiff goods as his own, *sciens* they were the goods of a stranger. *Dale's Case*, Cro. Eliz. 44. See further as to the *scienter* in *Furnis* v. *Leicester*, Cro. Jac. 474. See also *Chandelor* v. *Lopus*, post, p. 31.

The *scienter* must be also proved, though in ——— v. *Purchase*, cited 2 East, 448, Lord *Raymond* thought it unnecessary, where there was a warranty, to maintain the action, but see *Sprigwell* v. *Allen*, sup. where plaintiff failing to prove that defendant *knew* a horse (not legally tolled in *Smithfield*) did belong to *B.* was nonsuited. Vide etiam *Dowding* v. *Mortimer*, 2 East, 450. (n.) S. P. And there is this distinction between an action on the case for breach of an express promise, and one in nature of deceit on an implied warranty, that in the latter the *deceit* is the *gravamen* and the *scienter* the gist of the action, and in the former the *breach* of the warranty is the *gravamen*, therefore where plaintiff declares in tort for such breach, it is not necessary to alledge the *scienter*, nor if alledged to prove it. Vide *Selw. N. P. Ab.* 582. (n.) referring to *Williamson* v. *Allison*, 2 East, 446.

(b) For as to an *express warranty* it is a rule, that if a person by a false assertion has induced another to place a confidence in him, and has thereby deceived and injured him, this action lies. Vide *Crosse* v. *Gardner*, Carth. 90. (c.) *Furnis* v. *Leicester*, Cro. Jac. 474. S. P. But where the affirmation is merely a nude assertion or matter of opinion, leaving the party open to exercise his own judgment, or make his own enquiries, it is his fault if he be deceived. *Selw. N. P. Ab.* 583. As where *A.* being in possession of a term,

such case to prove the defendant knew it not to be his own at the time of the sale (for the declaration must be, that he did it fraudulently, or knowing it not to be his own:) for if the defendant had a reasonable ground to believe it to be his property (as if he bought it *bonâ fide*) no action will lie against him; but the defendant cannot plead such matter, but must give it in evidence.—*Medina* v. *Stoughton*, sup.

So if the vendor affirm that the goods are the goods of a stranger, his friend, and that he had an authority from him to sell them, whereas in truth they are the goods of another, and he had no such authority, an action will lie against him; and in such case it will be sufficient for the buyer to prove them the goods of another, without proving that the defendant knew them to be so; (for it need not be averred in the declaration) *for the deceit is in his falsely affirming he had an authority to [*31] sell them; the plaintiff must therefore prove that he had no such authority; and doubtless, proving them to be the goods of another would be evidence *primâ facie* that he had no authority, and sufficient to put him upon proving that he had.—*Warner* v. *Tallerd*, cited 1 Danv. Ab. 176. pl. 7. *(a)*

If the seller were out of possession of the personal chattel at the time of the sale, no action will lie against him though it be not his own, without an express warranty, for then there was room to question his title.—*Medina* v. *Stoughton*, T. 12 W. 3. Salk. 210. *(b)*

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term, offers to sell it to *B.* saying that a stranger would have given a certain sum for it, when in fact nothing was offered for it, this is not such an affirmation as will maintain this action. Vide etiam *Bayley* v. *Merrill*, Cro. Jac. 386. and 3 Bulst. 94. for a useful attestation of this rule; and also *Pasley* v. *Freeman*, 3 T. Rep. 54, where *Grose*, J. has mentioned another class of cases on fraudulent assertions, which see *infra*, note (b).

(a) In *Miles* v. *Sheward*, 8 East, 9, *Lawrence*, J. said, if the substantive part of a warranty be proved, it is sufficient, and it is a very different thing whether the plaintiff truly state those parts of a contract, the breach of which he complains, though other parts, not material to the question, be not stated, or whether he state any part of it untruly, for then it appears to be a different contract. And *Le Blanc*, J. in S. C. said, that where the plaintiff states the consideration for the promise of the defendant, he must state the whole consideration, otherwise the contract is not truly stated. But where he states *the consideration* truly, and then states those parts of the defendant's, the breach of which he complains, and states them truly, that is sufficient, without shewing those parts of the promise irrelevant to the breach complained of.

(b) But where one having possession of a chattel, sells it as his own, the bare affirmation carries a colour of title, and amounts to a warranty, and will support an action, for perhaps no other title can be made out. *Medina* v. *Stoughton*, Raym. 593. Et vide *Crosse* v. *Gardner*, Carth. 90. *Furnis* v. *Leicester*, Cro. Jac. 474. S. P.

If the seller affirm the rent of a house to be more than it really is, whereby the purchaser is induced to give more than it is worth, an action will lie for the deceit; for the value of the rent is matter which lies in the private knowledge of the landlord and tenant, and must be the same to all. But if the seller had only affirmed that *J. S.* would have given so much for it, whereas *J. S.* had never offered so to do, no action would lie, for such affirmation could not deceive in the value; (*Risney* v. *Selby*, H. 3 Ann. Salk. 211. Raym. 1118. S. C. nom. *Lysney* v. *Selby*. *Leakins* v. *Chissell*, T. 15 Car. 2. 1 Sid. 146.) so if he had only affirmed it was worth so much, for the purchaser might inform himself of the value. (*Harvey* v. *Young*, M. 44 & 45 Eliz. Yelv. 20.)*(a)* And so it is in all cases, where the purchaser may easily discover the true value, or where the thing may be of more value to one man than to another; as jewels, pictures, *&c.*—*Leakins* v. *Chissell*, sup. et vide 1 *Lev.* 102. S. C. nom. *Elkins* v. *Tresham*.

In *Chandelor* v. *Lopus*, (E. 1602. Cro. Jac. 4.) which was a case, whereas the defendant having skill in jewels, had a stone which he affirmed to be a bezoar stone, and sold it as such to the plaintiff: judgment was arrested, because the declaration did not aver, that the defendant knew it not to be a bezoar stone, or that he warranted it to be one. *(b)*

But if a merchant sell one kind of silk for another, whereby the purchaser is imposed upon in the value, he may bring his action; and though it appear upon evidence that there was no actual deceit in the merchant,

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(*a*) Where a thing is of a certain value, and that is known to the seller, but cannot be so to the buyer, if there be any deceit in affirming the value to be different from what it is, this action lies. *Esp. N. P. Dig.* 629; and upon this principle the above cases in the text were decided, and so was *Jendwine* v. *Slade*, 2 Esp. N. P. C. 572. cited in *Philips* v. *Hunter*, 2 H. Bla. 415. and it has been also decided upon great consideration, that a purchaser may recover against a vendor for a false affirmation of rent, though he enquired what the estate let for, and did not depend on the statement. *Sugd. Vend. and Purch.* 5. See also *Pasley* v. *Freeman*, 3 T. Rep. 51, where *Buller*, J. said, that every deceit comprehends a lie, but yet it is more than a lie, from the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion to another.

(*b*) *Sed quære* as to this case, because there may be a difference between *affirming* a thing to be of a species which it is not, and *warranting* it to be *good or bad* of a particular species. In *Lysney* v. *Selby*, Raym. 1118. above cited, it was said by *Powell*, J. that actions on the case, in nature of a deceit, will lie upon a *false affirmation without a warranty*. But where this action is grounded on the warranty, there you must say, "*warrantizando vendidit*." Which was formerly the usual and correct form for this purpose. Vide *Pope* v. *Lewyns*, Cro. Jac. 630. See also Mr. *Selwyn's* observations on this case in his *Abr. of N. P. Law*, p. 581.

but

but that it was in the factor beyond sea; yet it will be sufficient to charge the defendant; for he shall be answerable for the deceit of his factor *civiliter*, though not *criminaliter*; for since somebody must be a loser, it is more reasonable that he that puts the trust and confidence in the deceiver should be the loser, than the stranger.—*Hern* v. *Nichols*, Salk. 289. *(a)*

If

(a) So if a servant sell any thing in the way of his master's trade, and warrants it, the master is liable. *Esp. N. P. Dig.* 630. Et vide *Gramsar* v. *Nixon*, 1 Stra. 653, and *Armory* v. *Delamirie*, 1 Stra. 505. S. P.

But where some hops were sold by sample, with a warranty that the bulk was of the same quality, the law will not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price was given; therefore, if there be a latent defect then existing in it unknown to the seller, and without fraud on his part (but arising from the fraud of the grower) such seller is not answerable, though the goods turn out not merchantable. *Parkinson* v. *Lee*, 2 East, 314, as to sale of goods by sample, and a compliance with warranties. Vide etiam *Fortune* v. *Lingham*, 2 Camp. 416. *Hibbert* v. *Shee*, 1 Camp. 113. *Fisher* v. *Samuda*, 1 Camp. 190.

In order to charge the seller by reason of his warranty, it must be observed, that the warranty does not extend to defects visible to the buyer, for he must be aware of what he can see. But if the defect be not visible, a general warranty shall extend to it, and subject the seller in case of fraud. Vide *Pasley* v. *Freeman*, 3 T. Rep. 63, where an action was brought upon an inducement to the plaintiff to give credit to a third person, in consequence of an affirmation by the defendant which he knew to be false, and it was there held, that to maintain such action, it was not necessary that defendant should have any interest in the deceit, or that he should have colluded with the other party, for fraud without damage, or damage without fraud, gives no cause of action, but where these two concur, the action lies. *Per Croke*, J. in *Baily* v. *Merrell*, 3 Bulst. 95; and it was said, that in the declaration, *fraudulenter*, without *sciens*, or *sciens* without *fraudulenter*, would be sufficient. *Per Buller*, J. in *Pasley* v. *Freeman*, sup. in which case *Grose*, J. mentioned another class of cases, (somewhat contradictory) on fraudulent assertions, in which this action cannot be maintained, namely, where the affirmation is that the thing sold has not a defect which is visible, as in a case cited *arguendo* in *Bayley* v. *Merrell*, Cro. Jac. 387, where a man bought a horse, which the seller warranted to have two eyes, when in fact it had but one, yet the purchaser was held without remedy. So in *Dyer* v. *Hargrave*, 10 Ves. 507, *Grant*, M. R. said, that at law a warranty is not binding where the defect is obvious, and he put the case of a horse with a visible defect, or a house without roof or windows, as in good repair.

On a warranty broken, the ancient method was to declare in tort, in which case it was not necessary to charge the *scienter*, or if charged, to prove it. *Williamson* v. *Allison*, 2 East, 451. But the modern practice of declaration in assumpsit, with the money counts added, being found more convenient, it has been adopted ever since the case of *Stuart* v. *Wilkins*, M. 1778. Dougl. 18.

And there are other cases of express warranty which move on the principle before laid down. As where a painter exhibited specimens of his art to one who contracts with him for a painting of a particular size,

at

If the vendor affirm a horse to be sound wind and limb, whereupon the purchaser *fidem adhibens* gives so much; if the horse be blind, an [*32] action will lie; *(a)* but it seems to be good evidence * in such case on the

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at a certain price, and the painting sent is of inferior execution. It was held, that the vendee must either pay the price or return the picture. *Grimaldi* v. *White*, 4 Esp. N. P. C. 95. Et vide *Hunt* v. *Silk*, 5 East, 449. 452. 2 *Pr. Smith* 15. *Basten* v. *Butter*, 7 East, 479. *Taylor* v. *Hare*, 1 Bos. and Pull. N. R. 260.

In *Finch*'s Law 189, it is laid down, that a warranty, in order to charge the vendor, must be upon the sale, for if after it is void. And the warranty can only reach things in being at the time. 3 *Blac. Com.* 165, therefore an offer of a warranty at one time will not extend to a subsequent sale of the same thing. *Anon.* 1 Stra. 414. But this action lies for the breach of a warranty in the sale of a chattel for which the purchaser has not paid. 9 *Henry* VII. 21. *(b)* *Bro. Ab.* tit. *Deceit*, pl. 24.

So will cheating, or a false pretence, maintain this action, as personating a man in the demand and receipt of money. *Thompson* v. *Gardener*, Mo. 538. But not for the assumption of full age by an infant to obtain money. *Johnson* v. *Pye*, 1 Sid. 258. Yet for playing for money with false cards or dice it will. *Harris* v. *Bowden*, Cro. Eliz. 90.

(a) A horse being more the subject of speculative dealing, than almost any chattel, and being more liable to secret maladies than any other animal, (which maladies are frequently not discernable either on inspection, or a mere trial) it has become usual, and a practice of prudence, to require from the seller a warranty of soundness, to guard against latent defects, and in *Parkinson* v. *Lee*, 2 East, 323, it was held, that if an express warranty be given, the seller will be liable for every latent defect, but if there be no such warranty, and the seller dispose of the thing such as he believes it to be, *Grose*, J. said, he did not know that the law would imply he had sold it on any other terms than what passed; in fact, it is the fault of the buyer if he do not insist on a warranty. *Lawrence*, J. also said, that a seller is not liable for a latent defect where there is no fraud, even though the horse have a secret malady, if he be sold without a warranty.

It was long a prevalent idea that a *sound price* given for a horse was tantamount to a *warranty* of soundness, but in the above case *Grose*, J. observed, that Lord *Mansfield* had rejected this doctrine as loose and unsatisfactory, and he laid it down as a rule, that there must either be an *express warranty* of soundness or *fraud* in the seller to maintain this action, which express warranty he held to extend to all sorts of soundness whether *known* or *unknown* to the seller.

If a horse be warranted sound, and if upon discovery that it is not so, the buyer offers to return it, but the seller refuses to receive it, the former may bring his action on the breach of the warranty, if he can prove the unsoundness existed at the time it was given, even though eight months had elapsed; for Lord *Loughborough* held, that no length of time could alter a contract originally false.

But where the seller expressly warrants a horse to be sound, and undertakes to receive him back and restore the money, if *on trial* he shall be found defective, the buyer, on discovery of unsoundness, must instantly return the horse, for a trial means a reasonable trial. *Adams* v. *Richards*, 2 H. Blac. 575. Et vide

Payne

the part of the defendant, that the defect is visible, for then it cannot be reasonably intended that the affirmation extended to it. And note, that

Payne v. *Whale*, 7 East, 274. *Power* v. *Wells*, Cowp. 818. cited in *Weston* v. *Downes*, Dougl. 23.

So if a man buy a horse which is warranted sound, and he afterwards prove to be unsound at the time of the warranty, the buyer may keep the horse, and bring an action on the warranty, in which he may recover the difference between the value of a sound horse, and the unsound horse when sold to him, or may return the horse, and sue for the full price, but in the latter case he must return him in the same state as when bought, and not diminished in value. *Curtis* v. *Hannay*, 3 Esp. N. P. C. 83. Et vide *Grimaldi* v. *White*, 4 *ibid.* 95. and *Hunt* v. *Silk*, 5 East, 452. S. P.

So where plaintiff declared, that in consideration of his re-delivery to defendant of an unsound horse, which he had before bought of him, defendant had promised to deliver another horse in lieu, &c. which should be young, and worth £80, and then alledged a breach in both respects, this was held sufficient, though the proof was not only of a promise that the second horse should be worth £80, (which it was not) and be a young horse, but also of a warranty that it was sound, and had never been in harness. *Miles* v. *Sheward*, 8 East, 7.

At a sale by auction one condition was, that any horse purchased there, and warranted sound, should be so deemed, unless returned within two days; plaintiff bought a horse, warranted six years old, and sound; ten days afterwards plaintiff discovered, that the horse was twelve years old, and offered to return him, but defendant refusing to receive him, plaintiff brought this action, and obtained a verdict, which the court afterwards set aside, holding that the condition of sale was confined to the soundness, and did not extend to the age. *Buchanan* v. *Parnshaw*, 2 T. Rep. 745.

As to the publication of conditions of sale, it was held, in *Mesnard* v. *Aldridge*, 3 Esp. N. P. C. 271, that where the auctioneer announced the conditions to be *as usual*, and pasted them, printed on paper, under his box, it was a sufficient notice to all bidders; and Lord *Kenyon* compared this to cases of carriers who limit their responsibility by their public notices.

Where a horse is sold, warranted sound, and part of the purchase money is paid down, if he prove unsound, and not of greater value than what is paid, the seller has received *quant. mer.* and can recover no more, *King* v. *Boston*, 7 East, 481. (n.)

If a man sells a horse as of the age stated in a written pedigree, and declares he knows no more, this does not amount to a warranty. *Dunlop* v. *Waugh*, Peake's N. P. 123.

Neither can a horse be deemed unsound which is lame by accident, and capable of being speedily cured, therefore an averment of a general warranty of soundness is supported by evidence of a warranty made with an exception of such an injury. *Garment* v. *Barrs*, 2 Esp. N. P. C. 673.

In an action on a warranty it is not enough to shew that a horse is a *roarer*, for that may be a habit and not symptomatic of any disease, or it may proceed from causes unconnected with health. *Basset* v. *Collis*, 2 Camp. 523.

A party sued on the warranty of a horse may call a prior vendor, who sold with a warranty, to prove the animal sound. *Briggs* v. *Crick*, 5 Esp. N. P. C. 99.

The vendee of a warranted horse, which proves unsound, cannot recover the expences incurred in keeping

that if the first contract with warranty be broken off, the warranty will not extend to a subsequent sale.—*Butterfield* v. *Burroughs*, T. 1707. Salk. 211. cited in *Hartop* v. *Hoare*, 3 Atk. 44.

It has been said, that if a married man pretend to be single, and marry *J. S.* she may bring an action to recover damages for the injury done her by his deceit; (*Anon.* 35 Car. 2. Skin. 119.) but such an action will not lie for a man who is imposed upon by a married woman, because the conversation and contract of the wife will not bind the husband. (*Cooper* v. *Witham*, M. 1668. 1 Lev. 247.) And it may be doubted in the other case, being felony by 1 *Jac.* as it is a general rule, that where a trespass is by statute turned into felony, the trespass is merged; (*Proctor* v. *Bury*, Hil. 17 Geo. 2. C. B.) though in the case of *Garford* v. *Richardson*, T. 36 Car. 2. the court of K. B. upon a motion in arrest of judgment in such an action brought by a woman, gave judgment for the plaintiff, holding the action to be maintainable *(a)*.

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ing the horse unless he offer to return him before he bring the action. *Caswell* v. *Coare*, 2 Camp. 82. And the Court of *C. B.* reduced a verdict in which the keep had been included, contrary to the Chief Justice's direction. S. C. 1 *Taunt.* 566.

A warranty of the soundness of a horse does not require a stamp, it being an agreement relating to the sale of goods. *Skrine* v. *Elmore*, 2 Camp. 407. and S. P. was ruled by *Lawrence*, J. at *Devon* assizes 1809, in *Page* v. *Fry*, *ib.*

(a) The old cases on this subject were confined to fraudulent assertions by the contracting parties only, and did not extend to the wilful misrepresentations of strangers to the contract, and they proceeded upon the breach of a *promise* either *express* or *implied*, that the thing misrepresented was true, but a different doctrine now prevails, and for the first time it was decided in *Pasley* v. *Freeman*, H. 1789. 3 T. Rep. 51. that where a man, with a design to deceive and defraud another, who makes enquiry of him, falsely represents the matter enquired of, whereby an injury arises, this action will lie against the party making such false representation, though he be a stranger to the original contract. This case was elaborately argued, and on the argument a further question arose whether, admitting all the facts stated to be true, this action could be maintained, and *Kenyon*, C. J. *Ashhurst*, J. and *Buller*, J. held, that it could, but *Grose*, J. held *contra*.

It is not necessary however to support this action, that the defendant should either himself derive an advantage from the deceit, or collude with the person who did derive a benefit; for if there be fraud, *i. e.* an intention to deceive, this action will lie, but not otherwise, therefore where a man incautiously represented circumstances to be within his own knowledge, which he could not have known, but had good reason to believe, it was held by *Grose*, *Lawrence*, and *Le Blanc*, J. contra *Kenyon*, C. J. that this action was not maintainable. *Haycraft* v. *Creasy*, 2 East, 92.

A credit having been lodged with defendant by a foreign house, in favor of *T.* to a limited amount, on an express stipulation that goods should be previously lodged with defendant to treble that amount, and plaintiff having enquired of defendant the responsibility of *T.* to which he replied, he

CHAPTER II.

OF TROVER. (a)

TROVER is a special action on the case, which one man may have against another, who hath in his possession any of his goods by delivery, finding or otherwise, or sells or makes use of them without his consent, or refuses to deliver them on demand; and it is for recovery of damages to the value of the goods; (b) and therefore the declaration ought

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he knew nothing of him, except what he had heard of him from his correspondent, but that a respectable credit had been lodged with him, which he held at the disposal of *T.* (not mentioning the previous stipulation) and that upon a view of all the circumstances which had come to his knowledge plaintiff might execute *T.*'s order with safety. It was held, that there was a material suppression of the truth on defendant's part, and sufficient evidence for the jury to find fraud, which was the gist of the action, though defendant added, when he made the representation that he gave the advice without prejudice to himself. Verdict for plaintiff. *Eyre* v. *Durnford*, 1 East, 318. So if *A.* fraudulently misrepresent the circumstances of *B.* in order to induce *C.* to give him credit, and add, "if he does not pay "for the goods I will." The court held, that this action might have been maintained against *A.* even without the addition of the promise. *Hamar* v. *Alexander*, 2 Bos. and Pull. N. R. 241.

(a) See the case of *Wilbraham* v. *Snow*, 2 Saund. 47. where the learned editor, Mr. Serjeant *Williams*, has obliged us with a very explanatory note on the nature, properties, and requisites of this sort of action.

(b) And it differs from *detinue* inasmuch as detinue is brought for the thing itself, and *trover* for its value in damages. *Hartford* v. *Jones*, 3 Salk. 654.

Trover is a fictitious action in form but not in substance. *Hambly* v. *Trott*, Cowp. 371, and supposes a loss by the plaintiff of his *personal* goods, and not only a finding of them by defendant, but a tortious conversion of them to his defendant's use, for that is the gist of the action.

To maintain trover there are four requisites:

1. An *absolute* or *special property in the plaintiffs* (but not both) when the defendant took and converted the goods. *i. e.* An *absolute* possession, and an exclusive right of enjoyment in him till defeated by some act of his own. (*Per Lawrence*, J. in *Webb* v. *Fox*, 7 T. Rep. 398.) or that *special* property which a possessor has subject to the claims of others. *Armory* v. *Delamirie*, 1 Stra. 505.

2. *A right of possession* in the goods. For though a *property* without *possession*, or *possession* without *property*, will do, yet a *right* in both must concur. Vide Lord *Cullen's Case*, post, p. 33. *Hudson* v. *Hudson*, Latch. 214. and *Gordon* v. *Harper*, 7 T. Rep. 9.

3. *That the goods were personal.* For trover lies not for any thing affixed to the freehold. *Per Kenyon*, in *Webb* v. *Fox*, sup.

4. *That the defendant's conversion was wrongful.* For that it is which forms the gist of the action. *Fuller* v. *Smith*, 3 Salk. 366. and therefore it is, that if a man finds the goods which he had lost in the hands of another who bought them in open market, or at a fair, the property is altered, and he cannot recover them, 1 *Inst.* 498. 1 *Danv.* 23.

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to contain convenient certainty in the description of the things, so that the jury may know what is meant thereby; but it need not contain so much certainty as an action of detinue, because that is for the recovery of the things themselves, and therefore trover for 20 ounces of cloves and mace has been holden good. (*Hartford* v. *Jones*, M. 10 W. 3. Salk. 654.) So for a parcel of diamonds.—*White* v. *Graham*, H. 2 Geo. II. Str. 827. *(a)*

If a gentleman lodge jewels sealed up in a bag with a banker for safe
[*33] custody only, and the banker break open the bag, and *pawn the jewels to another, the gentleman may bring trover against the pawnee, for he shall not be answerable for the deceit of the banker, as he gave him no power to do that act in which the deceit lies; and therefore it differs greatly from the case taken notice of in the last chapter, of the merchant answering for the deceit of the factor.—*Hartop* v. *Hoare*, E. 16 Geo. 2. 2 Stra. 1167. 1 Wils. 8. *(b)*

The conversion is the gist of the action, and the manner in which the goods came to the hands of the defendant is only inducement: and therefore the plaintiff may declare upon a *devenerunt ad manus* generally, or specially *per inventionem*, (though the defendant came to the goods by delivery,) or that the defendant fraudulently at cards won money (of the plaintiff) from the wife of the plaintiff; and this being but inducement, need not be proved; but it is sufficient to prove property in himself, pos-

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(*a*) So for 400 pieces or ends of boards. *Knight* v. *Barker*, 2 Raym. 1219.

So for a piece of tepee. *Radley* v. *Rudge*, 2 Stra. 738.

So for a dog, which cannot be detained for his keep. *Binstead* v. *Buck*, 2 Bla. 1117. Et vide *Nicholson* v. *Chapman*, 2 H. Bla. 256.

So for whelps, where a man has a property in the bitch. *Chambers* v. *Warkhouse*, 3 Salk. 140.

So for a gelding on a count for a horse. *Gravely* v. *Ford*, 2 Raym. 1209.

So for a bond. *Arnold* v. *Jefferyson*, Salk. 654.

So for a bill of exchange. *Lucas* v. *Haynes*, Salk. 130.

So for a bank bill against a finder, but not against his assignee. *Anon.* 1 Salk. 126.

So for the title deeds of an estate. *Yea* v. *Field*, 2 T. Rep. 708.

So for the exemplification of letters patent. *Jones* v. *Winckworth*, Hard. 111.

So for money (though formerly doubted) because damages only are to be recovered. *Anon.* 1 Stra. 142.

So for old iron generally, but this is good only after verdict. *Talbot* v. *Spear*, Willes, 70.

So for a suit of child-bed linen, and a muff, good after verdict. *Helyng* v. *Jennings*, 1 Raym. 133.

So for a parcel of pack-cloths, wrappers, and cords, and no objection to the uncertainty of the word "parcel" after judgment by default. *Bottomley* v. *Harrison*, 2 Stra. 809. 2 Raym. 1529. Vide etiam *Hartford* v. *Jones*, sup. S. P.

(*b*) Reported fully in 3 Atk. 44.

session

session to have been in the defendant, and a conversion by him.—1 *Danv.* 23. *Fuller* v. *Smith*, M. 8 W. 3. 3 Salk. 366. *(a)*

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(*a*) In trover at Nisi Prius, *cor. Holt*, C. J. A carpenter sent his servant to work for hire at the *Queen's yard*; having been there some time, he refused to go again, on this the surveyor kept his tools, pretending an usage to detain tools to force workmen to continue till the Queen's work was done. A demand and refusal being proved at one time, and a tender and refusal after, *Holt*, C. J. said, the very denial of goods to him who has a right to demand them is an *actual* conversion, and not evidence of it only, as hath been holden. For what is conversion but an assuming upon oneself the property and right of disposing of another's goods, and he that takes upon himself to detain another's goods without cause, takes upon himself the right of disposing of them. So the taking and carrying away another's goods is a conversion. So if one come into my close, and take my horse, and ride him, it is a conversion. And here, if the plaintiff had received them upon tender, the action would lay, notwithstanding upon the former conversion, and the having the goods after, would go only in mitigation of damages; (*Baldwin* v. *Cole*, 6 Mod. 212.) *ergo* a temporary conversion will support trover, though defendant do not claim the absolute property. This last case was recognized by *Ellenborough*, C. J. in *M'Combie* v. *Davies*, 6 East, 540, where it was held, that taking an assignment of tobacco in the king's warehouse, by way of pledge, from a broker who had purchased it in his *own* name *for his principal*, and refusing to deliver it to the principal after notice and demand by him (none other than he in whose name it is warehoused being able to take it) is a conversion.

But where defendant took plaintiff's boat to assist him in a state of danger, and the boat sunk, this is not an illegal conversion. *Drake* v. *Shorter*, 4 Esp. N. P. C. 165.

So for taking five oxen by defendant's bailiff, who was dead, defendant insisted that plaintiff should have brought trespass, and not trover; *sed per cur.* He might bring either. *Bishop* v. *Montague*, Cro. Eliz. 824. Cro. Jac. 50. S. C.

So where a tenant for life pawned plate, it was held, that the pawnbroker could not hold it against the remainder-man, though he had no notice of the pawner's interest in it. *Hoare* v. *Parker*, 2 T. Rep. 376.

Yet if goods be obtained from *A.* by fraud, and pawned to *B.* without notice, and *A.* prosecute the offender to conviction, and get possession of his goods, *B.* may maintain trover for them. *Parker* v. *Patrick*, 5 T. R. 175. But in felony, where the owner's right of restitution being positively given by 21 *H.* 8. *c.* 11. trover will not lie. *Horwood* v. *Smith*, 2 T. R. 750.

Trover against a pawnbroker for goods pledged with him, which had been stolen. It appeared that the goods in question were stolen from the house of the plaintiff, and had been pawned by a woman named *Brown*, but that she had been tried for the felony and acquitted, on account of the absence of a material witness. Lord *Ellenborough* held, that the action well lay. *Packer* v. *Gillies*, 2 Camp. 336. (n.) Sed vide *Parker* v. *Patrick*, supra.

Trover will lie by the owner of a ship against a purchaser from the master, unless the vendee can shew urgent necessity for the sale. *Hayman* v. *Molton*, 5 Esp. N. P. C. 65.

In trover for a bill of sale of one-fourth part of a ship, the plaintiff not being able to prove a demand and a refusal, prior to the commencement of his suit, offered to shew that defendant had actually sold the ship, and contended, that this

In the declaration the conversion was laid to be on a day before the trover; wherefore a motion was made in arrest of judgment, but the declaration was holden to be good, for the *Postea convertit* is sufficient, and the *viz.* is void.—*Tesmond* v. *Johnson*, T. 1617. Cro. Jac. 428.

As to the property, a special one is sufficient, and therefore this action may be brought by a carrier or bailee; or by a finder, for that will enable him to keep the thing against all but the rightful owner.—*Wilbraham* v. *Snow*, H. 21 & 22 Car. 2. 1 Mod. 31. *Armory* v. *Delamirie*, H. 8 Geo. 1. 1 Str. 505.

A sheriff who has taken goods in execution may bring trover for them, if they were taken away before the sale.—*Wilbraham* v. *Snow*, H. 21 & 22 Car. 2. 2 Saund. 47. 1 Lev. 182. 1 Vent. 52. 1 Mod. 80. 2 Keb. 588. *(a)*

If an house be blown down and a stranger take away the timber, the lessee for life may bring trover; for he has a special property to make use of the same (as if he would rebuild) though the general property be in the reversioner.—*Per Powel*, J. on Midland Circuit, Salk. MSS.

A lord who seizes an estray or wreck, may, before the year and day expired, maintain trover against a stranger; for he has more than a possession, *viz.* a possession that will turn into a property.—Sir *William Courtney's Case*, C. B. Salk. MSS. *Pye* v. *Pleydel*, Berks. 1750. *Per Clarke*, Bar. S. P.

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this being a conversion in fact, rendered it unnecessary to prove a demand and refusal. And Lord *Kenyon* said, that as the action was for the bill of sale, and not for the ship itself, this was no conversion, for by possibility it might happen, that one person should be entitled to the bill of sale, and another to the ship, and therefore nonsuited the plaintiff. *Lee* v. *Wilkinson*, Sittings after Hilary, 30 Geo. 3. MS. Ca.

If *A.* indorse a bill drawn in his favor, and accepted, and give it to *B.* to negociate, and *B.* give it to *C.* who delivers it to *D.* without consideration, *A.* may maintain trover against *D.* for it, though it be two years over due. *Goggerley* v. *Cuthbert*, 2 Bos. and Pull. N. R. 170. And in trover on bills of exchange the exchequer chamber allowed interest from the date of the final judgment on all such bills as had been received before judgment, and from the time of the receipt on all such as had been received afterwards. *Atkins* v. *Wheeler*, 2 Bos. and Pull. N. R. 205.

Trover lies not for goods condemned by a foreign court having competent jurisdiction. *Hughes* v. *Cornelius*, T. Raym. 473. Skin. 59. *Sed secus*, where a court has only a limited jurisdiction. *Papillon* v. *Buckner*, Hardr. 478. *Terry* v. *Huntingdon*, ibid. 480.

See further as to what amounts to a conversion and evidence thereof, post, p. 44 (*a.*) n. (*b.*)

(*a*) So if a party pay money to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer. *Shipwick* v. *Blanchard*, 6 T. R. 298. but trover lies not for goods irregularly sold under a distress. *Wallace* v. *King*, 1 H. Bla. 13.

And

And property is sufficient without possession; therefore on the trial of an ejectment for a mine it was holden, that a recovery in trover for a parcel of lead dug out of the mine was no evidence of the plaintiff's possession.—Lord *Cullen's Case*, at Bar, K. B. *(a)*

In trover for ten load of timber, the case was, that the defendant had [34] been tenant to the plaintiff, and erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground; and upon proof that it was usual in that country to erect barns so, in order to carry them away at the end of the term, a verdict was given for the defendant. (*Culling* v. *Tuffnal*, *Per Treby*, C. J. at *Hereford*, 1694.) But though Lord Chief Justice *Treby* thought proper in this case, to take advantage of the custom of the country, yet I apprehend that it would now be determined in favour of the tenant without any difficulty; for of late years many things are allowed to be removed by tenants, which would not have been permitted formerly; as marble chimnies, *&c.* so more strongly in things relative to trade, as brewing vessels, coppers, fire engines, cyder mills, *&c.* The general rule of law is, that whatever is fixed to the freehold becomes part of it, and cannot be moved; *(b)* but many exceptions have been admitted of late to this general rule, as between landlord and tenant, or between tenant for life, or tail, and the reversioner: but the rule still holds as between heir and executor.—*Lord Dudley* v. *Lord Ward*, Mich. 1751. in Canc. Amb. 113.

(*a*) *Sed quære*, whether this case proves more than this, that property in lead is no evidence of the possession of a mine. Plaintiff in the action of trover might have bought the lead. *Et vide post*, p. 102. *casu*. *Lord Cullen* v. *Rich*.

(*b*) A tenant however may remove utensils set up in relation to trade. *Poole's Case*, Salk. 368. Also ornamental marble chimney-pieces, pier-glasses, hangings, wainscots fixed only by screws may be removed. *Lawton* v. *Lawton*, 3 Atk. 13. Vide *Beck* v. *Rebow*, 1 P. W. 94. *Ex parte Quincey*, 1 Atk. 477.

Where the fixed instrument, engine, or utensil, was an accessary to a personalty merely, it shall itself be considered as a personalty. *Lawton* v. *Lawton*, sup. *Lord Dudley* v. *Lord Ward*, Amb. 113. sup. and *Lawton* v. *Salmon*, 1 H. Bla. 259. (n.) buildings for the purposes of trade may be removed. *Penton* v. *Robart*, 2 East, 88. Sic *Dean* v. *Allaley*, 3 Esp. N. P. C. 11.

The above cases and principles were recognized by Lord *Ellenborough* in giving the judgment of the court in *Elwes* v. *Maw*, 3 East, 50, which was a case of removal by a tenant of a farm, of buildings erected for mere agricultural purposes, and necessary for the purpose of managing the farm, and in that case his lordship held, that such buildings were not within the description of buildings set up for trade, and consequently should not be removed.

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In trover by an executor against an heir, *Lee*, C. J. held, that hangings, tapestry, and iron backs to chimnies, belonged to the executor, and he recovered accordingly.—*Harvey* v. *Harvey*, M. 14 Geo. 2. 2 Stra. 1141.

But corn growing belongs to a devisee of land and not to the executor. (*Spencer's Case*, M. 20 Jac. 1. Winch. 51. Though a devisee of goods, stock, and moveables shall take it from both.—*Cox* v. *Godsalve*, *Holt's* MS. 157. [cited in 6 East, 604.]

If there be trover before the marriage of the plaintiff, and a conversion after, the baron and feme may join; for though the conversion is the cause of action, and therefore the husband may sue alone, yet the inception of the cause of action was in the wife by the trover.—*Blackburn and Ux'* v. *Graives*, T. 26 Car. 2. 2 Lev. 107. *(a)*

If a bank bill payable to *A.* or bearer, be found by a stranger, who transfers it to *B.*, *A.* may maintain trover against the stranger, but not against *B.* because the course of trade creates a property in him: *(b)* but as to the stranger who had no title, the property is still considered to remain in *A.* (*Anon.* M. 10 W. 3. Salk. 126. Raym. 738.) But if the plaintiff had given lottery tickets to a goldsmith to receive money for them, and the goldsmith having likewise received tickets of the defendant, and given him a note to pay him so many tickets, afterwards had

(*a*) In trespass for an injury done to the property of a wife *dum sola*, must be brought by the husband and wife, but if it be brought by the wife alone, defendant must plead the coverture in abatement, and not in bar. *Milner* v. *Milner*, 3 T. R. 627.

(*b*) Not after it has been paid away in currency. *Per Mansfield*, in *Miller* v. *Race*, 1 Burr. 458, in which case Lord *Mansfield* also said, it was impossible that the report sup. (in the text) of *Ford* v. *Hopkins* can be a true representation of what Lord *Holt* had said in that case, and that the reporter must have mistaken his reasoning.

Where a note comes *malâ fide*, into a person's hand, it is in the nature of specific property, and if its identity can be traced and ascertained, the party has a right to recover. *Per* Lord *Mansfield*, in Cowp. 200.

A bank note, though stolen, becomes the property of him who gives valuable consideration for it, if he has no notice or knowledge of the robbery. *Miller* v. *Race*, 1 Burr. 452. See also *Lawton* v. *Weston*, 4 Esp. N. P. C. 56. as to discounting a bill lost. Vide *Collins* v. *Martin*, 1 Bos. and Pull. 648.

Trover for a £50 note, which the plaintiff lost in the streets, and defendant came into possession of it, and (as plaintiff endeavoured to prove) without having given a *bonâ fide* consideration for it, Lord *Ellenborough*, C. J. held; that there was a distinction between negotiable instruments and common chattels; that, with respect to the former, possession is *primâ facie* evidence of property, but that the possessor of the latter must have presumed to have become so by having given a valuable *bonâ fide* consideration, and that the plaintiff must impeach defendant's title by strong evidence of fraud or suspicion. Plaintiff therefore not making out a sufficiently suspicious case was non-suited. *King* v. *Milsom*, 2 Camp. 5.

delivered

delivered upon his note the plaintiff's tickets to the defendant, this would not change the property.—*Ford v. Hopkins*, H. 12 W. 3. 1 Salk. 283. *(a)*

One joint-tenant or tenant in common, or parcener, cannot bring trover against his companion for a thing still in his possession, because the possession of one is the possession of both; if he do, it is good evidence upon not guilty. (*Blackham's Ca.* H. 7 Ann. 1 Salk. 290.) But if one tenant in common destroy the thing in common, the other may bring trover; and therefore where one tenant in common *of a ship took it [*35] away, and sent it to the *West Indies*, where it was lost in a storm, Lord *King* left it to the jury, whether this were not a destruction by the defendant; who found it so accordingly. (*Barnardiston* v. *Chapman and Smith*, H. 1 Geo. 1.) But if one joint-tenant, &c. bring trover against a stranger, the defendant may plead it in abatement, but cannot give it in evidence. (*Blackham's Ca.* H. 7 Ann. 1 Salk. 290.) But in such case the plaintiff shall recover only the value of his share.—*Nelthorpe* v. *Dorrington*, M. 26 Car. 2. 2 Lev. 118. *(b)*

If a lease be made to *A.* and *B.* and the indenture of lease be delivered to *B.* who dies, by which the whole survives to *A.* he may bring trover for the indenture, for the possession of *B.* was his possession.—*Anon.* E. 16 Eliz. 2 Leon. 220.

But though one tenant in common cannot bring trover against his companion, yet that is only where the law considers the possession of one to be the possession of both; and therefore if *A.* be tenant in fee of one fourth part of an estate, and *B.* tenant in common with him of the other three parts, for a term of years without impeachment of waste; if *A.* cut down any trees and *B.* take them away, *A.* may maintain trover: for though *B.* being dispunishable of waste might cut down what trees he would, yet trees having an inheritable property, and he having no interest in the inheritance, cannot take them when felled by him who has

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(a) In trover for a bond the plaintiff may give parol evidence of it to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce it, as the nature of the action gives sufficient notice to the defendant of the subject of inquiry, to prepare himself to produce it if necessary for his defence. *How, Executor of Nicholls*, v. *Hall*, 14 East, 274.

(b) A member of an amicable society, entrusted with the custody of a box containing the stock, although bound by bond to keep it safely, cannot maintain trover against another member, and a third person who took it from him, for all the members of the society have a general property in the box jointly, and the special property of the plaintiff arising from the custody cannot give him a right in this action against a general property. *Holliday* v. *Camsell & al.* 1 T. R. 658.

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the inheritance; and consequently his possession being tortious, cannot be said to be the possession of the other.—*Apud Exon. per Turton*, J. Salk. MSS. *West* v. *Passmore*, Oct. Str. 4. S. C. *(a)*

If a son, having a general authority to receive and pay money for his father, receive money due on a bill to his father, and give a receipt for it, as money had to his father's wife, and after give it away, the father may bring trover against the donee; for his son's receipt is a good discharge of the debt, and therefore his possession is the possession of the father; the son being as to this purpose his servant; and the son may in this case be a witness (to prove the delivery to the defendant), his evidence being corroborated by other circumstances.—*Anon.* 1 Salk. 289.

If *A.* be indebted to *C.* and *B.* to *A.* and it is agreed between them, that *B.* shall deliver goods to *C.* in satisfaction of *A.*'s debt; if *B.* convert them to his own use, *C.* may maintain trover against him though he never had possession, for by the agreement the right was in him, and the conversion a wrong to him, (*Flewellin* v. *Rave*, M. 8 Jac. 1. 1 Bulst. 68:) *(b)* but if *A.* order a tradesman to send him goods by a hoyman, and

(a) Trover cannot be maintained by a tenant in tail, expectant on the determination of an estate for life without impeachment of waste, for timber which grew upon and was severed from the estate, after which it came into the possession of defendant, for the moment it was severed it became the property of the tenant for life. *Pyne* v. *Dor*, 1 T. R. 55.

(b) In this case the whole court agreed that the action brought by *C.* the plaintiff, against defendant, being the first bailee, for not bailing the goods unto him according to agreement, was well brought. Vide etiam *Brand* v. *Lisley*, Yelv. 164, where it was held that, *by delivery of goods* to defendant to satisfy plaintiff £100, the plaintiff has an interest and *property* in the goods.

By this form of action not only property arising under consignments may be tried, but also the validity of sales of merchandize, whether such consignments be made to a creditor, a factor, or any other; therefore, where there were several bills of lading of different import, and differently indorsed, it was held, that he who first gets one of them by a legal title from the owner or shipper has a right to the consignment in exclusion of the rest. *Caldwell* v. *Bull*, 1 T. R. 205.

A. entrusted *B.* with goods to sell in *India*, agreeing to take back what he should not sell, and allowing him all he could get beyond a certain price, with liberty to sell them if he could not get that price. *B.* not being able to sell the goods, left them, on his departure from *India*, with an agent, whom he directed to remit the produce to himself in *England*. Held, that *A.* could not maintain trover against *B.* for these goods. *Bromley* v. *Coxwell*, 2 Bos. and Pull. 438.

In the case of an indorsement to a factor, though the authority be ever so general, and the factorship be not disclosed, the owner, as between him and the factor, has a lien till the delivery of the goods for sale, but if they are sold by the factor at sea, such sale shall bind the owner; and if the factor to whom the bill of lading is indorsed generally, (though in truth to him as factor only) indorses it over as his own property, such an indorsement shall be good, if for a good consideration and without

and the tradesman send the goods by a porter to the house where the hoyman resides when in town, *and the porter not finding him, leave the [*36] goods with the landlord, *A.* cannot have trover against the landlord, for the property never vested in him, but remained in the tradesman, (*Colston* v. *Woolaston*, T. 1 Ann. *per Holt*, C. J. at Guildhall;) but if the person to whom the goods had been delivered had been a ser ant to the hoyman, and intrusted by him to receive the goods, *A.* might maintain trover; for by such delivery the property would have vested in him; and therefore in such case the tradesman could not bring trover against the hoyman: (*Staples* v. *Ardin*, 2 Mod. 309. *Lane* v. *Cotton*, Salk. 18. S. P.) But if *A.* had not directed the tradesman to deliver the goods to that particular hoyman, in such case the property would not have been in *A.* till he had actually received the goods; and therefore the tradesman might bring trover for them against the hoyman. (*Graves* v. *Child*, E. 2 Ann. *per Holt*. Salk. MSS.) Yet it has been holden, that if a tradesman in *London* send goods by order, to a tradesman in the country, by a carrier

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out notice, but not otherwise. *Wright* v. *Campbell*, 4 Burr. 2046.

But where a consignment is made to another, the consignor may (if he has any suspicion) stop the goods *in transitu* to the consignee. *Lickbarrow* v. *Mason*, 2 T. R. 63. But this can only be done whilst the goods are *in transitu*, for when once they come into the hands of the consignee, the property is changed. It is not necessary, however, that the stoppage *in transitu* should be made by the consignor himself, or that he should be deprived of that right by the consignee in person. *Ellis* v. *Hunt*. *Same* v. *Dawes*, 3 T. R. 464. Neither is a consignor's right to stop goods *in transitu* taken away by the consignee's having in part paid for the goods. *Hodgson* v. *Loy*, 7 T. R. 440.

If a consignee, to whom the bill of lading is indorsed in blank, assign it as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards by agreement they became copartners in the goods, by which agreement it appeared that the consignee had not paid for them, the assignee of the bill of lading cannot maintain trover against the consignor if he stop the goods *in transitu* upon the insolvency of the consignee. *Salomons* v. *Nissen*, 2 T. R. 674.

As to the validity of sales, it has been held, that if a factor is simply empowered to sell goods by his principal, and the goods are not delivered over, the principal is not thereby precluded from selling them himself. *Esp. N. P. Dig.* 538. Et vide *Alwin* v. *Taylor*, Al. 93.

A factor, having only a power to sell goods for his principal, cannot pledge them for his own debt. *Patterson* v. *Tash*, 2 Stra. 1178. And in case of such a pledge, the principal may recover his goods, or their value, from the pawnee, on tendering the factor what is due to him, and without any tender to the pawnee. *Daubigny* v. *Duval*, 5 T. R. 606.

So where a sheriff, having taken goods in execution, was discharged from his office before a sale or the writ returned, and he afterwards sold them under a *vendit. expon.* it was held in trover brought for them that he was authorized to have sold under the *fi. fa.* even though out of office. *Ayre* v. *Aden*, Cro. Jac. 73. Yelv. 44.

And a sheriff, who has taken goods in execution, may bring trover or trespass for them if they are taken away before the sale. Vide *Wilbraham* v. *Snow*, 2 Saund. 47, together with the editor's elaborate note thereon.

not named or appointed by the country trader; if the carrier embezzle the goods, the country trader must stand to the loss. (*Godfrey* v. *Furzo*, T. 1733, 3 P. W. 186.)(*a*) So if *A.* order the goods to be transmitted to him by a particular carrier, though upon condition to return them again if he dislike them; yet upon delivery to the carrier the property is vested in *A.* and he will be bound to pay the price to the tradesman; and consequently the tradesman cannot bring trover against the carrier;(*b*) though perhaps if it were to come out in evidence, that the carrier had kept the goods in town, in satisfaction of a debt due from *A.* to him, (and that without the consent of *A.* who was soon after to run off) the court would leave it to the jury, and not let the carrier take advantage of such tortious act; for in such case there is reason to presume the carrier did not accept the goods for *A.* never having had any intention to deliver them to him; and if so, the property will not have vested in *A.* and consequently must remain in the tradesman, who may therefore bring the action. (*Haynes* v. *Wood*, *per Herbert*, J. Surry, 1686.) The defendant, 7th *April*, sent goods to *A.* who in *May* following finding himself in bad circumstances, re-delivered the goods to a friend of the defendant's, and sent him notice; but before the defendant could signify his consent to take back the goods, *A.* became a bankrupt, and in an action of trover by the assignee, the

(*a*) If the consignor of goods has paid the carriage, he may bring an action against the carrier for losing them, although by delivery to the carrier the property might vest in the consignee. *Davis* v. *James*, 5 Burr. 2680.

Where it was alleged in the declaration that the defendant (a carrier) undertook to carry the goods for hire and reward, to be paid by the plaintiffs (the consignors), and it was proved at the trial that the consignee had agreed with the plaintiffs to pay the carriage, *Buller*, J. nonsuited the plaintiffs, but the nonsuit was afterwards set aside, and *Buller*, J. said, that, on re-considering the question, he found he had been mistaken in a point of law, for that whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and vendor, the latter of whom was by law liable. *Moore* v. *Wilson*, 1 T. R. 659.

(*b*) So if a vendee order goods to be sent by land carriage, and there is only one land carrier, it is the same as if he had ordered them to be sent by that particular carrier, and he must stand to the loss. *Vale* v. *Bayle*, Cowp. 294.

Defendant ordered goods of plaintiff, a tradesman in *London*, to be sent by the first tin ship to *Falmouth*; plaintiff delivered them at a wharf, and entered them to go by the *S.* which was the first ship that was to sail. The wharfinger did not send them by the *S.* but by the next ship, which was lost. In defence to an action for the price, defendant offered to prove that the *S.* lay nine days at the wharf after the delivery, ready to take goods on board, but Lord *Kenyon* held this to be a sufficient delivery according to the order, so as to charge defendant, and he said defendant might have an action against the wharfinger for negligence, which he conceived the plaintiffs could not maintain. *Twining* v. *Freeman*, Guildhall, March 1790, MS. Ca.

court

court held, there being a precedent consideration, *viz.* the debt, *A.* could not countermand the delivery, but the property revested in the defendant till disagreement, and the contract did not stand open till agreement. *(a)*—*Atkins* v. *Berwick*, E. 5 Geo. I. 1 Str. 165. *(b)*

But where a bankrupt, on the 7th *November*, indorsed and sent a promissory note for £600 by the post to the defendant, to whom he was indebted to a larger amount, and the letter was carried to the post-office that morning; but by the course of the post it could not go away till the next day, and the defendant could not receive it till the 10th, at which time he did receive it; and an act of bankruptcy was committed on the 8th, and it was found by the jury that the note was indorsed and sent in contemplation of an act of bankruptcy: the court held this to be a fraudulent preference of the defendant to the other creditors of the bankrupt; for that as the note was not found to have been indorsed in payment of any particular debt, and it might be in trust for the bankrupt, and no assent was given by the defendant, before the act of bankruptcy was committed, the assignees were entitled to recover it from the defendant. But it was there said, that if a man send bills of exchange, or consign a cargo to another who has before paid the value for them, the sending them to the carrier will be sufficient to prevent the assignees from recovering the goods or bills back, in case of an intervening act of bankruptcy; though the person to whom they were sent did not know of their being sent at that time.—*Alderson and another, Assignees of Laroche and another*, v. *Temple*, K. B. T. 8 Geo. 3. 4 Burr. 2235. 1 Black. 660. *(c)* [37]

If

(a) Yet if there be a special agreement between the parties, that the consignor was to pay for the carriage of the goods, the action may be maintainable by the consignor. *Per Le Blanc*, J. Vide *Vale* v. *Bayle*, Cowp. 296. *Davis* v. *James*, 5 Burr. 2680, and *Moore* v. *Wilson*, 1 T. R. 639.

(b) This case was decided on the ground, that both consignor and consignee agreed to rescind the contract of sale; the consignee expressly, and the consignor impliedly, as it was for his advantage. *Per Buller*, J. in *Salte* v. *Field*, 5 T. R. 214. But Lord *Mansfield* had treated this case as a refusal of consignee to take the goods on account of his situation, and he said the judgment was right, but that the reason given was wrong. In *Salte* v. *Field*, both parties *expressly agreed* to *rescind* the contract *before* bankruptcy; but in a subsequent case this was not done by the vendors, who attached the goods for a debt, yet the sale was held complete, and the property changed. Lord *Mansfield*'s, therefore, must be the right construction, for the original consignees did not signify their consent to take back the goods till *after* bankruptcy, which differs this case from *Salte* v. *Field*.

(c) Quære, Whether the difference between this and the last case is not in the *sending in contemplation* of bankruptcy, the first being done from fear of an inability to discharge the debt, and the latter with a view to an act of bankruptcy?

If a man deliver corn to his servant to sell, who does so accordingly, and converts the money to his own use, the master may bring trover against him for the money, (*Anon.* M. 3 Jac. 1. Noy. 12. *Higgs* v. *Holiday*, H. 43 Eliz. Cro. Eliz. 746.); for though it has formerly been a doubt, yet it seems now to be agreed, that trover will lie for money, because damages only are to be recovered.—*Isaac* v. *Clarke*, M. 12 Jac. 1. 1 Rol. Abr. 5. pl. 1. *Anon.* Salk. 289. *Anon.* H. 5 Geo. 1. 1 Str. 142. *(a)*

In trover for a debenture, the plaintiff must exactly prove the number of the debenture as laid in the declaration, and the exact sum to a farthing, or he will be nonsuited. (*Per Holt*, at Guildhall, 1707.) But he need not set out the number (any more than the date of a bond, for which trover is brought), for being out of possession he may not know the number, and if he should mistake, it would be a failure of his suit.—*Wilson* v. *Chambers*, T. 1633. Cro. Car. 262.

In order to prove property, where the action is brought by an assignee under a commission of bankruptcy, who may declare, if he will, *ut de bonis suis propriis*) it is necessary to prove, 1. The bankrupt a trader within the statute. 2. The act of bankruptcy. 3. That the commission was regularly granted. 4. The assignment to the plaintiff. 5. A property in the bankrupt. (*Pepys* v. *Low*, E. 1 W. & M. Carth. 29.) *(b)* It will

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A fraudulent sale of goods, in contemplation of bankruptcy, by a person to one of his creditors, in combination to keep up the vendor's sinking credit, in order to prefer that creditor and cheat others, is void, and does not alter the property of the goods, (though it may not be an act of bankruptcy in itself.) And trover will lie for such goods after vendor has become a bankrupt. Therefore, where the bankrupt bought goods upon credit from several tradesmen, who did not suspect his circumstances, and sold the same goods to an agent employed by another creditor to a large amount, at prime cost, who gave his notes for them payable at a future day, which notes were paid in by the creditor employing the agent, for whose use also the agent sold the goods, and accounted for the profits with him as agent. This was held to be a fraud upon the other creditors of bankrupt, and a cheat by covin and collusion between him and that creditor, though in itself it did not amount to an act of bankruptcy, and that trover lay by assignees for goods. *Roberts' Assignees* v. *Roberts*, 4 Burr. 2477.

(a) The case in *Strange* is this. In trover for money the court gave leave to bring the whole money declared for into court, but said, they could only do it in this case, and not in trover for goods; but that the court will, under particular circumstances, give leave to bring goods into court for which trover is brought. Vide *Fisher* v. *Prince*, 3 Burr. 1363. *Cooke* v. *Holgate*, Barnes, 281. *Royden* v. *Batty*, *ib.* 284.

(b) These were formerly the requisites to enable the assignees of a bankrupt to maintain trover for the recovery of his property; but now by stat. 49 *Geo.* 3. *c.* 121. *s.* 10, it is enacted, that in any action brought by or against any assignee of a bankrupt, the commission, and the proceedings under the same, shall be evidence

will be proper therefore to consider what evidence is sufficient to prove these several things; and for that purpose I will set down the words of the several statutes which describe what persons may be bankrupts, and what acts will make them so.—*Rush* v. *Baker*, M. 8 Geo. 2. 2 Str. 995.) *(a)*

By 13 *Eliz. c.* 7, any person using the trade of merchandize, by way of bargaining, exchange, rechange, bartery, chevisance, * or otherwise, [*38] in gross or by retail, or seeking his trade or living by buying and selling, that departs the realm, or begins to keep house, or otherwise absent himself, or suffers himself willingly to be arrested for any debt not due, or suffers himself to be outlawed, to defraud any of his creditors, shall be deemed a bankrupt; (and by 1 *Jac. c.* 15,) or fraudulently procures his goods to be attached or secreted, or *makes any fraudulent grant* of his land or goods, to the intent that his creditors may be defrauded; *(b)* and by 21 *Jac.* 1. *c.* 19, any that uses the trade of a scrivener, receiving other men's money into his trust and custody, or any merchant who shall endeavour to compel his creditors to take less than their just debt, or gain longer time than was given upon the original contract, or being indebted in £100, or more, shall not pay or compound for the same within six months after due, and the debtor be arrested for the same, or within six months after an original sued out and notice thereof, or being arrested shall lie in prison two months or more upon that or any other arrest, or being arrested for £100 or more of just debts shall escape out of prison, or procure his enlargement by putting in hired bail. And by the said act 21 *Jac.* 1, in the cases of arrest and lying in prison, or getting forth by hired bail, he is to be deemed a bankrupt from the time of his first arrest.

By 14 *Car.* 2. *c.* 24, the having money in the *East India* Company *(c)* will not make a trader; and in the 5 *Geo.* 2. *c.* 30, by which bankers,

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evidence of the petitioning creditor's debt, and of the trading and bankruptcy of the bankrupt, unless the other party in the action shall (if a defendant) before the time of his pleading to such action, and (if a plaintiff) before issue joined, give notice in writing to the assignee that he intends to dispute such matters, or any of them.

(a) The assignees under a joint commission of bankruptcy against two cannot bring trover against a consignee of goods consigned to him *bonâ fide*, and for a valuable consideration, by one partner before his own bankruptcy, after a secret act of bankruptcy committed by the other partner. *Fox & al'* v. *Hanbury*, Cowp. 445.

(b) If a grant be made, it does not amount to an act of bankruptcy, though a transaction, if manifestly fraudulent, on the eve of bankruptcy, will be set aside. *Martin* v. *Pewtress*, 4 Burr. 2480.

(c) Nor in the Bank of *England*, *South Sea* Company, or any other society.

brokers,

brokers, and factors, are made liable to be bankrupts, there is a proviso that it shall not extend to any farmer, grazier, or drover.

By 5 *Geo.* 2. *c.* 30. *s.* 24, if any bankrupt shall, after the issuing of a commission against him pay the person who sued out the same, his debt, or give or deliver to such person goods or any other satisfaction or security for his debt, whereby the person suing out the commission shall privately receive more in respect of his debt than the other creditors, such payment, *&c.* shall be such an act of bankruptcy whereby, on good proof thereof, such commission shall be superseded, and another commission shall be awarded to any creditor petitioning, and the person taking or receiving such goods or other satisfaction shall lose his debt and all that he has received.—Vide *Vernon et al'* v. *Hankey et al'*, Guildhall, 16th July, 1787. 2 T. R. 113. *(a)*

As to the constructions on the aforesaid statutes, it has been held that a man cannot be a bankrupt in respect to debts contracted during his infancy, though the act of bankruptcy were committed after he was of age.—*R.* v. *Cole*, M. 10 W. 3. 12 Mod. 243.

A. being arrested, puts in bail, afterwards he surrenders in discharge
[*39] of his bail, and is above two months in prison; he *is a bankrupt only

(a) It was said by Lord *Camden*, in *Port* v. *Turton*, 2 Wils. 171, and repeated by Lord *Loughborough*, in *Parker* v. *Wells*, 1 Cooke's B. L. 44. that a trader gains an extensive credit upon an uncertain and invisible capital, that credit will be in proportion to the extent of his dealings, and can be measured by nothing else; his real means are not visible, and, from the very nature of his trade, he is liable to unforeseen losses, by the failure of those persons to whom he is obliged to give credit, and with whose credit his is interwoven. In his behalf, the law, in the statutes of bankrupt, relieves him, in consequence of his large engagements, on a fair distribution of what he has; and in behalf of his creditors, they are permitted to have an immediate execution in the first instance, and force him to produce his accounts, and then make an equal distribution of his effects. But those persons whose principal business is not buying and selling, but merely bringing to market the produce of the lands, are in a different situation from the trader; their capital is open—it is permanent—it is limited—and their dealings are necessarily confined. Their credit rests upon their own endeavours and industry, and can rarely be involved with the credit of other persons. The working tailor only purchases instruments and necessaries to carry on his work—the merchant tailor buys and sells cloth; the one is a labourer, and not liable to bankruptcy—the other introduces all those consequences of extensive credit and connections with other persons.

The mode of enjoying the profits of a real estate will not make a man a bankrupt, and this must be left for the decision of the jury. *Dict. per Buller*, J. in *Ex parte Harris*, MS. Ca. and confirmed by Lord *Mansfield*.

But buying and selling under *particular restraints*, and for *particular* purposes, is not a trading within the statute, as a schoolmaster buying books for the use of his scholars, *Ex parte Walker*, Co. B. L. 62.

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from the time of his surrender, not from the time of his arrest.—*Tribe* v. *Webber*, H. 17 Geo. 2. Willes, 464. *Bird* v. *Sedgwick*, 1 Salk. 109. S. P.

But where sham bail is put in before a judge, as a means to get the defendant turned over to the prison of the court, and he is accordingly immediately surrendered and sent there, the imprisonment is to be computed from the arrest.—*Rose* v. *Green*, H. 31 Geo. 2. B. R. 1 Burr. 437.

A shoemaker may be a bankrupt, for he lives by buying and selling leather; but an innkeeper as such cannot, for though he buy provision, yet he does not properly sell it, for the attendance of his servants, furniture of his house, *&c.* are to be considered.—*Crump* v. *Barne*, E. 1627. Cro. Car. 31. *Newton* v. *Trigg*, 3 W. III. 3 Lev. 309. *(a)*

So it has been holden that a victualler, as such, cannot be a bankrupt.—*Saunderson* v. *Roles*, K. B. E. 7 Geo. 3. 4 Burr. 2068.

One who buys cattle at one fair, keeps them three or four days on his own ground, and then drives them to another fair to sell, is a drover within the meaning of 5 *Geo.* 2. aforesaid.—*Mills* v. *Hughes*, M. 19 Geo. 2. C. B.

In the case of *Woodier*, a mercer on *Ludgate-hill*, against whom his going beyond sea being given in evidence, it was insisted that shewing *quo animo* it was done, (*viz.* on account of having killed his wife) it could not be construed an act of bankruptcy; but it appearing his creditors were thereby in fact prevented from recovering their debts, *Reeves*, C. J. held it was: but if that fact had not come out, it would have been otherwise.—*Woodier's Ca.* cited in *De Golls* v. *Ward*, H. 12 Geo. 2. *Forr.* 243.

If *A.* commit a plain act of bankruptcy, as keeping house, *&c.* though he after go abroad and be a great dealer, yet that will not purge it. But if the act were doubtful, the going abroad and dealing will be an evidence to explain the intent of the first act; for if it were not to defraud creditors, and keep out of the way, it will not be an act of bankruptcy. Also, if after a plain act, he pay off or compound with all his creditors, he is become a new man.—*Hopkins* v. *Ellis*, T. 3 Ann. 1 Salk. 110. *(b)*

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(a) But if, where an innkeeper or victualler sells to any person that applies, the commodity in which he professes to deal, and it is not sold as a favour to particular persons, this is a dealing within the bankrupt laws. *Patman* v. *Vaughan*; 1 T. Rep. 572.

(b) In all these cases it is a question to be left to the jury, whether the person buys and sells with a view to make a profit by it. In this case the man was a farmer; but it appeared in evidence that he had bought *several* horses, which were not fit to be used in the farming business, and that

To constitute an act of bankruptcy, the denial of the party must be with an intent to delay creditors; therefore being denied when sick in bed, or engaged in company, will be no act of bankruptcy; and *Lee*, C. J. held the same, where the denial was by agreement in order to take out a commission. (*Field* v. *Bellamy*, H. 15 Geo. 2.) *(a)* But in *Bramley* v. *Mundee*, at Guildhall, 2d *June*, 1756, Mr. Justice *Foster* held it sufficient proof of an act of bankruptcy: the fact proved was, that the party (in consequence of an agreement made at a meeting of the creditors two hours before, at which he and the plaintiff both were) was denied to the
[*40] plaintiff's clerk, who was sent to demand money; * *tamen quære*, for how can such a denial be said to be with intent to delay the creditor?—Probably the defendant himself in this case had concerted or been privy to the committing the act of bankruptcy: and under such circumstances a denial by agreement has in many cases been holden to be sufficient proof of an act of bankruptcy. For where a person has been assisting in procuring such act of bankruptcy to be committed, it does not afterwards lie in *his* mouth, nor shall *he* be permitted to say it was fraudulent or ineffectual. But such act of bankruptcy will be of no avail against persons who were not privy to it.—Though a man, with intent to delay his creditors, order himself to be denied, yet unless in fact he be denied to a creditor, it will be no act of bankruptcy; therefore it is necessary to prove that the person denied was a creditor.—*Jackmar* v. *Nightingale*, E. 13 Geo. 2. *per Lee*, at Guildhall. *(b)*

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that he frequently sold them immediately for a guinea profit. The court refused a new trial, for this evidence was *uncontradicted* by any other on the part of the supposed bankrupt. *Bartholomew* v. *Sherwood*, 1 T. R. 573, *in notis*.

(a) The bankrupt in this case *denied* himself to the holder of a bill at *nine* o'clock in the morning, but paid the bill before *five* the *same* day; yet this was held an act of bankruptcy, although it is the custom to give the payer the whole day to pay the bill; and the holder is not guilty of laches, so as to discharge the indorser by waiting the whole of the day the bill becomes due. *Colkett* v. *Freeman*, 2 T. R. 59.

(b) The supposed bankrupt being in insolvent circumstances, and in expectation of bills being sent for him to pay, which were then due, was advised by his friends to keep out of the way of his creditors, and accordingly he gave his clerk orders to deny him to every body. He went up stairs with his account book, where he remained several days, and was denied to several persons, but it *did not appear* that they were *creditors*. On the 7th of *June* one *Rider*, a creditor of the bankrupt to the amount of £100, on two bills of exchange, called at the bankrupt's house respecting other matters, but *he did not ask for* the bankrupt, *understanding he was from home*; he continued in the house about half an hour, *with the knowledge of the bankrupt*, and in the course of conversation with the clerk, he asked if the bankrupt's wife could not let him have part of his demand, but this

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On the 28th of *November*, *Hall* rode out of town, and returned in the evening, before which a bailiff had been at his shop to arrest him: the next morning he sent for the bailiff, and told him he went out in order to get the term of the plaintiff, and now the return of the writ was out, if they would take out a new writ he would give bail, which was done accordingly; and this was held to be an act of bankruptcy within 1 *Jac.* 1. *c.* 15.—*Maylin* v. *Eylve*, T. 2 Geo. II. 2 Str. 809.

In an action of trover against a sheriff, who had levied an execution on the bankrupt's goods, to prove an act of bankruptcy prior to the execution, the plaintiffs relied on an assignment made by the bankrupt of *all* his effects to two of his creditors, in trust for themselves, and the rest, in consequence of a proposition made by the bankrupt at a meeting of his creditors, and accepted by all that were present. *Per* Lord *Mansfield*, this deed is a fraud on the bankrupt laws, and is an act of bankruptcy, unless every creditor concurred. And as every creditor did not concur in it, (for the plaintiff in the execution was adverse) the present plaintiff had a verdict.—*Kettle et al'*, *Assignees of Ewing*, v. *Hammond*, Westminster Sittings, after Hil. 7 Geo. 3.

A man cannot be an evidence to prove an act of bankruptcy committed by himself; but his confession to a third person that he had gone out of the way to avoid being arrested, is evidence. So a verdict upon an issue directed out of chancery, to which only one of the defendants was party, may be read against all the defendants, to prove the time of the act of bankruptcy.—*Ewens* v. *Gold*, H. 8 Geo. 2. *per Hardwicke*, C. J. *Lowfield* v. *Bencroft*, *per Raym.* C. J. Guildhall, 1732. 2 Str. 910.

A man's giving money for notice when a writ should come into the sheriff's office against him is no proof of an act of bankruptcy, for he may do it to prevent his credit being blown.—*Croxton* v. *Hodges*, *per Fortescue*, J. Hereford, 4 Geo. 2.

Proof of the commission ought to be by shewing it under seal, and [41] the petition to the chancellor on which it was granted, and the debt of the petitioning creditors, which (by 5 *Geo.* 2.) if one, must amount to £100, if two, to £150, if three or more, to £200. It must also be a legal debt; therefore the assignee of a bond cannot be a petitioning

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was refused. *Per Kenyon*, C. J. "On "trials of this kind, the question has "always been asked, whether or not "the debtor was *denied* to a *creditor*, "which shews in what light the sta- "tute has been considered. His "Lordship said he would not pre- "sume to say whether this construc- "tion should have been put on it at "first, but that construction having "once obtained, he was afraid now "to disturb it." *MS. Ca.*

creditor,

creditor, (*Medlicott's Case*, in Chancery, E. 4 Geo. II. 2 Stra. 399.) and it must be due at the time of the act of bankruptcy committed, (*Toms et al.* v. *Mytton*, H. 13 Geo. I. 2 Stra. 744.) but though of above six years standing, it will be good.—*Swayne & al.* v. *Wallenger*, H. 13 Geo. I. 2 Stra. 746. *Crisp* v. *Perrit*, E. 17 Geo. 2. C. B. Willes, 467.

N. B. A joint creditor may sue out a separate commission.

The assignment is to be proved by producing the deed, and proving the execution of it by the commissioners.

Till assignment, the property is not out of the bankrupt; but the assignment vests the property in the assignees from the time of bankruptcy; (*Paine* v. *Teap*, H. 2 W. 3. Salk. 108.) and therefore if a person sue out execution against a bankrupt, and the sheriff seize his goods, and sell them, and give the money to the person suing out the execution, the assignees may bring trover against the sheriff (or the person suing out the execution, if he can be proved a party to the conversion, by giving bond to secure the sheriff, and so making it his own act;) and there is no occasion for an actual demand, because the property being vested in the assignees from the time of the bankruptcy, the execution was tortious. (*Rush* v. *Baker*, M. 8 Geo. 2. K. B. 2 Stra. 995.) If therefore a sheriff levy goods on a *fi. fa.* after an act of bankruptcy committed, but before a commission sued out, he ought not to sell the goods after the commission, for if he do, he will make himself liable in trover. (*Cowper* v. *Chitty & al.* E. 32 Geo. 2. K. B. 1 Burr. 20. 1 Bla. 65.) *(a)* Where the case appeared to be, that the defendant took the goods by virtue of a *fi. fa.* directed to him as bailiff after an act of bankruptcy, but *before a commission sued out*; on a special verdict he had judgment, for being an officer he was obliged to execute the writ. (*Bailey* v. *Bunning*, T. 17 Car. 2. 1 Lev. 174.) *(b)* Note, the single question referred by the special verdict was, whether the taking were lawful? and it was upon that the court determined: A bailiff, as soon as he has taken the goods, is *functus officio*, and therefore if he

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(a) On the contrary, he should return *nulla bona, for the sale* would make him answerable. The seizure (though the goods were the property of the assignee at the time) may be lawfully excused, neither will the subsequent sale make him a trespasser *ab initio*. So that trover is the only action. *Smith* v. *Mills*, 1 T. R. 475.

(b) And accordingly it has been adjudged, that *trespass* does not lie against the sheriff in such case, though *trover* does; for the sale, after issuing the commission, is indeed a conversion, but does not make the sheriff a trespasser *ab initio*.

were

were justified at the time of taking, a subsequent commission ought not to affect him. *(a)*

A. was arrested and lay in gaol for two months, in which time his goods were taken in execution on a *fi. fa.* then a commission of bankruptcy issued, and *A.* was declared a bankrupt from the first arrest. Afterwards the sheriff returned *nulla *bona;* this is a good return.— [*42] The *fi. fa.* was returnable the 26th *June:* the commission issued the 5th *July:* The return was in fact made the 5th *November,* and the court said, they would take it as made at the time when in fact it was made, and not as made at the day of the return of the writ.—*Coppingdale* v. *Bridgen & al.* B. R. T. 32 & 33 Geo. II. 2 Burr. 814.

A. living in *Ireland,* employed *B.* in *London,* to sell goods for him. *B.* sold them to *J. S.* (*A.* not knowing to whom they were sold, and *J. S.* not knowing whose property they were) *B.* became a bankrupt, and *J. S.* paid the money to his assignees. *A.* shall recover it from them. It was agreed that a payment by *J. S.* to *B.* was a discharge for him against the principal *A.* yet the debt was not in law to *B.* but to the person whose goods were sold, and therefore was not assigned to the defendants under the general assignment of all their debts, but remained due to *A.* as it was before; and it being paid to the defendant, who had no right to it, but under a mistake, that payment must be understood in law to be for the use of him to whom it was due.—*Garrat* v. *Cullum,* E. 1709.

A. became a bankrupt after his goods were extended on a statute, and before the *liberate*; and in trover by the assignees against the defendant, who had got possession by virtue of the *liberate,* the court held the property was divested out of the bankrupt by the extent, and consequently that the goods were not assignable.—*Audley* v. *Halsey,* H. 1629. Cro. Car. 148.

And note, The act of bankruptcy is the same thing in the case of common creditors, as the assignment is in the case of the king. The king is bound by an actual assignment, because the property is then absolutely transferred to a third person: but relations, which are but fictions of law, cannot bind the crown.—*Brassey* v. *Dawson,* T. 7 Geo. II. 1 Str. 982.

And note, that the 19th *Geo. 2. c. 32.* reciting that persons frequently commit secret acts of bankruptcy unknown to their creditors, and after

(a) The sheriff is not a trespasser by taking the goods in execution, after the act of bankruptcy, and before the commission issued. But by selling, the sheriff converts the goods, and then trover is maintainable against him, or his vendee, or the plaintiff in the original action. *Hitchin* v. *Campbell,* 2 Bla. 829.

appear

appear publicly and carry on their trade, and that permitting such secret acts of bankruptcy to avoid payments *bonâ fide* made is a discouragement to trade, enacts that no person who is *bonâ fide* a creditor of any bankrupt for goods sold, or for any bill of exchange drawn, negociated, or accepted by him, shall be liable to refund to the assignees any money, which before the suing forth the commission was *bonâ fide*, in the usual or ordinary course of trade and dealing, received by such person of such bankrupt before such time as he shall have notice that he is become a bankrupt, or that he is in insolvent circumstances.

As to the proof of property; by 21 *Jac.* 1, *c.* 19. *s.* 11. if any person becoming a bankrupt have in his possession, (order and disposition) by the consent of the owner, goods of another man, and shall be reputed owner of such goods, *(a)* and shall take upon him the sale, alteration, or disposal of them, the commissioners of bankrupts shall have power to sell such goods for the benefit of creditors.

This does not extend to goods which a factor has in his possession,
[*43] and offers to sell for another man: therefore in trover *for a parcel of diamonds against the assignee of *Levi*, a bankrupt, to whom before his bankruptcy the plaintiff had delivered the diamonds to sell; upon a case made, the court of *K. B.* were of opinion, that the general words of the clause ought to be explained by the preamble, and that these jewels being originally the plaintiff's, and the bankrupt having no more than a bare authority to sell them for the plaintiff's use, were not liable to the bankruptcy.—*L'Apostre* v. *Le Plaistrier*, M. 1708. *(b)*

But if a jeweller have in his possession jewels belonging to *A.* and becoming a bankrupt offer the jewels to sale to *J. S.* the assignee may dispose of them, and *A.* cannot have trover against the vendee.—*Salk. MSS.* S. C.

(a) A possession of lands by a bankrupt is no proof of title within this statute. *Ryal* v. *Rowles*, post, p. 262.

(b) Cited in 1 P. W. 318, and mentioned by Lord *Hardwicke* in *Ryal* v. *Rolle*, 1 Atk. 174, to have been rightly determined, as appeared from a MS. note of Sir *Edw. Northey*, which his Lordship had. Questions of this kind have much more of fact than of law in them. The sort of possession, disposition, &c. are therefore to be proved, and left for the consideration of the jury. *Per Buller*, J. in *Walker* v. *Burnell*, Dougl. 316, (320.)

The cases upon the point of possession, and reputed ownership, seem to rest upon the question only of the credit which the bankrupt derives by appearing to be owner of the goods. As in case of the factor, where no credit can be given to him for the sake of the goods he has in his possession. Vide *Mace* v. *Cadell*, Cowp. 232. In which it was decided by the court, that, under this clause, the goods need not have been originally the bankrupt's, but they must be such as the party suffers the trader to sell as his own.

Upon

Upon this clause too in the statute it has been determined, that if a trader mortgage his stock in trade, and continue in possession, and become a bankrupt, his assignees may dispose of it; but if he mortgage or sell a *chose en action* (*ex. gr.* a ship at sea) and deliver over the muniments, it will not be within the statute. (*Ryal* v. *Rolle*, H. 22 Geo. 2. 1 Wils. 260.) If goods be consigned to a factor who sells them, and becomes a bankrupt, the merchant must come in under the commission; but if he lay the money out in other goods for the merchant, the merchant will have the goods. So if he sell the goods for money at a future day, the merchant will be entitled to the money.—*Scott* v. *Surman*, H. 16 Geo. 2. C. B. Willes, 400. *(a)*

And by the 1 *Jac.* 1. *c.* 15. *s.* 5. If any person, who shall afterwards become a bankrupt, shall convey his lands or chattels, or transfer his debts, except upon the marriage of any of his children, or some valuable consideration, the commissioners may dispose thereof the same as if the bankrupt had been actually seised or possessed.

The bankrupt cannot be evidence to swear property in himself, or a debt due to himself, without a release of his share in the surplus and the dividends, for else he is plainly interested, but he may prove property in, or a debt due to another.—*Ewens* v. *Gold, per Hardwicke,* 8 Geo. 2.

By 5 *Geo.* 2. *c.* 30. *s.* 7. In case any person is sued for a debt due before he became a bankrupt, he may plead in general, that the cause of action did accrue before such time as he became a bankrupt, and may give the special matter in evidence; and the certificate and allowance shall be sufficient evidence of the trading, bankruptcy, commission, and other matters precedent to such certificate, and a verdict shall thereupon be given for the defendant, unless the plaintiff can prove the certificate obtained unfairly and by fraud, or can make appear any concealment by the bankrupt to the value of £10.

Though by that statute the future effects of a bankrupt after a second bankruptcy, where he does not pay fifteen shillings in * the pound, are [*44] liable to be seized for the benefit of creditors, yet till seizure the bankrupt has such a property in them as will enable him to sell them.—*Ashley* v. *Kell*, E. 17 Geo. 2. 2 Str. 1207.

In trover by a stranger for goods taken at sea, in order to establish a property in himself, the plaintiff must prove two things: 1. That the sovereign of the plaintiff was, at the time of the taking, in amity with

(a) For, from the moment of the sale, the factor becomes a debtor to the amount, but when the money is converted into goods, he becomes a fiduciary depositary of goods as the property of another.

the

the king of *England*. 2. That the defendant was, at the time of taking, in amity with the sovereign of him whose goods were taken; for if he that took them were at enmity with him whose goods were taken, the taking was lawful, and of consequence the property altered.—The case in Fourth Institute was, *England* was in amity with *Spain* and *Holland*, who were at enmity; the *Hollanders* took goods at sea from the *Spaniards*, and brought them into *England*; the *Spaniards* brought trover for them as being *in solo amici*; and it was holden that they could not recover.—4 *Inst.* 154.

Possession ought to be proved in the defendant himself, for delivery to a servant is not sufficient, if the goods do not come to his hands; unless the servant be employed by his master to receive goods for him, and they be delivered in the way of his trade; as if a pawn be delivered to a pawnbroker's servant.—*Jones* v. *Hart*, M. 10 W. 3. Salk. 441. *(a)*

To determine what evidence will be sufficient to prove a conversion in the defendant, it must be known how the goods came to his hands; for if they came to his hands by delivery, finding, or bailment, an actual demand and refusal ought to be proved; (*Taylor* v. ———, T. 1 Ann. Raym. 792.) but it is not necessary to prove an actual demand, if an actual taking be proved, for the taking being unlawful is itself a conversion; so likewise if an actual conversion be proved, it is not necessary to prove a demand.—*Bruen* v. *Roe*, 1 Sid. 264. *(b)*

A demand

(a) Trover for 5000 bricks: the bricks had been sent to the defendant to be carried by him as a common carrier, and to be delivered to *S.* which he asserted he had done, but in fact he had not, and *S.* had never received them. *Held*, no evidence of a conversion, though he might have been guilty of a tort respecting the bricks. *Attersol* v. *Briant*, 1 Camp. 409.

So where a carrier merely loses goods, no trover lies. *Ross* v. *Johnson*, 5 Burr. 825. Vide etiam *Owen* v. *Lewyn*, 1 Vent. 223. But evidence of delivery of them to a wrong person by *mistake* is evidence of conversion. *Youl* v. *Harbottle*, Peake N. P. C. 49.

(b) If the defendant, after demand and refusal, tender the goods to the plaintiff, and he refuse to receive them, that will only go in mitigation of damages, and not affect the plaintiff's right to his action, for that will remain. *Baldwin* v. *Cole*, 6 Mod. 212. 3 Nels. Abr. 424, 425.

According to this case, the very assuming to one's self the right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it. *Per* Lord *Ellenborough*, in *M'Combie* v. *Davis*, 6 East, 540.

And if *A.* takes goods, and *B.* takes them from him, trover will lie by the owner against either.

But if upon demand defendant delivers the thing taken, no damages for having taken it can be recovered in this action. 2 *Lilly*, 619.

So where a man finds my goods, and refuses to deliver them on demand, alledging he does not know whether I am the owner or not, this is no conversion. *Easton* v. *Newman*, 1 *Danv. Ab.* 21.

If

A demand and refusal is only evidence of a conversion; and therefore, if the jury find a special verdict, that there was a demand and refusal, the court cannot adjudge it a conversion.—*Chancellor of Oxford's Ca.* T. 11 Jac. 1. 10 Co. 56.

A demand and refusal is no evidence, where it is apparent the defendant has made no conversion; as, suppose the defendant to have cut down the plaintiff's trees, and to have left them lying in the plaintiff's ground; for it is plain he has not converted them, if they continue there as before.—*Mires* v. *Solebay*, T. 29 Car. 2. 2 M. 245.

In trover against a carrier, denial is no evidence of a conversion, if the thing appear to be really lost through negligence; but if that do not appear, or if the carrier had it in his custody * when he denied to deliver it, it is good evidence of a conversion. (*Anon.* 3 Ann. Salk. 655.) But he may give in evidence the detaining of the goods for carriage; (*Skinner* v. *Upshaw*, T. 1 Ann. 2 Raym. 752.) so he may give in evidence, that the goods were stolen; for then he is guilty of no conversion, though he will be liable in an action on the case on the custom.—*George* v. *Wiburn*, 14 Car. 1. 1 Danv. 22. *(a)* [*45]

So in trover for a horse in an inn-keeper's hands, denial is no evidence of a conversion, *(b)* unless the plaintiff tender what the horse has eaten out, and the jury is to judge if sufficient were tendered. (*Anon.* 33 Car. 2. 2 Show. 161. post 48.) But if *A.* put a horse to pasture with *B.* and agree to pay him 12*d. per* week as long as he remains at

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If a man find the goods of another, and uses or wilfully abuses them, as if it be paper, and he puts it into water, or the like, trover lies, but this action will not lie for any negligence in the keeping, as where one finds another's garment, and suffer it to be moth-eaten. *Mulgrave* v. *Ogden*, 1 Cro. 219.

(a) So trover lies not against a wharfinger for goods stolen or lost; for in trover there must be an *injurious* conversion. *Ross* v. *Johnson*, 5 Burr. 2826.

(b) Where the owner of goods on board a vessel directed the captain not to land them on the wharf, at which she was moored, which he promised not to do, but afterwards delivered them to the wharfinger, for the owner's use, on a supposition of the wharfinger's having a lien on them for the wharfage dues, because the vessel was unloaded against the wharf. It was held, that the owner might maintain trover against the captain, unless the latter could establish the wharfinger's right to the dues. *Syeds* v. *Hay*, 4 T. Rep. 260.

If one, having a lien upon goods when they are demanded of him, claims to detain them upon a different ground, making no mention of the lien, trover may be maintained against him, without evidence of any tender having been made of the amount of his lien. *Boardman* v. *Sill*, 1 Camp. 410. (n).

If goods be cast away, and saved, they may be retained for payment of salvage. *Per Holt*, C. J. in *Hartford* v. *Jones*, Salk. 654. 1 Ld. Raym. 393. S. C.

pasture,

pasture, and afterwards sell him to *C.* who brings trover against *B.* he cannot give in evidence the detaining him till he be paid, but is put to his action against *A.* for this differs from the case of an inn-keeper or taylor, who may retain.—*Chapman* v. *Allen*, H. 7 Car. 1. Cro. Car. 271. *(a)*

A lord of a manor seized a beast as an estray, and kept it for some time after having proclaimed it. The owner afterwards, and within the year and day, claimed it, and brought trover, without first tendering a satisfaction for the keeping of it: And for the want of that, it was holden that the action would not lie.—*Taylor* v. *James*, E. 5 Jac. 1. 2 Rol. Abr. 92. pl. 3.

But if a horse be distrained in order to compel an appearance in a hundred-court, after appearance the plaintiff cannot justify detaining the horse till paid for his keeping.—*Lenton* v. *Cook*, 9 Geo. 2.

So if *A.* purchase the interest of a lease for years, and the writings are left in the hands of *B.* an attorney, to draw an assignment, and he does draw one accordingly, which is executed, he cannot afterwards refuse to deliver it to *A.* till he have paid for it.—*Anon.* E. 6 W. & M. 1 Raym. 738. *inter* Lord *Holt's* points. *(b)*

So where the defendant paid the duty at the custom-house for the plaintiff's goods; for he may have an action for the money so laid out.—*Stone* v. *Lingood*, M. 12 Geo. 1. Stra. 651. but denied to be law in *Green* v. *Farmer*, Burr. 2218.

Note, no person can in any case retain where there is a special agreement, because then the other party is personally liable.—*Bremin* v. *Currant*, T. 28 Geo. 2. *(c)*

If

(a) Because he is compelled to receive, and he gives credit to the thing, and not to the person. *Francis* v. *Wyatt*, Burr. 1499.

A taylor loses his right to retain, if he stipulates for a particular price. 2 *Rol Abr.* 92. pl. 1, 2: and this seems to govern the case of *Chapman* v. *Allen*, sup.

(b) Trover for a lease assigned by bankrupt to defendant after bankruptcy. Upon demand made, defendant said, he would not deliver it up, but his attorney had then got it, who had a lien upon it for a small sum due to him. *Per Ellenborough.* To make a demand and refusal good evidence of conversion, plaintiff must then have it in his power to deliver up, or retain it. *Smith, Assignee* v. *Young*, 1 Camp. 439.

(c) As to questions of lien or retainer, nothing can be clearer than that liens are personals, and cannot be transferred to third persons by any tortious pledge of the principal goods. *Per* Lord *Ellenborough*, in *M'Combie* v. *Davies*, 7 East, 6. But where one, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has the lien to that other, with notice of his lien, and appoints that other, as his servant, to keep possession of the

If trover be brought against a constable for goods taken by him, pursuant to a warrant from a justice or other person, if he have a jurisdiction, though not in that particular instance, (as if commissioners of the window-tax fine a collector for a neglect not within their power) the constable will not be liable, for he is not guilty of a conversion to his own use; and though the plaintiff is intitled to the surplus of the distress, yet he cannot *recover it in trover. (*Presley* v. *Dawkins*, H. 11 W. 3. Oct. Str. 6. *Masters* v. *Butcher*, 12 W. III. Raym. 740. *tamen quære.*) *(a)* So Lord Chief Justice *Holt* held, that if a sheriff upon an extent for the king against *A.* seize the goods of *B.* *B.* cannot have trover, because, by the seizure, the property vested in the king. *(b)* [*46]

If upon an information of seizure the goods be condemned, no action will lie for them. But if there be no condemnation, and the goods

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the goods for him, in that case he may preserve the lien. *S. C.*

But an inn-keeper cannot sell the horse to reimburse himself for his keep, except in *London*, by the custom. *Jones* v. *Pearle*, 1 Stra. 556. And if he once part with the possession of the horse, he cannot afterwards detain him, if he come again into his hands. *Ib.*

So, generally, if a person holding any thing as a lien, once parts with the possession of it, his lien is lost; as in the case of a shipwright repairing a *ship at home*. *Ex parte Shank*, 1 Atk. 234.

By the general course of trade, a lien extends only to the particular debt which arises on account of the specific thing that is held as a lien, and not to other debts previously due in the way of business between the parties. *Ex parte Ockenden*, 1 Atk. 235. Thus a miller can only retain corn, delivered to him to be ground for the price of grinding such particular corn, and not for money previously due for grinding other corn. So a dyer has no lien upon goods, delivered to him to be dyed, beyond the price of dying the same goods. *Green* v. *Farmer*, 4 Burr. 2214; in which case Lord *Mansfield* said, the convenience of commerce and natural justice are on the side of liens, and therefore of late years courts lean that way: 1st, where there is an *express* contract: 2dly, where it is *implied* from the usage of trade: or 3dly, from the manner of dealing between the parties in the particular case: and 4thly, where the defendant has acted as a factor.

A factor has a lien upon goods in his hands for the general balance due to him from his principal, and even if he will sell the goods upon credit, he has the same lien upon the price thereof in the hands of the buyer. *Drinkwater* v. *Goodwin*, Cowp. 251.

Yet it has been determined, that a broker, being in the nature of a factor, has a lien for his general debt. *Ex parte Deeze*, 1 Atk. 228.

The captain of a ship has no lien upon it for his wages, or for the expence of repairs or stores in *England*. *Wilkins* v. *Carmichael*, 1 Dougl. (97) 101. *Sed secus* if repaired in a foreign port. *Ex parte Shank*, 1 Atk. 234.

(a) In *Masters* v. *Butcher*, Lord *Holt* held, that an officer cannot justify the imprisonment of a man for non-payment of taxes under the general printed warrant, which the collectors have, signed by two justices, but he must have a special warrant.

(b) Yet it has been held, that trover lies against a sheriff who has seized goods under a *fi. fa.* *Cooper* v. *Chitty*, 1 Burr. 20. 1 Bla. 65.

were not liable to be seized, trespass or trover will lie against the officer for them. But by 19 *Geo.* 2. *c.* 34. *s.* 16. if the judge certify on the record that there was a probable cause for such seizure, then the plaintiff, beside his ship or goods so seized, or the value thereof, shall not be intitled to above 2*d.* damages, nor to any costs of suit.—*Tinkler* v. *Poole et al.* B. R. Mich. 11 Geo. III. 3 Wils. 146. 5 Burr. 2657. *(a)*

If a man take my horse and ride him, and after deliver him to me, yet I may have this action against him, for the riding was a conversion, and the re-delivery will only go in mitigation of damages.—*Countess of Rutland's Ca.* T. 38 Eliz. 1 Danv. 21. 1 Rol. Abr. 5. pl. 1.

Drawing out part of a vessel, and filling it up with water, is a conversion of all the liquor.—*Richardson* v. *Atkinson,* M. 10 Geo. 1. Str. 576.

If a man find my goods, and upon a demand answer that he knows not whether I am the true owner, and therefore refuse; this is no evidence of a conversion, if he keep them for the true owner.—*Isaack* v. *Clarke,* 2 Bulst. 312. *per Coke,* C. J. *(b)*

Though it be necessary to alledge a day and place of conversion, (*Hubbard's Ca.* 29 Cro. Eliz. 78,) (or a request and refusal, which is tantamount) yet as it is a transitory action, the conversion may be laid here and proved in *Ireland.*—*Wilson* v. *Chambers,* T. 1633. Cro. Car. 262. *(c)*

If trover be brought against baron and feme, the declaration must suppose that they converted the goods to the use of the husband, and it must not be laid that she converted them to her own use; (*Berry* v.

(a) Trover will however lie against the officers of the revenue for making a tortious seizure, *though condemned by the commissioners,* if at the trial it appears there was no legal ground for such condemnation; in this case it was objected, that trover did not lie against the defendant, for that the seizure of the goods, and putting them into the custom-house warehouses, could not be a conversion to the use of the defendants (the king's officers), but that trespass or case was the proper action. *Sed per Cur.* the king had no property, therefore the goods were tortiously seized by the defendants, which was a conversion by them; and the court further said, that the case cited from Bunb. 67, is not law, though, as reported in 3 Wils. 146, the same case is cited in *Tinkler* v. *Poole;* but as reported in Wils. the goods, which were herrings, were condemned by the commissioners of salt duties. *Tinkler* v. *Poole* is also reported in 5 Burr. 2657, but no mention is made there, as in Wils. of the herrings being condemned by the commissioners of salt duties. Vide etiam *Chapman* v. *Lamb,* Stra. 943.

(b) Sed secus, if he knew me to be the true owner, for to maintain trover, there must be an injurious conversion.

(c) Aliter in trespass *quare clausum fregit.*

Neavs,

Nevys, H. 1622. Cro. Jac. 661.) and many judgments have been arrested on that account; yet as the conversion is a tort, it should seem as if she might be charged with it the same as with a trespass: (*Draper* v. *Fulker*, M. 7 Jac. 1. Yelv. 166.) as suppose she were to take my sheep and eat them: and in trespass against baron and feme it may be laid in the declaration, that they converted the goods to their own use; for though it had been to the use of the husband only, yet after his death the wife would be charged with the damages; however there is a difference between the two cases, for in trover the conversion is the gist of the action, but not in trespass.—*Smalley* v. *Kerfoot and Ux'*, E. 11 Geo. 2. Stra. 1094. And. 245. *Pullen* v. *Palmer*, M. 3 Geo. 1. C. B. S. P.

An executor left furniture in the house by the consent of the heir, who used them; afterward upon a demand and refusal the executor [47] brought trover; the heir pleaded the statute of limitations, and *per cur.* the user before demand was no conversion, and the refusal (which is the only evidence of it) being within six years, the action is not barred.—*Wortley Montague* v. *Lord Sandwich*, M. 1 Ann. 7 Mod. 99. *(a)*

Trover will not lie against a servant for taking goods by his master's command, and for his master's use; but trespass will.—This rule must not be taken in the full latitude of the words, for it is certain it will not extend to cases where the command is to do an apparent wrong; and so it is said by *Scroggs*, J. in *Mires* v. *Solebay*, T. 29 Car. II. 2 Mod. 242. and perhaps it will not to any case where the taking is tortious, for then there is no occasion for a demand and refusal; but where the possession was lawful, a refusal by a servant will not be evidence of a conversion in him, for it will be evidence of a conversion in his master; as is the case of the pawnbroker in *Jones* v. *Hart*, Salk. 441.—*Parker* v. *Godwin*, M. 2 Geo. II. 2 Stra. 813. is a strong case to shew how far one man, acting by the command of another, shall be answerable in trover: that was, a bankrupt left plate with his wife, who delivered it to a servant to sell, the servant delivered it at the door of *Woodward's* shop to the defendant, who went into the shop and pawned it, and immediately delivered the money to the servant, who paid it to

(a) Executors may bring this action for a conversion in the life-time of their testator. *Rutland* v. *Rutland*, Cro. Eliz. 377.

But trover does not lie against an executor for a conversion by his testator; yet, if the goods come to the executor in *specie*, trover will lie on his own conversion; or if the testator disposed of them, and received the value, an action for money had and received will lie against the executor. *Hambly* v. *Trott*, Cowp. 371.

the wife. Upon trover brought by the assignee against the defendant, he obtained a verdict; but, upon motion, the court granted a new trial, as being a conversion in the defendant; and upon a second trial the plaintiff had a verdict. Note; the defendant pawned it in his own name, and gave his own note for the money. *(a)*

If the plaintiff prove the goods to have been in his possession, it is *primâ facie* evidence of property, but the defendant may prove them the goods of *J. S.* who died *intestate*, and that letters of administration have been granted to him; but such evidence will not be conclusive against the plaintiff, for he may shew that he was married to *J. S.* and so entitled.—*Blackham's Ca.* H. 7 Ann. 1 Salk. 290.

So it would be sufficient if the defendant could prove that the plaintiff had before recovered in an action of trover against *J. S.* for the same goods, for such recovery vests the property in *J. S.* and the plaintiff has damages in lieu thereof, and therefore in a second action he cannot say the goods are his.—*Adams* v. *Broughton*, T. 10 Geo. II. 2 Stra. 1078. And. 18.

[48] Where trover is brought by a rightful executor or administrator against an executor *de son tort*, he cannot plead payment of debts, *&c.* to the value, *&c.* or that he hath given the goods, *&c.* in satisfaction of debts, but, upon the general issue, such payments shall be recouped in damages; (*Whitehall* v. *Squire*, H. 2 W. & M. Carth. 104. 3 Mod. 276. 1 Salk. 295. Skin. 274.) and if they amount to the full value, the plaintiff shall be nonsuited: (*Parker* v. *Kett*, E. 13 W. 3. 12 Mod. 472.) but he shall not give in evidence a retainer for a debt of his own; and if the action be trespass instead of trover, payment of debts to the value will only go in mitigation of damages: (*Whitehall* v. *Squire*, E. 1691. Carth. 104.) *(b)* And perhaps in trover by a rightful administrator against an executor *de son tort*, he could not give in evidence payment

(a) So where a bankrupt delivered goods to one *Smith*, a servant to a Mr. *Garrowey*, to whom the bankrupt was much indebted, *Smith* gave a receipt for the goods in his master's name, and afterwards sold them for his master's use; the bankrupt's assignee was allowed to recover their value in an action of trover against *Smith*. *Perkins* v. *Smith*, 1 Wils. 328.

(b) This position however, it seems (says Mr. *Selwyn*, in his Abridgment of the N. P. Law, 714, n.) is founded on an expression in *Parker* v. *Kett*, 12 Mod. 472, ascribed to Lord *Holt*; but, as Lord *Ellenborough* justly observed in *Mountford* v. *Gibson*, 4 East, 441, it is directly contrary to the opinion of Lord *Holt*, in *Whitehall* v. *Squire*, sup. The known accuracy of *Carthew's* Reports may induce a suspicion, that the reporter in 12 *Mod.* was mistaken, more especially as in page 472 of that report, Lord *Holt* is made to contradict what he had asserted in page 471, and indeed (adds Mr. *Selwyn*) there does not appear any reasonable ground of distinction between the actions of *trespass* and *trover* on this point.

of

of debts to the value of such goods as were still in his custody, but only for such as he had sold.—*Cheshold* v. *Messenger*, coram *Parker*, C. B. at *Gloucester*, 1747. *Blainfield* v. *March*, M. 1701. Salk. 285.

If an administrator bring trover on his own possession, the defendant may upon the general issue give in evidence a will and executor; but if the action be brought on the possession of the *intestate*, the defendant must plead it in abatement, and cannot give it in evidence on not guilty.

Mr. *Danvers* (1 Abr. 25.) says there is no plea in trover, but a release and not guilty; for every plea in justification is tantamount, and Lord Chief Justice *Holt*, in the case of *Hartford* v. *Jones*, Salk. 654, says, he never knew but one plea that was good, and refers to *Kenicot* v. *Bogan*, Yelv. 198. where in trover for two butts of wine, the defendant pleaded that he took them for prisage for the king, and there is another special plea in 2 Bulst. 289, *(a)* that was holden good, *viz.* that the defendant kept a common inn, and that a stranger brought the plaintiff's horse there; and that not being paid for his meat, he detained the horse there; (Vide *Hill* v. *Hawkes*, 1 Rol. Rep. 44. where a justification by force of a custom was held good;) but for the reason given by Lord Chief Justice *Holt*, in the case of *Hartford* v. *Jones*, setting aside a special plea (that the goods were cast away and that he saved them, and detained them till he was paid for his pains) *viz.* that if a detainer be lawful, it does not confess a conversion (which is certainly law) that plea ought not to have been allowed. And in *Wingfield* v. *Stratford*, H. 25 G. 2. K. B. it was holden by the whole court, that there could be no special plea in trover, but a release. But as the defendant cannot plead the special matter, he may give it in evidence on the general issue; and therefore in trover for a gun, the defendant may give in evidence, that he was gamekeeper of the manor of *B.* and took the gun by the 22 & 23 Car. 2. though * the act do not authorize the pleading the [*49] general issue: and therefore it would be otherwise in trespass for taking it. (*Dane* v. *Walter*, in *Kent*, 1682.)—Yet where in trover for goods, the defendant pleaded that the plaintiff had brought the like action against *J. S.* for the same goods, and had recovered, and had execution; upon demurrer, the plea was holden to be good: and it was said, that where the demand and recovery is of a thing certain, as where two are bound in £100 bond, jointly and severally, there recovery and execution against one is not a bar against the other: for execution is no satisfaction for the £100 demanded: but where the demand and recovery is of a thing

(a) No such point is there reported: but it is to be found in 3 Bulst. 289. Casû *Stirt* v. *Dungold*, E. 15 Jac. 1.

incertain,

incertain, as where trespass is done by two, which rests only in damages, if the plaintiff recover against one, that judgment is a sufficient bar against the other; for *transit in rem judicatam;* the property of the goods is changed, so as he may not seize them again.—*Broome* v. *Wooton,* 3 Jac. 1. Yelv. 67.

Note, In general cases it is not allowed to bring the thing into court for which the action is brought; (*Elliot* v. *Callow,* M. 9 Ann. Salk. 597. *Anon.* 5 Geo. 1. Str. 142.) yet I have known it under particular circumstances, where the court would discountenance the action: (*Everard* v. *Lathbury,* Mich. 17 Geo. 2. K. B.) and it appears from Mr. *Barnes's Notes* that in the common pleas it has been often done.

The rule seems to be, that *bona peritura* and cumbrous goods shall not be permitted to be brought into court; but in other cases they may, upon an affidavit that they are in the same plight and condition as when taken.—*Fisher* v. *Prince,* B. R. 1762. *(a)*

Where goods are cumbrous, the court will grant a rule to shew cause, why on the delivery of the goods to the plaintiff, and paying costs, proceedings should not be staid.—*Cooke* v. *Holgate,* C. B. T. 10 G. 2. Barnes, 281. *Watts* v. *Phipps,* B. R. East. 7 G. 3. *(b)*

(a) Vide S. C. nomine *Esher* v. *Prince,* B. R. 3 Burr. 1363. Et vide *Cooke* v. *Holgate,* Barnes 281. *Royden* v. *Batty,* ib. 284. S. P. See also the note to *Elliot* v. *Callow,* sup.

(b) But where there are several parcels of goods, the ordinary way is to make an inventory of them, and prove property of goods mentioned in it, and demand and refusal of them.

CHAPTER III.

OF DETINUE.

DETINUE lies for the recovery of goods in specie, and also for damages for the detainer, and it lies against a person who has them either by delivery or finding: *(a)* but as in this action the defendant may wage his law, trover is the action in more common use. *(b)*

I have

(a) Vide *Kettle* v. *Bromfall,* Willes, 118.

(b) The principal grounds of this action are, 1. A property in the plaintiff either absolute or special, (at the time the action brought) in personal goods capable to be distinguished. 2. A possession in the defendant by bailment, finding, *&c.* 3. An unjust detention by defendant.

But where *A.* bargained and sold goods to *B.* on condition that the sale should be void, if *A.* should pay to *B.* a

I have already taken notice, that the declaration in this action must contain more certainty than is necessary in trover; in most other respects it agrees with that action. (2 *Rol. Abr.* 703. pl. 11.) It may be brought by one having a special property; so, by one having a property without possession. *(a)* It will lie for a piece of gold, value twenty-one shillings; *(b)* for that is a demand of a thing certain: (2 *Danv.* 510.) but it will not lie for money out of a bag, *(c)* though in that case trover will, because in that action damages only are to be recovered.

And it has been said, that it would not lie for hawks, hounds, apes, or popinjays, or such like things which are *feræ naturæ*, though made tame; yet trespass will lie in such case, because in that the plaintiff recovers only damages for the taking, and not the things themselves.—*Bro. Ab.* tit. *Detinue*, 44.

If a man detain the goods of a feme covert, which came to his hands before the marriage, the husband can only bring detinue; because the law transfers the property to him, and the detainer is the cause of action. *(d)* But in such case the wife might join in an action of trover, because the inception of the cause of action was in her by the trover.—*Drew* v. *Bayly*, E. 26 Car. II. 2 Lev. 101.

If *A.* deliver goods to *B.* to deliver to *C.*, *C.* may bring detinue against *B.* for the property is vested in him by the delivery to his use. *(e)* So if a man deliver goods to *B.* and after grant them to *C.* the grantee may have detinue, but not the grantor.—1 *Rol. Abr.* 606. (C) pl. 1.

If the bailee of a thing burn it, his executor shall not be charged in detinue, because he shall not be charged without a possession in himself; for the action dies with the person.—1 *Rol. Abr.* 607.

B. a certain sum at a day fixed. If *A.* pays the money he may have detinue for the goods, though they came to his hands by bargain and sale, and not by bailment. *Bateman* v. *Elman*, Cro. Eliz. 866.

(a) Therefore an heir may recover an heir-loom in detinue. *Bro. Ab.* tit. *Detinue*, pl. 30.

(b) Or for money in a bag. 1 *Rol. Ab.* 606. (A) pl. 1. or for a horse or a cow. F. N. B. 138. Or for deeds concerning the inheritance of plaintiff's land if he can describe them, and what land they concern. 1 *Inst.* 286. Or if such deeds are in a chest. *Banks* v. *Whetstone*, Mo. 394.

(c) Or for a chest of corn, and such other things as cannot be distinguished from chattels of the same description. 1 *Inst.* 286.

(d) But where the defendant has tortiously taken the plaintiff's goods, he cannot maintain this action, for it proceeds on the ground that the plaintiff had a property in them at the time the action brought, which property is divested by the trespass. *Per Brian*, C. J. 6 *Hen.* VII. 9 (a.) *Bro. Ab.* tit. *Detinue*, pl. 53.

(e) Vide 2 *Danv.* 511, post, p. 51.

Where

Where a man comes to a shop to buy goods, and they agree upon a price, and a day of payment, and the buyer takes them away, detinue will not lie; because the property was changed by a lawful bargain; but if they agree for present money, and the buyer take the goods away without payment, detinue lies, because the property is not altered. (*Bateman* v. *Elman*, M. 1601. Cro. Eliz. 867.) So if a man sell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, detinue lies, because the property is in the buyer; but earnest does not alter the property, but only binds the bargain; (*Anon.* M. 11 W. 3. 12 Mod. 345.) and therefore if no other time for payment be appointed, the money must be paid on fetching away the goods: the earnest gives the party a right to demand; but a bare demand without payment is void. After earnest the vendor cannot [*51] sell the goods to another, without a default * in the vendee; and therefore if the vendee do not come and pay, and take the goods, the vendor ought to request him; and then, if he do not in convenient time, the agreement is dissolved, and the vendor at liberty to sell to another person.—*Langfort* v. *Tiler's Administratix*, E. 3 Ann. Salk. 113.

By the act of navigation, certain goods are prohibited under pain of forfeiting them, one part to the king, another to him that will inform, seize or sue for the same; any person may bring detinue for such goods; for the bringing of the action vests a property in him.—*Roberts, q. t.* v. *Withered or Witherall*, E. 1696. 5 Mod. 193. 12 Mod. 92. Salk. 223. *(a)*

If I deliver goods to *B* who loses them, and *D.* find them, and deliver them to *J. S.* who has a right thereto, I cannot bring detinue against *D.* because he is not privy to my delivery.—2 *Danv.* 511.

The plaintiff must prove an actual possession in the defendant, and the detainer of the goods precisely as mentioned in the declaration; and therefore if detinue be brought for a bond, and it is proved to be for a greater or less sum, it is not sufficient.—2 *Rol. Ab.* 703. *Trial*, pl. 11.

The gist of the action is the detainer: therefore if goods be delivered to baron and feme, the detinue shall be only against the baron; (*Isaac* v. *Clarke*, H. 12 Jac. I. 1 Rol. Rep. 128. 38 Ed. III. 1. (n.) S. P.) but if

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(a) This case was recognized in *Wilkins* v. *Despard*, 5 T. Rep. 112, where it was held, that if a ship be seized as forfeited under the navigation act (12 Car. 2.) c. 18. by a governor of a foreign country under the dominion of *Great Britain*, the owner cannot maintain trover against the governor, though there has not been any sentence of condemnation, because the forfeiture is complete by the seizure, and the property is thereby divested out of the owner.

goods

goods come to a feme covert before marriage, the action must be brought against the husband and wife.—*Co. Lit.* 351. (b) *(a)*

General Issue. If the defendant plead *non detinet*, he may give in evidence a gift by the plaintiff, for that proves he does not detain the plaintiff's goods; but he cannot give in evidence that the goods were delivered as a pledge, &c. as he might in trover.—*Co. Lit.* 283. (a)

In detinue for a deed, the defendant after a general imparlance, *proferendo hic in cur'* the said deed, pleaded that it was delivered to him by the plaintiff and *J. S. ad custodiend' sub certis conditionibus, et quod ipse paratus est ad deliberand' cui vel quibus cur' consideravit, &c. Sed utrum conditiones illæ ex parte prædicti querentis adimpletæ sunt ipse omnino ignorat et petit quod idem* J. S. *præmuniatur.*—The plaintiff demurred; but the court held, a prayer of garnishment may be after an imparlance, *ideo preceptum est vic' quod per probos homines, &c. Sci fa. quod sit hic, &c.*—*Hancock* v. *Baddy*, E. 28 Car. 2.

The judgment in this action is to recover the thing itself, or the value thereof, *(b)* therefore the jury must find the value; and if they find damages and costs, and no value, it shall not be supplied by a writ of enquiry.—*Cheney's Case*, M. 1612. 10 Co. 119. *(c)*

The jury ought to find the value of every particular thing demanded; but a flock of sheep is intire, &c.—*Ibid. (d)*

(a) Formerly a man on an affidavit filed might be held to bail in detinue, but he cannot by the modern practice without a judge's order. *Per Reg. Gen. Cur. B. R.* H. 1808. 9 East, 325.

(b) Besides the plaintiff's damages for the detention. *Peter* v. *Hayward*, Cro. Jac. 681. but in trover it is for his damages only. *Knight* v. *Bourne*, Cro. Eliz. 116.

(c) This case was recognized by *Holt*, C. J. in *Herbert* v. *Waters*, Salk. 205. denying a contra decision in *Burton* v. *Robinson*, T. Raym. 124. 1 Sid. 246.

(d) Furthermore, *as to the pleadings and evidence* in this action, it has been held, that if the plaintiff declares on a bailment, defendant cannot plead that plaintiff did not bail the goods, for the bailment is not traversable, and the manner in which they came into defendant's possession is mere matter of inducement. *Bro. Ab.* tit. *Detinue*, pl. 50.

So where plaintiff declared that the goods came to defendant's hands by finding, and the evidence was that plaintiff had delivered the goods to defendant (an infant) for a special purpose, and he refused to redeliver them. This was held sufficient to sustain the action. *Mills* v. *Graham*, 1 Bos. and Pull. N. R. 140.

And where detinue is brought for several articles, the distinct value of each need not be set forth in the declaration, for the jury may sever the values by their verdict. *Pawley* v. *Holly*, 2 Bla. 853.

CHAPTER

CHAPTER IV.

OF REPLEVIN.

THE action of replevin is of two sorts. 1. In the *detinet*. 2. In the *detinuit;* and may be brought in any case where a man has had his goods taken from him by another. *(a)*

Where the party has had his goods re-delivered to him by the sheriff, upon a writ of replevin, or upon a plaint levied before him (which by the statute of *Marlbridge* the sheriff may take out of the county-court, and make replevin presently,) the action is in the *detinuit;* but where the sheriff has not made such replevin, but the defendant still has the goods, the action is in the *detinet: (b)* however of late years, no action has been brought

(a) Either by distress or otherwise; and it is not confined to a taking by distress alone, for the writ is founded on a taking, and the right of the party from whom the things are taken to have them restored to him, unless the question of title to the goods is determined. The person who takes the goods may claim property in them, and if he do, the sheriff cannot deliver them till that question is tried; but this claim of property can only be made where there has been a taking, and it seems that the writ of replevin was calculated, in such cases, to supply the place of detinue or trover, and to prevent the party from whom the goods are taken being put to those actions, except in cases where the other could shew property. *Per Redesdale*, C. in *Shannon* v. *Shannon*, 1 Sch. and Lef. 327.

(b) This statute does not extend to hundred courts, which, deriving their authority from the county court, cannot prescribe to grant replevins by plaint by the steward *out* of court, for at common law the sheriff could only replevy by writ *in* his county court. *Hallett* v. *Birt*, Raym. 218. Under this statute, therefore, whether the replevin is by writ or plaint, the sheriff, before he executes the one or grants the other, must take pledges, as well *de prosequendo* as *de retorno habendo*. *Dorrington* v. *Edwin*, 2 Show. 421. And if the proceedings are by plaint, and are removed by *certiorari*, and defendant has judgment, he may have a *sci. fa.* against the pledges. *S. C.* 3 Mod. 56.

The sheriff cannot take money or cattle as a pawn, in nature of pledges *de retorno habendo*, for the process to bring such pledges into court is by *sci. fa.* *Moyser* v. *Gray*, Cro. Car. 446. But for an account of this ancient mode of proceeding, see Mr. Serjeant *Williams*'s ed. of *Saund.* vol. i. p. 195, (n. 3.) and *Gilb. Replev.* 242, 243, (ed. 1757.) The modern practice, however, is to proceed against the sheriff by action on the case for taking insufficient pledges at the suit of the person making cognizance, where there is no avowant on the record. *Page* v. *Eamer*, 1 Bos. and Pull. 378; and in such action the court of K. B. held that the plaintiff could not recover damages beyond the value of the distress, which was not equal to the rent in arrear. *Yea* v. *Lethbridge*, 4 T. Rep. 433. But in a similar action it was held in C. B. that the plaintiff might recover damages to the extent of his injury. *Concanon*

brought in the *detinet*, though there is much curious learning in the old books concerning it.

The advantage the plaintiff has in bringing an action of replevin in the *detinet*, in preference to an action of trespass *de bonis asportatis*, is, that he can oblige the defendant to re-deliver the goods immediately, in case upon making his avowry they appear to be replevisable; but as in such cases he may more speedily have them delivered to him by application to the sheriff in the common way, it is of no use, unless the distrainer have eloigned the goods so that the sheriff cannot get at them to make replevin; and in such case he may bring an action of replevin in the *detinet*, and after avowry pray that the defendant may gage deliverance; or he may upon a return of an *elongavit* to the *pluries* writ of replevin, have a writ to the sheriff commanding him to take other beasts of the defendant *in withernam*, (*Termes de la Ley*, 590); but if the defendant before the return of the *withernam* appear to the writ of replevin, and offer to plead *non cepit*, it shall stay the *withernam*; for the defendant shall not be concluded by the return of an *elongavit*, for the sheriff can make no other return, where he cannot find the thing to be replevied.—*Bastile* v. *Reignald*, E. 1693. 12 Mod. 36.

Concanon v. *Lethbridge*. 2 H. Bla. 36. In a subsequent action, however, *Eyre*, C. J. *Buller*, J. and *Rooke*, J. declared the good sense and justice of the case to be, that the sheriff should be no further liable than the sureties would have been if he had done his duty, under the statute of 11 *Geo.* 2. *c.* 19. *viz.* to the amount of double the value of the things distrained. *Evans* v. *Brander*, 2 Bla. 547. Vide etiam post, p. 60*c*, notes (*a*) (*b*)

When the sheriff has taken all the preliminary steps required, he may issue his precept to his bailiff to make replevin, and cause the goods to be restored to the plaintiff. *F. N. B.* (by *Hale*) 168. But as he is sometimes negligent, the replevin may, by writ of *pone* or *re. fa. lo.* be removed into a superior court without any cause shewn by the plaintiff, but the defendant must assign a cause, and no advantage can be taken of a variance between the plaint and the declaration in a superior court. *Bargrave* v. *Arden*, Cro. Eliz. 543. Vide etiam 10 Ed. II. *Avowry*, 213. 29 Ed. III. *Avowry*, 130; and there is another writ, by which these proceedings may be removed into a superior court, *viz.* the writ of *accedas ad curiam*, which is sued by plaint in the lord's court, and is a species of *re. fa. lo.* For the form, see *Gilb. Replev.* 145, (ed. 1757.)

The delivery of the *re. fa. lo.* to the clerk of the county court, after interlocutory and before final judgment, is a bar to all further proceedings there, and the clerk cannot refuse the writ on account of his fees, for he may sue for them. *Bevan* v. *Prothesk*, 2 Burr. 1151.

The conditions of a replevin bond is not satisfied by a prosecution of the suit in the county court, but the plaint, if removed, must be prosecuted in the superior court, and a return made if adjudged there. *Gaillim* v. *Holbrook*, 1 Bos. and Pull. 410. Vide p. 60, n.

If the writ of removal be returnable on the first return of the term, plaintiff must declare in the superior court within four days before the end of that term, or defendant will be entitled to an imparlance. *Thompson* v. *Jordan*, 2 Bos. and Pull. 137.

Where

Where the person taking the goods claims property in them before the sheriff, he cannot make replevin of them: but in such case the party may sue out a writ *de proprietate probanda*, upon which the sheriff [*53] must have an inquest of office; and if *upon such inquisition the property is found in the plaintiff, the sheriff shall make replevin, *aliter non*; but though the property be found in the defendant, yet the plaintiff is not concluded, for he may still have his action of replevin, or of trespass; but if in an action of replevin the defendant plead property, and it be found for him, the plaintiff is concluded.—So if goods be taken in execution (or on a conviction before justices) the sheriff shall not make replevin of them, and if in such case the sheriff should make replevin, he would subject himself to an attachment; for goods are only replevisable where they have been taken by way of distress, (*R.* v. *Monkhouse*, E. 1742. Stra. 1184.): *(a)* Lord *Coke*, therefore, defines replevin to be a remedy grounded upon a distress, being (as he says) a re-deliverance to the first possessor of the thing distrained, on security given by him to try the right, and to re-deliver the distress if judgment shall be against him.—*Co. Lit.* 145.

He that brings replevin must have an absolute, or at least a special property in the thing distrained; *(b)* and therefore several men cannot join in a replevin, unless they be joint-tenants or tenants in common.—*Ibid. (c)*

Executors may have a replevin of a taking in *vitâ testatoris*. (*Arundel* v. *Trevil*, T. 1662. Sid. 82.) So if the cattle of a feme sole be taken, and she afterwards intermarry, the husband alone may have replevin. But if they join, after verdict judgment will not be arrested, because the court will presume them jointly interested, (as they may be, if a distress

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(a) Vide etiam *Pearson* v. *Roberts*, Willes, 668. It is not universally the case, however, that where there is a distress replevin may be maintained; for in *R.* v. *Monkhouse*, sup. the court attached an under-sheriff for granting a replevin of goods distrained for deer-stealing. So neither will replevin lie on a distress made for a duty to the crown. *R.* v. *Oliver*, Bunb. 14. But where replevin was brought for goods distrained for an assessment under the highway act, the court would not set aside the proceedings. *Fenton* v. *Boyle*, 2 Bos. and Pull. 399.

It is doubtful whether goods distrained by commissioners of sewers may not be replevied whilst in the officer's hands, but if they are, and the cause is removed into B. R. the court will not quash the proceedings on a summary application, but leave it to the defendant in replevin to put his objection on record. *Pritchard* v. *Stevens*, 6 T. R. 522.

(b) Vide *Bro* (*Replev.*) pl. 8. 20. for a mere possessory right is not sufficient. *Templeman* v. *Case*, 10 Mod. 25.

(c) The words of Lord *Coke* are, "If the beasts of several men be "taken, they cannot join in a *replegiando*, but every one must have a "several replevin."

b*

be taken of goods of which a man and woman were joint-tenants, and afterwards intermarry); the avowry admitting the property to be in the manner it is laid.—*Bourne and Ux'* v. *Mattaire*, E. 8 Geo. 2. Ca. temp. Hardw. 119. F. N. B. 69.

The declaration (a) ought to be certain in setting forth the number and kinds of cattle distrained, because otherwise the sheriff cannot tell how to make deliverance if it should be necessary; yet an avowry may make that good which would be bad on demurrer, both parties agreeing what the *quantum* and the nature of the goods are, (*Moore* v. *Clypsam*, M. 32 Car. 1. Aley. 32. Sty. 71.) as if the declaration were for taking fourteen skimmers and ladles, and three large pots and covers. (*Bourne* v. *Mattaire*, E. 8 Geo. II. 2 Stra. 1015.*(b)* And the sheriff may require the defendant to shew him the goods, and it would be a good return to say *nullus venit ex parte defendentis ad ostendendum bona et catalla.*

The declaration ought to be not only of a taking in a vill or town, but also *in quodam loco, vocat*; but if the defendant would take advantage of this, he must demur to the declaration.—*Reade* v. *Hawke*, H. 1698. Hob. 16.*(c)* *Bullythorp* v. *Turner*, T. 16 & 17 Geo. 2. C. B. Willes, 475.*(d)*

A man may count of several takings, part at one day and place, and [54] part at another: and if the plaintiff alledge two places, and the defendant answer only one, *i. e.* if the plea begin only as an answer to part, and be in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but must take his judgment for that by *Nihil dicit*; for

(a) The declaration, as well as the writ of replevin, complains, 1. of the unlawful *taking*, and, 2. of the unjust *detention*; if, therefore, the sheriff has returned *replog. feci*, the replevin goes only for the damages, and the declaration is in the *detinuit*; but if the sheriff has not made that return, the declaration must be in the *detinet*. *Petree* v. *Duke*, Lutw. 1150.

(b) If a thing affixed be treated in the declaration as a personal and moveable chattel, it cannot be pleaded in bar that it is appendant to the freehold. *Niblet* v. *Smith*, 4 T. R. 504.

(c) For if the vill were alleged generally, the defendant might, perhaps, have a freehold there himself. Vide *Ward* v. *Laville*, Cro. Eliz. 896, or *Ward* v. *Lakin*, Mo. 678; and note, that the arguments in *Reade* v. *Hawke*, sup. are reported in *Godb.* 186. but the judgment of the court only in *Hob.* 16. and 1 *Brownl.* 176.

(d) In *Abercrombie* v. *Parkhurst*, 2 Bos. & Pull. 481, it is said it may appear hard that the plaintiff should be obliged to name the *locus in quo*; but so much strictness is not required, for the law considers the distress as wrongfully taken in every place where defendant may have it in his custody; it is sufficient, therefore, for the plaintiff to name that place where he finds defendant in possession of the distress. If, however, the replevin be brought in an inferior court, the *locus in quo* must be alleged to be within its jurisdiction. *Quarles* v. *Searle*, Cro. Jac. 95.

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if he demur or plead over, the whole action is discontinued. But if a plea begin with an answer to the whole, but is in truth an answer to part, the whole plea is naught, and the plaintiff may demur. (*Week* v. *Speed*, 13 W. 3. Salk. 94. *Weekes* v. *Peach*, T. 13 W. 3. Salk. 179. Raym. 856. F. N. B. 68.) Where the defendant avows at a different place, in order to have a return, he must traverse the place in the count, because his avowry is inconsistent with it. But where he does not insist upon a return, he may plead *non cepit*, and prove the taking to be at another place, for the place is material. (*Johnson* v. *Wollyer*, H. 8 Geo. 1. Str. 507.) —This is to be understood, where the defendant never had the cattle in the place laid in the declaration at all; for if, on the plea of *non cepit*, the plaintiff prove that the defendant had the cattle in the place laid in the declaration, he will have a verdict: and if the fact be that the defendant took the cattle in another place, and only had them in the place mentioned in the declaration in the way to the pound, he ought to plead that matter specially.—*Walton* v. *Kirsop*, C. B. M. 8 Geo. 3. 2 Wils. 354. *(a)*

The general issue in replevin is *non cepit*, upon which property cannot be given in evidence, for that ought to be pleaded, (*Wildman* v. *Norton*, M. 25 Car. 2. 1 Vent. 249. 2 Lev. 92. S. C. nom. *Wildman* v. *North*); and if he plead property in himself, he may either plead it in bar, or in abatement, (*Presgrave* v. *Saunders*, M. 2 Ann. 1 Salk. 5.); *(b)* but if he plead it in a stranger, it ought properly to be pleaded in abatement, thought it may then likewise be pleaded in bar.—*Co. Lit.* 145.

If the defendant plead property, whether it be in himself or a stranger, he shall have a return without making an avowry for it; but where the plea in abatement is of a collateral matter, such as *cepit in alio loco* he must make an avowry in order to have a return, for he must shew a right to the property, or at least to the possession, to have a return, (*Butcher* v. *Potter*, T. 4 W. 3. Carth. 243. Salk. 94. S. C.): but the plaintiff ought not to traverse the matter of the conusance; and if he do, and demurrer be joined upon it, it is a discontinuance, and the defendant will have judgment.—*Bullythorp* v. *Turner*, sup. *(c)*

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(a) This action was brought on 1 & 2 *P. & M. c.* 12. *s.* 1. for driving a distress out of the hundred. The distress was in a hundred in *Kent*, and driven into another in *Surrey*, where they were impounded. *Per cur.* the venue was improperly laid in *Kent*, for, by stat. 21 *Jac.* 1. *c.* 4. *s.* 1. actions for offences against penal statutes shall be brought in the county, city, &c. wherein such offences were committed. *Pope, q. t.* v. *Davies*, 2 Camp. 266.

(b) 6 *Mod.* 81. *Holt*, 562. 2 Ld. *Raym.* 984. Vide etiam *Parker* v. *Mellor*, Ld. Raym. 217. Carth. 398.

(c) In *Dorkett* v. *Booth*, in B. R. Selw. N. P. Abr. 1027. defendant pleaded *cepit in alio loco*, and prayed judgment,

The defendant may either avow the taking, or justify it; if he avow, it must be upon a right subsisting, such as rent arrear, &c. and then he entitles himself to a return; but where by matter subsequent, he is not to have the thing for * which the distress was taken, there he will not be [*55] entitled to a return, and therefore cannot avow, but must justify; as if a lord distrain for homage, and afterward the tenant die, and then his executor bring replevin. (1 *Danv. Ab.* 652.) But a man may distrain for one thing, and avow for another.—*Butler* v. *Baker*, M. 33 & 34 Eliz. 3 Co. 26. *(a)*

By 11 *Geo.* 2. *c.* 19. Any person distraining for rent, relief, heriot, or other service, may in replevin avow or make conusance generally, without setting out a title.—By 4 *Geo.* 2. *c.* 28. a man may distrain for rent-sec, rent of assize, and chief-rents, which have been paid for three years, within twenty before the first day of the then sessions (which was in 1731,) or which may thereafter be created, as in case of rents reserved upon lease. *(b)*

Note; if the defendant acted as bailiff to another, he is not said to avow, but to make cognizance, *i. e.* instead of saying *bene advocat captionem*, he says *bene cognovit captionem*. (*Trevilian* v. *Pyne*, E. 1707. Salk. 107. 11 Mod. 112.) And if the defendant make cognizance, as bailiff to *J. S.* the plaintiff may traverse his being bailiff, for this is different from trespass *quare clausum fregit*, for there, if the defendant justify an entry by command, or as bailiff to one in whom he alledges the freehold to be, the plaintiff shall not traverse the command, because

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judgment, and that the count might be quashed. On demurrer, for that the plea ought to have prayed judgment of the writ, it was insisted that the place being mentioned in the count only, and not in the writ, the exception was properly taken to the count where the fault was, and the court gave judgment for the plaintiff, considering the conclusion as good.

(a) A *justification* as a plea in replevin admits the taking, but denies the injustice of it. *Presgrave* v. *Saunders*, Salk. 5. *Wildman* v. *North*, 2 Lev. 92. Therefore, where defendant pleaded, that at the time of the taking the property was in Lord *N.* and not in the plaintiff, he was held entitled to a return. *Sir N. Bacon's Ca.* Cro. Eliz. 475.

But an *avowry* is an acknowledgement by defendant of the taking of the distress, and then setting forth the cause for the purpose of a return. The distinction between a *justification* and an *avowry* therefore is, that the first goes not for a return. *Roll. Ab.* 319. But an avowry always does, and therefore shews a subsisting right at the time of the avowry, as for rent. *Danv. Ab.* 652.

(b) There are many good causes of avowry, for indeed a cause exists in every case where there is a right to distrain, as for rent arrear, damage-feasant, fines or amerciaments in courts leet or baron, tolls or customs, suits or services claimed by the custom of a manor, and poor's rates.

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it would admit the truth of the rest of the plea, *viz.* That the freehold was in *J. S.* which would be sufficient to bar his action. (Vide *Earl of Bedford's Case*, E. 25 Eliz. Cro. Eliz. 14 S. P.) *(a)* But in trespass *de bonis asportatis*, *ex. gr.* for taking the plaintiff's sheep, if the defendant justify the taking them damage-feasant as servant to *J. S.* the plaintiff may traverse the command or authority; for though *J. S.* had a right to take the cattle, yet a stranger who had no authority from him will be liable.

And there is a great difference between a justification in trespass, and an avowry in replevin, in another respect, *ex. gr.* for an amerciament in a court-leet; in the justification it is necessary for the defendant to set forth a warrant or precept, *&c.* but not to aver the matter of presentment, because his plea is only in excuse; but in avowry he ought to aver in fact that the plaintiff committed the crime for which he is amerced, because he is an actor, and is to recover, which must be upon the merits. —*Trevilian* v. *Pyne*, sup.

In trespass for breaking and entering the plaintiff's house, and taking his goods, the defendant pleaded, that the house is parcel of an half
[*56] yard-land, holden of the Earl of *Northumberland*, * by homage, fealty, escuage incertain, suit of court, inclosing his park with pales, and rent of a pound of cummin: and for three years rent arrear, and for the homage and fealty of the tenant, he, by the earl's command, entered and took, *&c.* The plaintiff traversed the tenure *modo et forma*. Special verdict that he held of the earl by homage, fealty, inclosing his park, rent of a pound of cummin, *et non aliter*; and judgment for the defendant; for though the verdict do not agree with the plea in the manner and nature of the tenure, yet it agrees in substance in the point for which the distress was made; and that is sufficient: for there is a difference between trespass and replevin, for in replevin it behoves the avowant to make a good title *in omnibus*. *(b)*

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(a) So held in *George* v. *Kinch*, 7 Mod. 481, where *Burnet*, J. recognized the case of *Trevilian* v. *Pyne*. But see more of this subject in Mr. Serjeant *Williams*, note (c), to *Potter* v. *North*, 1 Saund. 347.

In *Wood* v. *Tate*, 2 Bos. & Pull. N. R. 247, it was held that a servant of a corporation may make cognizance for taking a distress under a demise by the corporation, (not under their seal) notwithstanding a notice had been given by the aldermen (one of whom was a party to the demise) to pay the rent to them only, for the payment of rent to the servant admitted a yearly tenancy.

(b) And in *Goodman* v. *Aylin*, Yelv. 148, it was held, that as the avowant is to have a return, he ought to make a good title *in omnibus*, and the avowry or cognizance should contain sufficient matter. A defect in form, however, though not in substance, may be aided by the plea

If an avowry be made for rent, and it appear by the defendant's own shewing, that part of it is not yet due, yet the avowry will be good for the residue. (*Duppa* v. *Mayo*, T. 21 Car. II. 1 Saund. 285. *Battey* v. *Trevillion*, M. 32 Eliz. Moor, 278.) In such case the avowant must abate his avowry *quoad* the rent not due, and take judgment for the rest; but if it appear that he has title only to two undivided parts of the rent, the avowry shall abate.—*Richards* v. *Cornforth*, M. 9 W. III. 2 Salk. 580. *(a)*

So if the avowry be for part of a quarter or half a year's rent, he must shew how the rest is satisfied, or it will be bad.—*Johnson* v. *Baynes*, M. 7 W. III. 12 Mod. 84. Comb. 346. S. C. *Mounson* v. *Redshaw*, T. 19 Car. II. 1 Saund. 191.

In avowry for rent and a *nomine pœnæ* together, without alledging any demand of rent, the avowry is good for the rent, though it will be ill for the penalty.—*Duppa* v. *Mayo*, sup. *Howell* v. *Sambacks*, Hob. 133. *(b)*

Avowry for rent due at a latter day, is no bar in avowry for rent due at a former day; but an acquittal under seal is; but if not sealed, contrary proof will be admitted.

By 32 *Hen.* VIII. *c.* 27. The executors and administrators, of tenants in fee, fee-tail, or for life, or rent services, rent charges, rent seck, and

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plea of the adverse party. *Brett's Ca.* C. B. 7 Co. 25. But if the declaration be for taking goods, chattels, and beasts, and the avowry is for taking beasts only, it will be bad on demurrer. *Hunt* v. *Braines*, 4 Mod. 402. Vide etiam *Week* v. *Speed*, Salk. 94. et sup. p. 54.

In *Challoner* v. *Clayton*, 3 Salk. 306, defendant avowed, but did not set forth his title: this is not good. If, however, the defendant had the possession, it is a good bar against the plaintiff if he have no title, but he cannot give a return unless he shew property in the goods, and it is sufficient if they were delivered to him, for otherwise the judgment must be *quod quær. nil cap. per billam*, but no return. *Parker* v. *Meller*, 3 Salk. 54.

Upon a plea in replevin, which goes to the point of the action, defendant shall have a return without an avowry. *Parker* v. *Mellor*, 1 Raym. 217. But the avowry must set out an attornment on a fine under a devisee, from whom he claims. *Long* v. *Buckeridge*, 1 Stra. 106. and the commencement of a particular estate must always be shewn if either party avow or justify under it. *Scilly* v. *Dally*, 2 Salk. 562. 1 Ld. Raym. 331.

(a) Vide S. C. in 1 *Ld. Raym.* 255. and *Comy.* 42; and as to S. P. vide *Harrison* v. *Barnby*, 5 T. R. 248, and Mr. Serjeant *Williams'* notes (6. 8.) to *Duppa* v. *Mayo*, 1 Saund. 285.

(b) But where the issue was on a collateral matter, *viz. non concessit*, though no demand of the *nomine pœnæ* was laid, it was held to be cured by the verdict. *Wentworth's Ca.* Hutt. 42.

Where a man is sole seized, or has a title to an entire rent, he should distrain for it all at once, for the law will not multiply actions. *Holt* v. *Samback*, Cro. Car. 103. *Hunt* v. *Braines*, 4 Mod. 402, which seems to be S. C. as *Johnson* v. *Baynes*, 12. Mod. 84.

fee farms, may distrain upon the lands chargeable, so long as they remain in the possession of the tenant, who ought to have paid; or of any other person claiming under him by purchase, gift, or descent. The like remedy is given to husbands after the deaths of their wives, and to other persons after the death of the *Cestui que vie*. Lord *Coke* says, that the preamble concerning the executors and administrators of tenant for life, is to be intended of tenant *pur auter vie*, so long as *Cestui que vie* liveth; however, it has been since determined to extend to all tenants for life.—*Hool* v. *Bell*, H. 8 & 9 W. III. 1 Raym. 173.

Tenant for life of a rent-charge confessed a judgment, which was ex-
[*57] tended by *elegit*; tenant for life died, conusee distrained, *and in replevin avowed for the arrears incurred in the life of tenant for life; and upon demurrer the distress was holden to be bad, and not warranted by the statute. 1. Because the case of the conusee is not enumerated in it. 2. Because he comes in in the *post*. and not under the tenant for life.—The executor of a grantee of a rent-charge for divers years, if he so long live, is not within the statute.—*Pool* v. *Duncomb*, T. 1657.

Lord *Coke* says, if a man make a lease for life, or a gift in tail, reserving a rent, this is a rent-service within the statute; from whence it may be inferred, that he thought that a rent reserved upon a lease for years was not within it, and I apprehend that it is not, for the landlord is not tenant in fee, fee-tail, or for life, of such a rent; and it is the executors of such tenants only who are mentioned in the act. However in trespass, where it appeared the defendant had distrained the plaintiff's goods for rent due to his testator upon a lease for years, Lord Chief Justice *Lee* held it to be within the statute, and the defendant obtained a verdict.—*Powel* v. *Killick*, at Westminster, M. 25 Geo. 2. *(a)*

The act does not extend to rents out of copyholds.—*Appleton* v. *Doily*, M. 6 Jac. 1. Yelv. 135. *(b)*

By

(a) On plea of cognizance as bailiff to *R.* and that plaintiff was tenant to *R. by virtue of a certain demise;* it appeared that the plaintiff held under an agreement that *R.* would demise to him for fourteen years, and that he had been in possession three quarters of a year. Held that this was no demise; that plaintiff was not tenant from year to year, and that he might be ejected without notice. *Hegan* v. *Johnston*, 2 Taunt. 148.

(b) Neither does it give any right of distress to a tenant who had it not before; therefore if a tenant had such a right, and parted with it, his executors cannot claim it. *Co. Lit.* 162. Hence it is always necessary, in an avowry by executors or administrators, who have distrained for rent arrear, that they shall aver that the land remains in the possession of the tenant who ought to have paid, or some person who claims under him, for to such cases only does the statute extend. *Myles* v. *Willoughby*, Cro. Eliz. 547. An executor or administrator, however, must always bring

By 21 *Hen.* VIII. *c.* 19. If the avowry, cognizance, or justification be found for the defendant, or the plaintiff be nonsuited, the defendant shall recover such damages and costs as the plaintiff would have had if he had recovered. *(a)*—But note, this act mentions only persons avowing or making cognizance for rent-service, customs, services, damage-feasant, or for other rent or rents; so that it does not extend to an avowry for a *nomine pœnæ*, or for an estray; and therefore, if in such case damages and costs were given, the judgment would be reversed.—*Warner* v. *Hardyn*, T. 2 Car. 1. W. Jones, 135. *(b)*

In replevin the defendant avowed for £36 rent for a year and half: the plaintiff pleaded payment of £12 and issue thereon, and another issue as to the £24. The first issue was found for the plaintiff, and damages and costs taxed by the jury: but the second issue being found against the plaintiff, so that the defendant was entitled to a return, and to damages and costs, it was upon motion holden, that the jury finding

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bring himself within the statute; but where the avowry was as administratrix of rent, to which defendant was entitled in her own right, she nevertheless had judgment, her claim as administratrix being rejected as surplusage. *Browne* v. *Dunnery*, Hob. 208.

(a) Though the words of this statute are, that the lord *may* distrain *on* the lands within the lord's fee, yet if the beasts have been driven off the lands, but pursued by fresh suit, the lord may distrain *off* the lands. *Ca. of Avowry*, 9 Co. 22. And notwithstanding this statute, the lord may still elect to avow at common law if he pleases, for the statute is in the alternative "*may*," *Co. Lit.* 268, and that without naming any person against whom he so avows, yet he must alledge seisin by some certain tenant within forty years. *Ibid.* But if the defendant avow according to the statute, every plaintiff in replevin may, under sect. 4, avail himself of every answer to the avowry that is sufficient except disclaimer. In *Lucy* v. *Fisher*, Cro. Eliz. 146, however, defendant in his avowry mentioned the name of the tenant, which the statute did not require, but he concluded *secund. stat. &c.* This was held well within the statute, though the name should not have been mentioned. Where the tenant conveyed to the king, who granted over to *B.* it was held that the lord could not avow upon *B.* for by the grant to the king the tenure was at an end; the lord, therefore, should have declared according to the circumstances of his case. *Broker* v. *Smith*, Anders. 159.

(b) So where the avowry was for an amercement in a leet, and the plaintiff was nonsuited, the court held the case not within the statute, and the avowant was not entitled to damages and costs. *Porter* v. *Grey*, Cro. Eliz. 300.

But this statute has been held to extend to amercements in leets, heriots, estrays, *&c.* if the plaintiff be barred. *Haselip* v. *Chaplin*, Cro. Eliz. 257.

Where the judgment in replevin was, that the defendants should have a return of the cattle, and recover their damages and costs, assessed by a jury, *&c.* it is good, either as a judgment at common law, though the return be not adjudged irreplevisable, or as a judgment under stat. 21 *Hen.* 8. *c.* 19. which entitles the defendants to damages and costs. *Gamon* v. *Jones*, 4 T. R. 509.

damages and costs for the plaintiff was void.—*Dent* v. *Parso*, E. 1619. Cro. Jac. 473.

By 17 *Car.* II. *c.* 7. If the plaintiff in replevin be nonsuited before issue joined, the defendant making a suggestion in nature of an avowry or cognizance for rent, the court * shall award a writ to enquire of the rent in arrear, and of the value of the distress. Note; it has been the custom ever since this statute (as it was before) to enter judgment for a *retorn' habend'*; but notwithstanding, the defendant may enter a suggestion on this statute, and a writ of second deliverance will be no *supersedeas* to such writ.—The whole fact is to be proved, and may be litigated on the writ of enquiry.—*Cooper* v. *Sherbrook*, E. 32 Geo. 2. C. B. 2 Wils. 116. *(a)*

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By the same statute, in case the plaintiff be nonsuited after avowry or conusance made, and issue joined, or if the verdict shall be given against him, the jury shall, at the prayer of the defendant, enquire concerning the sum of the arrears, and the value of the goods and cattle distrained, and thereupon shall have judgment for such or so much thereof as the goods and cattle distrained amounted unto. *(b)* But in such case if the jury omit to enquire of the value of the rent arrear or of the cattle, it cannot be supplied by a writ of enquiry, because the statute confines the enquiry to the jury impanelled in the cause. (*Sheape* v. *Culpepper*, M.

(a) For the damages are not the things avowed for, but are given by stat. 21 *Hen.* VIII. as a compensation to the avowant; therefore, though the second deliverance supersede the effect of the judgment or nonsuit, *viz.* a return of the goods, yet the damages still continue. *Pratt* v. *Rutlcis*, 12 Mod. 547. *Baker* v. *Lade*, Carth. 253. *Qu. autem*, if, under the writ of enquiry, defendant shall not have all the rent avowed for, besides costs and damages; for *per Bathurst*, J. in *Cooper* v. *Sherbrook*, sup. the stat. of 17 *Car.* 2. intended that the proceedings by writ of enquiry, *fi. fa.* and *elegit*, should be final for the avowant to recover his damages, and that the plaintiff was to keep his cattle, notwithstanding the course of awarding a *retorno habendo*, which is a right judgment, (and still is entered up as before the statute), for the act has not altered the judgment at law, but only given a further remedy to the avowant.

It has also been held on this statute, that if the plaintiff be nonsuited, the defendant is not bound to take his remedy under the statute, for he may proceed by action on the replevin bond against the plaintiff and his sureties. *Waterman* v. *Yea*, *Lyde* v. *Laurence*, 2 Wils. 41.

(b) If the jury find for the plaintiff, they should also find damages; if the action is in the *detinet* only, they should give damages to the full value of the distress, as well as for the unlawful taking. *Petree* v. *Duke*, 2 Lutw. 1150. But in the common action in the *detinuit*, they give damages for the unlawful taking, and do not notice the cattle, because the plaintiff had them in his possession.

If the value of the distress shall not be found to be the full value of the arrears distrained for, the party, to whom such arrears were due, his executors or administrators may, from time to time, distrain again. Vide 17 *Car.* 2. *c.* 7. *F. N. B.* 72.

20 Car. II. 1 Lev. 255. Therefore in such case the defendant must take judgment *de retorno habendo* at common law; but it is not the same upon 21 *H.* 8. nor upon the 43 *Eliz. c.* 2. if the defendant avow as overseer for a distress for a poor's rate, because if the jury had enquired, it had been as an inquest on which no attaint would have lain, and the statute does not tie it up to the same jury. (*Tucker* v. *Stevens*, E. 6 Geo. I. C. B. *Herbert* v. *Waters*, M. 7 W. III. Carth. 362.)*(a)* And if the plaintiff being nonsuited bring a writ of second deliverance, though it will be a *supersedeas* to the writ *de retorno habendo*, yet it will be none to the writ of enquiry.—*Valentine* v. *Faucet*, T. 8 Geo. I. Str. 1021. Ca. temp. Hardw. 138.

Note; in writs of enquiry the jury set their hands and seals to the verdict; and upon the trial of such writs the judge of *Nisi Prius* is only assistant to the sheriff, and has no judicial power; and if the parties come to any agreement at the trial, the way is to bring it to the judge to sign, and after move above to have it made a rule of court.—*Case of Hampstead Water Farmers*, E. 13 W. III. 12 Mod. 519. *Anon.* H. 13 W. III. *Ibid.* 610.

The writ of second deliverance is a judicial writ depending upon the first original, and is given by stat. of *Westm.* 2. (13 *E.* 1. *c.* 2.) which re-

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(a) It has also been resolved on this statute, that if the plaintiff be nonsuited after avowry, the jury only who try the cause can assess the arrears, damages, &c. and if they omit it, it cannot be supplied by a writ of enquiry of rent in arrear to that jury. *Sheape v. Culpepper*, 1 Lev. 255. *Ward* v. *Culpepper*, 1 Vent. 40. Vide etiam *Freeman* v. *Archer*, 2 Bla. 763, where *Gould*, J. expressed a doubt whether a writ of enquiry could be granted to supply a defective verdict for defendant in case of an avowry for rent arrear; but in *Rees* v. *Morgan*, 3 T. R. 349, it was held, that, under this statute, the jury must find as well the amount of the rent arrear as of the goods distrained. Therefore, where the avowry was for £195, three years rent arrear, and the jury found a verdict for that sum as damages, without finding either the amount of the rent in arrear or the value of the cattle distrained, this was held to be error; but the court allowed the defendant to amend, and to enter his judgment *pro ret. hab.* after a writ of error brought.

This, however, is confined to cases within the statute, as avowries for rent, for, where defendant avowed the taking as a distress for poor rates, and the jury omitted to enquire of the damages, the court granted a writ of enquiry to supply the defect. *Dewell* v. *Marshall*, 3 Wils. 442. 2 Bla. 921. *Herbert* v. *Waters*, Salk. 205. And in general, as was laid down by Lord *Hardwicke*, in *Valentine* v. *Faucett*, sup. the court, in every case where it is not tied up by the statute 17 *Car.* 2. *c.* 7. *s.* 2. which respects only rent arrear, may grant a writ of enquiry to do complete justice; therefore it was so held in the case of poor rates, by *Gould*, J. in *Dewell* v. *Marshall*, 2 Bla. 921. So where defendant avowed for a taking damage-feasant, and the plaintiff was non-suited, a writ of enquiry was granted. *Humfreys* v. *Misdall*, Comb. 11. *Sed nota* the case of *Farmers of Hampstead Water*, sup. cites,

cites, that after the return is awarded, the party distrained does replevy again, and so the judgments given in the king's courts take no effect, wherefore it enacts, that when return is awarded to the distrainer, the sheriff shall be commanded by a judicial writ to make return, in which [*59] it shall *be expressed, that the sheriff shall not deliver them without writ, making mention of the judgment. And it further enacts, that if the party make default again, or for any other cause return of the distress be awarded, being now twice replevied, the distress shall remain irreplevisable. *(a)*

By 4 & 5 *Ann. c.* 16. The plaintiff, with leave of the court, may plead as many pleas as he shall think necessary; and if a verdict be found on any issue for the defendant, costs shall also be given; unless the judge certify that the plaintiff had a probable cause to plead such matters.—*Bright* v. *Jackson*, 28 Geo. 2. C. B. *(b)*

If issue be joined on the property, the defendant may give in evidence, the plaintiff's having the cattle in mitigation of damages.—*Anon.* Godb. 98.

If the plaintiff plead *riens* arrear in bar to an avowry for rent, he cannot upon such issue give in evidence *non-tenure.*

If the defendant avow the taking damage-feasant, and the plaintiff prescribe for common for all commonable cattle, and upon issue joined thereon, give in evidence common for sheep and horses only, this will not maintain the issue; but if he had a general common, and prescribed for common for any particular sort of cattle, it would be good.—*Pring* v. *Henley, per Ward*, C. B. at *Exon*, 1700. *(c)*

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(a) The advantage afforded by the provisions of this statute is, that the writ of enquiry awarded under it may be executed, notwithstanding the plaintiff has sued out a suit of second deliverance; and the same rule holds with respect to the writ of enquiry of damages, under 21 *Hen.* VIII. *c.* 19. which may be executed after a writ of second deliverance has been served. *Pratt* v. *Rutlidge*, Salk. 95. Vide etiam *Gamon* v. *Jones*, 4 T. Rep. 510.

(b) And an avowant (though not within the words) is within the meaning of the 4th section of this act, entitled to plead several avowries; and within the 5th section he was holden liable to pay costs on the avowries found against him. *Stone* v. *Forsyth*, 2 Dougl. 683. (709.) n. 2. But in *Coan* or *Cone* v. *Bowles*, 1 Salk. 205. Carth. 122. 4 Mod. 7. it was held, that an avowant is not a plaintiff within the meaning of 3 *H.* VII. *c.* 10, so as to be entitled to costs on the affirmation of a judgment in his favor on a writ of error.

(c) An inhabitant, having common as such, shall not have other beasts to common there than such as are *levant* and *couchant* in the vill where he is inhabitant, and there is no diversity between that and common-appendant, for he that has common-appendant to an acre of land shall not use it with other beasts

If a man prescribe for a certain number of cattle, it is not necessary to shew they were levant and couchant, because it is no prejudice to the owner of the soil, the number being ascertained: (*Richards* v. *Squib*, 10 W. III. 1 Raym. 726.) But if the prescription be for a number uncertain, they must be levant and couchant; *(a)* but a prescription for all cattle levant and couchant will be good; and need not be for all his cattle; for levancy and couchancy are a sufficient ascertaining what cattle may be put in, for no more shall be said to be levant and couchant than the land is sufficient to maintain, and if the plaintiff were guilty of any fraud as to that, the defendant may take advantage of it in pleading. (*Handing* v. *Johnson*, M. 20 Geo. 2. *Leech* v. *Widsley*, H. 1670. 1 Vent. 54.) If the jury find the plaintiff has common by prescription *prout* he has prescribed, paying for it every year one penny to the defendant; the plaintiff fails in his prescription, for it is intire, and the payment of one penny parcel of it. (*Lovelace* v. *Reynolds*, Cro. Eliz. 546. 563.) *(b)* But in *Gray* v. *Fletcher*, (5 Co. 78. Cro. Eliz. 405.) where the copyholder prescribed to have common, and the jury found he had common *prout* he had prescribed, but also found that the copyholders of that manor had used to pay to the lord a hen and five eggs yearly *pro eadem communia*, *it was adjudged to be well; for [*60] they were two prescriptions, and the distinction between this case, and the case of *Lovelace* v. *Reynolds*, was taken and allowed in *Kenchin* v. *Knight*, M. 23 Geo. II. 1 Wils. 253.

So if a man prescribe for common-appendant to 300 acres in four towns, and the evidence is, that it is appendant to 200 acres, in two of the towns only, this will not maintain the issue; (*Michel* v. *Mortimer*, M. 15 Jac. 1. Hob. 209.) but if he prescribe for common-appendant

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beasts than those which are *levant* and *couchant* upon the said acre. *Bro. Abr.* tit. *Commoner* and *Common*, pl. 8. See more as to an averment of the *levancy* and *couchancy* of cattle in Mr. Serjeant *Williams*, note (4) to *Manchester Earl* v. *Vale*, 1 Saund. 28.

(a) By levancy and couchancy is meant the possession of such lands as will support cattle during the winter. *Scholes* v. *Hargraves*, 5 T. Rep. 48; therefore the plaintiff must prove that he is in possession of some land whereon cattle may be levant and couchant through the winter. *S. C.* Et vide *Benson* v. *Chester*, 8 T. Rep. 400. S. P.

(b) In *Bushwood* v. *Pond*, Cro. Eliz. 722, it was held, that a man may prescribe for less than he proves. But he must prove as large a right as he prescribes. *Rotheram* v. *Green*, Noy. 67. Yet he cannot prescribe a right of common over his own field; therefore if he prescribe such a right over a field of 100 acres, his own being parcel thereof, he may except that from his prescription. *Conyers* v. *Jackson*, Clayt. 19.

to

to his house and 20 acres, and upon evidence it appears that he has but 18, that will maintain his issue.—*Gregory* v. *Hill*, M. 38 Eliz. Cro. Eliz. 531. *(a)*

If a man avow taking the cattle, damage-feasant, and the plaintiff plead tender of amends and a refusal, he shall recover damages for the detaining, and not for the taking, because the taking was lawful; but if the tender were before the taking, the taking is tortious; if after impounding, neither the taking nor detaining is tortious. *(b)* And after the avowant has had return irreplevisable, yet if the plaintiff make sufficient tender, he may have detinue for the detainer after.—*Horne* v. *Lewin*, H. 12 W. III. Salk. 584. Vide *Carpenter's Ca.* M. 8 Jac. I. 8 Co. 290.

In an avowry for rent the plaintiff may plead a tender and refusal, without bringing the money into court; because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *(c)*

Note; That in order to prevent vexatious replevins of distresses for rent, the 11 *Geo.* 2. *c.* 19. enacts, that sheriffs and other officers granting replevins, shall take from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (to be

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(a) Neither inhabitants nor tenants at will can prescribe, but yet they may say, that in the same vill there has been an usage and custom from time, &c. and that all the inhabitants or tenants of the vill *à voluntate*, &c. have use, &c. *Bro. Abr.* tit. *Custom*, 207-49. *Prescription*, 152-76. The plea in this case was of a custom, that inhabitants, residing in *antiq. mess.* in S. have a right of common, &c. *Per Cur.* this is not within any description of common. He who claimeth such common cannot have any action for it. Tenant in fee-simple prescribes in his own name, but a tenant for life, years, and at will, in the name of him who hath the fee, and he who hath not any interest cannot have any common. A prescription is always alledged in the person, a custom in the land. *Gatcward's Ca.* 6 Co. 60. (b).

There may be a custom for an easement, but for a profit *à prendre*, the party must prescribe in *à que estate*. *Grimstead* v. *Marlow*, 4 T. R. 718.

As to prescription for an inhabitant or occupier, vide *Weekly* v. *Wildman*, Ld. Raym. 405.

(b) Case will not lie for detaining the plaintiff's cattle in the pound after a tender of amends, but the specific remedy of replevin must be pursued. *Anscombe* v. *Shore*, 1 Camp. 285.

(c) On payment into court of the rent avowed for, with costs, the court will stay the proceedings in replevin. *Vernon* v. *Wynne*, 1 H. Bla. 24. So before the avowry on payment of debt and costs to that time, with the costs of the application, but not on payment of the rent and costs to the time of the tender, which had been made of such rent and costs after the distress and before the replevin. *Hopkins* v. *Shrole*, 1 Bos. & Pull. 382. Nor upon payment of costs on application of the defendant, though no special damage was assigned in the declaration. *Hodgkinson* v. *Snibson*, 3 Bos. & Pull. 603.

ascertained

ascertained by oath) conditioned for prosecuting the suit with effect, and for a return of the goods; and the sheriff is authorized to assign the bond to the avowant or person making conusance; *(a)* and if the bond be forfeited, the avowant may bring an action in his own name, and the court may by rule give relief to the parties, *&c.(b)*

It

(a) In *Chapman* v. *Butcher*, Carth. 248, plaintiff in replevin gave a bond to the bailiff of N. W. *to prosecute with effect* in the court of record of that borough, and to make return, *if return should be adjudged by law.* A replevin was brought in the borough court, and judgment given for defendant, which was reversed in B. R. and a new judgment was given, that the plaint should abate, and defendant have a return. An action was then brought on the bond, and it was holden a lawful bond; but, with respect to the condition, it was determined, that it was not confined to a prosecution in the court of N. W. but extended to the prosecution of a writ of error in B. R. for that was a part of the suit commenced below, and by the words, "if a return should be adjudged by law;" the condition was not confined to the judgment of any particular court: wherefore the court gave judgment for the bailiffs.

Again, in *Morgan* v. *Griffith*, 7 Mod. 380, *Lee*, C. J. said, that in all replevin bonds there were three several independent conditions: one to prosecute, another to return the goods, and a third to indemnify the sheriff, and that a breach may be assigned on any one of them. "To prosecute with effect," his lordship said, must be not only to proceed to the end of the suit, but to succeed in it; it is not a completion of the condition, therefore, to have levied a plaint in the county-court, for the words extend to all proceedings, from the beginning to the end, as well in the court below, as by *re. fa. lo.* in the superior court. Vide etiam *Vaughan* v. *Norris*, Ca. temp. Hardw. 137. *Ormond* v. *Brierly*, Carth. 519. 12 Mod. 380.

In *Dias* v. *Freeman*, 5 T. Rep. 195, it was held, that the breach assigned in a declaration on a replevin bond, ought to pursue the condition, but it need not go further. And in *Cutfield* v. *Corney*, 2 Wils. 83, it was held, that if the plaintiff in replevin die after declaration and before avowry, no *ret. habend.* can be issued.

(b) It is the general opinion of the pleaders, that a replevin bond is not assignable, unless an avowry or cognizance has been pleaded. If therefore the plaintiff in replevin suffer himself to be nonprossed, the proceedings on the bond must be in the sheriff's name. 11 *Geo.* 2. *c.* 19. *s.* 23. *Qu. tamen. s.* 22. which enables defendant to avow and make cognizance. *S.* 23. also speaks of persons *avowing* or *making cognizance*, which may fairly be considered as equivalent to "defendants." The statute also directs the sheriff to assign where the bond is forfeited. Now the bond is forfeited, if the plaintiff is nonprossed. *Qu.* therefore, whether every person making a distress is not within the equity of the statute. *See the cases ante*, note *(a)*.

The bond to the sheriff is assignable to the avowant only, and he may bring his action upon it without joining the party making cognizance. *Archer* v. *Dudley*, 1 Bos. & Pull. 381. (n).

And where, in an action by the assignee, it did not appear that the plaintiff was the avowant, or person making cognizance, the court referred to the replevin suit, as being of record in the court, and the declaration concluding *prout patet per recordum*. *Barker* v. *Horton*, Willes, 460.

A defendant

It has been holden, that an action upon the case will lie against a sheriff for taking insufficient pledges, and that without any previous *sci. fa.* against the pledges.—*Prouse* v. *Pattison*, H. 13 Geo. 2. *(a)*

In such action against the sheriff, some evidence must be given by the plaintiff of the insufficiency of the pledges or sureties; but very slight evidence is sufficient to throw the proof on the sheriff: For the sureties are known to him, and he is to take care that they are sufficient.—*Saunders* v. *Darling & al.* Sittings at *Westminster*, C. B. T. 10 Geo. 3.

[61] In replevin, both plaintiff and defendant are actors, therefore either party may carry down the cause; and if the defendant give notice, and do not go on to trial, the court will give costs against him; for the same reason, the defendant may not move for judgment of nonsuit, unless the plaintiff have given notice of trial.—*Eggleton* v. *Smart*, T. 2 Geo. 3. 1 Bla. 375. *(b)*

A defendant in replevin, being entitled to an assignment of the bond, if the plaintiff do not appear in the county court, and prosecute, &c. according to the condition, he may sue thereon as assignee of the sheriff in the superior courts, though the replevin be not removed out of the county court. *Dias* v. *Freeman*, sup. in note (*a*).

(a) If the sheriff neglect to take a replevin bond, the court will not grant an attachment against him, but leave the party to his remedy by action, in which action the party can only recover double the value of the goods distrained. *Twells* v. *Colville*, Willes, 375. *R.* v. *Lewis*, 2 T. Rep. 617.

In an action, however, against the sheriff for taking insufficient pledges, the court of C. B. will not order him to pay the costs recovered by the defendant in replevin, but the defendant has a more summary mode against the sheriff, the under sheriff, and the replevin clerk, by motion, as in *Richards* v. *Acton*, 2 Bla. 1220. Vide etiam ante, p. 52. n. (b).

(b) Vide etiam *Jones* v. *Concannon*, 3 T. Rep. 661. *Shortridge* v. *Hiern*, 5 T. Rep. 400. In *Hicks* v. *Young*, 2 Barnes, 371, in replevin, plaintiff did not appear at the assizes; defendant therefore brought down the record; and his counsel insisting strongly on a verdict, Baron *Reynolds* complied, but on motion by plaintiff to set it aside, the court, after hearing the judge's report, ordered the postea to be amended, and a nonsuit to be returned instead of a verdict for defendant, and that defendant should pay the costs of the motion.

Plaintiff, obtaining judgment in replevin, was not entitled to costs at common law; but by the statute of *Gloucester* (6 *Ed.* 1. *c.* 1. *s.* 2.) the plaintiff is entitled to costs in all cases where he was entitled to damages before that statute, therefore he shall now have his costs in replevin. *Tidd's Pra.* 863. (2d ed.)

Where there were several defendants, and one pleaded *non cepit*, and was acquitted, in which case (under stat. 8 & 9 *W.* 3. *c.* 11.) he would have been entitled to costs in trespass, if the judge did not certify there was good ground to make him a defendant; yet in replevin he cannot have his costs, for replevin is not mentioned in the statute, and the statutes giving costs are to be strictly construed. *Ingle* v. *Wordsworth*, 3 Burr. 1284.

CHAPTER

CHAPTER V.

OF RESCOUS.

Rescous is twofold, and is applicable,

1. To goods and chattels distrained.
2. To a person arrested.

1. *RESCOUS* (in its first sense) is where the owner, or other person, takes away by force a thing distrained from the person distraining, *(a)* but the person must be actually in possession of the thing, or else it is no rescous; as if a man come to make a distress, and he be disturbed to do it; but the party may bring an action on the case for this disturbance.—*F. N. B.* 102.

The plaintiff ought to count for what rent or services he took the distress, and the defendant may traverse the tenure. *Ib.* 230.

If a man send his servant to distrain for rent, &c. and rescous be made, the master shall have the writ, *(b)* and he may join in the writ for the assault and battery of the servant.—*Co. Litt.* 47. 160.

If a distress be taken without cause, as where no rent is due, one may make rescous *before the cattle is impounded.* So if the owner tender the rent before the distress taken.

If a man distrain 40 sheep of *A.'s*, and as many of *B.'s*, damage-feasant, *A.* cannot by reason of the right of common in the place where, and that he could not separate his sheep from *B.'s*, justify rescuing *B.'s* sheep with his own. (*Jennings* v. *Plaistow*, E. 1620. Cro. Jac. 468. Co. Litt. 161.) *N. B.* The beasts must be damage-feasant at the time of the distress, and if they were damage-feasant yesterday, and again to-day, they can only be distrained for the damage they are then doing. (*Vaspor* v. *Edward*, M. 13 W. III. 12 Mod. 660.) But by 11 *Geo.* 2. *c.* 19. If the lessee fraudulently convey * his goods [*62] from the premises, the lessor may within thirty days seize them as a distress, wherever found.

If the defendant plead not guilty, (which is the general issue) he cannot give in evidence non-tenure of the plaintiff who distrained for rent, but he ought to plead it.—*Heath's Maxim*, 76.

But this action is rarely brought now-a-days, but a special action upon the case, in which non-tenure might be given in evidence on the general

(a) Vide 1 *Inst.* 160. *(b)* Vide *F. N. B.* 101.

general issue.—Note; by 2 *IV. & M. c. 5. s. 4.* the plaintiff shall recover *treble* damages, if the distress be for rent, in such action upon the case for an unlawful rescous. *(a)*

2. *Rescous* (in its second sense) may be made of any one taken up on legal process, and for such rescous the plaintiff may bring an action of rescous, or an action on the case against the rescuers. *(b)* To support his action, it will be necessary for him to prove, 1. The original cause of action. 2. The writ and warrant; which must be by producing sworn copies. 3. The arrest, to shew it legal. 4. In point of damage, it is expedient to prove that the person arrested became insolvent, or not to be found; but this is not necessary, for the defendant being guilty of violence against the process of the law shall have no favour. (*Wilson* v. *Geary*, T. 3 Ann. 6 Mod. 211.) However he may give in evidence, in mitigation of damages, the ability of the person arrested, or that he is still amenable to justice; yet if the jury give the whole debt in damages, the court will not grant a new trial.—*Kent* v. *Kelway*, 7 Jac. 1. Jenk. 311. pl. 93.

The person rescued may be a witness for the defendant, and though he be *particeps criminis*, if the defendant be guilty, yet it shall only go to his credit.—*Wilson* v. *Geary*, sup. *(c)*

Note; That bare words will not make an arrest, but if the bailiff touch the person, it is an arrest, and the retreat a rescous. (*Genner* v. *Sparkes*, T. 1704. Salk. 79.) On a motion for an attachment against three persons for a rescous of a person taken in execution, it was objected that there had not been a legal arrest, as the bailiff had never touched the defendant—*per curiam*, this is a good arrest; and if the

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(a) And the word "*treble*" in this statute has been construed to refer to the costs as well as the damages. *Lawson* v. *Story*, Ld. Raym. 19. Salk. 205.

(b) Which latter remedy is now most usually adopted, the former having grown out of use.

(c) Vide etiam *Anon.* 1 Vent. 306.

In *Hawkins* v. *Plomer*, 2 Bla. 1048, it was held, that if the sheriff return *cepi corpus*, and the ground of complaint be, that the defendant was not forthcoming at the return of the writ, the plaintiff must prove his debt, and the writ, and return, but not the caption, that being admitted by the return. Next he must shew, that defendant was at large, or in improper custody after the return of the writ, and that no bail was put in whereby the plaintiff was injured. *Atkinson* v. *Matteson*, 2 T. Rep. 172; for where a sheriff's officer kept the defendant after the return of the writ, and then took him to prison, so that the plaintiff was not delayed, it was held, that this action would not lie. *Plank* v. *Anderson*, 5 T. Rep. 37; and indeed it is for permitting the defendant to be at large without a bail bond, that this action is most commonly brought; in which case the court will not stay proceedings on the defendant's putting in bail. *Fuller* v. *Prest*, 7 T. Rep. 109.

bailiff

bailiff who has a process against one, says to him when he is on horseback, or in a coach, "you are my prisoner, I have a writ against you," upon which he submits, turns back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process: but if instead of going with the bailiff, he had gone or fled from him, it could be no arrest unless the bailiff had laid hold of him.—*Homer* v. *Battyn & al.* B. R. H. 12 Geo. 2.

By 29 *Car.* II. *c.* 7. *s.* 6. An arrest may be made on a *Sunday* for [63] treason, felony, or breach of the peace; but in other cases, an arrest on a *Sunday* is void, *(a)* insomuch that the party may have an action of false imprisonment: (*Wilson* v. *Tucker*, T. 1695. Salk. 78.) But a person may be re-taken on a *Sunday*, when arrested the day before. *(b)* So bail may take their prisoner on a *Sunday*, and render him on the next day. *(c)*

Chief Justice *Holt* doubted whether an arrest made by a bailiff's servant would be lawful, even though in the presence of a bailiff; and where the bailiff sent his follower up stairs to arrest a man who was rescued by the defendant, reserved the case for his opinion. But howsoever such a case might be determined, yet it would certainly not be good, if the bailiff were not *quodam modo* in his company.—*Wilson* v. *Geary*, sup. *(d)*

It is not necessary to shew the warrant, or to tell at whose suit you arrest him, unless he demand it: And if you have two warrants in your

(a) As this act directs that the execution of every process on the Lord's day shall be void to all intents and purposes, the regularity or irregularity of any proceedings cannot depend on the subsequent assent of the party to waive any objection to such proceedings. *Taylor* v. *Philips*, 3 East, 155.

(b) For he was in the custody of the law by the first arrest, and it is an original arrest on a *Sunday* only that this statute prohibits. *Parker* v. *Moor*, Salk. 626. So on an escape warrant; a man may be arrested on a *Sunday*, for that is in nature of a fresh pursuit, and not an original proceeding and commitment, but the old commitment continued. *S. C.* Ld. Raym. 1028. 6 Mod. 95.

(c) So may a man be taken on a *Sunday* upon an attachment for a rescue. *Anon.* Willes, 459.

But not on a rule *nisi* for an attachment on non-payment of money due on the master's allocatur. *M'Ilcham* v. *Smith*, 8 T. Rep. 86. Nor after a voluntary escape. *Atkinson* v. *Jameson*, 5 T. Rep. 25. which recognized *Featherstone* v. *Atkinson*, Barnes, 373, in which case the distinction between a voluntary and a negligent escape was taken.

Nor for non-payment of a penalty by defendant, who has been convicted on a penal statute. *Rex* v. *Myers*, 1 T. Rep. 265.

And where defendant was arrested on a *Sunday* by a writ out of the *Marshalsea*, the court of *King's Bench* refused to discharge him, saying he must bring an action for false imprisonment. *Wilson* v. *Guttery*, 5 Mod. 95.

(d) But it will be sufficient if he be near and acting in the arrest. *Blatch* v. *Archer*, Cowp. 65.

pocket

pockets against him and produce neither, if he be rescued, either party at whose suit the warrants were made out may bring an action against the rescuers.—*Hodges* v. *Marks*, T. 1619. Cro. Jac. 485. (*a*)

If the party rescued were taken upon process of execution, the sheriff may maintain an action against the rescuers, because he is liable to an action of escape; for he cannot return a rescous as he may upon mesne process. (*May* v. *Proby*, H. 1617. Cro. Jac. 419.) But if the prisoner had been once in gaol upon mesne process, the sheriff ought at his peril to keep him, and a rescous from thence is no excuse for him, neither is it an excuse where the sheriff is bringing him up by *habeas corpus*; (*May* v. *London Sheriffs*, H. 1617. 1 Rol. Rep. 440.) and consequently in such case likewise, he may have an action against the rescuers.—*Crompton* v. *Ward*, E. 1721. 1 Stra. 434. (*b*)

In

(*a*) A bailiff sworn, and commonly known to be such, need not shew his warrant, though the party demands it. *Mackalley's Ca.* 9 Co. 68, 69. 2 *Hawk. P. C.* 85. If an action is laid in one of the compters in *London*, a city serjeant may arrest the party without the sheriff's warrant. 1 *Lill. Abr.* 94. And by the custom of *London*, a debtor may be arrested before the debt has become due, to make him find sureties, but not by the common law. 1 *Nels. Abr.* 258. A bailiff having a writ to arrest *A. B.* comes up to another person, and asks him if his name is *A. B.*, and he answers that it is, if the bailiff arrest him, an action will lie for the false arrest. Lane, 49. *Sed quære*, if a warrant be to take *A.* the son of *B.*, and the bailiff arrests the son of *D.* who is the person intended, but not the party within his warrant, it will be a false arrest. *Ibid.*

(*b*) In *May* v. *Proby*, sup. it was held, that if the sheriff arrests a man on mesne process, and he is rescued on going to gaol, the sheriff shall not be liable, for though he is bound to arrest a man against whom he has a writ, if he meets him, and the man is pointed out to him, yet he cannot be supposed to have the *posse comitatus* always with him; and on the same principle, it was held in *Clark's Case*, Cro. Eliz. 873, that the sheriff shall be excused in all cases of mesne process. So where he is sued for an escape on mesne process, if he plead a rescue he is not bound to shew that the rescue was returned. *Gorges* v. *Gore*, 3 Lev. 46.

An escape occasioned by fire, or by the king's enemies, will excuse the sheriff, but not where the prison is broke by rebels or traitors, for against them he may raise the *posse comit.* 33 Hen. VI. 1. *Elliot* v. *Norfolk*, 4 T. Rep. 789.

A recaption upon a fresh suit is also a ground of excuse for the sheriff. *Ridgway's Ca.* 3 Co. 52. But it must be before action brought. *Whiting* v. *Reynall*, Cro. Jac. 657. for a recaption on the same day the action was brought, will not do. *Harvey* v. *Reynall*, W. Jones, 145.

After a *voluntary* escape, gaoler cannot retake his prisoner, but the plaintiff may by an escape warrant, and proceed to judgment against either the defendant or the gaoler, but this is confined to a case of mesne process only. *Ravenscroft* v. *Eyles*, 2 Wils. 295. *Key* v. *Briggs*, Skin. 582, S. P. for all writs on mesne process must be returnable in the same or the next term. *Shirley* v. *Wright*, 2 Salk. 700. But in the case of an execution plaintiff may

retake

In the return of a rescous, it is not necessary to aver the place where the rescous was made, if the place of the arrest be shewn, for the rescous shall be intended to be in the same place.—It seems as if such a return is traversable. *Rex* v. *Clark et al.* T. 29 Car. 2. Dy. 212. S. P.

See more of the misbehavior and liability of sheriffs and their officers, in cases of escape under execution, in the next chapter.

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retake him twelve months after without a *sci. fa.* *Lenthall* v. *Gardener*, post, 69. And so though the plaintiff has recovered against the gaoler, if he did not recover the whole of his debt. *Collop* v. *Brandley*, Ibid.

But after an *involuntary* escape, if the party return, and surrender before action brought, the officer shall be excused. *Chambers* v. *Gambier*, Comy. 554. *Bonafous* v. *Walker*, 2 T. Rep. 126.

After a *negligent* escape, the gaoler may retake the prisoner at any time, but if after the escape plaintiff sends a discharge before recaption, the gaoler cannot retake him for his fees. *Willing* v. *Goad*, 2 Stra. 908.

For the escape of a prisoner *in execution*, the law has provided another remedy, *viz.* by action of debt on the statute of *Westm.* 2. (13 *Ed.* 1. 11.) and 1 *Ric.* 1. 12.

CHAPTER VI.

OF CASE FOR MISBEHAVIOR IN AN OFFICE, TRUST, OR DUTY. [64]

ANOTHER action which may be brought for an injury affecting a man's personal property, is trespass; but as that lies likewise for an injury affecting his real property, I shall defer what I have to say upon it to the next book, and proceed in the present place to take notice for what misbehaviour in an office, trust, or duty, an action on the case will lie.

As to sheriffs and other judicial and ministerial officers.—It is the proper remedy for all false returns by a sheriff *(a)*. *Bag's Case*, T. 13 Jac.

(*a*) The office of sheriff is both *judicial* and *ministerial*, but in his *judicial* capacity no action will lie against him for misconduct. *Metcalfe* v. *Hodgson*, Hut. 120. But it will lie for a false return, an escape, or rescue, and for extortion, and so for an informal or improper execution.

And so it will for default in executing writs.

So for *suppressio veri*, as well as *allegatio falsi*. *R.* v. *Lyme Regis Corporation*, 1 Doug. 145. (149).

An action for misbehaviour in the office of sheriff must be brought against the high sheriff, though the under sheriff or bailiff be the person actually guilty. *Cameron* v. *Reynolds*, Cowp. 403.

No action lies against a sheriff upon a promise to execute a bill of sale to the plaintiff's nominees, for it

Jac. I. 11 Co. 38. So if a mayor, &c. return a good cause to a *mandamus*, the matter of which is false; though now by 9 *Ann. c.* 20. *s.* 2. the party may in many cases traverse the return, and is not put to his action.—*Walker* v. *Griffiths*, M. 26 Geo. 2.

(Note; an action for a false return ought to be laid either in the county of *Middlesex*, where the return is, or in the county where it was made.)

So for a wilful misbehaviour in a ministerial office, by which the party is damnified; as denying a poll to one who stands candidate for an elective office (such as bridge-master;) and it need not be averred in the declaration, that he would have been chosen if the poll had been taken. So for refusing to take his vote at an election. So for not returning him who is duly chosen.—*Turner* v. *Sterling*, M. 23 Car. II. 2 Vent. 25. 2 Lev. 50. S. C. nom. *Starling* v. *Turner*. (*a*)

If my servant be robbed, and he go to a justice of peace, and pray to be examined touching the robbery, and the justice refuse to examine him, so that I am thereby damnified, and cannot proceed against the hundred, I may have an action against the justice.—*Green* v. *Buckle Church Hund.* T. 32 Eliz. 1 Leon. 323.

If a sheriff or any other officer suffer any person who is arrested, or taken in execution, to escape, the party at whose suit, &c. may have a special action on the case against him; (*Dr. Drury's Ca.* E. 1610. 8 Co. 241.) and it is necessary to set forth all the formalities required by law in other cases; (*Gold* v. *Strode*, T. 2 W. & M. Carth. 148.) and therefore, if upon a judgment by a testator, his executor bring a *sci. fa.* and have judgment, whereupon a *ca. sa.* issues and the person is taken and escapes; in an action against the sheriff the plaintiff may declare briefly upon the judgment in the *sci. fa.* (*Jones* v. *Pope*, M. 18 Car. II. [*65] 1 Saund. 37.) But if he declare that he sued out a writ of * execution, without setting forth any judgment, it will be an incurable fault; for by this means the defendant loses the benefit of pleading *nul tiel record.* (*Burton* v. *Eyre*, M. 1611. Cro. Jac. 289.) But though error be in the process, the sheriff cannot take advantage of it.—*Martyn* v. *Hendeye*, Sty. 232.

Yet where an action was brought against the marshal of *K. B.* for not receiving a copy of a declaration against a prisoner *per quod* he lost

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it is no part of the office of sheriff to execute a bill of sale at an appraised value. *S. C.*

(*a*) Case lies by a judge in the colonies against the governor for maliciously suspending him from his office, without a reasonable cause. *Sutherland* v. *Murray*, cited in 1 T. R. 538.

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his suit; it appearing that the declaration was tendered at the prison, before the bill was filed, the plaintiff was nonsuited, though it was strongly insisted that an officer could only take advantage of process being void, and not of its being voidable.—*Ekins* v. *Ashton*, Mid. 1752, *per Lee*, C. J.

And where a *ca. sa.* was executed on a judgment given in an inferior court in debt upon a bond made *extra jurisdictionem*, and an escape, the court held no action would lie for the escape; because *coram non judice*.—*Anon.* 1689. Mar. 8. *(a)*

Case will lie for the party against the sheriff, for an escape suffered upon an outlawry or mesne process; for though the party is in custody merely at the suit of the king, and the plaintiff has no interest in his body, yet he cannot have his outlawry reversed without security first given to appear to a new original.—*Cook* v. *Champness*, E. 4 Geo. 2. Fitzg. 265. *Bonnet* v. *Stokeley*, Cro. Eliz. 652. S. P.

If the plaintiff declare that he had *J. S.* and his wife in execution, and that the defendant suffered them to escape, and the jury find specially, that the husband only was taken in execution (it being a debt due from the wife before coverture), and that he escaped, he shall have judgment; for the substance of the issue is found.—*Roberts* v. *Herbert*, M. 1660. 1 Sid. 5.

So if both baron and feme be taken in execution, and the feme be suffered to escape, an action will lie, though the baron continue in prison.—1 *Rol. Abr.* 810, (F.) pl. 5.

So if the jury find that *J. S.* was taken by the former sheriff, and that he was legally in the custody of the defendant, who suffered him to escape. (*King* v. *Andrews*, M. 1615. Cro. Jac. 380.) So if they find he was taken on an *alias ca. sa.* where the plaintiff declares on *ca. sa.* (*Foster*

(a) So where *A.* levied a plaint in the sheriff's court against one who was then in the counter upon a former plaint, and the sheriff permitted him to escape, *A.* may bring this action against the sheriff, for, by entering the plaint, and charging the defendant in the counter, he is actually in custody of the sheriff. *Jackson* v. *Humphreys*, Salk. 273.

And so will this action lie where a court not having jurisdiction, orders an officer to discharge a prisoner. As where the county justices order the discharge of an insolvent debtor at an improper adjournment of the general quarter sessions under the act of 37 *Geo.* 3. c. 112, the court (agreeable to the rule laid down in the *Marshalsea Case*, 10 Co. 76.) held the proceeding *coram non judice*, and that the prisoners discharged was an escape, for which the officer was held liable at the suit of a creditor. *Brown* v. *Compton*, 8 T. Rep. 424, by which decision the case of *Orby* v. *Hales*, 1 Ld. Raym. 3, was over-ruled; the creditor, however, in such case may retake the prisoner on an escape warrant. Vide *Anon.* Salk. 273.

v. *Jackson*, Hob. 55.) So if the escape be proved on another day, if it be before the action commenced.—*King* v. *Andrews*, sup.

So if it be alledged that the prisoner was surrendered to him in the parish of *B.* and it is proved to be in the parish of *A.* for the surrender is the material thing, and it differs from trespass, where every part of the declaration is descriptive.—*Oats* v. *Machin*, T. 9 Geo. 2, *per Raym.* 1 Stra. 595.

[66] The plaintiff need neither produce the *ca. sa.* nor the copy of it, but the return of it is sufficient, and the *ca. sa.* need not be set forth in the declaration. (*Tildar* v. *Sutton*, E. 2 Ann. *per Holt*, Guildhall. Salk. MSS.) But if it be set forth with a *scilicet*, that it issued on such a day, it may be doubtful whether he ought not to prove the *ca. sa.* with the true *teste*; otherwise against the sheriff, the warrant is sufficient evidence, though it would not be so for him.—*Johnson* v. *Gibbs*, Exon. 1698, *per Holt*. Salk. MSS. *(a)*

The confession of the under-sheriff is evidence against the sheriff, because in effect it charges himself.—*Yabsley* v. *Dobley*, T. 9 W. III. 1 Raym. 190.

If it appear in evidence that the prisoner was taken upon a void judgment, the plaintiff cannot recover; but it is otherwise in the case of an erroneous judgment.—*Gold* v. *Strode*, T. 2 W. & M. Carth. 148, ante 64, S. C. *(b)*

Note; where the court in which judgment was obtained had cognizance of the cause, the judgment is only erroneous; but if the court had no jurisdiction, it is void.

So where the defendant is taken on a *ca. sa.* issued after the year, and escapes, debt will lie against the sheriff, though the process erroneously awarded; for the sheriff may justify in an action of false imprisonment, and therefore may not set him at large.—*Bushe's Case*, T. 1590. Cro. Eliz. 188.

Note; that if *A.* be in custody at the suit of *B.* and a writ be delivered to the sheriff at the suit of *D.* the delivery of the writ is an arrest in law; and if *A.* escape, *D.* may bring debt against the sheriff for an escape.—*Jackson* v. *Humphreys*, T. 5 Ann. Salk. 274. *(c)*

If

(*a*) The indorsement of the *non est inv.* upon a *ca. sa.* is sufficient evidence of its delivery to the sheriff. *Blatch* v. *Archer*, Cowp. 63.

And it seems the indorsement of a bailiff's name on the writ is sufficient evidence that there was a warrant to him in an action against the sheriff for an escape. *Ibid.*

(*b*) Vide *Burton* v. *Eyre*, Cro. Jac. 289. *Shirley* v. *Wright*, Ld. Raym. 775. Salk. 700.

(*c*) So where a *ca. sa.* against *A.* at the suit of *B.* is delivered to the sheriff,

If the plaintiff declare, That whereas he had a good cause of action against *J. S.* and sued out a *latitat* against him, that the defendant arrested him, and suffered him to escape; he must prove a cause of action, else he will be nonsuited; though the cause of action need not be for the same sum mentioned in the declaration: but if the declaration be on a *latitat* in a plea of trespass, and the writ produced be in a plea of trespass, *ac etiam billæ* £20, it will not support the declaration.—*Gunter* v. *Cleyton*, E. 25 Car. II. 2 Lev. 85. *(a)*

If the prison take fire, or be broken open by the king's enemies, by means whereof the prisoners escape, this will excuse the sheriff, (1 *Rol. Abr.* 808, pl. 5.); but it is otherwise if the prison be broken open by the king's subjects. *(b)*—*Southcote's Case*, E. 43 Eliz. 4 Co. 84.

If a prisoner in execution escape without the assent of the sheriff, and he make fresh suit and retake him before any action brought against him, this will excuse him: *(c)* but by 8 & 9 *W.* 3. *c.* 26. *s.* 6. he cannot give this in evidence, but * must plead it, and must likewise make oath, [*67] that the prisoner made such escape without his consent, privity, or knowledge.

If the plaintiff in his declaration set forth a *voluntary* escape, the defendant may plead that he retook him upon fresh suit, without traversing the voluntary escape; for the alledging it is in no wise necessary to this action, but should come in in the replication.—*Bovey's Case*, E. 24 Car. II. 1 Vent. 211. *(d)*

Note; For a *voluntary* escape an action will lie against the gaoler as well as against the sheriff, because he is a wrong-doer; but for a *negligent* escape it will only lie against the sheriff.—*Lane* v. *Cotton*, E. 12 W. III. Salk. 18. *(e)*

And

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sheriff, and a warrant issues thereon, and before the return *A.* is taken in execution by *C.* and then escape, *B.* may sue the sheriff for an escape, though *A.* was never taken at the suit of *B. Benton* v. *Sutton*, 1 Bos. & Pull. 24.

(a) The sheriff is not bound to carry a person arrested on *mesne* process to prison at the return of the writ, but may keep him in his custody without subjecting himself to an action by the plaintiff, provided that the plaintiff be not thereby delayed or prejudiced in his suit. *Planck* v. *Anderson*, 5 T. R. 37.

(b) Traitors or rebels, for against them he may raise the *posse comitatus*, 33 *Hen.* VI. 1.

(c) As to this point, see the cases collected in the last chapter, pa. 63 *a.* n. *(b)*.

(d) On the authority of this case it was ruled in *Bonafous* v. *Walker*, 2 T. R. 126, that under a count for a *voluntary* escape, plaintiff may give evidence of a *negligent* escape.

(e) A *voluntary* escape must be with the consent of the gaoler. *Ridgeway's Ca.* 3 Co. 52. But a *negligent* escape must be without his knowledge or consent. *Alsept* v. *Eyles*,

And note, that to prove a *voluntary* escape the party escaping may be a witness, because it is a thing of secrecy, a private transaction between the prisoner and the gaoler.—*Rex* v. *Warden of the Fleet*, Salk. MSS.

If a man escape in *Essex*, and be seen at large in *Hertfordshire*, the plaintiff may lay his action in *Hertfordshire*.—*Walker* v. *Griffiths*, M. 25 Geo. 2.

If the defendant plead no escape, he cannot give in evidence no arrest; for he admits an arrest by his plea.

If the prisoner being out on bail come and surrender himself, entering *reddidit se* in discharge of his bail on the judge's book, and the plaintiff's attorney accept him in execution, and file a *committitur*, and the prisoner escape, the marshal is not chargeable without notice, either by serving him with a rule, or entering a *committitur* also in his book, without proving the party actually in prison.—*Watson* v. *Sutton*, M. 1707. Salk. 272.

If a sheriff, by colour of an *habeas corpus*, suffer the prisoner to go at large, it is an escape :—So it is, according to *Fitz-Jefferies's Case*, 1 Sid. 13, if the prisoner being in execution be brought upon an *habeas corpus ad testificandum*. However this does not seem a point intirely settled: About the 11 of *Geo.* 2. all the judges met, and seven inclined against allowing the writ, and five for it; but they came to no fixed resolution; and in fact, such an *habeas corpus* is frequently granted.—*Boyton's Case*, M. 1593. 3 Co. 44. (*a*)

According to a MSS. report of *Mosedell's Case*, *E.* 26 *Car.* II. 1 Mod. 116. The court of *K. B.* held, that if a judge of that court granted such an *habeas corpus* for a prisoner in execution in the *Marshalsea*, it would

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2 H. Bla. 108. Furthermore as to the distinction between a *voluntary* and a *negligent* escape, vide *Featherstone* v. *Atkinson*, Barnes, 373, and *Atkinson* v. *Jameson*, 5 T. Rep. 25, which was determined on that authority.

And so strict is the writ of execution, that even a moment's liberty will fix the gaoler. *Sheriff of Nottingham's Ca.* Noy. 72. and that too, though the writ be not returnable. *Hawkins* v. *Plomer*, 2 Bla. 1048, or though the defendant be accompanied at large by the bailiff's follower. *Benton* v. *Sutton*, 1 Bos. & Pull. 24.

(*a*) Undetermined however as this point might have been when the judges so met and divided, it seems there was a resolution of the justices in 1625, that though it was not justifiable in law to grant a *ha. cor.* to a gaoler to have his prisoner (under execution) appear before them at a day certain the next term, and under colour thereof to let him go at large with the keeper in the vacation, or in term time, and then to return to prison at the day appointed; yet the gaoler shall have a reasonable time to bring up his prisoner on a *ha. cor.* which, if he exceed, it shall be deemed an escape; and in *Anon.* Cro. Car. 14, it seems that the justices admonished the warden of the *Fleet* that he should not suffer any person to go at large under colour of a *habeas corpus* upon peril of being charged with an escape.

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be a good justification for the marshal, because the prisoners there are under the government of the court of *K. B.* But Lord C. J. *Hales* doubted if such an *ha. cor.* were granted by another court, than that to which the prisoner belonged.—*S. C.* 3 Keb. 305. nomine *Lutterell* v. *Mosedall.*

If the sheriff arrest the party on mesne process, and he is rescued in [68] going to gaol, it will be a good excuse for the sheriff; but if he be once within the walls of the prison, a rescue from thence by any but common enemies, will be no excuse. If a company of rebels break the prison, and let out the prisoners, the sheriff is answerable: So if the prisoner be rescued in bringing him to a judge's chambers (or elsewhere) upon an *habeas corpus.*—*Crompton* v. *Ward,* E. 7 Geo. I. 1 Str. 435.

Note; By an equitable construction of *West.* 2. (13 *Ed.* 1. *c.* 11.) and 1 *R.* 2. *c.* 12, an action of debt lies for an escape in execution; (*a*) but if one have execution on a statute, of lands, goods, and body, and the prisoner escape, yet, because the lands remain in execution, debt will not lie, but only an action on the case.—*Whiting* v. *Reynel,* H. 1623. Cro. Jac. 657. (*b*)

And note, That it has been holden, that if the plaintiff in an action against an hundred be nonsuited, and judgment be entered for the costs, and the party by taken in execution on a *ca. sa.* and escape, the hundred may bring debt against the sheriff for the escape.—*Lauress Hundred* v. ———, T. 5 Geo. II. Fitzg. 296. (*c*)

By 8 & 9 *W.* 3. *c.* 26. *s.* 8. If the keeper of any prison, after one day's notice in writing, refuse to shew any prisoner committed in execution, to the creditor or his attorney, such refusal shall be deemed an escape. And (be sec. 9.) if any person desiring to charge another with any action

(*a*) Before these statutes a creditor had no remedy against a sheriff, or other gaoler for an escape, except by action on the case grounded on the tort. As to these statutes, see also 2 *Inst.* 382, where it is said that a bill of debt lies also by the equity of these statutes. So in *Plummer* v. *Whitchcott,* 2 Lev. 159, it was said *arguendo,* that after the statute of 13 *Ed.* 1, and before that of 1 *Ric.* 2, actions of debt were brought in other cases besides account. And *per Buller,* J. in *Bonafous* v. *Walker,* 2 T. Rep. 132, the statute 13 *Ed.* 1. has been holden by a liberal construction to extend to all cases. Vide etiam *Whiting* v. *Reynell,* sup.

(*b*) In which the jury may give discretionary damages, which are often very small, in cases of great hardship on the gaoler. *Jones* v. *Pope,* 1 Saund 44; but in an action on the above statutes, the jury must give the sum indorsed on the writ, with the charges of the levy. *Bonafous* v. *Walker,* ante.

Though the statute of 1 *Ric.* 2. seems confined to the warden of the *Fleet,* yet all other gaolers and sheriffs have been held within the equity of it. Vide *Platt* v. *London Sheriffs,* Plowd. 35. *For actions of debt on these statutes, see* Selw. N.P. Ab. tit. *Debt,* s. ix.

(*c*) For actions on the statute of *Hue* and *Cry,* vide post, part III. ch. I.

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or execution, shall desire to be informed by the keeper of the prison whether such person be a prisoner or not, the keeper shall give a true note in writing thereof to such person upon demand at his office for that purpose, and such note shall be sufficient evidence that such person was at that time a prisoner in actual custody. And in such case delivering the writ to the sheriff will be sufficient to charge the prisoner with the action, and to subject the sheriff in case of an escape.

Where a new sheriff is appointed, his predecessor ought to deliver over all the prisoners in his custody, charged with their respective executions; and if he omit any, it is an escape; but if a sheriff die, the new one must at his peril take notice of all persons in custody, and of the several executions with which they are charged.—*Westby's Case*, M. 1598. 3 Co. 71. *(a)*

And by 3 *Geo.* 1. *c.* 15. *s.* 8. The under-sheriff is answerable till a new sheriff is appointed.

[69] *Note.* That an assignment of prisoners by an under-sheriff to the succeeding high sheriff, (though not by indenture) is a good assignment.—*Poulter* v. *Greenwood*, 1 Barnes, 259. 367. (4to. ed.)

If a man in execution escape, and return again, and afterwards be made over with other prisoners, and then make a second escape, the second sheriff shall be chargeable.—*Lenthall* v. *Lenthall*, T. 26 Car. II. 2 Lev. 109. *(b)*

In an action on the case against the warden of the *Fleet*, it appeared in evidence that the plaintiff knew of the escape, yet proceeded in his action to judgment, but had not charged the defendant (who had returned to the gaol) in execution, and on a case made it was holden, that the plaintiff had not by such proceedings waved his right of action against the warden.—*Ravenscroft* v. *Eyles*, 6 Geo. 3. C. B. 2 Wils. 294.

If a writ come to the sheriff, and he make out his mandate to the bailiff of a liberty, who takes the party, and afterwards suffers him to escape; the action lies against the bailiff, and not against the sheriff.—*Backwell* v. *Hunt*, Noy. 107. *Sheriff of Nottingham's Case*, *Ibid.* 72. *(c)*

(a) So where there are two sheriffs defendants, and one dies before the trial, the action will remain against the survivor, for the tort is both joint and several. *Bennion* v. *Sheriffs of York*, Cro. Eliz. 625.

(b) So in *James* v. *Pierce*, 1 Vent. 269, it was held, that if a prisoner, after a voluntary escape, return, plaintiff may admit him to be in execution, and if he be turned over to a new sheriff, and afterwards escape, the new sheriff is liable, and this case denies *The Sheriff of Essex's Case*, Hob. 202, to be law.

(c) Because he is not the sheriff's officer, nor does he give any security to the sheriff. *Ackworth* v. *Kemp*, 1 Dougl. 42. Vide etiam *Boothman* v. *Surrey Earl*, 2 T. Rep. 5, and the other cases on S. P. referred to by Dougl.

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It will not be improper here to take notice, that if he who is in execution escape (though it be with the consent of the gaoler or sheriff,) yet the plaintiff may retake him, and that after a twelvemonth, without a *sci. fa.* for he is in upon the first execution. (*Lenthall* v. *Gardiner*, H. 26 & 27 Car. 2. *per Hales.*) (*a*) And this even though he have brought

(*a*) *Recaption* of a man in execution may be made where he has escaped by the *negligence* of the gaoler. *F. N. B.* 130. or of the plaintiff. *Allanson* v. *Butler*, 1 Sid. 330. or if the plaintiff recovers against the sheriff for an escape the sheriff may bring case against the sheriff for his damages. *F. N. B.* 130. But if the escape be with the assent of the gaoler, he cannot retake the prisoner, for that would be a *voluntary* escape. *Vide ante*, p. 67, n. (*d*) Yet as the judgment remains, plaintiff may either bring debt, as in *Buxton* v. *Home*, 1 Show. 174. or a *sci. fa.* on the judgment, as in *Allanson* v. *Butler*, 1 Lev. 211, and *Allen* v. *Vinter*, T. Jo. 21, or sue out another *ca. sa.* as in *Anon.* 1 Vent. 4. or a *fi. fa.* as in *Basset* v. *Salter*, 2 Mod. 136, and if the plaintiff die his representatives may have a *sci. fa.* as in *Sudall* v. *Witham*, 2 Lutw. 1264.

Before the late statute of 41 *Geo.* 3. c. 64. *s.* 1. it was a rule of the common law, that if a prisoner in execution was permitted to be at large with the consent of the plaintiff, he could never afterwards resort to his judgment, though the prisoner has been released on terms which were not complied with, as upon an undertaking to pay the debts by instalments. (*Vigers* v. *Aldrich*, 4 Burr. 2482.) or to surrender himself at a future day (*Clark* v. *Clement*, 6 T. R. 525.) or to pay at a future period; (*Tanner* v. *Hague*, 7 T. R. 420.) and on failure that he should again be taken in execution. (*Blackburn* v. *Stupart*, 2 East, 243.) So where plaintiff consented to discharge one of several defendants taken on a joint *ca. sa.* he cannot afterwards take another of the defendants. (*Clark* v. *Clement*, supra) but where one joint defendant is discharged by the act of the law (as under an insolvent act) that shall not operate to the discharge of the action. (*Nadin* v. *Battie*, 5 East, 147.) So where a prisoner was discharged, on giving a new security to satisfy the judgment (which was afterwards defeated for informality) it was held, that the judgment was satisfied, and could not be set off against a demand of the prisoner. *Jacques* v. *Withy*, 1 T. R. 557. So where defendants agreed with plaintiff on his discharge, that the judgment should stand revived for 12 months, the agreement was held void. *Thompson* v. *Bristow*, Barnes, 205. And so where defendant on his discharge, entered into a bond, conditioned, that he should surrender on a certain day, to be again taken in execution, it was held void. *Da Costa* v. *Davies*, 1 Bos. & Pul. 242.

Upon the principle of these decisions, founded as they were upon the common law, the creditors were deprived of *every* remedy as well by action of debt upon his judgment, (*Vigers* v. *Aldrich*, sup.) as by writ of execution against the goods or person of his debtor. (*Tanner* v. *Hague*, 7 T. R. 420.) until the statute 41 *Geo.* 3. *c.* 64. *s.* 1. whereby it was enacted, "that any creditor, "at whose suit any debtor is in pri- "son, and taken or charged in exe- "cution for any sum of money, may "declare his consent by writing, "signed to the discharge of such "debtor, and shall not lose the be- "nefit of the judgment, but may "take out execution thereon against "land or goods (except the necessary "apparel and bedding of the pri- "soner or his family, not exceeding "in

brought an action against the gaoler or sheriff and recovered, *if the sum recovered were less than the debt*; as where the judgment was for £2000, and the damages recovered were only £1000.—*Collop* v. *Brandley*, T. 31 Car. II K. B. Thes. Brev. 282.

In the case in *Thes Brev.* 282. the whole debt was recovered against the sheriff; but the defendant pleaded to the *sci. fa.* that the plaintiff had taken a less sum of the sheriffs in satisfaction of the several sums of money and judgment aforesaid, and on demurrer, that plea was held to be bad. I suppose on the stale ground that a less sum could not be a satisfaction of a greater. *(a)*

This action being founded in *maleficio*, and given by the statute, is not within the statute of limitations.—*Jones* v. *Pope*, M. 18 Car. 2. 1 Lev. 191. 1 Saund. 34. 1 Sid. 305.

As to Carriers. (b)—For misbehaviour in a trust or duty, an action on the case will likewise lie; for whosoever undertakes to do a thing for another ought to do it faithfully, else he is answerable for the damages arising from his negligence or misbehaviour: therefore if a man deliver goods to a common carrier to carry, and the carrier lose them, an action on the case will lie against him; but if there appear to be no default in the defendant, the plaintiff shall be nonsuited; *(c)* as if an action were brought against

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" in value £10,) or bring any action " on the judgment, or use any remedy " for recovery of his demand against " any other person liable to satisfy " the same, in the same manner as " he might have done in case such " debtor had never been taken or " charged in execution: Provided " always that no debtor discharged " in pursuance of this act, shall at " any time afterwards be taken or " charged in execution, or arrested " upon the judgment, or in any ac- " tion brought thereon, and that no " proceedings shall be had against " the bail." And by *s.* 2. it is enacted, " that the personal representa- " tive of the creditor may consent " to the discharge of the debtor in " the same manner, and with the " same advantages as the creditor if " living might have done; and such " personal representative shall not, " by reason of such discharge, be " deemed guilty of a *devastavit*, or " chargeable with the debt due to " the person discharged."

(a) See more of the cases of escape in the last chapter, tit. *Rescous*, (in its second sense) together with the present editor's notes thereto subjoined.

(b) Connected with the cases of *carriers*, and their liability to their employers, the whole law of *bailments* is to be considered, the doctrines of which, and more especially the learned arguments of Lord *Holt*, in *Coggs* v. *Barnard*, as reported by Lord *Raymond* (post p. 71,) gave rise to the well known elegant enlightened *essay* on that subject by the late Sir *William Jones*, to which, in justice to the reader, he is referred.

(c) The common mode of declaring against a carrier now, is in *assumpsit*, to which *trover* cannot be joined. But if plaintiff declare *on the*

against a carrier for negligently driving his cart, so that a pipe of wine burst and was lost, it would be good evidence for the defendant, that the wine was upon the ferment, and when the pipe burst he was driving gently.—*Farrar* v. *Adams*, E. 10 Ann. *Per Holt*, at Guildhall, Salk. MSS.

So where the defendant's hoy coming through bridge, by a sudden gust of wind was drove against the bridge and sunk, *Pratt, C. J. held [* 70] the defendant not liable; the damage being occasioned by the act of God, which no care of the defendant could foresee or prevent: and as to the evidence given by the plaintiff, that if the hoy had been better it would not have sunk with the stroke received, the C. J. said, no carrier was obliged to have a new carriage for every journey; it is sufficient if he provide one which without any extraordinary accident (such as this was) will probably perform the journey. (*Amies* v. *Stevens*, M. 5 Geo. 1. Stra. 128.) But nothing is an excuse except the act of God and the king's enemies, (*a*) and therefore in an action against such a carrier, where the goods were spoiled by water, the defendant proving, that when the goods were put on board, the ship was tight, and that the hole through which the water came had been made by a rat eating out the oakum,

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the custom of the realm, a count in trover may be joined. *Per Buller*, J. in in *Brown* v. *Dixon*, 1 T. R. 274; and and it is a rule, that where the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration. *Ibid.*

(*a*) The act of God means something in opposition to the act of man. The law presumes against the carrier, unless he shews the loss was occasioned by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightening, *&c.*

But the king's enemies here meant are public enemies, and not traitors or felons. *Morse* v. *Slue*, 2 Lev. 69. *Barclay* v. *Higgens*, cited 1 T. Rep. 33.

So are the acts of God generally confined to storms, tempest, and lightening. *Amies* v. *Stevens*, Stra. 128. *Case of Gravesend Barge*, 1 Rol. Rep. 79.

But even these will not excuse a hoyman who puts to sea in tempestuous weather. *Amies* v. *Stevens*, sup.

Therefore a carrier is liable for goods burnt in his warehouse at *Weyhill fair*, it being stated in the case that the fire did not happen by lightening. *Forward* v. *Pittard*, 1 T. Rep. 27.

So where common carriers from *A.* to *B.* charged and received cartage of goods from a warehouse at *B.* (where they usually unloaded) to the house of the consignee in *B.* but whilst they remained in the warehouse at *B.* they were burnt, the carriers were held liable, though the profits of the cartage were allowed to another, and the consignee knew it. *Hyde* v. *Trent and Mersey Navigation*, 5 T. Rep. 389. But where the goods are not in defendant's custody as a carrier, and are left after their arrival in defendant's warehouse for plaintiff's convenience, till forwarded (without reward) defendant will not be liable, though the goods are burnt. *Garside* v. *Same*, 4 T. Rep. 391.

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was holden to be no excuse.—*Dale* v. *Hall*, M. 24 Geo. II. 1 Willes, 281.

If I send my servant with the goods on board the vessel, and they are lost, the carrier is not liable; for they are to be considered not in the possession of the carrier but of the servant.—*East India Company* v. *Pullen*, H. 12 Geo. I. Stra. 690. *(a)*

If a carrier having convenience to carry goods, being offered his hire refuse to carry them, an action will lie against him.—*Jackson* v. *Rogers*, M. 35 Car. II. 2 Show. 327. *(b)*

Note. All persons carrying goods for hire, come under the denomination of common carriers: *(c)* but if the driver of a stage coach, which only carries passengers for hire, lose the goods of his passengers, the master is not liable; *(d)* for no master is chargeable with the act of his

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(*a*) In this case the company had taken a whole lighter, and put their locks upon the hatches, and sent a particular person, called a guardian, according to their usual custom. Sed vide *Robinson* v. *Dunmore*, 2 Bos. & Pull. 416. So if I take my passage in a ferry boat, and a tempest arising, to save the lives of the passengers several goods are cast over board, amongst which are mine, I have no action against the bargeman. *Bird* v. *Astcock*, 2 Bulst. 280.

(*b*) By the law of the land all common carriers are bound to receive and carry the goods of the subject for a reasonable reward. 1 *Rol. Abr.* 2. (C) pl. 1. but if the waggon be full, and goods are forced on the carrier, he shall not be answerable. *Lovett* v. *Hobbs*, 2 Show. 127; carriers must also take due care of goods in *transitu*; they must deliver them safely, and in as good condition as they were received, or in default they must make compensation for any loss or damage to them while in their custody. 1 *Rol. Ab.* sup. *Golden* v. *Manning*, 3 Wils. 429. 2 Bla. 916.

(*c*) Persons usually denominated common carriers are masters of ships. (*Morse* v. *Slue*, 2 Lev. 69. *Barclay* v. *Higgins*, cited 1 T. R. 33.) owners of ships, hoymen, lightermen. and barge owners. (*Rich* v. *Kneeland*, Cro. Jac. 330. Ilob. 17.) Proprietors of waggons, stage-coaches, &c. (*Lovett* v. *Hobbs*, 2 Show. 127. *Bastard* v. *Bastard*, 2 Show. 81.) and so are all persons undertaking to carry goods indifferently for hire. *Gisborne* v. *Hurst*, 1 Salk. 249.

Therefore, if one who is not a common carrier, takes hire, he may be charged on a special assumpsit, for when hire is taken a promise is implied. *Rogers* v. *Head*, Cro. Jac. 262.

But *stage-coachmen* have been excepted as common carriers, unless they take a distinct price for luggage as well as the passenger. Vide *Middleton* v. *Fowler*, Salk. 282. Quære tamen et vide *Clarke* v. *Gray*, 4 Esp. N. P. C. 177, where *Ellenborough*, C. J. held, that there was no distinction between a parcel sent to be carried, and a passenger's luggage.

Furthermore as to coach owners it has been held, that they are not liable for injuries to passengers from inevitable accidents, as from the horses taking fright, and upsetting the carriage. *Aston* v. *Heaven*, 2 Esp. N. P. C. 533. *Sed secus*, if there be negligence or misconduct in the driver. *White* v. *Boulton*, Peake's N. P. C. 81. *Christie* v. *Griggs*, 2 Camp. 79.

(*d*) *Hackney-coachmen* also are not common carriers, and therefore not chargeable for goods lost, unless by special agreement, and carriage hire paid. *Upshare* v. *Aidee*, Comy. 25.

servant,

servant, but when he acts in execution of the authority given him by his master; *(a)* and then the act of the servant is the act of his master; and in such case the action may be brought against either the master or the servant; and as the action may be brought against either the master or the servant, so either may bring *assumpsit* for the money for the carriage.—*Middleton* v. *Fowler*, M. 10 W. III. Salk. 282.

Note. In the case in *Salk.* it is holden, that if the action be brought against the masters, it must be brought against them all; and if brought against one only, advantage may be taken of it on evidence. But according to later determinations, that matter can only be pleaded in abatement.—*Rice* v. *Shute*, B. R. E. 10 Geo. III. 5 Burr. 2611. 2 Bla. 692.

If the carrier ask what is in the box, and is told silk; yet in truth if there be money, he shall be answerable for it if lost, unless he made special acceptance; but this intended cheat upon the carrier will be a good reason for the jury to give less damages.—*Drinkwater* v. *Quennel*, T. 11 & 12 Geo. II. C. B. Sed vide post, *Kenrig* v. *Egleston*, M. 24 Car. II. Aleyn, 93.

If a bag sealed be delivered to a carrier, and said to contain £200, [71] and the carrier give a receipt for so much, *(b)* when in fact it contains £400, if the carrier be robbed, he shall be answerable only for £200, for his reward extends no further, and it is that makes him liable.—*Tyley* v. *Morrice*, 4 W. III. Carth. 485. *(c)*

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(a) Goods were delivered to a person standing at a warehouse-door in an inn-yard, who was employed in loading another waggon at the time, but the deliverer did not know even the name of such person. This was held not a sufficient delivery to charge the waggoner, although the deliverer told the person whom he saw, by what waggon the goods were to go, and asked the owner's name. *Per* Ld. *Kenyon*, at *Westminster* Sittings after Mich. Term, 30 Geo. 3. MS. Ca.

(b) Which in fact amounts to a special acceptance.

(c) But if a box be delivered to a carrier generally, and he so accepts it, he is answerable, though the party did not inform him there was money in it; if, however, the carrier enquires, and the owner says there is no money in it, or if the carrier accepts it provided there be no money in it, the carrier is not liable. *Tichborne* v. *White*, Stra. 145. Et vide *Gibbons* v. *Payton*, sup.

The taking of hire by a common carrier is an implied undertaking, for the safe custody and delivery of the goods, and he shall therefore be responsible for their value if he is robbed of them, 1 *Inst.* 89; and equally so, though he be neither a carrier or take reward, if he undertake to carry safely and securely. *Coggs* v. *Barnard*, Raym. 909. And so though plaintiff, for greater caution, send a servant with the goods, who pays a person to guard them. *Robinson* v. *Dunmore*, 2 Bos. & Pull. 416. Sed vide *East India Company* v. *Pullen*, sup. p. 70.

In *Hutton* v. *Osborne*, M. 1730, MS. Ca. plaintiff declared specially that

An action was brought against the proprietors of a stage-coach, for not safely carrying £100, delivered to their book-keeper in a bag, from *B.* to *L.* and on the trial it appeared that the money was put into a bag, and carried by the plaintiff's servant to the defendant's house, and there delivered to their book-keeper, who asked no questions about the contents of the bag, but took it as a common parcel, and was paid for it as such by the servant, who gave him no information about it; the money was lost; and the servant, on his cross examination on the trial, swore that he received no particular instructions from his master about the carriage, but only to deliver the parcel to the book-keeper, and pay what was demanded of him for the carriage: the defendants proved that an advertisement had been put into the country newspaper once every month for two years together, concerning the carriage of parcels by this stage-coach, with a N. B. at the bottom of it, that the proprietors would not be answerable for any money, plate, jewels, writings, or other valuable goods, unless they were entered as such, and paid for accordingly; and that this paper was taken in at the house where the plaintiff lodged, who was frequently seen with it in his hand, and appeared to be reading it: *(a)* the

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that defendant had undertaken to carry a hare, but he carried it so negligently that it was lost. Defendant demurred, 1st, for that plaintiff had not declared on the general custom of the realm relating to carriers, and therefore defendant must be deemed a private person, and if so, there being no consideration, it was *nudum pactum;* and, 2dly, that plaintiff had not set forth a delivery of the hare, upon which the promise was made, and for the breach of which the action was brought. The court admitted first that defendant was a private person, but said, if he voluntarily undertake, he must answer for his negligence; and, 2dly, that the delivery of the hare was implied, from the statement that it was carried part of the way, and as to the breach of promise, the action was brought for the loss of the hare, and the promise was only inducement. Judgment for plaintiff.

(a) The general responsibility of common carriers in all cases (except as the acts of God and the king's public enemies) has induced them to make special contracts for the carriage of goods beyond a certain value, at a premium proportionate to the risk, the basis and extent of which special contracts are declared by public notices, which carriers themselves have generally given, to limit their responsibility, and hence they seem to have laid down a law for themselves; but as their notices differ in form, and some of them are written in very ambiguous terms, no general rule can be laid down as a guide to the public, and put all future questions on this subject at rest by one solemn decision of the court. Until the legislature, therefore, shall in its wisdom declare what sort or form of notice shall be considered as the standard between carriers and the public, every case must necessarily be determined upon its own peculiar circumstances, and upon the construction of the court upon each distinct form of notice. At present it is the practice of carriers to insert their notices in the public papers

the court of K. B. held that the defendants were not liable to answer for this money; for a carrier is only liable in respect of the reward which he receives:

papers, to distribute hand-bills, to put up painted boards in their own offices, and otherwise, in the most conspicuous manner, to declare to what extent they will hold themselves liable, in order that the public may be generally informed of the nature of their special acceptances and undertakings; but these notices unfortunately are too variant; they are not uniform, nor framed by the common consent even of the carriers themselves, for the provisions of some go entirely to discharge the liability of the carrier, unless the terms of the notice are complied with, as in *Clay* v. *Willan*, 1 H. Bla. 298. *Hutton* v. *Bolton*, *ibid.* 299 (n.); and others limit the responsibility of the carrier to a certain sum, if the conditions are not complied with, as in *Clarke* v. *Gray*, 6 East, 564.

The validity of these notices, however, was questioned in *Nickolson* v. *Willan*, 5 East, 507, where it was insisted that they were contrary to the policy of the common law, and that it was the duty of carriers, if their reward was not adequate to their risk, to make special acceptances of the goods in such cases, at a rate proportionate to their value. But Lord *Ellenborough*, C. J. considering the long time during which the practice of making special acceptances had prevailed, and been countenanced by the courts, and the legislature having also sanctioned them by rejecting a bill proposed to narrow the carrier's responsibility in certain cases, the house having deemed such a measure unnecessary, in regard that carriers were competent to limit their own responsibility, and considering also that there was no case in which the right of a carrier thus to limit his own responsibility by special contract, had ever been denied by express decision, his lordship said the court could do no otherwise than sustain such a right, however subject to abuse or productive of inconvenience, leaving it to the legislature to apply such a remedy as the evil may require.

It is submitted, however, that though the house may not entertain a bill to limit the responsibility of carriers under their special contracts, yet it would be a salutary measure if all carriers were compelled by law to adopt one and the same form of notice.

In an action against the proprietor of a stage-coach, for the value of a broach and ring, value £1. 12*s.* the delivery at the office, the proper packing, and the non-arrival were proved. The defendant proved a notice, written on a large board in his office, that he would not be answerable for plate or jewels, of however small a value, unless entered and paid for as such. The plaintiff then proved that the defendant had circulated hand-bills, containing a list of his several coaches, and concluding with a memorandum, "that he would not be answerable for any article above the value of £5, unless entered as such and paid for accordingly." And Lord *Ellenborough* said, that the circulation of these papers dispensed with any necessity to attend to the notice in the office, and plaintiff recovered. *Cobden* v. *Bolton*, 2 Camp. 108. Vide *Nicholson* v. *Willan*, and *Clarke* v. *Gray*, sup. S. P.

Again, in an action against a carrier for the loss of a trunk, the defence was, that the trunk was above the value of £5. and had not been entered and paid for as such, according to a notice for that purpose. The notice was by a hand-bill, stating in large print the advantages to be derived from the defendant's waggon, and, in a small character at the bottom, that the owner would not be answerable for goods above the value of £5, unless entered as such, and paid for accordingly. *Per Ellenborough*,

receives: and in the present case there was a clear fraud committed by the plaintiffs. And *per Yates*, J. here is a full proof of a special acceptance, and a deceit on the part of the plaintiffs; for it is not necessary that there should be a personal communication in order to make a special acceptance. The reason of a personal communication is that each party may know the other's mind; and therefore if they know each other's mind in any other manner, that is sufficient.—*Gibbons* v. *Payton and another*, E. 9 Geo. III. 4 Burr. 2298. 2 H. Bla. 299.

As to Bailment.—If a common carrier be robbed, yet he is answerable; for nothing will excuse him but the act of God, or of the king's enemies;
[*72] but he who has a particular employment (as a *bailiff or factor) though he have a reward, yet he is not bound against all events, if he do to the best in his power.—*Coggs* v. *Bernard*, T. 1704. Raym. 909.

And it is to be known that there are six sorts of bailments, which lay a care and obligation on the party to whom goods are bailed, and which consequently subject him to an action, if he misbehave in the trust reposed in him. *Per Holt*, C. J. in S. C.

1. A bare and naked bailment to keep for the use of the bailor, which is called *depositum*, and such bailee is not chargeable for a common neglect, but it must be gross one to make him liable.—*Mytton* v. *Cock*, 12 Geo. II. 2 Stra. 1099. S. P. *(a)*.

2. A delivery of goods which are useful to keep, and they are to be returned again in specie, which is called *accommodatum*, which is a lending

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lenborough, C. J. " This is not enough to limit the defendant's common law liability; there is not sufficient evidence of any special contract. The jury ought to believe that, at the time of the delivery of the trunk at the waggon office, the plaintiff or his agent saw, or had ample means of seeing, the terms on which the plaintiff carried on his business. How can this be inferred from the hand-bill nailed on the door, which called the attention to every thing that was attractive, and concealed what was calculated to repel customers?" His lordship added, if a common carrier is to be allowed to limit his responsibility, he must take care that every one who deals with him is fully informed of the limits to which he confines it. *Butler* v. *Heane*, 2 Camp. 415. The notice in a carrier's office ought to be in such large characters that no persons delivering goods there can fail to read it without gross negligence; and if a carrier's servant receives goods at a distance from the office, the special terms on which he deals ought to be communicated through some other medium. *Clayton* v. *Hunt*, 3 Camp. 27.

(a) If, therefore, a bailee receives goods *to keep safely*, and he is robbed, he shall answer for them in detinue. *Sed secus* if he undertake *to keep them as his own goods*, though in that case he would be answerable for damage arising from his own negligence. *Kettle* v. *Bromsall*, Willes, 121.

gratis;

gratis; and in such case the borrower is strictly bound to keep them: for if he be guilty of the least neglect, he shall be answerable, but he shall not be charged where there is no default in him. *(a)*

3. A delivery of goods for hire, which is called *locatio* or *conductio*, and the hirer is to take all imaginable care, and to restore them at the time; which care if he so use he shall not be bound. *(b)*

4. A delivery by way of pledge, which is called *vadium*; and in such goods the pawnee has a special property; and if the goods will be the worse for using, the pawnee must not use them; otherwise he may use them at his peril; as jewels pawned to a lady, if she keep them in a bag and they are stolen, she shall not be charged; but if she go with them to a play and they are stolen, she shall be answerable. *(c)* So if the pawnee be at a charge in keeping them, he may use them for his reasonable charge; *(d)* and if notwithstanding all his diligence he lose the pledge, yet he shall recover the debt. (*Manby* v. *Westbrooke*, 19 Geo. 2. K. B.) *(e)* But if he lose it after the money tendered, he shall be chargeable, for he is a wrong-doer; after money paid (and tender and refusal is the same) it ceases to be a pledge, and therefore the pawnor may either bring an action of *assumpsit*, and declare that the defendant promised to return the goods upon request; or trover, the property being vested in him by the tender.—*Ratcliffe* v. *Davies*, T. 18 Jac. 1. Yelv. 178.

5. A delivery of goods to be carried for a reward, of which enough has been already said; only I will here add, that the plaintiff ought to prove the defendant used to carry goods, and that the goods were delivered to him or his servant to be carried. *(f)* And if a price be alledged

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(a) As if a man lend another a horse to go westward, or for a month, and he goes northward, or stays more than a month, he shall be answerable. *Bract.* lib. iii. *c.* 2. 99, (b) But if the bailee had put this borrowed horse in his stable, and it was stolen, he shall not be answerable. *Sed secus* if he or his servant had left the stable door open. A bailee also shall not be liable in case of irresistible force. *Ibid.*

(b) Vide *Bract.* 62, (b); and the degree of diligence here required is such as the most discreet father of a family would use, but as no man can guard against robbery, no bailee shall be responsible for that. *Buckmyr* v. *Darnall*, 2 Raym. 1087.

(c) And to this effect is *Mores* v. *Coxham*, Ow. 123.

(d) As a horse or cow, which he may ride or milk. *Bract.* 99, (b)

(e) Agreeable to this is 29 *Assisar.* 28; and so is *Southcote's Ca.* 4 Co. 83; though the reason given in *Southcote's Case* is, because the pawnee hath a special property in the pawn; but that is not the true reason, for the true reason is given in *Lib. Assis.* sup. viz. that the law requires nothing extraordinary of the pawnee, nor more than that he shall use ordinary care.

(f) This point, however, is applicable to two sorts of persons, *viz.* those who are in *public* and those who are in *private* employ, the first of

ledged in the declaration, it ought to be proved the usual price for such
[*73] a stage; and if the price be proved, *there need no proof, the defendant being a common carrier; but there need not be a proof of a price certain.—*Per Holt*, C. J. at *Horsham*, 13 W. 3.

6. A delivery of goods to do some act about them (as to carry) without a reward, which is called by *Bracton*, (lib. iii. 300.) *mandatum*, in *English*, an acting by commission; and though he be to have nothing for his pains, yet if there were any neglect in him, he will be answerable, for his having undertaken a trust is a sufficient consideration; but if the goods be misused by a third person in the way without any neglect of his, he would not be liable, being to have no reward. *(a)*

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of whom, namely, common carriers, are only considered in the text. But as to the second sort of persons, *viz.* bailees, factors, agents, and such like, though they have a reward for their management, they are only to do the best they can, and though they be robbed, it is a good account. *Vere* v. *Smith*, 1 Vent. 121. 2 Lev. 5. S. C.

(a) That the obligation to restore a deposit flows from the nature and definition of the contract is clear, yet in *Rickes* v. *Brigges*, Yelv. 4. Cro. Eliz. 883, where it was held that case lay against a man who had not performed his promise of re-delivering things bailed to him, the judgment was reversed; and soon after, in a similar case, judgment for the plaintiff was arrested. Vide *Pickas* v. *Guile*, Yelv. 128. The reversal, however, was said to be a bad resolution, and the contrary was afterwards solemnly adjudged in *Wheatley* v. *Low*, Cro. Jac. 667; and yet in that case there was no benefit to the defendant, nor any consideration but the having the money in his possession, and being trusted with it; that, however, was held to be a good consideration: therefore a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. Vide *Morse* v. *Slue*, 2 Lev. 69, in which case the arguments of the judges, in delivering judgment, are very elaborate and full of learning, well worthy the attention of the reader; and in that case it was laid down that a *general* bailment is not, nor can be taken to be a special undertaking *to keep* the goods bailed *safely at all events;* but if a man does undertake *specially to keep* goods *safely*, that is such a warranty as will oblige him to keep them safely against all perils, where he has his remedy over, but not against those where he has no such remedy. It is also to be observed, that in *Morse* v. *Slue*, the declaration was drawn by the ablest man in *England*, in which (as it always was in such cases) it was considered prudent to insert that a reward was to be paid for the carriage, and so it has been usual to put it in the writ where the suit is by original; and Lord *Holt* said thus much, that the law on this point should be settled, though he would not take upon himself to say he had so settled it.

The learned Sir *William Jones*, in his Essay on the Law of Bailments, (p. 55) differs in some degree from the doctrine of Lord *Holt*, for he says that Lord *Holt*'s division of bailments into six sorts is inaccurate, for in truth his fifth is only a branch of his third; and he might with equal reason have added a seventh, since the fifth is capable of a sub-division. Sir *William Jones* acknowledges but five

If the goods of a guest be stolen out of an inn, the innkeeper is answerable; but the plaintiff must prove that the defendant kept a common inn, and that he, his son, or servant, was a guest at the time, and that the goods were brought within the inn, and remained under the care of the defendant.—*Beedle* v. *Morris*, T. 1610. Cro. Jac. 221. Mo. 117. *(a)*

If a man come to the inn with an horse, and leave the horse there for several days, and in his absence his horse be stolen, the owner is a sufficient guest to maintain an action; but it would be otherwise if he had left a trunk or other dead thing, by which the innkeeper would have no gain. (*Gelley* v. *Clerk*, M. 1608. Cro. Jac. 188.) If he desire the host to put his horse to grass, and the horse be stolen, the innkeeper is not liable; for by law he is only bound to answer for those things that are *infra hospitium*. (*Calye's Ca.* E. 26 Eliz. 8 Co. 32.) So if the innkeeper refuse to receive him because his house is full, whereupon he says he will shift, and then is robbed, the host shall not be charged; but without such cause he cannot discharge himself by words only.—*Bird* v. *Bird*, 1 Anders. 29. *Anon.* M. 7 Eliz. Mo. 78.

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five sorts, which he thus enumerates:

1. *Depositum*, which is a naked bailment (without reward) of goods to be kept for the bailor; and on this doctrine *Benion's Ca.* Mayn. Ed. II. 275. Fitzh. (Detinue) 59, is the earliest decision; but Sir *W. Jones* says that case is wholly incomprehensible: and then he proceeds to condemn the doctrine of Lord *Coke*, in *Southcote's Ca.* 4 Rep. 83, and afterwards introduced into 1 *Inst.* 89, that there is no difference between a *special* acceptance *to keep safely*, and a *general* one *to keep*, which Lord *Holt* equally reprobates in *Coggs* v. *Barnard*, after having examined all the antecedent authorities.

2. *Mandatum*, or *commission*, which is where the mandatory undertakes, without recompence, to do some act about the things bailed, or simply to carry them; and hence Sir *H. Finch* divides bailment into two sorts, *to keep* and *to employ*.

3. *Commodatum*, or *loan for use*, is where goods are bailed without pay, to be used for a certain time for the bailee; and this is one of the most useful and convenient species of bailment in society.

4. *Pignori acceptum*, which is where a thing is bailed by a debtor to his creditor in pledge to secure the debt.

5. *Locatum*, or *hiring*, which is always for a reward; and this is either *locatio rei*, by which the hirer gains the temporary use of the thing; or *locatio operis faciendi*, when work and labour, or care and pains, are to be done or bestowed on the thing delivered; or *locatio operis mercium vehendarum*, when goods are bailed for the purpose of being carried from place to place, either to a public carrier or to a private person.

(a) If a servant come into an inn, and ask to leave his master's goods till the next market-day, and the innkeeper refuses because his house is full of parcels, and the servant then sit down, and drink as a guest, and put the goods behind him, and they are lost, the innkeeper is liable to the master. *Bennet* v. *Mollet*, 5 T. R. 273.

In *Yielding* v. *Fay*, T. 1587. Cro. Eliz. 569, it was holden, that where by custom the parson ought to keep a bull and a boar, every inhabitant who hath prejudice by his not keeping them may have an action, and that Not Guilty is no good plea to such an action, upon this distinction that it is a good plea to an action for a misfeasance, *aliter* to an action for non-feasance; for they are two negatives, which cannot make an issue any more than two affirmatives.

And note, That in all cases where a damage accrues to another by the negligence, ignorance, or misbehavior of a person in the duty of his trade or calling, an action on the case will lie; as if a farrier kill my horse by bad medicines, or refuse to shoe him, or prick him in the shoeing, *&c. &c.* (*Mulgrave* v. *Ogden*, T. 1591. Cro. Eliz. 219.) (*a*) But it is otherwise where the law lays no duty upon him; as if a man find garments, and by negligent keeping they be spoiled. (*b*)

(*a*) So if a surgeon injure his patient by his want of professional skill, this action lies. *Seare* v. *Prentice*, 8 East, 348. Et vide *Slater* v. *Baker*, 2 Wils. 359. S. P.

If one who has hired a horse, instead of calling in a farrier to the horse when ill, undertakes to prescribe himself, and prescribes so improperly that the horse dies, he is guilty of a breach of the implied undertaking to exercise that degree of care which might be expected from a prudent man towards his own horse. *Deane* v. *Keate, Esq.* 3 Camp. 4.

(*b*) In assumpsit against a warehouseman for negligently keeping a quantity of gentian, whereby it was spoiled. Defendant proved that he had taken all possible care of it; and Lord *Kenyon* held that he was not, like a common carrier, answerable to all losses, and that having exerted due and common diligence, he should not be liable to a damage he could not prevent. *Cailiff* v. *Danvers*, Peake N. P. C. 114.

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CHAPTER VII.

OF CASE FOR CONSEQUENTIAL DAMAGES.

AN action upon the case will likewise lie for consequential damages where the act itself is not an injury.

As if a man who ought to inclose against my land, do not inclose, by which the cattle of his tenants enter into my land and do damage to me. (1 *Rol. Abr.* 105. *c.* 11.) (*a*) So, till 6 *Ann. c.* 31, (which enacts that no action shall be had against any person in whose house or chamber any fire shall accidentally begin, for any damage occasioned

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(*a*) In which case the action must be brought, not against the landlord, but the terre-tenant. *Cheetham* v. *Hampson*, 4 T. R. 318.

thereby,

thereby, with a proviso that it shall not extend to defeat or make void any contract or agreement between landlord and tenant) if a fire broke out in the house of *B.* which burnt the house of *A.* *A.* might bring an action.—*Pantam* v. *Isham*, E. 1701. Salk. 19.

It has been holden that if a lessee for years under a contract to be answerable for fire, lease to *B.* at will without such covenant, yet he may have an action against his under-lessee, because he is answerable over: and this is not within the act: *tamen quære*, for he had it in his own power to make him covenant to be careful.—*S. C.*

Right of Way and Water-course.—A right of way may be extinguished by unity of possession, unless it be a necessary one, and then it shall not. *(a)* But a right of water-course does not seem to be extinguished by unity of possession in any case.—*Surry* v. *Pigot*, H. 1625. Latch. 153. Poph. 166. 3 Bulst. 339. Noy. 84. W. Jones, 145. Palm. 444. S. C. *(b)*

(*a*) A right of way arises from a grant by the owner of the soil, or from a prescription which supposes a grant, or from the operation of law. *Finch's Law*, 63. *Co. Lit.* 56.

(*b*) Because it is a thing of necessity; but a right of way may be extinguished by unity of possession. *Vide* 21 *Ed.* III. 5. 11 *Hen.* IV. 12. 3 *Hen.* VI. 21. *Bro. Chemin.* pl. 13; but *Doddridge*, J. in *Surry* v. *Pigot*, Poph. 166. took a distinction between mere private ways and ways of necessity, as to church or market, and held that the latter were not extinct by unity of possession. See also *Clarke* v. *Cogg*, Cro. Jac. 170. *Beaudley* v. *Brook*, *ibid.* 189. *Bury* v. *Pope*, Cro. Eliz. 118. *Bowry* v. *Pope*, 1 Leon. 168. *R.* v. *Rosewell*, Salk. 459.

If a man has a right to a private way over the land of another, and that way is obstructed, an action lies for the obstruction. *Cantrel* v. *Church*, Cro. Eliz. 845. *Allston* v. *Pamphin*, Cro. Eliz. 466. In an indictment for obstructing an highway, *Ellenborough*, C. J. said, if the owner of a soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons by positive prohibition, he shall be presumed to have dedicated it to the public. *Rex* v. *Lloyd*, 1 Camp. 260. And in *Roberts* v. *Karr*, *ib. in notis*, where a bar had been put up across a street, and been afterwards knocked down, it was held that the putting up of the bar rebutted the presumption of a dedication to the public. And that there could not be a partial dedication to the public, though there might be a *grant* of a footway. Also in *Lethbridge* v. *Winter*, ib. in notis; twelve years elapsing between the absence of one gate and the putting up of another, was held no dedication to the public.

Where the thing hath its being by *prescription*, unity will extinguish it, but where the thing hath its being *ex jure naturæ*, it shall not be extinguished. *Per Whitlock*, C. J. in *Surry* v. *Pigot*, Poph. 170. And a water-course is *ex jure naturæ*, and therefore shall not be extinguished by unity; but a way or common shall, because they are part of the profits of land. *Ib.* For the case of a *way distinguendum est*, for if it should be a way which is only for easement, it is extinguished by unity of possession; but if it be a way of necessity, as a way to market or church, there it is not extinguished by unity of possession, because it is matter of necessity. *Per Doderidge*, J. *Ibid.* 172.

If *A.* have Black Acre and *C.* have White Acre, and *A.* has a way over White Acre to Black Acre, and then purchases White Acre, the way will be extinct; and if *A.* afterwards enfeoff *C.* of White Acre without excepting the road, it is gone.—11 *Hen.* IV. 5. 21 *Ed.* III. 2. 2 Sheph. Abr. 156.

J. had four closes of land together, and sold three of them, reserving the middle close, to which he had no way but through that which he sold; and it was holden that though he did not reserve the way, yet it should be reserved for him.—*Clarke* v. *Cogg*, T. 1607. Cro. Jac. 170. *Beaudley* v. *Brook*, M. 1607. *ib.* 189, 190. Co. Lit. 155.

If a man has a way by prescription over *A.*'s ground to Black Acre, he can't by virtue of this drive his cattle over *A.*'s ground into Black Acre, and so into other places beyond Black Acre.—*Howell* v. *King*, M. 26 Car. II. 1 Mod. 190. *Saunders* v. *Mose*, 1 Rol. Abr. 391, pl. 3.

In an action for obstructing a way, the plaintiff proved that *Fowler* was seised of the plaintiff's tenement, and the defendant's close, and in 1753 conveyed the tenement to the plaintiff with all ways therewith used, and that this way had been used with the tenement as far back as memory could go. The defendant produced a subsisting lease from
[*75] *Fowler* for three lives, made in *1723, by which *Fowler* demised the field in question in as ample a manner as one *Rock* a former tenant held it; and in this lease there was no exception of a way over the close. *Yates*, J. held, that by the lease without any reservation *the way was gone*, and therefore could not pass under the words *all ways*, &c. But as there were thirty years intervening between the defendant's lease, and the plaintiff's conveyance, and the way had been used all the time, that was sufficient to afford a presumption of a grant or licence from the defendant so as to make it a way lawfully used at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would pass.—*Keymer* v. *Summers*, Heref. Sum. Assizes, 1769. *Quare tamen*, and vide *Finch*'s Law, 63. *(a)*

In an action for diverting a water-course, the defendant pleaded that he was seized of two closes through which, *&c.* and that he and all those, *&c.* had used to water their cattle in the said water; and for the conveniency of watering, to dig a ditch near the said water-course, *&c.* and the court held that one prescription cannot be pleaded against another without a traverse, (*Murgatroid* v. *Law*, E. 2 & 3 W. & M. Carth. 117.) but if upon the general issue it had been proved, that the water was

(*a*) But where a way is claimed by *prescription*, if a *grant* appear the prescription is at end, and mere usage after gives no right. *Rex* v. *Hudson*, 2 Stra. 909.

usually

usually drunk up by the cattle of the defendant, the plaintiff would have failed in his prescription.—*Brown* v. *Best*, 20 Geo. II. 1 Wils. 124. (*a*)

Ancient lights.—If a man have an ancient house, and another build so near as to darken his windows, he may have an action upon the case, (*Aldred's Ca.* M. 1610. 9 Co. 58.) So if a man build a new house on part of his land, and afterwards sell the house to another, neither the vendor, nor any other claiming under him, may stop the lights. (*Palmer* v. *Fletcher*, M. 15 Car. II. 1 Lev. 22.) But if he sell the vacant ground to another, and keep the house without reserving the benefit of the lights, the vendee may build.—*Vide* S. C. Raym. 392. Salk. 459. Carth. 454. (*b*)

If

(*a*) The owner of land through which a river runs cannot, by enlarging a channel through which the water had before run, divert more of it to the prejudice of another land owner down the river, who had, previous to such enlargement, appropriated to himself the surplus water which did not escape the former channel. *Bealy* v. *Shaw*, 6 East, 208.

Twenty years exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it. *Balston* v. *Bensted*, 1 Camp. 463. Et vide *Bealy* v. *Shaw*, sup.

(*b*) Case lies for stopping lights on the presumption that they are antient lights; if it be shewn that they have continued thirty years without interruption, it may be left to the jury as conclusive evidence that they are antient lights. Vide *Darwin* v. *Upton*, M. 26 Geo. 3. post, where the court said twenty years possession was such a decisive presumption of a right by grant or otherwise, that the jury ought to believe it. Vide etiam *Lewis* v. *Price*, Esp. N. P. Dig. 636. S. P. But it is said to have been formerly held, that plaintiff must aver the house to be of immemorial standing, for if two men have land adjoining, and one building on his own land, makes windows to overlook that of the other, though his house may have stood forty years, yet may the other build on his own land and obstruct his neighbour's new-made windows. *Bury* or *Bowry* v. *Pope*, Cro. Eliz. 118. 1 Leon. 168, and against this prescription a contrary prescription cannot be alledged, for each is supposed to be coevally immemorial. *Aldred's Ca.* sup.

But if the period of enjoyment fall short of twenty years, other circumstances must be brought in aid of the plaintiff's right. *Dougal* v. *Wilson*, C. B. and *Darwin* v. *Upton*, B. R. 2 Wms. Saund. 175 (a), n. 2. Et vide *Hubert* v. *Groves*, 1 Esp. N. P. C. 148. And the same rule holds as to other easements. Vide *Campbell* v. *Wilson*, 3 East, 294.

This action may be maintained by a lessee for years, for the prescription goes with the house. *Symonds* v. *Seabourne*, Cro. Car. 325. And so for the reversioner. *Jessar* v. *Giffard*, 4 Burr. 2141. *Bidingfield* v. *Onslow*, 3 Lev. 209. *Leader* v. *Moxon*, 3 Wils. 461. 2 Bla. 924.

If a house has for twenty years enjoyed light enough for a malt house, the owner may up to that extent require light to be admitted into it, and no further. Therefore he can only maintain an action for a nusance in darkening his windows so much. *Martin* v. *Goble*, 1 Camp. 320.

A landlord cannot be concluded by his tenant's non-opposition to the enjoyment of certain windows by the tenant

If *A.* recover damage against *B.* for stopping his lights, and afterward *B.* assign the lands in which the nusance was erected, *A.* may bring another action against *B.* for the continuance of the nusance, for before the assignment *B.* was answerable for all the consequential damages, and it shall not be in his power to discharge himself by granting it over: Yet *A.* may bring the action against the assignee. (*Roswell* v. *Prior*, M. 12 W. 3. 12 Mod. 635. 2 Salk. 459.) (*a*) Though formerly a distinction was taken, *viz.* where the continuance occasions a new nusance, and where the first erection has done all the mischief; that in the first case the assignee is liable to an action, but not in the second.—*Rippon* v. *Bowles*, T. 1616. Cro. Jac. 373. (*b*)

All these cases go upon this principle, that every man should so use his own as not to damnify another. But if a new school be set up in a town, where an ancient school has been time out of mind, by which the old school receives damage, yet no action lies, and this is founded upon public convenience, and comes within the description of *damnum sine injuria*.—1 *Rol. Abr.* 107. (*c*)

(76) *Right of Ferry.*—A man possessed of an ancient ferry may bring an action against one who sets up a new ferry near to it: for if it be an ancient ferry, he is compellable to keep boats, &c.—*Blisset* v. *Hart*, M. 18 Geo. 2. C. B. Willes, 508. (*d*)

Patent Rights.—If the king grant a patent for the sole use of a new invention, and the patent is good in law, an action lies against any person who infringes upon it; but the invention must be new, and must be fully and fairly discovered. (*e*)

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tenant of the adjoining premises unless there be evidence of the knowledge of the landlord sufficient to found a presumption of a grant. *Daniel* v. *North*, 11 East, 372.

It seems that an action for opening a window to disturb the privacy of the plaintiff cannot be maintained; and that the only remedy is to build on the adjoining land opposite to the offensive window. *Per Le Blanc*, J. Shrewsbury Ass. *Chandler* v. *Thompson*, 3 Camp. 80.

(*a*) After a request made to remove the nusance. *Penruddock's Ca.* 5 Co. 101.

(*b*) In the first action for a nusance it is usual to give nominal damages only, but with costs, if it be continued, however, (even by an alience) after notice, exemplary damages will be given. *Penruddock's Ca.* sup.

(*c*) For it must not be understood that an action will lie for any thing that may merely inconvenience another.

(*d*) And if he does not, he shall be amerced, 1 *Rol. Abr.* 140. The owner of a ferry by prescriptive right however shall only have his action for direct injuries, therefore where a man claimed a right to ferry persons over from *Hull* to *Barton*, that right shall not extend to carrying persons to a different place, unless it was colourably done to prevent the use of the regular ferry, as by landing passengers within a short distance of the regular ferry. *Tripp* v. *Frank*, 4 T. R. 666.

(*e*) By the specification, as that when the patent has expired, the public may have the benefit of the invention without further instructions. *Liardet* v. *Johnson*, post, p. 76, b.

By

By 21 *Jac.* I. *c.* 3. which declares all monopolies illegal, it is enacted in *s.* 6. that that act shall not extend to any letters patent and grants of privilege for 14 *years* or under, thereafter to be made of the sole working or making of any manner of *new* manufactures within this realm to the true and *first inventor* of such manufactures, which others at the time of making such letters patent shall not use, so as also they be not contrary to law, nor mischievous to the state by raising the prices of commodities at home, or hurt of trade, or generally inconvenient.

A manufacture newly brought into the kingdom from beyond sea, though not new there, is within this exception: and whether learned by travel or by study it is the same thing.—*Edgebury* v. *Stephens*, Salk. 447. 1 Hawk. 233.

No new invention concerning the working of any manufacture is within this exception, unless it be substantially new, and not barely an additional improvement of an old one.—3 *Inst.* 184. 1 *Hawk.* 233.

No old manufacture in use before can be prohibited by the grants of the sole use of a new invention.—*S. C.*

Respecting patents the following general rules were laid down by *Lee*, C. J. 1st. Every false recital in a thing not material will not vitiate the grant, if the king's intention is manifest and apparent.—*Rex* v. *Mussary*, M. 12 Geo. 2.

2d. If the king is not deceived in his grant by the false suggestion of the party, but from his own mistake upon the surmise and information of the party, it shall not vitiate or avoid the grant.

3d. Although the king is mistaken in point of law or matter of fact, if that is not part of the consideration of the grant, it will not avoid it.

4th. Where the king grants *ex certa scientia et mero motu*, those words occasion the grant to be taken in the most liberal and beneficial sense according to the king's intent and meaning expressed in his grant.

5th. Although in some cases the general words of a grant may be qualified by the recital, yet if the king's intent is plainly expressed in the body of the grant, the intent shall prevail and take place.

A writ of *scire facias* to repeal letters patent lies in three cases, 1st, When the king doth grant by several letters patent one and the self same thing to several persons, the first patentee shall have a *sci. fa.* to repeal the second. 2dly, when the king doth grant a thing upon a false suggestion, he *prærogativa regis*, may by *sci. fa.* repeal his own grant. 3dly, when the king doth grant any thing which by law he cannot grant. 4 *Inst.* 88.

Where a patent is granted to the prejudice of a subject, the king of right

right is to permit him upon his petition to use his name for the repeal of it.—*Butler's Ca.* H. 31 & 32 Car. II. 2 Vent. 344.

A grant of the sole making of playing cards is void, because it is to restrain trade and traffick.—*Case of Monopolies,* T. 44 Eliz. 11 Co. 84.

When upon false insinuations or pretences, the king makes any grant, as of a monopoly, &c. which in truth is to the prejudice of the king and the commonwealth, the king *jure regis* shall avoid such grant, and such letters patent by judgment of law shall be cancelled. And it may be said that perpetuities, monopolies, and patents of concealment, were born under an unfortunate constellation, for as soon as they have been brought in question, judgment has always been given against them, and none at any time given for them; and all of them have two inseparable qualities, *viz.* to be troublesome and fruitless.—*Legate's Ca.* M. 10 Jac. I. 10 Co. 113.

There are three inseparable incidents to every monopoly against the commonwealth. 1st, the price of the commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases. 2dly, the commodity is not so good. 3dly, it tends to the impoverishment of artificers.—*Case of Monopolies,* 11 Co. 86.

The general questions on patents are, 1st, whether the invention were known and in use before the patent. 2d, whether the specification is sufficient to enable others to make it up. The meaning of the specification is, that others may be taught to do the thing for which the patent is granted; and if the specification is false, the patent is void; for the meaning of the specification is, that after the term the public shall have the benefit of the discovery.—*Liardet* v. *Johnson,* sittings at *Westminster* after Hil. 1778. *cor.* Lord *Mansfield. (a)*

" In a patent for trusses for ruptures, the patentee omitted what was very material for tempering steel, which was rubbing it with tallow, and for want of that, Lord *Mansfield* held it void.—*S. C.*

" Inventions are of various kinds, some depend on the result of figuring, others on mechanism, &c. others depend on no reason, no theory, but a lucky discovery: water tabbies were discovered by a man's spitting on the floor. This must in the nature of the thing depend on experiments, and those must depend on the proportions of the things used in the composition."—*S. C.*

(a) This case, as also *R.* v. *Arkwright,* sup. are reported in *Collier's Law of Patents,* ch. ix. sec. 2. and ch. x. sec. 1.

In

In *Morris* v. *Branson*, sittings at *Westminster* after *Easter*, 1776. The question was, whether an addition to an old stocking frame was the subject of a patent? Lord *Mansfield* said, if the general question of law, *viz.* that there can be no patent for an addition, be with defendant, that is, open upon the record, he may move in arrest of judgment, but that objection would go to repeal almost every patent that was ever granted. There was a verdict for plaintiff and £500 damages, which was acquiesced in.

On a *scire facias* to repeal a patent, four issues were joined on the record. 1st, that the patent was inconvenient to his majesty's subjects in general. 2dly, that the invention at the time of granting the patent was not a new invention as to the public use and exercise of it in *England*. 3dly, that it was not invented and found out by defendant. 4thly, that the defendant had not by his specification particularly described and ascertained the nature of the invention, and in what manner it was to be performed.—*The King* v. *Arkwright*, sittings at *Westminster* after T. 1785. *Collier's Law of Patents*, ch. x. sec. 1.

Buller, J. held, that the 1st issue was merely a consequential one, it stated no fact which could be tried by a jury, or which the defendant could come prepared to answer, and therefore refused to hear any evidence but what applied to the three last issues; and he laid down the following rules.

1st, A man to intitle himself to the benefit of a patent of monopoly must disclose his secret and specify his invention in such a way that others of the same trade who are artists may be taught to do the thing for which the patent is granted by following the directions of the specification without any new invention or addition of their own.

2dly, He must so describe it that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the patentee himself uses it: and therefore if the specification describes many parts of an instrument or machine, and the patentee himself uses only a few of them; or does not state how they are to be put together or used, the patent is void.

3dly, If the specification be in any part of it materially false or defective, the patent is against law and cannot be supported.

4th, That as to the invention, the rule of law was very different from what it was on the specification: for as on the specification if any one part of the invention were not sufficiently described, the patent is void; so on the invention, if any one part of it be new and useful, that is sufficient to sustain a patent for the particular object of the invention: but if the invention consists of an addition or improvement only, and the patent

patent goes to the whole machine, it would be a very different question, whether such a patent could be supported. But it was not necessary to give a precise opinion on that point, because no material part of the invention was new, or made by the defendant. The jury found for the crown on all the issues.

The patent must not be more extensive than the invention; therefore if the invention consist in an addition or improvement only, and the patent is for the whole machine or manufacture, it is void.—*Per* Ld. *Mansfield* in different cases, and by *Buller*, J. in *The King* v. *Else*, sittings at *Westminster*, after M. 1785.

Right of Common.—In an action on the case by a commoner for disturbing him in his common, he must prove his right to the common, and yet in such case it is not necessary to set it forth in the declaration, for possession is sufficient against a wrong-doer, (*Strode* v. *Byrt*, 4 Mod. 424.) (*a*) But if he were to set up a title to a different kind of common from that to which he had a right, he would not be intitled to recover; for he must prove himself possessed of the common, for the being disturbed in which he brings his action, though he need not prove the same title as he has set out in his declaration; for the disturbance is the gist of the action, and the title is only inducement, and cannot be traversed, (*Marvin* v. *Maynard*, M. 1595. Cro. Eliz. 419. *Ferrer* v. *Johnson*, Cro. Eliz. 335, and *post*.) It is true if the defendant set up a title, and justify, the plaintiff in his replication must shew a title.—*Strode* v. *Byrt*, sup.

For every feeding by the cattle of a stranger, the commoner shall not have an action; but the feeding ought to be such *per quod* the commoner, *&c.* common of pasture, *&c.* for his cattle, *&c.* *in tam amplo modo habere*

(*a*) If to this action by a commoner, defendant plead that he dug turf under licence from the lord, he should add that sufficient common was left for the commoners, or if he do not plaintiff is not obliged to reply that there is not sufficient common left, which is the gist of the action. *Greenhow* v. *Ilsley*, Willes, 619.

In this action plaintiff must state an injury sustained, though ever so small, as taking away the manure dropped by the cattle. *Pinder* v. *Wadsworth*, 2 East, 154, otherwise a wrong-doer might, by repeated torts, establish a right of common. *Patrick* v. *Greenaway*, 1 Saund. 346, (b). n. 2, in *Williams'* notes to *Mellor* v. *Spateman*.

If the right of common be particularly injured, the commoner ought not to abate the cause of injury, if in so doing he must interfere with the right of soil; therefore in *Cooper* v. *Marshall*, 1 Burr. 259, it was held, that a commoner could not justify digging up the soil, and destroying the coney burrows made by the lord who had a free warren there. So where the lord planted trees, and a commoner cut them down, the lord may maintain trespass, and the commoner cannot justify the abatement of the trees. *Sadgrove* v. *Kirby*, 6 T. Rep. 483; affirmed in *Cam. Scacc.* 1 Bos. & Pull. 13.

non

non potuit, sed proficuum suum inde per totum tempus amisit, &c. So that if the trespass be so small that he has not any loss, but sufficient in ample manner remain for him, the commoner shall not have any action for it; but the tenant of the land may in such case have an action.—*Mary's Case*, T. 1612. 9 Co. 113. *(a)*

Right of Pew.—It has been said that in case for disturbing the plaintiff in the seat of a church, the plaintiff ought to prove usage to repair, though it be not alledged in the declaration. (*Steven's Ca.* 26 Car. II. 1 Sid. 203.) But the true distinction seems to be between prohibitions or actions against the ordinary, and actions against a wrong-doer. Where it is to oust the ordinary of his jurisdiction you must prove repairs; but it is not necessary to prove them in an action against a wrong-doer, which is founded upon possession.—*Kendrick* v. *Taylor*, T. 26 Geo. 2. K. B. 1 Wils. 326. *(b)*

Right of Office.—If case be brought for disturbing the plaintiff in taking the profits of an office, it is sufficient to prove the value *communibus annis*, without proving every particular sum received by the defendant.—*Montague* v. *Preston*, E. 2 W. & M. 2 Vent. 171. *(c)*

In case for disturbing him in an office, the plaintiff made a special title to it; a special verdict found a title *variant* in part from that which

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(a) Formerly, where one commoner had surcharged the common with his cattle, the party aggrieved might have a writ of admeasurement of pasture. But now the mode is for the complaining commoner to bring his action on the case against the surcharging commoner, even though the former has been guilty of the same offence. *Hobson* v. *Todd*, 4 T. Rep. 71. And plaintiff need not set forth the defendant's right of common, and shew how he exceeded that right, by putting too many or improper cattle, for the disturbance may be alledged generally. *Atkinson* v. *Teasdale*, 3 Wils. 278. 2 Bla. 817. Neither is it necessary the plaintiff should state that he was exercising his right at the time of the surcharge. *Wells* v. *Watling*, 2 Bla. 1233. But from *Smith* v. *Feverell*, 2 Mod. 6; and from a *dictum* in *Hassard* v. *Cantrel*, Lutw. 107, it should seem that in an action against the lord a particular surcharge must be shewn.

(b) As this right is *primâ facie* in the ordinary, the plaintiff, in case of disturbance, must shew his title either against the ordinary or the wrong-doer, either by prescription, as appurtenant to a messuage, or under a faculty from the ordinary. *Stocks* v. *Booth*, 1 T. Rep. 428. Vide *Gibs. Cod.* 221.

The presumption of a right by prescription to a pew, founded on long enjoyment, may be rebutted, by shewing when the pew was built. And *per Buller*, J. a seat in a church may be annexed to a messuage either by a faculty or prescription, or by long usage a faculty may be presumed. *Griffith* v. *Matthews*, 5 T. Rep. 296.

(c) But the plaintiff in such action must shew it was an office in fee, and had fees annexed to it, otherwise they can be no injury to sustain the action. *Harvey* v. *Newlyn*, Cro. Eliz. 859.

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was alledged; and after divers arguments the plaintiff had judgment, for setting out a title in this action was superfluous.—*Ferrer* v. *Johnson*, M. 35 Eliz. Cro. Eliz. 335. *(a)*

[77] *Dogs mischievous.*—An action upon the case will lie for keeping a dog used to bite sheep, and which has killed sheep belonging to the plaintiff; *(b)* but in such case it must be proved that the defendant knew that he would bite sheep; and killing sheep twice before is sufficient proof of usage. *(c)*

In *Smith* v. *Pelah*, (H. 20 Geo. 2. Stra. 1264.) *Lee*, C. J. ruled, That if a dog have once bit a man, and the owner having notice thereof keep the dog and let him go about, and he bite another person, case will lie against him at the suit of the person bit (though it happened by his treading on the dog's toes;) for the owner ought to have hanged him on the first notice.

If one knowingly keep a dog accustomed to bite sheep, and the dog bite an horse, it is actionable; because the owner after notice of the first mischief ought to have destroyed or hindered him from doing any more.—*Jenkins* v. *Turner*, M. 1696. 1 Raym. 110. *Mason* v. *Keeling*, M. 11 W. III. 12 Mod. 335. *(d)*

Note; There is a difference between things *feræ naturæ*, as lions, bears, &c. which a man must keep up at his peril, and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature; in the latter case the owner must have notice; in the former an action lies against the owner without notice.—*Rex* v. *Huggins*, M. 1730. 2 Raym. 1583. *(e)*

Carelessness culpable.—The servant of *A.* with his cart ran against the cart of *B.* in which was a pipe of sack, and overturned it, and the wine was spilt, an action was brought against the master, and it was holden good. (*Anon.* 1 Raym. 739. int. *Holt's* Points.) *(f)* And note,

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(a) The principal officers of the court have no power to remove their clerks, unless for misconduct, therefore this action lies against a *custos brevium*, at the suit of his under-clerk, who was turned away without cause. *Whitechurch* v. *Paget*, 1 Sid. 74.

(b) Vide *Bolton* v. *Banks*, Cro. Car. 254.

(c) *Kinnion* v. *Davis*, Cro. Car. 487.

(d) Et vide *Buxentin* v. *Sharpe*, 2 Salk. 662. 3 Salk. 12.

(e) Et vide *Mason* v. *Keeling*, 1 Ld. Raym. 606.

(f) Alleging that the plaintiff negligently did such an act may be followed up by proof, that it was done by his servant in his employ in the absence of the master, according to *Michael* v. *Alestree*, 2 Raym. 1402, and *Brucker* v. *Fromont*, 6 T. Rep. 659. *Per Lawrence*, J. in *Leame* v. *Bray*, 3 East, 601.

where

where such an action is brought against the master for consequential damages occasioned by the neglect of his servant, the servant charged with the neglect cannot be a witness to prove it no neglect. (H. 10 *Ann. per Holt.* Salk. MSS.) But in an action for so negligently managing his barge that he run down the plaintiff's, *Lee*, C. J. (at *Guildhall*, 1744,) permitted the defendant to produce every one of the men on board his vessel to prove there was no neglect, he being himself at that time asleep on board. And in case against the master, for his carman's negligently driving his cart, *per quod* the plaintiff was flung off a ladder and bruised; on shewing a release from the master, the servant was allowed to be examined.—*Jarvis* v. *Hayes*, M. 11 Geo. II. 2 Stra. 1083.

In case for digging a pit in a common, *per quod* his mare being straying there fell into it and perished: After verdict for the defendant on Not Guilty, the plaintiff, to save costs, moved in arrest of judgment that the declaration was not good, he not shewing any right why his mare should be in the common, and therefore it is *damnum absque injuriâ*, and of * that opinion was the whole court: Wherefore it was [*78] adjudged that the bill should abate. (*Blythe* v. *Topham*, E. 1608. Cro. Jac. 158.) Yet it seems unjust in such case to deprive the defendant of his costs, merely because the action brought against him was erroneous as well as wrongful: Though doubtless the objection to the declaration was good, and ought to have availed in case the verdict had been for the plaintiff. It is a good reason why the plaintiff should not have judgment; but it seems to be no reason why the defendant should not. *(a)*

If a man dig a ditch in the highway, into which my servant falls and breaks his thigh, by which I lose his service, I may have an action on the case for this loss of service. (*Everard* v. *Hopkins*, H. 12 Jac. I. 1 Rol. Abr. 88.) So for beating him by which I lose his service; and in such case the servant may be a witness. And the defendant may give in evidence upon the general issue, that the plaintiff did not lose his service, for that is the gist of the action. (*Per Raym.* C. J. in *Duel* v. *Harding*, 9 Geo. I. 1 Stra. 593.)*(b)* But if the servant die of the battery, the master

(a) If a man set dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that passing or neighbouring dogs may be attracted by their instinct into the traps, and injured, this action will lie. *Townsend* v. *Wathen*, 9 East, 277.

(b) If a lad (under age) be living with his father in his family, and under his protection, it is not necessary in an action for an assault, *per quod*

master cannot have an action for the loss of his service, for the private offence is drowned in the felony; and the defendant might give this in evidence on the general issue; for as this action arises from the special damages, any thing may be given in evidence on the general issue that destroys the right of action; (*Osborne's Ca.* M. 11 Jac. 1. 10 Co. 133. *Higgins* v. *Butcher*, M. 4 Jac. 1. Yelv. 89.) as in case for beating his horse, *per quod* he totally lost the use of him, the defendant may prove the beating lawful.—*Slater* v. *Swan*, T. 4 Geo. 2. Stra. 872. *(a)*

Miscellanea.—The plaintiff declared that he exercised the trade of a wheeler, and was possessed of several tools that related to the trade, *viz.* an axe, *&c.* and being so possessed gained a livelihood, *&c.* and by the licence of the defendant deposited them in his house, and that he had detained them two months after request, by which the plaintiff had lost the benefit of his trade; after verdict it was moved in arrest of judgment, because the plaintiff ought to have brought detinue or trover. But the court held the action well brought, for if he have had the goods again, detinue is not proper; and though a detainer upon request is evidence of a conversion, yet it is not a conversion, and the damages he demands in this case being special, the action ought to be special.—*Kettle* v. *Hunt*, M. 27 Car. 2. C. B.

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quod servitium amisit to prove he was employed about his father's business. *Per Kenyon*, C. J. in *Jones* v. *Brown*, cited in 5 East, 49, (n.) Peake's Ca. 233.

So in case of seduction; if a daughter be a minor, the action is maintainable, though she be not resident at the time in her father's house; but if she be of age and non-resident, then it is not maintainable. *Per Wilson*, J. in *Booth* v. *Charlton*, and *Johnson* v. *Macledair*, cited *arguendo* in *Dean* v. *Peel*, 5 East, 47.

Where a daughter, under age, lives with a brother-in-law, and acts in his service, though not under any contract, and is seduced whilst there, but previous to such seduction intends not to return to her father's house, the father can maintain no action, there being no *animus revertendi*. *Dean* v. *Peel*, 5 East, 45.

So an action on the case, for seducing, and getting with child, the adopted daughter and servant of the plaintiff, *per quod* he lost her service, is maintainable, for the plaintiff stands *in loco parentis*. So also an aunt, for the seduction of her niece, living with her, may maintain this action. *Edmonson* v. *Machell*, 2 T. Rep. 4.

The plaintiff cannot give evidence of the chastity of his daughter, except in answer to evidence on the other side. *Bamfield* v. *Massey*, 1 Camp. 460.

If the plaintiff has been guilty of gross misconduct, he cannot maintain his action for the seduction of his daughter. *Reddie* v. *Scoolt*, Pea. Ca. 240.

(a) Declaration against defendant for driving his cart against plaintiff's horse with force and violence, alleging it to have been done through mere negligence, and want of proper care in the defendant. Defendant demurred; for that trespass should have been brought, but the court held the declaration good. *Rogers* v. *Imbleton*, 2 Bos. & Pul. N. R. 117.

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The plaintiff declared that his wife unlawfully and without his consent departed and continued absent, and during that time a large estate real and personal was devised for her separate use, and thereupon she was desirous of being reconciled and cohabiting with him, but the defendant* persuaded and inticed her to continue absent, by means of [*79] which she continued absent till her death, whereby he lost the comfort and society of his wife, and the advantage which he ought to have had from such real and personal estate. After verdict for the plaintiff for £3000 damages, it was moved in arrest of judgment, that this was an action *primæ impressionis*. But the court said that every special action on the case was in itself a novelty; (*Winsmore* v. *Greenbank*, M. 19 Geo. 2. C. B. Willes, 577.)*(a)* no action lies without damages, and the *per quod* will not alone be sufficient, unless the act done be illicit; but though a bare inticement to depart may not be actionable, yet the jury, under the direction of the judge, are judges of the legality: And as receiving a servant *scienter* is a ground for an action for the master, *a fortiori* for the husband; and injuries, that are in their nature of spiritual conusance, if attended with a temporal damage, are a ground of action.—*Fawcet* v. *Beawes*, T. 24 Car. II. 2 Lev. 63. *Skinner* v. *Andrews*, M. 20 Car. II. 2 Saund. 169. 2 Sid. 370. Vide *Vidian's Entr.* 85.

So shooting off a gun, *per quod* the plaintiff's decoy was damaged, was holden to be actionable in *Hickeringal's Ca.* H. 5 Ann.

General Rules.—It is impossible to set down all the cases in which an action upon the case will lie for consequential damages: I shall therefore conclude this head with referring to the fifth chapter of the first book, and repeating the rule already taken notice of in that chapter, *viz.* Where the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, &c. trespass *vi et armis* will lie; but where the act itself is not an injury, but a consequence of that act is prejudicial to the plaintiff's person, *(b)* house, lands, &c. trespass *vi et armis* will not lie: but the proper remedy is an action upon the

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(a) Vide etiam *Chapman* v. *Pickersgill*, 2 Wils. 146, which was an action for maliciously suing out a commission of bankrupt against the plaintiff, and in which an objection was also made to the novelty of the action; but *Pratt*, C. J. said, that though the same had been urged in *Ashby* v. *White*, Ld. Raym. 957, he did not wish ever to hear it again, for that torts were so infinite and various, that there was scarce any thing in nature which could not be converted into an instrument of mischief.

(b) If a man sustain any damage in his vigour or constitution, from having bad provisions or wine sold him, assumpsit lies. 1 *Rol. Abr.* 95.

case.

case. (*Reynolds* v. *Clarke*, T. 1734. Raym. 1399. 1 Stra. 635. S. P.) The case of *Pitts* v. *Gaince* and *Foresight*, (E. 1700. Salk. 10.) may serve to illustrate this rule. There the plaintiff declared in an action upon the case, for that he was master of a ship, and that it was laden with corn ready to sail, and that the defendant seized the ship and detained her, *per quod impeditus fuit in viagio*. It was objected that it should have been trespass, and some cases cited; but *Holt*, C. J. said, that in the cases cited the plaintiff had a property in the thing taken, but here the ship was not the master's but the owner's; the master only declares as a particular officer, and can only recover for his particular loss; though he said he might have brought trespass, declaring upon his possession, which in trespass is sufficient. *(a)*

(a) Trespass for running defendant's ship against plaintiff's in the river *Thames:* plea, Not Guilty. When the accident happened, the defendant himself was on board his ship, and stood at the helm, but he wished to steer clear of the plaintiff, and the mischief only happened through his ignorance and unskilfulness. Lord *Ellenborough* (after adverting to the doubts expressed by others on the subject) said, his own opinion had always been uniform, "whether the injury complained of arises directly, or follows consequentially from the act of the defendant," he had always thought, the only just criterion between trespass and case. If in the dark I ride against another man on horseback, this is undoubtedly trespass, although I was not aware of his presence till we came into contact; it makes no difference, that the parties were on ship-board; the defendant was at the helm, and guided the motion of his vessel: the winds and waves were only instrumental in carrying her along in the direction which he communicated: that force therefore proceeded from him, and the injury which the plaintiff sustained was the immediate effect of that force. *Covell* v. *Laming*, 1 Camp. 497, and the cases cited in p. 499.(n.)

Trespass for driving defendant's ship over plaintiff's boat; the defendant was on board at the time, but the order was given by the plaintiff, the vessel, however, would not obey her rudder; the accident was not owing to any design or wilful act of any person on board; the jury thought the accident was occasioned by negligence, and found for the plaintiff. But the court of C. P. decided, that the action should have been case, and granted a new trial. *Huggett* v. *Montgomery*, 2 Bos. & Pul. N. R. 446. Et vide *Selw. N. P. Abr.* tit. (Conseq. Dam.) 355.

But where the defendant drove against the plaintiff's chaise by accident, and not wilfully, it was held, that trespass was not the proper action; that *wilfulness* is not necessary for maintaining trespass: that if one put in motion a dangerous thing, and leave it to the hazard of what may happen, and mischief ensue to any person, such person is answerable in trespass. The only rule is where the injury arises from an immediate act of force of the defendant, there it is trespass. And if one put an animal or carriage in motion, which causes an immediate injury to another, he is the actor, the *causa causans*. The true criterion, therefore, is, whether the plaintiff received an injury by force from the defendant. *Leame* v. *Bray*, 3 East, 599.

Trespass will not lie against a master

master for the wilful act of his servant, in driving his master's carriage against another's carriage, against the will of his master. *Macmanus* v. *Crickett*, 1 East, 106.

To an action for running a cart against the plaintiff's chaise, (in which he was travelling along the highway), and killing one of his horses with the shafts of the cart, not guilty was pleaded. Defendant's case was, that the accident happened through plaintiff's negligence, or by mere accident, without default on the part of defendant. But, *per Ellenborough*, C. J. these facts ought to have been pleaded specially. The only thing to be tried on not guilty, is, whether defendant's cart struck plaintiff's chaise, and killed his horse, that is now admitted, and the intention of defendant is immaterial. This is an action of trespass, if what happened arose from inevitable accident, or from the negligence of the plaintiff, defendant is not liable; but as he did run against the chaise, and kill the horse, he committed the acts stated in the declaration, and he ought to put upon the record, any justification he may have for doing so. The plea denying these acts must clearly be found against him. *Knapp* v. *Salisbury*, 2 Camp. 500.

So if the defendant has a general authority from the plaintiff, and the act complained of was done in pursuance of that authority, or if the act done be really for the plaintiff's benefit, or there had been an inevitable necessity to do it, in consequence of doing a rightful act for a third party, still it is matter to be pleaded, and is not evidence of not guilty in discharge of the action. *Millman* v. *Dolwell*, 2 Camp. 578.

Although there does not seem at any time to have been a doubt, as to what degree of improvident conduct, or culpable carelessness, will render a man liable to be sued for consequential damages, yet a question has frequently arisen respecting the form of action, which should be adopted by the person who has sustained an injury, *i. e.* whether the proper remedy is by action of *trespass vi et armis*, or, *trespass on the case;* and, as in order to avoid confusion, the judges have been ever anxious, that the boundaries of actions should be preserved, it may be proper to notice, that the true and settled distinction now is, that if the injury be occasioned by the act of the defendant at the time, or the defendant be the immediate cause of the injury, *trespass vi et armis* is the proper remedy; but where the injury is not direct or immediate on the act done, but consequential only, there the remedy is by action *on the case*, or as it is, term on the case for consequential damages. Vide *Leame* v. *Bray*, sup. in which case, *Grose*, J. said, that such was the only rule and principle that could be drawn from an examination of the authorities from the year book, 21 *H.* VII. *c.* 28, to the latest decision on the subject; but in no case is this doctrine so fully discussed and laid down as in the important case of *Scott* v. *Shepherd*, 2 Bla. 892. 3 Wils. 403; which decision Lord *Ellenborough* said, in *Leame* v. *Bray*, sup. had gone to the limit of the law. See further on this point, *Turner* v. *Hawkins*, 1 Bos. & Pul. 472; *Reynolds* v. *Clarke*, Raym. 1399; Stra. 634; and the several cases before referred to in this chapter.

BOOK III.

FOR WHAT INJURIES AFFECTING A MAN'S REAL PROPERTY AN ACTION MAY BE MAINTAINED.

INTRODUCTION.

THE actions, which may be brought for injuries affecting a man's real property are of three sorts,

First. Such in which damages alone are to be recovered.
Second. Such by which a term for years may be recovered.
Third. Such by which a freehold may be recovered.

The actions in which damages alone are to be recovered are two,

I. Trespass.
II. Case; of which enough has been already said in the last chapter of the last book.

The only action by which a term for years may be recovered is Ejectment.

The actions by which a Freehold may be recovered are,

1. Writ of Right.
2. Formedon.
3. Dower.
4. Waste.
5. Assize.
6. Quare Impedit.

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CHAPTER I.

OF TRESPASS.

THE action of Trespass lies for an injury done by one private man to another, where the immediate act itself occasions the injury either to his person, goods, or lands; and though in this place I ought regularly to treat only of the last, yet (as I before promised) I shall likewise take into

into my consideration the second, having already spoken of the first as far as is necessary. *(a)*

Where entry, authority, or licence is given to any one by the law, and he does abuse it, he will be a trespasser *ab initio*; but where it is given by the party, he may be punished for the abuse, but he will not be a trespasser *ab initio*. But the not doing cannot make the party, who has authority or licence by the law, a trespasser *ab initio*, because not doing is no trespass.—*The Six Carpenter's Ca.* 8 Jac. I. 8 Co. 146. *(b)*

Estray.

(a) 1. To entitle a man to bring trover, the plaintiff must, *at the time when the act*, which constitutes the trespass, was done, either have the actual possession in him of the thing which is the object of the trespass, or else he must have a constructive possession, in respect of the right being actually vested in him. *Per Ashhurst*, J. in *Smith* v. *Milles*, 1 T. Rep. 480.

2. But he in whom the general property of a personal chattel is, may, although he has never been in the actual possession of it, maintain trespass for the taking or injuring thereof by a stranger; for a general property always draws to it a possession in law, which possession, in the case of a personal chattel, is, by reason of the transitoriness of its nature, sufficient whereon to found an action for the trespass. *Bro. Trespass*, 303. pl. 346. *Hudson* v. *Hudson*, Latch. 214. *Fisher* v. *Young*, 2 Bulst. 268. S. P.

3. In real property, the person only who has possession in fact, can maintain trespass for an injury done to it; for the having a general property in realty, does not, as in personalty, draw to it a possession in law. *Bro. Trespass*, pl. 36. 303. 346. *Bidingfield* v. *Onslow*, 3 Lev. 209. *Hodson* v. *Hodson*, Latch. 263. *Fisher* v. *Young*, sup.

If a tenant at will commit voluntary waste, as in pulling down houses, or felling of trees, it is said, the lessor shall have an action of trespass against him; *Litt. s.* 71: and Lord *Coke* adds, true it is that trespass *vi et armis* lies, for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in law to a determination of his will. *Co. Litt.* 57. (a)

4. In actions which are in their nature transitory, though arising out of a transaction abroad, trespass will lie in this country, but not such as are in their nature local, as for entering a house in *Canada*, and expelling the plaintiff. *Doulson* v. *Mathews*, 4 T. R. 503.

(b) And the reason of this difference is, that, in the case of a general authority or licence of law, the law adjudges by the subsequent act *quo animo*, or to what intent he entered, for *acta exteriora indicant interiora secreta*. But when the party himself gives a licence or authority to do any thing, he cannot, for any subsequent cause, punish that which is done by his own authority or licence.

Not doing cannot make the party, who has authority and licence by law, a trespasser *ab initio*, because *not doing* is no trespass; and if lessor distrain for his rent, and thereupon the lessee tender him his rent and arrears, and requires the beasts again, and he will not deliver them, this will not make him a trespasser *ab initio*. So in replevin after tender, he shall recover damages only for the detaining.

Tender upon the land, before the distress, makes the distress tortious, so tender after distress, and before impounding,

Estray.—In trespass for taking a gelding, the defendant justified the taking of him as an estray, the plaintiff replied that he laboured the said gelding, riding upon him and drawing with him, whereby he was much damnified; the defendant demurred, and it was objected that the first seizure was lawful by the plaintiff's own shewing, and therefore the action should not have been brought for the taking, but for the subsequent tort: but the court held that he was punishable for the abuse in an action of trespass, as a trespasser *ab initio*, and that the using of the estray was an abuser; for it is not lawful, except in case of necessity, and for the benefit of the owner; as to milk milch kine, *&c.*—*Bagshaw* v. *Goward*, H. 1607. Cro. Jac. 147. *Oxley* v. *Watts*, M. 26 Geo. III. S. P. *(a)*

Damage-feasant.—In trespass for taking away his goods, the defendant justified the taking *nomine districtionis* damage-feasant; the plaintiff replied *quod post districtionem*, viz. *eodem die, &c.* he converted them to

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impounding, makes the detaining, and not the taking, wrongful; but tender after impounding makes neither wrongful.

A merely accidental involuntary trespass may be justified, but a voluntary trespass cannot. Defendant and other persons came into one of plaintiff's closes, and one of defendant's dogs killed a deer of plaintiff's in an adjoining close, defendant calling him off; held that trespass will lie. *Rex* v. *Shordike*, 4 Burr. 2090. But where plaintiff's sheep were originally on defendant's ground, and defendant chased them off with his dog, and the dog pursued them (though called off by defendant) after they got on plaintiff's grounds, trespass will not lie. *Mitten* v. *Faudrye*, Poph. 161. cited in *Rex* v. *Shordike*, sup.

Plaintiff was landlord of a house, which he let to *M.* ready-furnished, and the lease contained a schedule of the furniture. An execution was issued against *M.* and the sheriff seized and sold the goods, after notice of property in plaintiff. *Per Kenyon*, C. J. the distinction between trespass and trover is well settled, the former is founded on possession, the latter on property; here the plaintiff had no possession, his remedy was by action of trover, founded on his property in the goods taken; but in the case (put) of a carrier, there is a mixed possession, actual possession in the carrier, and an implied possession in the owner. *Per Buller*, J. a carrier is considered in law as the servant of the owner, and the possession of a servant is the possession of the master. *Ward* v. *Macaulay*, 4 T. R. 489. But in *Gordon* v. *Harper*, 7 T. R. 11, Lord *Kenyon* observes, that what he had said in *Ward* v. *Macaulay*, sup. of trover being the proper remedy was an extrajudicial opinion to which on further consideration he could not subscribe; his Lordship declined giving any opinion on the point, but said, it was clear trover would not lie in such a case.

(a) If I lend my sheep to dung *A.*'s land, or my oxen to plough his land, and he kills my cattle, I may well have trespass against him. *Litt.* *s.* 71. The reason is, that when the bailee having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them, or in these cases he may have an action of trespass *sur le case* for the conversion at his election. *Co. Lit.* 57. (a)

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his own use. On demurrer it was holden to be no departure, but to make good the declaration, for he that abuses a distress is a trespasser *ab initio*; and it would be of no avail to the plaintiff to state the conversion in his declaration, for it is no way necessary to his action; and if alledged, need not be answered: it would be out of time to state it in the declaration, but it must come in in the replication.—*Gargrave* v. *Smith*, H. 2 W. III. Salk. 221. *Sir Ralph Bovey's Case*, T. 14 Car. II. 1 Vent. 217.

Rent Arrear.—But in trespass for breaking and entering his house, and taking an excessive distress, after judgment by default, it was holden on error brought that trespass would not lie; for the entry was lawful, and there is nothing subsequent to make it a trespass, as there is where the distress is abused. (*Hutchings* v. *Chamber*, M. 31 Geo. II. Burr. 580.) *(a)* At common law the party might take a distress of more value than the rent, *(b)* therefore that did not make him a trespasser *ab initio*, but the remedy ought to be by special action founded upon the statute of *Marleberge*.—*Lynne* v. *Moody*, M. 34 Geo. II. Stra. 851.

And note, That in distress for rent, if the outward door be open, the distrainant may justify the breaking open an inner door or lock, in order to find any goods which are distrainable.—*Browning* v. *Dann*, 9 Geo. 2.

By 2 *W. & M. sess.* 1. *c.* 5. Where goods are distrained for rent reserved, and the tenant or owner of the goods so distrained shall not within five days next after such *distress* taken, and *notice* thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises, replevy the same with sufficient surety to the sheriff, then *after* such distress and notice, and expiration of the said five days, the person distraining shall and may, with the sheriff, under-sheriff, or with the constable of the hundred, parish, or place where such distress shall be taken, cause the goods to be *appraised* by *two sworn appraisers* (whom such sheriff, under-sheriff, or constable are impowered to swear) to appraise the same truly according to the best of their under-

(a) Unless the distress be excessive on the face of it, as in *Moir* v. *Munday*, (cited in *Hutchings* v. *Chamber*,) where 6 ounces of gold, and 100 ounces of silver, were taken for 6*s.* 8*d.* but that appeared on the face of it and on the pleadings to be excessive; it was a distress of gold and silver, which are of a certain known value, and even the measure of the value of other things, but it was there holden, that in all other cases of goods and things of arbitrary and uncertain value, it must be an action on the statute of *Marleberge*.

(b) So as to make it more eligible to the party to redeem the goods by payment of the rent.

standings,

standings, and after such appraisement may *sell* the same for the best price that can be gotten, towards satisfaction of the rent and the charges, leaving the *overplus* (if any) in the hands of the sheriff, under-sheriff, or constable, for the owner's use. *(a)*

Notice to the tenant or to the owner of the goods is sufficient.—*Walter* v. *Rumball*, H. 6 W. & M. 4 Mod. 395.

A distress taken in two hundreds (they being contiguous) at the same time and for the same rent, is but one distress, and ought to be put in one pound, and the constable of the place where the distress was driven is the proper officer within the statute.—*S. C.*

If the person distraining is sworn as one of the appraisers, it is illegal, for he is interested in the business, and the statute says that *he*, with the sheriff, *&c.* shall cause the goods to be appraised by two sworn appraisers.—*Andrews* v. *Russel et al.* Sittings at *Westminster* after Easter 1786.

By the same statute, *s.* 5. if distress and sale are made where no rent is due, the owner of the goods by action of trespass, or on the case, may recover double the value of the goods distrained and sold, with full costs.

Sect. 3. Corn, grain, and hay may be distrained, and shall be kept in the place where they are found till they are replevied or sold.

[82] By 11 *Geo.* 2. *c.* 19. *s.* 8. The landlord may distrain any cattle or stock of the tenants feeding on any common appendant or appurtenant, *&c.* and all sorts of corn, grass, or other product growing on any part of the estate, and may cut and make the same, and lay it up in barns or other proper place on the premises when ripe; and if none such, then in any other barn or proper place which the landlord, *&c.* shall hire for the purpose, and as near as may be to the premises, and in convenient time to appraise, sell, or otherwise dispose of the same towards satisfaction of the rent, and of the charges, appraisement, and sale: and the appraisement to be made when cut, gathered, and made, and not before. *(b)*

Sect.

(a) In *Gorton* v. *Falkner*, 4 T. R. 567, Lord *Kenyon* said, he could not refrain from observing, as it then struck him, that this act of parliament has not taken away all privileges from distress, but has merely given the power of selling those things which might have been distrained before.

(b) Lord *Coke* (in *Co. Litt.* 47 a. b.) says, there are five things not distrainable. 1st. Things annexed to the freehold. 2d. Things delivered to persons exercising their trade, as cloth to a tailor. 3d. Hops and corn. 4th. Implements of ploughing. 5th. Implements of trade. The three first were absolutely privileged, the two

Sect. 9. Notice of the place where the goods are deposited shall, within a week, be given to the lessee or tenant, or left at his last place of abode, if the rent and charges be paid before the corn, &c. is cut, the distress shall cease.

Sect. 10. Distresses may be secured and sold on the premises, in such place or on such part as may be most fit and convenient. *(a)*

By 11 *Geo.* 2. *c.* 19. A distress for rent shall not be deemed unlawful for any irregularity in the disposition of it afterward, nor the party making it a trespasser *ab initio:* but the party aggrieved may recover full satisfaction for the special damage he shall have sustained thereby, and no more, in an action of trespass, or on the case, unless tender of amends have been made before. *(b)*

By 17 *Geo.* 2. *c.* 38. Where any distress is made for money justly due for the relief of the poor, it shall not be deemed unlawful, nor the party making it a trespasser, on account of any defect or want of form in the warrant of appointment of such overseers, or in the rate or assess-

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two last *sub modo*, as to the first they are not distrainable to this day, nor was corn distrainable till the statute of *W.* & *M.* this was so because they could not be restored in the plight they were when taken. Beasts of the plough were not distrainable, in favor of husbandry, which was for the general good of the nation, and if they were distrained, a person's livelihood would be taken away. The last reason holds for instruments of trade; another reason is, that when it is in the custody of any person in actual use, it cannot be taken away without a breach of the peace; there is a plain distinction in *Bracton*, and all the books between *catalla otiosa*, and those in actual use. *Per Buller*, J. in *Gorton* v. *Falkner*, 4 T. Rep. 565, in which case *Webb* v. *Bell*, 1 Sid. 440, was expressly overruled, it being there said that an horse mounted may be distrained *damage-feasant*. Vide *Story* v. *Robinson*, 6 T. Rep. 139. S. P. See also Mr. *Hargrave*'s notes to *Co. Litt.* 47, where all the cases on this point are collected together.

(a) By *Winterbourne* v. *Morgan*, 11 East, 404, it seems, that a continuance (by one who has made a distress) upon the premises longer than is allowed by law, may be the subject of an action of trespass. At all events, if a disturbance of possession be added to such continuance, trespass will lie. *S. C.*

This statute however, only makes the distrainer a trespasser, for that part which is irregular; but allows the injury done to the tenant to be a trespass, or case, according to the cause of action. *Per Ellenborough*, C. J. in *Messing* v. *Kemble*, 2 Camp. 116.

(b) Trespass for breaking and entering plaintiff's house, and seizing plaintiff's goods, plea Not Guilty. Evidence, that plaintiff held under defendant, that the goods were seized as a distress for rent arrear, but were sold without having been previously appraised according to 2 *W.* & *M.* *c.* 5. Held, *Per Ellenborough*, C. J. that this omission was not a trespass, and that this action was misconceived. And that plaintiff must in these cases elect to proceed by case or trespass, according to the nature of the injury. *Messing* v. *Kemble*, sup.

If the distress be regular in other respects, the omitting to appraise is no ground for an action of trespass upon the statute 11 *Geo.* 2. *c.* 19. *S. C.*

ments,

ments, or in the warrant of distress thereupon; nor shall the party be deemed a trespasser *ab initio* on account of any irregularity which shall afterward be done by him; but the party grieved may recover for the special damage, unless tender of amends have been before made.

Note. A warrant may be made to distrain before the time for which the rate is made, is expired.—*Charlwood* v. *Best*, Westminster 1748.

It hath been determined that *averia carrucæ* may be distrained for the poor's rate, though there be sufficient goods on the premises independent of them; and the law seems to be the same in all cases where an act of parliament gives remedy by distress and sale. (*Hutchins* v. *Chamber et al'* M. 31 Geo. 2. K. B. Burr. 580.) And though where a man has an entire duty, he shall not split and distrain for distinct parts at several times, yet if he be mistaken in the sufficiency of what he has taken, there is no reason or law that he should not distrain again for the residue.—Vide 17 *Car.* II. *c.* 7. *s.* 4.

Where the subject-matter of the suit is within the jurisdiction of the
[*83] court, but the want of jurisdiction is as to the person or *place, unless the want of jurisdiction appear on the process to the officer who executes it, he is not a trespasser: (*Papillon* v. *Backner*, M. 10 Car. 2. Hardr. 480.) but where the subject-matter is not within the jurisdiction, there every thing done is absolutely void, and the officer a trespasser.—*Combe's Case*, M. 11 Jac. 1. 10 Co. 76.

Though an officer may justify under the mesne process of an inferior court, without saying that the cause of action arose within the jurisdiction, yet when he justifies under process of execution he ought to make it appear that the cause arose within the jurisdiction of the court, or at least that it was so laid: *(a)* but that would not be sufficient for the plaintiff himself; he ought to know the extent of the jurisdiction for which he applies for justice; and therefore if in an action of false imprisonment he justified under the process of an inferior court the plaintiff above might reply that the cause of action arose out of the jurisdiction of the court; and a rejoinder praying judgment if the plaintiff, having by his pleading in the inferior court admitted the jurisdiction there, shall now be admitted to deny it here, would not be good.—*Higginson* v. *Martin and Hadley*, M. 28 Car. 2. Rot. 416.

(a) Trespass *vi et armis* lies not against an officer who by process arrests a man who is entitled to be discharged under a particular statute, but if the officer, knowing all these circumstances, and that he is entitled to be discharged, will yet arrest and detain him, perhaps case may lie. *Tarlton* v. *Fisher*, Dougl. (666.) 671.

But

But by 24 *Geo.* 2. (*quod vide ante*) no constable will be answerable for obeying a justice's warrant, notwithstanding any defect of jurisdiction in the justice. *(a)*

Note. That warrant *ex vi termini* means only an authority; therefore a warrant under the hand of the justice is sufficient without being under seal, unless particularly required by act of parliament.—*Padfield* v. *Cabbel et al'* T. 16 & 17 Geo. 2. C. B.

And *note*, That by 27 *Geo.* 2. *c.* 20. in all cases where any justice is impowered, by any act made or to be made, to issue a warrant of distress, it shall be lawful for him in such warrant, to order the goods distrained to be sold within a certain time limited by such warrant so that such time be not less than four, nor more than eight days, unless the

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(a) Trespass for entering plaintiff's house, defendant justified under a warrant from a justice of peace to search for nets; the warrant being proved, was directed to the constable of *Shipborn*, to *J. S.* and all other officers of the peace in the county of *K.* Evidence was given that the defendant was householder of the hundred of *P.* which adjoined to the hundred of *S.* in which the plaintiff's house was situated. *Per* Lord *Mansfield*, no constable can act under a warrant out of his district; it is certainly to be taken *reddendo singulos singulis.* The defendant is neither constable of *Shipborn*, nor is *J. S.* and the general direction is to be taken to each within his district. For plaintiff it was argued, that no justice could, by such a warrant, authorize a constable of one hundred to act in another, without specially appointing him so to do. This is a wise and politic regulation; for if the execution of warrants were given to mere strangers, force would be repelled by force, and excessive mischief would attend the departure from the ancient rules of local magistracy; if the defendant, not being constable of *S.* had been refused to execute the warrant, or had refused himself, he would not have been punished for his refusal; he was only a volunteer, neither generally described in the warrant, or specially named, and was not entitled to notice under the statute; for, said Lord *Mansfield*, the reason assigned by counsel are good, and they weighed with me in the present case. *MS. Ca.*

In an action against magistrates judicially acting, the facts stated to the court should appear the same as were laid before them when they made the order, and the plaintiff ought to shew that the facts on which he relies were proved before the magistrates. *Lowther* v. *Radnor*, 8 East, 119.

Officers shall not be made trespassers by relation. In this case an act of bankruptcy was committed on the 28th of *April;* afterwards the sheriff's officer took the goods under an extent; then an assignment was made to the plaintiffs, and they, as such assignees, brought trespass against the officer for the taking; and it was held, that, for the above reason, the action could not be maintained. *Lechmore* v. *Thorowgood*, 1 Show. 12, cited in *Smith* v. *Milles*, 1 T. R. 480, in which case the sheriff had entered and seized the bankrupt's goods before the commission, and sold them afterwards; and it was held that the sheriff could not be treated as a trespasser; though perhaps trover might lie upon the conversion.

money

money for which such distress shall be made, together with the charges of taking and keeping such distress, be sooner paid.

Chattels taken.—Proof that the plaintiff had delivered a box with the goods in it to the defendant to keep, and that the defendant had broken open the box and converted the goods to his own use, would be sufficient to maintain the declaration; for wherever a man has neither a general nor a special property, and he converts the goods, trespass will lie.—*Anon.* M. 29 Eliz. Mo. 248.

[84] But the plaintiff can only prove the taking such goods as are mentioned in the declaration; because a recovery in the action could not be pleaded in bar to any other action brought for taking other goods than those specified in the declaration; and therefore where the declaration was for entering the plaintiff's house, and taking *diversa bona et catalla ipsius querentis ibidem inventa*, after verdict for the plaintiff judgment was arrested.—*Wyatt* v. *Essington*, M. 11 Geo. I. 1 Str. 637.

After judgment vacated, and restitution awarded, the defendant brought trespass against the plaintiff for taking the goods, and the court held that the action would lie; for by vacating the judgment it is as if it had never been, and is not like a judgment reversed by error. But in such case it would not lie against the sheriff, who has the king's writ to warrant him; but the party must produce not only the writ but the judgment.—*Turner* v. *Falgate*, M. 15 Car. II. 1 Lev. 95.

In trespass *quare clausum fregit* the defendant pleaded, that the plaintiff distrained his hog, damage-feasant for the same trespass; the plaintiff replied, that the hog escaped without his consent, and that he is not satisfied for the damage; on demurrer it was holden that the action would not lie, though it was admitted that if the distress had died, the action would revive; but the escape (unless the contrary be shewn) is the fault of the plaintiff.—*Vasper* v. *Eddowes*, E. 12 W. III. Salk. 248. 1 Raym. 719.

Timber cut.—Trespass *vi et armis* does not lie against a lessee for years for cutting down timber trees, and carrying them away and selling them; but if after cutting them down he let them lie, and afterward carry them away, so that the taking and carrying away be not one continued act, but there is time for the property of the divided chattel to settle in the lessor, trespass will lie: (*Udall* v. *Udall*, M. 24 Car. II. Aleyn. 82.): and the reason why he is not otherwise liable is, that he has a special property or interest in them for repairs and shade; (*Herlakenden's Ca.* E. 31 Eliz. 4 Co. 62.); and therefore if the trees be excepted in the lease, it will make him a trespasser equally with a lessee

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at will, and it will lie against tenant at will, because such acts determine the will; (*Anon.* Mo. 248.) but against a tenant by sufferance the lessor cannot have trespass before entrance. (*Co. Lit.* 57.) And though a trespass will lie against the lessee for years for cutting the trees where they are excepted in the lease, yet if he put in his cattle to feed, and they bark the trees, trespass will not lie.—*Gleutram* v. *Hanby*, M. 11 W. III. 1 Raym. 739. *(a)*

Note; if land be leased to *A.* for a year, and so from year to year as long as both parties shall agree, this is a lease for two * years certain; [* 85] and if the lessee hold on after two years, he is not a lessee at will (as the old opinion was) but for a year certain, for his holding on is an agreement to the original contract; and such an executory contract is not void by the statute of frauds, for there is no term for above two years ever subsisting at the same time; (*Legg* v. *Strudwick*, H. 7 Ann. Salk. 414.) but if the original contract were only for a year, or if it were at £8 *per annum* rent without mentioning any time certain, it would be a tenancy at will after the expiration of the year, unless there were some evidence, by a regular payment of rent annually or half-yearly, that the intent of the parties was that he should be tenant for a year.—*Goodtitle* ex dem. *Hucks* v. *Langford, per Foster*, J. on a case reserved from Berks, 1753. *(b)*

By

(a) It was long doubted whether a landlord had such a possession of timber cut down pending a lease, as that he could maintain trover, but it has been determined he has; because the lessee has only an interest while it was growing on the premises, which determines as soon as it is cut down. *Berry* v. *Heard*, Palm. 327, cited by *Lawrence*, J. in *Gordon* v. *Harper*, 7 T. Rep. 13.

(b) In this case in *Salk.* there was a demise "for a year, and so from year to year." This was held to be a lease for two years at least, and also that when the third year had begun, neither lessor nor lessee could determine the estate in the middle of the year; and S. P. was held in *Birch* v. *Wright*, 1 T. R. 381.

Condition that "*C.* should continue tenant not for one year only, but from year to year." *Per Ellenborough*, C. J. This is a demise for a year, and so on from year to year, and must enure as a tenancy for at least two years. *Denn* v. *Cartwright*, 4 East, 29.

Plaintiff averred that he was possessed of a certain shop, *&c.* for the remainder of a certain term of years then unexpired therein. Evidence that, at the time of the agreement, plaintiff was only a tenant from year to year, with a promise of a lease for fourteen years. And held that the tenancy from year to year agreed with the declaration. *Botting* v. *Martin*, 1 Camp. 317.

Defendant was tenant from year to year; upon some dispute, the plaintiff told him he might quit when he pleased, and defendant did quit in the middle of the year, and tendered the plaintiff rent for a day beyond the time he occupied: this sum was paid into court, on the tender pleaded; but the court held that the tenancy was not determined by this parol licence to quit, and the quitting

By 6 *Ann. c.* 18, guardians, trustees, husbands seized in right of their wives, and tenants *pur autre vie*, holding ever without consent are made trespassers, but the act does not extend to lessees for years.

Trees.—If the lord of a manor cut down so many trees as not to leave sufficient estovers, his copyholder may bring trespass against him, and recover the value of the trees in damages; and if the lord leave sufficient estovers, yet he shall recover *special* damages; *viz.* for the loss of his umbrage, breaking his close, *&c.* therefore if the lord have a mind to cut trees, he ought to compound with his tenant.—*Ashmead* v. *Ranger*, E. 12 W. III. 12 Mod. 379. *(a)*

If *A.* make a lease for years excepting the trees, the lessor may enter to shew the trees to a purchaser, and the lessee cannot bring trespass.—*Lifford's Case*, 11 Co. 46.

Note; If *A.* plant a tree upon the extremest limits of his land, and the tree growing extends its root into the land of *B.* *A.* and *B.* are tenants in common of the tree; but if all the roots grow in *A.*'s land, though the boughs shadow the land of *B.* yet the property of the whole is in *A.*—*Glentram* v. *Hanby*, M. 11 W. III. 1 Raym. 737.

Crops.—It is not necessary to have an interest in the soil, to maintain trespass *quare clausum fregit*, but an interest in the profits is sufficient, as he who has *prima tonsura*. So if *J. S.* agree with the owner of the soil to plow and sow the ground, and for that to give him half the crop, *J. S.* may have his action for treading down the corn, and the owner is not jointly concerned in the growing corn, but is to have half after it is reaped by way of rent, which may be of other things than money: (*Welch* v. *Hall, per Powell*, at Wells, 1700. Salk. MSS.) *(b)* Though in

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ting accordingly; that the surrender ought, by 29 *Car.* 2. *c.* 3. *s.* 3. to have been by deed or note, in writing, or by act and operation of law. *Mollett* v. *Brayne*, 2 Camp. 104. And it is so upon cancelling a lease. *Roe* v. *York Archbp.* 6 East, 86.

(a) A copyholder is not entitled to take trees for house-bote, fire-bote, *&c.* as a tenant for life or for years is, except by special custom of the manor. *Montague, Lord*, v. *Shepperd*, Cro. Eliz. 8.

(b) Trespass for breaking plaintiff's close, and treading down hay. The plaintiff agreed with defendant for a standing crop of growing grass, then in a close of defendant's, the plaintiff to mow it and make the hay; but no earnest nor memorandum was given. Before the time of cutting by plaintiff, the defendant told him he should not have it, and he sold it to another person. *Ellenborough*, C. J. held, that a person entitled to the exclusive enjoyment of the crop growing, might in respect of such exclusive right, maintain trespass against any person doing the acts complained of in violation thereof. This crop, he said, was, at the time of the sale, an unsevered portion of the freehold, and as such not *goods, wares, or merchandizes*, within the 17th section of the statute of frauds. Held also that this agreement was not a lease, estate, interest of freehold, or term of years, or an

in *Co. Lit.* 142, it is said it cannot be of the profits themselves; but that (as it seems) must be understood of the natural profits. *(a)*

Trespass in Continuando.—The plaintiff may prove trespass at any [86] time before the action brought, though it be before or after the day laid in the declaration. (*Co. Lit.* 283. *Per Holt*, 4 Ann. at Hertford. But in trespass with a *continuando* the plaintiff ought to confine himself to time in the declaration; yet he may waive the *continuando*, and prove a trespass on any day before the action brought, or he may give in evidence only part of the time in the *continuando*.—Vide *Webb* v. *Turner*, E. 11 Geo. 2. Stra. 1095.

Note; That of acts that terminate in themselves, and once done cannot be done again, there can be no *continuando*; as hunting or killing a hare, or five hares, but that ought to be alledged, that *diversis diebus ac vicibus* between such a day and such a day he killed five hares, and cut and carried away twenty trees. And where a trespass is laid in continuance that cannot be continued, exception ought to be taken at the

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an uncertain interest of, in, to, or out of lands created by parol, within the meaning of the 1st section, so as to be void, as not having been put in writing; that the leases, &c. meant to be vacated by the 1st section, must be understood as leases of the like kind with those in the 2d section, but which conveyed a larger interest to the party than for a term of three years, and such also as were made under a rent reserved thereupon; that the agreement was a contract of an interest in, or at least concerning lands; that the statute does not immediately vacate such contracts, if made by parol, but only precludes bringing actions on the contract, which does not apply properly to the action now brought, which is merely trespass for an injury to the plaintiff's possession, but that the contract was executory, and as for the non-performance of it, no action could have been by the 4th section maintained, the court thought it might be discharged before any thing was done under it, which could amount to a part execution of it, as was here. *Crosby* v. *Wadsworth*, 6 East, 602.

Where a full grown crop of potatoes was purchased while in the ground, to be taken up immediately by defendant, it was decided to be merely an easement, or right of coming upon the land for the purpose of taking up and carrying away the potatoes, and it gave him no interest in the soil, and he therefore could not maintain trespass *qua. claus. freg.* *Parker* v. *Staniland*, 11 East, 362.

Certain lots of turnips, then growing upon the plaintiff's land, were purchased by defendant, and one question was, whether he was to be considered as the purchaser of an interest in land; and the court of C. P. held that he was, and this upon the principle of the above cases, and of *Waddington* v. *Bristow*, 2 Bos. & Pul. 452. *Emmerson* v. *Heelis*, 2 Taunt. 42. An agreement by defendant by parol, that plaintiff should have liberty of stacking coals upon part of a close belonging to defendant for seven years, and that during this term he should have the sole use of that part of the close, it was held that this was a good agreement (though by parol) for seven years. *Wood* v. *Lake*, Say. 3.

(a) If a person have the sole profits, he may maintain trespass. *Per Buller*, J. in *R.* v. *Tolpuddle Inhab.* 4 T. R. 677. *Burt* v. *Moore*, 5 T. R. 333. S. P.

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trial, for he ought to recover but for one trespass. But hunting may be continued as well as spoiling and consuming grass.—*Monkton* v. *Pashley*, H. 1 Ann. 2 Salk. 639.

Whether the trespass may be laid with a *continuando* or not, depends much upon the consideration of good sense, as where trespass is brought for breaking a house or hedge, it may well be laid with a *continuando*, for that pulling away every brick or stick is a breach; but if the declaration be that the defendant threw down twenty perches of hedge *continuando transgressionem prædictam* from such a day to such a day, this must be intended of a prosternation done at the first day, and therefore will be ill upon demurrer, or judgment by default, but will be aided by verdict, because the court will intend that the jury gave no damage for the *continuando*.—*Fontleroy* v. *Aylmer*, H. 9 W. III. 1 Raym. 240.

So trespass cannot be laid of loose chattels with a *continuando*, and if it be so laid, no evidence can be given but of the taking at one day, and therefore in trespass for mesne process it ought to be laid *diversis diebus ac vicibus*. (*Ibid.*) Where several trespasses are laid in one declaration, *continuando transgressiones prædictus*, and some of them may be laid with a *continuando*, and some not, after verdict, the *continuando* shall be extended only to the trespasses which may be laid with a *continuando*. (*Monkton v. Pashley*, sup.) So where the *continuando* is impossible, the court will intend no damages were given for it.—*Anon.* 4 W. III. 12 Mo. 24.

If my disseisor cut down the trees, grass, or corn, growing upon my land, and afterward I re-enter, I may have an action of trespass against him, for after my regress the law supposes the freehold always continued
[*87] in me; but if my disseisor make a *feoffment in fee, or a lease for years, and afterwards I enter, I may not have trespass against those who came in by title, for those fictions of law shall not have relation to make him who comes in by title a wrong-doer *vi et armis*.—*Lifford's Ca.* 12 Jac. I. 11 Co. 51.

So the law is laid down by Lord *Coke*, but it may admit of doubt, for there are cases to the contrary, and the reason of the law seems to be with them.—*Holcomb* v. *Rawlyns*, H. 1587. Cro. Eliz. 540. Mo. 461. S. C.

Trespass after Ejectment.—In trespass against the tenant in possession for mesne profits, either by the lessor or the nominal plaintiff, after a recovery in ejectment, the plaintiff need not prove a title; but it is sufficient to produce the judgment in ejectment, and the writ of possession executed, and to prove the value of the profits, and thereupon he shall recover from the time of the demise laid in the declaration.

tion.—*Astlin* v. *Parkin*, M. 32 Geo. 2. (per omnes Justic. on a case reserved.) 2 Burr. 665. Barnes, 472, (4to. edit.) *(a)*

Where the judgment was against the tenant in possession, and the action of trespass is brought against him, it seems sufficient to produce the judgment without proving the writ of possession executed, because by entering into the rule to confess, the defendant is estopped both as to the lessor and lessee, so that either may maintain trespass without proving an actual entry; *(b)* but where the judgment was against the casual ejector, and so no rule entered into, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed.—*Thorp* v. *Fry*, Oct. Str. 5. *(c)*

In case the plaintiff can prove his title accrued before the time of the demise, and prove the defendant to have been longer in possession, he shall recover antecedent profits; but in such case the defendant will be at liberty to controvert the title, which he cannot do in case the plaintiff do not go for more time than is contained in the demise; because being tenant in possession, he must have been served with the declaration, and therefore the record is against him conclusive evidence of the title; but against a precedent occupier the record is no evidence, and therefore against such a one it is necessary for the plaintiff to prove his title, and also to prove an actual entry; for trespass being a possessory action cannot be maintained without it. (*Decosta* v. *Atkins, per Eyre*, C. J. Hil. 4 Geo. 2.) *(d)*

(a) In *Goodtitle* v. *Tombs*, 3 Wils. 121. *Wilmot*, C. J. said, that in trespass for mesne profits, the damages are not confined to the mere rent of the premises, but the jury may give more if they please; and he agreed with *Gould*, J. in his observation in *S. C* that the plaintiff in that case was not confined to the mesne profits only, but he may recover for his trouble, &c. *Gould*, J. said, he had known four times the value of the mesne profits given by a jury in this sort of action of trespass, and if it were not so to be sometimes, complete justice could not be done to the party injured; and the costs of the ejectment are generally recovered in this action. *Gulliver* v. *Drinkwater*, 2 T. R. 262.

(b) Vide *Button* v. *Box*, at Oxford, T. 1742, and *Northeson* v. *Bowler*, at Exeter, S. P. It may be prudent, however, says Mr. *Selwyn*, (N. P. Abr. 673, n.) to be prepared with an executed copy of the writ of possession and return of execution; but if the plaintiff had been let into possession by the defendant, that will supersede the necessity of proving that the writ of possession has been executed. *Calvart* v. *Horsfall*, 4 Esp. N. P. C. 167.

(c) As also the costs of the ejectment and the value of the mesne profits. *Selw.* N. P. Abr. 673.

What the learned author means by a reference to *Oct. Str.* in this and many other places, the editor is at a loss to conjecture: Mr. *Selwyn*, in referring to the above case in pa. 672, n. (39) of his *N. P. Abr.* only states, that it was determined cor. *Blencowe*, J. 11 W. III. MS. Now it is to be observed, that Sir *John Strange* did not commence his reports till 2 *Geo.* 1. from which it is to be inferred, that the reference cannot point to the octavo edition of *Strange*'s Reports.

(d) Vide etiam *Denn* v. *White*, 7 T. R. 112.

But

But it may admit of doubt what proof of an actual entry is sufficient: it has been said that the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession; and therefore if a man make his will and * die, the devisee will not be entitled to the profits till he has made an actual entry. (*Stanynought* v. *Cousins*, 2 Barnes, 367.) *(a)* Others have holden, that when once he has made an actual entry, that would have relation to the time his title accrued, so as entitle him to recover the mesne profits from that time, and they rely on the case in *Sid.* 239, *(b)* which was trespass brought for the mesne profits, *devant le* lease, and nothing said in the case about proving an actual entry antecedent to it: they say too, that if the law were not so, the courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they now do, and by that means entitle themselves to recover profits which they would not otherwise be entitled unto. (2 *Rol. Abr.* tit. Trespass *per* Relation, 554.) However, supposing a subsequent entry has relation to the time the plaintiff's title accrued, yet certainly the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years. *(c)*

[*88]

(a) Where an entry was necessary to avoid a fine, defendant, by proving the fine, may prevent plaintiff from recovering any profits which accrued before the entry, which in such case the plaintiff should be prepared to prove. *Compere* v. *Hicks*, 7 T. R. 727.

(b) *Collingwood* v. *Ramsey*, H. 16 Car. II.

(c) In cases where the plaintiff does not enter into evidence of title, the defendant's evidence will, of course, be confined to the value of the profits and the time of his possession, and if the plaintiff claim profits for more than six years, the defendant must plead the statute of limitations, to prevent his recovering any damages for the profits taken previous to that time. *Peake's Evid.* 328.

As to other pleas, it has been held, that *a fine and non-claim*, or *a descent cast*, which takes away the right of entry, are good to bar the plaintiff's right. *Run. on Eject.* 235, ed. 1795.

So is *ancient demesne* a good plea in ejectment with leave of the court, and the affidavit to obtain such leave must shew the lands of a manor which is ancient demesne. *Doe* ex dem. *Rust* v. *Roe*, 2 Burr. 1046. But in *Goodright* v. *Shuffil*, 2 Raym. 1418, it was held that ancient demesne may be pleaded without an affidavit.

So is *accord and satisfaction*, for it is an action of trespass in its nature; but to make that a good bar, it is necessary, 1. that the satisfaction should be full; 2. that the thing given is in itself necessarily a satisfaction, (*Jesop* v. *Pegham*, 1 Rol. Abr. 128, pl. 10.); 3. that it be certain; 4. that it be executed before the action brought. (*Davis* v. *Oakham*, Rol. Abr. 128, pl. 8.); 5. that it be not only given but accepted as in satisfaction; and, 6. that it move from the party making it, and from none other. *Blundell* v. *Macartney*, 2 Ridgw. P. C. 596. *Grymes* v. *Blofield*, Cro. Eliz. 541. S. P.

But *bankruptcy* cannot be pleaded in bar to this action, it being to recover uncertain damages. *Goodtitle* v. *North*, Dougl. 562, (584.) yet if the demand of the damages can be liquidated and ascertained, without the intervention of a jury, it is a debt that may be proved. *Utterson* v. *Vernon*, 3 T. R. 539.

But

But another question might be put, which would perhaps occasion more difficulty, *viz.* Suppose the defendant were to plead the former recovery in the ejectment in bar, how must the plaintiff reply? It seems certain that the plaintiff may recover the whole mesne profits in the ejectment, and that is apparent from the 16 & 17 *Car.* 2. which enacts, that in case the judgment be affirmed on the writ of error, the court may award a writ of enquiry as well of the mesne profits, as of the damages by any waste committed after the first judgment. Perhaps it may be answered, that the court will take notice that the proceedings in ejectment are merely fictitious, and only to enable the plaintiff to get possession, and that it is never usual to recover more than small damages for the ouster, without any consideration had of the mesne profits. And it is certain the courts do frequently take that into consideration; otherwise the lessor would not be entitled to recover at all for the time laid in the declaration, since by his own shewing, his lessee and not himself was entitled to the action. But if the plaintiff were, upon the judgment in ejectment being affirmed on error, to have a writ of enquiry, it would probably (if rightly pleaded) prevent his recovering any thing in a subsequent action of trespass: and therefore if the demise were laid any time back, it would be advisable for the plaintiff in ejectment to take (as he may) judgment for his costs on the writ of error, without having any writ of enquiry. (*Doe* v. *Roache*, E. 11 Geo. II. K. B.) Note; in case the action be brought after a judgment * by default against the casual [* 89] ejector, it is usual for the plaintiff to recover the costs of the ejectment, as well as the mesne profits. (*Astlin* v. *Parkin*, M. 1758. 2 Burr. 665.) In case the action be brought by the nominal plaintiff in ejectment, the court will, upon application, stay the suit till security is given for answering the costs.—*S. C.* accord.

Trespass quare clausum fregit.—If the plaintiff set out the abuttals of his close, he must on the evidence prove every part of his abutment; as if the abuttal be laid *à parte australi* to the mill of *A.* he must prove a mill there, and that it was in the tenure of *A.* but it will be sufficient though there be an highway between them. So if the abuttal be assigned towards the east, though it be north, if it incline to the east it is sufficient. (*Howell* v. *Sands*, 37 Eliz. 2 Rol. Abr. 677, pl. 22.) If the plaintiff count of a trespass in one acre setting forth its abuttals, and he prove a trespass in any part of that acre so abutted, the jury may find the defendant guilty as to that part.—*Winkworth* v. *Wean*, M. 5 Jac. I. Yelv. 114.

Many things may be laid in aggravation of damages, of which alone trespass would not lie; as trespass may be brought for entering the plaintiff's house, and beating his wife, child, or servant; but in such case the plaintiff cannot recover damages for losing the service of his child or servant, because he may have a proper action for that purpose, nor can that be given in evidence; but the beating may be given in evidence to aggravate the damages, (*Newman* v. *Smith*, T. 5 Ann. Salk. 642. *Dix* v. *Brookes*, T. 3 Geo. I. Stra. 61.); for now (though it has been holden otherwise formerly), (as in 1 *Sid.* 225, post) if the principal matter will bear an action, you may give any thing in evidence in aggravation of damages, *i. e.* any thing that will not of itself bear an action; for if it will it must be shewn, as in trespass *quare clausum fregit*; the plaintiff would not be permitted to give evidence of the defendant's taking away a horse, *&c.* (*Newman* v. *Smith*, sup. and *Dix* v. *Brookes*, sup.) But in trespass *quare clausum et domum fregit*, he may give in evidence that the defendant came into his house and defiled his daughter.—*Sippora* v. *Bassett*, M. 16 Car. II. 1 Sid. 225.

Where the action is transitory (as trespass for taking goods) the plaintiff is foreclosed to pretend a right to the place, nor can it be contested upon the evidence who had the right; therefore possession is justification enough for the defendant, and it is sufficient for him to plead that he was possessed of *Blackacre*, and that he took the goods damage feasant without shewing any title. But it is otherwise in trespass *quare clausum fregit*, because there the plaintiff claims the close, and the right may be contested.—*Anon.* E. 8 Ann. 2 Salk. 643.

[90] Trespass for taking and detaining his cattle at *Teddington*; the defendant justified taking them damage feasant at *Kingston*, and that he carried them to *Teddington* and impounded them there. It was objected on demurrer that the justification was local, and therefore the defendant ought to have traversed the place in the declaration; *sed non allocatur*, for when the defendant says he carried them to *Teddington*, and impounded them there, they agree in the place; for if the defendant had not a right to take them, he was a trespasser at *Teddington*.—*Riley* v. *Parkhurst*, T. 22 Geo. 2. 1 Wils. 219.

In trespass *quare clausum fregit*, the defendant may upon not guilty give in evidence that he had a lease for years (but not that he had a lease at will, for that is like a licence which may be countermanded at pleasure), or that his servant put the cattle there without his assent, (2 *Rol. Abr.* 676, 677. pl. 15. 22. *Bro. General Issue*, 82.); but he cannot give in evidence a right of common, or to a way, or any other easement; nor can the defendant give in evidence that the plaintiff ought to repair his fences, for

for want whereof the cattle escaped, (*Kent* v. *Wright*, 1 Raym. 732. Co. Lit. 283.); nor that he entered to take his emblements or cattle, (*Knivett's Ca.* E. 38 Eliz. 5 Co. 85.) nor that he entered in aid of an officer for execution of process, or in fresh pursuit of a felon, or to remove a nuisance, nor that it was the freehold of *A.* and that he entered by his command or licence, for these are all matters of justification only.—*Bro. General Issue*, 81.

(Note;) every man of common right may justify the going of his servant or horses upon the banks of navigable rivers, for towing barges, &c, and if the water impair the banks, they shall have reasonable way in the nearest part of the next field.—*Young* v. ———, 10 W. III. 1 Raym. 725. See *Ball* v. *Herbert*, H. 29 Geo. III. 3 T. R. 253, *contra.*

Miscellaneous Defences.—Upon not guilty in trespass the defendant gave in evidence, articles by which Sir *Robert Hatton* (under whom the plaintiff claimed as heir) sold the defendant 300 of the best trees in such a wood, to be taken between such a time and such a time. Sir *Robert* died, and the defendant within the time took the trees; upon which the plaintiff proved Sir *Robert* was only tenant in tail, but this was a voluntary settlement of his own; and the judge held clearly that this sale, being proved to be for a valuable consideration, bound the heir in tail, being within the 27 *Eliz. c.* 4. and besides the settlement was with a power of revocation; and the plaintiff was nonsuited.—*Hatton* v. *Neal*, *per Jones*, C. J. 1683.

The defendant cannot give in evidence, that the goods were seized as a heriot, or that they were distrained damage feasant, &c. (*Co. Lit.* 283.) But in trespass for taking goods from the plaintiff's wife, * he may give [*91] in evidence that they were taken after a decree for alimony (for that is a separate maintenance, and not in the power of the husband.) (*Plowden* v. *Plowden*, E. 15 Car. I. Mar. 11, pl. 31.) But he cannot give in evidence, that the plaintiff had no property, for possession is sufficient to maintain trespass. (*Haywood* v. *Davies*, M. 1 Ann. Salk. 4.) So he may give in evidence, or plead that he is tenant in common with the plaintiff: but if he would take advantage of a stranger being so, he must plead it in abatement, for that will not prove him not guilty.—*Ante*, pa. 34.

So if there be two defendants, they may plead a tenancy in common in one of them with the plaintiff.—*Haywood* v. *Davies*, sup.

If trespass be brought by an executor against an executor *de son tort*, he may give in evidence payment of debts to the value in mitigation of damages; but yet there shall be a verdict against him, for he is nevertheless a trespasser.—*Anon.* H. 1700. 12 Mod. 441.

If trespass be brought against a sheriff, who has levied goods by virtue of a *fi. fa.* against the plaintiff, he need not shew the judgment. But if the goods were the goods of *J. S.* and the plaintiff claim them by a prior execution (or sale) that was fraudulent, the sheriff must shew a copy of the judgment.—*Lake* v. *Bellers*, H. 1698. 1 Raym. 733. *(a)*

Note; A *fi. fa.* is *de bonis et catallis debitoris*, and therefore the debtor's goods only can be taken in execution: but the *lev. fa.* is *de exitibus terræ*, and therefore the cattle of a stranger levant and couchant may be taken, for they are issues; but the cattle of another tenant in common cannot, for he has done nothing but what he might do; but then his title must be found by the inquisition, for otherwise he is bound till he avoid it by a *monstrans de droit.* (*Britton* v. *Cole*, H. 9 W. III. Salk. 395.) The *fi. fa.* first delivered to the sheriff ought to be first executed; but if he execute the second first, the execution is good, and the party can only have his remedy against the sheriff. Note; At common law the goods were bound from the teste of the writ, but by 29 *Car.* they are bound only from the delivery of the writ to the sheriff.—*Gargrave* v. *Smith*, H. 2 W. & M. Salk. 220.

Per Hardwicke, C. Neither before the statutes of frauds nor since, is the property of the goods altered, but continues in the defendant, till execution executed. The meaning of the words, "That the goods shall be bound from the delivery of the writ to the sheriff," is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sheriff may take them in execution.—*Lox thal* v. *Tomkins*, 2 Eq. Ca. Abr. 381.

[92] Note; By 21 *Jac.* I. the defendant may to a trespass *quare clausum fregit*, plead a disclaimer, and that the trespass was by negligence or involuntary, and tender of sufficient amends before the action brought; whereupon, or upon some of them, the plaintiff shall be enforced to join issue.

New Assignment.—If in trespass *quare clausum fregit* a man declare generally in such a vill, the defendant may plead *liberum tenementum*, and if the plaintiff traverse it, it is at his peril; for the defendant, if he have any part of the land in the whole town, shall justify it there; and therefore the better way is for the plaintiff to make a new assignment.

(*a*) Trespass for breaking and entering plaintiff's house, and seizing his goods, plea, Not Guilty, and a justification under a *fi. fa.* against the goods of one **R.** The only evidence to connect the defendants with the trespass was their warrant to the bailiff, *per cur. Primâ facie* the warrant made the defendants trespassers, and it was their business to prove the writ as a part of their justification. *Grey* v. *Middlesex Sheriffs*, 1 Camp. 387.

(*Lambert*

(*Lambert* v. *Strother*, M. 14 Geo. II. C. B.) Yet *quære*, how can he make a new assignment unless the defendant in his plea give a name certain to the *locus in quo*? *(a)* And therefore in *Anon.* Dy. 23. it is said that if the defendant say, that the *locus in quo* is six acres in *D.* which are his freehold, and the plaintiff say they are his freehold, and in truth the plaintiff and defendant have both six acres there, the defendant cannot give in evidence, that he did the trespass in his own soil, unless he give a name certain to the six acres, for otherwise (says the book) the plaintiff cannot make a new assignment. And it is certain that where the action is transitory (as for taking the plaintiff's goods) the defendant, if he would plead the *locus in quo* to be his freehold, and that he took the goods damage feasant, he must ascertain the place at his peril; because by his plea he has made that local which was at large before; (*Elwis* v. *Lomb*, H. 2 Ann. 6 Mod. 117.) for the taking the goods is the gist of the action, and therefore the plaintiff may prove it at a different place than that laid in the declaration.—1 *Lit.* 148. *(b)*

In trespass the defendant justified in a place called *A.* as his freehold; the plaintiff by way of new assignment said that the place in which, *&c.* is called *B.* It is no plea to say that *A.* and *B.* are the same place; for by the new assignment the bar is at an end.—27 *Hen.* VIII. 7. *(c)*

(a) Until defendant gives a name to the place where the trespass was done, there is no necessity for the plaintiff to alledge a new assignment, inasmuch as the defendant hath not varied from the meaning of the plaintiff, if he give not a name certain to the Six Acres, as to say, "that the place, *&c.* is Six Acres in *D.* called *Greenmead*," &c.

(b) Vide *Digby* v. *Fitzharbert*, Hob. 104. Et vide *Stevens* v. *Whistler*, 11 East, 51, which was a case of trespass for breaking and entering plaintiff's close, called *Shepherd's Lane*. The evidence was, that *Shepherd's Lane* was a parish highway, and that plaintiff had lands on one side only, and objected that this could only entitle him to the soil and freehold of half the lane opposite his own inclosures, and would not justify his declaring for the lane generally. It was proved that defendant had depastured his cattle all along the lane, and they had broken into an inclosure of the plaintiff. And *per cur.* the plaintiff had an exclusive right to part of *Shepherd's Lane*. If defendant meant to drive plaintiff to confine the trespass complained of upon the declaration to that part of the lane which was his, he should have pleaded soil and freehold in answer, which would have obliged plaintiff to new assign.

(c) The general use of adding the second count is this, the first charges an injury done to *the land*, and *taking the goods there*, that is in its nature local, and must be the foundation laid. Thus, the reason, and almost the only reason for adding the second count is in order to avoid the locality, as it is for *taking goods generally*, and that is of a transitory kind, and may be supported, though the taking be found to be elsewhere there cannot be a new assignment but where there is a special plea, and if the case be such that on a special plea, the plaintiff may be driven to a new assignment, he may give the matter in evidence under the second count on not guilty pleaded. *Smith* v. *Milles*, 1 T. R. 479.

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If the plaintiff make a new assignment, and the general issue be joined thereon, the plaintiff cannot prove the defendant guilty at the place mentioned in the bar; for when the plaintiff makes a new assignment, he waives that whereto the defendant pleaded in bar; so as in truth if it be the same place, he can never take advantage thereof, and therefore if it be the same, yet the defendant ought not to rejoin that it is so, but plead not guilty, and take advantage of it at the trial.—*Freeston* v. *Crouch*, M. 1597. Cro. Eliz. 492. *(a)*

[93] *Traverse.*—As trespass is a possessory action, it is enough for the plaintiff in his replication to traverse the title set out by the defendant, without setting up a title in himself; for the possession admitted in the plea in giving colour is sufficient, unless the defendant can make out a title in himself. (*Cary* v. *Holt*, M. 19 Geo. II. 11 East, 70 (n.) reported in Stra. 1238.) But if in trespass for taking a gelding, (or other chattel) the defendant plead that the place where, &c. is 100 acres, and that *J. S.* is seised thereof in fee, and that he as his servant and by his express orders took the gelding (or other chattel) damage feasant, the plaintiff cannot reply *de injuria sua propria absque tali causa*, for that would put in issue three or four things; but he must traverse one thing in particular.—*Cockerel* v. *Armstrong*, E. 11 Geo. II. C. B. Willes, 99. *(b)*

Trespass

(a) Trespass for breaking and entering plaintiff's house, staying therein three weeks, and seizing and carrying away his goods, plea Not Guilty. As to breaking and entering the house, and staying therein twenty-four hours, part of the said time in the said declaration mentioned, and as to seizing, &c. defendant pleaded a justification under a writ of *fi. fa.* Replication to the last plea, admitting the writ *de injuria suâ propriâ absque*, &c. defendants proved their justification, but it appeared that their officers had staid in the plaintiff's house beyond twenty-four hours. Held, that the last plea applied to the whole declaration, and if the plaintiff meant to have relied upon the excess of hours, he ought to have said so by a new assignment. As the pleadings then stood, the residue of the cause mentioned in the plea was alone put in issue, and the length of time, during which the officers remained in the house was rendered immaterial. *Smith* v. *Sheriffs of Middlesex*, 2 Camp. 175.

The object of a new assignment is to give the go-by to all the defendant had pleaded, by saying that the trespass stated and justified by the defendant was not that which the plaintiff complained of in his declaration, but other or different. *Cheasley* v. *Barnes*, 10 East, 80.

(b) In trespass the declaration stated, 1st, that defendant on 1st *September*, and on divers other days, &c. broke and entered, &c. at *Combe*. Second count, breaking and entering another close at *Combe*; plea, 1st general issue. 2d, As to the breaking, &c. at the said several days and times when, &c. in the first count, and as to the trespass in the last count, averment of identity of the closes of the times, &c. in both the counts; and plea that at the said several days, &c. when, &c. he committed the said several trespasses, &c. by leave and licence of the plaintiff.

Trespass by the lord of a manor for spoiling his peat, and digging holes: the defendant pleaded a right of common, and because the peats, *&c.* injured his right of common he removed them; to which the plaintiff replied *de injuria sua propria absque tali causa*; the plaintiff cannot on this issue give in evidence that there was a sufficiency of common left.—*D'Ayrolles* v. *Howard*, E. 1763. 3 Burr. 1385. Et vide *Goe* v. *Cother*, 1 Sid. 106. S. P.

The defendant pleaded a right of common for his cattle levant and couchant, and to another count a licence to cut down a tree to make a gate, and that he had applied it for that purpose. The plaintiff replied as to the first that they were not his own commonable cattle levant and couchant, and as to the second, *protestando* that the tree was not applied, traversed the licence and concluded to the country. The defendant demurred specially to the first replication, because it was *multifarious*, and as to the other because it concluded to the country when it should have been with an averment. But the court held the first traverse good, for the rule is not that you must join issue on a single fact, but on a single point, which need not consist only of one fact.—A custom from the nature of it must have several: in this case the levancy and couchancy of his own commonable cattle make up this one point of right to the common. As to the second they held that by the denial of the licence, and admitting all the rest of the fact, the plaintiff put the substantial thing in issue, therefore ought to conclude to the country.—*Rayley* v. *Robinson*, M. 30 Geo. 2.

If the defendant plead that it is his freehold; the plaintiff may reply three ways, 1. That it is his freehold, and then he must always traverse the defendant's plea, except in one case, *and that is where he makes a [*94] new assignment. 2. Or he may derive a title under the defendant, and

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plaintiff. Replication that defendant of his own wrong, and without the cause by him alledged, *&c.* committed, *&c.* *Per Ellenborough*, C. J. The "cause" in this case means, "the matter of excuse alledged." The defendant says, that at the said several days when, *&c.* he had the licence of the plaintiff, meaning a licence as large as the declaration, and to commit as many trespasses as the plaintiff has assigned, and is able to prove. The replication denies the defendant's justification to the extent pleaded by him; it denies that he had licence to commit the several injuries of which the plaintiff complained, and is able to prove within the terms of his declaration. The cause put in issue by the replication is, that the defendant had not a licence as extensive as the trespass complained of, and a new assignment could have done no more. *Barnes* v. *Hunt*, 11 East, 451. *Note*, the evidence was of trespass committed on 1st, 2d, and subsequent days of *September*. And of licence by plaintiff to defendant on the 2d for that and other subsequent times.

then

then he must not deny its being the defendant's freehold. 3. He may set up a title not inconsistent with the defendant's; and then he may either traverse the defendant's title, or not, as he pleases.—*Lambert* v. *Strother*, M. 14 Geo. II. C. B. Willes, 222. *(a)*

If the declaration be for taking away a stack of rye, the jury may find the defendant guilty as to five quarters parcel thereof, and not guilty as to the residue. (2 *Rol. Abr.* 684, pl. 6.) So if the declaration be for cutting and taking away trees, the defendant may be found guilty of the taking, though not of the cutting. (*Player* v. *Warn*, M. 1626. Cro. Car. 54. *Rodney* v. *Strode*, M. 3 Jac. II. Carth. 20.) So if there be two defendants, the jury may find them severally guilty as to part, and severally not guilty as to the residue, and assess damages severally; but if the jury were to find them guilty *de præmissis*, and then sever the damages, it would be ill, for by finding them guilty *de præmissis*, they find them equally guilty, and then they cannot sever the damages, which is to find one more guilty than the other. *(b)*

Trespass against two for taking goods; the one pleaded not guilty, and verdict against him; the other pleaded the plaintiff had given him the goods, and verdict for him; and it was holden that the plaintiff should not have judgment against the other, it being one action, and the court apprized that the title was against the plaintiff.—*Tilly* v. *Woody*, 7 Ed. IV. 31. cited in *Porter* v. *Harris*, E. 14 Car. II. Hob. 54. 1 Lev. 63 S. C. *(c)*

Trespass against three for taking the plaintiff's goods, and for false imprisonment; judgment by default against one; not guilty pleaded by

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(a) To trespass *qu. claus. fregit*, defendant pleaded that the place in which, &c. was the soil and freehold of *E. B.* by whose command defendant broke and entered, &c. plaintiff replied that the said place was the soil, &c. of *E. B.* but that *W. B.* demised to plaintiff, by virtue of which plaintiff entered, and was possessed, and defendant as servant of *W. G.* entered, and by his command committed the trespass complained of, and traversed the command of *E. B.* demurrer, because the demand was traversed. And because the title of *E. B.* was admitted, and a demise by *W. G.* stated, and no title to demise deduced to *W. G.* And upon argument it was held, that the plaintiff might in such an action traverse the command without deriving title from the person who has the soil and freehold to the person demising to plaintiff. *Chambers* v. *Donaldson*, 11 East, 65.

(b) In trespass against several, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest, and it is matter for the jury whether the trespass proved be the same as that confessed. *Harris* v. *Butterley*, Cowp. 483.

(c) The goods must be particularly specified, for the defendant cannot justify the taking of divers goods. *Bertie* v. *Pickering*, 4 Burr. 2455. *Sed secus* in trover. Vide etiam *Wyat* v. *Effington*, 1 Stra. 637, but more fully in 2 Raym. 1410.

In *trespass* there can be no accessary, therefore every party concerned is liable to an action. *Rex* v. *Jackson*, 1 Lev. 124. Bro. *Trespass*, 113.

another;

another; and a demurrer to the declaration by the third. At the trial of the general issue, there was likewise a writ to assess damages on the judgment by default, and contingent damages on the demurrer. The jury gave a verdict for the defendant on not guilty, and £100 on the writ of enquiry as to one of the defendants, and 1*s.* as to the other. And *Lee*, C. J. was of opinion, that the jury might separate the damages, the defendants not having pleaded jointly.—*Chapman* v. *House*, T. 13 Geo. III. 2 Stra. 1140.

Costs.—But where the plaintiff declared against two for a joint trespass, and the jury found them guilty in *manner and form* as the plaintiff complained against them, and assessed damages against *H.* 40*s.* and 40*s.* costs, and against *W.* 1*s.* and 1*s.* costs, and judgment was entered against *Hill* for £4 damages, assessed by the jury, and £23 costs *de incremento*, in the whole £27, and against *Winsey* for 1*s.* damages, and 1*s.* *costs; on error being brought for this cause, the [*95] court reversed the judgment, saying, that as there was a joint trespass laid and found, the damages could not be severed.—*Hill et Winsey* v. *Goodchild*, B. R. T. 11 Geo. III. 5 Burr. 2790. *(a)*

(a) Trespass for the entry of diseased cattle, *per quod* plaintiff's cattle were infected: Not Guilty pleaded: verdict for plaintiff, damage 20*s.* On motion to allow plaintiff full costs, it was alledged, he ought not to be punished for joining this cause of action, with trespass, to avoid vexation. Defendant insisted, that matter, alleged merely in aggravation, cannot intitle plaintiff to full costs. But *Pratt*, C. J. and *Powis* and *Fortescue*, J. were for full costs, because the consequential damage is a matter for which the plaintiff might have had a distinct satisfaction; and they likened it to the case of battery, *per quod consortium* of the wife, or *servitium* of the servant *amisit*, which, for that reason, are not within the statute. (Vide *Browne* v. *Gibbons*, Salk. 206. *Batchelor* v. *Biggs*, 3 Wils. 319. 2 Bla. 854.) The true distinction is, where the matter, alleged by way of aggravation, will entitle the party to a distinct satisfaction. Asportation of trees may be a ground for trover, but yet may be laid as an aggravation in trespass, and the plaintiff shall have full costs. If a man enters, and chaces, and kills my cattle, that is a distinct wrong, but yet may be joined as matter of aggravation. (Vide *Thompson* v. *Berry*, Stra. 551.) Suppose I have two closes at a great distance, and the same water-course running through both, I may allege the entry into one, *per quod* the water was prevented from coming to the other, and there shall be full costs: *Eyre*, J. held *contra*, because this recovery would not be pleadable to a special action on the case, for the special injury, *quod cestui negaverunt*, adjudged to the plaintiff his full costs. *Anderson* v. *Buckton*, 1 Stra. 192. Vide *Say. L. of Costs*, c. 4. 3 *Com. Dig.* tit. *Costs*, (A. 3.) 235.

CHAPTER

CHAPTER II.

OF EJECTMENT.

THE second sort of action which may be brought for an injury affecting the real property of the party is an Ejectment, by which a term for years is to be recovered; and as this is almost the single action now in use for the recovery of estates, (the person who claims the right bringing an ejectment in the name of a fictitious lessee) it will be necessary to treat pretty largely upon this head.

The plaintiff who claims a title feigns a lease, and in the name of the fictitious lessee delivers a declaration against the casual ejector (who is also some feigned person) to the tenant in possession; upon this declaration there is indorsed a notice to the tenant in possession in the name of the casual ejector, signifying, that unless he appear and defend his title, he shall let judgment pass by default. This service may be on the tenant himself in any place off the premises, but if it be on the wife or servant, it must be on the premises; (*Savage* v. *Dent*, H. 10 Geo. II. K. B. 2 Stra. 1064.) and if it be on the servant, there must be some acknowledgment by the tenant of having received it. (*Anon.* M. 10 W. III. Salk. 255.) By 11 *Geo.* 2. *c.* 19, the tenant must give notice to his landlord, of any declaration in ejectment, under the penalty of three years' rent, *(a)* and the landlord may, by leave of the court, make himself defendant with the tenant in possession, in case he appear; and in case such tenant refuse to appear, judgment shall be signed against the casual ejector; but upon the landlord's entering into the like rule to confess, as the tenant ought to have done, the court shall order a stay of execution upon such judgment till further order. *(b)*

(a) But a tenant to a mortgagor, who omits to give notice of an ejectment, brought by the mortgagee, to enforce an attornment, is not within this statute. *Buckley* v. *Buckley*, 1 T. Rep. 647.

(b) By 11 *Geo.* II. *c.* 19. *s.* 18, if a tenant give notice that he means to quit, and does not quit, the penalty is *double rent.*

And by 4 *Geo.* II. *c.* 28. *s.* 1, tenants for lives or years wilfully holding over, after the determination of their term, and after demand made, and notice in writing given for delivering possession, shall, for the time they shall so hold over, pay at the rate of *double the yearly value.*

The statute 4 *Geo.* II. *c.* 28. *s.* 1, requires the landlord's notice to be in writing; but the 11 *Geo.* II. *c.* 19. *s.* , does not say, that the tenant's notice must be in writing, and therefore, under this last act, verbal notice may be given. *Timmins* v. *Rowlinson*, 3 Burr. 1603.

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In cases of a vacant possession, no person claiming title will be let in to defend, but he that can first seal a lease upon the premises must obtain possession.—*Jones* ex dem. *Woodward* v. *Williams*, T. 13 Geo. 2. 1 Barnes, 122. *(a)*

A mortgagee need not give notice to a tenant to quit before bringing his ejectment, if he mean only to get into the receipt of the rents and profits of the estate, though the mortgage be made subsequent to the tenant's lease. But in such case he shall not be suffered to turn the tenant out of possession by the execution. In the present case the lease was only from year to year, and, with respect to the last year, might be considered as a lease subsequent to the mortgage: but the court held it would have been the same, if the lease were for a long term.—*White* ex dem. *Whatley* v. *Hawkins*, M. 14 Geo. III. 1 Dougl. 23. (n. 7.) *(b)* [96]

If a tenant hold from year to year, the landlord cannot maintain an ejectment without giving six months' *(c)* previous notice, unless the tenant

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(a) In B. R. an affidavit must be made of the sealing of the lease, ouster of the plaintiff, &c. and then on motion the court will allow judgment to be entered against defendant, unless he appears and pleads. But in C. B. no affidavit or motion is necessary, for plaintiff gives a rule to plead on the first day of term, and if defendant does not accordingly appear, and plead, judgment may be signed. 2 *Sell. Prac.* 3.

(b) Vide etiam *Doe*, d. *Da Costa* v. *Wharton*, 8 T. Rep. 2. A mortgagee may recover in ejectment against a tenant claiming under a lease made by mortgagor, without privity of mortgagee subsequent to the mortgage, without giving notice to quit. *Keech* v. *Hall*, Dougl. 21. But if the tenancy be from year to year, and the landlord mortgages during the year, the tenant is entitled to six month's notice to quit. *Birch* v. *Wright*, 1 T. Rep. 378. 380.

No ejectment, however, shall be brought against a tenant who has been encouraged by the mortgagee to lay out money on the premises. *Weakly, Lessee of Yea*, v. *Bucknell*, Cowp. 473, cited in *Keech* v. *Hall*, sup.

In *Thunder* v. *Belcher*, 3 East, 451, *Ellenborough*, C. J. held, that a mortgagor in possession, being only a tenant at sufferance, is not entitled to notice to quit, and one tenant at sufferance cannot make another; the mortgagor's lessee, after the mortgage, therefore cannot be said to have any possession under the mortgagee, and consequently he cannot claim any notice to quit.

(c) It must be *half a year's* notice, and not *six* months. *Right* ex dem. *Flower* v. *Derby*, 1 T. Rep. 163. *Per Buller*, J. citing *Year Book*, 13 *Hen.* VIII. 15 (b). But notice is not necessary on either side, whether the tenant holds for a certain term. *Messenger* v. *Armstrong*, 1 T. Rep. 52. Nor need any notice be given to a tenant who has attorned to a stranger, or otherwise disavowed his landlord. *Parker* ex dem. *Walker* v. *Constable*, 3 Wils. 25. *Doe*, d. *Forster* v. *Williams*, Cowp. 622. *Doe*, d. *Shore* v. *Porter*, 3 T. Rep. 13. *R.* v. *Stone*, 6 T. Rep. 298. *Doe*, d. *Williams* v. *Pasquali*, Peake N. P. Ca. 196, in which case *Kenyon*,

tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord; and in that case no notice is necessary.—*Throgmorton* v. *Whelpdale*, B. R. Hil. 9 Geo. III. *(a)*

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Kenyon, C. J. said, that if a tenant put his landlord at defiance, he may consider him either as his tenant or a trespasser, in which case no previous notice is necessary; but if the tenant does not dispute his landlord's title, he is entitled to notice. So where a tenant holds under a void lease, no notice is necessary. 2 *Esp. N. P. Dig.* 464. Unless the landlord, by accepting rent, admits the tenancy to be legal. *Doe*, d. *Martin* v. *Watts*, 7 T. Rep. 83. So notice to quit was held unnecessary, where *B.* held under an executory agreement with *A.* for a lease during their joint lives. *Doe*, d. *Bromfield* v. *Smith*, 6 East, 530.

But notice is necessary in all cases where the duration of the tenant's term and interest is not fixed and limited by previous agreement, as if he hold from year to year, as long as he and the landlord can agree, or where its duration must remain uncertain from the nature of things, as if he be tenant during the life of another, or the like, in neither of which cases can the landlord recover or the tenant relinquish his possession without previous notice. *Maddon*, d. *Baker* v. *White*, 2 T. Rep. 159. And if the tenant die, his executor, &c. shall have the like notice. *Doe*, d. *Porter* v. *Shore*, and *Parker*, d. *Walker* v. *Constable*, sup. Vide etiam *Sykes*, d. *Murgatroyd* v. ———, cited 1 T. Rep. 161. *Den*, d. *Jacklin* v. *Cartwright*, 4 East, 31.

(a) As to what shall be deemed a sufficient notice to quit, it was held by *Heath*, J. at *Gloucester*, T. 1800, that upon a taking from *Old Michaelmas* to *Old Michaelmas*, a notice to quit at *Michaelmas* was sufficient. *Woodf. Landlord and Tenant*, 224. (2d ed.) So a notice, delivered at *Michaelmas*, 1796, to quit "at *Lady Day*, *which will be* in the year 1795," was held good, for the intention is clear, and the words "in the year 1795," may be rejected. *Doe* ex dem. *Bedford D.* v. *Kightley*, 7 T. Rep. 63. So a notice to quit at the expiration of the current year of the tenancy, which shall expire next after the end of one half year from the date of the notice, is sufficient, though no particular day is mentioned. *Doe* ex dem. *Philips* v. *Butler*, 2 Esp. N. P. Ca. 589. It is necessary, however, that the notice should be to quit at the end of the current year of the tenancy; for if a notice to quit at *Midsummer* be given to a tenant holding from *Michaelmas*, it will be insufficient; *Oakapple* ex dem. *Green* v. *Copous*, 4 T. R. 361; but a notice to quit at a particular day is *primâ facie* evidence of a holding from that day, unless the contrary is shewn. *Doe* ex dem. *Puddicombe* v. *Harris*, 1 T. Rep. 161. (n.) And where a notice, having been delivered on 29th *September*, to quit on 25th *March* or 8th *April* next, defendant objected to it, because it did not express, with sufficient certainty, the end of the tenancy, and the time when he was to quit, and that it was at all events incumbent on the lessor of the plaintiff to shew that the defendant's tenancy commenced either on the 25th *March* or the 8th *April*, Lord *Kenyon* ruled the notice sufficient, and that the onus of proving the commencement of his demise lay on the defendant. *Doe* ex dem. *Mathewson* v. *Wrightman*, 4 Esp. N. P. Ca. 5. In which case the demise was laid on a day subsequent to the 8th *April*. It may be proper in this place to observe, that where the tenant, being applied to by his landlord, respecting the commence-

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If *A.* be seized in fee, and a stranger enters by virtue of a lease for years which is void, and pays rent to *A. A.* can never proceed against him as a disseisor; for the acceptance of rent is a full allowance of the lease he claims, and consequently the entry by virtue of it is made rightful.—*Barham* v. *Hayman*, Dy. 173. in marg. *Molyneaux's Ca.* E. 6 Jac. I. 1 Rol. Abr. 661. *(a)*

Tenant for life by lease and release made a lease for life, tenant in tail when he came into possession accepted rent, yet this is no confirmation,

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ment of his holding, told him, that it began on a certain day, and the landlord gave him notice to quit, agreeable to that information the tenant will be precluded from setting up, that his tenancy began on a different day, even though he can prove, that the information he gave proceeded from a mistake, and not from an intention to deceive. *Doe* ex dem. *Eyre* v. *Lambly*, 2 Esp. N. P. Ca. 635. As to the notice to quit, it should be expressed in clear and definite terms, so as to avoid any objection at the trial of the ejectment, for it has been held, that where an irregular notice is given, it is not incumbent on the party served to object to it at the time of service, for he may do it at the trial. It is not necessary that the notice should be directed to defendant, if in terms it shews the defendant is tenant to the plaintiff, and if it is proved to have been served on defendant at the proper time. *Doe* ex dem. *Mathewson* v. *Wrightman*, sup.

To avoid the effect of this notice, defendant will sometimes shew a *waiver* of it by the lessor of the plaintiff, as where he had received rent after the time of quitting mentioned in the notice, (*Goodright*, d. *Charter* v. *Cordwent*, 6 T. Rep. 219,) or distrained, (*Zouch et Ward* v. *Willingale*, 1 H. Bla. 311,) or brought covenant for it, (*Crompton* v. *Minshall*, Run. on Ejectment, 80,) or done some other act whereby he has acknowledged the defendant to be his tenant after that time; but the payment of rent due before, though made after the time of quitting, does not avoid the notice; nor will a landlord, who has given one notice, and brought an ejectment on it, lose the benefit of it by giving another, to quit at a subsequent day, under an idea that he should not be able to prove the first. *Doe*, d. *Williams* v. *Humphreys*, 2 East, 237.

(a) The mere acceptance of rent for occupation, subsequent to the time appointed for quitting by the notice given, is not of itself a waiver of such notice, but matter of evidence, to be left to the jury on the question of intention. *Doe*, d. *Cheyney* v. *Batton*, Cowp. 243. So an action for use and occupation, subsequent to the time appointed by such notice, and an ejectment together, and the former is no bar to the latter, *ibid.* 246; but a distress taken for rent, accrued after the time appointed by such notice, is a waiver of the notice. *Zouch*, d. *Ward* v. *Willingale*, 1 H. Bla. 311. And it seems, the acceptance of single rent is a waiver of the landlord's right to double, under stat. 4 *Geo.* II. c. 28. And *Aston*, J. said, that where an ejectment has been brought under sect. 2. of this statute for the forfeiture of a lease, there being half a year's rent in arrear, and no sufficient distress, there acceptance of rent afterwards by the landlord, had, he believed, been held a waiver of the forfeiture, which might well be, for it is a penalty, and by accepting the rent, the party waived the penalty.

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tion, but the lease is absolutely void on the death of tenant for life.—*James* ex dem. *Aubrey* v. *Jenkins*, C. B. T. 30 & 31 Geo. II.

In ejectment by a landlord against his tenant, on a proviso for re-entry for a forfeiture, the whole court held that the lessor bringing covenant for half a year's rent subsequent to the time of the demise laid in the declaration in ejectment, was a waiver of the right of entry for the forfeiture, and an acknowledgment that the covenant then subsisted. The law will always lean against forfeitures, as courts of equity relieve against them.—*Roe* ex dem. *Crompton* v. *Minshall*, B. R. East. 33 Geo. II. Selw. N. P. 635.

By 4 *Geo.* II. *c.* 28, where the landlord or lessor has right to re-enter for non-payment of rent, and no sufficient distress is to be found on the premises, he may, without any formal demand or re-entry, serve a declaration in ejectment, *(a)* or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then affix the same upon the door of any demised messuage; or in case there be no messuage, then upon some notorious place of the lands. *(b)*

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(a) As to the service of the declaration, it need not, in general, be on the premises, for if the tenant, or his wife, be personally served, it is sufficient. *Run. on Ejectment*, 155. (ed. 1795.) But *Selwyn*, (N. P. Ab. 641,) says, that service on the wife must be on the premises, or at the dwelling-house of her husband. Vide *Doe*, d. *Moreland* v. *Bayliss*, 6 T. Rep. 765; and *Doe*, d. *Baddam* v. *Roe*, 2 Bos. & Pull. 55. S. P. In *Jones*, d. *Griffiths* v. *Marsh*, 4 T. Rep. 465, it was said, *Per Kenyon*, C. J. that service of the declaration on the wife, at her husband's dwelling-house, is good, if it appears that she is living with him. And in *Jenny*, d. *Preston* v. *Catts*, 1 Bos. & Pull. N. R. 308, the court held service on the wife of the tenant good, she living with her husband, and having admitted that her husband had received the declaration. But in *Goodtitle*, d. *Read* v. *Badtitle*, 1 Bos. & Pull. 384, the court refused to admit the mere acknowledgment of the wife, that she had received the declaration to bind the husband. Yet in *Smith*, d. *Stourton* v. *Hurst*, 1 H. Bla. 644, service on the daughter before the essoin day (the tenant and his wife being absent) was held good, on the acknowledgment of the wife, though it did not appear that her daughter had given her the declaration before the essoin day. So service on the tenant's child, niece, or servant, *on the premises*, will be good, if it be afterwards acknowledged by the tenant himself. *Goodright*, d. *Waddington* v. *Thrustout*, 2 Bla. 800. *Anon.* Salk. 255. *Goodtitle*, d. *Read* v. *Badtitle*, sup. Vide etiam *Savage* v. *Dent*, sup. p. 95 *a*.

(b) So if the tenant abscond, leaving some person in the house, service on that person will be deemed good, on affidavit of the circumstances. *Sprightley*, d. *Collins* v. *Dunch*, 2 Burr. 1116; on the authority of which case, it was moved in *Goodright*, d. *Method* v. *Noright*, 1 Bla. 290, that service at the tenant's house on 13th *May preceding*, might be deemed good, it having been formerly usual to grant such rules, with respect only to *future* service, and not with any *retrospect*; but that in the case relied upon,

A very little matter is sufficient to keep the possession, therefore where the defendant had left some beer in his cellar, the landlord proceeding as on a vacant possession, the judgment and execution were set aside with costs.—*Savage* v. *Dent*, H. 10 Geo. II. Stra. 1064, more fully stated.

By the same act, where an ejectment is brought against a tenant for non-payment of rent, the tenant may at any time before the trial pay into court the rent arrear and the costs, and thereupon the proceedings shall be stayed.—N. B. The courts had done this antecedent to this act. *Downes* v. *Turner*, M. 8 W. III. 2 Salk. 597.

In ejectment by a landlord, the tenant moved to stay proceedings upon payment of rent arrear and costs. On a rule to shew cause it was insisted for the plaintiff, that the case was not within the act, for that it was not an ejectment founded singly on the act, but that it was brought likewise on a clause of re-entry in the lease for not repairing, and the lease was produced in court; however, the rule was made absolute, with liberty for the plaintiff to proceed upon any other title.—*Pure* ex dem. *Withers et al'* v. *Sturdy*, H. 1752.

The person who swears to the service must swear positively that such a one is tenant in possession, and that he read the indorsement to him, and acquainted him with the contents thereof: and upon this affidavit the plaintiff moves for judgment against the casual ejector, which is granted unless the tenant enter into the common rule of confessing lease, entry and ouster *(a)*

If there be several persons who claim title, the rule may be drawn generally, or particularly: generally, as that *J. S.* who claims title to the premises in question in his possession should be admitted defendant for such messuages; and this puts a necessity on the plaintiff to distinguish by proof what tenements are in each tenant's possession, otherwise he can have no verdict. But if the rule be drawn specially, that supersedes the necessity of proof that the lands are in his possession.

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upon, this rule was first altered in B. R. though it had before been the course in C. B. and a rule to shew cause was granted in this case, and that service at the house might be good. Et vide *Gulliver* v. *Wagstaffe*, 1 Bla. 317. So in *Douglas* v. ——, Stra. 575, service at defendant's house was held good, on affidavit, that the servants refused to call their master, or receive any papers. So where the tenant in possession was personated by another, who accepted the service in the tenant's name, it was held, that service on such person was good. *Fenn*, d. *Tyrrell* v. *Denn*, 2 Burr. 1181.

(a) But in the case of a vacant possession no affidavit of service is necessary. *Lill. Prac. Reg.* 499.

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If the plaintiff after issue, and before the trial, enter into part, the defendant may, at the assizes, plead this as a plea *puis darrein continuance* in bar to the plaintiff's action, but it is at the discretion of the justices, whether they will receive it; but if they do, it stops the trial, and the plaintiff is not to reply to it at the assizes, but the judge is to return it as parcel of the record of *Nisi Prius*.—*Moore* v. *Hawkins*, M. 8 Jac. I. Yelv. 180. Cro. Car. 261. *(a)*

[98] The plaintiff has a right to proceed both for the possession and the trespass, and therefore the death of the lessor (though only tenant for life) is no abatement; but if the plaintiff in such case insist to go on, the court will oblige him to give security for payment of the costs in case judgment go against him.—*Thrustout* ex dem. *Turner* v. *Grey*, M. 10 Geo. II. 2 Stra. 1056.

If on the trial the defendant will not appear, and confess lease, entry, and ouster, *(b)* the course is to call the defendant to confess, &c. and

(a) Sed vide *Paris* v. *Salkeld*, 2 Wils. 137. 139, *Wilmot*, C. J. held, that he was bound to receive this plea if verified by affidavit, and Lord *Kenyon* confirmed the same doctrine in *Lovell* v. *Eastaff*, 3 T. R. 557.

(b) In *Doe* ex dem. *Fisher* v. *Prosser*, Cowp. 217, Lord *Mansfield* said, actual ouster does not mean an act accompanied by actual force. A man may come in by a rightful possession, and yet hold over *adversely* without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster. If tenant *pur auter vie* hold over for twenty years after the death of *cestui que vie*, such holding over will in ejectment be a complete bar to the remainder-man or reversioner, because it was adverse to his title. So, in case of tenants in common, the possession of one tenant in common, *co nomine* as tenant in common, can never bar his companion, because such possession is not adverse to the right of his companion, but in support of their common title, and by paying him his share he acknowledges him as his co-tenant: nor indeed is a *refusal* to *pay*, of itself sufficient, without *denying* his *title*. But if upon demand by the co-tenant of his moiety, the other *denies to pay*, and *denies* his *title*, saying he claims the whole, and will not pay, and continue *in* possession, such possession is adverse, and ouster enough.

Receipt of rents and profits for forty years, without account, is evidence of ouster. *Ibid.*

In *Peaceable* ex dem. *Hornblower* v. *Read*, 1 East, 568, 574, *Kenyon*, C. J. observed, that he had no hesitation in saying where the line of adverse possession begins and where it ends. *Primâ facie* the possession of one tenant in common is that of another, but it must be shewn that one of them has been in possession, and received the rents to his own sole use, without accounting to the other, and yet the other has acquiesced in this for such a length of time as may induce a jury, under all the circumstances, to presume an actual ouster of his companion, and there the presumption ends. Ouster may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. In *Doe* v. *Prosser*, sup. there was an undisturbed and exclusive possession for forty years, by one tenant in common, which the court properly held to be sufficient evidence of an ouster to leave to the jury.

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then to call the plaintiff and nonsuit him, and pray to have it indorsed on the *postea* that the nonsuit was for want of confessing, &c. and then upon the return of the *postea* judgment will be given against the casual ejector.

If there be several defendants, and some of them do not appear and confess, according to the old method a verdict was to be taken for them, and the *postea* was indorsed that the verdict was for them because they did not confess. But, it is said, in *Greeves* v. *Rolls*, Salk. 456, that by a rule made 4 *Ann. B. R.* the plaintiff shall go on against those who will confess, and shall be nonsuited as to those who will not; but the cause of the nonsuit shall be expressed on the record, and upon the return of the *postea*, the court being informed what lands were in the possession of those defendants, judgment shall be entered against the casual ejector as to them.—*Claxmore* v. *Searle*, 13 W. III. 1 Raym. 729.

N. B. I can find no such rule in the printed book: and in *Ellis* v. *Knowles*, E. 7 Geo. II. in C. B. 1 Barnes 118, upon the precedent of *Claxmore* v. *Searle*, sup. judgment was given on motion against the casual ejector, as to such of the defendants as were acquitted at the trial for not confessing, as appeared by an indorsement on the *postea*; and this seems the right way.

If there be several tenants in possession, the plaintiff must deliver a declaration to each of them. *(a)*

Where the house is empty it is necessary to seal a lease on the land, and give rules to plead, and when they are out, upon affidavit of the whole matter, the court grants judgment.—*Vide ante*, p. 95 *b.* n. *(a)*

Where a corporation aggregate is lessor of the plaintiff, they must give a letter of attorney to some person to enter and seal a lease upon the land, and therefore the plaintiff ought in such case to declare upon a demise by deed, (for they cannot enter and demise upon the land as natural persons can) though this will be aided after verdict.—*Patrick* v. *Balls*, M. 8 W. III. Carth. 390. *(b)*

If a material witness for the defendant be also made a defendant, the right way is for him to let judgment go by default; but * if he [*99] plead, and by that mean admit himself tenant in possession, the court will not afterwards upon motion strike out his name. But in such case if he consent to let a verdict be given against him for as much as he

(a) Vide *Goodtitle* v. *Meymot*, Stra. 1211. *Smith* v. *Jones*, 8 Mod. 119. *Roe* v. *Doe*, ex dem. *Stevenson*, 2 Barnes, 186. (4to ed.)

(b) It is doubtful however whether this is now necessary, at all events it is cured by a verdict. *Partridge* v. *Ball*, 1 Raym. 136. *Anon.* 12 Mod. 113.

is proved to be in possession of, I see no reason why he should not be a witness for another defendant.—*Dormer* v. *Fortescue*, M. 9 Geo. II. Willes 343 (n).

If an ejectment be brought for a church, the curate may move for a special rule to defend only *quoad* a special right of entry to perform divine service. So it is said in *Hillingsworth* v. *Brewster*, H. 11 W. III. Salk. 256. But in *Martin* v. *Davis*, M. 5 Geo. II. Stra. 914, the court denied to let the parson of *Hampstead* chapel defend only for a right to enter and perform divine service, saying the case in *Salk.* has been often denied.

An ejectment lies for part of a highway, and though it be built upon, it shall be demanded as land.— *Goodtitle*, d. *Chester* v. *Alker*, B. R. Hil. 30 Geo. II. Burr. 133.

An ejectment will lie for nothing of which the sheriff cannot deliver execution: therefore it will not lie for a rent, common, or other thing lying in grant, *quæ neque tangi nec videri possunt;* but it will lie for common appendant or appurtenant, for the sheriff by giving possession of the land gives possession of the common; (*Newman* v. *Holdfast*, M. 3 Geo. II. Stra. 54.) *(a)* so it will likewise lie for tithe by the 32 *Hen.* 8. *c.* 7. where they are appropriated; but in such case the demise must be

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(a) It would be almost useless to state for what an ejectment will or will not lie, but when the courts of law found it expedient in this action to give the writ of *habere facias possessionem*, in order that the plaintiff might recover the possession itself, it became necessary to confine it to such things as the sheriff might have recourse to after judgment, and it is said to be the design of the law to have the thing demanded so particularly specified, that the sheriff may know (in case the plaintiff should recover) what to join the possession of, for the judgment is with a view to execution, and it would be in vain if execution could not be had of the thing specifically demanded. *Bindover* v. *Sindercombe*, Raym. 1470, and yet it is now the practice for the sheriff to deliver the possession according to the direction of the plaintiff who acts therein at his peril, but in ejectment the judges do not confine themselves to those rules which govern the *præcipe quod reddat*, for they allow some things to be recovered which cannot be demanded in the *præcipe*, for since the establishment of that real action many things have been added and improved which have acquired new appellations, now perfectly understood, though not to be found in the old law books, and as men began to form their contracts by such new appellations, it was but reasonable that the remedy should follow the nature of the contract. Vide *Cottingham* v. *King*, 1 Burr. 629. *Conner* v. *West*, 5 Burr. 2673, whilst ejectments indeed were compared to real actions, and arguments where drawn by analogy from them, they must of course have been fettered, and this was very much the case till after the reign of king *James* I. but of later times an ejectment has been considered with more latitude and greater liberality as a fictitious action to try titles with more ease and dispatch, and with less expence to the parties. *Cottingham* v. *King*, sup.

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set forth to be by deed, though after a verdict this would be aided; it must likewise shew the nature of the tithe.—*Linsey* v. *Clerk*, M. 8 W. III. Carth. 390. *Wirral* v. *Harper*, T. 12 Jac. I. 11 Co. 28. *Partridge* v. *Ball*, H. 8 & 9 W. III. 1 Raym. 136.

Whatever creates a discontinuance is a bar to an ejectment; as if tenant in tail make a feoffment, or levy a fine to another in fee, the issue cannot bring ejectment as he may if his ancestor alien by lease and release without warranty. (*Co. Litt.* 337.) If tenant in tail, remainder to *B.* in tail, bargain and sell to *C.* and his heirs, and afterwards levy a fine with proclamations to *C.* and his heirs, who enfeoffs *D.* tenant in tail dying without issue, the remainder-man may bring ejectment, for the fine levied to the bargainee makes no discontinuance of the remainder, no estate of freehold passing by it; (*Seymour's Case*, 10 Jac I. 10 Co. 95.) but if it had been levied before the bargain and sale inrolled, or if the bargain and sale had been expressly made to declare the use of the fine, so that both must have been considered as one conveyance, it had been otherwise; (*Odyern* v. *Whitehead*, T. 32 Geo. II. K. B.) and the feoffment of the conusee is no discontinuance of the remainder, for none can discontinue the remainder or reversion, but he only to whom the land is intailed, and none can discontinue an estate tail, unless he discontinue the reversion of him who has the reversion, or remainder if any hath the remainder, * *&c.* (*Co. Litt.* 335.) Therefore if a donee [*100] in tail, reversion in the donor, infeoff the donor, it is no discontinuance. So if before 34 *Hen.* 8. *c.* 20, the reversion were in the king, the tenant in tail could not discontinue the estate tail, though he might have barred it by a common recovery. (*Co. Litt.* 331.) And note, that it is a maxim, that a grant by deed of such things as lie in grant works no discontinuance.—So a fine *sur* grant and render, or *sur* conusance *de droit tantum*.—It is likewise a maxim, that none can make a discontinuance but he who is seized of the estate tail in possession; and therefore if tenant for life and he in remainder in tail make a feoffment by deed, it is no discontinuance. (*Co. Litt.* 333. 1 *Rol. Abr.* 632. (B) 1. *Peck* v. *Channel*, E. 1602. Cro. Eliz. 828. *Cromwell's Case*, 43 Eliz. 1 Co. 76.) So likewise if they levy a fine. (*Co. Litt.* 302. *Ibid.* 326.) If tenant in tail make a lease for the life of the lessee, it is a discontinuance; and so it is though the remainder-man join in the lease. (*Baker* v. *Hacking*, E. 1635. Cro. Car. 405.) A tenant for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to *B.* husband and wife levied a fine with warranty, and died *sans* issue, *B.* brought ejectment, and it was holden that the fine was no discontinuance, and consequently the warranty no bar. (*Stephens* v.

Britridge, T. 13 Car. II. 1 Lev. 36.) And note, no discontinuance lasts longer than the wrongful estate created by it, therefore where tenant in tail levied a fine to *B.* for life, and after levied a second fine for the use of himself in fee, and then bargained and sold to *J. S.* it was holden the first fine made a discontinuance only for the life of *B.* Secondly, the second fine did not enlarge the discontinuance, because the estate returned back to the conusor. Thirdly, if the second fine had been levied to a stranger, yet during the life of the first conusee it had been no discontinuance.—*Co. Litt.* 333.

By 32 *H.* VIII. *c.* 28. No fine, feoffment, or other act, made, suffered, or done by the husband only, of any manors, *&c.* being the inheritance or freehold of the wife, during the coverture shall make a discontinuance thereof.—A feoffment by husband and wife is within this act. (*Co. Litt.* 326.) So where during the coverture lands are given to the husband and wife, and the heirs of their two bodies. But in that case if the husband levy a fine with proclamations it will bar the issue, and if five years pass after his death without any entry or claim by the wife, her entry will be taken away and her right extinguished. (*Greenley's Case*, 7 Jac. I. 8 Co. 72.) If land be given to the husband and wife, and the heirs of the body of the husband, and the husband make a feoffment in fee, this is a discontinuance if he survive his wife, but not otherwise.—*King* v. *Edwards*, M. 1633. Cro. Car. 320.

By 11 *H.* VII. *c.* 20. If any woman having an estate in dower, or for life or tail, jointly with her husband, or wholly to herself or to her use, of the inheritance or purchase of the husband, or given to the husband or the wife in tail or for life, by any ancestor of the husband's or other person seized to the use of the husband or his ancestors, being sole, or with other after-taken husband, discontinue, alien, release, or confirm with warranty, or by covin suffer a recovery, all such recoveries, discontinuances, *&c.* are void, and every person to whom the interest should belong after the death of the woman, may enter as if no discontinuance had been; and if such husband and wife make such discontinuance, the person to whom the manors, *&c.* should belong after the death of the woman, may enter and hold according to such title as he should have had if the woman had been dead, and there had been no discontinuance, as against the husband during his life, provided that the woman after the death of the husband may re-enter. But if sole when the discontinuance is made, she shall be barred for ever, and the person to whom the interest belongs may enter.

If a husband devise to his wife in tail, remainder to *B.* in fee, and the wife with a second husband levy a fine to *J. S.* the son by the second husband

husband cannot enter; for though it is within the words, it is not within the intent of the act.—*Foster* v. *Pitfall*, 18 Eliz. 1 Leon. 261.

It is within the act, though the gift by the husband or his ancestors, by which the wife takes, were made as well in consideration of money paid by the feme or her father, as of the marriage. (*Kirkman* v. *Thompson*, E. 1619. Cro. Jac. 474.) But it is otherwise if the land be settled by the ancestor of the wife in consideration of the marriage, and of money paid by the husband; for it shall be intended, that her advancement was the principal cause of the gift. (*Kynaston* v. *Lloyd*, M. 1621. Cro. Jac. 624.) But if conveyed by a stranger in consideration of the wife's fortune paid by her father to the vendor, and other money paid by the baron, it is within the act.—*Pigott* v. *Palmer*, T. 28 Eliz. Mo. 250.

If the issue in special tail, remainder to him in fee levy a fine, and after his mother being tenant in tail within this act lease for three lives, (not warranted by 32 *Hen.* VIII.) living the issue, the conusee may enter. (*Sir George Brown's Case*, 24 Eliz. 3 Co. 51.) But if the reversion in fee had been in another, the conusee could not enter, because he would take only by estoppel; nor the heir because he has concluded himself by the fine; (*Ward* v. *Walthew*, T. 1608. Cro. Jac. 175.) nor his issue who is likewise barred. But if the wife tenant in tail suffer a recovery, and the *issue in tail release to the recoveror, the issue of that [*102] issue is not barred thereby.—*Lincoln College Case*, 38 Eliz. 3 Co. 61.

By 21 *Jac.* I. *c.* 16. None shall make an entry into land, but within twenty years after their right or title shall first descend or accrue to them, with the usual saving for infants, femes covertes, &c. Therefore if the lessor of the plaintiff be not able to prove himself or his ancestors to have been in possession within 20 years before the action brought, he shall be nonsuited. (*a*)

(*a*) Unless he can account for the want of it under some of the exceptions of the statute. *Taylor*, d. *Atkyns* v. *Horde*, 1 Burr. 119, and twenty years adverse possession is not only a negative bar to the action but a positive title to the plaintiff. S. C. and vide *Stokes* v. *Berry*, Salk. 421. S. P. The king however is not affected by this statute. *Lee* v. *Norris*, Cro. Eliz. 331. But now by statute 9 *Geo.* 3. *c.* 16, a time of limitation is extended to the king, who is thereby disabled to make title except to liberties and franchises, after twenty years from the commencement of the suit for recovery of the thing in question, so that a possession of sixty years will bar the king's prerogative, notwithstanding the maxim, *Nullum tempus occurrit regi*.

But even a subject is not affected by the statute where the possession is in the hands of his tenant, who has paid him rent within the time of limitation, for the possession of the lessee is that of the lessor whose title does not accrue till the lease expires. *Saunderson* v. *Stanhope*, 2 Keb. 127.

If

If a declaration in ejectment be delivered within 20 years, and a trial had, whereby there is a lease, entry and ouster confessed; yet if the plaintiff being nonsuited in that action, bring another after 20 years, that will not be proof of an entry, to bring it out of the statute of limitations, for that must be an actual entry.—*Hayward* v. *Kinsey*, M. 13 W. III. 12 Mod. 573. *(a)*

Note; the possession of one joint-tenant or parcener is the possession of another. (*Ford v. Grey*, H. 2 Ann. Salk. 285.) *(b)* So if the

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(a) As to the lessor's right of entry on the land, it was held in *Taylor*, d. *Atkyns* v. *Horde*, sup. that an ejectment being a possessory remedy, the lessor of the plaintiff must have a right of entry when this action is brought, for if his entry be taken away, he cannot make a lease on the land to try his title; and even the modern practice supposes that actual entry, which the old practice required, and though the present practice obliges the defendant to confess lease, *&c.* for ease and expedition, yet it has made no alteration in the law, nor was it ever intended to better the plaintiff's title, or to give him a right of entry he had not before, therefore where tenant in tail makes a discontinuance the issue in tail is put to his *formedon*, and cannot have an ejectment, because his right of entry is by the discontinuance taken away.

So the *alienation of a husband*, seized in right of his wife, worked a discontinuance of the wife's estate by the common law, but by the statute 32 *Hen.* VIII. c. 28, "no "act of the husband shall work a "discontinuance of or prejudice the "wife's inheritance or freehold, but "after his death she or her heirs "may enter on her land." *Runn. on Eject.* 45.

By descent also a right of entry may be tolled or taken away, for the law presumes, that the possession, which is transferred from the ancestor to the heir, is a rightful possession until the contrary be shewn, and therefore there, mere entry of him who has a right is not allowed to evict the heir; but by statute 32 *Hen.* VIII. c. 33. "If a disseisor "die within five years after the dis-"seisin done, and the lands descend "to his heir, such descent shall not "take away the entry of the dis-"seisee, though he made no claim." Yet if there be five years quiet possession in the disseisor, continual claim is still as necessary as it was before the statute. *Ibid.* 48.

Abaters and intruders are not within the statute of 32 *Hen.* VIII. for that statute being penal was only extended to cases where there was an actual ouster of the tenant, which is a consequence of all disseisins, whether with or without violence; but an abater or intruder remains as at common law, for he ousteth none. *Wimbish* v. *Tailbois*, Plowd. 47. *Co. Litt.* 238. Disseisors, and their heirs, however, are within the express meaning of the statute, which gives the remedy to the disseisee, and though the preamble of the statute only speaks of "*disseisins with force*," and the body of the statute of "*such disseisins*," yet it has been extended to all disseisins, as being within the same mischief. *Harper's Case*, 11 Co. 23. *Willowe's Case*, 13 Co. 1. *Anon.* Dy. 219. (a).

So the feoffee of a disseisor is not within the statute, for he has not ousted any one, therefore if such feoffee die, and the land descend to his heir, this descent will take away the entry of the disseisee and his heirs. *Co. Litt.* 238 (a). But bodies politic are within the remedy of the statute, so that the party held himself to a disseisin. *Ibid.*

(*a*) And so it is of coparceners. *Fairclaim*, d. *Empson* v. *Shackleton*, 5 Burr. 2605.

defendant

defendant were to prove that the sister of the plaintiff had enjoyed the estate above 20 years, and that he entered as heir to her; the court would not regard it, because her possession would be construed to be by curtesy, and not to make a disherison, but by licence to preserve the possession of the brother, and not to be within the intent of the statute. But perhaps it would be within the statute, if the brother had ever been in the actual possession and ousted by his sister, for then her entry could not possibly be construed to be to preserve his possession.—*Page* v. *Selfby, per Weston*, J. in *Sussex*, 1680. Salk. MSS. *Co. Litt.* 242.

In ejectment for mines, evidence of being lord of the manor is not sufficient, for it is necessary to shew an actual possession of the hereditament in question; and for the same reason a verdict in trover for lead dug out of the mine is no evidence, for trover may be brought on property without possession.—*Lord Cullen* v. *Rich*, M. 14 Geo. II. K. B. Et vide ante, note *(a)* p. 33 *c*. S. C.

Where the plaintiff is devisee of a term, he must prove the assent of the executor to the devise; (*Co. Litt.* 240.) to which purpose the case of *Young* v. *Holmes*, (M. 4 Geo. I. Stra. 70.) is worthy of notice; there the lessee for years had devised his term to his executor for life, paying £50, to *J. S.* remainder to the lessor of the plaintiff, the executor dying, his executrix entered; and on ejectment it was holden, first, that the executor took as executor and not as legatee, and therefore the remainder over not executed, and that it was incumbent on the remainderman to prove a special assent thereto as to a legacy; upon which the plaintiff proved payment of the *£50, and that was holden to be a sufficient assent, and the plaintiff recovered. But where it is a freehold it is not necessary to prove possession, for the law casts the freehold on the devisee; and though the heir have entered before him and died, yet that will not bar his entry.—*Co. Lit.* 240 (b). [*103]

The confession of lease, entry and ouster, is sufficient in all cases, except in the case of a fine with proclamations, (*Jenkin* v. *Prichard*, C. B. M. 30 Geo. II. 2 Wils. 45.) in which case it is necessary to prove an actual entry; and the lessor of the plaintiff directing one to deliver a declaration to the tenant in possession will not amount to such an entry; (*Oates*, ex dem. *Wigfall* v. *Bridon*, E. 6 Geo. III. 3 Burr. 1895. 1901.) and by the 4 *Ann. c.* 16. *s.* 16. no claim or entry shall be of force to avoid a fine levied with proclamations, or shall be sufficient within the 21 *Jac.* I. of limitations, unless the action be commenced within one year after making such entry or claim.—Note, the plaintiff must not lay his demise antecedent to his entry.—*Berrington* v. *Parkhurst*, H. 11 Geo. II. 2 Str. 1086.

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If *A.* enter on the premises in *B.*'s name, but without any authority or command from *B.* but afterwards, and before the time when the demise is laid to be made, *B.* consents to *A.*'s entry, such subsequent consent is sufficient.—*Fitchet* v. *Adams*, H. 13 Geo. I. 2 Stra. 1128.

A fine having been levied, the lessor of the plaintiff proved that at the gate of the house in question he said to the tenant he was heir of the house and land, and forbade him to pay more rent to the defendant; but he did not enter into the house when he made the demand, on which it was agreed that the claim at the gate was not sufficient. Then it was proved that there was a court before the house, and which belonged to it, and that though the claim was at the gate, yet it was on the land, and not in the street; and that was holden good without question.—*Anon.* H. 5 W. & M. Skin. 412.

If the plaintiff prove that *A.* was in the possession of the premises in question, and that his lessor is heir to *A.* it is sufficient *primâ facie*; for it shall be intended that *A.* had seisin in fee, till the contrary appear. And if he prove that his lessor or his ancestors had possession for twenty years without interruption; till the defendant obtain possession, it is a sufficient title; (*Stokes* v. *Berry*, T. 1699. Salk. 421.)*(a)* for by 21 *Jac.* I. *c.* 16, twenty years possession tolls the entry of the person having right, and consequently though the very right be in the defendant, yet he cannot justify his ejecting the plaintiff. (*Bishop* v. *Edwards, per Powel*, J. on the Western circuit.) So if an ejectment be brought by a lord against a cottager, twenty years possession is a
[*104] good title; for if the possession of the manor should * be a possession of the cottage, the lord would have a better title to that than to any other part of his estate; yet a distinction has been taken and allowed by all the judges on a case reserved by Lord Chief Baron *Pengelly*, that if a cottage is built in defiance of a lord, and quiet possession has been had of it for twenty years, it is within the statute: but if it were built at first by the lord's permission, or any acknowledgment have been since made, (though it were one hundred years since) the statute will not run against the lord, for the possession of a tenant at will for ever so many years is no disseisin; there must be a tortious ouster, and it is not to be presumed a country fellow should build in opposition to the lord, unless it be shewn, or conveyances are produced.—*Lisle's Lessee* v. *Harding*, C. B. 1727. *Case of Holt Wells*, 1 Rol. Abr. 659. c. 2.

Receipt for rent by a stranger is no evidence of possession, so as to take it out of him in whom the right is, for it is no disseisin without the

(a) Vide *Stocker* v. *Berny*, Raym. 741, which is S. C.

admission

admission of him who has the right; not even though he make a lease to the tenant by indenture reserving rent, unless he make an actual entry: (*Elvis* v. *York Archbp.* E. 17 Jac. I. Hob. 322.) so though the tenant declare he is in possession for the stranger; (*Prenson* v. *Sone*, E. 3 Jac. I. 1 Rol. Abr. 659. c. 12.) though it may be proper to be left to a jury, especially if the stranger have any colour of title.—*Dormer* v. *Fortescue.* sup. 99 *a*.

The grantee of a rent charge, with power to enter and retain *quousque* he be satisfied, has such an estate that he may demise it to a plaintiff in ejectment. (*Jemott* v. *Cowley*, M. 19 Car. II. 1 Saund. 112.) *(a)* So may tenant by elegit, but it will be necessary for him to prove the judgment, the elegit taken out upon it, and the inquisition and return thereupon, by which the land in question is assigned to him; and if by that it appear, that more than a moiety was extended, he could not recover, for it would be *ipso facto* void, and not need a judgment or *audita querela* to avoid it.—*Pullen* v. *Birbeck*, H. 13 W. III. 1 Ld. Raym. 718. Salk. 563. S. C. nom. *Putten* v. *Purbeck.* *(b)*

So the conusee of a statute-merchant may bring ejectment, but then he must prove a copy of the statute, and of the *capias si laicus* returned, and the extent also returned, and also the *liberate* returned; for though by the return of the extent an interest be vested in the conusee, yet the actual possession of the interest is by the *liberate*.—*Wood* v. *Palmer*, *per Blencowe*, Dorchester, 1699. Salk. MSS. *Hammond* v. *Wood*, Salk. 563. S. P.

An extent gives only a possession in law. So also it seems on an execution on a judgment in dower; and therefore they will not enable a sheriff to use force, which may be necessary for the delivery of an actual possession.—*Lindsey* v. *Lindsey*, M. 8 Ann. Salk. 291.

The plaintiff made title under one who obtained judgment by default [105] against the heir upon a bond of his ancestor, and had taken out a general elegit against all the land of the heir. The defendant's title was likewise

(a) And this point is now settled, whether the rent be created by grant at common law or by way of use, and in such case it was formerly held that an actual entry must be made, because the title accrues by the grantee's entering. It was, however, determined by Lord *Hale*, in *Little* v. *Heaton*, Ld. Raym. 750. Salk. 259. long before the statute 4 *Geo.* 2. c. 28. that in such case the general confession was sufficient, without the proof of an actual entry.

(b) But in executing an elegit, the sheriff is not bound to deliver a moiety of each particular tenement, but a valued moiety of the whole. *Den*, d. *Taylor* v. *Abingdon*, 2 Dougl. 456, (473); and without such right of possession this action is not maintainable. *Hammond* v. *Wood*, 2 Salk. 563.

by

by judgment against the heir on a bond of his ancestor, and it was upon a bill filed precedent to the plaintiff's judgment, to which the heir pleaded *riens per descent prætor* the land in question, and thereupon he took a special judgment against the assets confessed (but this was subsequent to the plaintiff's judgment) and had an *extendi facias* of the whole land, and was put in possession by the sheriff; and *per Holt*, this special judgment shall have relation to, and bind from the time of filing the original: but such a general judgment as the plaintiff's will not operate by way of relation, but bind only from the time the judgment was given; and thereupon the plaintiff was nonsuited.—*Gree* v. *Oliver*, T. 4 W. & M. Carth. 245.

If the ejectment be brought for a rectory, the plaintiff ought to prove his lessor was admitted, instituted and inducted, and has read and subscribed the thirty-nine articles, and declared his assent and consent to all things contained in the Book of Common Prayer, but he need not prove a title in the patron; for institution and induction upon the presentation of a stranger is sufficient to bar him who has right in an ejectment, and to put the rightful patron to his *quare impedit*. (*Snow* v. *Philips*, M. 16 Car. II. 1 Sid. 220.) But presentation ought to be proved, and institution would not be of itself sufficient evidence of it, though it were recited in the letters of institution, especially if induction or possession have not followed. (*Clarke* v. *Pryn*, M. 21 Car. II. 1 Sid. 426. S. C. 1 Vent. 16. nom. *Heath* v. *Pryn*.) But proof of a verbal presentation is sufficient; however, that cannot be proved by the person who presented, *though he were only grantee of the avoidance*. But probably in such case evidence of general reputation would be admitted.—*Quære*, for this was denied by *Lee*, J. in *Rex* v. *Bray*, post, p. 288.

The demise must be laid after the title accrues, otherwise the plaintiff will be nonsuited;*(a)* but Lord *Hardwicke* inclined to think that, where an estate was settled to *A.* for life, remainder to his first and other sons, a posthumous son might lay the demise from the time of his father's death, and that the defendant would be estopped (to say he was not born,) by 10 & 11 *W.* III. *c.* 16.—Note, *Salkeld*, in p. 228, makes a *quære*, Whether this statute extends to a devise, because the words are,

(a) In ejectment by the surrenderee against the surrenderor, the demise may be laid at any time between the surrender and admittance, because after admittance the title relates back to the surrender. *Holdfast*, d. *Woolhams* v. *Clapham*, 1 T. Rep. 600.

A parol agreement to lease lands for four years creates only a tenancy at will, but if an ejectment be brought against the tenant, the day of the demise must not be laid antecedent to a demand of possession by the lessor, or some other act declaratory of the determination of his will. *Goodtitle*, d. *Gallaway* v. *Herbert*, 4 T. R. 680.

" Where

" Where an estate by marriage or other settlement is limited," but there seems no just ground for the doubt.—*Basset* v. *Basset*, 16th *December* 1744, in Canc. *(a)*

Ejectment of a lease 6 *September*, 2 *Jac.* and that he was possessed till [106] the defendant *postea*, *scilicet*, 4 *September*, 2 *Jac.* ejected him; after verdict for the plaintiff it was moved in arrest of judgment, but the declaration was holden to be good, for when the declaration is, that he was possessed, *virtute dimissionis, quousque postea, scilicet*, 4 *September*, 2 *Jac.* he was ejected; those words *scilicet*, 4 *September*, 2 *Jac.* are impossible and repugnant, therefore must be rejected.—*Adams* v. *Goose*, M. 1606. Cro. Jac. 96.

N. B. This case was cited in (*Goodgaine* v. *Wakefield*,) 1 Sid. 8, and the difference taken at the bar, and there it appeared on the plaintiff's own shewing, that he entered before the lease commenced, and therefore was a disseisor; but here that he entered by force of the lease: however, Sir *Orlando Bridgman*, C. J. said he thought there was no reason for the judgment: yet I am strongly inclined to think that in these days the courts would in support of the action hold the case of *Adams* v. *Goose* to be good law.

In ejectment the plaintiff declared upon a lease, dated 1st *February* 1742, to hold from 8th *January* before; that afterwards, *viz.* 28th *January* 1752, the defendants ejected him. It was insisted for the defendants, that the ejectment was laid to be before the plaintiff's title under the lease, which was not made till the 1st of *February*, and 1 *Sid.* 8. sup. was cited; but it was holden that the day of the ejectment being laid under a *videlicet* was surplusage, and that *afterwards* should relate to the time of making the lease, and then all would be well enough; and the plaintiff had a verdict.—*Swymmer & al'* v. *Grosvenor, Bart. & al'*, at Salop assizes, 1752, cor. *Gundry*, J. *(b)*

The

(a) " Sect. 1. *Where any estate is*, " or shall be, *by any marriage or other* " *settlement*, *limited* in remainder " to or to use of the first or other " son or sons of the body of any person lawfully begotten, with any remainder over to or to the use of " any other person, or in remainder " to or to the use of any daughter " lawfully begotten, with any remainder to any other person, than " any son or daughter of such person lawfully begotten, that shall " be born after the decease of the father, shall, by virtue of such settlement, take such estate so limited " as if born in the life-time of the father, although there shall happen " no estate to be limited to trustees, " after the decease of the father, to " preserve the contingent remainder " to such after-born son, &c. until " he come *in esse*, or be born to " take the same. And by sect. 2. it " is provided, that nothing in this " act shall extend to divest any estate " in remainder that, by virtue of any " settlement, is already come to possession."

(b) The demise must be laid some day after the lessor's title commenced, for the question is, whether he

The lease declared upon was from the 25th of *March* 1765, for seven years. The plaintiff proved that *J. S.* was seized; and that by indenture in 1763, he demised the premises in question to *D.* for seven years, to commence at *Midsummer* 1763, and that in 1764, *D.* assigned the residue of the term then unexpired to *Carruthers*. It was insisted for the defendant, that though in ejectment the lease is fictitious, yet the plaintiff must declare on such a lease as suits with the title of his lessor; here if he recover at all, he must recover a term, which is of two years longer duration than his title, and (*Roe* v. *Williamson*,) 2 Lev. 140, (*Cramporne* v. *Freshwater*,) 1 Brownl. 133, were cited. But *per* Lord *Mansfield*, there is nothing in the objection, for if the lessor have a title, though but for a week, he ought to recover; for the true question in an

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he could then make a lease; therefore, where an entry is as necessary to complete a title (*Goodtitle*, d. *Gallaway* v. *Herbert*, 4 T. Rep. 680) as to avoid a fine (*Berrington* v. *Parkhurst*, Stra. 1087) or a recovery, (*Taylor*, d. *Atkyns* v. *Horde*, Burr. 119) the demise must be laid on a day subsequent to the entry; but it is usual to lay the demise as far back as possible, that the judgment may be conclusive evidence in an action for mesne profits. The demise should also be laid before the declaration, but if a man deliver a declaration against the casual ejector as of *Easter* term, which must be delivered before the essoin-day of *Trinity*, and the plaintiff's title arise after *Easter* term, if the tenant in possession accept the declaration, it must be of *Trinity* term, and then the plaintiff can shew a good title on that declaration of *Trinity* term, for then the declaration against the casual ejector as of *Easter* term will be put out of the case, and the defendant proceeds to issue on the declaration of *Trinity* term; but if the defendant will not proceed to issue as of *Trinity* term, and confess lease, *&c.* he has no remedy, for the plaintiff will take judgment against the casual ejector. *Runn. on Eject.* 208, (ed. 1795.)

So where plaintiff declared on a demise at an impossible time, the court, after verdict, over-ruled the objection. *Small*, d. *Baker* v. *Cole*, 2 Burr. 1159. *Roe*, d. *Wrangham* v. *Hersey*, 3 Wils. 274.

In *Goodright*, d. *Smallwood* v. *Strother*, 2 Bla. 706, it was held that the vill in which the demised land lay, though omitted in the declaration, shall, after verdict for the plaintiff, be collected from the vill in which the ejection is laid to have been committed, for that amounts to a sufficient certainty.

The demise may be made for any number of years, *Selw. N. P. Abr.* 638; therefore, in case of a yearly tenancy, if the tenant die intestate, his administrator has the same interest in the land which the intestate had, and the lessee of such administrator may declare on a term for seven years. *Doe*, d. *Shore* v. *Porter*, 3 T. Rep. 13. The court, however, will permit the plaintiff to amend his declaration by enlarging an expiring term, in such a case as was done in *Dickens* v. *Greenvill*, Carth. 3, where several ancient rules in point were produced, (though *Hutchins*, d. *Norworthy* v. *Basset*, Comb. 90, was *contra*) and also in *Vicars* v. *Haydon*, Cowp. 841, where all the later authorities are collected, and upon the authority of *Dickens* v. *Grenvill*, and *Vicars* v. *Haydon*, Lord Chancellor *Redesdale*, assisted by the judges in *Ireland*, made an order to amend the record by enlarging the term, which had expired pending a writ of error in the exchequer chamber. *Power*, d. *Boyce* v. *Rowe*, 1 Sch. & Lef. 81 (n.)

ejectment

ejectment is, who has the possessory right. Suppose a person has an interest for three years only, and should make a lease for five years, it would be good for the three years.—*Bedford* (*Lessee of Carruther*) v. *Dendien*, Sittings at Middlesex after T. 5 Geo. III.

If there be several lessors, and you lay in the declaration *quod dimiserunt*, you must shew in them such a title that they might demise the whole; (*Mantlew* v. *Wollington*, T. 1607. Cro. Jac. 166.) and therefore if any of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them, for it is only his confirmation where he is not concerned in interest: so if the plaintiff were to declare upon a lease made by *A.* and *B.* and it were to appear on the trial that *A.* was tenant for life, remainder to *B.* in fee, it would be bad: (*Tripor't's Ca.* 36 Eliz. 6 Co. 14, b.) So if *A.* and *B.* were tenants in common; but it would be otherwise if they were joint-tenants, and the reason of the difference is, that tenants in common are in of several titles, and therefore the freehold is several, and consequently each of them cannot demise the whole: but joint-tenants are seised *per my et per tout*, and therefore each may be said to demise the whole; and coparceners stand upon the same foundation. (*Moore* v. *Fursden*, M. 3 W. III. 1 Show. 342. *Morris* v. *Barry*, H. 16 Geo. II. 1 Wils. 1. 2 Stra. 1180. *Boner* v. *Juner*, T. 10 W. III. 1 Raym. 726.) Therefore there ought to be a different count on the demise of each tenant in common, or they may join in a lease to a third person, and that lessee make a lease to try the title.—*Lit.* sect. 316. *Gilb. L. of Ejectm.* 86.) *(a)* [107]

If the plaintiff make title in the lessor as lord of a manor, who has right by forfeiture of a copyhold, he ought to prove that his lessor is lord, and the defendant a copyholder, and that he committed a forfeiture, but the presentment of the forfeiture need not be proved, nor the entry or seizure of the lord for the forfeiture.—*Peters*, ex dem. *Episc. Winton* v. *Mills & al*, *per Tracy*, Surry, 1707.

If a copyholder without licence make a lease for one year, or with licence make a lease for many years, and the lessee be ejected, he shall not sue in the lord's court by plaint, but shall have an ejectment at com-

(a) Declaration in ejectment. The first count was on a demise of the whole by *E. L.*; second count, the like by *I. G.*; third, the like by *I. C.* all on 2d *October*, 1811. In evidence a lease was produced, dated *August* 22, 1780, whereby the lessors of the plaintiff, *G.* and *C.* and *I. L.* (since dead) father of the lessor, *E. L.* demised to defendant for thirty years, and it was proved that defendant had paid rent under the lease. It was objected by defendant that they who granted the lease must be considered as joint-tenants, and there being no joint demise, the plaintiffs could not recover. But Lord *Ellenborough*, C. J. held this to be no good objection to be set up by the tenant, and the lessor of the plaintiff recovered. *Doe* ex dem. *Lulham* v. *Fenn*, 3 Camp. 190.

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mon law, because he has not a customary estate by copy, but a warrantable estate by the rules of the common law.—*Co. Copyh. s.* 51. *(a)*

Note; If the copyholders of a manor belonging to a bishoprick, during the vacancy of the see, commit a forfeiture by cutting timber, the succeeding bishop may bring ejectment. (*Read* v. *Allen, per Comyns*, Oxford Circuit, 1730.) If an ejectment be brought against the lessee for years of a copyholder (relying upon the lease as a forfeiture) the plaintiff must prove an actual admittance of the copyholder; (*Boner* v. *Juner*, sup.) and it will not be sufficient to prove the father admitted, and that it descended to the defendant's lessor as son and heir, and that

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(a) A *copyholder* ejected by his lord may maintain an ejectment, for though called a tenant at will, yet he cannot be put out whilst he performs his services. *Lit. sect.* 77. But in such cases the copyholder should be warranted to make leases, either by the custom or by the lord's licence. *Anon.* 1 Leon. 4. *Goodwin* v. *Longhurst*, Cro. Eliz. 535. And even without a custom to warrant such leases, the tenant may maintain this action against every man but his lord. *Spark's Ca.* Mo. 569. Cro. Eliz. 676. So if the lessee of a copyholder be ejected by a stranger, he may have this action. *Melwich* v. *Luter*, 4 Co. 26. So the lord shall maintain this action against his tenant for a forfeiture. Vide *Peters*, d. *Winton Bp.* v. *Mills*, sup.

So an heir to whom a copyhold descends may surrender before admittance, for he is in by course of law, and the custom which makes him heir casts the possession upon him from his ancestor, and therefore he may maintain this action before admittance. *Roe*, d. *Jeffereys* v. *Hicks*, 2 Wils. 15. *Roe*, d. *Tarrant* v. *Hellier*, 3 T. R. 169. So a widow, entitled to her *free bench* after the death of her husband, may maintain an ejectment before admittance, for her estate comes out of her husband's. *Jurden* v. *Stone*, Hutt. 18. But a stranger to whom a copyhold is surrendered has nothing before admittance, because he is a purchaser, and until the admittance of the surrenderee the copyhold remains in the surrenderor, and if he die, his heir may bring ejectment. *Wilson* v. *Weddell*, Yelv. 144. But after admittance the surrenderee may maintain ejectment against the surrenderor, and lay his demise on a day between the surrender and admittance. *Holdfast*, d. *Woollams* v. *Clapham*, 1 T. R 600.

When the devisee of a copyhold estate, which has been surrendered to the use of the will, died before admittance, it was held that her devisee, though admitted afterwards, could not recover in ejectment, for the admittance of the second devisee had no relation to the last legal surrender, and the legal title remained in the heir of the surrenderor. *Doe*, d. *Vernon* v. *Vernon*, 7 East, 8.

A. a copyholder for life, remainder to *B.* surrendered his own and *B.*'s estate, (over which latter he had no controul, and by which he let in *B.*'s remainder) and took a new copy for the lives of himself, *C.* and *B. successivè*, and on *A.*'s death, after twenty years had run against *B.* he entered on the possession then vacant. Held that as against *C.* who had no possession and no title, *B.* might defend his legal title, coupled with possession, though the twenty years possession by *A.* had barred his possessory right as against him, or might have disabled *B.* from recovering had he been out of possession. *Doe*, d. *Borough* v. *Reade*, 8 East, 353.

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he had paid quit-rents; for a copyholder cannot make a lease except to try a title before admittance; for nothing vests in him before *admittance and an actual entry; and therefore if after admittance he were to surrender without making an actual entry, the surrender would be void. And note; till admittance of surrenderee the copyhold remains in the surrenderor, and if he die his heir may bring ejectment.—*Wilson* v. *Weddell*, M. 6 Jac. I. Yelv. 144. *Auncelme* v. *Auncelme*, T. 1604. Cro. Jac. 31. [*108]

Note; Admittance of tenant for life is admittance of him in remainder, so as to make his surrender good.—*Auncelme* v. *Auncelme*, sup. *(a)*

Copyholds are not within the statute against fraudulent conveyances, and therefore if the plaintiff claim under a voluntary conveyance, though the defendant claim under a subsequent purchase for a valuable consideration, yet the plaintiff shall recover.—*Per Blencowe*, at Launceston, 1699. *(b)*

The recital of the will in the copy of the admittance is good evidence of the devise against the lord or any other stranger: but if the suit be between the heir of the copyholder and the devisee, the will itself ought to be produced.—*Anon.* T. 1693. 1 Raym. 735.

A man makes a mortgage for years to *A.* who without the mortgagor's joining assigns to *B.* who assigns to *C.* *C.* may bring ejectment against the mortgagor, for upon executing the deed of mortgage, the mortgagor by the covenant to enjoy till default of payment is tenant at will, and the assignment of the mortgagee could only make him tenant at sufferance. —*Smartle* v. *Williams*, E. 6 W. III. 1 Salk. 245.

But it has been said, that it would be otherwise if the mortgagor were to die, and his heir enter, and then the mortgagee make an assignment without entry, or the heir of the mortgagor joining; for the entry of such heir would be tortious, and consequently the mortgagee would be out of possession, and his assignment void.—*S. C. quære tamen.*

If the plaintiff make title under an assignment of a term by an administrator, if he cannot produce the letters of administration, the book of the ecclesiastical court where the order was entered for granting them is evidence; (*Garret* v. *Lister*, E. 13 Car. II. 1 Lev. 25.) or a copy of the

(a) In copyhold property, though the title has retrospective relation from the time of admittance to that of surrender against all persons but the lord, the surrenderee may recover in ejectment against the surrenderor on a demise laid between the time of surrender and admittance. *Hold-fast*, d. *Woollams* v. *Clapham*, 1 T. R. 100.

(b) Sed vide *Doe*, d. *Watson* v. *Routledge*, Cowp. 705, where Lord *Mansfield* said this *dictum* was of no authority, and ought to be rejected. Vide etiam *Doe*, d. *Gibbons* v. *Pott*, Dougl. 690, (715.)

book

book will be sufficient; but the administrator shall not be permitted to give such book or copy in evidence, until he have proved the administration under the seal of the court, lost.—*Lewis* v. *Brag*, M. 16 Geo. II. coram *Lee*, Guildhall.

If a man bring an ejectment for 100 acres, and make a title to 40, he shall recover *pro tanto*, and as to the other the defendant shall be found Not Guilty. (*Anon.* E. 16 Jac. I. 2 Rol. Abr. 704. c. 22. *Guy* v. *Rand*, H. 1582. Cro. Eliz. 13.) So if an ejectment be brought for a house, and the proof be that part of the house only is erected on the plaintiff's land by encroachment: (*Smales* v. *Dale*, T. 12 Jac. I. Hob. 120. *Seabright's Ca.* M. 7 Jac. I. 2 Rol. Abr. 719. c. 19. and the cases there cited.) So if
[* 109] the plaintiff make a title but to a moiety of that for which he * brings his ejectment, if it be by bill he shall recover; (*Goodwin* v. *Blackman*, T. 4 W. III. 3 Lev. 334.) and so is the determination in *Bracebridge's Case:* but *Plowden* in the report of that case says, he found great fault with himself afterwards in forgetting to speak to that point; for he says the register makes a difference between the demand of an entirety and of a moiety: that entireties are first to be demanded in a writ, and that if a man were to bring a writ of entry *sur* disseisin for one acre, and the tenant plead *ne disseisa pas*, and the jury find that he had a right to a moiety, and was disseised of that, and that the tenant had good title to the other moiety, he should recover nothing, because he might have another form of a writ for the moiety; but, says he, if it were found that he was disseised *de dimidio dict. acr' et nient plus*, then he should have judgment for that, for that is several, and it appeared probable to him that the suit should abate for the whole in this case upon a bill, as it would upon an original writ, if exception had been taken to it.—*Bracebridge's Ca.* T. 14 Eliz. Plowd. 417.

But this defect, even in the case of a writ, is now aided after verdict, by 18 *Eliz.*

It has been said, if a man bring ejectment for one acre of land in *D.* and *S.* and the whole lies in *D.* he shall recover: but if an ejectment be of the tenth part of a messuage in the parishes of *B.* and *C.* and it appear on evidence that the whole messuage lay in the parish of *B.* the declaration being precisely the tenth part of an entire thing, the evidence will not maintain it.—*Goodwin* v. *Blackman*, sup.

Ejectment will not lie of twenty acres of arable and pasture without shewing how much of each: (*Knight* v. *Syms*, E. 4 W. & M. Salk. 254. *Savil's Ca.* M. 12 Jac. I. 11 Co. 55.) nor will it lie of a close of meadow called *Partridge's Lees*, containing ten acres more or less, because the certainty of acres ought to appear in the declaration; (*Holdfast* v. *Wright*,

Wright, M. 12 Geo. I. C. B. nor will it lie for a close containing three acres, without ascertaining whether arable, meadow, or pasture.—*Savil's Ca.* sup.

If one tenant in common bring an ejectment against another, there is no occasion to prove an actual entry and ouster, for that is confessed by the rule: and if the fact be that there has been no actual ouster, the defendant ought to apply to the court not to compel him to confess, or to permit him to do it specially; which they will do, where it is only matter of account, and the only ouster is by pernancy of the profits, without an actual obstruction of the other to occupy.—*Wigfall* v. *Brydon*, E. 6 Geo. III. 3 Burr. 1895.

Note; Receiving the whole profits is no ejectment. (*Co. Lit.* 199, b.) [110] So the levying a fine of the whole land. (*Ford* v. *Grey*, H. 2 Ann. Salk. 286.) So the not consenting to have the rents raised.—*Johnson* v. *Allen*, H. 13 W. III. 12 Mod. 657.

Though the defendant confess lease, entry and ouster, yet he may deny that he is in possession of the premises for which the plaintiff goes, and put the plaintiff upon proving it; and if he cannot, he will be non-suited.—*Smith* v. *Man*, T. 21 Geo. II. 1 Wils. 220, on a case reserved, *tamen qu. et vide infra.*

And in case the landlord have been made defendant instead of his tenants, the plaintiff must prove the tenants in possession, for the defendant does not, by entering into the rule, confess himself to be landlord of any premises, but of such as were in the possession of such tenants. (*S. C.*) However, it has been said, that if there be but one defendant as tenant in possession, the plaintiff need not prove him in possession, because if he be not, why did he enter into the rule?—*Doe*, ex dem. *Jesse* v. *Bacchus*, M. 30 Geo. II. K. B. at Sittings.

If the defendant prove a title out of the lessor, it is sufficient though he have no title himself: but he ought to prove a subsisting title out of the lessor; for producing an ancient lease for 1000 years will not be sufficient, unless he likewise prove possession under such lease within twenty years. *(a)*

(a) Defendant entered under the plaintiff, to whom he paid rent till the last two years; that he still continued in possession, but paid rent to the lord under a notice from the steward of the manor. Held, by *Ellenborough*, C. J. that a man cannot controvert the title of the person under whose demise he continues to hold, but he must, by some formal act, first renounce the plaintiff's title. *Balls* v. *Westwood*, 2 Camp. 11. But in ejectment by landlord against tenant, the tenant may shew that the landlord's title has expired, though he cannot be allowed to prove that the landlord never had any title. *England*, d. *Syburn* v. *Slade*, 4 T. R. 682.

But in an ejectment brought by a second mortgagee against the mortgagor, he shall not give in evidence the title of the first mortgagee in bar of the second, because he is barred to aver contrary to his own act that he had nothing in the land when he took upon him to convey by the second mortgage.—*Lindsey* v. *Lindsey*, M. 8 Ann. *(a)*

So if the defendant produce a mortgage deed, where the interest has not been paid, and the mortgagee never entered, it will not be sufficient to defeat the lessor who claims under the mortgagor, because it will be presumed that the money was paid at the day, and consequently that it is no subsisting title; but if the defendant prove interest paid upon such mortgage after the time of redemption, and within twenty years, it will be sufficient to nonsuit the plaintiff.—*Wilson* v. *Witherby*, 8 Ann. in Kent, *per Holt*, C. J.

On the argument of the case of *Lade, Bart.* v. *Holford & al'*, E. 3 Geo. III. B. R. 3 Burr. 1416. 1 Blackst. 428, Lord *Mansfield* declared that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but direct the jury to presume it surrendered. *(b)*

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(a) A second mortgagee who takes an assignment of a term to attend the inheritance, and has all the title deeds, may recover in ejectment against the first mortgagee, if he has not had notice of such prior mortgage. *Goodtitle*, d. *Norris* v. *Morgan*, 1 T. R. 755. But if a subsequent mortgagee has notice of a former incumbrance, he shall not avail himself of an assignment of an old outstanding term prior to both, in order to get a preference. But if he had no notice of such prior incumbrance, and has the first and best right to call for the legal estate, then, if he gets an assignment of it, a court of equity will not deprive him of his advantage. *Willoughby* v. *Willoughby*, (in Chancery) 1 T. R. 763. But as to the effect of outstanding terms to attend the inheritance, and the benefits to be derived therefrom, see *Bridgman's Anal. Dig. of Eq. Ca.* tit. *Trust and Trustees*, V. (2d ed.) very much at large.

If a second mortgagee lend his money on an estate upon which there is an old outstanding term, and has notice at the time of a certain incumbrance prior to his own, the prior incumbrancer having the best right to call for the legal estate, may satisfy himself of any other incumbrances on the estate, though they were not known to the second mortgagee when he advanced his money. *Willoughby* v. *Willoughby*, sup.

(b) It does not follow, however, said Lord *Kenyon*, in *Doe*, ex dem. *Bowerman* v. *Sybourn*, 7 T. Rep. 3, that an ejectment may be maintained on a mere equitable title, which would remove ancient land-marks in the law, and create great confusion, (vide *Goodtitle*, ex dem. *Jones* v. *Jones*, post) but, that in all cases where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume, where such presumption might reasonably be made, that they had conveyed accordingly, in order to prevent a just title

The defendant produced a mortgage for years by deed from the plaintiff's ancestor, upon which was an indorsement *in hæc* **verba*, "Re- [*111] "ceived of Mrs. *M. O.* £500, on the within recited mortgage, and all "interest due to this day; and I do hereby release to the said *M. O.* and "discharge the mortgaged premises from the said term of 500 years." On a case reserved the court held, 1. That these words amounted to a surrender of the term. 2. That such surrender might be by note in writing, by the statute of frauds. 3. That a note in writing was not required to be stamped. (*Farmer*, ex dem. *Earl* v. *Rogers*, C. B. T. 1755. 2 Wils. 26.) But though a surrender or an assignment of a term may be made by note in writing without stamps, yet if it be made by deed under seal, it must be stamped.—*Goodright*, ex dem. *Ford* v. *Gregory*, M. 1744. Loft. 339. *(a)*

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title from being defeated by a matter of form. Again, in *Goodtitle*, ex dem. *Jones* v. *Jones*, 7 T. R. 49, Lord *Kenyon* observed, that what Lord *Mansfield* said, in *Lade* v. *Holford*, sup. must be understood with this restriction, that, in either case, the jury might presume the term surrendered, but that without such surrender the estate in the trustee must prevail at law, to which proposition, so qualified, Lord *Kenyon* fully assented. Again, in *Roe*, ex dem. *Reade* v. *Reade*, 8 T. R. 122, Lord *Kenyon* said he agreed with what was said in *Lade* v. *Holford*, that when the beneficial occupation of an estate by the possessor has given reason to suppose that possibly there may have been a conveyance of the legal estate to a person who is equitably entitled to it, a jury may be advised to presume a conveyance of the legal estate; but if it appear in a special verdict, or special case, that the legal estate is outstanding in another person, the party not cloathed with that legal estate cannot recover in a court of law; and in this respect, Lord *Kenyon* said he could not distinguish between the case of an ejectment brought by a trustee against his *cestuy que trust*, and an ejectment brought by another person; and indeed, said Lord *Ellenborough*, in *Doe*, ex dem. *Shewin* v. *Wroot*, 5 East, 138, as to the doctrine that the legal estate cannot be set up at law by a trustee against his *cestuy que trust*, it has long been repudiated, ever since a case which was argued in the Exchequer Chamber some years ago, and which Mr. *East* supposes to be the case of *Weakley*, ex dem. *Yea* v. *Rogers*.

In *Martin*, ex dem. *Tregonwell* v. *Strachan*, 2 Stra. 1179, but more correctly reported in 5 T. R. 110 (n), it was laid down by *Lee*, C. J. that the plaintiff in ejectment must recover *on the strength of his own title*, and not *on the weakness of defendant's*; and by Lord *Mansfield*, in *Roe*, ex dem. *Haldane* v. *Hervey*, 4 Burr. 2487, that possession gives a right against every person who cannot shew a good title.

Where the possession and receipt of rents, issues, and profits of a trust estate, though for above twenty years after the creation of the trust, without any interference of the trustees, is consistent with, and secured to the *cestuy que trust* by the terms of the trust-deed, such possession is not adverse to their title, so as to bar their ejectment against his grantees brought after the twenty years. *Keene* v. *Deardon*, 8 East, 248.

(*a*) By the last stamp act, however, a stamp is required in this case.

By 21 *H.* VIII. *c.* 15, a termor may enter immediately after the *habere facias seisinam* on a common recovery, and give his term in evidence upon an ejectment brought against him; but if the defendant be a stranger to the term, he is not within the benefit of the statute, so as to give the term of a third person in evidence to falsify the recovery against himself, or those under whom he claims.—*Booth* v. *Lindsey*, M. 1709. 2 Raym. 1294.

Where the lessor of the plaintiff is an infant, or resides abroad, the court will upon motion stay proceedings till a real lessee is named, or security given for payment of the costs.—*Birchman* v. *Wright*, E. 1734. *(a)*

The court will always stay proceedings upon a second ejectment till the costs of the first are paid, though it were brought in a different court. (*Anon.* H. 10 W. III. Salk. 255.) So where an ejectment was brought on the demise of husband and wife, in which they were nonsuited, after the husband's death the wife bringing a fresh ejectment, the court stayed proceedings till the costs of the former nonsuit were paid.—*Duchess of Hamilton's Ca.* E. 14 Geo. II.

If an ejectment be brought in order to try the validity of a will, *(b)* and a parcel of land is inserted in the declaration to which the plaintiff has an undoubted right (as copyhold land where there is no surrender to the use of the will,) and the defendant not observing it confesses lease, entry, and ouster for the whole, the plaintiff shall not on this account be excused from the costs, but the court will give the defendant leave

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(a) But if the guardian undertake to pay the costs, it is sufficient. *Anon.* Cowp. 128.

(b) Deaf, dumb, and blind persons, as well as infants, *&c.* are ranked by Lord *Coke* as amongst persons incapacitated to make a will, but that rule surely can only apply to those who are deprived of those powers of mind, which enable the parties to judge properly of their own concerns, and of the disposition of their property.

As to fêmes covertes, though they cannot in general make a will, of which the spiritual court can grant probate, yet under a power reserved or created, a fême coverte may make a will to operate as an appointment in execution of such a power, and a probate thereof may be granted accordingly. *Jenkin* v. *Whitehouse*, 1 Burr. 431. But if the devise be of a chattel interest, under such a power, the will cannot be read in evidence till the probate is granted. *Stone* v. *Forsyth*, Dougl. 68 *b.* (707.)

As to those cases in which a devise is deemed void, as being a disposal of what the law already gives, or of what the policy of the law will not admit, or for uncertainty in the description of the devisee or of the estate devised, or by the death of the devisee in the life-time of the devisor, see *Bridgm. Anal. Dig. of Eq. Ca.* tit *Devise*, III. IV. (2d ed.)

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to retract his confession as to this parcel.—*Odie* v. *Preston*, M. 27 Car. II. *(a)*

As in this action more frequently than in any other the legitimacy of the parties comes in question, it may be proper in this place to take notice, that it is the practice to admit evidence of what the parties have been heard to say as to their being or not being married; and with reason, for the presumption* arising from their cohabitation, is either [*112] strengthened or weakened by such declarations, which are not to be given in evidence directly, but may be assigned by the witnesses as a reason for their belief.

In *May* v. *May*, (H. 17 Geo. II.) which was tried in *K. B.* at bar upon an issue directed out of chancery, the preamble of an act of parliament reciting that the plaintiff's father was not married, and to the truth of which he was proved to have been sworn, was given in evidence, yet upon proof of a constant cohabitation, and his owning her upon all other occasions to be his wife, the plaintiff obtained a verdict. *(b)*

But on an appeal against an order of removal, where the sessions stated that *J. H.* the father of the pauper swore that he had travelled

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(a) Ejectment being the mode by which titles to land, under wills, are frequently tried, it is necessary to shew what is required in such cases by the statute of frauds, and to enquire into the testator's capacity to devise; as to the first of which points, we refer the reader to the statute, 29 *Car.* II. *c.* 3. *s.* 5 & 6; and as to the second, to the statute, 32 *H.* VIII. *c.* 1; in regard that the first of those statutes points out the solemnities necessary to be observed in executing a will to pass real estates; and the second declares all infants, insane persons, and fêmes covertes, incapable to make a will; but wills made under undue influence, or obtained by fraud, are left subject to the common law as before. As to infants however, though a will made by one under twenty-one is void, yet it may be substantiated by a publication on the attainment of full age. *Herbert* v. *Torball*, 1 Sid. 162. But it is no publication for a man, when of full age, to say before witnesses, that his will should stand good. *Hawe* v. *Burton*, Comb. 84. An infant however may devise by custom, (*Perk.* 221,) for his incapacity only extends to estates in fee-simple. Terms for years therefore, and chattel interests may be devised by males at fourteen, and by females at twelve years of age. *Godolph. Orph. Leg.* pl. 1. c. 8. *Lovelass on Wills*, 122.

The day of birth is inclusive, therefore if *A.* be born on 1st *February*, at eleven at night, and die at one in the morning of the last day of *January*, in the twenty-first year of his age, his will made on that day is good. *Anon.* Salk. 44.

(b) Coverture being the defence set up in this case, proof was offered of an acknowledgment by *W. W.* that *A. W.* the plaintiff, was his wife, and that they were married together, but no proof was offered of actual marriage. *Per Ellenborough*, C. J. this acknowledgment is insufficient without proof of actual marriage. *Wilson* v. *Mitchell*, 3 Camp. 393.

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with *H. A.* for seven years, and during all that time they cohabited as man and wife: That she had the pauper and two other children by him born in *Swinford* parish: and that they were reputed man and wife, and continued so till the woman's death, but that they never were married; the court held, that as all this case was disclosed on the sole evidence of the father, however difficult it might be to admit his evidence to bastardize a reputed legitimate child, yet as all depended on the father's testimony, the whole must be taken together, and then it appeared that he never was married; and consequently the child being a bastard was settled at *Swinford.* And the court said there was no colour to say the father was swearing to discharge himself; for if the child were legitimate, he was bound to keep it by 43 *Eliz.* and if a bastard, he must indemnify the parish by 18 *Eliz.*—*Parish of St. Peter in Worcester* v. *Old Swinford,* E. 8 Geo. II. B. R.

The old rule of the presumption of law, that the husband continuing within the four seas, and being alive at the child's birth, the child could not be a bastard, is exploded.—*Rex* v. *Inhabitants of Bedel,* T. 11 Geo. II. 2 Stra. 1076. *(a)*

Where a woman is separated from her husband by a divorce *a mensa et thoro,* the children she has during the separation are bastards, for the court will intend a due obedience to the sentence unless the contrary be shewn; but if baron and feme, without sentence, part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved, for access shall be intended. But if a special verdict finds the man had no access, it is a bastard, and so was the opinion of my Lord *Hale* in the case of *Dickins* v. *Collins,* S. P. H. 3 Geo. I. between the parishes of *St. Andrew's* and *St. Bride's.*—*St. George's Parish, Westminster,* v. *St. Margaret's, Westminster,* 1 Salk. 123.

[113] The wife gave evidence that the defendant (upon whom an order of bastardy in this case was made) had carnal knowledge of her body about *August,* 1732, and several times since, and was the father of the child, which was born in 1733.——That her husband had no access to her from *May,* 1731.——Other witnesses proved the husband to be within seven miles of her all the time. The question was, Whether the wife were a competent witness to bastardize the child. And *per curiam,* such facts as cannot in their nature be proved by any other person, must

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(a) In this case, which was a case of removal, it was stated, that there had been no access for seven years, though it fully appeared the husband was living, yet that was held sufficient to bastardize the issue.

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be proved by the wife; as here the act of incontinence, which lay in the wife's own knowledge: but she ought not to be permitted to prove the want of access, which might be notorious to the whole neighbourhood. —*Rex* v. *Reading*, B. R. M. 8 Geo. II. Ca. temp. Ld. *Hardwicke*, 79. 1 Bott. 399. *(a)*

Note; The want of access in that case tended to discharge her husband from the maintenance of the child, as it proved the child to be the bastard of another man; but after her husband's death she might be a witness to prove the child a bastard, as well as the father who was admitted for that purpose in the case before, between the parish of *St. Peter's* in *Worcester* and the Parish of *Old Swinford*.—*Ante* p. 112*a*.

In *Pendril* v. *Pendril*, H. 5 Geo. II. (Stra. 925,) *(b)* Lord *Raymond* would not suffer the wife's declaration, that she should not know her husband by sight, *&c.* to be given in evidence, till after she had been produced on the other side; the fact of the marriage not being disputed, but only the legitimacy.

In the same case the Chief Justice admitted evidence to be given of the mother's being a woman of ill fame.

The declarations of the wife without oath were properly rejected in that case, because they were not the best evidence. The husband was dead, and she might be examined. *Stra.* says, that the Chief Justice would not allow the wife's declarations to be given in evidence, till she had been called, and *denied them on cross examination*.—After that they were evidence to impeach her credit.—The reason here given, *viz.* "because the fact of the marriage was not disputed, but only the legi-"timacy," is not mentioned in *Strange*. The Chief Justice, in directing the jury, said, that the old notion of the presumption *infra quatuor maria* was exploded, that the evidence to overturn this presumption need not be so strong as was insisted upon by the plaintiff's counsel. That the evidence was the same in this as in all other cases, a probable evidence was sufficient, and it was not necessary to prove access impossible between them. The jury found that the plaintiff was a bastard without going from the bar, upon which the Chief Justice commended the verdict. *(c)*

In

(a) Vide etiam *Rex* v. *Rook*, 1 Wils. 340.

(b) In *Sidney* v. *Sidney*, 3 P. W. 276, where this case is cited, it is said to have been heard before Lord *Talbot* on 5th *February*, 1733.

(c) So the child of a married woman may be proved to be a bastard by other evidence than the non-access of her husband, as by evidence of being born during the notorious cohabitation of his mother with

In *Lomax* v. *Holmden*, (6 Geo. II. at Bar. Stra. 940,) the marriage being proved, and evidence given of the husband's being frequently in *London* where the mother lived, so that access must be presumed, the defendants were admitted to give evidence of his inability from a bad habit of body; but their evidence going only to an improbability, and not to an impossibility, it was thought not sufficient, and the plaintiff had a verdict.

In *Jones* v. *Bow*, (E. 4 W. III. Carth. 225.) the defendant, by way of anticipation to the evidence the plaintiff was about to give, moved the court that the plaintiff ought not to be allowed to give evidence of the marriage of Sir *Robert Carr* to *J. S.* under which he claimed, because there was a sentence in the arches in a cause brought against her *causa jactitationis maritagii*, that there was no marriage between them, but that they were free one of another; and upon debate the court were all of opinion, that this sentence, whilst unrepealed, was conclusive against all matters precedent.

By 26 *Geo.* II. *c.* 33, if any person shall solemnize matrimony in any other place than a church, or public chapel, (unless by special licence from the archbishop of *Canterbury*) or without publication of banns, or licence in a church or chapel, the marriage shall be void. This act does not extend to marriages solemnized in *Scotland*, or in parts beyond the seas; nor to marriages amongst Quakers or Jews, where both parties are such. *(a)*

And by the same act, all marriages solemnized by licence, where either of the parties not being a widower or widow, is under the age of twenty-one years, which shall be had without the consent of the father or guardian of such party, shall be absolutely void.

The appellant and respondent, both *English* subjects, and the appellant being under age, ran away without the consent of her guardian,
[*114] and were married in *Scotland;* and on a suit brought *in the spiritual court to annul the marriage, it was holden that the marriage was good.—*Compton* v. *Bearcroft*, cor. Delegates, 1st *December*, 1768.

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with another man, and of his being considered by all the family as the child of those two. *Goodright*, d. *Tompson* v. *Saul*, 4 T. Rep. 356. Et vide *Rex* v. *Lubbenham Inhabitants*, 4 T. Rep. 251.

(a) Neither does it take away the evidence of presumption from cohabitation; but if the evidence be clear that the marriage was not celebrated according to the requisitions of the act, it is totally void, and no declaratory sentence in the ecclesiastical court is necessary. *R.* v. *Preston* next *Travusham*, M. 33 Geo. II. B. R. MS. Ca.

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This act doth not take away the evidence of presumption from cohabitation. But if the evidence be clear that the marriage was not celebrated according to the requisitions of the act, it is totally void, and no declaratory sentence in the ecclesiastical court is necessary.—*Rex* v. *Preston* next *Travasham*, M. 33 Geo. II. B. R.

By the same act all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and shall be entered in the register; in which entry shall be expressed whether the marriage were celebrated by banns or licence, and signed by the minister and the parties married, and attested by two witnesses.

The sessions stated in a case reserved by them, that the entry made in the register was not subscribed by the minister and two witnesses, *Per curiam.*—In a suit of jactitation of marriage in the spiritual court, whilst the parties are alive, they are put to prove all ceremonies: But in all other cases, proof by witnesses who saw the marriage, is *primâ facie* sufficient; and whoever would impeach it, must shew wherein it is irregular. In the present case the marriage appears by the witnesses, and the register, to have been by banns; and therefore there is no colour for any objection; for the entry of the register is not of the essence of the marriage.—*R.* v. *St. Devereux Inhabitants*, E. 2 Geo. III. 1 Blacks. 367.

It is not precisely settled what length of time shall be allowed for a woman to go after her husband's death. *T.* 18 *Ed.* I. *Rot.* 13, because a feme went eleven months after the death of the husband, it was resolved the issue was not legitimate, being born *post ultimum tempus mulieribus pariendo constitutum.(a)* But in *Alsop* v. *Bowtrell*, (1620. Cro. Jac. 541,) where the husband died 23d of *March*, and the child was born the 5th of *January;* upon proof of the mother having been hardly dealt with, forced to lie in streets, *&c.* and upon an examination of physicians, the court held the child might be legitimate.

(a) Pliny, in his Nat. Hist. *Lib.* VII. *c.* 5. says, there is no definite time known or set down for women to go with child, and he mentions a case before *L. Papyrius*, the *Prætor*, (or Lord Chief Justice) where a second heir in remainder made claim, and put in a plea for his inheritance, of the goods, and the *Prætor* made an award, and gave judgment against him on behalf of an infant, the right heir, born after the decease of his father; in this case the mother came in and testified how she was delivered of that child within thirteen months after the death of the testator.

Pliny also mentions, that the consul *Suillius Rufus*, was born at the end of eleven months; his mother was *Vestilia*, who was married to three roman citizens successively, and had children by all.

Note;

Note; The rule *quod non est justum aliquem post mortem facere bastardum* holds place only in the case of bastard *eigne* and *mulier puisne*. But if *H.* marry a woman, and that woman marry again, living *H.* the last marriage is void without any divorce, and the jury shall try the fact which proves it not a marriage.—*Pride* v. *Earl of Bath*, E. 6 W. III. Salk. 120. Co. Litt. 244. *(a)*

[115] *N. B.* By 16 & 17 *Car.* II. *c.* 8. No execution shall be stayed by writ of error after verdict and judgment thereupon, unless the plaintiff in error became bound to the defendant to pay the damages and costs in case the judgment be affirmed, or the plaintiff discontinue or be nonsuited, and a writ shall issue in such case to enquire of the mesne profits and damages by any waste. *(b)*

(a) And the rule that parents shall not be allowed to bastardize their issue, holds only where it is to bastardize issue born after marriage, for either parent may prove that a child was born before marriage, and a general declaration, or an answer to that effect, is good evidence; but as to issue born after marriage, it is inadmissible. *Goodright*, d. *Stephens* v. *Moss*, 1 Cowp. 591.

So the reputed father or mother is competent to prove the illegitimacy of the child, by shewing no marriage, or an illegal one. *Rex* v. *Bramley Inhabitants*, 6 T. Rep. 331.

But the rule, that a bastard is *nullius filius*, applies only to cases of inheritance. *Per Buller*, J. in *Rex* v. *Hodnett Inhabitants*, 1 T. Rep. 101.

(b) Under this statute the defendant is entitled to his writ of error, if he offer to become bound, as the statute directs, which is generally in double the rent, even though it appear by affidavit that he is insolvent, and that the land is mortgaged for more than it is worth. *Thomas* v. *Goodtitle*, 4 Burr. 2501. But where defendant afterwards brings error in parliament, he must enter into a rule and recognizance not to commit waste, pending the writ. *Wharod* v. *Smart*, 3 Burr. 1823.

A writ of error cannot issue in the name of the casual ejector. *George*, d. *Bradley* v. *Wisdom*, 2 Burr. 756. Nor can any thing be assigned for error, which can render it necessary to enquire into the title. *Wilkes* v. *Jorden*, Hob. 5.

As it may be that this writ is only brought for delay, plaintiff in ejectment may, pending the writ, bring his action for mesne profits; but if it be not brought for that cause, the sum which plaintiff recovers may be given in evidence in mitigation of damages, on a writ of enquiry. *Donford* v. *Ellys*, 12 Mod. 138.

And plaintiff may enter, pending this writ, if he find the premises vacant. *Badger* v. *Floyd*, Holt, 199, cited in *Withers* v. *Harris*, Raym. 808.

The above-mentioned statute however does not extend to any writ of error brought by an executor or administrator. *Runn. on Eject.* 423, (ed. 1795.)

CHAPTER

CHAPTER III.

OF THE WRIT OF RIGHT.

BY the 32 *H.* VIII. *c.* 2. No person shall have a Writ of Right of the possession of his ancestor, but within threescore years, nor of his own but within thirty years. *(a)*

A claim or entry to prevent the statute must be upon the land, unless there shall be some special reason to the contrary.—*Ford* v. *Grey*, H. 2 Ann. Salk. 285. *(b)*

Note; The possession of one joint-tenant is the possession of another, so far as to prevent the statute. *(c)*

(a) Vide etiam *Herne* v. *Lilborne*, 1 Bulst. 159. 162.

By this writ the *property*, as well as the possession, are recoverable, and it is the only remedy for the owner, or his ancestors, after they have neglected to bring a writ of *entry*, or *assize*, or *mort d'auncestor*, or of *novel disseisin* within thirty years. *F. N. B.* I. 12.

(b) Et vide *Herne* v. *Lilborne*, sup. *Co. Litt.* 15. 3 *Com. Dig.* 137.

(c) A writ of right is usually a writ close. *William* v. *Gwyn*, 2 Saund. 45 d. n. 4, and not a writ *patent*, as it is called in reporting the case of *Tyssen* v. *Clark*, 3 Wils. 419. 541. 558: and it is to be observed, that in prosecuting it, the smallest error will be fatal. *Dumsday* v. *Hughes*, 3 Bos. & Pull. 453; especially where the demandant has dealt unfairly with the tenant. *Almsgill* v. *Pierson*, 1 Bos. & Pull. 103: and unless the verdict be flagrantly wrong, no new trial will be granted. *Tyssen* v. *Clark*, sup. and 2 Bla. 941. *S. C.* But almost any collateral bar may be given in evidence on the general issue. *S. C.*

For the practical proceedings under this writ, and further authorities, vide *Lee's Dict. of Pract.* 1051, where this subject is very ably treated, and the forms are supplied.

CHAPTER IV.

OF THE WRIT OF FORMEDON.

BY 21 *Jac.* I. *c.* 16. All Writs of Formedon shall be sued within twenty years next after the title or cause of action first descended, or fallen, with a proviso that if the person entitled to such writ be, at the time of the said writ first descended or fallen, within twenty-one years, feme covert, *&c.* then such person and his heirs may, notwithstanding the

the said twenty years be expired, bring his action, so as it be within ten years, &c. *(a)*

If the tenant plead that *A. ne done pas*, it is not sufficient for the demandant to prove the gift by another: (2 *Rol. Abr.* 676. pl. 13.) So [*116] if the demandant* count of a gift in frank-marriage, a gift with a remainder in fee is not sufficient evidence.—*Ibid.* pl. 14.

In a formedon *in discender* the demandant must make himself heir to him who was last seised by force of the intail; but he need not mention an ancestor who happened to be inheritable, but never was actually seised by force of the intail.—*Buckmere's Case*, 7 Jac. I. 8 Co. 88. *Anon.* Dy. 14.

In a formedon *in reverter* the demandant need not alledge that all the issue inheritable are dead, but it is sufficient to say the donee is dead without issue; for he is a stranger to the pedigree: But he must not omit any of his own ancestors who were seised of the reversion.—*Booth*, 153.

In a formedon *in reverter* the taking the profits must be alledged both in donor and donee: So in a formedon *in remainder*, if a fee-

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(a) This writ was granted by statute *de donis*, (*Westm.* 2. 3 Ed. I.) and lies for one who is entitled to lands by virtue of an entail; it is in nature of a writ of right, and is the highest action a tenant in tail can have, where upon alienation the estate tail is discontinued, and the remainder is by failure of the particular estate turned into a mere right. *Co. Litt.* 316. *Finch's Law*, 267.

Of formedon there are three species: 1. In the *discender* it lies where a gift in tail is made, and the tenant in tail aliens, or is disseised, and dies, in which case his heir shall recover the lands against the actual tenant of the freehold, but he must prove himself heir, *secundum formam doni*. *F. N. B.* 211, 212.

2. In *remainder* it lies upon a gift for life, or in tail, or in fee, and he who has the particular estate dies without issue inheritable, whereupon a stranger intrudes on the remainder-man, and keeps possession. The remainder-man shall then have this writ, stating the form of the gift, and the happening of the event on which the remainder depended. *F. N. B.* 217.

3. In *reverter* it lies where, by the death of the donee in tail, or his heirs without issue of the body, the reversion falls into the donor, his heirs or assigns. The reversioner in such case shall, by this writ, suggest the gift his own title minutely from the donor, and the failure of issue, which lets in his reversion, and thus recover the lands. *F. N. B.* 219. *Buckmere's Ca.* 8 Co. 88.

Formedon in *discender* lies also by the heir of a *coparcener* in tail, who after partition aliens her part, and then, by reason of her sister's death, takes the other part. For a coparcener lies also *formedon insimul tenuit* against a stranger on the ancestor's possession, and it may be brought without naming her companion in possession. And it lies also for one heir in *gavelkind* of lands intailed, and where the lands are held without partition. *N. Nat. Brev.* 476. 481.

simple

simple be demanded; but if an estate tail only be demanded (as in a formedon *in discender*) it is sufficient to alledge *explees* in the donee only.—*Hunloke* v. *Petre*, H. 3 W. III. 2 Lutw. 963.

In a formedon *in discender* by husband and wife in right of the wife, the discent must be made to the wife alone; but in a formedon *in reverter* it may be laid either to the wife, or to the husband and wife.—*E. Clanricarde* v. *Sydney*, M. 11 Jac. I. Hob. 1.

The defendant pleading never tenant of the freehold, in abatement, the plaintiff refused to accept the plea; but upon motion the plea was ordered to be received, for it cannot be pleaded otherwise than in abatement.—1 *Barnes*, 238. *(a)*

(a) Non-tenure special may be pleaded where the tenant shews what estate or interest he hath in the land demanded, and therefore this plea must always state who is tenant. *Bishop* v. *Cossen*, 1 Brownl. 153. *Booth*, 29.

Non-tenure of parcel of an entire thing abated the whole writ at common law, but by statute 25 *Ed.* III. c. 16, no writ shall be abated by the exception of *non-tenure of parcel*, save only as to that parcel whereof *non-tenure* was alledged. *Fowle* v. *Doble*, 1 Mod. 181. *Booth*, 29.

But on *non-tenure of the whole* pleaded, defendant need not shew who was tenant, but of *parcel*. *S. C.*

After a *general imparlance* the tenant cannot plead non-tenure of *part*, though of the *whole* he may. *Barrow* v. *Haggett*, 3 Lev. 55.

A tenant may plead both in bar and abatement in this action, and there are several pleas, but *non-tenure* can only be pleaded in abatement.

CHAPTER V.

OF THE WRIT OF DOWER.

DAMAGES in Dower are given by the statute of *Merton*, c. 1. *(a)* (Vide *Co. Litt.* 32 b. for an exposition of this statute), but it extends

(a) This writ lies where a woman has received only part of her dower, to recover the residue against the same tenant in the same term, and dower *unde nil habet* lies where a wife has received no part, nor has her husband made any assurance thereof, so that she is driven to sue the heir or his guardian. *F. N. B.* 7. *Co. Litt.* 32. *Wood's Inst.* 568.

At common law, before the statute of *Westm.* 1. c. 39, if a woman received even the smallest part of her dower of any one tenant, she had no remedy for the rest, but by this writ; for if she brought dower *unde nil habet*, the acceptance of part was a good plea in abatement, but now it shall be no plea in abatement for defendant to say, she has received part of any other person, and this extends as well to a guardian in chivalry, as to the tenant of the land. 2 *Inst.* 261.

only

only to lands whereof the husband died seised; and therefore if the jury do not find that he died seised, judgment for damages will be reversed; they must find too of what estate he died seised, *viz.* an estate in fee or in tail; for if the husband alien, and take back an estate for life, the wife shall recover dower, but no damages.—*Bromley* v. *Littleton*, M. 5 Jac. I. Yelv. 112. *(a)*

If the jury find the husband died seised, they must find the time when, [*117] the annual value of the land, damages on account *of the detention and costs; but if they find the husband was seised but did not die so, then no costs or damages, but only the value of the land; for damages are given by the statute of *Merton* only where the husband died seised, and the statute of *Gloucester* gives costs only where the plaintiff recovers damages.—*Dennis* v. *Dennis*, E. 23 Car. II. 2 Saund. 331.

The reason why the jury are to find the value of the land in case the husband died seised, is, that the court may give damages pursuant to the statute of *Merton*, from the death of the husband to the time of the judgment. *(Ibid.)* And if the heir sell to *J. S.* and the widow recover her dower against him, he must pay the whole mesne profits from the death of the husband, though he have not himself been half the time in possession: she is intitled by the statute and can recover only against the tenant.—*Brown et Ux'* v. *Smith*, H. 25 & 26 Car. II. *c.* 28.

Though the statute say only that she shall recover damages to the time of the judgment, yet if she obtain judgment by default, upon a writ of enquiry, the jury may give her damages to the time of the inquisition, unless she were in possession before by virtue of an execution awarded upon the judgment by default. The jury may assess damages beyond the revenue, for she may have sustained more.—*Walker* v. *Levinz*, E. 29 Eliz. 1 Leon. 56.

Damages must be after demand of dower, for the heir is not bound to assign till demanded. (*Co. Litt.* 33.) But unless the heir plead *tout jours prist*, he shall not take advantage of the widow's laches in not demanding her dower; and though he plead *tout temps prist*, yet she

(*a*) Judgment in dower is to recover a third part of the lands by metes and bounds, and a wife may have this writ against an heir or any one who has a power to assign dower. So she may against the lord who enters upon the land for an escheat, but to the king she must sue by petition. *Bedingfield's Case*, 9 Co. 15. *Browning* v. *Beston*, Plowd. 141. *Arundell's Case*, Dy. 263. Co. Litt. 32 a. 208 a. If any thing be objected precedent to the title of dower, a widow may recover with a *cessat executio* title that objection is determined. *Lindsey* v. *Lindsey*, 1 Salk. 291.

shall

shall recover damages from the teste of the original to the execution of the writ of entry; but if the heir assign dower, and the wife accept thereof, she loses her damages.—*Kent* v. *Kent*, M. 1733. K. B. 2 Stra. 971. *Yeo* v. *Yeo*, T. 14 Geo. III. K. B. 2 Dick. 498. Co. Litt. 32.

Upon a trial at bar the issue was, if there were a demand of dower, to intitle the plaintiff to damages, she proved an actual demand of the heir who was an infant, and the court held that dower was demandable of the heir, though he was under the age of fourteen, and that the not assigning of dower, though the infant did not refuse to do it, but was prevented by his guardian, was a refusal in law sufficient to intitle the plaintiff to damages.—*Corsellis* v. *Corsellis*, H. 29 & 30 Car. II. Finch, 200.

Detinue of charters of the same land is a good plea in delay of dower, and if she deny the detainer, and that be found against her, she shall lose her dower.—*Brickhead* v. *York Archbp.* M. 6 Jac. I. Hob. 199.

He that pleads detainment of charters ought to alledge what, and likewise plead that he has been always ready to render dower, and yet is, if the defendant would deliver the charters; therefore it cannot be pleaded after imparlance.—*Bedingfield's Case*, H. 28 Eliz. 9 Co. 18. *Gerard* v. *Gerard*, H. 7 W. III. 1 Salk. 252. 11 Hen. VI. 4.

The tenant pleaded that the demandant detained certain charters, *&c.* [118] and if she will render, *&c.* then ready to render dower, *&c.* the demandant produced the deed, and prayed dower, and the deed was read, so that the court perceived it was the same deed; by which the demandant recovered.—*Bro. Dower*, 53.

But if a wife be with child, the heir for the time being cannot plead detinue of charters, for she may keep them for the infant.—*Bro. Dower*, 8.

If the defendant plead *ne unques seise que dower*, she may give in evidence a release to her husband, or a surrender to him by one who was seised as joint-tenant with him. So if the demand be of an advowson or rent-charge, she may give a grant of the rent or advowson in evidence, and that her husband died the day before payment or presentment.—2 *Rol. Abr.* 676. *c.* 10.

Father tenant for life, remainder to his son in tail, remainder to the father in fee, father and son were hanged out of the same cart for felony. (*Broughton* v. *Randal*, T. 38 Eliz. Noy. 64.) The father's widow brought a writ of dower, and upon the issue *ne unques seisie*, upon proving by witnesses that the father moved his feet after the death of the son, she recovered.—*Gyppin* v. *Burney*, M. 1595. Cro. Eliz. 403.

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If the tenant plead *ne unques accouple in loial matrimonie*, it shall not be tried by a jury, but a writ shall issue to the bishop to certify it.

The defendants having pleaded *ne unques accouple*, the plaintiff replied a sentence of the ecclesiastical court in a cause of divorce brought by Sir *W. W.* against her, charging that she was his wife, and had committed adultery with *J. R.* to which she pleaded, that she was the lawful wife of the said *J. R.* and not of the said Sir *W. W.* and that afterwards *J. R.* died, and the cause coming on to be heard, the judge did declare that the plaintiff had been the wife, and was then the widow of the said *J. R.* and prayed judgment whether the defendants were not estopped to plead *ne unques accouple*. The court held it no estoppel, as the bishop's certificate in an action between the plaintiff and other defendants would have been.—*Robins* v. *Crutchly et al'* T. 33 Geo. II. 2 Wils. 118. 127.

If issue be taken upon the life or death of the baron, it shall not be tried by a jury, but by the court, and a day shall be given to the parties to produce their witnesses, and presumptive evidence will be sufficient; but *quære*, whether if it be found against the tenant, it will be peremptory, or whether he shall not plead to the right of dower.—*Parker's Case*, M. 38 Eliz. Dy. 185. pl. 65. *(a)*

[119] By 16 & 17 *Car.* II. *c.* 8. Execution shall not be staid by writ of error upon any judgment after verdict, unless the plaintiff become bound to pay damages and costs in case the judgment be affirmed, or the plaintiff discontinue, or be nonsuited; and a writ shall issue to enquire of mesne profits and damages by waste done after the first judgment.—*Kent* v. *Kent*, E. 7 Geo. II. Stra. 971.

Note; If the judgment be affirmed *in dom. proc.* and costs given, the defendant may bring an action on the recognizance for such costs, without suing out a writ of enquiry.—*Roe* v. *Roach*, E. 11 Geo. II. Andr. 153. *(b)*

CHAPTER

(a) In dower against eight feoffees of the husband after marriage, two confessed the action, and six pleaded issuably. The wife had judgment first for her third of two-eighths of the land, and afterwards the issue being found against the rest, she recovered her third of the remaining six parts of the land. *Anon.* Dy. 187. Co. Litt. 32.

(b) A wife should proceed to demand her dower immediately after her husband's death. The first process is a *summons* to appear, and if defendant neglects, or does not cast an essoign, a *grand cape* lies to seize the lands. By statute 31 *Eliz. c.* 3. every summons on the land must be made fourteen days before the return of the writ, and proclamation made at the church door on a Sunday, or no *grand cape* can be awarded but on an *alias* and *pluries* summons till proclamation, but on the return of the writ of summons, the defendant's attorney may enter appearance with

CHAPTER VI.

OF WASTE.

BY the statute of *Gloucester*, (6 *Edw.* I. *c.* 5.) the plaintiff in an action of Waste is to recover the thing wasted, and treble damages. *(a)*

If a lease be made excepting the wood and timber, an action of waste will not lie against the lessee for cutting it down, because not demised.—*Anon.* Dy. 119.

If a termor assign his term except the trees, and after, the trees are cut down, waste will lie against the assignee, for the exception was void; but if tenant for life make a lease for years, he may except the trees, because he still remains tenant and is chargeable in waste.—*Saunders' Case*, 41 Eliz. 5 Co. 112.

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with the filazer, and pray view, *&c.* Then passes a *writ of view*, whereby the sheriff is to shew the tenant's land, and on return the defendant's attorney takes a declaration, and generally pleads *ne unque seize*, *&c.* On which issue being joined, and a trial had, the jury are to give damages for the mesne profits from the death of the husband, for which execution issues to the sheriff to give possession of a third of the lands, and the wife takes seisin by the delivery of a turf, or by any beast then on the land. *Fitz. Dower*, 48. Et vide *William* v. *Gwyn*, 2 Saund. 45. (a.) n. 4.

(a) When the *waste* and *damages* are ascertained, and judgment is given, if the thing wasted be subsisting, plaintiff may recover it by writ of *seisin*, but if not, plaintiff can only have treble damages, which he must recover as he would all other damages in personal and mixed actions. 3 *Blac. Com. c.* 14.

This writ lies at common law, and on the statute of *Gloucester*, for the owner of an inheritance in reversion or remainder against a tenant for life, in dower, by the curtesy, or for years, and by statute of *Westminster* (13 Ed. I. c. 22.) by one tenant in common against another, and the equity of the statute has been holden to extend to joint-tenants, but not to coparceners. 2 *Inst.* 403, 404.

Waste is a *mixed* action, *real* as to the *land*, and *personal* as to the *damages*. 3 *Blac. Com.* 227. *Finch*, 29. But now the most usual remedy is by a bill in Chancery for an injunction to stay waste. *Atkins* v. *Temple*, 1 Ch. Rep. 14. *Williams* v. *Day*, 2 Ch. Ca. 32.

By this writ the plaintiff is called to appear and shew cause why he committed waste to the plaintiff's disherison. *F. N. B.* 55. And if he appear not the sheriff goes personally to the place wasted, with his jury, where he enquires of the waste done, and on his return the judgment is founded. *Crocker* v. *Dormer*, Poph. 24. But if defendant appears, and then suffers judgment by default, he confesses the waste, and in that case the sheriff goes not to the place, but only makes an enquiry of the *quantum* of *damages*, as in other actions. *Foster* v. *Spooner*, Cro. Eliz. 18. *Warnford* v. *Haddock*, Cro. Eliz. 290.

The process in this action is first a writ of *summons* made out by the cursitor of the court, on the return of which defendant may essoin, and plaintiff adjourn, *&c.* Then the filazer makes out a *pone*, on the return of which a *distringas* issues for defendant to appear, which done, plaintiff declares, and defendant pleads, *&c.*

The plaintiff declared that being seised in fee of a farm called *Strode's* farm, he leased the said farm to the defendant for ninety-nine years, and that the defendant did waste in the farm, to wit, in cutting down two hundred oaks in a close called *Webb's* close, parcel of the said farm; and on demurrer it was holden certain enough, for the declaration follows the lease, and the waste is assigned in a particular place alledged to be parcel of the demised premises.—*Strode* v. *Devenish*, M. 1 Geo. I.

If the defendant plead *nul waste fait*, and issue is taken thereupon, the plaintiff must prove his title as laid in the declaration, for it is not admitted by the plea. The plaintiff must likewise prove the kind of waste laid in his declaration; and therefore if he alledge waste in cutting trees, and the jury find that he stubbed them did not cut them, it is variance.—*Leigh* v. *Leigh*, E. 4 W. & M. 2 Lutw. 1507.

[120] Wherever the plaintiff is to recover *per visum juratorum*, there ought to be six of the jury that have had the view; therefore it seems a good exception for the defendant at the trial, that there are not six viewers appear.—*Co. Litt.* 158.

The defendant, upon the general issue *nul waste fait*, may give in evidence any thing which proves it no waste; as that it was by tempest, *&c.* but not that it was for repairs, or that the plaintiff gave him leave to cut, or that he had repaired before the action brought. Neither will it be any defence that a stranger did it, for if the plaintiff should not have his action of waste, he would be without remedy; and the defendant may bring trespass against the stranger, and recover his damages. But it would be a good plea to say that the plaintiff himself did it.—*Co. Litt.* 283. 2 *Inst.* 145. 50 *Hen.* IV. 2 b.

If waste be assigned in three houses, two gardens, *&c.* the jury ought to find damages severally for every of them, for if it be but of small value for any of them, the court will not adjudge it waste as to that part; but if the jury give entire damages, it shall not be intended that there were petit damages in any, and therefore the verdict will be good.—*King* v. *Fitch*, T. 1634. Cro. Car. 414. 452.

If the plaintiff have judgment by *nihil dicit*, and a writ of enquiry issue, the jury shall enquire of the damages, but not of the place wasted, for that is confessed. (*Topping* v. *King*, E. 19 Jac. I. Winch. 5.) But after a recovery by default there goes out a writ to enquire *de vasto facto, et quod vastum predict' A.* (the defendant) *fecit*, so as the defendant may give evidence, and the jury find that no waste was done, or if they find damages only to a small sum, the plaintiff shall not have judgment.—*Co. Litt.* 355, 356. *Bro. Waste*, 70. *(a)*

(a) For a *corrective* injury a writ of *waste* is proper, but there is also a remedy *preventative*, which is by writ of *Estrepement*.

CHAPTER

CHAPTER VII.

OF WRITS OF ASSIZE.

WRITS of Assize are of two sorts, *novel disseisin* and *mort de ancestor*; *(a)* the first process is an original out of chancery directed to the sheriff, commanding him to return a jury, who are called recognitors of the assize; they are to be taken in *K. B.* or *C. B.* for the county in which they sit, and for all others in their proper counties, but to be adjourned for * difficulty into *C. B.* The tenant is to appear and plead [* 121]

(a) Mort de ancestor lies where the abatement by a stranger happened after the death of the demandant's father, mother, brother, sister, uncle, aunt, nephew, or neice. *Reg. Orig.* 223, and the writ is directed to the sheriff to summon a jury to view the lands, and to enquire whether the ancestor died seised, and whether the demandant is the next heir. *F. N. B.* 195. 1 *Com. Dig.* 416, it is good as well against the abator as against any other possessor of the land, but it lies not between privies in blood. *Co. Litt.* 242. Yet where the abatement happen on the death of a grandfather or grandmother, this writ is no longer his but a writ of *Ayle*, so for a great-grandfather or great-grand-mother, a writ of *Besayle*, and if it mount one degree higher, then *Tresayle*, and if the abatement happen on the death of a collateral relative, then a writ of *Cosinage* must issue. *Finch's Law*, 266, 267, and the same things shall be enquired of as in *mort de ancestor*, for the only difference is, that the *ancestral* writs must expressly state the seisin of the ancestor at his death, and the demandant's own right of inheritance. 2 *Inst.* 399. There is also another auncestral writ, called a *nuper obiit*, which lies to establish an equal division among coheiresses, where one enters, and holds out against the rest. *F. N. B.* 197. *Finch*, 293. *Reg. Orig.* 226. *N. N. B.* 437. *Booth*, tit. *Ass.* But none can have these writs beyond the fourth degree. *Hale on F. N. B.* 221. though in the lineal ascent he may proceed *ad infinitum*. *Fitz. Abr.* tit. *Cosinage*, 15. 3 *Blac. Com.* 186. *Sed semble* that since the statute of 12 *Car.* II. *c.* 24, which converts all tenures into common socage, no assize of *mort de ancestor* can be brought, but recourse must be had to the writs of *Entry*. 3 *Blac. Com.* 187.

This writ lies also for the heir of a wife, whose husband (being tenant by the courtesy) alienated his wife's land, and died, if such heir have not assets by descent from the tenant by curtesy, and the same shall be, as well where the wife was not seised of the land at her death, as where she was seised. *N. Nat. Brev.* 489.

So a *warden of a college*, *&c.* shall have this writ, of *rents* of which his predecessor was seised, and a man may have it against several tenants in different counties by several summonses, but if a tenant make default on the return day, the plaintiff must issue a re-summons, and if he again make default then the assize shall be taken, *&c. Bro. Ass.* 88.

Damages are recoverable in this action, but it lies not of an *estate tail* only where the ancestor was seised in fee. *Bro. Ass.* And though a man be barred in assize of *novel disseisin*, yet on shewing a descent or other collateral matter he may have *mort de ancestor*, or a writ of *entry sur disseisin*, *&c.*

instantly (unless the court will allow him an imparlance) on the same day the writ is returnable, for the demandant is to count immediately; and therefore if he be not ready he shall be nonsuited, but he may bring a new assize. (*Savier* v. *Lenthall*, H. 1 W. & M. Salk. 82.) And note; if the defendant plead in abatement, he must plead over in bar at the same time; and if there be several defendants, and any of them do not appear the first day, it shall be taken by default against them.—*Saveris* v. *Briggs*, E. 5 W. III. Salk. 83.

Though the assize be awarded by default, yet the tenant may give evidence, and the jurors find for him, but he cannot plead in abatement or bar of the assize, nor challenge.—*Cragge* v. *Norfolk*, H. 26 & 27 Car. II. 2 Lev. 120. Co. Litt. 355.

An assize of *novel disseisin* must be founded upon a seisin in him who brings the writ, and therefore this writ is rarely used now-a-days for any thing beside the recovery of an office. It will lie as well for an office for life as in fee, though the statute of *Westminster* 2. *c.* 25, mentions only offices in fee, but that statute is made in affirmance of the common law. (*a*) The statute, with the reading upon it in 2 *Inst.* and *Viner's Abr.* tit. *Assize* (A. 2.) is worth consulting, but it being a suit not much in use, I shall not transcribe their learning.—*Co. Litt.* 47.

The plaint need not be so certain (where it is for land) as in other writs, because the judgment is to recover *per visum recognitorum*, therefore if it be so certain that the recognitors may put the demandant into possession, it is sufficient. But the plaintiff must prove his title precisely as laid.—*The Serjeant's Case*, E. 1553. Dy. 84. *Heydon* v. *Goodsalve*, H. 1614. Cro. Jac. 335.

If the assize be brought for an ancient office, the demandant need not shew what fee or profit is belonging to it, for it shall be intended there is some; but for an office newly created he must shew what fee or profit is granted for the execution of it, for no assize lies for an office without fee or profit.—*Webb's Case*, 6 Jac. I. 8 Co. 49.

An assize of *novel disseisin* must be founded on an actual seisin: and therefore in an assize for the office of Serjeant at mace of the House of Commons, where to prove the seisin, he proved that he went to the house and demanded his place, but received no fees, but that in an action on the case for this disturbance he recovered £300 damage; it was holden not to be sufficient proof of seisin, and the plaintiff was non-

(*a*) It must however be an office of profit and not of charge only. *Webb's Case*, 8 Co. 49.

suited.

suited. But in a new assize, the plaintiff giving in evidence, that one committed by the house to the defendant, compounded with * the plaintiff [* 122] for the fees (though the defendant was in possession both before and after) it was holden to be a good seisin: it was also proved that the plaintiff in the lobby laid his hands upon the mace then in the defendant's hands, and would have taken it, but the defendant hindered him; and this was holden good evidence of seisin and disseisin, and the demandant had a verdict.—*Cragge* v. *Norfolk*, T. 26 Car. II. 2 Lev. 108. 120. *(a)*

In an assize for estovers to a house, upon issue *nul tort*, *nul disseisin*, the defendant may give in evidence, that the house is fallen down. (*Cowper* v. *Andrews*, M. 10 Jac. I. Hob. 39.) So in an assize for land, he may upon the general issue give in evidence a lease of the land made to him before the disseisin, but not a release after.—*Co. Lit.* 283. *(b)*

(a) In assize for the office of *filazer* in the common pleas, the demandant counted *de libero tenemento*, and alledged seisin for taking money for a *capias*, the *post* being put in view where the officer sat. Held, that the court may discharge him, if the cause be without record; but if there be no cause, the court is not a disseisor, and he that took the office ought to survey that at his peril. *Vaux* v. *Jefferen*, Dy. 115. (a.)

So for the office of *registrar of the admiralty* assize lieth, and in this case the demandant laid a prescription to it, *quod quilibet hujusmodi persona*, who should be named by the admiral, should be registrar of the admiralty for life. *Hunt* v. *Ellisdon*, Dy. 153.

So for the office of *wood-ward*, *park-keeper* and *keeper of chases*, *warrener*, &c. assize lieth, yet these are not at common law, but by the statute of *Westminster* 2. c. 25. for they are of profit to be taken in *alieno solo*. It lieth also of all other offices or bailiwicks in fee. *Webb's Ca.* 8 Co. 49.

(b) Assize lies also for *tithes* by stat. 32 *Hen.* VIII. c. 7. *Cadogan* v. *Powell*, Cro. Eliz. 559, but not for an *annuity* or *pension*, &c. and in some cases it will lie where *trespass vi et armis* does not. *Webb's Ca.* 8 Co. 47. This writ, however, where the title to lands is in question, is almost wholly superseded by the action of ejectment, unless where length of time requires a writ of right to be brought, but where ejectment lies not, as for a *piscary*, the possession of which cannot be given by the sheriff, an assize will lie, as it may be viewed by the recognitors. *John Webb's Ca.* 8 Co. 47.

By *magna charta*, 9 *Hen.* III. c. 12. assize of *novel disseisin* shall be taken in the proper countries for estovers of wood, profit taken in woods, corn to be yearly received in a certain place, toll, tounage, &c. also for offices in fee, also for common of turbary and fishing, appendants to the freehold, &c.

For the proceedings in assize of *novel disseisin*, see *Plowd.* 411, 412. Vide etiam *Lee's Pract. Dict.* tit. *Assize*.

CHAPTER

CHAPTER VIII.

OF QUARE IMPEDIT.

A *QUARE IMPEDIT* is a possessory action, for which reason the plaintiff must shew an actual seisin, which in general must be by alledging a presentation in himself, or in some person under whom he claims; (*R.* v. *Landaff Bp.* H. 8 Geo. II. Stra. 1006.) though there may be cases in which that is not necessary, as where a man recovers in a writ of right of advowson, and has execution. (2 *Rol. Abr.* 378, U. *F. N. B.* 33, H.) So where it is a new created advowson to which there is no presentment. And where a presentation is necessary to be shewn, that of a grantee of the next avoidance, or of a tenant at will, is a sufficient title for the patron in fee to have this writ. (2 *Rol. Abr.* 377. pl. 13. *Northumberland's Ca.* M. 39 & 40 Eliz. 5 Co. 98.)*(a)* However, this defect of not setting out a presentment will be aided by a verdict, where it was necessary for the plaintiff to prove it in order to prove the issue; for it is not a defect of title, but a title defectively set out.—*R.* v. *Landaff Bp.* sup.*(b)*

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(a) The crown, as well as the subject, must alledge a presentation, and a *commendam retinere* does not amount to one; but where the verdict finds that the crown was seised in fee *ut de uno grosso*, it cures the want of allegation. *R.* v. *Landaff Bp.* sup.

(b) In *quare impedit* the patron only, and not the clerk, may sue the disturber, but where there is no disturbance this writ will not lie; therefore, where the patron declared that he was disturbed on the 1st *November*, and defendant pleaded that on 1st *May* next there was a lapse to the queen, who presented him, the plea was held ill on demurrer, because defendant had not confessed, avoided, or traversed the declaration, and though the queen's title was confessed by the demurrer, yet defendant having lost his incumbency by his ill plea, the patron, and not the queen, shall present again. *Arundell* v. *Gloucester Bp.* 1 Leon. 149. Ow. 49.

After plaintiff has fully set out his title, as in *Birch* v. *Litchfield*, 3 Bos. & Pull. 444, he must shew at least one presentation in himself or his ancestors, for he must recover on the strength of his own right. *Tufton* v. *Temple*, Vaugh. 7, 8; and he must shew a disturbance before action brought. *Brickhead* v. *York Archbp.* Hob. 199. On this the bishop and clerk usually disclaim all title, save the first, to admit and institute, and the latter, as presentee, to defend his right, and, on failure of the plaintiff to make out his own title, defendant is put to prove his, that he may obtain judgment. *Thrale et al', Executors*, v. *London Bp. et al'*, 1 H. Bl. 376. 530; but if, on the trial, the right be found for plaintiff, three other things must be enquired. 1st, Whether the church be full, and if so, of whose presentation? for if it be of defendant's, the clerk is removeable by writ brought in due time. 2dly, Of what value the living is? in order that the damages

may

By *Westminster* 2. *c.* 5. If a stranger usurp upon an infant claiming by descent, or upon tenant for life, by the curtesy, in dower, in tail, or upon tenant for years by demise of the ancestor, the heir shall not be put to his writ of right, but on the next avoidance may present, or if he be disturbed bring his *quare impedit*, in which he must lay the last presentation in his * ancestor, and skip over the usurpation, for by the statute that [* 123] is to be counted as none to this purpose: (*Boswell's Ca.* 3 Jac. I. 6 Co. 148.) but if one usurp on an infant heir who comes of age within six months, if the heir remove not the incumbent by suit, he is out of the statute. (*Stanhope* v. *Lincoln Bp.* E. 14 Jac. I. Hob. 240.) The infant in such case cannot grant the advowson, because he has but a right; for in this point the statute has made no change, but has left the possession with the usurper, only has given the usurpee a readier action.—*Fitz. Qu. Imp.* 67. *(a)*

By the 7 *Ann. c.* 18, it is enacted, That no usurpation upon any avoidance in any church, *&c.* shall displace the estate or interest of any person, but he may present, or maintain his *quare impedit* upon the next or any other avoidance (if disturbed) notwithstanding such usurpation. And if coparceners, joint-tenants or tenants in common, make partition to present by turns, each shall be adjudged to be seised of his separate part to present in his turn. *(b)*

If the issue be found for the plaintiff, the jury are to enquire, first, whether the church be full; secondly, upon whose presentment; thirdly,

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may be assessed under statute *Westminster* 2. *c.* 5. And 3dly, In case of plenarty upon an usurpation, whether six calendar months have elapsed between the avoidance and the writ, for then it would be within the statute, which permits an usurpation to be devested by a *quare impedit*, brought *infra tempus semestre*. So that plenarty is still a sufficient bar to a *quare impedit* brought above six months after the vacancy; but if it be found that plaintiff has the right, and has sued in good time, he shall have judgment for the presentation. *Lancaster* v. *Lowe*, Cro. Jac. 93. Vide 2 *Inst.* 36.

(a) *A. B.* and *C.* three sisters, were coparceners of an advowson. *A.* married *D.* on whom her third was settled. *B.* married *E.* and *C.* died, having devised her third to *F.* the son of *B.* and *E.* *D. E.* and *F.* being thus entitled, under or in right of the several original coparceners, a *quare impedit* was brought by *G.* a stranger, against *D.* and *E.* *E.* died pending the writ, and the share of *B.* (who was also dead) thereupon descended to *F.* in addition to the share which he derived from *C.* *D.* suffered judgment by default. Held, that this judgment against *D.* was a bar to a *quare impedit* brought by *D.* and *F.* (in which *D.* was summoned and severed) to recover the same presentation, but it is no bar to *F.*'s right to recover on the next avoidance in his turn. *Barker* v. *London Bp.* 1 H. Bla. 412. Willes, 659.

(b) If two coparceners cannot agree in presenting to the church, assize of *darrein presentment* will not lie for one against the other, and the ordinary ought to admit the presentee of the eldest. *Sed secus* of joint-tenants, M. 15 *Edw.* III.

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how long since it was void; fourthly, the yearly value; which being found, damages are to be given according to *Westminster* 2. *c.* 5. before which no damages were allowed; but by that statute, if six months pass by the disturbance of any, so that the bishop do confer to the church, and the very patron loseth his presentation for that time, damages shall be awarded to two years value of the church, and if six months be not passed, but the presentment be deraigned within the said time, then damages shall be awarded to the half year's value of the church. *(a)*

Note; The plaintiff shall recover no damages where the church remains void, and if the jury tax damages, a *remittitur de damnis* must be entered. (*Holt* v. *Holland*, T. 34 Car. II. 3 Lev. 59.) The damages are to be recovered against the disturber, and therefore if the incumbent counterplead the title of the plaintiff as well as the patron, the plaintiff shall recover the value as well against him as against the patron. (2 *Inst.* 362.) But no damages shall be recovered against the bishop, where he

(a) If the church be full when plaintiff recovers judgment, he may remove the incumbent unless filled on a lapse *pendente lite*, the bishop not a party, in which case, though the plaintiff loses *that* presentation, he shall recover from the defendant (patron) two years value of the church in lieu, or defendant shall be imprisoned two years if insolvent, and in other cases half a year's value and half a year's imprisonment. *Stat. Westm.* 2. 13 *Edw.* I. *c.* 5. *s.* 3. But if the church remain vacant till the suit is ended, the prevailing party shall have a writ to the bishop *ad admittendum clericum*, which, if the bishop refuses, a writ of *quare non admisit* lies against him to recover damages. *R.* v. *Thornborough*, 1 Mod. 254. *F. N. B.* 38. 47. So where the church was found filled by a stranger to the writ, and he did not appear to have come in on a better title than the plaintiff's, the plaintiff may have a general writ to the bishop, which he must execute, and cannot return that the church is full. *Boswell's Ca.* 6 Co. 51. But where plaintiff recovered an advowson in ejectment, and had a writ to the bishop, and the incumbent was no party to the suit, *quare impedit* lies not without a *sci. fa.* to the incumbent. *Hall* v. *Broad*, 1 Sid. 93.

Where the issue is joined on the avoidance, the *manner* in which it is stated is not material. An avoidance by death will support an allegation of an avoidance by privation. *Co. Lit.* 282 (a), and on avoidance by death, it may be shewn that the incumbent has taken another living without a dispensation, for the manner is not the plaintiff's title but the avoidance. *Anon.* Dy. 377 (b).

The bishop had only one plea at common law, *viz.* that he claims nothing but as ordinary, nor could the incumbent counterplead the patron's title till 25 *Edw.* III. *st.* 3. *c.* 7. by which both may counterplead such title, the one when he collates by lapse, or makes title to himself as patron, and the other being *persona impersonata*, may plead his patron's title, and counterplead that of the plaintiff. *Palme* v. *Hudde*, Mar. 158. *Hellwayes* v. *York Archbp.* W. Jo. 4. If it appear either by pleading or confession that neither party has a title, but that it is in the king, the court may award a writ to the bishop to remove the incumbent, and admit *idoneam personam ad præsent. regis*, but only when his title is very plain. *Camb. Canc.* v. *Walgrave*, Hob. 126. *Colt* v. *Coventry*, ibid. 163. *Norwood* v. *Dennis*, 1 Leon. 323.

claims

claims only as ordinary. The king is not within the statute, because by his prerogative he cannot lose his presentation.—*Chandos's Ca.* 6 Co. 55.

By *Westminster* 2. *c.* 30. The judge of *Nisi Prius* has power to give judgment immediately; yet if he do not, upon the return * of the *postea* [* 124] judgment may be given by the court to which the return is made.

If a retainer as chaplain to a person of quality be necessary to be proved, evidence of a copy of the retainer entered in the court of faculties is not good, but the oath of any person who has seen the retainer under the hand and seal of the person of quality, is good.—*Roy* v. *Tranckwell*, 2 Car. I. Litt. 1.

If the ordinary be not named, he may present by lapse, if the six months incur *pendente brevi*; but being named he cannot take advantage of any lapse; and as he is bound, so the metropolitan and the king are bound.—*Lancaster* v. *Lowe*, M. 3 Jac. I. Cro. Jac. 93.

The rule, that when the bishop is named in the *quare impedit*, he shall not present by lapse, is to be understood with some restriction, *i. e.* that there has been an actual disturbance before the action brought, for else the bishop shall not be ousted of his right of presentation by lapse.—*Brickhead* v. *York Archbp.* M. 6 Jac. I. Hob. 201.

The course to stop strangers from presenting *pendente brevi*, is to sue a *ne admittas* to the bishop, and if the bishop then admit the clerk of any other hanging the suit, and the plaintiff recover, he shall have a *quare incumbravit*, and thereby remove such person so admitted, and put him to his *quare impedit*. But if he sue not a *ne admittas*, if the incumbent of a stranger come in by good title *pendente brevi*, he shall bar him in a *sci. fa.* and shall hold it, and therefore, if the jury find the church full by the presentment of a stranger, a writ shall not be awarded to remove the incumbent without a *sci. fa.* first sued out.—*Lancaster* v. *Lowe*, sup.

By the 21 *Hen.* VIII. *c.* 13. *s.* 9. If any person having one benefice with cure of souls, of the yearly value of £8, accept and take any other with cure of souls, and be instituted and inducted in possession of the same, the first benefice shall be adjudged to be void.—*Digby's Ca.* 8 Jac. I. 4 Co. 65. (*a*)

By the institution to the second benefice, the first is void by the ecclesiastical law, and therefore the patron may take notice and present, yet no lapse will incur without notice until six months after induction, and

(*a*) And if a clerk is instituted to a benefice of the yearly value of £8, and before induction he accepts another, with cure, and is instituted, the first is void, for institution only is within the words of the act. *Digby's Ca.* 4 Co. 78.

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that only in cases within the statute.—*Winchcombe* v. *Winchester Bp.* M. 6 Jac. I. Hob. 166.

By 13 *Eliz. c.* 12. No title to present by lapse shall accrue upon any deprivation, but after six months notice of such deprivation given by the ordinary to the patron. *(a)* The law is the same upon a resignation: but in case of death no notice is necessary.—2 *Codex*, 869. *Anon.* 18 Hen. VII. Kielw. 49. *(b)*

[125] Note; The computation is to be according to the calendar and not the lunar months, and the day the church became void is to be taken into account.—2 *Inst.* 361.

Where the institution takes no notice of whose presentation, it has been said that the party may give evidence of general reputation; for a presentation may be by parol, and what commences by parol may be transmitted to posterity by parol, and that creates a reputation; yet as it is a single fact which is not the subject of notoriety, such evidence seems to be mere hearsay; and it differs from the case of proving a marriage, for there the reputation arises from the cohabitation; so of the retainer of a chaplain, from his acting as such; so of filiation, *&c.*—*Bp. of Meath* v. *Ld. Belfield*, T. 21 Geo. II. 1 Wils. 252.

By 12 *Ann. c.* 14. Papists are disabled to present to any benefice, and the right of presentation is given to the universities; and the statute enacts, that where any *quare impedit* is brought either by or against the university, the court may upon motion make a rule, requiring satisfaction upon the oath of such patron and his clerk (who shall contest the right of the university) by examination in open court, or by commission, or by affidavit, in order to discover any secret trust or fraud relating to the

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(a) The six months, however, shall be accounted from the death of the one and the creation of the other. *York Archbp.* v. *Willock*, Dy. 327.

(b) Every patron must present within six months after vacancy, or the right will lapse to the bishop; but if presentation be made within six months, the bishop is bound to admit and institute the clerk, if worthy, unless the church be full, or there be notice of litigation. *Boswell's Ca.* 6 Co. 49. *Wood's Inst.* 566. *Co. Lit.* 344. 2 *Inst.* 356. 5 *Com. Dig.* 376. If the bishop delay or refuse, the patron must bring his writ against the bishop *alone*, but if another presentation be set up, the writ may be against the pretended patron and his clerk, either with or without the bishop, or against the patron alone. It is most advisable, however, to include all three, for then no lapse can accrue till the right is determined. 2 *Crompt. Pra.* 285. *Lancaster* v. *Lowe*, Cro. Jac. 93. *Elvis* v. *York Archbp.* Hob. 316. *Hall's Ca.* 7 Co. 25. Besides, if the clerk be left out, and has been instituted before the suit, the patron may recover the right of patronage, though not the present turn, for he cannot remove him unless he be made a party defendant to hear the allegations against him. *Barker* v. *London Bp.* 1 H. Bla. 412.

presentation

presentation in question; and if it appear that the patron is a trustee, he shall discover for whom, and the court may order the *cestui que trust* to appear and make the declaration, *&c.*—1 *Barnes*, 2. Such a commission directed to the prothonotaries. *(a)*

By

(a) On presentations belonging to Roman Catholic patrons a remedy in the temporal courts is given to clerks presented, as well to owners of the advowson, by virtue of several statutes, by which the presentation to such benefices is secured to the two universities, *viz.* 3 *Jac.* I. *c.* 5. 1 *W. & M. st.* 1. *c.* 26. 12 *Ann. st.* 2. *c.* 14. and 11 *Geo.* II. *c.* 17. by the two last of which discovery and relief are granted as against papists, but in no other instance can a clerk interfere to recover a benefice for his own advantage. Vide 3 *Blac. Com. c.* 16. But where a parson who has been admitted, instituted, and inducted, is disturbed, *ejectment* is the proper remedy to recover possession of his parsonage, glebe, and tithes.

Where any opposition to a presentation is intended, each party may lodge a *caveat* with the bishop against the institution of the other clerk, though such *caveat* is not regarded in the temporal as it is in the ecclesiastical courts, but as by the contest the church is said to have been litigious, the bishop may suspend the admission of either, and suffer a lapse to incur: he is bound, however, to award a *jus patronatus*, if the patron or clerk on either side request him, after which, if he admit and institute the clerk of that patron, whom the commissioners return to be the true one, he will at all events secure himself from being a disturber. 3 *Blac. Com. c.* 16.

In *quare impedit* defendant may traverse the presentation alledged if the matter of fact will bear it, but he must not deny the presentation alledged where there was one. *Tufton* v. *Temple*, Vaugh. 16, 17; and where it is in the grantor and grantee, that in the grantor (*i. e.* the principal) is only traversable. *Northumberland Countess* v. *Hall*, Cro. Eliz. 518.

Where several were plaintiffs, and defendant pleaded the release of one pending the writ, the release shall only bar him who made it. *Countess of Northumberland's Ca.* 5 Co. 97; but where two defendants pleaded several bars, and one is found against plaintiff and the other for him, he shall not have his writ to the bishop. So if many defendants plead several pleas, plaintiff shall not have judgment till all are tried, for till then it cannot appear he has a good title. *Parker* v. *Lawrence*, Hob. 70. F. N. B. 30.

As to the writ, it may be brought for a church and an hospital. *Bedford Mayor* v. *Lincoln Bp.* Willes, 608; and it must be brought in the county where the church stands. It commands the disturbers, the bishop, the pseudo-patron, and his clerk, to permit the plaintiff to present a proper person to his church, which the defendants (as he alledges) obstruct, and unless, *&c.* that they appear and shew cause why they hinder, *&c. &c. &c.* F. N. B. 32.

And this writ lies for a patron on his presentation to a *church*, *chapel*, *prebend*, *vicarage*, *&c.* So for a *donation*, setting forth the special matter in the declaration. So for a *deanery* by the king, though elective; and so for an *arch-deaconry*, but not for a *mere office* in the church. *Co. Lit.* 344. *Smallwood* v. *Lichfield Bp.* 1 Leon. 205. It lies, however, for the *chapter*, in respect of their possessions, against the *dean*. 40 Edw. III. 48.

For a *donation* the writ must be *quare impedit presentare ad donationem;*
— a *parsonage*, *ad ecclesiam;*
— a *vicarage*, *ad vicariam;*
— a *prebend*, *ad prebendam;*

and

By 3 *Hen.* VII. *c.* 10. If the defendant bring a writ of error, and judgment be affirmed, the plaintiff shall recover his costs and damages for his wrongful delay.

By virtue of this statute, the court of *King's Bench* have, upon a writ of error, awarded damages according to the value of the church found by the verdict: (*Anon.* M. 1627. Cro. Car. 145. *Pembroke Earl* v. *Bostock*, M. 1628. Ib. 175.) but as the real damages which the plaintiff sustains, is only the being kept out of the half year's value, the legal interest on that seems to be all he is entitled to.—*London Bp.* v. *Mercers Comp.* H. 5 Geo. II. 2 Stra. 931.

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and in like manner with other benefices *mutatis mutandis*.

This writ also lies for a *bishop disturbed*, to collate where he ought to do so, and the writ shall be *quod permittat ipsum presentare, &c.* And so for the *king disturbed*, in his collation by letters patent, *N. Nat. Brev.* 73; for the king cannot remove an incumbent presented, instituted, and inducted, though on usurpation, but by *quare impedit* judicially. *Rex* v. *Norwich Bp.* Cro. Jac. 385.

It lies also for the grantee of an advowson against the (patron) grantor. 39 *Hen.* VI. So for executors on their disturbance, or for the disturbance of their testator. *Sale* v. *Lichfield*, Owen, 99. *Smallwood* v. *Coventry Bp.* Lutw. 1. So for husband and wife jointly, or the husband alone in right of his wife's presentation; and if he die, the wife may sue alone. *Lady Northumberland's Ca.* 5 Co. 97. And so for a claimant under a recovery by 7 *Hen.* VIII. *c.* 4.

But it lies not for an heir-apparent, *temp. patris*. Neither can he have execution on a recovery by his ancestor. *Bro. Qu. Imped.* pl. 7. 9. But by statute 13 *Edw.* I. *c.* 5. usurpation of churches, during wardship or estate of vacancy, shall not bar an heir of full age, a reversioner in possession, or a patron in succession, from this writ, if the ancestor could have had it, and the pleadings may be had as in *darrein presentment*.

Nor does this writ lie for issue in tail, if tenant in tail suffer usurpation and die, and six months pass, but at the next avoidance he may have it within six months.

Neither does it lie for one who brought an ejectment, (without making the incumbent a party) recovered the advowson, and had a writ to the bishop without a *sci. fa.* to the incumbent. *Hall* v. *Broad*, Sid. 93.

Neither does it lie against the ordinary and incumbent, without naming the patron. *Sed secus* if the king be patron, for *quare impedit* lies not against him, but where he is plaintiff he may sue the patron without naming the incumbent. Where the patron's inheritance is to be divested the incumbent must be named, but not where the next presentation only is to be recovered. The incumbent may always plead to defend his incumbency by statute *Edw.* III. *st.* 3. *c.* 7. *Hall's Ca.* 7 Co. 107. *Saville* v. *Thornton*, Cro. Jac. 650. Palm. 306.

For the practical directions upon this writ, as well as upon the mode of prosecuting the *Writ of Right*, the editor begs leave to refer his readers to the accurate *Dictonary of Practice*, lately published by Mr. *Thomas Lee*.

PART

PART II.

CONTAINING ONE BOOK OF

ACTIONS FOUNDED UPON CONTRACTS.

INTRODUCTION.

MUTUAL commerce and intercourse is of the very essence of society; but if there were no method of compelling the faithless to keep their engagements, self-interest is so prevalent, that very few would be adhered to, and consequently very few made. Thus the chief advantage of society would entirely fail, unless its laws were so framed as to bind its members to a strict performance of their contracts, by compelling them to make an adequate satisfaction for the breach of them.

Hence springs a new set of actions very different from those treated of in the first part of this work, and they are actions founded upon contract: Such are actions of

I. Account.
II. Assumpsit.
III. Covenant.
IV. Debt.

CHAPTER I. [127]

OF ACTIONS OF ACCOUNT.

THE Action of Account is of late years but rarely used, therefore I shall say very little upon it. At common law it lay only against a guardian in socage, bailiff, or receiver, and in favour of trade between merchants. The 13 *Ed.* III. *c.* 23, gave it to the executors of a merchant; the 25 *Ed.* III. *c.* 5. to the executors of executors, and 31 *Ed.* III. *c.* 11. to administrators. And now by the 3 & 4 *Ann. c.* 16, it may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators against the other, as bailiff, for receiving more than his share, and against their executors and administrators.

If

If the plaintiff in his declaration say not by whose hands, if the defendant demur specially he will have judgment; for if it were by the hands of the plaintiff, the defendant may wage his law, *aliter* if it were by another's hands. (*Jaggard* v. *Flitt*, H. 26 & 27 Car. II. B. R.) It seems this must be understood of cases where the defendant is charged as receiver only; for if he be charged as bailiff, it is not necessary to shew by whose hands.—*Walker* v. *Holiday*, M. 1731. Comy. 272.

In account against one as receiver by the hands of *A.* a receipt by his hands ought to be proved. But if he prove that *A.* directed the defendant to borrow of another to pay the plaintiff, and that the defendant borrowed the money accordingly, that is sufficient.—*Harrington* v. *Deane*, H. 1613. Hob. 36.

If the defendant plead *ne unques receiver*, he cannot give a release in evidence, neither can he give in evidence bailment to deliver to *B.* and that he has delivered accordingly: for though this special matter prove he is not accountable, yet as upon the delivery he was accountable conditionally, (*viz.* if he did not deliver over) it does not prove the plea; but if the defendant plead he accounted before *R.* and *W.* evidence that he accounted before *R.* only is sufficient, because the account is the substance.—*Speake* v. *Hungerford*, 1561. 2 Rol. Abr. 683. F. 1. *Willoughby* v. *Small*, H. 1616. 1 Brownl. 24.

In the action of account there are two judgments; the first is *quod* [*128] *computet*, after which the court assigns auditors, before * whom nothing shall be allowed as a good discharge, which might have been pleaded to the action.—*Taylor* v. *Page*, T. 1628. Cro. Car. 116.

If the defendant plead any matter in discharge before the auditors, which is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the court, who will thereupon award a *ven. fa.* to try it; and if on such trial the plaintiff make default, he shall be nonsuited, but after that he may bring a *sci. fa.* upon the first judgment.

Note; the defendant cannot in this action pay money into court, as he may in *assumpsit*.—*Per Willes*, C. J. T. 27 Geo. II. *(a)*

(a) The last action of account which was brought, seems to be that of *Godfrey* v. *Saunders*, 3 Wils. 73, which was depending fourteen years in C. B. and *Wilmot*, C. J. concluded the judgment of the court in that cause, with expressions of his own approbation to see this ancient mode of proceeding revived. N. B. The pleadings in this case are set forth at length after the manner of Lord *Coke*'s reports.

CHAPTER

CHAPTER II.

OF ASSUMPSIT.

OF all actions founded upon contract, none is in more general use than the Action of *Assumpsit*, which is founded upon a contract either *expressed* or *implied* by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract.

There are two sorts of *assumpsit*.

First, a general *indebitatus assumpsit*.

Secondly, a special *assumpsit*.—*Woodford* v. *Deacon*, E. 1608. Cro. Jac. 206. 1 Rol. Abr. 8. *Green* v. *Harrington*, Hut. 35.

1st. *General indebitatus assumpsit* will not lie where the debt is due by specialty, for in such case the specialty ought to be declared upon; *(a)* therefore it is always necessary in this action to shew for what cause the debt grew due; and in case it be not shewed, it will be sufficient reason to arrest judgment, or to reverse it upon a writ of error. *(b)*

The general causes for which this action may be brought, are either, first, for money lent. Secondly, for money laid out and expended. Thirdly, for money had and received to the plaintiff's use. Fourthly, for a sum certain (*viz.* £10) for goods sold and delivered. Fifthly, for goods sold *quantum valebant*. Sixthly, for a sum certain for work and labour. Seventhly, a *quantum meruit* for work and labour. Eighthly, on an account stated.

(*a*) Where a person does not rely on the promise which will raise an *assumpsit*, but takes a bond as a security, he cannot afterwards resort to this action. *Toussaint* v. *Martinnant*, 2 T. R. 100.

(*b*) As the plaintiff in this action is bound to declare specially on special agreement, he ought to prove the contract expressly as laid. *Anon.* 1 Ld. Raym. 735. *Hockin* v. *Cook*, 4 T. Rep. 314. *Payne* v. *Hayes*, post, 145. For the agreement being the gist of the action, must be truly stated. *Churchill* v. *Wilkins*, 1 T. Rep. 447. *Weaver* v. *Burrows*, post, 139. *King* v. *Robinson*, Cro. Eliz. 79. *Bradburn* v. *Bradburn*, ibid. 149. But where the agreement is in the alternative, plaintiff has his option to sue on either part, and in that case he need not state the whole agreement, for the part he has elected becomes absolute, and that part he must prove. *Sed secus*, where the alternative is in the defendant. *Layton* v. *Pearce*, Dougl. 15, and *Churchill* v. *Wilkins*, sup. therein cited. Such is the case of a *general assumpsit*, but if he declare in assumpsit on a *special* agreement, and has other counts in his declaration, he may go into evidence on the general counts, though he fail to prove the special agreement. Vide *Harris* v. *Oke*, post, 139, and the case of *Payne* v. *Bacombe*, there referred to *in notis*.

And

And the plaintiff's proof ought to tally with some of the counts in the declaration, and therefore if in an action for work and labour and money lent, the evidence were that there had been mutual dealings between the parties, and that they had come to an account, and that the defendant upon the balance was indebted to the plaintiff, (*ex. gr.* £5) and had promised to pay, the plaintiff ought to be nonsuited, unless there were likewise a count upon an *insimul computasset.*—*May* v. *King*, T. 13 W. III. 12 Mod. 537. *(a)*

Note; Till within these few years it was a general received notion, that on a count upon an *insimul computasset*, the plaintiff was obliged to prove the exact sum laid: but this idea is now exploded, and the plaintiff may now recover part of the sum laid on this count, as well as on any other.—*Thompson* v. *Spencer*, B. R. East. 8 Geo. III.

So in an action on a policy of insurance, though the plaintiff declare for a total loss, he may recover for a partial loss only; though this seems to have been holden otherwise formerly.—*Gardner* v. *Crosdaile*, B. R. H. 33 Geo. II. 2 Burr. 1117. Cowp. 79.

In *assumpsit* upon an account stated, proof that the defendant and the plaintiff's wife reckoned that the defendant had borrowed at one time 40*s.* at another time 40*s.* and at another time £4, and that this came to £8, and that he promised to pay it, is good evidence. And yet in such case no confession of the wife's would be allowed to be given in evidence against the husband.—*Styart* v. *Rowland*, E. 3 W. III. 1 Show. 215. *(b)*

Upon an *indebitatus assumpsit* against several, a joint debt or contract must be proved; for it is different in contracts from what it is in torts, which are several, in which one alone may be found guilty.

There must be either an *express* or *implied* promise to found this action upon. *(c)*

A private act of parliament gave power to commissioners to divide common fields, and to make such orders and regulations as they should think fit; they awarded that all proprietors of land allotted to them

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(*a*) After settling an account either party may destroy the vouchers, and the balance may be recovered in *assumpsit*, instead of a writ of account. *Eagles* v. *Vale*, Cro. Jac. 69. Yelv. 70. S. C. nom. *Vale* v. *Egles.*

(*b*) Where money is paid in mistake, or more is received in a reckoning than is due, or more fees are taken than ought to be taken, *assumpsit* lies. *Tomkins* v. *Bernet*, 1 Salk. 23. *Anon.* Comb. 447.

(*c*) *Assumpsit* does not lie even on an *express* promise to pay the money recorded by a judgment in consideration of a forbearance of execution against the defendant in the original suit, because the remedy upon the judgment itself, is of a higher nature. But against a third person it does lie on such promise. *Anon.* Cowp. 128.

which

which had been ploughed or manured, since any corn had been reaped, should pay to the person who had manured or ploughed it, 4*s.* an acre. General *indeb. assumpsit* lies for this.—*Bell* v. *Burrows*, C. B. East. 5 Geo. III.

An action was brought by an apothecary against the overseers of a parish for the cure of a pauper, who boarded with her son out of the parish, under an agreement made with him * by the defendant *Turner*, [*130] who was the only acting overseer of the parish. The pauper was suddenly taken ill, and her son called in the plaintiff who had attended her for four months, and cured her. After the cure *Turner* was applied to, and promised to pay the plaintiff's bill. It was held, that though there was no precedent request from the overseers, yet the promise was good, notwithstanding the statute of frauds; for overseers are under a moral obligation to provide for the poor. 2dly, that as *Turner* was the only acting overseer, the other was bound by his promise.—*Watson* v. *Turner, et al.* in *Scacc.* T. 7 Geo. III. *(a)*

If the defendant be under an obligation from ties of natural justice, it implies a debt, and gives this remedy founded upon equity, *quasi ex contractu;* as suppose a recovery on a policy on a ship presumed lost, which afterwards appear to be safe. (*Moses* v. *Macferlane*, E. 33 Geo. II. K. B. 2 Burr. 1008.) *(b)* But in *assumpsit* for goods sold, if the evidence be that the defendant has agreed with the plaintiff's servant to pay him half price, which the servant is to have to his own use, this will not maintain the action, for here arises no contract to the plaintiff; he might as well bring *assumpsit* against one who steals his goods. (*Thorp* v. *How*, H. 13 W. III. at *Westminster*, *per Holt.* Salk. MSS.) But where a factor to one beyond sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last the promise will be presumed to be made to him, and the rather so, as it is so much for the benefit of trade.—*Gonzales* v. *Sladen*, T. 1 Ann. *Guildhall*, Salk. MSS. *(c)*

However,

(*a*) Vide *S. C.* post, 147. 281, S. C. with notes, and see *Wenell* v. *Adney*, 3 Bos. & Pull. 247, (n). on the validity of an express promise founded on a mere moral obligation.

(*b*) Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none were actually made. *A fortiori*, a legal or equitable duty, is a sufficient consideration for an actual promise. *Hawkes* v. *Saunders*, Cowp. 209.

(*c*) If one man takes another's money to do a thing, and refuses to do it, it is a fraud, and it is at the election of the party injured either to affirm the agreement by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*,

However, a factor's sale does by the general rule of law create a contract between the owner and buyer, and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him and not the factor, the buyer would not be justified in afterwards paying the factor. Yet perhaps under some particular circumstances this rule may not take place: As where the factor sells the goods at his own risk; (*i. e.* is answerable to the owner for the price, though it be never paid) for in such case he is the debtor to the owner, and not the buyer.—*Alderton* v. *Schrimshere*, H. 1743. 2 Stra. 1182. (*a*)

The defendant was nurse to the plaintiff's *intestate*, and when he died went off with the money he had about him; and *per Parker*, C. J. an action will well lie for money had and received to the plaintiff's use; for (he said) he would presume a subsequent agreement to make a contract of it; and the bringing the action is an admission of such consent.—And he said, he knew but of two cases where the plaintiff had not such
[*131] * election, the one was in case of money won at play, and the other in case of money paid by a bankrupt (though on valuable consideration) after the act of bankruptcy committed; in either of which cases the action *must* be trover, for you cannot confirm the act in part, and impeach it for the rest. And Lord *Hardwicke* (mentioning this case) said he always so held it, and had nonsuited many plaintiffs in actions of *assumpsit* under such circumstances.—*Thomas* v. *Whip*, T. 1 Geo. I. cited in *Miller* v. *West*, 1 Burr. 458. Vide etiam *Smith* v. *Hodgson*, 4 T. Rep. 216.

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initio, by reason of the fraud, and bring an action for money had and received to his use. But plaintiff can receive no more than he is in conscience and equity intitled to, which can be no more than what remains after deducting all just allowances which the defendant has a right to retain out of the very sum demanded. Held, that this is not in nature of a cross demand, or mutual debt, but it is a charge which makes the sum of money received for plaintiff's use so much less. *Dale* v. *Sollett*, 4 Burr. 2134.

(*a*) Agreeable to this latter remark, it appears that the jury, against the direction of the judge, gave their verdict in this case, for they found, that where, by the usage of trade, the factor sells the goods *at his own risk*, he is at all events answerable to the owner, and the owner cannot stop the price of the goods in the hands of the buyer for the factor, and not the buyer is debtor to the owner. The doctrine of the Ld. C. J. in *Alderton* v. *Schrimshere*, has, however, (notwithstanding this contradictory verdict) been since recognized, and admitted in the subsequent case of *Escot* v. *Milward*, 1 Esp. N. P. Dig. 107, but the rule applies only *when nothing is due to the factor himself*, for he has a lien on the money in the hands of the buyer for any monies due, or for any engagement he may have entered into on account of his principal. *Drinkwater* v. *Goodwin*, Cowp. 251.

However,

However, where goods were sold under an execution after an act of bankruptcy committed, the assignees recovered the money for which they were sold, in an action for money had and received, after solemn argument.—*Kitchen, assignees* v. *Campbell*, C. B. 11 Geo. III. 2 Bla. 827.

The defendant levied money by seizing and selling the plaintiff's goods, on a justice's warrant founded on a conviction, which conviction was afterwards quashed; and it was holden that an action for money had and received then lay for the clear money produced by the sale of the goods. *Feltham* v. *Terry*, B. R. East. 13 Geo. II. 1 T. Rep. 387.

On a contract for stock, the party who has the difference in his hands, is receiver of so much to the other's use.—*Dutch* v. *Warren*, M. 7 Geo. I. Stra. 406. 2 Burr. 1011. cited *Per Mansfield*, C. J. in *Moses* v. *Macferlane*.

Where money is paid, and the thing contracted for not delivered, it is money received to his use.—*S. C.*

In *assumpsit* for money received to the plaintiff's use, proof that a lamb of his was driven to *London*, and sold there by the defendant, will be sufficient, unless it appear to have been stolen, for then trover would be the only proper action.—*Simpson* v. *Gisling*, at *Rochester*.

Assumpsit will not lie for money had and received, where the defendant has entered into articles to account, for then the plaintiff has a remedy of an higher nature.—*Bulstrode* v. *Gilbourn*, H. 9 Geo. II. Stra. 1027.

If a sheriff levy money upon a *fi. fa.* the plaintiff or his executors may have *indebitatus assumpsit* for so much money received to his use.—*Williams* v. *Carey*, E. 1695. Salk. 12. Ld. Raym. 46.

A. paid *B.* £100 for a bill of exchange on a banker, who broke before it could be tendered, and he was allowed to recover back the money in an action for money received to his use.—*Oct. Stra.* 69, 70.

So for a legacy, where the executor owned it lay ready for the plaintiff whenever he would call for it.—*Campden* v. *Turner*, T. 5 Geo. I. *per King*, C. J. Midd. (*a*)

Where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, he may bring *indebitatus assumpsit* for the money; but where one *knowingly* pays money upon an illegal consideration, he is *particeps criminis*, and there is no reason he should

(*a*) And in all cases *assumpsit* lies for a legacy against an executor or administrator (*cum testamento annexo,*) if he has assets. *Atkins* v. *Hill*, and *Haukes* v. *Saunders*, Cowp. 284.

have his money again, for he parted with it freely, and *volenti non fit injuria.*—*Tomkins* v. *Bernet*, H. 5 W. III. Salk. 22. Skin. 411. Vide *Lowry* v. *Bourdieu*, Dougl. 451 (468). (*a*)

[132] In such case *melior est conditio defendentis*, not because the defendant is more favoured, but because the plaintiff must draw his justice from pure fountains. (*Moses* v. *Macferlane*, E. 1759. 2 Burr. 1009) (*b*). Therefore though if *A.* agree to give *B.* money for doing an illegal act, as if a wager be made on a boxing match, *B.* cannot, (though he do the act) recover the money by an action; yet if the money be paid, *A.* cannot recover it back again.—*Webb* v. *Bishop, Gloucester Lent Ass.* 1731. cor. *Reynolds*, C. B. (*c*)

So

(*a*) In *Smith* v. *Bromley*, Dougl. 697. (3d ed.) *in notis*, Lord *Mansfield* said, that where the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action, for where both parties are equally criminal against such laws, *potior est conditio defendentis.* But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover. (Vide *Cockshott* v. *Bennet*, 2 T. Rep. 763. 766. *Jaques* v. *Withy*, 1 H. Bla. 65. *Nerot* v. *Wallace*, 3 T. Rep. 17.) And it is astonishing that the Reports do not distinguish between the violation of the one sort and the other. As to the case of *Tomkins* v. *Bernet*, sup. it has often been mentioned, and I have frequently had occasion to look into it, but it is so loosely reported and stuffed with such strange arguments, that it is difficult to make any thing of it. One book says it was reported by Lord *Holt*, another by Lord *Treby*, certain it is, it was only a *nisi prius* case. I think the judgment may have been right, but *Salkeld*, not properly acquainted with the facts, has recourse to false reasons to support it. Lord *Mansfield* then proceeds to state what the case truly was in his conception of it. The case of *Tomkins* v. *Bernet*, was also cited in *Clarke* v. *Shee*, Cowp. 167, when Lord *Mansfield* said it had been denied a thousand times.

Where both parties are *in pari delicto*, plaintiff cannot recover. By the constitution of the statutes, insurers may recover money paid for insurance, but not the profit thereon. One office-keeper cannot recover against another. Dict. *per* Ld. *Mansfield*, in *Browning* v. *Morris*, Cowp. 792. Neither will the court assist either party *in pari delicto*. *Lowry* v. *Bourdieu*, Dougl. 452. (468.) *Andree* v. *Fletcher*, 3 T. Rep. 266. *Vandyck* v. *Hewitt*, 1 East, 97. *Morck* v. *Abell*, 3 Bos. & Pull. 35.

(*b*) The case of *Lacaussade* v. *White*, 7 T. Rep. 535, seems to militate against the rule, that *in pari delicto potior est conditio defendentis*, and this case was said by *Le Blanc*, J. in *Vandyck* v. *Hewitt*, 1 East, 98, to have been fully discussed in *Howson* v. *Hancock*, 8 T. R. 575, where money having been deposited on the event of a horse race (prohibited by 13 *Geo.* II. *c.* 19. *s.* 2.) and having been paid over by the consent of the winner, the court held, that the latter could not afterwards maintain an action to recover back the deposit.

(*c*) In *Barjeau* v. *Walmsley*, Stra. 1249, a man was allowed by *Lee*, J. to recover money which he had lent to the defendant to game with, for the word *contract* was not mentioned in the stat. 9 *Ann. c.* 14. against gaming. So where plaintiff lent defendant

So if a debt contracted during infancy, be paid, or if money be paid which was fairly won at play: (*Dutch* v. *Warren*, M. 7 Geo. I. C. B. 1 Str. 406.) But where the plaintiff has paid money on a consideration not performed, (*ex. gr.* of transferring stock at a day certain) he may either affirm the agreement by a special action on the case for the non-performance, or disaffirm it by reason of the fraud, and bring an action for money had and received; in which case the jury ought to make the price of the stock at the time it should have been delivered, the measure of the damages.(*a*) However, he could not in such action recover more than the money he had paid. The law would be the same, though the condition were illegal, for not being performed, the defendant is under an obligation from ties of natural justice, to repay the money: (*b*) Therefore where *A.* gave a custom-house officer money to run goods, the goods being seized, *A.* recovered his money back again.—*Hussey* v. *Jacob*, T. 1696. 1 Raym. 89. (*c*)

Where

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fendant money to bet at a horse race he was allowed to recover. *Alcinbrook* v. *Hall*, 2 Wils. 309. Vide etiam *Wettenhall* v. *Wood*, 1 Esp. N. P. Rep. 18. And it was also held, that plaintiff was entitled to recover on a bond given by the defendants to secure the repayment of money paid by plaintiff to a third person on account of defendants, in settling stock-jobbing differences. *Faikney* v. *Reynous*, 4 Burr. 2069. Et vide *Petrie* v. *Hannay*, 3 T. Rep. 418. The authority of *Faikney* v. *Reynous*, however, seems to have been questioned in *Aubert* v. *Maze*, 2 Bos. & Pull. 371.

(*a*) Between contracts *executed* and *executory*, *Buller*, J. in *Lowry* v. *Bourdieu*, Dougl. 451. (468), said, there is this distinction, that an action to rescind a contract must be brought whilst it is *executory*, as to which he cited *Walker* v. *Chapman*, in B. R.; (cited in *Cotton* v. *Thurland*, 5 T. R. 405.) and *Heath*, J. in *Tappenden* v. *Randall*, 2 Bos. & Pul. 471, said, that the above distinction, taken with the modifications Mr. J. *Buller* would have applied to it, was a sound one, in which doctrine *Rooke*, J. fully acceded. See also *Wilkinson* v. *Kitchen*, Ld. Raym. 89. *Pickard* v. *Bonner*, Peake's N. P. Ca. 221.

(*b*) Where a contract is neither *malum in se*, nor prohibited by any positive law, but yet cannot be enforced by reason of the inconvenience of a public discussion there, whilst it remains *executory*, money paid upon it by one of the parties to the other, may be recovered. *Tappenden* v. *Randall*, 2 Bos. & Pull. 467. *Shirley* v. *Sankey*, ibid. 130. So where the contract is legal, plaintiff cannot recover on the general counts in *assumpsit*, whilst it remains open, and not rescinded by the defendant, for the remedy is on the special agreement. *Power* v. *Wells*, Cowp. 819. Dougl. 24 (n.) *Weston* v. *Downes*, Dougl. 23. S. P. Vide etiam *Compton* v. *Burk*, Esp. N. P. Dig. 13. *Hulle* v. *Heightman*, 2 East, 145. But where the contract is rescinded by the general terms of it, no act remaining to be done by the defendant, shall prevent the plaintiff from recovering back his money. *Towers* v. *Barratt*, 1 T. Rep. 133. *Giles* v. *Edwards*, 7 T. Rep. 181. *Hunt* v. *Silk*, 5 East, 449. *Cooke* v. *Munstone*, 1 Bos. & Pul. N. R. 351.

(*c*) If a man promise to do a thing by such a day, without any consideration

Where the plaintiff having pawned plate to the defendant for £20, at the end of three years came to redeem it, and the defendant insisting to have £10 for interest, the plaintiff tendered £4, being more than legal interest, which the defendant refusing, and insisting on the £10, the plaintiff paid it, and had his goods, and brought his action for the surplus beyond legal interest; on a case made, the court held that the action well lay, for that it was a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business, and the rule *volenti non fit injuria* holds only where the party had his freedom of exercising his will. In the case of *Tompkins* v. *Bernet*, sup. p. 131 *a*. and vide note *a*, the party has not paid more than was really lent, therefore had no equity to have his money repaid, though the bond which he gave for it had been avoided by another obligor pleading the statute of usury: But if a person under the influence of his creditor pay more than legal interest, he may recover it back; for the defendant is under a moral tie to return it.—*Astley* v. *Reynolds*, M. 5 Geo. II. 2 Stra. 915.

[133] The plaintiff's brother being a bankrupt, an agent for one of the creditors told her that for money his client would sign the certificate: She gave £40, the certificate was signed; she brought *assumpsit*, and recovered.—*Smith* v. *Bromley*, cor. *Mansfield*, 1760. 2 Dougl. 696. *in notis* (3d ed.) *(a)*

A. took out administration to *B.* and appointed *J. S.* his attorney, who received money and paid it to the administrator; afterwards a will

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consideration or reward, and does it not, no action will lie, but if he actually enter upon the performance of a thing, and he neglects it, to the deceit of the plaintiff, action on the case lies. *Coggs* v. *Bernard*, 1 Salk. 26. 3 Salk. 11.

(a) When contracts are made, or transactions take place which are prohibited by statute, and money is paid upon them by men whose condition renders them liable to be imposed upon by others, the party paying is not *in pari delicto*, but he may bring this action, and defeat the contract, though the transaction be completely finished. *Smith* v. *Bromley*, sup. and the cases cited therein. Vide etiam *Campbell* v. *Hall*, Cowp. 204. Lofft. 655. *Shove* v. *Webb*, 1 T. Rep. 732. *Scurfield* v. *Gowland*, 6 East, 241. *Jacques* v. *Golightly*, 2 Bla. 1073. *Jacques* v. *Withy*, 1 H. Bla. 65. *Clarke* v. *Shee*, Cowp. 167. So against a third party to an illegal contract this action lies for recovery of money paid to him by one of the two other parties to the same contract for the use of the other. *Tenant* v. *Elliott*, 1 Bos. & Pull. 3. And in *Farmer* v. *Russel*, 1 Bos. & Pull. 296, it was said by *Buller*, J. that the knowledge and participation of the defendant in an illegal contract, could not make any difference in an action for money had and received, which was not founded on the illegal contract, but on a ground wholly distinct; and *Heath*, J. said, the distinction was, that whether the consideration was good or bad, a man might recover his own money, though not that of another person.

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appearing, the executor brought an *indebitatus assumpsit* against the attorney; and it was holden by *Trevor*, C. J. at *Guildhall*, that the authority being void, it was a receipt for so much money for the use of the plaintiff on an implied contract, for which *indebitatus assumpsit* well lies.—*Jacob* v. *Allen*, M. 2 Ann. 1 Salk. 27.

Where money is paid in pursuance of a void authority, *indebitatus assumpsit* will lie, as where Sir *Richard Newdigate* was decreed by the high commission court in *James* the Second's time, to pay arrears to *Davy*, whom he had removed from a donative.—*Newdigate* v. *Davy*, 4 W. III. 1 Raym. 742.

But where a man receives money for another under a pretence of right, (*ex. gr.* for tithe) the court will not suffer the principal's right to be tried in such an action against the collector, if the defendant can shew the least colour of right in his principal: As (in the case put) by having been for some time in possession.—*Staplefield* v. *Yewd*, T. 1753, cited 4 Burr. 1984.

A. as agent of *W.* received money for quit-rents due to *W.* and gave a receipt for it as such; then an action for money had and received was brought against *A.* to try *W.*'s right to the quit-rents; and it was holden that the action would not lie against him, but ought to have been brought against *W.* But if *A.* had had notice not to pay it over to *W.* because it was not due, and then he had paid it over, the action would have laid against him.—*Sadler* v. *Evans*, T. 6 Geo. III. 4 Burr. 1984. (*a*)

In *assumpsit* for money had and received to the use of the plaintiff, proof that the defendant was a married man, and pretending to be single had married the plaintiff, and made a lease of her land and received the rent, would be sufficient to maintain the action. For though the defendant not having a right to receive, the tenants were not discharged by his receipt, yet the recovery in this action will discharge them.—*Hasser* v. *Wallis*, H. 6 Ann. Salk. 28.

The case of *Dutton* v. *Poole*, (M. 29 Car. II. 1 Vent. 318. 332. T. Jo. 130. S. C.) is very remarkable to shew how far the law goes in giving this action to the party interested. There the plaintiff declared, that his wife's father being seised of land now descended to the defendant, and being about to cut down £1000 worth of timber for his daughter's portion, the * defendant promised the father, in consideration [*134] that he would forbear to sell the timber, that he would pay (the plaintiff) the daughter £1000. After verdict for the plaintiff upon *non assumpsit*,

(*a*) *Assumpsit* lies only for the person to whom the promise was made, and not for those who are strangers, and for whose benefit it was intended. *Ritly* v. *Dennett*, 1 Danv. Abr. 64.

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it was moved in arrest of judgment that the action would not lie for the daughter, but ought to have been brought by the executors of the father. But the court said it might have been another case, if the money had been to be paid to a stranger, but it is a kind of debt to the child to be provided for, and therefore affirmed the judgment. Yet in the case of *Pine* v. *Morris*, (cited in *T. Jo.* 103,) where the son promised the father, that in consideration that he would surrender a copyhold to him, that he would pay a certain sum to his sister, for which she brought the action, it was holden that it would lie for none but the father; and the reason given is, that where the party to whom the promise is to be performed, is not concerned in the meritorious cause of it, he cannot bring the action. And therefore where the plaintiff declared, that whereas *P.* was indebted to the plaintiff and defendants in two several sums of money, and that a stranger was indebted to *P.*, the defendants in consideration that *P.* would permit them to sue the stranger in his name, promised to pay the sum *P.* owed the plaintiff, and alledged that *P.* permitted, and they recovered; after verdict for the plaintiff judgment was arrested, because the plaintiff was a mere stranger to the consideration; but a case being then cited of a promise made to a physician, that if he did such a cure he would give such a sum of money to himself, and another to his daughter, in which it was resolved the daughter might bring an *assumpsit* for the money, the court agreed to it, and said the nearness of the relation gave the daughter the benefit of the consideration performed by her father.—*Bourne* v. *Mason*, H. 20 Car. II. 1 Vent. 6.

And perhaps in these days the other cases would receive a different determination, as the courts have been more liberal than formerly in extending the benefit of this action.

Baron and Feme.—As this action may be brought upon an implied promise, it will be proper to see how far and *in what cases a husband is liable on his wife's contracts; (a)* and the reason why a husband shall

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(a) As to the husband's liability to the contracts of his wife *before marriage*, he is, according to *Blackstone*, (2 Com. 435,) liable to them all, but her creditor must sue and recover judgment against him in her life-time. *Sed secus*, where she has left *choses in action* of her own to pay. *Heard* v. *Stamford*, 3 P. W. 409. Ca. temp. Talb. 173. *After marriage*, however, the husband is absolutely liable to his wife's debts for necessaries only, even though she desert him or he desert her. *Hodges* v. *Hodges*, 1 Esp. N. P. Ca. 441. *Rawlyns* v. *Vandyke*, 3 Esp. N. P. Ca. 251. *Harris* v. *Morris*, 4 Esp. N. P. Ca. 42. But where a wife's debt has been contracted under illegal circumstances, her husband

shall pay debts contracted by his wife, is upon the credit the law gives her by implication in respect of cohabitation, *(a)* and is like credit given to a servant, and therefore where they part by consent, and an allowance is made her, it is presumed that she is trusted on her own credit, and her husband is discharged; *(b)** therefore where the [*135] plaintiff, who was an apothecary, sued the defendant who lived in *Chichester* for physick administered to his wife in *London*, who had been parted by consent for five years, and on separation articled to allow her £20 *per annum*, which he accordingly did, and it appeared that the plaintiff did not know her to be a fême covert at the time when the medicines were given; *per Holt*, if husband and wife part by consent, and the husband secure her an allowance, it is in consideration that he shall not be charged any more by her, and a personal knowledge is not neces-

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husband shall not be liable even for necessaries. *Fowles* v. *Dinely*, 2 Stra. 1122. But in no case can a wife borrow money without the husband's consent even to pay for necessaries. *Stephenson* v. *Hardy*, 3 Wils. 388. 2 Bla. 872. *Harris* v. *Lee*, 1 P. W. 483. And as to what shall be deemed necessaries to charge the husband, the court has held, that the expence of curing a wife of the foul disease, communicated to her by her husband, is his debt. *Harris* v. *Lee*, sup. And so is money paid for a wife's funeral by her father during her husband's absence abroad. *Jenkinson* v. *Tucker*, H. Bla. 90.

(a) As to cohabitation without marriage; if a man cohabits with a woman who is not his wife, though she appear to the world as such, and contracts debts in that character for necessaries, he will be liable, even though the creditor knew her real situation. *Watson* v. *Threlkeld*, 2 Esp. N. P. Ca. 637. *Hudson* v. *Brent*, Esp. N. P. Dig. 124.

(b) Case on a note of hand for £10 against a woman who kept a public-house: plea, general issue. Defendant gave in evidence coverture. Plaintiff then said, her husband was transported, and that his time was not expired. *Yates*, J. held, that the transportation suspended her disability. *Sparrow* v. *Carruthers*, 1 T. R. 6. (n). Lord *Mansfield* ruled the same point at *Maidstone*.

A *fême coverte* living separate from her husband, and having a competent maintenance secured to her, may bind herself by her own contracts. *Ringstead* v. *Lady Lanesborough*, cited in *Corbet* v. *Poelnitz*, infra. And it makes no difference whether her husband resides in another country, or in the same country as she does. *Barwell* v. *Brooks*, ib. The great principle is, that where a woman has a separate estate secured to her by deed, and acts and receives credit as a fême sole, she shall be liable as such. She has a capacity to contract, it is a general capacity, not confined to necessaries, or to the amount of her separate maintenance. *Corbet* v. *Poelnitz*, 1 T. Rep. 5.

In the case of *Ellah* v. *Leigh*, 5 T. Rep. 682, *Ashhurst*, J. said, in order to make a fême coverte answerable for her debts as a fême sole, she ought to have a permanent fund, out of which she can satisfy her creditors. Vide etiam *Gilchrist* v. *Brown*, 4 T. Rep. 766.

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sary, so it be publicly known, and such public notification need not be at *London*, where the debt was contracted, but it is sufficient if it be where the parties lived, *viz.* in this case at *Chichester;* but if the debt were contracted in so short a time after the agreement, as that it could not be known at *London*, the husband would be liable.—*Todd* v. *Stoakes*, 8 W. III. at *Guildhall*, 12 Mo. 244. 1 Raym. 444. Salk. 116. *(a)*

But if the husband turn away the wife, he sends credit with her for reasonable expences; to which purpose the case of *Bolton* v. *Prentice*, M. 18 Geo. II. B. R. (2 Stra. 1214.) is very strong: The defendant and his wife lodged at the plaintiff's house, who was a milliner, during which time she furnished the wife with many things, without the privity or consent of her husband, which however he paid for, but forbade the plaintiff to trust his wife any more: About twelve months after the defendant turned his wife out of doors, who went to the plaintiff, and was by her furnished with apparel suitable to her degree; and for this debt the plaintiff brought the action, and had a verdict; and upon motion for a new trial it was denied; for when a man turns away his wife, he gives her a general credit, and the prohibition is gone and superseded. But if the wife elope from her husband, he shall not be liable though the tradesman who trusts her has no notice of the elopement. *(b)*—It is sufficient for the husband to give general notice that tradesmen, *&c.* should not trust his wife. Though the husband and wife cohabit, yet he may forbid any particular tradesman to trust her, and such prohibition to the tradesman's servant is sufficient.—*Longworth* v. *Hackmore*, Exon. 10 W. III. *per Holt*. Salk. MSS. *Warr* v. *Huntly*, T. 1704, Salk. 118. *(c)*

Where

(a) A fême coverte cannot contract, and be sued as a fême sole, even though she be living apart from her husband, having a separate maintenance secured to her by deed. *Marshall* v. *Rutton*, 8 T. Rep. 545; under the authority of which case Lord *Kenyon* said, *Todd* v. *Stokes* seemed to fall.

(b) When the elopement of a wife becomes notorious, every one trusts her at his peril, for the husband is not liable unless he takes her back again. *Robinson* v. *Greenold*, Salk. 119. *Morris* v. *Martin*, 1 Stra. 647, *Manwairing* v. *Sands*, 1 Stra. 706. *Child* v. *Hardyman*, 2 Stra. 875.

(c) But this doctrine applies only to cases where a wife extravagantly takes up goods and pawns them, and not to cases where necessary apparel is bought and made up for her use. *Etherington* v. *Parrott*, Salk. 118. Ld. Raym. 1006.

The principle so strongly laid down in these cases however has been since denied in *Marshall* v. *Rutton*, 8 T. R. 545, where Lord *Kenyon* said, that the earlier cases had proceeded on a principle, supposing the husband

Where an ordinary working man married a woman of the like condition, and after cohabitation for some time left her, and during his absence the wife worked; an action being brought for her diet, Lord Chief Justice *Holt* held, that the money she earned should go to keep her.—*Warr* v. *Huntly*, T. 1704. Salk. 118. Holt. 102.

In an action for meat found and provided for the defendant, Lord *Raymond* held, that the plaintiff could not give evidence of meat found for the defendant's wife who lived separate from him, but the plaintiff agreeing not to bring another action, he left it to the jury.—*Harris* v. *Collins*, T. 12 Geo. I. *Ramsden* v. *Ambrose*, Stra. 127. S. P. [136]

But where the plaintiff declared that the defendant was indebted for meat, *&c.* found by the plaintiff at the defendant's request; and on evidence it appeared to be found for the defendant's wife at his request in his absence; upon a case reserved it was holden, that a delivery to the wife at the husband's request, is in law a delivery to the husband; *(a)* though it was said that it would be wrong in the case of a third person.—*Ross* v. *Noel*, E. 31 Geo. II. C. B.

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band to be dead, or the wife as divorced *à vinculo;* until *Ringstead* v. *Lady Lanesborough*, *Barwell* v. *Brooks*, and some other cases, there was no authority to shew that man and wife could change their legal capacities, or that the latter may be sued as a fême sole whilst the relation of marriage subsists, and both are living in this kingdom. But it does not seem so clear, that the decision in *Marshall* v. *Rutton*, has altogether shaken the authority of those cases, where the wife was held liable as a fême sole, by reason that her husband was not in a situation to be sued as not being amenable to the process of the court, as in *Portland* v. *Prodgers*, 2 Vern. 104, where the husband was banished, or in *Decily* v. *Mazarine Duchess*, Salk. 116, where the husband was an alien enemy, or had abjured the realm, or in *Sparrow* v. *Carruthers*, 2 Bla. 1197, where the husband was transported; for in *Marshall* v. *Rutton*, the learned judge only said, that a fême coverte could not be sued as a fême sole whilst the relation of marriage subsisted, and both parties were living in this kingdom. The policy of the law, however, which has considered a married woman as incapable of suing or being sued, without her husband, admits of some modification: as in the case of a fême coverte, sole trader under the custom of *London*. *Langham* v. *Bewett*, Cro. Car. 68. *Caudell* v. *Shaw*, 4 T. Rep. 361. *Beard* v. *Webb*, 2 Bos. & Pull. 93; in which case Lord *Eldon* delivered the elaborate judgment of the court on these customs. The wife may also acquire a separate character by the civil death or exile of her husband; as in *Belknap's Ca.* 2 Hen. IV. 7 (a.) or by his transportation, *Lean* v. *Shutz*, 2 Hen. Bla. 1197. *Marsh* v. *Hutchinson*, 2 Bos. & Pull. 231, or by his deserting the kingdom, *Walford* v. *De Picanç*, 2 Esp. N. P. Ca. 554. *Francks* v. *Same*, ibid. 587. *Bufricld* v. *Same*, 2 Bos. & Pull. N. R. 380, or by his residence abroad, *De Gaillon* v. *L'Aigle*, 1 Bos. & Pull. 357.

(*a*) But this must be during cohabitation. *Ramsden* v. *Ambrose*, sup.

Before

Before I quit this point it may be necessary to observe, that even cohabitation is only evidence of an assent of the husband, and therefore in a special verdict the jury ought to find the assent, and not the cohabitation. *(a)* So they ought to find the goods necessary and convenient for the husband's estate as well as degree, for a high degree may have a low estate.—*Manby* v. *Scott*, M. 12 Car. II. 1 Lev. 4. 1 Sid. 121. 1 Bac. Abr. 296. S. C.

The plea of *ne unques accouple in loyal matrimonie*, is good only in dower and appeal; and if pleaded to an action on the case for a debt contracted by the wife, on demurrer the plaintiff will have judgment.—*Norwood* v. *Stevenson*, T. 11 & 12 Geo. II. K. B. Andr. 227.

Husband's benefit from his wife's contracts.—Having seen how far the husband is liable to pay the wife's debts, it may not be improper to shew *how far he may be benefited by her contracts*, and he is intitled to whatsoever she earns during the coverture, and therefore he alone must bring *assumpsit* for work and labour done by his wife, the promise in law being made to him; (*Buckley* v. *Collier*, M. 1692. Salk. 114.) but if there be an express promise to her, they may join.—*Brashford* v. *Buckingham*, T. 1605. Cro. Jac. 77. 205. *(b)*

Where

(a) Where any act is done by the wife, and the promise is made to her, though done without her husband's authority, yet he may afterwards assent to it, and they may join in the action. *Pratt & Ux'* v. *Taylor*, Cro. Eliz. 61. *Bidgood* v. *Way*, 2 Bla. 1239. But in all actions where the husband and wife join, the wife's interest must be stated, otherwise the *assumpsit* shall be deemed as made only to the husband. So if she has a separate property; and so if the cause of action existed before marriage. *Bidgood* v. *Way*, supra.

(b) On an obligation to a feme coverte obligee, her husband is supposed to assent, it being for his advantage; but if he disagrees, the obligation has lost its force; and if he neither agrees or disagrees, the bond is good, for his conduct shall be esteemed a tacit consent. *Whelpdale's Ca.* 5 Co. 119 (b.) *Co. Litt.* 3 (a.)

If money be due to the husband by bill or bond, or for rent on a lease, and it is paid to the wife, this shall not prejudice him, if after payment he publicly disagrees to it. 2 *Shep. Abr.* 426.

If a husband and wife be divorced *à mensâ et thoro*, and the wife has her alimony, and sues for defamation, or other injury, and has costs, the husband has no right to them, and if he release them, it will not bar the wife, for these costs are in lieu of what she has spent out of her alimony, which is separate maintenance, and not in the power of her husband. *Motam* v. *Motam*, 1 Rol. Rep. 426. *Motteram* v. *Motteram*, 3 Bulst. 264. 1 Rol. Abr. 343. 2 Rol. Abr. 393. Vide etiam *Carpenter* v. *Faustin*, 1 Salk. 115.

But

Where a woman married a second husband, living the first, and the second not privy. As to what she acquires by her labour during cohabitation, the second husband will be entitled to it, as she will be esteemed a servant to him.—*Strutville* v. ——, M. 4 Geo. II. *per Parker*, C. J. 1 Stra. 80.

In an action for wages earned by the wife, *Lee*, C. J. refused to let the wife's confession of a receipt of £20 be given in evidence.—*Hall* v. *Hill*, T. 11 Geo. II. 2 Stra. 1094.

Miscellaneous Cases.—Case upon four several promises, one of which was upon a promissory note, to which the defendant demurred, and the plaintiff had judgment; to the other three counts he pleaded *non assumpsit*; at the trial the plaintiff would have rested his case upon the count for money lent, and offered the note in evidence; * but *Eyre*, C. J. [*137] would not allow it, because that would be to charge the defendant twice for the same note; the plaintiff then would have given evidence of goods sold and delivered, which was likewise refused, it appearing that the note was given for the same goods.—*Randulph* v. *Regendo*, 28 Geo. II.

However, in common cases upon *assumpsit* for money lent, the plaintiff may give a promissory note from the defendant in evidence, for the 3 & 4 *Ann. c.* 9, which enables the plaintiff to declare upon the note, is only a concurrent remedy.—*Story* v. *Atkins*, M. 13 Geo. I. Stra. 719.

Assumpsit upon a note of hand, dated the 10th of *September*, payable two months after date, the memorandum was general of *Michaelmas* term; and upon objection taken that the suit was commenced before the cause of action accrued, the plaintiff was nonsuited; (*Hollingworth* v. *Thompson, Guildhall*, 1752, *per Dennison*;) *sed quære*, for in *Proger's Ca.* (M. 21 Car. II.) 2 Sid. 482, on a trial at bar, where the declaration in ejectment laid the lease to be dated after the first day of *Michaelmas* term, and the declaration was of the same term, it was holden to be matter of evidence when the bill was filed, for if the bill was in fact filed after the day of the supposed lease, all is well. So in *Dobson* v. *Bell*, T. 28 Car. II. 2 Lev. 176, in trover, the conversion was laid to be on the first day of *Easter* term, and the declaration was of the same term; verdict for the plaintiff and motion in arrest of judgment; but upon making it appear that the bill was filed, and declaration delivered after the first day of the term, judgment was entered without any amendment, for though the declaration being general relates to the first day of

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But where a legacy was given to a fême coverte, who lived separate from her husband, and the executor paid it to the fême, and took her receipt, on a bill brought by the husband against the executor, he was decreed to pay it over again, with interest. *Twisden* v. *Wise*, 1 Vern. 161.

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the term, yet the bill being filed at a day after, all relates to the filing of the bill by the course of the court. So in *Tatlow* or *Castle* v. *Bateman*, (T. 23 Car. II.) 2 Lev. 13, upon like motion in trover the court said, it was well enough if the bill were filed after the cause of action accrued, for no action can be depending, nor declaration delivered, until the defendant be *in custodia maresc.* and that is never till bill filed, and it was referred to the secondary to examine when the bill was filed. Yet in *Venables* v. *Daffe*, (E. 2 W. & M. Carth. 113,) in an action for a malicious prosecution, where the day of acquittal was laid to be after *Michaelmas* term began, and the memorandum was general of *Michaelmas* term; on motion the judgment was arrested; but there it was not shewn that the bill was filed after the first day of the term.

In trover the declaration was of *Easter* term, which began 8th *April*, [*138] the demand was the 9th *April*, but the plaintiff proving *that the writ was not taken out till 2d *May*, he obtained a verdict; and on a case stated the court held that he should not be prevented by the fiction of relation from shewing the real truth of his case.—*Morris* v. *Harwood, and Pugh*, M. 1762. Bla. 312. 320. 3 Burr. 1241.

The defendant was arrested, and the writ returnable before the cause of action accrued, but the declaration was specially intitled of a day in term subsequent to the time when the cause of action accrued. *Per* Lord *Mansfield*, unless the plaintiff particularly make the writ the commencement of his suit, it is only to be considered as process to bring the defendant into court; and the record being specially intitled of a day in term, that must be considered as the day on which the bill was filed, and the time of the commencement of the suit. So the plaintiff had a verdict.—*Guildhall*, T. 1771. *(a)*

Use and Occupation.—At common law it was holden that *assumpsit* would lie for rent on an express promise, but not upon an implied promise, and such express promise must have been made at the same time with the lease.—*Chapman* v. *Southwick*, H. 18 Car. II. 2 Lev. 150.—But now,

By 11 *Geo.* II. *c.* 19. *s.* 14. Where the agreement is not by deed, the landlord may bring case for the use and occupation; and if in evi-

(a) Vide etiam *Dobson* v. *Bell*, 2 Lev. 176. *Symons* v. *Low*, Sty. 72. *Pugh* v. *Robinson*, 1 T. Rep. 116, where it was held that a declaration entitled of the term generally relates to the first day of the term, and the promises and the breach being laid on the first day of term may be presumed to have been made before the delivery of the declaration, because by a reference to the ancient practice of declaring *ore tenus*, the defendant cannot be supposed to have been delivered till the sitting of the court on that day.

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dence any parol demise or any agreement (not being by deed) whereon a certain rent is reserved, do appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as in evidence of the *quantum* of the damages to be recovered. *(a)* And by *s.* 15, if the tenant for life die before or on the day on which any rent was made payable, upon any lease which determined on the death of such tenant for life, his executors may in an action on the case recover the whole, or a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, in which the said rent was growing due. *(b)*

An executor brought an action for rent due to his testator in his lifetime, and for other rent due in his own time, and there was another count on a *quantum meruit* for the rent of another messuage, in which he had not declared as executor. After judgment by default and a writ of enquiry executed, upon error brought, judgment was reversed, because the demands were incompatible; but perhaps it would have been helped by a verdict, because for rent due in his own time he need not declare as executor, and therefore if it had been tried, the judge ought not to have permitted him to prove rent due to himself in his own right.—*Hooker* v. *Quilter*, T. 21 Geo. II. Stra. 1271.

In case for use and occupation of an house by permission of the [139] plaintiff the defendant pleaded *nil habuit in tenementis*; and upon demurrer the court held it not a good plea, as it would be upon a lease at common law, because there an interest is supposed to have passed from

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(a) Before this statute rent was recoverable by action of debt only. *Green* v. *Harrington*, Hutt. 34, in which plaintiff need not set forth the particulars of the demise, nor need he in *assumpsit* for use and occupation. *Wilkins* v. *Wingate*, 6 T. Rep. 62.

Assumpsit lies only where defendant holds by permission or by demise from the plaintiff, not where his possession is adverse and tortious, for that excludes the idea of a contract which in this action must be express or implied. *Birch* v. *Wright*, 1 T. R. 378. And it seems a general rule, that as this action is founded on a contract whcrever a defendant enjoys by permission or demise from the plaintiff, he shall be liable without questioning the plaintiff's title. *Morgan* v. *Ambrose*, Esp. N. P. Dig. 21.

(b) Upon this clause Lord *Hardwicke* decided, that where a tenant in tail made a lease for years, and died without issue a week before the rent became due, his executor should have apportionment of the rent, for though tenant for life only is mentioned in the statute, yet he was tenant for life as to this. Held also, that a tenancy for years determinable on lives, was within the mischief of the statute. *Paget* v. *Gee*, Ambl. 198.

So where a wife had an annuity payable quarterly, and died in the middle of a quarter, the annuity was adjudged to be apportioned, though annuities are not within the statute. *Howell* v. *Hanforth*, 2 Bla. 1016.

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the lessor, but here the court must take it that there was an express promise, and therefore if the plaintiff had an equitable title, or no title at all, yet if the defendant have enjoyed by permission of the plaintiff, it is sufficient, and it is not necessary for the plaintiff to say it is his house, any more than in *assumpsit* for goods sold, to say they were the goods of the plaintiff.—*Lewis* v. *Wallace*, H. 25 Geo. II. B. R. 1 Wils. 314. S. C. nomine *Lewis* v. *Willis*. *(a)*

If a man declare upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from what is laid, he cannot recover on either count, not on the first, because of the variance, nor on the second, because there was a special agreement. *(b)* But if he prove a special agreement and the work done, but not pursuant to such agreement, he shall recover upon the *quantum meruit*, for otherwise he would not be able to recover at all: (*Weaver* v. *Borrows*, M. 12 Geo. I. *per* Raym. 1 Stra. 648.) *(c)* As if in a *quantum meruit* for work and labour, the plaintiff proved he had built a house for the defendant, though the defendant should afterwards prove that there was a special agreement about the building of it, *viz.* that it should be built at such a time and in such a manner, and that the plaintiff had not performed the agreement, yet the plaintiff would recover upon the *quantum meruit*, though doubtless such proof on the part of the defendant might be proper to lessen the *quantum* of the damages. (Mr. *Keck's Case*, at *Oxon.* 1744.) And perhaps in the first case put, the plaintiff ought to have been suffered to recover, if there had been a count on an *indebitatus assumpsit*; for though an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed, yet when that is done it raises a duty for which a general *indebitatus assumpsit* will lie.—*Gordon* v. *Martin*, T. 5 Geo. II. Fitzg. 302.

(a) Vide 12 Vin. Abr. 184. And where a tenant from year to year of a house at a yearly rent, becomes bankrupt in the middle of the year, and his assignees enter, and remain till the end, the assignees cannot maintain this action, for the bankrupt's occupation, as well as their own, without proving their special instance and request for the bankrupt to occupy during the time that elapsed before his bankruptcy. *Naish* v *Tatlock*, 2 H. Bla. 329. But where defendant (though holding under a tenant at will only) has enjoyed the benefit of a contract (whatever the law may be as between the original landlord and first tenant.) Yet *assumpsit* is clearly maintainable by such tenant at will against him. *Atkinson* v. *Pierpoint*, Esp. N. P. Dig. 21. So if *A.* agrees to let land to *B.* who permits *C.* to occupy them, *A.* may recover the rent against *B.* for use and occupation. *Bull* v. *Sibbs*, 8 T. Rep. 327.

(b) Vide ante, p. 128 *a* note (*b*).

(c) Vide 12 Vin. Abr. 200.

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And this point now seems to be so settled: for in an action where the plaintiff declared on a special agreement, and also on a general *indebitatus assumpsit*, the plaintiff failed to prove his special count; and then it was objected that he ought not to be allowed to enter into proof of the general count: but Lord *Mansfield* suffered him to go into such proof; and the next day his Lordship declared in court, that he had asked Mr. Justice *Wilmot* (who was then with his Lordship on the circuit) his * opinion on a case of this kind, which happened before him at [*140] *Launceston* assizes, and which had been mentioned on the occasion; who said he did not recollect that particular case, but that the circuit practice, according to his observation, had been on this distinction; when the plaintiff attempted to prove the special agreement, and failed in it, he was not permitted to go on the general *indebitatus assumpsit*. But his Lordship said, he did not approve of that distinction, and that his opinion, after the consideration he had given it was; that where the evidence is sufficient to warrant the plaintiff's action on the general count, supposing no special agreement had been laid in the declaration, the plaintiff should be permitted to recover on such general count, though there be a special agreement laid; whether he attempts to prove such special agreement or not: and that Mr. Justice *Wilmot* intirely concurred in this opinion.—*Harris* v. *Oke*, *Winton* Sum. Ass. 1759. *(a)*

Executors and Administrators.—Upon an *assumpsit* against an executor or administrator, the plaintiff must prove his debt, though the defendant have pleaded *plene administravit*; for by that plea, though a debt be admitted, yet the *quantum* is not; (*Shelly's Case*, T. 1693. Salk. 296.) and therefore it differs from debt in which the plea of *plene administravit* is an admission of the debt, and therefore it need not be proved. *(b)*

(a) This point seems to be further settled by the case of *Payne* v. *Bacombe*, Dougl. 628. (651) where the plaintiff declared in assumpsit on a special agreement to pay a proportion of the expence of a suit, but failing in the proof of that, he was allowed to resort to his usual count for money paid, &c.

(b) Plene administravit, without shewing how, is a bad plea to a *sci. fa.* on a judgment against the testator. *Newton* v. *Richards*, Salk. 296. 1 Ld. Raym. 3.

If an executor or administrator plead *plene administravit præter*, as certain, and also to another action in the same term plead the same plea *præter* the same sum, and as to that sum, that he had confessed it in the other action, such a plea is a good bar. *Waters* v. *Ogden*, 2 Dougl. 435. (452.)

To a plea of *plene administravit præter*, plaintiff may pray judgment of the sum admitted by the plea, and reply assets *ultra*. *Lockyer* v. *Coward*, 3 Wils. 52.

The plaintiff cannot upon this issue give in evidence a copy of an inventory delivered by the defendant to the spiritual court, unless it be signed by him, though it be signed by the appraisers; (*Saunderson* v. *Nichol*, M. 1 W. & M. 1 Show. 81.) but he may give evidence by witnesses, that the defendant had assets, or if he give an inventory in evidence, he may shew the goods were under-valued. (*Welbourne* v. *Dewsbury*, *Per Eyre*, C. J. H. 12 Geo. I. post.) *(a)* (Note, a leasehold estate not sold is *assets ad valorem:* and assets in *Ireland* are assets here.) (*Richardson* v. *Dowey*, M. 1605. Cro. Jac. 55. 1 Barnes, 240.) If in the inventory produced, the article concerning debts did not distinguish between sperate and desperate, it would be sufficient to charge the executor with the whole *primâ facie* as assets, and put it upon him to prove any of them desperate, as if the article were, "*Item*, for debts due and owing, which I admit myself to be charged with when recovered or received."—*Smith* v. *Davis*, M. 10 Geo. II. *Per Hardw.* J. *(b)*

And in the case of sperate debts, the executor may discharge himself by shewing a demand and refusal.—*Shelley's Case*, T. 1693. Salk. 296.

If assets be proved in his hands, the defendant (the executor) may give in evidence that he has paid debts to the value, and need not plead it. (*Co. Litt.* 283.) So he may give in evidence a retainer for his own debt,
[*141] or that the intestate before marriage with the defendant* gave a bond to *J. S.* conditioned to leave the defendant £500, and that she retained to satisfy this obligation. So if administration be granted to a creditor, and after repealed at the suit of the next of kin, the creditor may retain against the rightful administrator; for where administration is granted to a wrong person it is only voidable, but if it be granted in a wrong diocese it is void, and in such case there could be no retainer.—*Simpson* v. *Tresler*, in Kent, 1681, *per Weston*, Bar'. *(c)*

(a) Or he may shew the fact of defendant having other goods not mentioned in the inventory. *Peake's Law of Evid.* p. 347.

(b) But in a MS. note of this case by Mr. *Selwyn*, in his Abr. of N. P. Law, p. 695 (n). it is said, that Lord *Hardwicke* put the defendant on proof that she could not recover some of the debts in the inventory which she having done by a witness, who demanded them, they were allowed as desperate.

(c) Payment of money to an executor who has obtained probate under a forged will, is a discharge to the debtor, though the probate be afterwards declared void, for (*Per Grose*, J.) the law will never compel any person to pay a sum of money a second time, which he has once paid under the sanction of a court of competent jurisdiction. *Allen* v. *Dundas*, 3 T. R. 125. 133.

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Note; If a man have *bona notabilia* in several dioceses of the same province, there must be a prerogative administration; if in two of *Canterbury* and two of *York*, there must be two prerogative administrations, and if in one diocese of each province, each bishop must grant one.—*Burston* v. *Ridley*, M. 1 Ann. Salk. 39.

Debts due by specialty are deemed the deceased's goods in that diocese where the securities happen to be at the time of his death. But debts by simple contract follow the person of the debtor, and are esteemed goods in that diocese where the debtor resides at the time of the creditor's death.—*Byron* v. *Byron*, H. 1596. Cro. Eliz. (472.) Godolph. 70. Office of Executor, 46.

The executor, on the plea of *plene administravit*, cannot give in evidence debts of a higher nature subsisting, but must plead them; it will not be improper therefore in this place to consider how they ought to be pleaded. Where the days of payment in the condition of a bond are past, the penalty is the debt, and therefore the ancient method of pleading them was to plead them singly, and set forth the penalty only; but the common way now is to set forth the condition likewise. But where the days of payment were not incurred at the death of the testator, the executor can only plead the sum in the condition, because he may deliver himself from the penalty by performing it; and if he refuse or neglect to do it, it will be a *devastavit*. But where the day of payment is past, though the executor set out the condition in his plea, yet he shall cover assets to the amount of the penalty, unless the plaintiff reply *per fraudem*, and on issue joined thereon, prove that the obligee offered to take a less sum than the penalty, and not more than the executor had to pay. If the testator acknowledge a recognizance, or enter into a statute with condition for the payment of a less sum at a future day, it will be a bar to debts of an inferior kind, though the day of payment be not yet incurred, because it is a present duty, and is on record, on which execution may be taken out without further suit; but a debt due by obligation is only a *chose in action*, and recoverable by law, and not a present duty as the other is.—*Bank of England* v. *Morris*, 9 Geo. II. Stra. 1028. 4 Bro. P. C. 287. fo. ed. 2 Bro. P. C. 465. 8vo. ed. For the entry of this judgment at large, *vide* Ca. temp. Hardw. 230. *(a)*

(a) On a bond debt lies against the heir of an obligor who has lands by descent, if the executors have not sufficient assets, and the obligor may bring his action against the heir or executor, although the executor have assets. *Capel's Case*, And. 7.

If the executor plead twenty judgments, he confesses assets for above nineteen, and yet at his peril he must plead all the judgments, for otherwise, if the creditor pray judgment of assets *quando acciderint*, he shall not be allowed for those not pleaded; and if he plead five judgments, and one be false or fraudulent, and so found, he is saddled with the whole debt; so if any one be ill pleaded.—*Atfield* v. *Parker*, E. 12 W. III. 12 Mod. 496. *Rouse* v. *Etherington*, E. 1 Ann. Salk. 312. *(a)*

An executor pleaded, that his testator had entered into a statute which remained in force and not paid; upon demurrer, because not averred to be for a just debt, the court held the plea good, for that it should be intended to be for a just debt, and he who will take advantage of the contrary ought to shew it.—*Philips* v. *Echard*, E. 1603. Cro. Jac. 885.

In debt for rent, though the lease be by parol and the term determined, a bond outstanding cannot be pleaded in bar, for the contract still remains in the realty.—*Newport* v. *Godfrey*, E. 2 W. & M. 3 Lev. 267. *(b)*

If a judgment being pleaded, and *per fraudem* replied, and issue taken thereupon, by evidence it appear the debtee was willing to take less than is recovered, it is evidence of fraud, unless the executor shew that he had not assets to pay the same.—*Rouse* v. *Etherington*, sup. *(c)*

Where upon the issue of *plene administravit* a verdict is found, that the defendant has assets to part of the debt; yet judgment shall be entered for the whole debt, but the *si non &c. de bonis propriis* ought

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(a) So if an executor plead six judgments against him, and *nul assets ultra*, he confesses that he has assets above five, and if the replication take issue upon the *reins ultra* a certain sum, it is ill. *Aston* v. *Sherman*, Salk. 298. Ld. Raym. 263.

(b) In debt for rent an executor may plead no assets, and that the premises are of less value than the rent. *Billinghurst* v. *Speerman*, 1 Salk. 297.

(c) To a plea of judgments, and no assets *ultra*, plaintiff replied *per fraudem*. It appeared that the judgments were given for nearly double the debts by mistake, and without fraud, as the debts were more than the assets. Held, that this was conclusive evidence of fraud, and precluded further enquiry. Verdict for plaintiff, but it was afterwards set aside, the court holding, that, as there was no fraud in fact, there was none in law, but the defendant should have pleaded the sums really due. *Pease* v. *Naylor*, 5 T. Rep. 80. Vide etiam *Parker* v. *Atfield*, Salk. 311. Ld. Raym. 678, where it was held, that pleading of judgments is a confession of assets to satisfy them, and the *riens ultra* a certain sum is but form, and not material or traversable.

If an executor plead several judgments, plaintiff may reply to every one that they were obtained by fraud, or he may plead *seperalia judicia, &c. obtent. per fraudem;* but if he plead *seperalia, &c.* if one be found a true debt he will be defeated. *Trethuny* v. *Acland*, 1 Mod. 33. 2 Saund. 48; and see Mr. Serjeant *Williams'* observations on this case, 1 Saund. 337 (b), n. 2.

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to be as to the costs only, and execution ought to be taken out only for so much of the debt, for which the defendant is by the verdict found to have assets.—*Mary Shipley's Case*, 8 Co. 134. *Bank of England* v. *Morris*, ante, p. 141 *a*.

If an executor suffer judgment by default, it is a confession of assets sufficient to pay the debt, and therefore the sheriff may return a *devastavit* to a *fi. fa.* if he cannot find goods of the testator; and if the executor do not plead such judgment and *nul assets ultra* to another action, but admit judgment to go by default, it is a confession of assets as to that likewise.—*Rook* v. *Salisbury Sheriff*, T. 12 W. III. 12 Mod. 411. Salk. 310. S. C. nom. *Rock* v. *Leighton*. (*a*)

But a *cognovit actionem* is not a confession of assets.—*Bird* v. *Culmer*, Hob. 178.

Judgment against *B.* in *C. B.* who after judgment enters into a statute and dies, his administrator brings error on the judgment, which is affirmed, and upon a *sci. fa.* to have execution, pleads payment of the statute, and *nul assets ultra*, and it was holden a good plea; for at the time of the execution of the statute he could not plead the judgment in bar, and therefore payment of the statute was no *devastavit*.—*Ride* v. *Buelock*, M. 1602. Yelv. 29.

(*a*) In *Skelton* v. *Hawling*, 1 Wils. 258, (but more correctly stated by Mr. Serjeant *Williams* in a note to 1 Saund. 219.) *A.* brought debt against *B.* an administrator, who suffered judgment by default, and made his will, appointing *C.* executor. An action on the judgment, suggesting a *devastavit*, being brought against *C.* he pleaded *quod plene administravit* the effects of *B.* and the judgment by default was held to be evidence of a *devastavit*. Vide *Wharton* v. *Richardson*, Stra. 1075, where a *sci. fa.* was brought against an administratrix on a judgment against her husband, and after two *nihils* returned a *sci. fieri* inquiry was taken out; and held, that the award of execution on the former writs was evidence of assets, but where there has been no *sci. fieri*, and only two *nihils* returned, the court, on motion, will set aside the award of execution, and admit defendant to plead if he come in time. *Sed secus* after two years acquiescence. Vide *Mitford* v. *Cordwell*, Stra. 1198.

The most leading case on the subject of assets is *Rock* v. *Layton*, 1 Ld. Raym. 589. Comy. 87. (and imperfectly reported in *Salk.* 310, nom. *Rock* v. *Leighton*), which was fully stated by *Buller*, J. in *Erving* v. *Peters*, 3 T. R. 689, from Lord *Holt's* MSS. from whose note it appears to have been Lord *Holt's* opinion that if an heir plead *non est factum*, or conditions performed, a general judgment shall be given, if the matter pleaded be found against him. So if the matter be found against an executor, he admits assets next followed. *Ramsden* v. *Jackson*, 1 Atk. 292, where Lord *Hardwicke* thought himself bound by the above authority, and decided that an executor having pleaded *non est factum*, which was found against him, could not afterwards be relieved on account of a deficiency of assets.

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The sheriff to a *sci. fa.* having returned that the defendant the executor had wasted, he appeared at the return of the writ and *plene administravit*, and traversed the wasting:* on issue thereon, the inventory exhibited by the defendant in the ecclesiastical court was allowed to be evidence sufficient to put the executor to shew how he had disposed of the goods and money mentioned therein.—*Ayliff* v. *Ayliff*, 2 H. Geo. I. C. B.

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In strictness, no funeral expences are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees, but not for the pall or ornaments.

The usual method is to allow £5.

Upon the plea of *ne unques executor* evidence may be given, that the seal of the ordinary is forged, or the administration repealed, or that there were *bona notabilia*, for they confess and avoid the seal; but evidence that another person is executor, or that the testator was *non compos*, or that the will was forged, cannot be given, for that would be to falsify the proceedings of the ordinary wherein he was judge.—*Noel* v. *Wells*, H. 19 & 20 Car. II. 1 Lev. 235.

If it be alledged that a simple contract debt is paid, the very debt ought to be proved as well as the payment. So if an executor plead *plene administravit* to an action upon a bond, he must prove the debts paid to be on bonds sealed and delivered. *(a)* But in an action for a simple contract debt on the like plea, proof of payment is sufficient, for if no bond, it is a good administration.—*Saunderson* v. *Nicholson*, M. 2 W. & M. 2 Show. 81.

Note; In such case the creditor may prove his bond, and the debt due upon it, and the payment of it.—*Kingston* v. *Grey*, 28 W. III. 1 Raym. 745.

If an executor plead *plene administravit*, and thereupon issue is joined, the defendant has admitted himself executor, and therefore cannot shew that he only acted as agent for the executor, for then he should have pleaded *ne unques executor*. But if he give in evidence a retainer, *(b)*

(a) On a plea of *plene administravit* to debt on judgment against the intestate, not docketted according to the statutes 4 & 5 *W. & M.* c. 29, defendant may give in evidence payment of bonds and other specialty debts, which exhausted all the assets. *Hickey* v. *Hayter*, 6 T. R. 384, on the authority of which it was held, in *Steel* v. *Rorke*, 1 Bos. & Pull. 307, that an outstanding judgment against a testator or intestate, not docketted, cannot be pleaded to an action on simple contract.

(b) A right of retainer may be either pleaded or given in evidence. *Plumer* v. *Marchant*, 3 Burr. 1380.

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the plaintiff cannot object that as executor *de son tort* he cannot retain, without shewing the will and who are rightful executors.—*Arnold* v. *Arnold*, H. 6 Geo. II. *per Eyre*, C. J.

If a man bring an action against an executor *de son tort*, he may declare against him as executor of the last will and testament; (*Alexander* v. *Lane*, M. 6 Jac. I. Yelv. 137.) therefore if defendant plead a retainer, he ought to shew that the testator made him executor; and it is not enough to say that the testator made his will, and that he *suscepto super se onere testamenti* paid divers debts, and retained for a debt of his own. (*Atkinson* v. *Rawson*, M. 27 Car. II. C. B. 1 Mod. 208.) If he so plead, the plaintiff may either demur for this cause, or reply that he is executor *de son tort*. (*Vaughan* v. *Browne*, H. 1738. Stra. 1100. Andr. 332.)*(a)* But in such case the defendant may rejoin, that *puis darrein continuance* letters of administration have been granted to him, for such administration* will legitimate all intermediate acts, and justify a retainer.—*Vaughan* v. *Browne*, H. 1738. Stra. 1106. Andr. 332. S. C.*(b)* [*144]

(a) An *executor de son tort* is liable to all the troubles of an executorship without any of the advantages, for he cannot bring an action in right of the deceased. *Anon.* Noy. 69. *Bro. Abr.* tit. *Administrator*, pl. 8. Yet he may be sued as a rightful executor. *Ampson* v. *Stockburn*, Noy. 13. And he must be declared against as *executor testamenti*. *Coulter's Ca.* 5 Co. 31. *Alexander* v. *Lane*, Yelv. 137. In all cases he shall be charged with the testator's debts, so far as he has assets. *Stokes* v. *Porter*, Dy. 166 (b), but for a false plea he will be severely punished, for in such case execution shall be awarded against him for the whole debt, though he only meddle with a trifle. *Anon.* Noy. 69. As against creditors in general, however, he shall be allowed all payments to any other creditor of greater or equal degree, himself only excepted. *Ayre* v. *Ayre*, 1 Ch. Ca. 33. *Coulter* v. *Ireland*, Mo. 527. 5 Co. 30; for in no case can he retain to pay himself. *Alexander* v. *Lane*, sup.

(b) Vide *Anon.* 7 Mod. 31. Salk. 113, where it was held, that, if an *executor de son tort* deliver the goods to the administrator *before* action brought, he may plead *plene administravit*, but he cannot discharge himself from a creditor's action by delivering over the effects *after* action brought, nor can he, after such action, retain his own debt, though of a higher nature, even with the consent of the rightful executor; and this, said Lord *Kenyon*, in *Curtis* v. *Vernon*, 3 T. R. 587. is clear from all the authorities on the subject, which he enumerated. The defendant, however, being dissatisfied, brought his writ of error, when, after an elaborate argument, Lord *Loughborough* declared the opinion of the court to be, that as the law was settled upon both points there rested upon by a series of authorities, from *Coulter's Ca.* sup. to the *Anon. Ca.* in Salk. 113, the court ought not to overturn it, whatever the hardship or inconvenience might be. The authorities enumerated and relied upon in *Curtis* v. *Vernon* were, *Keble* v. *Osbaston*, Hob. 42. *Bradbury* v. *Reynell*, Cro. Eliz. 565. *Whitehead* v. *Sampson*, Freem. 265. *Loveday* v. *Young*, 2 Show. 373. *Baker* v. *Beresford*, 1 Sid. 76. *Pyne* v. *Woolland*, 2 Vent. 179. *Williamson* v. *Norwitch*, Sty. 337. *Vaughan* v. *Browne*, 2 Stra. 1106, and *Padget* v. *Priest*, 2 T. Rep. 97, in which last case it was held that the slightest intermeddling with an intestate's goods will constitute an *executor de son tort*.

Executors

Executors are no further chargeable than they have assets,(a) unless they make themselves so by their own act, as by pleading a false plea; *i. e.* such a plea as will be a perpetual bar to the plaintiff, and which of their own knowledge they know to be false; as *ne unques executor*, or a release to himself. But if he plead a former judgment had against him by another person, and *nil ultra*, and the plaintiff reply *per fraudem*, and it be so found, yet the judgment shall only be *de bonis testatoris*.—*Holt* v. *Hoare*, M. 37 Eliz. 1 Rol. Abr. 931.

If an executor plead *plene administravit*, and the plaintiff reply that he sued out his original such a day, and that the defendant had assets then; and the defendant in his rejoinder takes issue, that he had not assets then: the plaintiff need not give in evidence a copy of the original to prove the time of its being taken out, because the defendant admits it by his rejoinder. But if the plaintiff reply assets at the time of exhibiting his bill, *viz.* such a day, and conclude his replication to the country; (which in such case he may;) though the plaintiff lay his bill to be exhibited on the first day of the term, if in fact it were exhibited afterwards, the defendant shall have advantage thereof on the evidence, so that he shall not be bound for what he paid before. The difference between those two cases depends solely on the manner of the plaintiff's replying; for in the first case, the plaintiff alledged the time of suing out the original, as a distinct positive fact, and concluded with an averment; and so the defendant was at liberty to take issue in his rejoinder, on the time of the original's issuing, or on his having assets: but in the last case, the defendant had no opportunity of putting the time of exhibiting the bill in issue; but was obliged to join in the issue taken by the plaintiff, that the defendant had assets at the day the plaintiff exhibited his bill, and the day mentioned in the replication, being alledged under a *videlicit* is totally immaterial.—*Palmer* v. *Lawson*, E. 19 Car. II. 1 Sid. 332.

On *plene administravit* he may give in evidence, that he was but executor *durante minoritate*, that he paid such debts and legacies, and that he had delivered over the residue of the testator's personal estate to the infant when he came of age, for his power then ceases, and the new executor is liable to all actions. But he will be answerable for as much as [* 145] he has wasted, and the new executor has his remedy against him; * but *quære*, whether he is liable to other men's suits? In 1 *Mod.* 175, it is said he is not, but in *Packman's Case*, 6 Co. 19. and *Palmer* v. *Litherland*,

(b) *Per Mansfield*, C. J. in *Harrison* v. *Beccles*, cited 3 T. Rep. 688. Et vide *Dearne* v. *Grimp*, 2 Bla. 1275. *Waters* v. *Ogden*, Dougl. 435, (452). *Barry* v. *Rush*, 1 T. Rep. 691. *Pearson* v. *Henry*, 5 T. Rep. 6.

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Latch. 160, it is said he is, and that seems the most reasonable determination.—*Brooking* v. *Jenning*, M. 26 Car. II. 1 Mod. 174.

If an executor compound with the creditors, and after at the suit of any of them plead *plene administravit*, proof of the composition would be conclusive proof of assets, and the court would not suffer him to give evidence of no assets.—*Per Holt*, C. J. E. 4 Ann. Salk. MSS. *(a)*

Attorney's Fees.—By 2 *Geo.* II. *c.* 24. No attorney shall maintain any action for fees until one month after he shall have delivered a bill written in a common legible hand, and in the *English* tongue (except law terms and names of writs) and in words at length (except times and sums) subscribed with his proper hand. It has been holden, 1. That this act may be given in evidence on the general issue. 2. That it does not extend to the executor of an attorney. 3. Nor to business done in conveyancing.— *Birkinhead* v. *Fanshaw*, H. 2 W. III. Salk. 86. *Milner, Gent.* v. *Crowdall*, M. 3 W. & M. 1 Show. 138.

The court will upon motion stay proceedings till the plaintiff has delivered a bill.—1 *Barnes*, 28.

2dly. *Special assumpsit.*—In a special assumpsit the plaintiff must prove his declaration expressly as laid, therefore if the agreement be to deliver merchandizable corn, proof of an agreement to deliver good corn of the second sort is not sufficient: (*Anon.* 12 W. III. 1 Raym. 735.) so where the agreement declared upon was to sell the plaintiff all his merchandizable skins, and the agreement produced by the plaintiff, and signed by the defendant was so, yet the agreement of the same date entered in the defendant's book, and signed by the plaintiff, being to sell all his merchandizable calf skins, the plaintiff was nonsuited.—*Anon.* at Salop, 1744.

The plaintiff declared upon a promise to pay so much money upon the plaintiff's transferring so much *South Sea* stock; at the trial the note produced appeared to be to pay on a transfer to the defendant or his order; and this was holden to be a variance, and the plaintiff nonsuited. (*Rutland D.* v. *Hodgson*, E. 22 Geo. III. *per Raym.* C. J. So where the contract declared on was to deliver stock on the 22d of *August*, and upon the trial the entry in the broker's book was a contract for the opening, though it was proved to be notorious that the books were to

(a) In the bequest of a legacy, or of any personal thing, the assent of an executor is so necessary, that if the legatee take the thing without the delivery of the executor, he may have an action of trespass against him. *Anon.* Kielw. 128, pl. 94. 1 New Abr. 260; but in a devise of lands which are freehold, the assent is not required. *Co. Lit.* 111. If the executor does once assent to the legacy, the legatee has such a property vested in him that he may take it, though the executor revokes his assent afterwards. *Paramour* v. *Yardley*, Plowd. 543.

open

open the 22d, and the broker swore he took the 22d of *August*, and the opening, to be convertible terms. (*Payne* v. *Hayes*, Stra. 74. Et vide *S. C.* ante, p. 128, n. (*b*) (*a*) But these seem rather to be cases founded on the times to get rid of *South Sea* contracts, than to be relied on as precedents in other cases.

Consideration.—A mere voluntary curtesy will not have a consideration to uphold an *assumpsit*, but if such curtesy were moved by a request [*146] of the party, that gives an *assumpsit*; and therefore if the plaintiff *declare, that whereas the defendant hath feloniously slain *A.* he required the plaintiff to labour and do his endeavour to obtain the king's pardon; whereupon the plaintiff did do his endeavour, *viz.* in riding, &c. and afterwards in consideration of the premises the defendant did promise to pay the plaintiff £100, it will be good: And note, in such case, if the plaintiff could prove no riding, yet any other effectual endeavours according to the request would serve; and if the consideration were future, that he would endeavour, so that the plaintiff must lay his endeavour expressly; and the defendant would not deny the promise, but the endeavour, he must traverse the endeavour in the general, and not the riding in special. And this leads me to take notice of a distinction between promises upon a consideration executed, and executory.—*Lampleigh* v. *Braithwaite*, M. 13 Jac. I. Hob. 105. *Bosden* v. *Thynn*, infra. (*b*)

In

(*a*) As the plaintiff is bound to declare specially on a special agreement, he ought to prove the contract expressly as laid. *Anon.* Ld. Raym. 735. *Hockin* v. *Cooke*, 4 T. Rep. 314.

(*b*) If *A.* promise to do, or to abstain from doing, an act in consideration of the antecedent performance of some act or promise on the part of *B.* the promise of *B.* is called a dependant promise, because *B.*'s right of action for a breach of such promise depends on the prior performance (or that which is equivalent to performance) of the act or promise on the part of *B.* and the act or promise to be performed by *B.* being in nature of a condition precedent, is usually distinguished by this appellation, because the performance (or that which is equivalent to performance) of such act or promise precedes *B.*'s right of action to recover damages against *A.* for non-performance of his promise, and must be specially avowed in the declaration. *Selw. N. P. Abr.* 94. Vide etiam *Raynay* v. *Alexander*, Yelv. 76, and *Thorpe* v. *Thorpe*, Ld. Raym. 662, which is a leading case on this subject, and where Ld. *Holt*, after fully discussing the distinction between positive agreements and conditions precedent, observed, that in cases of conditions precedent, an action could not be maintained before performance, but in the case of positive agreements it was otherwise. The learned judge then laid down certain rules to which the reader is referred. See also *Martin* v. *Smith*, 6 East, 555. and *St. Albans D.* v. *Shore*, 1 H. Bla. 270, with the remarks of *Ellenborough*, C. J. and *Lawrence*, J. on Lord *Loughborough*'s opinion in *Martin* v. *Smith;* also see *Phillips* v. *Fielding*, 2 H. Bla. 123.

In all cases of conditions precedent a performance ought to be specially

In the case of a consideration executed the defendant cannot traverse the consideration by itself, because it is incorporated and coupled with the promise, and if it were not then in deed acted, it is *nudum pactum*. (*Bosden* v. *Thynn*, M. 1603. Cro. Jac. 18.) But if it be executory, the plaintiff cannot bring his action till the consideration performed, and if in truth the promise were made, and the consideration not performed, the defendant must traverse the performance, and not the promise, because they are distinct in fact. And therefore the plaintiff, when he alledges performance, ought to alledge a place where; and if he do not, the defendant may demur for want of a *venue*.—*Sexton* v. *Miles*, 1 W. & M. Salk. 22. *(a)*

If the consideration be illegal it will not uphold an *assumpsit*; as where the defendant in consideration of 20*s*. assumed to pay 40*s*. if he did not beat *J. S.* out of such a close. But the act to be done must appear unlawful at the time, otherwise the promise will not be void. (*Allen* v. *Rescous*, T. 28 Car. II. 2 Lev. 174.) As if *A.* bring *B.* to an inn, and affirming to the host that he has arrested *B.* by virtue of a commission of rebellion, in consideration that the host will keep *B.* as a prisoner for one night, promise to save him harmless; if *B.* recover against the host for false imprisonment, the host may have an action on that promise against *A.* (*Battersey's Case*, M. 29 Jac. I. Winch, 48.) But where *B.* in consideration that the gaoler would permit *A.* his prisoner to go at large, promised the gaoler to pay the debt, and save him harmless, it was holden a void promise; *vide* to the same purpose, *Webb* v. *Bishop*, *ante*, and the cases there cited.—*Martin* v. *Blytheman*, H. 8 Jac. I. Yelv. 107. Et vide *Cragge* v. *Norfolk*, H. 26 & 27 Car. II. 2 Lev. 120.

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cially avowed, or what is equivalent, a tender and refusal, but the averment of a tender alone will not suffice. *Lea* v. *Exelby*, Cro. Eliz. 888. Furthermore, *as to concurrent acts*. Where two acts are agreed to be performed by each party at the same time one party cannot sue the other without avowing either performance of his part of the agreement, or what is equal to it. *Morton* v. *Lamb*, 7 T. Rep. 125, which case *Lawrence*, J. assimilated to *Callonell* v. *Briggs*, Salk. 112. But after verdict an averment that plaintiff was ready and willing to perform his part of the contract, has been holden sufficient. *Rowson* v. *Johnson*, 1 East, 203. *Waterhouse* v. *Skinner*, 2 Bos. & Pull. 447. So where something is to be performed by two at the same time, he who is ready and offers to perform his part, may sue the other for non-performance. *Jones* v. *Barkeley*, Dougl. 659. (684).

(a) A consideration altogether unexecuted is not good to maintain an *assumpsit*; as if *A.*'s servant be arrested in *London* for a trespass, and *J. S.* who knows *A.* bails him, and after *A.* for his friendship, promises to save him harmless, if *J. S.* should be charged, this will be no consideration to ground an *assumpsit*, because the bailing, which was the consideration, was past and executed. *Hunt* v. *Bate*, Dy. 272, 1 Rol. Abr. 11. *Doggett* v. *Dowell*, Owen, 144. But it would have been otherwise, if *A.* had requested him to bail his servant, and the bailing had been after. *Hunt* v. *Bate*, sup.

Where

Where the action is brought upon mutual promises, it is necessary to
[*147] shew they were both made at the same time, or else * it will be *nudum pactum*; (*Nichols* v. *Rainbred*, II. 12 Jac. I. Hob. 88.) and though the promises be mutual, yet if one thing be in the consideration of the other, a performance is necessary to be averred, unless a certain day be appointed for it; (*a*) and therefore where *A.* had given *B.* a note for so much money six months after the bargain, *B.* transferring the stock, and *B.* at the same time had given a note to *A.* to transfer the stock, *A.* praying, *&c. B.* brought an action, and upon *non-assumpsit*, *Holt*, C. J. at *Guildhall*, obliged the plaintiff to prove either a transfer, or a tender and refusal, within the six months; and said that if *A.* had brought an action against *B.* for not transferring, he must have proved a payment or a tender.—*Callonel* v. *Briggs*, T. 2 Ann. Salk. 112. *(b)*

(a) Where there are *mutual promises*, and the bare promise, and not the consideration, an action will lie by either party, without avowing part performance in himself. *Lampleigh* v. *Braithwaite*, Hob. 106. But *Lawrence*, J. in *Glazebrook* v. *Woodrow*, 8 T. Rep. 373, said this question depends upon, and must be gathered from the nature and words of the agreement.

So in *Martindale* v. *Fisher*, 1 Wils. 88, it was held, that promise for promise is a good consideration, without an averment of the plaintiff's promise. Vide *Brown* v. *Hancock*, Cro. Car. 115. *Wright* v. *Johnson*, 1 Vent. 64. *Pilchard* v. *Kingston*, Cro. Car. 202. And in *Glazebrook* v. *Woodrow*, sup. *Grose*, J. said, the intention of the parties is or is assumed to be the governing principle of all the late determinations, and when the nature of the consideration is ascertained, the rules respecting the averments before laid down invariably hold. See also Mr. Serjeant *Williams'* notes to 1 Saund. 320 (n. 4.) and Mr. *Durnford's* notes to Willes Rep. 157.

In *Mountford* v. *Horton*, 2 Bos. & Pull. 62, the first count of a declaration in *assumpsit* stated an agreement between two persons, but omitted the mutual promises. On motion in arrest of judgment, it was held, that the agreement itself implied a promise. So in *Starkey* v. *Cheeseman*, Salk. 128, where a similar objection was taken to a count on a bill of exchange, and *Holt*, C. J. held, that the drawing of the bill was an actual promise, and in *Lowther* v. *Conyers*, cited 1 Stra. 224, the same doctrine applied to a count on a promissory note, where the promise was omitted. So in *Roe* v. *Gatehouse*, 2 Salk. 663, where the name of the defendant was omitted in the averment of the promise in the second count, the court held that the same nomination should go to all the promises, and therefore the declaration was well enough. But in *Buckler* v. *Angill*, 1 Lev. 164, where the declaration was, that in consideration that the plaintiff would surrender a term the defendant would pay £10, without stating any promise, the declaration was held bad; and the some doctrine prevailed in *Lea* v. *Welsh*, 2 Ld. Raym. 1517, upon a similar declaration, and in *Law* v. *Saunders*, Cro. Eliz. 913, where the name of the defendant was omitted in the statement of the promise, the declaration was held bad after verdict, there being no prior count by which the the omission could be helped.

If a man and woman (being unmarried) mutually promise to intermarry, and afterwards the man marries another woman, *assumpsit* lies. *Dickenson* v. *Holcroft*, Carter, 233.

So if the woman marries another man. *Harrison* v. *Cage*, Carth. 467.

Where

Where in an *assumpsit* two considerations are alledged, the one good and sufficient, the other idle and vain; if that which is good be proved it sufficeth; and although he fail in the proof of the other, it is not material, because it was in vain to alledge it; but if both be good, both must be proved.—*Crisp* v. *Garnel*, T. 1607. Cro. Jac. 127.

Though the promise alledged be proved, yet if it appear to be made on a different consideration than is mentioned in the plaintiff's declaration, it is not sufficient, or if it were made on the consideration alledged, and some other thing beside.—*Carter* v. *Toddard*, M. 1587. Cro. Eliz. 79.

Ex nudo pacto non oritur actio, and therefore if *A.* in consideration that *B.* will make an estate at will to him, promise to pay, it is a void promise, for *B.* may immediately determine his will.—*Keble* v. *Tisdale*, M. 12 Jac. I. 1 Rol. Abr. 23. *(a)*

If in consideration of a thing already done, without my request, not for my benefit, and where I was under no moral obligation to do it, I promise to pay money, that is *nudum pactum*, and void. But if I were under a moral obligation to do a thing, and another person does it without my request, and I afterwards promise to pay, that is good. Therefore where a pauper was suddenly taken ill, and an apothecary attended her without the previous request of the overseers, and cured her, and afterwards the overseers promised payment, it was holden good, for they were under a moral obligation to provide for the poor.—*Watson* v. *Turner et al*, *Excheq.* T. 7 Geo. III.

In *assumpsit* the plaintiff declared, that he had delivered goods to the defendant, which he promised to dispose of and to give the plaintiff an account, *&c.* the defendant pleaded in abatement, that he was bailiff to the plaintiff to merchandize the said goods, and that he ought to bring account; and upon demurrer it was adjudged that here being an express promise * to account, *assumpsit* will lie as well as account, and that wherever [*148] one acts as my bailiff he promises to render an account. However upon that occasion, *Holt*, C. J. told the plaintiff, that when it came to be tried he would not suffer him to give all the account in evidence, or to enter into the particulars thereof, but that he should direct his proof only as to the damages which he had sustained for not accounting according to his promise. (*Wilkin* v. *Wilkin*, H. 1 W. & M. Carth. 89.) In such cases where *indebitatus assumpsit* is brought for money received *ad computandum*, it is necessary to prove a misapplication or breach of trust; for if

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(a) Where the doing a thing will be a good consideration, a promise to do that thing will be so too. *Dict.* Per *Holt*, C. J. in. *Thorp* v. *Thorp*, 12 Mod. 459.

a man

a man receive money to a special purpose, it is not to be demanded of the party as a duty, till he have neglected it or refused to apply it according to the trust, and such misapplication or breach of trust ought regularly to be laid in the declaration, but the want of it will be aided by a verdict.—*Wilkin* v. *Wilkin*, sup. *(a)*

Where the defendant has no way to come at the knowledge of the performance of the consideration, the plaintiff ought to give notice of it; otherwise where there is a person named, to whom the defendant may resort and inform himself; as if the promise be to pay as much as *J. S.* paid, *quia constat de persona* the plaintiff is not bound to give notice; otherwise if the promise be to pay to the plaintiff as much as he shall have of any other.—*Smith* v. *Goffe*, E. 4 Ann. 2 Raym. 1128. ——— v. *Henning*, T. 1618. Cro. Jac. 432. *Holmes* v. *Twist*, T. 12 Jac. I. Hob. 51.

Statute of Limitations.—By 21 *Jac.* I. *c.* 16. This action must be brought within six years after the cause of action accrued; but if the defendant would take advantage of the statute, it is necessary for him to plead it, for he will not be permitted to give it in evidence on the general issue. *(b)*

(a) Where a man receives money for the use of another person, assumpsit lies against him as bailiff or receiver, and this supplies the plea of actions of account; and where money was deposited on a wager, an *indebitatus* lay for money received. *Martin* v. *Sitwell*, 1 Show. 117.

(b) Vide *Puckle* v. *Moor*, 1 Vent. 191. *Lee* v. *Rogers*, 1 Lev. 110: for the plea of *non-assumpsit* speaks of a time past, and relates to the time of making the promise; but the statute relates to the time of pleading. *Anon.* Salk. 278. *Draper* v. *Glassop*, 1 Raym. 153. And this statute is pleadable in two forms: 1. That defendant did not promise, &c. at any time within six years. *Collins* v. *Benning*, 12 Mod. 444: and 2. That the cause of action did not accrue within six years, which may be safely pleaded in all cases. *Gould* v. *Johnson*, Ld. Raym. 838. 2 Salk. 422. Vide Serjeant *Williams'* note to 2 Saund. 62. n. (b.) 63. n. (c.)

This statute runs against every demand, and is a complete bar, notwithstanding any intervening acts, as the bankruptcy, coverture, infancy, &c. of the parties. *Gray* v. *Mendez*, 1 Stra. 556. But there is an exception of accounts current between merchants. *Cotes* v. *Harris*, Esp. N. P. Dig. 148; which has been held to extend to all mutual accounts. *Catling* v. *Shoulding*, 6 T. Rep. 189. There is also a saving of all rights which have been interrupted by disability, as where the plaintiff has been beyond the seas. *Chandler* v. *Vitell*, 2 Saund. 120. *Rochtschilt* v. *Leibman*, Stra. 836. *Strithorst* v. *Græme*, 3 Wils. 145. 2 Bla. 723. As to which, *Ireland* has been held beyond the seas, but not *Scotland*. *Anon.* 1 Show. 91. *R.* v. *Walker*, 1 Bla. 286. But when the disability is once removed, and the statute has begun to run, no subsequent disability will stop its progress. *Per Kenyon*, C. J. in *Doe*, ex dem. *Duroure* v. *Jones*, 4 T. Rep. 311.

If

If the defendant plead *non assumpsit infra sex annos*, it is sufficient for the plaintiff to prove a promise to pay within six years without any other consideration, for the plea admits a cause of action before the six years. (*Bland* v. *Haselrig*, H. 1689. 2 Vent. 151.) So if the defendant say, "prove it due and I will pay it," such a promise with a proof of the debt is sufficient, but a bare acknowledgment of the debt, or of the delivery of the goods after the six years, is not in itself a new promise, though it is evidence of one, as a non-delivery on demand is not a conversion in itself, yet is good evidence of a conversion. (*Heyling* v. *Hasting*, per 10 Just. Salk. MSS. Salk. 29. Carth. 471. 1 Raym. 421. S. C.) But in an action by an executor for money had and received to the use of his testatrix, where upon this issue the defendant was proved to say, "I acknowledge the receipt of the money, "but the testatrix gave it to me;" Mr. Baron *Clive* directed the jury to find for the defendant: For *such an acknowledgment could not amount [*149] to a promise to pay, when he insisted he was intitled to retain.—*Owen* v. *Wolley*, Salop, 1751.

In *assumpsit* on a promissory note, the defendant pleaded *non assumpsit infra sex annos*: And on the trial it appeared that the defendant was surety in the note for *J. S.* and that six years were elapsed since the note was given, but that upon a demand within six years the defendant said, "You know I had not any of the money myself, but I am "willing to pay half of it." The judge was of opinion at the assizes that this promise took it out of the statute, but the jury found for the defendant: And on a motion for a new trial, the court held clearly that the judge was right; that this promise was sufficient; and granted a new trial.—*Yeo*, Bart. v. *Fouraker*, M. 1 Geo. III. B. R. 2 Burr. 1099. *(a)*

If

(a) As to what cases shall prevent this statute from attaching, the first is, that of a promise by the defendant to pay the debt after six years have elapsed, for that is a revival of the original assumpsit. *Bland* v. *Haselrig*, 2 Vent. 151. *Dickson* v. *Thompson*, 2 Show. 126. *Heyling* v. *Hasting*, Salk. 29. 1 Ld. Raym. 421. Comy. 54; where a conditional promise was held to take the demand out of the statute. But it must be an actual promise to pay; *Owen* v. *Wolley*, sup. or some acknowledgment that will amount to a promise, as "Prove your debt "and I will pay you." *Yea* v. *Fouraker*, sup. or "I am ready "to account, but nothing is due "to you." *Truemon* v. *Fenton*, Cowp. 548. And indeed a much slighter acknowledgment will do. *Lloyd* v. *Maund*, 2 T. Rep. 762. As where defendant said to plaintiff, "What an extravagant bill you "have sent me." And Lord *Kenyon* held this an acknowledgment that some money was due. *Lawrence* v. *Worrall*, Peake's N. P. Ca. 93. So in *Clarke* v. *Bradshawe*, 3 Esp. N. P. Rep. p. 155, defendant acknowledged, "that plaintiff had paid "money

If there be several defendants, and they plead *non assumpserunt infra sex annos*, proof of a promise by one within six years is not sufficient to charge him, for the action is joint. (*Bland* v. *Haselrig*, H. 1689. 2 Vent. 151. Modern practice is otherwise.)*(a)* If the defendant plead *non assumpsit infra sex annos ante diem impetrationis brevis*, and the plaintiff reply *quod assumpsit infra sex annos, viz.* such a day: Upon evidence the plaintiff is not obliged to prove the taking out the original, because there is a particular day mentioned in the replication; but if no particular day be named, the plaintiff must prove the taking out the original. (—— v. *Layfield*, Salk. 292.)—There seems but very little foundation for this distinction; for though a particular day be named in the replication, yet the plaintiff is not bound to prove a promise on that day.—The manner of pleading to avoid the necessity of proving the original at the trial seems to be mistaken; for to do that the plaintiff should reply that he sued forth his writ on such a day, and that the defendant promised within six years of that day, and conclude with an averment; and then the defendant is at liberty to take issue in his rejoinder, on the time of the writ's being sued out, or on the promise being made within six years

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money for him twelve years ago, "but that he had since become a "bankrupt, by which he was dis- "charged as well as by length of "time:" and Lord *Kenyon* held it such an acknowledgment as amounted to a promise to pay; but one of the most material cases on this point is *Bryan* v. *Horseman*, 4 East, 599, where a bailiff proved, that on his arresting the defendant, he said, "I "do not consider myself as owing "the plaintiff one farthing, it being "more than six years since I con- "tracted: I have had the wheat I "acknowledge, and I have paid some "part of it, and £26 remain due." This Lord *Ellenborough* considered a sufficient acknowledgment to take a case out of the statute, though the point might have been doubted, if the matter had been *res integra*. On a verdict for plaintiff, and a motion for a new trial, Lord *Ellenborough* said, that after such a long train of decisions on this subject, it was necessary to abide by them, and, in conformity with their doctrine, he held, that what defendant had said was a sufficient acknowledgment of a pre-existing debt, to *create* an assumpsit. But after all it seems, that the question, as to what will amount to an acknowledgment, must be decided by a jury. *Lloyd* v. *Maund*, sup. *Rucker* v. *Hannay*, 4 East, 604, (n.) Et vide *Bicknell* v. *Keppel*, 1 Bos. & Pull. N. R. 20.

(a) In assumpsit against four defendants, all pleaded *non-assumpsit infra sex annos:* verdict, that one *did* assume *infra sex annos*, and that the others did not. Held, that the declaration being on a *joint* contract, and the verdict finding a *several* contract, no judgment could be given. *Vin. Abr.* (*Trial,*) C. 9. 4.

See also *Whitcomb* v. *Whiting*, Dougl. 629, (652,) where *Bland* v. *Haselrig*, sup. was denied, for in assumpsit on a joint and several note, and one only was sued, payment of interest by the other was held an acknowledgment as to all. Vide etiam *Jackson* v. *Fairbank*, 2 H. Bla. 340.

of

of the time mentioned, they being alledged in the replication as two distinct facts; and when the defendant takes issue on one of those facts, he admits the other to be true, and consequently it need not be proved. —*Osman* v. *Bowley*, H. 12 Geo. I. *Per Eyre*, C. J. *(a)*

The defendants were executors of the executor of *W. W.* and in an action of *assumpsit*, pleaded *non assumpsit infra sex annos*; the plaintiff replied, that on the 3d *June*, 28 *Geo.* II. he sued out a bill of *Middlesex* against the defendants, and that the testator in his life-time promised to pay the demand within six years before the bill of *Middlesex* sued out.— The first item in * the bill whereon this demand arose, was in 1746, and [*150] all the items except the last were above six years standing before the bill of *Middlesex* sued out. Mr. *Norton* insisted for the plaintiff, that the last item being within six years, and this being a current account, never liquidated, should draw the former items out of the statute: But *Denison*, J. held that the clause in the statute of limitations about merchants' accounts extended only to cases where there were mutual accounts, and reciprocal demands between two persons: But if there were only a demand by *A.* against *B.* in the common way of business, as by a tradesman on his customer, that cannot be called merchants accounts: and he was very clearly of opinion that in this case the statute was a bar to all demands of above six years standing.—*Cotes* v. *Harris et al'*. Sittings at *Guildhall*, T. 29 & 30 Geo. II. *Wace* v. *Wyburn*, T. 19 Geo. III. K. B.

If an executor bring *assumpsit* on a promise made to his testator, and the defendant plead that he made no promise to the testator within six years; if issue be joined thereon, a promise to the executor within six years will not maintain the action.—*Green* v. *Crane*, H. 5 Ann. B. R. Salk. MSS. 2 Ld. Raym. 1101. S. C.

If an executor take out proper process within a year after the death of his testator, if the six years were not lapsed before the death of the testator, though they be lapsed within that year, yet it will be sufficient to take it out of 21 *Jac.* I. *c.* 16. by the equity of *s.* 4.—*Cawer* v. *James*, T. 15 Geo. II. C. B. Willes 255. S. C. nom. *Karver* v. *James*.

So if an executor bring *assumpsit*, but die before judgment, and the

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(a) As where to a plea of the statute, plaintiff replied a bill of *Middlesex* issued on a certain day, and defendant rejoins that he did not promise within six years before that day, plaintiff cannot give parol evidence of the time of suing out the writ, but he must produce the writ itself; that not being admitted. *Burnell* v. *Braund*, Esp. N. P. Dig. 155.

six years run, his executor may, notwithstanding, bring a fresh action, so as he bring it in a reasonable time, which is to be discussed at the discretion of the justices upon the circumstances of the case. (*Wilcocks* v. *Huggins*, T. 1731. Fitzg. 170. 289. 2 Stra. 907. S. C.)*(a)* And note; though *assumpsit* be not within the letter of the proviso of 21 *Jac.* I. which excepts persons beyond seas, yet it is within the equity of it; therefore where the plaintiff replied to the plea of *non assumpsit infra sex annos*, that he was beyond sea till such a time, after which he brought the action at such a day, it will be good. But the plaintiff would not have been excused by the defendant being beyond sea before the statute of 4 & 5 *Ann.*—*Hall* v. *Wybourn*, T. 2 W. & M. 1 Show. 81.*(b)*

Assumpsit in consideration that the plaintiff at the defendant's request would receive *A.* and *B. ut hospites* and diet them, the defendant promised to pay. The defendant pleaded *non assumpsit infra sex annos*, and on demurrer it was holden to be no plea, for it is not material when
[* 151] the promise was made if the cause * of action be within six years, therefore the plea ought to have been *actio non accrevit infra sex annos.*—*Gould* v. *Johnson*, H. 1 Ann. Salk. 422. *(c)*

If an action be properly commenced in an inferior court within the six years, and the defendant remove it by *ha. cor.* to the *K. B.* the statute will be no bar though the six years be elapsed before the removal.

(a) See Mr. *Selwyn*'s note on this subject in his Ni. Pri. Abr. pl. 130, 131. See more of S. P. as relating to executors and administrators in *Deane* v. *Crane*, Salk. 28. *Sarell* v. *Wine*, 3 East, 409. *Hickman* v. *Walker*, Willes, 27. *Smith* v. *Hill*, 1 Wils. 134. *Perry* v. *Jackson*, 4 T. Rep. 516. *Bree* v. *Holbech*, Dougl. 630. (655), *Cary* v. *Stevenson*, 2 Salk. 421.

(b) By 4 *Ann.* c. 16. *s.* 19. "If "any person against whom there be "any cause of action for seaman's "wages, trespass, detinue, trover, "replevin, for taking goods or cha-"tels, account, case, detinue, "grounded on any lending or con-"tract without specialty, debt for "arrears of rent, assault, menace, "battery, wounding, or imprison-"ment, shall be at the time any "such cause of action *given* or *ac-crued* beyond the seas, then the "person intitled to such action shall "be at liberty to bring his action "against such person after their re-"turn from beyond seas, so as they "bring the same within such time "after their return, as were re-"spectively limited for bringing the "said action before by this act, or "by 21 *Jac. c.* 16."

Note, *s.* 17, had limited suits for seaman's wages in the Admiralty courts to six years.

Before the above statute it was held, that the exception in the 7th section of the statute of King *James*, extended only to absent plaintiffs, and not to absent defendants. *Hall* v. *Wybourn*, Carth. 136. *Chevely* v. *Bond*, Carth. 226.

(c) Vide ante, p. 148 *a*, n. (b), where it is observed that this statute is pleadable in two forms.

(*Cawer*

(*Cawer* v. *James*, T. 14 Geo. II. C. B. Vide etiam *Bevin* v. *Chapman*, 1 Sid. 228. *Matthews* v. *Phillips*, Salk. 424.) And note; A *capias* is good without an original, as well as a *latitat* without a bill of *Middlesex*. (*a*) And a *latitat* sued in the vacation will by fiction of law save the limitation of time, unless the defendant in his rejoinder set out the very day on which the *latitat* issued. (*Metcalfe* v. *Burrows*, M. 14 Geo. II.) If the plaintiff would take advantage of such process, he must shew that he has continued the writ to the time of the action brought, and must set forth that the first was returned: For if the defendant plead *non assumpsit infra sex annos ante exhibitionem billæ* and issue be taken thereupon, he cannot give the *latitat* in evidence; for a *latitat* may either be the commencement of the action, or only process to bring the defendant into court; and as process it may be sued out before the cause of action accrues: (*Lambert* v. *Whiteley*, E. 1760. K. B. *Kinsey* v. *Heyward*, H. 10 W. III. 1 Raym. 434. Et vide

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(*a*) But the plaintiff must shew that such writ was returned. *Karver* v. *James*, Willes 255, or the variance will be fatal. *Brown* v. *Babington*, Ld. Raym. 883. And in *Atwood* v. *Burr*, 7 Mod. 5, *Holt*, C. J. said, "If one were to continue a *latitat* "for several years, he must get the "first returned; upon which his con- "tinuances may be made, though he "never take out another writ." Vide etiam *Harris* v. *Woolford*, 6 T. Rep. 618. S. P. So in *Kinsey* v. *Heyward*, 1 Lutw. 256. Ld. Raym. 482, where the question was, whether an *assumpsit* in one county should be considered as a continuance of a *claus. freg.* in another, within the limited time, so as to prevent the statute from attaching. *Treby*, C. J. *Powell*, J. and *Nevill*, J. held that it should, contra *Blencowe*, J. On error brought in *B. R.* the court thought this point difficult to maintain, but reversed the judgment, because no return of the writ of continuance was stated, and the latter decision was affirmed by the lords. In *Brown* v. *Babington*, sup. Lord *Holt* concurred with *Blencowe*, J. but *Powell*, J. retained his former opinion, alledging that a *claus. fregit* was ancient process in the Common Pleas, and very useful in saving the fine upon the original.

An *informal* writ will save the statute. *Leadbeater* v. *Markland*, 2 Bla. 1131, but a process, which is a *nullity*, will not. *Green* v. *Rivett*, 2 Salk. 421. So will a plaint in an inferior court, if the plaintiff aver it was for the same cause of action. *Story* v. *Atkyns*, 2 Stra. 719.

But the statute will attach on a demand, pending a suit in equity for the same. *Anon.* 1 Vern. 73. Et vide *Bridgm. Anal. Dig. Eq.* tit. *Limitations, stat. of*, s. 1, pl. 9, though the court will protect a man's right, if he be stayed by the act of the court, as by an injunction, &c. *Anon.* 1 Vern. 74. *Anon.* 2 Ch. Ca. 217. *Craddock* v. *Marsh*, 1 Ch. Rep. 205. *Hurdret* v. *Calladon*, 1 Ch. Rep. 214. Yet it is necessary that a suit should be continued, for a writ without proceedings will not do. *Lacon* v. *Lacon*, 2 Atk. 395. *Budd* v. *Berkenhead*, 2 Salk. 420. *Smith* v. *Bower*, 3 T. R. 662. And the continuances must be pleaded where the cause commenced by *lat.* or *claus. freg. Finch* v. *Wilson*, 1 Wils. 167. *Whitehead* v. *Buckland*, Sty. 373. 401.

Johnson v. *Smith*, 2 Burr. 950.) As where the defendant pleaded a tender before exhibiting the bill, the plaintiff replied a *latitat* sued out before, the defendant rejoined *non assumpsit* before suing out the *latitat*, and on demurrer had judgment.—*Wood* v. *Newton*, T. 19 Geo. II. 1 Wils. 141.

In an *indebitatus assumpsit* on a promise to pay on demand, the defendant pleaded *non assumpsit infra sex annos*; the plaintiff demurred, because the plea should have been, that there had been no demand within six years, or *non assumpsit infra sex annos* after demand. But the court held that an *indebitatus assumpsit* shews a debt due at the time of the promise, and therefore the plea good; (*Collings* v. *Burrows*, H. 12 W. III. 12 Mod. 444.) but if the promise had been of a collateral thing which would create no debt till demand, it might be otherwise. (*Powel* v. *Pierce*, M. 4 Geo. I.) In such case the plea is *quod actio non accrevit infra sex annos.* (*a*)

Where a mere duty is promised to be paid on request, as in consideration of £10 lent to the defendant, he promised to pay it on request, there no actual request is necessary, but the bringing the action is itself a sufficient demand. (*Birks* v. *Trippat*, M. 18 Car. II. 1 Saund. 33. *Wallis* v. *Scott*, E. 4 Geo. I. 1 Stra. 88. S. P.) But it is otherwise on a promise to pay a collateral sum on request; as where the defendant promised to pay £40 on request if he did not perform an award, there an actual request is necessary, and must be set forth in the declaration, and *sæpius requisitus* will not serve.—*Hill* v. *Wade*, H. 1619. Cro. Jac. 523.

General Issue.—The defendant may in this action (whether it be a general or special *assumpsit*) upon the plea of *non assumpsit*, which is
[*152] the * general issue, (for if the defendant plead not guilty, the plaintiff may demur, though if issue be joined thereon and a verdict for the plaintiff, it cannot be moved in arrest of judgment, *Beckford* v. *Clark*, H. 16 Car. II. 1 Sid. 236.) give in evidence any thing which proves nothing due, as the delivery of corn or any other thing in satisfaction, or a release; so he may give in evidence performance. (*Elrington* v. *Doshant*, M. 16 Car. II. 1 Lev. 142.) And though in *Fitz* v. *Freestone*, H. 27 & 28 Car. II. 1 Mod. 210. a distinction is taken between a general and special *assumpsit*, and it is said that in the last case payment or any other legal discharge must be pleaded, yet that distinction is not law; (*Harmon* v. *Ouden*, M. 13 W. III. Salk. 140.) but in both cases the defendant is

(*a*) As in *Gould* v. *Johnson*, 2 Salk. 422, *et ante*, p. 151.

allowed

allowed to give in evidence any thing that will discharge the debt, so he may give in evidence an usurious contract, because that makes it a void promise.—*Per Holt*, H. 2 Ann. Salk. MSS. *Bernard Lord* v. *Saul*, H. 8 Geo. I. 1 Stra. 498. *(a)*

Note; That a promise, before it is broken, may be discharged by parol agreement: but after it is broken it cannot be discharged without deed by any new agreement, without satisfaction.—*Season* v. *Gilbert*, T. 27 Car. II. 2 Lev. 144. *Walwyn* v. *Awbrey*, T. 29 Car. II. 11 Mod. 259. *May* v. *King*, T. 13 W. III. 12 Mod. 538.

So he may give in evidence on the general issue, that he was an infant at the time of making the promise. For the gist of the action is the fraud and delusion that the defendant has offered the plaintiff in not performing his promise, and therefore whatever goes to shew there was no contract, or that it was performed or released, or that there was no consideration, goes to the gist of the action, because there could be no delusion or fraud to the plaintiff at the time of the action brought. (*Gilb. Hist. of C. B.* 53.) So he may give in evidence that the plaintiff has a partner, for then it would not be the same contract; or that the promise was made by him and another jointly; (*Leglise* v. *Champante*, M. Geo. II. 2 Stra. 820.) though in regard to this there has been some latitude of late in the conduct of most judges, who will not nonsuit a plaintiff on such evidence, unless it appear clearly that the plaintiff knew there were more partners than he has brought his action against, for he gave credit only to such, and therefore the law may well raise an *assumpsit* in them only.

(a) As to the *general issue*, it has been held, that where the defendant pleaded *not guilty* by mistake it was held good after verdict, though it would have been bad on demurrer. *Marsham* v. *Gibbs*, 2 Stra. 1122. Ca. temp. Hardw. 173. *Elrington* v. *Doshant*, 1 Lev. 142. *Corbyn* v. *Browne*, Cro. Eliz. 470.

To a declaration in *assumpsit*, consisting of several counts on several promises, defendant may plead *non assumpsit* generally. *Taylor* v. *Willes*, Cro. Car. 219. And under this issue he may go into an equitable defence, for he may prove a release without pleading it, and take advantage of every equitable allowance possible. *Per Mansfield*, C. J. in *Moses* v. *Macferlan*, 2 Burr. 1010.

And as to what may be given in evidence under this issue, it has been held, that in *assumpsit* for money had and received, defendant may give in evidence a *retainer* of money in his hands due to the plaintiff, without a plea or notice of sett-off. *Dale* v. *Sollet*, 4 Burr. 2133. So he may have *payment* of the debt sued for. *Hatton* v. *Morse*, Salk. 394. Ld. Raym. 787. So an *usurious contract* may be given in evidence. *Bernard Lord* v. *Saul*, sup. Fortesc. 336. So may *infancy*. *Season* v. *Gilbert*, sup. *Darby* v. *Boucher*, Salk. 279. So may *coverture*. *James* v. *Fowks*, 12 Mod. 101. So may *gaming*. *Hussey* v. *Jacob*, Ld. Raym. 89. Salk. 344. Com. 4. And in general whatever defeats the promise is good evidence on this issue. *Burrows* v. *Jemino*, 2 Stra. 733.

(*Segar*

(*Segar* v. *Randal*, M. 24. Car. II.) And in a late case, where two persons were partners, and the plaintiff dealt with them as such, and entitled his account "*Cole & Shute*," but brought his action against one only, and was nonsuited at the assizes; the court set aside the nonsuit, and granted a new trial.—*Rice* v. *Shute*, H. 10 Geo. III. B. R. 2 Bla. 692. *(a)*

Matters of law that do not go to the gist of the action, but to the discharge of it, are to be pleaded, as the statute of limitations. *(b)* So if
[*153] a less sum be paid before that time, because that * is not a performance which destroys the being of a promise, but a collateral agreement that supplies the performance of it: But such evidence may be given in mitigation of damages.—*Abbot* v. *Chapman*, H. 24 & 25 Car. II. 2 Lev. 81. *(c)*

(*a*) If the plaintiff hold two defendants to bail on a joint writ, and declare against them separately, the court will set aside all the proceedings. *Moss* v. *Birch*, 5 T. Rep. 722.

When a joint action lies against several persons, and some of their names are not known, the action may be brought against those who are known by their particular names, and they may be declared against *simul cum aliis*, &c. *Billinge* v. *Crossley*, Comb. 260.

(*b*) But matters of law that amount to the general issue, and go to the gist of the action may be pleaded or given in evidence. *James* v. *Fowks*, 12 Mod. 101. Therefore if the promise be good in law, and not performed, defendant may, under the general issue in certain cases, give some legal excuse for non-performance, as a foreign attachment. *Willes* v. *Needham*, Ld. Raym. 180.; or a release. *Miller* v. *Aris*, Selw. Ni. Pri. Abr. 106, or a *discharge by parol before* breach, but not *after*, without a deed and satisfaction. *May* v. *King*, 1 Mod. 538. So if there has not been any contract between the parties or if there be one different from the plaintiffs declaration, the general issue may be pleaded. *Leglise* v. *Champante*, 2 Stra. 820. But a different rule holds in tort. *Addison* v. *Overend*, 6 T. Rep. 766. *Bloxham* v. *Hubbard*, 5 East, 407. Indeed in *assumpsit* against one or more defendants, if any of the persons who ought to be joined, are omitted, defendant can only take advantage of it by plea in abatement. *Rice* v. *Shute*, sup. *Abbot* v. *Smith*, 2 Bla. 947. *Germain* v. *Frederick*, 1 Saund. 291, n. (c). *Dixon* v. *Bowman*, there cited, and *Evans* v. *Lewis*, ibid. 291, n. (b).

(*c*) If the party that makes the *assumpsit*, and he to whom it is made, agree together, and a bond is given and taken for what is promised, the *assumpsit* is discharged. *Shelley* v. *Alsop*, Yelv. 78. Also when the *assumpsit* made, is to stand to an award, if the award made is void, it will make the *assumpsit* void. *Bedell* v. *Moore*, 1 Leon. 170.

If *A.* promised *B.* that when *A.* receives £100, which *C.* owes *A.* that he will pay *B.* £20, *indebitatus assumpsit* lies not, for there was no consideration; but *aliter*, if the money had been originally the money of *B.* *Anon.* Skin. 196. *Indebitatus assumpsit* will not lie for money *paid knowingly, by an illegal consideration*, as an usurious bond, but it will for money paid by mistake in an action of deceit. *Tomkins* v. *Bernet*, Salk. 22.

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In *indebitatus assumpsit* for goods sold, the defendant pleaded *non assumpsit*, and gave in evidence that he became insolvent, and that the plaintiff and his other creditors signed a letter of licence to authorize him to recover monies due to him, and after that having notice of all that he had recovered divided it, and by agreement took 4s. in the pound, and the plaintiff and other creditors signed a general release to the defendant; the plaintiff pretended that the defendant gave him a note promising to pay the intire debt, if he would sign the release, and produce the note. But it was holden that the release was good evidence for the defendant on the *non assumpsit* in this action, and that the plaintiff ought to declare specially upon the special promise.—*Knight* v. *Cox*, *per Pemberton*, C. J. in *Sussex*, 1682. *(a)*

Proof that the plaintiff was a bankrupt at the time of the work and labour done, would be sufficient to nonsuit him.—*Hopkins* v. *Dewar*, H. 32 Geo. II. C. B.

If *A.* give a letter of attorney to *B.* to receive money from *C.* and after bring an action against *C.* *C.* cannot give in evidence (otherwise than in mitigation of damages) that he has paid the money to *B.* since the action brought, for the bringing the action is a revocation of the letter of attorney.—*Anon.* T. 12 W. III. 12 Mod. 409.

A. being indebted to *B.* indorsed a bill of exchange to him, and afterwards, on *assumpsit* brought against him by *B.* gave it in evidence, and that it had laid so long in his hands after it was made payable; but this was disallowed, because a bill shall never go in discharge of a precedent debt, except it be so agreed; *Clarke* v. *Rundal*, 3 W. & M. Salk. 124.) though not applying for payment in a reasonable time, seems fit to be left to the jury as evidence of such agreement.—*Griffith* v. *Pope*, at *Guildhall*, 1698. *per Treby*, C. J. Oct. Str. 2. *Smith* v. *Wilson*, E. 1738. Andr. 190. S. P.

B. brought an action for money had and received against *A.* and *A.* gave in evidence the payment of twenty guineas to the secretary of a

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(a) And in general where there is a special contract, plaintiff should declare upon it, for he cannot go into evidence of any special agreement on a general count in *assumpsit*, and thereby take the defendant by surprise, unless he had notice from the plaintiff that he meant to rely on the general as well as on the special ground. *Weston* v. *Downes*, Dougl. 24. *Towers* v. *Barrett*, 1 Term Rep. 134.

Neither *indebitatus assumpsit* nor debt will lie against the acceptor of a bill of exchange, but action on the case founded on the custom of merchants; for the acceptance is only a collateral engagement to pay the debt of another. *Brown* v. *London*, 1 Vent. 152. *Anon.* Hard. 485.

foreign

foreign minister for a written protection for *B.* and likewise his journies and expences in getting it. Mr. Baron *Clarke* directed the jury, that in case they believed the application for this protection to be by the order of the plaintiff on his own motion, to allow these sums in the account, but if they thought the advice to get such protection came from the defendant, then to allow him nothing; and accordingly the jury, who knew [*154] the defendant to be an artful* designing fellow, and the plaintiff an ignorant young man, who had been drawn into the difficulties he was under by the defendant who acted as an attorney for him, gave a verdict for the plaintiff without allowing the defendant any thing on that account.—*Aldworth's Ca.* Reading, 1749.

Infancy.—One lends an infant money, who employs it in paying for necessaries, the infant is not liable; for it is upon the lending that the contract must arise, and the infant's applying the money afterwards for necessaries, will not by matter *ex post facto*, entitle the plaintiff to an action; (*Earle* v. *Peele*, H. 1711. Salk. 279.)(*a*) but perhaps if the plaintiff prove that the money was lent to buy necessaries with, and that it was laid out accordingly, he would be entitled to a verdict.—*Ellis* v. *Ellis*, 10 W. III. 12 Mod. 197. *(b)*

Assumpsit for goods sold, the defendant pleaded non-age, the plaintiff replied they were *pro necessario victu et apparatu ad manutentionem familiæ suæ*; the defendant rejoined that he kept a mercer's shop at *Shrewsbury*, and bought those wares to sell again, and traversed that he bought them *pro necessario, &c.* and demurrer thereupon; and *per cur'*: This buying for the maintenance of his trade, though he gain thereby his living, shall not bind him, for an infant shall not be bound by his bargain for any thing but for his necessity, *viz.* diet and apparel or necessary learning. (*Whittingham* v. *Hill*, T. 1619. Cro. Jac. 494.)*(c)* But Mr. Baron *Clarke*, in such an action before him, where the defendant gave his non-age

(a) Vide 10 Mod. 67. S. C. and *Darby* v. *Boucher*, Salk. 279. S. P. So in *Probart* v. *Knouth*, 2 Esp. N. P. Rep. 472 (n.) where infancy was pleaded to an action for money lent. *Buller*, J. would not allow the plaintiff to prove that the money was lent to buy necessaries.

(b) Yet in such case the defendant should rejoin and take issue on the expenditure. *S. C.* For where infancy is pleaded, the only replication is, that the goods were necessaries, and such replication must be general, but a farrier cannot reply necessaries for an infant's horses, though his rank and fortune might justify his keeping horses. *Clowes* v. *Brook*, 2 Stra. 1101, or *Brooks* v. *Crowse*, Andr. 277.

(c) Infants are under a disability of contracting debts, except for bare necessaries, and even this exemption is merely to prevent them from perishing. *Brooke* v. *Gally*, 2 Atk. 35. *per* Lord *Hardwicke*. But it is not in all cases that an infant is liable even for necessaries, for when *sub potestate parentis*, he is exempt. *Bainbridge* v. *Pickering*, 2 Blac. 1325.

Case

non-age in evidence, it appearing he had been set up in a farm, and bought the sheep of the plaintiff in the way of farming, directed the jury to give a verdict for the plaintiff, and said he thought the law ought not to put it in the power of infants to impose upon the rest of the world.*(a)* And the *Scotch* law is agreeable to this determination. Vide *Erskine*'s Principles, *l.* 1. *tit.* 7. *s.* 21. However, in the case of *Wywall* v. *Champion*, (M. 11 Geo. II. 2 Stra. 1083.) at *Guildhall*, *Lee*, C. J. would not suffer the plaintiff to recover for tobacco sent to the defendant, who set up a shop in the country, he appearing to be an infant; for the law will not suffer him to trade, which may be his undoing.

A copyhold estate devolved on the defendant when he was an infant of six years of age: a fine was assessed, and he was admitted to the estate on his coming of age. *Assumpsit* was brought for this fine, and upon the case reserved the question was, whether *assumpsit* would lie for the fine, which the jury * found to be a reasonable one? The court held [*155] clearly that the action lay: and *per Yates*, J. if *assumpsit* had been brought against the infant during his minority, it would have lain. Debt in this case may not lie against an infant, because he cannot wage his law; (*Evelyn* v. *Chichester*, B. R. T. 5 Geo. III. Burr. 1717.) *(b)* but if an infant take a lease for years and hold, he may be charged in debt for that rent. If an infant be bound for necessaries, *a fortiori* he is for an old fine, which is necessary to entitle him to receive the rents

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Case will not lie against an infant on an account stated. The ground is this, the only consideration for a promise is, the stating of the account; now an infant cannot state an account, therefore the consideration does not hold, and the promise is void. *Bartlett* v. *Emery*, 1 T. R. 42 (n). *Freeman* v. *Hurst*, M. 26 Geo. III. B. R.

If an infant be sued, he must appear by a guardian, if not, the plaintiff may move the court to have one appointed. 2 *Inst.* 26. If an infant recovers by verdict, or judgment goes by default where he is plaintiff, it cannot be assigned for error, *that he is an infant*, for the defendant should have summoned to stay proceedings until a guardian was appointed. 21 *Jac.* I. *c.* 13. 4 *Ann. c.* 16.

(a) The law, however, seems to be, that an infant is not bound to pay for goods sold to him in the way of his trade, for the law will not allow an infant to trade. *Whittingham* v. *Hill*, Cro. Jac. 494; and so it was ruled by *Lee*, C. J. in *Wywall* v. *Champion*, 2 Stra. 1383, and by *Kenyon*, C. J. in *Dilk* v. *Keighley*, 2 Esp. N. P. Ca. 480. and in *Williams* v. *Harrison*, Carth. 160, where plaintiff having declared against two persons, and one of them pleaded infancy, the plea was held good on demurrer, for the bill was drawn in the course of trade, and not for necessaries. So in a similar case upon a plea of infancy by one partner, the plaintiff ought not to enter a *nolle prosequi* as to the infant, and proceed against the rest, but to discontinue the first action, and proceed *de novo* against the other partners. *Jaffray* v. *Frebain*, 5 Esp. N. P. Ca. 47, where Lord *Ellenborough* recognized *Chandler* v. *Parkes*, 3 Esp. N. P. Ca. 76.

(b) Vide *Borough's Ca.* 1 Lord Raym. 36. S. P.

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and profits of his estate, thereout to provide necessaries. But in this case it is clear beyond all doubt, as he has confirmed the contract by his enjoyment since he came of age.—*Kirton* v. *Elliot*, H. 1612. 2 Bulstr. 69.

Lord *Bacon*, in his maxims to illustrate his eighteenth rule, "*persona conjuncta æquiparatur interesse proprio*," says, that if one under age contract for the nursing of his lawful child, the contract is good, and shall not be avoided by infancy.

So necessaries for an infant's wife are necessaries for him, but if provided only in order for the marriage, he is not chargeable, though she use them after.—*Turner* v. *Frisby*, E. 1718. Stra. 168.

But though a promise by an infant will not bind him unless for necessaries, yet he shall take advantage of any promise made to him, although the consideration for such promise were the infant's promise; as in the case of *Holt* v. *Ward*, (5 & 6 Geo. II. Stra. 937.) where the plaintiff (an infant) recovered in an action on mutual promises of marriage. (*a*)

And note; If goods, not necessaries, be delivered to an infant, if after full age he ratify the contract by a promise to pay, he is bound.—*Southerton* v. *Whitelock*, H. 12 Geo. I. Stra. 690. (*b*)

An infant bought a chariot and horses, and within age gave a single bond for the money, and afterwards at full age promised to pay. In an action of *assumpsit* this matter was found specially, and the court were of opinion that the contract was so extinguished by giving the bond, that it did not remain so as to be a consideration for this promise at full age, and gave judgment for the defendant.—*Capper* v. *Davenant*, T. 29 Car. II. B. R. (*c*)

Tender.

(*a*) But where an infant is responsible in cases *ex delicto*, he cannot derive any advantage from his infancy, as in *Bristow* v. *Eastman*, 1 Esp. N. P. Ca. 172. Peake's N. P. Ca. 223. *Kenyon*, J. said, that case for money had and received would lie against an infant who had embezzled money, though he was not bound *ex contractu*, and though such an action was in form *ex contractu*, it was *ex delicto* in substance, and in trover for the lost money, infancy would be no bar.

(*b*) But he shall not be bound beyond the extent of such promise, as where it is to pay a composition only. *Green* v. *Parker*, Esp. N. P. Dig. 164. Nor shall a plaintiff in any case, grounded on a contract, convert it into a tort for the purpose of charging an infant. *Manby* v. *Scott*, 1 Sid. 129. Hence, whatever be the form of action, if the act done by the infant, be a proper ground for *assumpsit*, infancy will be a good plea in bar. *Jennings* v. *Rundall*, 8 T. Rep. 335.

(*c*) *Vide* 3 Keb. 798. S. C. nom. *Tapper* v. *Davenant*. But where the things furnished *were necessaries*, an infant may bind himself by a bond for

Tender.—As it is very common in *assumpsit* for the defendant to plead *non assumpsit* as to part, and a tender as to the rest, it is proper to be known that upon such an issue it is sufficient for the defendant to prove a tender of the money in bags, or untold, for it is the receiver's business to tell it; but if the defendant say, "Here I am ready to pay you," and yet hold * the bags all the time under his arm, it would not be a good tender.—*Wade's Ca.* 43 Eliz. 560. 115. *Suckling* v. *Coney*, Noy. 74. (*a*) [*156]

And note; That a tender cannot be pleaded after an imparlance, unless within the first four days in term, except under particular circumstances the court give leave so to do; as where the writ was returnable in *Easter* term, and declaration not delivered till the day before the essoign day of *Trinity*, and the defendant lived in *Shropshire*, so that the agent could not get instructions in time.—*Bailey* v. *Holdstone*, T. 16 & 17 Geo. II. C. B. (*b*)

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for the exact amount and value of the goods furnished, if it be without a penalty. *Ayliffe* v. *Archdale*, Cro. Eliz. 920, and so where an infant give a single bill for necessaries, it was held good. *Russell* v. *Lee*, 1 Lev. 87. But where an infant binds himself in an obligation with a penalty, it is void. *Whittingham* v. *Hill*, Cro. Jac. 494. *Ayliffe* v. *Archdale*, sup. In general, however, the contracts of an infant are so far deemed void, that if he incur a debt for any thing not necessary, the promise of his executor to pay will not bind his estate, for the promise being void *ab initio*, it is void *in toto*. *Stone* v. *Wythipoll*, Cro. Eliz. 126.

Again, in *Southerton* v. *Whitelock*, 1 Stra. 690, it was held, that though an infant be exempt from all debts, but necessaries, yet, if goods not necessary be delivered to an infant, and he ratify the contract at full age by a promise of payment, he shall be bound, but it is for the jury to determine what is a ratification. Sed vide *Cockshott* v. *Bennett*, 2 T. Rep. 766. where *Ashhurst*, J. speaking of subsequent promises, confines their operation to securities, which are only voidable, and may be revived after an infant becomes of age, but if he waive his privilege, the subsequent promise will operate on the preceding consideration; and an infant may waive his privilege if he pleases, for it is personal, and to be claimed only by himself. *Keane* v. *Boycott*, 2 H. Bla. 515. therefore he cannot plead his infancy by attorney. *Everden* v. *Appleby*, Selw. N. P. Abr. 109.

(*a*) A tender of a bank bill, and an offer to turn it into money, is a good tender. *Per* Lord *King*, in *Austen* v. *Dodwell's Executors*, 1 Eq. Ca. Abr. 318, cited in *Jones* v. *Barkley*, Dougl. 662. (688.) but not if objected to at the time. *Grigby* v. *Oakes*, 2 Bos. & Pull. 526, in *C. B.* but the *K. B.* has not yet determined that a tender in bank notes is good *at all events*, but when they are not objected to as bank notes, the court will admit the tender, though the statute of 37 *Geo.* III. *c.* 45. has not made them a legal tender. *Wright* v. *Reed*, 3 T. Rep. 554.

(*b*) Vide *Giles* v. *Hart*, Salk. 622. Carth. 413, where it is laid down as a general rule, that a tender cannot be pleaded after an imparlance, but in *Bailey* v. *Holdstone*, sup. *Browne* v. *Hagan*, Barnes, 357, and *Fittfield* v. *Morley*, ibid. 362.

Where

Where there is no certain time in the promise for the payment of the money, the defendant is to be always ready to pay, and when he pleads *semper paratus* the plaintiff must in his replication shew a special request and refusal, if there be any, for the request laid in the declaration is not material or traversable.—*Ferrand* v. *Pearson*, E. 2 Geo. I. C. B. and *Johnson* v. *Mappletoff*, H. 2 Jac. I. Lutw. 224. denied to be law. *(a)*

Note; The jury may in this action, if they see reason, give less damages than are proved: as suppose a promise to pay for an horse a farthing a nail, doubling it each time: or a promise to pay £1000 if the plaintiff cured the defendant's eye, or such like.—*Boldero* v. *Andrews*, H. 26 & 27 Car. II. *per Hales*, C. J. *Anon.* E. 22 Car. II. 1 Vent. 65. 267.

(a) On a promise to pay a certain sum monthly, action on the case may be brought before the whole is payable, for it is grounded on the promise, which is broken by every non-payment; it differs from a bill of debt, which, being founded on a specialty, cannot be demanded until the entire sum is due. *Leneret* v. *Rieett*, Cro. Jac. 504.

And further, as to the form in which a tender shall be made, see *Sweatland* v. *Squire*, 2 Salk. 623. *Giles* v. *Hart*, Salk. 622. Carth. 413. *Lancashire* v. *Killingworth*, 2 Salk. 623. *Clemens* v. *Reynolds*, Say. 18. *Hume* v. *Peploe*, 8 East, 168. And as to what shall be a good tender, see *Wade's Ca.* 5 Co. 114. *Douglas* v. *Patrick*, 3 T. R. 683. *Dickenson* v. *Shee*, 4 Esp. N. P. Rep. 68.

CHAPTER III.

OF THE ACTION OF COVENANT.

THERE is no set form of words necessary to be made use of in creating a Covenant, and therefore any will do which shew the parties' concurrence to the performance of a future act; (*Ld. Cromwell* v. *Andrews*, M. 43 Eliz. 2 Co. 72 b.) *(a)* as when a lessee covenants to repair, "Provided always and it is agreed that the lessor should find timber," this makes a covenant on the part of the lessor.—*Holder* v. *Tayloe*, T. 12 Jac. I. 1 Rol. Abr. 518. pl. 3.

(a) And any such, if they import an agreement, will support this action. *Holder* v. *Tayloe*, 1 Rol. Abr. 518. *Nurtie* v. *Hall*, 1 Vent. 10; as where the words are, "and the lessee shall repair the mills," in a lease of mills by indenture. *Brett* v. *Cumberland*, Cro. Jac. 399. Poph. 136. So a mutual agreement between master and apprentice that each shall do a certain thing, is a covenant on both sides. *Esp. N. P. Dig.* 267. See also *Hollis* v. *Carr*, 2 Mod. 91. *Harwood* v. *Hilliard*, ibid. 269, as to what amounts to a covenant.

Though

Though covenant lies on a deed poll as well as on a deed indented, yet the parties must be named therein; and therefore * if upon oyer the [* 157] deed appear to be only that the defendant promised and engaged himself to bring in the body of *A.* without saying, "to plaintiff" no action will lie.—*Green* v. *Horne*, E. 6 W. & M. Salk. 197.

There are some words which of themselves import no express covenant, yet in certain contracts amount to such, and are therefore covenants in law; *(a)* as where a man leases lands for years by the words *concessi* or *demisi*, if the lessee be evicted he may have covenant. (*Spencer's Ca.* 25 Eliz. 5 Co. 17.) So if an assignment be made by the word *grant*. (*Coleman* v. *Sherwin*, M. 1 W. & M. Carth. 98.) So the words *yielding and paying* make a covenant for paying of rent.—*Person* v. *Jones*, M. 21 Jac. I. 2 Rol. Rep. 399.

But if a man lease goods by indenture which are evicted within the term, yet the lessee shall not have covenant, for the law does not create any covenant upon such personal things; (*Nokes' Ca.* T. 1589. 4 Co. 80.) and therefore, in the case of a lease of a house with the goods, it is usual to make a schedule of them, and have a covenant from the lessee to re-deliver them at the end of the term; for otherwise the lessor can only have trover or detinue.—*Bedford* v. *Hall*, 36 Eliz. Ow. 104.

Covenant will lie for a misfeasance, but not for a nonfeasance; as if a man grant a way, and after stop it, but it is otherwise if he let it go out of repair.—*Pomfret* v. *Rycroft*, M. 21 Car. II. 1 Saund. 322.

If *A.* for a valuable consideration promise by deed not to do a certain thing, case will not lie, but covenant; as where *A.* recovered a debt

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(a) Covenants in law differ from covenants in deed, for, in the latter, the thing to be performed is founded on the words which express what is to be done, but the former do not follow, the words being raised by implication from the express covenants, and required to be performed, as necessary to the enjoyment of such covenants. *Coleman* v. *Sherwin*, Carth. 98.

(b) In a lease of lands for years, if a stranger enter before the lessee, such lessee shall not maintain covenant upon this ouster, because he was never a lessee in privity to have the action. 2 *Danv. Abr.* 234. pl. 6. So when the thing demised runs to decay, and the lessee cannot have the benefit of it, covenant lies not for this nonfeasance, nor can it be brought for a thing which was not *in esse* at the time of the making of the lease. 2 *Danv. Abr.* 233. pl. 6.

A covenant that lands shall continue of such a value, notwithstanding any act done, or to be done, extends only to the time when the covenant was made, and not to the time future. *Maynie* v. *Scott*, Cro. Eliz. 479. 1 Lill. Abr. 352.

So where a lease, *&c.* is void, as there can be no breach of covenant, this action will not lie. *Soprani* v. *Skurro*, Yelv. 18, 19. Yet where covenants are collateral to the lease and interest, though that be void, the covenants may be good. *Waller* v. *Dec. & Cap. Norwich*, Ow. 136.

against

against *B.* *B.* paid the condemnation; upon which *A.* released all actions, executions, *&c.* by deed, and by the same deed promised to discharge all writs of execution against *B.* upon the said judgment.—*Bemishe* v. *Hildersley*, M. 16 Jac. I. 1 Rol. Abr. 517. *(a)*

If the covenant be joint, yet if the interest be several, the covenant shall be taken to be several, and though the covenant be joint and several, yet if the interest be joint the action must be so too; (*Calthorpe's Ca.* Dy. 337.) as if *A.* covenant to do an act for the benefit of *B.* and *D.* and enter into bond to them *et cuilibet eorum* for performance, the interest being joint each cannot bring a separate action; (*Slingsby's Ca.* 30 Eliz. 5 Co. 19.) but two may bind themselves jointly and separately to pay money, and the obligee may sue which he pleases.—*Eccleston* v. *Clipsham*, T. 20 Car. II. 1 Saund. 155.

If several covenant jointly and severally, a defeasance to one is a defeasance to all; but in such case if *A.* covenant that he will not sue *B.* yet he may still sue the rest, for though a covenant that is a perpetual bar, to avoid circuity of action, is construed a release, yet it is not so in its nature, and therefore, where he has a remedy left against the rest,
[*158] it shall be *construed a covenant and no more. (*Clayton* v. *Kynaston*, M. 12 W. III. 12 Mod. 222.) So two deeds made at the same time between the same parties, that have not a reference the one to the other, shall not be construed to be a defeasance the one of the other.—*Lacy* v. *Kynaston*, T. 13 W. III. ib. 552.

And note, That in case of leases for years, the defeasance may be after the first deed, but it would be otherwise in case of freeholds of corporeal inheritances.—*Hambly* v. *Bp. of Winton et al'*, T. 16 & 17 Geo. II. C. B.

(a) But covenant will not lie upon an agreement without deed, but case will. *F. N. B.* 145. Nor does it lie in a lease made by the committee of a lunatic, for he cannot make a lease at law. *Knipe* v. *Palmer*, 2 Wils. 130. And it does not lie, if a covenant be for a personal act of the testator, if the breach is not in his life-time; nor upon a verbal agreement, for it cannot be grounded without writing, except by special custom. *F. N. B.* 145.

A recital of an agreement in the beginning of a deed will create a covenant, on which this action will lie. *Barfoot* v. *Pickard*, 3 Keb. 465. *Severn* v. *Clarke*, 1 Leon. 122.

So when a covenant refers to a preceding instrument upon which it is founded, the instrument shall so determine the covenant as that the covenant shall not exceed it. *George* v. *Butcher*, 2 Vent. 140.

But where a covenant is founded on a conveyance of an estate, if the conveyance be void the covenant is void also. *Capenhurst* v. *Capenhurst*, T. Raym. 27. Yet it is otherwise where the covenant is independent of the estate as to pay the money, *&c.* *Northcote* v. *Underhill*, Salk. 199.

Indenture

Indenture between *Rolle* and another of the one part, and *Yate* of the other part, among other covenants one was thus: "It is agreed between "the parties, that *Yate* shall enter into a bond to pay *Rolle* £160 by "such a day," *Rolle* died, the money not being paid, his executors brought covenant against *Yate;* and the court held that he who survived ought to have the action.—*Rolle* v. *Yate,* T. 8 Jac. I. Yelv. 177.

If in covenant against two there be judgment by default against one, and the other plead performance, which is found for him, the plaintiff shall not have judgment against the other.—*Porter* v. *Harris,* E. 14 Car. II. 1 Lev. 63.

If two men lease for years, and covenant that the lessee shall enjoy free from incumbrances made by them, this shall be taken to be several as well as joint.—*Merriton's Ca.* Noy. 86.

Note; If the covenant be joint, and the action brought only against one, advantage must be taken by pleading it in abatement. (*Vernon* v. *Jefferies,* M. 14 Geo. II. 2 Stra. 1146.) But where it is brought by one covenantee where there are several, advantage may be taken of it without pleading it in abatement by craving oyer, and demurring generally; (*Anon.* T. 21 Car. II. 1 Sid. 420. 1 Vent. 34. S. C.) Note, tenants in common ought to join in the action of covenant for rent.—*Co. Lit.* 198. *(a)*

A. covenants

(a) For in personal actions they must join. *Kitchen* v. *Buckley,* 1 Lev. 109.

Furthermore, where a covenant is made to many, as with and to them together *cum quolibet eorum,* yet it shall be construed according to the interest it passes. *Slingsby's Ca.* 5 Co. 19. 3 Leon. 160. *Matthewson's Ca.* ibid. 22; and the same is to be understood of legal interests. *Anderson* v. *Martindale,* 1 East, 497.

So joint covenants shall be taken distributively for the benefit of the estate. *Merriton's Ca.* sup.

Where the covenant is a covenant in law, it shall be taken to be joint if the interest be so, and the action must be brought against the covenantors jointly for a breach at the time of making it, but for a subsequent breach it may be sued severally. *Coleman* v. *Sherwin,* Salk. 137.

Where a covenant is joint and several, an action may be brought against one, and a breach assigned in the neglect of both. *Lilly* v. *Hedges,* Stra. 553. 8 Mod. 166.

If several covenant jointly and severally, a defeasance to one is a defeasance to all; but the covenantee may covenant with one not to sue him, and yet sue the rest. *Clayton* v. *Kynaston,* 12 Mod. 222.

Where the interest of the covenantors is joint and one dies, the survivors must bring the action, averring the death of their companions. *Rolle* v. *Yate,* sup.

If one named as covenantee in a deed has not executed, it ought to be so averred in an action by his companions. *Vernon* v. *Jefferies,* sup. but more fully in 7 Mod. 358.

From the cases of *Anderson* v. *Martindale,* sup. and *Scott* v. *Godwin,* 1 Bos. & Pull. 67, it appears

A. covenants that *B.* shall serve *D.* as an apprentice for seven years and dies; if *B.* depart within the term, covenant will lie against the executor of *A.* though not named.—*Bro. Covenant*, 12.

Covenants real, or such as are annexed to estates, shall descend to the heir of the covenantee, and he alone shall take advantage of them. *(a)* As where the lessee covenants with the lessor, his executors and administrators, to repair, the heir of the lessor may have covenant, though not named. So if *A.* covenant to make a new lease to *J. S.* at the end of the end of the term *J. S.* dies before, his executor may bring covenant, though not named.—*Chapman* v. *Dalton*, T. 5 Eliz. Pl. Com. 290. *(b)*

Where the plaintiff declared, that the defendant sold to the plaintiff's testator certain land, and covenanted with him, his heirs and assigns, that he should enjoy against him and Sir *P. Vanlore*, and all claiming under them; and assigned for breach, that one claiming under Sir *P.* [* 159] *Vanlore* ejected his testator, it *was objected, that the action ought to have been brought by the heir or assignee. But it was holden that the eviction being in the life-time of the testator, he could not have an heir or assignee of this land, and so the damages belong to the executor, though not named.—*Lucy* v. *Lavington*, M. 23 Car. II. 2 Lev. 26.

The assignee of a term is bound to perform all the covenants which are annexed to the estate, such as to pay rent, repair houses, &c. (*Windsor's Ca.* 41 Eliz. 5 Co. 24.)*(c)* but if the lessee covenant to build a wall

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pears that if the objection of other covenantees not being joined as plaintiffs, arises on the face of the declaration, defendant may take advantage of it by demurrer or by writ of error, according to *Slingsby's Ca.* sup. So where there are several covenantees, and one only brings an action, without averring the death of the others, defendant may either take advantage of it at the trial, as a variance on the plea of *non est factum*. *Eccleston* v. *Clipsham*, Saund. 154, n. (1); or he may crave oyer, and demur generally. *Vernon* v. *Jefferies*, sup. In *Eccleston* v. *Clipsham*, the objection being taken on arrest of judgment, the plaintiff discontinued. *Note*, where there are two covenantors, and one only is sued, defendant may take advantage of the omission by plea in abatement. *Per Lee*, C. J. in *Vernon* v. *Jefferies*, sup.

(a) If a man covenants with another to do any thing, his heir shall not be bound unless he is expressly named, and yet real covenants shall descend to the heir of the covenantee, who alone shall take advantage of them, because it runs with the land.

(b) So if a man covenants with another to do a personal thing and dies, his executor or administrator shall have covenant upon it. *F. N. B.* 145.

(c) Covenants in law which run with the land shall extend to the assignee, who may maintain this action on them as upon the words "demise and grant." The assignee shall have a writ of covenant if ejected, for as the lessee or assignee has the annual profits

wall upon the premises, it shall not bind the assignee unless he be expressly named in the covenant, and though he be named, yet if the covenant were broken before the assignment, he shall not be bound.—*Grescot* v. *Green*, E. 12 W. III. 1 Salk. 199. *St. Saviour's, Southwark*, v. *Smith*, H. 1762. 1 Bla. 351. *(a)*

A. leases to *B.* who covenants to repair, and assigns to *J. S.* who dies intestate, the lessor may bring covenant against the administrator of *J. S.* and declare against him as an assignee.—*Tilney* v. *Norris*, E. 12 W. III. Carth. 319.

If the lessee covenant to repair or pay rent, and grant over his term, yet covenant will lie against him or his executors, though the lessor have accepted rent from the assignee.—*Barnard* v. *Godscall*, M. 1612. Cro. Jac. 309.

So an assignee who assigns over is liable to covenant for the rent incurred during his enjoyment, and if covenant be brought, he may plead, that before any rent was due he granted and assigned all his term to *J. S.* who, by virtue thereof, entered and was possessed; and this will be a good discharge without alledging notice of the assignment, and the assignment will be good though made the day before the rent due to a prisoner in the *Fleet*, nor can the plaintiff take any advantage of it by replying *per fraudem*, unless he can prove a trust: it was the lessor's own fault and folly to take the first assignee for his tenant, nor is he without remedy, for he may bring covenant against the lessee, or distrain upon the land.—*Jordan* v. *Cowell*, 9 Geo. II. *Knight* v. *Buckley*, E. 19 Car. II. 1 Lev. 215. *Thursby* v. *Hall*, H. 21 Car. II. 1 Sid. 402. *Lekeux* v. *Nash*, *per Lee*, at Guildhall, H. 1744. 2 Stra. 1221. *Pitcher* v. *Tovey*, E. 4 W. III. Salk. 81. Carth. 177. *(b)*

As

Profits in return for rent, so for the loss of them he is entitled to a compensation from the lessor. *Nokes' Ca.* 4 Co. 80. *Spencer's Ca.* 5 Co. 17. *Harvey* v. *Oswald*, Cro. Eliz. 553.

So assignees who come in by act of law shall have the benefit of these covenants, and maintain this action as tenant by staple, by statute merchant, or elegit, or he who purchases a lease for years under an execution. So shall a tenant by the curtesy, and so the husband of a fême lessee for years who survives. *Spencer's Ca.* sup. So the executor of *B.* who was executor of *A.* shall have the benefit of a covenant made with *A.* and his assignees, for he is in law the assignee of *A.* *Chapman* v. *Dalton*, Plowd. 284.

(a) As where a lessee covenanted to pull down old houses and build new ones in seven years, and did not, but after seven years assigned the premises demised. *St. Saviour's, Southwark*, v. *Smith*, sup.

An assignee, though not named in a condition, may pay the money to save land, but he shall not receive any money unless he be named. 1 *Inst.* 215.

(b) In an action by the last assignee of a term against one who had agreed to purchase the residue of the term,

As the assignee shall be bound by a covenant, which runs with the land, so shall he take advantage of it. If a man lease land to another by indenture, this covenant in law will go to the assignee of the term.—*Spencer's Ca.* 25 Eliz. 5 Co. 17. *(a)*

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term, it was held that the plaintiff must prove all the mesne assignments and the lease. *Crosby* v. *Percy*, 1 Camp. 303. But where an action was brought by the assignee of a reversion against a lessee, proof of rent paid by the lessee is evidence of the assignment. *Doe* v. *Parker*, Pea. Evid. 267.

(a) When the covenant relates to and is to operate upon a thing as being parcel of the demise, the thing to be done by force of the covenant is *quodam modo* annexed to the thing demised, and shall go with the land, binding the assignee to the performance though not named, as if the covenant be to repair a house then demised, this shall bind the assignee though not named. *Spencer's Ca.* sup. *Tatem* v. *Chaplin*, 2 Hen. Bla. 133. *Sed secus* where the covenant relates to a thing not in being at the time of the demise, as if it be to build a wall *on the land* demised; yet where the covenant names the assignee particularly, he shall be bound, even in the latter case, but to do a thing which is merely collateral to the thing demised, as to build a house *on some other part* of the lessor's lands, there the assignee shall not be bound though named. *Bally* v. *Wells*, 3 Wils. 25.

So where a covenant is for the benefit of the thing demised, it shall extend to the assignee. *Cockson* v. *Cock*, Cro. Jac. 125; and so where it tends to the support of the thing demised, though the assignee is not named. *Dean & Chap. of Windsor*, v. *Gover*, 2 Saund. 302; but if he be named, no action will lie against him if the covenant has been broken before the assignment. *Grescot* v. *Green*, Salk. 199. *St. Saviour's, Southwark*, v. *Smith*, 1 Bla. 351. 3 Burr. 1271.

To entitle the lessor, however, to maintain this action against a lessee as assignee, he must be lessee of the whole term, and no part must be reserved. *Holford* v. *Hatch*, Dougl. 174, (183.) *Tilney* v. *Norris*, Carth. 519. *Spencer's Ca.* sup. *Derisley* v. *Custance*, 4 T. Rep. 74.

As to how far the *lessee* or *assignee* are liable in covenant, there is this material difference, that the lessee, from his covenant, has a privity both of contract and estate, and though he may destroy the privity of estate by assignment, yet the privity of contract remains to make him chargeable. *Chancellor* v. *Poole*, Dougl. 736, (765.) But the assignee comes in privity of estate only, and therefore his liability ceases with his possession. *Eaton* v. *Jacques*, Dougl. 441, (458.) The lessee also is liable for a breach committed by the assignee after assignment. *Walker's Ca.* 3 Co. 22. *Barnard* v. *Godscall*, Cro. Jac. 309. *Norton* v. *Acklane*, Cro. Car. 580. *Auriol* v. *Mills*, 4 T. Rep. 94. But not the assignee, unless in possession. *Taylor* v. *Shum*, 1 Bos. & Pull. 21. *Lekeux* v. *Nash*, 2 Stra. 1221. *Pitcher* v. *Tovey*, 1 Show. 340. et sup. *Chancellor* v. *Poole*, sup. Vide etiam *Barnfather* v. *Jordan*, Dougl. 435. (452.)

It is to be observed, however, that this distinction between the lessee and assignee applies only to cases of express covenants in deed, for it differs in the case of covenants which are collateral, for in such case this action will lie. *Batchelor* v. *Gage*, W. Jo. 223.

So covenant will lie against an assignee of part of the thing demised. *Conan* v. *Kemise*, W. Jo. 245, or *Congham* v. *King*, Cro. Car. 121, which is S. C. and which is recognized in *Stevenson*

By 32 *Hen.* VIII. *c.* 34. which recites, Whereas divers had lands, manors, *&c.* for life or years by writing, containing certain considerations and agreements, as well on the part of the lessees and grantees, their executors, and assigns, as on the part of the lessors and grantors, their heirs and successors: and whereas by the common law no stranger to any condition or covenant *could take advantage thereof: it is enacted, that all persons, their heirs, successors, and assigns, which have or shall have any grant of the king of any lands, manors, *&c.* or any reversion thereof, and also other persons being grantees or assignees to or by the king, or to or by any other person or persons, and the heirs, executors, successors, and assigns of every of them, shall and may have like advantage by entry for non-payment of rent, or for doing waste or other forfeiture, and the same remedy by action only for not performing other conditions, covenants, and agreements contained in the said leases, against the lessee and grantee, their executors, administrators, and assigns, as the lessors and grantors, their heirs or successors ought, should, or might have had at any time or times; *(a)* and by the same act all farmers, lessees and grantees for years, life or lives, their executors, administrators, and assigns, shall and may have like action and remedy against all persons, their heirs, successors, and assigns, which, by the grant of the king, or other persons, shall have the reversion or any part thereof, for any condition, covenant, or agreement contained in their leases, as the lessees or any of them might or should have had against the lessors and grantors, their heirs and successors; recovery in value by reason of any warranty in deed or in law only excepted. [*160]

Stevenson v. *Lambard*, 2 East, 575. And as to how far actual possession is necessary to constitute the lessor so as to maintain this action against an assignee, vide *Walker* v. *Reeves*, Dougl. 444. (461), n.

A covenant which relates to personal goods will not bind the assignee, because there is no privity. *Spencer's Ca.* sup. on the authority of which it was determined that a covenant to name an arbitrator to value trees does not run with the land. *Gray* v. *Cuthbertson*, Selw. N. P. Abr. 428.

An assignee of a lease, to exonerate himself from his liability under the covenants, must part with all his interest in the thing demised, for if he convey less he will remain liable. *Derby* v. *Taylor*, 1 East, 502. Vide etiam *Holford* v. *Hatch*, Dougl. 157. (183.) *Palmer* v. *Edwards*, ib. 178, (187) n. And in the case of a mortgage it was held that such an assignment is not a conveyance of all the interest of the assignor so as to make the mortgagee (not in possession) liable for rent, though the mortgage was forfeited. *Eaton* v. *Jacques*, Dougl. 438, (454.) Lord *Kenyon*, however, expressed his disapprobation of this case in *Westerdell* v. *Dale*, 7 T. R. 312; and again in *Stone* v. *Evans*, cited in 7 East, 371, and reported also in *Woodf. Landl. & Ten.* 113.

(a) At common law, and before this statute, no grantee or assignee could take the benefit of a condition for re-entry. *Lit.* 347. *Co. Lit.* 215.

It is plain this act does not extend to gifts in tail, nor to a grantee by fine, till attornment, for it must be intended of such assignees only, as have had all ceremonies by law requisite.—*Co. Litt.* 215.

The first clause extends to grantees of part of the estate of the reversion, but not to grantees of the reversion in part of the land. *Ibid.* (a)

Whoever comes in by the act and limitation of the party, though in the *post*, is a sufficient grantee within this statute, but it does not extend to such as come in merely by act of law, nor to him who is in of another estate. *Ibid.*

The grantee shall not take advantage of a condition before he has given notice to the lessee, though he may of a covenant.—*Chaworth* v. *Philips*, E. 1609. Mo. 876. Co. Litt. 215 b. *Hingen* v. *Payne*, E. 1619. Cro. Jac. 476. (b)

The words "other forfeiture," shall be taken for other forfeitures like to the examples there put, *viz.* payment of rent, or doing waste, which are for the benefit of the reversion, and therefore conditions for payment of any sum in gross, delivery of corn, *&c.* are not within the meaning of this act. (c) The privity of action is transferred, and it may be
[* 161] brought in the * country where the covenant was made, as well as where the land lies.—*Thursby* v. *Plant*, E. 21 Car. II. 1 Saund. 237. (d)

(a) See *Matures* v. *Westwood*, Cro. Eliz. 599. 617, where it was held, that the assignee of part of the estate in reversion, or of a grant for years of part of the reversion in fee, may take advantage of the condition.

But in *Lee* v. *Arnold*, 4 Leon. 27, it was held, that if there be a lessee of three acres, and the reversion be granted to two of them, the grantee shall not have advantage of the condition, for it is entire, and cannot be apportioned.

(b) The grantee or assignee shall only take advantage of such conditions as are for the benefit of the reversion, like those put, as for waste, non-payment of rent, *&c.* *Chaworth* v. *Philips*, sup. but not for paying a sum in gross. *Hingen* v. *Payne*, sup.

(c) Where the mortgagor and mortgagee of a term made an underlease, in which the covenants for rent and repairs were with the mortgagor and his assigns only, it was held, that the assignee of the mortgagor could not sue for the breach of such covenants, for they were collateral, and not running with the land, but entered into with a stranger to the land, that is, with the mortgagor, who had only an equity of redemption. *Webb* v. *Russell*, 3 T. R. 402, where Lord *Kenyon* recognized the case of *Lord Treasurer* v. *Barton*, Mo. 94, where it was said, that if the estate in reversion in respect of which the condition or covenant was made be extinguished, the condition or covenant is also extinguished.

And in *Dumpor's Case*, 4 Co. 120, it was held, that he who enters for condition broken must be in of the same estate, which he had at the time the condition was created.

(d) Vide *Barker* v. *Damer*, Carth. 183. 3 Mod. 336. Salk. 80. 1 Show. 191, where it was held, that covenant against an assignee of a term was a local action, because it is founded on his privity of estate.

Assignee.—Covenant by the assignee of the lessor against the lessee after his assignment, and after acceptance of rent from the assignee, it is good within the statute.—*Ashurst* v. *Mingay*, M. 32 Car. II. 2 Show. 134. *(a)*

It was formerly holden, that the surrenderee of a copyhold was not an assignee within this act; (*Beal* v. *Brasier*, T. 1617. Cro. Jac. 305. Yelv. 222. *Rowden* v. *Malster*, Cro. Car. 42. Gilb. Ten. 181.) but the latter cases have holden otherwise.—*Glover* v. *Cope*, E. 8 W. & M. Carth. 205. Salk. 185. 3 Lev. 326. 4 Mod. 80. 1 Show. 284. Skin. 296. 305. S. C. *(b)*

Construction of Covenants.—All covenants are to be taken according to the intent of the parties; *(c)* as where the condition of a bond was to

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(a) So the assignee of the reversion who has accepted rent from the assignee of the lessee, shall have covenant against the executor of the lessee for a breach of covenant after the assignment, for it is a covenant *in fait*, and runs with the land, and the lessee, by his own act, shall not discharge himself. *Brett* v. *Cumberland*, Cro. Jac. 521.

(b) For the surrenderee of a copyhold reversion may now bring debt or covenant against the lessee within the equity of this statute, for that is a remedial law, and no prejudice can come to the lord. *Glover* v. *Cope*, sup.

In *Awder* v. *Nokes*, Cro. Eliz. 436, shortly stated in *Pennant's Case*, 3 Co. 63. lessee for years assigned his term by indenture to *J. S.* and therein he covenanted that *J. S.* and his assigns should enjoy the land without interruption. *J. S.* then assigned the term by parol, and the assignee being disturbed, brought covenant, which was held to lie, though the assignment was not by writing, because the assignee was privy in estate. Now, however, by statute 29 *Car.* 2. *c.* 3. *s.* 3. such estates or interests cannot be assigned unless by deed or note in writing.

(c) As to the construction of covenants, Lord *Mansfield* has taken a distinction between such as are implied by operation of law, and such as are express, the latter of which are taken more strictly, for a man may, without consideration, enter into an express covenant by hand and seal, to the performance of which, he is at all events bound. *Shubrick* v. *Salmond*, 3 Burr. 1637; and where the covenant is express, there must be an absolute performance, which shall not be discharged by any collateral matter; a tenant therefore cannot set off his damages sustained by fire against his express covenant to pay rent and to repair, damage by fire excepted. *Monk* v. *Cooper*, 2 Stra. 763. Raym. 1477. Et vide *Cutter* v. *Powell*, 6 T. Rep. 323.

But to this there are exceptions, as where a man covenants to do a lawful act, and that act, by a subsequent statute, is declared unlawful, or is forbidden, the covenant shall be annulled by the statute. So if a man covenants not to do a thing which was then lawful, and a subsequent statute compels him to do it, the statute repeals the covenant. But if a man covenants not to do a thing which was then unlawful, and a subsequent statute makes it lawful, the covenant shall remain unrepealed. *Brewster* v. *Kitchell*, Salk. 198. Raym. 317.

Covenants are to be so construed as to have effect, and correspond with the intention of the parties at the time of entering into them. *Case of Mines*, Plowd. 329. Therefore a performance according to the letter, and not the spirit of the covenant, is

to deliver to the plaintiff an obligation (in which he was bound to the defendant) before such a day; if the defendant sue the plaintiff on the obligation and recover, and afterward before the day deliver the obligation, it will not be a performance. But if *A.* be bound to *B.* that his son (then being *infra annos nubiles*) should before such a day marry *B.*'s daughter, and he does marry her accordingly, and after at the age of consent disagrees to the marriage, yet the covenant is performed. (*Teat's Case*, T. 1582. Cro. Eliz. 7.) But if there be any doubt on the sense of the words, such construction shall be made as is most strong against the covenantor. Therefore if *A.* covenant with *B.* that if *B.* marry his daughter he will pay him *£20 per annum* without saying for how long, yet it shall be for the life of *B.* and not for one year only.—*Hooker* v. *Swain*, E. 15 Car. II. 1 Lev. 102.

A covenant for quiet enjoyment shall not be construed to extend to a wrongful ejectment by a stranger, unless so expressed.—*Tisdale* v. *Essex*, Hob. 34. *(a)*

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is not a legal performance. *Iggulden* v. *May*, 7 East, 241. Vide etiam *Teat's Case*, Cro. Eliz. 7. *Robinson* v. *Aunts*, 1 Sid. 48.

But if a covenant be once well performed, though by a subsequent act it becomes of no effect, yet it is a sufficient performance. *Leigh* v. *Hanmer*, 1 Leon. 52. If however there be any doubt as to the construction of a covenant, it is a rule that it is to be taken in that sense which is most strong against the covenantor, and beneficial to the other party. *Hookes* v. *Swain*, 1 Lev. 102. 1 Sid. 151. Vide etiam *Flint* v. *Brandon*, 1 Bos. & Pull. N. R. 78. Covenants therefore being intended for the benefit of the covenantees, the covenantor shall not be allowed to defeat the effect of his covenant by any act whatever. *Griffith* v. *Goodhand*, T. Raym. 464. T. Jo. 191.

No covenant shall be construed to a greater extent than the words import either in point of time, *Arlington* v. *Meyrick*, 2 Saund. 411. 3 Kebl. 45. 59, or to take in other persons indifferent from those mentioned in the covenant. *Woodroffe* v. *Greenwood*, Cro. Eliz. 517, or to vary the duty to be performed. *London City* v. *Greyme*, Cro. Jac. 182. *Stephens* v. *Carrington*, Dougl. 26. (27.)

Therefore the operation of the covenant must be confined to that only which is in being at the time it is made, and not to any thing subsequent, or of a different nature. *Davenant* v. *Sarum Bishop*, 2 Lev. 68. 1 Vent. 223.

It is not at all material in what part of a deed any covenant is inserted, for in the construction of it the whole deed must be considered, in order to discover the meaning of the parties. *Per Buller*, J. in *Northumberland* v. *Errington*, 5 T. Rep. 523. Agreeably to the rules laid down for the construction of covenants, and in support of the apparent intent of the parties, covenants in large and general terms have been frequently narrowed and confined. *Cage* v. *Paxlin*, 1 Leon. 116. cited by Lord *Ellenborough* in *Iggulden* v. *May*, sup. *Broughton* v. *Conway*, Mo. 58. *Browning* v. *Wright*, 2 Bos. & Pull. 13. Vide etiam *Hesse* v. *Stevenson*, 3 Bos. & Pull. 565.

(a) Vide *Selw. N. P. Ab.* 413 (n). for this case, more fully abridged from the record. Vide etiam *Perry* v. *Edwards*, 1 Stra. 400.

The breach of this covenant must

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If *A.* grant a rent-charge to *B.* for the use of *J. S. habendum* to *B.* his heirs and assigns to the use of *J. S.* and covenant with *B.* to pay to the use of *J. S.* if the rent be behind, *B.* may have covenant.—*Cook* v. *Herle*, M. 28 Car. II. 2 Mod. 138.

Where a man covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant.—*Brewster* v. *Kitchell*, H. 9 W. III. Salk. 198. 1 Raym. 317. S. C.

So if a man covenant to do a thing which is lawful, and an act comes to hinder him from doing it, the covenant is repealed. But if a man covenant not to do a thing which was then unlawful, and an act come and make it lawful, such act does not repeal the covenant. *(a)*

If the principal thing to be performed, as the conveying an estate, [162] *&c.* be void, further covenants which are relative and dependant thereon, are so likewise; (*Tilney* v. *Norris*, E. 12 W. III. 1 Salk. 309.) but where the covenants are distinct and separate, it is not material whether an estate passed or not; as a covenant for the payment of a sum of money.—*Brewster* v. *Kitchell*, supra.

Breach of Covenants.—For the better understanding what shall be said to be a breach of covenant, and how far it is necessary to set it

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be by some act inconsistent with it. *Witchart* v. *Vine*, 1 Brownl. 81. *Gervis* v. *Peade*, Cro. Eliz. 615, and where the covenant for quiet enjoyment is against the entry or eviction of the covenantor, his heirs or assigns, a disturbance by him, though done under a claim of right, is a breach. *Lloyd* v. *Tomkies*, 1 T. R. 671.

Though this covenant is usually against any acts of the lessee, or any claimant under him, and those who claim under him are such as come in privity of title as his heir, executor, or assignee; yet there are others to whom this covenant will extend, for it will lie against the executor of the husband of a fême covert seised in fee, whose husband, when living, had covenanted for her estate. *Hurd* v. *Fletcher*, Dougl. 43.

And the covenant to save harmless moves generally on the same principle.

(a) All covenants between persons must be to do that which is lawful, or they will not be binding, and if the thing is impossible the covenant will be held void. *Marvin* v. *Forde*, Dy. 112.

If a man covenant to do a thing before a certain time, and it becomes impossible by the act of God, he is not excused, inasmuch as he has bound himself to do it. 2 *Danv.* 84. pl. 8. As if a person covenants expressly to repair a house, and it is burnt down by lightning, or any other accident, yet he ought to repair it, for it was in his power to provide against that event in his contract. *Paradine* v. *Jane*, Alleyn, 26, 27. 1 *Lill. Abr.* 149. But where houses are blown down by tempest, the law excuses the lessee in action of waste, though in a covenant to repair and uphold, it will not. *Colthirst* v. *Bejushin*, Plowd. 29.

forth

forth in an action of covenant, it will be proper likewise to take notice what would be a breach of a promise or condition, and how far it is necessary to set it forth in an action of debt or upon the case. (*a*)

Debt upon bond conditioned to pay on or before the 5th of *September*, the defendant pleaded payment on the 5th; the plaintiff replied that

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(*a*) *Breach of covenant* is to be considered, first with respect to the time of performance, and secondly, as to the manner.

With respect to the time, covenants are threefold, 1. Such as are mutual and independent, where either party may recover damages from the other for the injury he has received from a breach of the covenants in his favor, and where it is useless for the defendant to alledge a breach of the covenants on the part of the plaintiff, as in *Trench* v. *Trewin*, Raym. 124. *Boone* v. *Eyre*, 2 Bla. 1312. *Hunlock* v. *Blacklow*, 2 Saund. 155. *Cole* v. *Shallett*, 3 Lev. 41.

2. Such covenants as are conditions, and dependant in which the performance of one depends on the prior performance of the other, and therefore till the prior condition is performed, the other party is not liable to an action of covenant, but on this point the principal doubt is, what constitutes a prior condition? On which question see *Blackwell* v. *Nash*, Stra. 535. *Thorpe* v. *Thorpe*, Salk. 171. But there are exceptions, vide *Peter* v. *Carter*, 2 Rol. Abr. 438. Et vide *Esp. N. P. Dig.* 283, the dependance therefore or independance of covenants is always to be collected from the evident sense and meaning of the parties, and however transposed the words may be, their precedency must depend on the order of time in which the intent of the parties requires the performance. *Per Mansfield*, J. in *Kingston* v. *Preston*, cited Dougl. 664. (689.)

3. Such covenants as are mutual conditions, and are to be performed at the same time, for this, if one party be ready and offer to perform his part, and the other neglect or refuse, he who was ready and offered has fulfilled his engagements, and may maintain covenant for default of the other, though it be not certain that either is obliged to do the first act. *Jones* v. *Barkley*, Dougl. 659. (684.) *Clarke* v *Tyson*, 1 Stra. 504. *Maine's Case*, 5 Co. 20. or *Mayne* v. *Scott*, Cro. Eliz. 450.

Secondly. With respect to the manner in which a breach of covenant may be committed. If the covenant be a covenant in a deed, this action will only lie for a misfeasance, and not for nonfeasance. *Pomfret* v. *Ricroft*, 1 Saund. 321. *Rich* v. *Rich*, Cro. Eliz. 43. But in the case of a covenant in law, an action lies on it, though there has been no act to cause a breach. *Holder* v. *Taylor*, Hob. 12.

So breach of covenant must always refer to that which is the subject matter of the covenant or undertaking. *Penn* v. *Glover*, Cro. Eliz. 421. *Dobson* v. *Crewe*, ibid. 705. *Morgan* v. *Hunt*, 2 Vent. 213. *Pitt* v. *Green*, 9 East, 188.

And it must also be committed on that which is granted by and passes under the deed containing the covenant. *Russell* v. *Gulwel*, Cro. Eliz. 657.

To support this action the breach must be committed during the existence of the estate on which the covenant is placed, for if the estate expire at the time the covenant is broken, this actions (it seems) cannot be maintained. *Landydale* v. *Cheyney*, Cro. Eliz. 157. *Brudenell* v. *Roberts*, 2 Wils. 143.

But if the estate has continued after the breach committed, the action will lie even after the estate has expired. *Lanning* v. *Lovering*, Cro. Eliz. 916.

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he did not, and thereupon issue joined: after verdict for the plaintiff, judgment arrested because the replication should have been, that he did not pay at the day, nor at any time before; for otherwise he does not shew a breach to intitle himself to his action, which is necessary in all cases where the plea is founded upon something within the condition. But it is otherwise where the plea is of a collateral matter, (as a release, &c.) for such plea admits a breach, and this rule holds in all cases, except in bonds for the performance of an award; (*Tryon* v. *Carter*, T. 1784. 2 Str. 994. *Fletcher* v. *Hennington*, E. 1760. Burr. 994.) for there, though a collateral matter be pleaded (such as *null agard fait*,) yet the replication must shew a breach, that it may appear to the court to be in such part of the award as is good; for an award may be good in part and bad in part.—*Meredith* v. *Alleyn*, E. 9 W. & M. Salk. 138. S. P.

In case for that the defendant promised to deliver, on or before the 5th *January*, twenty quarters of corn out of a ship into a barge, to be brought by the plaintiff, and breach assigned that the defendant did not deliver on the 5th; on *non assumpsit* verdict for the plaintiff, and on motion in arrest of judgment it was holden by *Holt*, C. J. that as the defendant could not make a tender before the last day, it shall not be presumed that the plaintiff was there to receive it sooner, therefore the declaration would have been good on demurrer, but clearly so after verdict, because an actual delivery at any time might have been given in evidence on the *non assumpsit*.—*Harmon* v. *Owden*, M. 12 W. III. Salk. 140.

In debt upon bond the defendant prayed oyer of the condition, which was to perform covenants in an indenture, and thereupon he brought the indenture into court, and pleaded that there were no covenants on his part to be performed. The *plaintiff prayed *oyer*, and in fact there [*163] being several covenants on the defendant's part to be performed, he demurred. *Saunders* for the defendant objected, that the plaintiff had demurred *trop hastivement*, for that he ought to have shewed a breach to maintain his action; but the plaintiff had judgment, for it appeared judicially to the court, of the defendant's own shewing, that he had pleaded a false plea, and therefore there was no occasion for the plaintiff to shew any matter of fact to maintain his action.—*Veal* v. *Warner*, M. 21 Car. II. 1 Saund. 326. 2 Keb. 568. S. C.

In debt upon a bail-bond, the declaration set forth that *A.* and *B.* and the defendant became bound jointly and severally for the appearance of *A.* that *A.* did not appear, and that the defendant had not paid; special

special demurrer, because not averred that the money was not paid by either of the other two, and compared to a covenant by three. However, upon search of precedents, the plaintiff had judgment.—*Busher* v. *Philips*, H. 8 Geo. II.

Debt on bond conditioned to perform an award, the defendant pleads *nul agard.* The plaintiff replies, and shews an award to pay a sum of money, but no time expressed when, and assigned a breach in non-payment *licet sæpius requisitus.* On demurrer the court held it not necessary to alledge a special request but where the other party may traverse it, which he could not do here without a departure.—*Rodham* v. *Strother*, M. 29 Car. II. K. B. 3 Keb. 830.

There is a great difference between assigning a breach in an action of covenant, and in debt upon bond conditioned for the performance of covenants, because in covenant all is recoverable in damages, and those will be what the party can prove he has actually sustained, but in the other case a breach is a forfeiture of the whole bond; therefore in covenant it is sufficient to assign the breach in the words of the covenant, but that would not do in debt upon bond for the performance of covenants.—*Brigstock* v. *Stannion*, M. 1676. 1 Raym. 107.

And this leads me to take notice of another difference between covenant and debt, *viz.* that at common law in debt upon bond, with condition to perform covenants, the plaintiff could assign only a single breach, but in covenant he might assign as many breaches as he pleased; but now by the 8 & 9 *W.* III. *c.* 11. the plaintiff may in debt on bond, or on a penal sum for performance of covenants, assign as many breaches as he shall think fit, and the jury shall assess not only such damages and
[* 164] costs as have been heretofore usually done in such * cases, but also damages for such of the said breaches as the plaintiff shall prove to have been broken, and like judgment shall be entered on such verdict as has been heretofore usually done on such like occasions; and if judgment be given for the plaintiff on demurrer, or by confession or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches as he shall think fit, upon which shall be a writ of enquiry, *&c.* and in case the defendant after judgment, and before execution, shall pay into court such damages and costs, a stay of execution shall be entered on record; or if by execution the plaintiff shall be paid and satisfied all such demands, costs, and charges, the body, land, or goods of the defendant, shall be thereupon discharged, which shall likewise be entered upon record; but in each case such judgment shall remain as a further security to answer the plaintiff such damages as may be sustained for further breach of any covenant

covenant in the same deed, whereupon the plaintiff may have a *sci. fa.* and so *toties quoties.* (*a*)

But notwithstanding this act, the plaintiff may take damages only *occasione detentionis debiti,* and take out execution for the penalty.—*Dry* v. *Bond,* T. 16 & 17 Geo. II. C. B.

In covenant not to buy or sell without the plaintiff's leave for two years, breach assigned that *diversis diebus ac vicibus* between such a day and such a day he had sold to *H.* and several other persons unknown, goods to the value of £100, and *per Holt,* C. J. in debt on bond to perform covenants, the replication must shew a certain breach, but in covenant it is enough to assign a general breach, and this is certain enough, for it is so described, that if another action be brought, the defendant may plead a former recovery for the same cause, and aver this to be the same selling.—*Farron* v. *Chevalier,* T. 11 W. III. Salk. 1 9.

In covenant for rent the breach assigned was, that the defendant had not paid, without saying "or his assigns;" and the court held the breach well assigned, for the court will not presume an assignment.—*Mayor of London* v. *Sir Fisher Tench,* M. 1733. K. B.

Pleas—Performance.—And now to consider what shall be a sufficient performance, and how to plead it. (*b*)

Where a person undertakes by bond for doing of an act, it is not sufficient for him to shew that he has done all in his power, for the condition is for his benefit, and if not performed he is subject to the penalty; however this rule is subject to this exception, *viz.* Where the condition is prevented from * being performed by the act of God, as by the [*165]

(*a*) Covenant was brought for breach of a condition in an indenture. Demurrer, because the breaches were ill assigned; and one was, "that divers other persons than, *&c.* had been employed by defendant to make cordage," not naming what persons: and it was said, that the particular persons ought to have been named. *Per Ellenborough,* C. J. the facts alledged in these breaches lie more properly in the knowledge of defendant (who must be presumed conusant of his own dealings) than of the plaintiff, and therefore there was no occasion to state them more particularly. *Gale* v. *Reed,* 8 East, 85.

(*b*) If all the covenants in an indenture be in the affirmative, defendant may plead performance generally; but if they are in the negative, he must plead them specially, and to the rest, generally, for a negative cannot be performed. *Cropwell* v. *Peachy,* Cro. Eliz. 691. *Laughwell* v. *Palmer,* 1 Sid. 87. *Ellis* v. *Box,* Alleyn, 72. So if any of the covenants be disjunctive, defendant must shew which he has performed. *Fitzpatrick* v. *Robinson,* 1 Show. 1.

And performance must be pleaded in the terms of the covenant, otherwise it will be bad on a general demurrer. *Scudamore* v. *Stratton,* 1 Bos. & Pull. 455.

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death of the party before the day, or by the act of law; as if I gave a bond conditioned to do an act, and a statute afterwards made it unlawful, or by the act of the obligee himself, for it would be unjust that he should take advantage of his own wrong.—*Hesketh* v. *Grey*, T. 27 Geo. II. *(a)*

Covenant on a demise of a messuage with the appurtenances, in which the defendants covenanted to repair, and breach assigned in not repairing; the defendants pleaded the entry of the plaintiff *in atrium posterius* of the messuage. The court held it no plea, for the entry into the back-yard does not suspend the covenant to repair, as he is still in possession of the messuage; but the rent is suspended by an entry into any part.—*Snelling* v. *Stagg & Andrews*, M. 26 Car. II. C. B. *(b)*

Where there is an express negative and likewise an affirmative in the covenant, the defendant must not plead generally, covenants performed, but must set forth that he has not done what he covenanted not to do, and that he performed what he covenanted to perform; and if any of the covenants be in the disjunctive, he must shew what part he has performed; (Co. Litt. 303 b. *Fletcher* v. *Richardson*, 10 Geo. II.); so if any of them be to be done of record, the performance must be shewn specially, because the record shall be tried by itself.—*Laughaell* v. *Palmer*, M. 14 Car. II. 1 Sid. 87. *Ley* v. *Lutterell*, M. 17 Jac. I. Palm. 70.

But note; That if the negative covenant be only in affirmance of the affirmative, performance generally is a good plea.

If by a deed two things are to be performed, one on the part of the plaintiff, the other on the part of the defendant, if there be not mutual remedy, the plaintiff ought to aver performance on his part: (*Pordage* v. *Cole*, M. 21 Car. II. 1 Saund. 319.) But where the agreement was in these words, "It is agreed upon by *G. S.* and *B. C.* that the said "*B. C.* shall give *J. S.* £100 for all his lands in *Dale*; in witness "whereof we do mutually put our hands and seals:" It was holden

(a) Vide etiam *Bassett* v. *Bassett*, 1 Mod. 265. S. P.

(b) To covenant for not keeping premises in repair was pleaded: 1st, Performance: 2d, A Licence. The plaintiff then offered to put in the deed, without producing the subscribing witness to prove the words more fully than they were stated in the declaration. And this, because there was no plea of *non est factum*. But *per Ellenborough*, C. J. the defendant, by not pleading *non est factum*, only admits as much as is in upon the record, if the plaintiff would avail himself of any other parts of the deed, he must prove it by the attesting witness in the common way. *Williams* v. *Sills*, 2 Camp. 519.

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that the action was well brought without averring the conveyance of the land, for if it were not conveyed the defendant might have an action of covenant against the plaintiff; but it had been otherwise, if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement, as in the case stated.—*Lock* v. *Wright*, T. 9 Geo. I. Stra. 569. Quære, & vide *Kingston* v. *Preston*, Dougl. 664. (689.)

If the covenant of the one part be negative, and the affirmative covenant of the other part be in consideration of the performance thereof; though the negative be broken, yet the affirmative ought to be performed, for it is not a condition precedent, as a negative covenant cannot be said to be performed while it is possible to be broken.—*Eccleston v. Clipsham*, T. 20 Car. II. 1 Saund. 155.

Where the covenant is for the act of a stranger, there performance [166] generally is not a good plea, but he must shew how performed.—*Fitzpatrick* v. *Robinson*, E. 1 W. & M. 1 Show. 1.

A. covenants that he has full power to lease, *&c.* in covenant it is sufficient for the plaintiff to say that he had not full power, but in such case the defendant must shew what estate he had at the time of making the lease, that it may appear he had full power, and then the plaintiff must shew a special title in somebody else, but the covenant being general, the general assignment is *primâ facie* good; (*Bradshawe's Ca.* 10 Jac. I. 9 Co. 60.); yet if *A.* covenant to permit *B.* to take the rents and profits of certain land, *non permisit* alone is too general; for in such case the defendant could not plead *quod permisit*.—*Francis' Ca.* 8 Jac. I. 8 Co. 89.

Tender.—In covenant the damages, and not the debt, being the thing in demand, there is no necessity of pleading tender and refusal with an *uncore prist*.—*Carter* v. *Downish*, M. 1 W. & M. 1 Show. 190. *(a)*

Levy by Distress.—In covenant for non-payment of rent, the defendant cannot plead levied by distress, for that is a confession that it was not paid at the day, but *riens* in arrear, or payment at the day, will be a good plea. *Aliter*, of *riens* in arrear, generally.—*Hare* v. *Saville*, M. 1609. 2 Brownl. 273. *Slater* v. *Carter*, C. B. E. 4 Geo. I. Ca. temp. King, 30.

Release—of all *demands* is not a release of a covenant before it is broken, and therefore cannot be pleaded in bar; (*Carthage* v. *Manley*,

(a) In this action, if a sum be miscast either too little or too much, it is amendable, and not like the action of debt, which, if alledged less than it is, without shewing the rest to be satisfied, it is ill. 3 Keb. 39. *Aderton* v. *Dunstar*, 2 Cro. 247.

H. 37 Car. II. 2 Show. 90.); *(a)* but *Accord and Satisfaction* is a good plea though the action be founded on a deed, for it is not pleaded in discharge of the covenant, but only of the damages, and the covenant remains.—*Alden* v. *Blague*, M. 1606. Cro. Jac. 99. *(b)*

Loss by Fire.—In covenant for a year's rent, due *Michaelmas* 1726, the defendant craved *oyer* of the lease, in which there was a covenant on the part of the lessee to repair (except the premises shall be demolished by fire) and then pleaded, that before *Michaelmas* 1725, the premises were burnt, and that they were not rebuilt by the plaintiff during the whole year for which the rent was demanded, nor had he any enjoyment of the premises, therefore prayed judgment if he should be charged with the rent. The plaintiff demurred and had judgment, for whatever was the default of the plaintiff in not repairing, yet the defendant must at all events perform his covenant.—*Monk* v. *Cooper*, E. 18 Geo. I. Stra. 763. Raym. 147. S. C. *(c)*

(a) Et vide *Co. Litt.* 292. *Eeles* v. *Lambert*, Alleyn, 38: but a release of *all covenants* is a good discharge of the covenant before it is broken. *Esp. N. P. Dig.* 307.

Where a discharge is pleaded in nature of a release, defendant must plead it to be by deed. *Rogers* v. *Payne*, 2 Wils. 376. For as the covenant is by deed, by deed only shall it be discharged. *Blake's Ca.* 6 Co. 44.

To covenant for rent arrear, defendant cannot plead a release of all demands at a day before the rent was due. *Henn* v. *Hanson*, 1 Lev. 99.

(b) Vide *Blake's Ca.* sup. But this is a good plea only where there has been an actual breach, for until then damages are not claimable. *Snow* v. *Franklin*, Lutw. 358.

(c) This case was decided on the authority of *Paradine* v. *Jane*, Alleyn, 27, which holds, that where the law creates a duty or charge, and the party is disabled from performing it without any fault on his part, and he has not any remedy over, the law will excuse him; but where the party, by his own contract, imposes a duty on himself, he is bound to make it good, notwithstanding inevitable accident, because he might have provided against it. And this rule was recognized in *Brecknock Co.* v. *Pritchard*, 6 T. R. 751, and in *Beale* v. *Thompson*, 3 Bos. & Pull. 420. Vide etiam *Belfour* v. *Weston*, 1 T. Rep. 310. This doctrine, however, having been alluded to *arguendo*, in *Cutter* v. *Powell*, 6 T. Rep. 323, Lord *Kenyon* said, it must be taken with some qualification; for where an action had been brought for rent after the house was burnt down, and the tenant filed his bill for an injunction, *Northington*, C. said, that if the tenant would give up his lease, he should not be bound to pay the rent; and the case here alluded to (says Mr. *Selwyn*) was probably that of *Camden* v. *Morton*, E. 1764, in Canc. (Selw. N. P. Abr. 394.) See also to this point, *Brown* v. *Quilter*, Amb. 619, and Selw. N. P. Abr. 395. *Pindar* v. *Ainsley*, 1 T. Rep. 312, (n.) *Bullock* v. *Dommitt*, 6 T. Rep. 650, and *Walton* v. *Waterhouse*, 2 Saund. 420. Vide etiam *Shubrick* v. *Salmond*, 3 Burr. 1637.

As to covenants, real, personal, inherent, executed, and executory; how created, where or when binding, or to whose advantage; for relief on non-performance, and how construed and to be performed, see *Bridgm. Anal. Dig.* in *Eq.* tit. *Covenant*, s. I.

As to general and uncertain, implied, defective, voluntary, and unlawful covenants, *ibid.* s. IV.

CHAPTER

CHAPTER IV.

OF DEBT.

THE action of Debt is founded upon a contract either express or implied, in which the certainty of the sum or duty appears; and the plaintiff is to recover the sum *in numero*, and not to be repaired in damages, as he is in those actions which sound only in damages, such as *assumpsit*, *&c.* But when the damages can be reduced by the averment to a certainty, debt will lie, as on a covenant to pay so much *per* load for wood, *&c.* (*Sanders* v. *Mark*, M. 7 W. III. 3 Lev. 429.) So if in an action, in which the plaintiff can only recover damages, there be judgment for him, he can afterwards bring debt for those damages.—*Slade's Ca.* 38 Eliz. 4 Co. 90. *(a)*

Debt will lie for an amercement in a court leet, but then the declaration ought to set forth, that the defendant was an inhabitant as well at the time of the amercement as of the offence, but this will be cured by the verdict, for it must be proved at the trial.—*Wicker* v. *Norris*, 8 Geo. II. Ca. temp. Hardw. 116. *(b)*

(a) So debt lies in C. B. on a judgment on a *sci. fa.* upon a recognizance in B. R. *Taine* v. *Puttenham*, Dy. 306, in marg. *Lotelesse's Ca.* 2 Leon. 14. So if the recognizance be taken in Chancery, debt lies. *Cowper* v. *Langworth*, Cro. Eliz. 608.

So in B. R. upon a judgment in C. B. removed thither by error. *Adamson* v. *Tomlinson*, 1 Sid. 236.

So in B. R. upon a judgment there, after error brought in the Exchequer-chamber. *Adamson* v. *Tomlinson*, sup. *Denton* v. *Evans*, Lutw. 602. *Adams* v. *Tomlins*, 1 Lev. 153, or *Adams* v. *Tomlinson*, T. Raym. 100. So after error depending in parliament, for the transcript of the record only is removed. *Adamson* v. *Tomlinson*, sup. So on a foreign judgment; and the plaintiff need not shew the ground of the judgment. *Walker* v. *Witter*, 1 Dougl. 1. *Sinclair* v. *Fraser*, cited ib. 4. *Crawford* v. *Whittal*, 1 Esp. N. P. Ca. 719. *Duplein* v. *De Roven*, 2 Vern. 540.

So upon a judgment recovered in a London court under the custom, though the original action could not have been brought in a superior court. *Mason* v. *Nicholls*, 1 Rol. Abr. 600.

And wherever *indeb. assumpsit* can be maintained debt will lie. *Ibid.* It lies also for a penalty given by an act of parliament or bye-law, though it does not say by what action it shall be recovered. 1 *Rol. Abr.* 599. pl. 2. So for a *nomine pœnæ*. *Barns* v. *Hughs*, 1 Lev. 249.

(b) Vide etiam *Lincoln Earl* v. *Fisher*, Cro. Eliz. 581. So for a pain or amercement in a court baron, debt lies. *Hodsden* v. *Harridge*, 2 Saund. 66, 67. *Shawe* v. *Thompson*, Cro. Eliz. 428. So for a fine upon an admittance to a copyhold. *Wheeler* v. *Honor*, 1 Sid. 58. *Trotter* v. *Blake*, 2 Mod. 239. *Shuttleworth* v. *Garnet*, 3 Mod. 240. *Anon.* Hardr. 487.

Note;

Note; In this case the defendant may traverse the fact of the presentment.—*Matthews* v. *Cary*, M. 1 W. & M. Carth. 74.

But where there is an averment in the declaration which is not necessary to maintain the action, the plaintiff is not bound to prove it; as where in debt on a policy of insurance the declaration set forth an agreement in the policy that if any dispute arose, it should be referred to arbitrators to be chosen one by each party, and averred that it had not been referred, and that without default in the plaintiff; at the trial the plaintiff did not prove he ever named a referee, and therefore it was objected that he had not proved his declaration. But on a case reserved the court held it to be no part of the contract, but a collateral agreement, therefore not necessary to be set out in order to intitle the plaintiff to his action, and therefore not necessary to be proved.—*Hill* v. *Hollister*, E. 19 Geo. II. K. B. *(a)*

If a sheriff levy money at the suit of *J. S.* and return the writ served, *J. S.* may have debt against the sheriff for the money without any actual contract. *(b)* But if he return that he has taken goods into his hands to such

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(a) In cases of arbitration, without deed, where the arbitrators award one party a certain sum, debt lies for it; but if the award be for doing some other thing which is beneficial to him, he must bring an action on the case. *Peytoe's Ca.* 9 Co. 78. 1 Rol. Abr. 242.

(b) And even so, though the writ should not be returned. 1 *Rol. Abr.* 598. pl. 17. And at the suit of a sheriff debt lies for fees given to him by statute. *Gritt* v. *Ridgeway*, Mo. 853. *Jayson* v. *Rash*, 1 Salk. 209.

So for an attorney's fees, debt lies against his employer, but not against another who promised to pay the demand. *Sands* v. *Trevilian*, Cro. Car. 107. 193.

So on a foreign judgment debt lies, not as a matter of record, but as a simple contract, which defendant may impeach if he can. *Walker* v. *Witter*, Dougl. 1. And to prove it, both the judge's hand and public seal must be proved. *Henry* v. *Adey*, 3 East, 221. *Sinclair* v. *Fraser*, cited, Dougl. 4.

Debt lies also for a simple contract debt. *Hulme* v. *Sanders*, 2 Lev. 4. *Smith* v. *Vow*, Mo. 298. And plaintiff may now recover less than the sum demanded in the writ. Vide *Aylett* v. *Lowe*, 2 Bla. 1221. *Walker* v. *Witter*, sup. *M'Quillan* v. *Cox*, 1 Hen. Bla. 249. *Emery* v. *Fell*, 2 T. Rep. 28.

But debt will not lie on a judgment after execution sued by *Elegit* or otherwise, for the plaintiff has chosen another's remedy. 1 *Rol. Abr.* 601. Nor after defendant is taken by *Ca. Sa.* and discharged by plaintiff's consent. *Vigors* v. *Aldrich*, 4 Burr. 2482. Nor does it lie upon a bill of exchange against the acceptor, for it is the debt of the drawer. *Hard's Ca.* Salk. 23. *Anon.* Hardr. 485. Nor on a promissory note. *Welsh* v. *Craig*, Stra. 680. Contra *Bishop* v. *Young*, 2 Bos. & Pull. 78. Nor for the interest of money, which ought to be recovered by assumpsit in damages. Vide *Heries* v. *Jamieson*, 5 T. Rep. 553, where the second count was debt for legal interest for money lent; but Lord *Kenyon* and the court were of opinion that it would not lie. Nor will debt lie against an executor,

such a value, which remain *pro defectu emptorum*, he shall not be charged.—*Speake* v. *Richards*, 15 Jac. I. Hob. 206.

Note; Debt against the sheriff for money levied upon a *fi. fa.* is not [168] within the statute of limitations (21 *Jac.* I. which enacts that actions of debt grounded upon any lending or contract without specialty, debt for arrearages of rent, *&c.* shall be brought within six years,) for though it be not a matter of record till the writ be returned, yet it is founded upon a record, and hath a strong relation to it.—*Cockram* v. *Welby*, M. 31 Car. II. 2 Show. 79.

If a statute prohibit the doing a thing under a certain penalty, and prescribe no method of recovery, the party intitled may bring debt.—1 *Rol. Abr.* 598, pl. 18, 19.

If a pawnee (after tender and refusal) recover goods in an action of trover, yet the pawnee may have debt for his money, for the duty remains.—*Co. Litt.* 209.

So if the pawn be stolen or perish without the default of the pawnee. *South Sea Company* v. *Duncombe*, M. 5 Geo. II. Stra. 919.

A. paid money to *B.* as a fine upon *B.*'s promise to make a lease of land; before the lease made *B.* was evicted; the court held debt would not lie for the money, for it was not paid to be received back again.—It appears by what is said before, that in such case the party might bring an action of *assumpsit* for money had and received to his use; and there-

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executor, upon a simple contract made with the testator. *Peyton's Ca.* 9 Co. 87. for he cannot wage his law as his testator might have done. *Morgan* v. *Green*, Cro. Car. 187. But it will lie for the arrears of an account against executors upon the receipts of the testator. 2 *Danv.* 497. pl. 9.

This was the common law remedy in cases where execution had not been sued out before the expiration of the year and day after judgment, but since the statute of *Westm.* 2. c. 45. the *sci. fa.* on the judgment has been the practice. 1 *Esp. N. P. Dig.* 196. Yet debt is often brought on judgments, and it will lie for the remainder of a sum recovered, where part has been levied on the defendant's goods. *Glascock* v. *Morgan*, 1 Lev. 92. So it will lie pending a writ of error. *Gribble* v. *Abbot*, Cowp. 72; for a writ of error cannot be pleaded in bar to this action. *Rogers* v. *Mayhoe*, Carth. 1. though it may in abatement. *Aby* v. *Buxton*, ibid. If, however, the defendant bring a writ of error, and the plaintiff bring another action on the judgment and recover, he cannot issue execution on the second judgment until the writ of error be determined. *Taswell* v. *Stone*, 4 Burr. 2454. *Benwell* v. *Black*, 3 T. Rep. 643.

This proceeding by action on judgment recovered, however, being considered vexatious, it is now discountenanced by the court, and in order that the plaintiff may reap the full benefit of his judgment under his writ of execution, it was, by stat. 43 *Geo.* III. *c.* 46. *s.* 4. enacted, that the plaintiff in such action shall not recover costs, unless the court in which the act is brought, or some other judge of that court, shall otherwise order.

fore it is probable that on the same ground the courts would now hold that the action of debt would lie.—*Brigg's Ca.* E. 21 Jac. I. Palm. 364.

If a man enter into a bond for the payment of several sums of money at several days, debt will not lie till the last day be past: And it is the same upon a contract, for where there is but one contract, there can be but one debt, and consequently but one action of debt. But on a covenant or promise, after the first default covenant or case will lie, for as often as the money is not paid, so often there is a breach of covenant.—*Co. Litt.* 476.

What is said above is meant of single bonds; for where there is a bond in a penal sum, conditioned to pay money at different days, the condition is broken, and the bond is become absolute upon failure of payment at either of the days, and debt will lie before the last day is past.—*Cotes* v. *Howel,* M. 18 Geo. II. 1 Wils. 80. nom. *Coates* v. *Hewitt.*

If this action be brought for money, it must be in the *debet* and *detinet*; if for goods in the *detinet* only. So if brought for foreign money not made current: Or it may be brought in the *debet* and *detinet* for such a sum as is the value of the foreign.—*Barnham's Ca.* M. 41 Eliz. 1 Rol. Abr. 604. *Ward* v. *Kedwin,* E. 1 Car. I. Palm. 409. *Pierson* v. *Pountny,* M. 6 Jac. I. Yelv. 135.

[169] *An executor* must bring debt in the *detinet* only, though this would be aided after verdict by the 16 *Car.* II. and the 4 *Ann. c.* 16, extends all the statutes of jeofails to judgments to be entered on confession, *&c.* (*Frevin* v. *Paynton,* M. 29 Car. II. 1 Lev. 250.) So if an executor bring debt against a sheriff upon an escape, it shall be in the *detinet* only. (*Crewe* v. *Broughton,* M. 8 Jac. 1. 1 Rol. Abr. 602.) So if he bring debt upon a judgment obtained by himself: But if he take a bond for a debt due to his testator, debt upon it must be in the *debet* and *detinet*; so if he sell the goods of his testator, and bring debt for the money. But if an executor were to take a fresh bond with an additional obligee, payable at the same time as the former, it seems in such case as if he should bring debt upon it in the *detinet* only, for by such change of the security he does not make himself liable, as he does in the other two cases. (1 *Rol. Abr.* 603.) So debt against an executor shall be in the *detinet* only, for he is chargeable no further than he has assets; but after judgment against an executor, one may have debt in the *debet* and *detinet,* suggesting a *devastavit,* and thereby charge him *de bonis propriis.* (*Hargrave's Ca.* 42 Eliz. 5 Co. 31.) So in debt for rent incurred in his own time,

time, and so in debt against an heir on the bond of his father.—*Walcot's Ca.* 30 Eliz. 5 Co. 36. *(a)*

In debt on a judgment against the defendants as executors suggesting a *devastavit*; in the original action the defendants had pleaded *plene administravit*, and the plaintiff had taken judgment of future assets *quando acciderent*. Lord *Mansfield* would not allow the plaintiff to give any evidence of effects come to the hands of the defendant before the judgment; for the plaintiff has admitted that the defendants fully administred to that time: And there being no evidence of any assets come to his hands since, the plaintiff was nonsuited.—*Taylor* v. *Holman et al'*, at *Guildhall*, Sittings after T. 1764.

In debt upon bond, the defendant cannot plead *nil debet*, but must plead *non est factum*; *Warren* v. *Conset*, T. 1727. 2 Raym. 1502. *(b)* and it has

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(a) An executor may bring an action before probate, but he cannot declare without it. *Wankford* v. *Wankford*, Salk. 302, and if the probate be lost, he must produce an exemplification from the ordinary. *Shepherd* v. *Sherthose*, 1 Stra. 412.

An executor's declaration must be in the *detinet* only. *Frevin* v. *Paynton*, supra. And so, whether the action be founded on contract, or be in tort. *Hitchcock* v. *Skinner*, Cro. Eliz. 327. 1 Rol. Abr. 602. pl. 2. 3. or be brought for rent arrear. *Spark* v. *Spark*, Cro. Eliz. 658.

But an executor must not declare for a debt due to his testator, and to himself *sui juris* together. *Hooker* v. *Quilter*, 2 Stra. 1271. 1 Wils. 171.

So a declaration against an executor must be in the *detinet* only, for he is not personally liable. 1 *Rol. Abr.* 603, but where rent has accrued due in his own time, the action must be both in the *debet* and *detinet*. *Hargrave's Ca.* 5 Co. 31. It appears, however, by the report of *S. C.* in Cro. Eliz. 711, that this decision was reversed in *Cam. Scacc.* Vide *Salter* v. *Codbold*, 3 Lev. 74, yet after a judgment obtained against an executor, one may have debt in the *debet* and *detinet*, suggesting a *devastavit*, and thereby charge him *de bonis propriis*, for, being liable to pay out of his own effects, it is properly his own debt. *Wheatly* v. *Lane*, 1 Saund. 216. 1 Lev. 255.

(b) Non est factum is the only plea which denies the contract, and puts the plaintiff to prove it, for any thing that goes to avoid it must be specially pleaded. Vide *Roles* v. *Rosewell*, 5 T. Rep. 538. *Hardy* v. *Bern*, cited ibid. 540. *Ethersey* v. *Jackson*, 8 T. Rep. 255. As to pleas on bond in general, it is a rule that no parol averment varying the condition of a bond, shall be admitted as a plea. *Hayford* v. *Andrews*, Cro. Eliz. 697. *Holford* v. *Parker*, Hob. 246. *Mease* v. *Mease*, Cowp. 47.

But though the obligor has entered into a bond for payment of money absolutely, yet he cannot be discharged by a subsequent instrument in writing. *Hodges* v. *Smith*, Cro. Eliz. 623.

Yet in such case it seems that such an instrument should appear as intended to operate as a defeasance of the first obligation, as to say, that on payment, &c. the first obligation should be void. *Mankood* v. *Crick*, Cro. Eliz. 716.

But where the bond has not been delivered to the obligee himself, but to a stranger, defendant may plead any parol matter. *Whyddon's Ca.* Cro.

has been said, (*per Pemberton*, C. J. at *Hertford, Lent*, 1683.) that if on such issue there be a variance in the date between the count and the deed, the plaintiff ought not to be nonsuited, because the deed is brought into court, and remains there; and therefore the material part of the issue is, whether the deed brought into court be his deed, and the deed in court is the deed "*upon which*," notwithstanding the mistake. However, this opinion may well be doubted of, for it is the constant practice to compare the declaration with the bond produced at the trial; yet where the plaintiff declared of a deed of covenant, dated 30th *March, anno domini* [*170] 1701, *annoq. regni* 13 *W.* III. and made a profert, * upon *oyer* the deed was only dated 30th *March* 1701, wanting *anno domini et anno regni, &c.* and though it was demurred to for the variance, the court held it none, for it was impliedly in the deed.—*Holman* v. *Borough*, T. 1 Ann. Salk. 658.

Debt on bond, *quod cum defendens apud*, London, *&c. per scriptum, concessit se teneri* to the plaintiff in £40 *solvend.* to the plaintiff, *&c.* the defendant craved *oyer*, and the bond was to pay to his attorney or his assignees, and was dated at *Port Saint David's*, the defendant pleaded these variances in abatement; and *per cur.*' the first is no variance, for payment to the plaintiff or his attorney is the same thing, the *teneri* made it a debt to the plaintiff, and a *solvend.* to any body else would be repugnant: But the second variance is fatal, for the dating made the bond *local*, but he might have declared *quod cum* the defendant, *apud* Port St. David's, *viz. apud* London *in paroch'*.—*Roberts* v. *Harnage*, M. 3 Ann. Salk. 659.

In debt for rent, if it be reserved by deed, the proper plea is *non est factum*, if without deed *non dimisit*; or if by deed he may plead *nil debet*, for an indenture does not acknowledge a debt like an obligation, for the debt accrues by the subsequent enjoyment.—*Wilson* v. ———, M. 15 Car. II. Hardr. 332.

The difference is, where the specialty is but inducement to the action, and matter of fact the foundation, there *nil debet* will be a good plea;

Cro. Eliz. 540. *Anon.* 1 Vent. 9. *Ward* v. *Forth*, ibid. 210. *Watts* v. *Rosewell*, 1 Salk. 274. 2 Ld. Raym. 603. To these rules, however, the modern practice has admitted an exception in the case of trusts, which are now noticed by courts of law, which allows a plea not consistent with the bond, as that the obligee is not the real owner of the bond, but a trustee for another. *Winch* v. *Keeley*, 1 T. R. 619. n. *Rudge* v. *Birch*, 1 T. Rep. 622. n. Vide etiam *Bottomley* v. *Brook*, ibid. 621, where there was a demurrer, but it was withdrawn by advice of the court.

And though the defendant be estopped to plead any matter contrary to the bond, yet he may plead that which will admit the bond and still avoid it as illegality of consideration. *Collins* v. *Blantern*, 2 Wils. 344.

but

but where the deed is the foundation, and the matter of fact but in ducement, there *nil debet* is no plea.—*Holman* v. *Burrough*, T. 1 Ann. 2 Raym. 1503. *(a)*

In debt for rent upon an indenture, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements, because, if he had pleaded it specially, the plaintiff might have replied the indenture and estopped him, or the plaintiff might demur, for the declaration being on the indenture, the estoppel appears on record. But if the defendant plead *nihil habuit*, &c. and the plaintiff will not rely on the estoppel, but reply *habuit*; the jury shall find the truth.—*Kemp* v. *Goodall*, E. 4 Ann. Salk. 277.

In debt against a sheriff, the plaintiff declared on a judgment against *J. S.* and a *fi. fa.* taken out and delivered to the defendant, who *virtute* thereof hath levied the money; the defendant pleaded *nil debet*, and it was holden a good plea, and this difference taken, that where the writ has not been returned, the plea is good, because it is matter of fact, whether he has levied the money or not; otherwise where the *fi. fa.* is returned.—*Cole* v. *Acorn*, M. 13 W. III. 12 Mod. 604.

By 4 & 5 *Ann. c.* 16. *s.* 12. Where debt is brought on any single bill, [171] or upon any judgment, if the money due thereupon have been paid, such payment may be pleaded in bar: And so of a bond conditioned to pay money, though the money were not paid at the day and place, yet if it were paid at a subsequent day, the defendant may plead it in bar; but

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(a) Where a specialty is not the gist of the action, but inducement only, as against the sheriff for an escape. (*Warren* v. *Consett*, 2 Raym. 1500.) or for rent on an indenture. (*Warner* v. *Theobald*, Cowp. 589.) or against executors on a *devastavit*. (*Jones* v. *Pope*, 1 Saund. 39.) and so where the action is founded on a duty raised by operation of law, a general defence is allowed by the plea of *nil debet*, which, like *non assumpsit*, puts the whole case in issue, calls on the plaintiff to prove the whole of his declaration, and enables the defendant to prove any thing which can shew that the plaintiff has no demand. In some cases it has been held, that defendant may avail himself of the statute of limitations on this plea, as in *Lee* v. *Rogers*, 1 Lev. 110. *Draper* v. *Glossop*, 1 Ld. Raym. 153. *Anon.* 1 Salk. 278. But the modern practice is to plead the statute specially, and that perhaps would be deemed necessary in all cases, if a question were to arise, for though the statute bars the remedy, the debt exists. *Quantock* v. *England*, 5 Burr. 2628. Et vide Mr. Serjeant *Williams'* note (2) to 1 Saund. 283. And on such a plea the replications and evidence would be the same as in *assumpsit*. *Peake's Evid.* 271.

If there be any averment in the declaration which does not go to the gist of the action, nor is necessary to support it (as on a collateral matter) such averment need not be proved. *Hill* v. *Hollister*, ante, p. 167 *a*, and this was resolved on a case reserved.

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the defendant cannot plead a tender and refusal of principal and interest at a subsequent day in bar, for that is not within the equity of the statute; for such construction would be prejudicial, as it would empower the obligor to compel the obligee at any time without notice to take in his money.—*Underhill* v. *Matthews*, E. 1 Geo. I. C. B. *(a)*

In debt upon a contract, the plaintiff must prove the same contract as is alledged in his declaration; as if debt be brought on a contract for £20, proof of a contract for 20 marks is not sufficient, though the defendant pleaded *non debet prædict. £20 nec aliquem denariorum*, for there is a difference between the contract proved, and the contract declared upon.—*Bladwell* v. *Sleggien*, H. 1563. Dy. 219.

The plaintiff declared upon a deed whereby the defendant covenanted to pay the plaintiff £35 for every hundred of wood in such a place, and that he delivered so many, —— hundred and one half, which came to £182: 10s. the defendant demurred; and the court held, first, there can be no apportionment, and the demand of the half hundred is more than can be due by contract. Secondly, a *remittitur* may be entered for that, and judgment for the rest. But where the sum demanded depends on the deed itself, and on nothing extrinsical, (as in debt or covenant to pay £20) there can be no *remittitur*. But here it might be more or less by matter extrinsic; and therefore the variance is not inconsistent with the deed.—*Incledon* v. *Crips*, M. 1 Ann. 2 Salk. 658. 2 Raym. S. C. *(b)*

General

(a) Upon this statute it has been decided, that where the bond was payable by instalments, and an action was brought for the whole, the defendant might bring the arrears, &c. into court. *Bridges* v. *Williamson*, Stra. 814. And in such a case though plaintiff may take judgment for the whole, he cannot levy for more than is due. *Darby* v. *Wilkins*, ibid. 957. Whether such arrear be for principal or interest. *Masfen* v. *Touchett*, 2 Bla. 706. *Sed secus*, where it is stipulated, that if default be made in any one instalment, the bond shall be in force for the whole, or words to that effect. *Gowlett* v. *Hanforth*, 2 Bla. 958. *Bonafous* v. *Rybot*, 3 Burr. 1370. *Qu. tamen?*

(b) In *B. R.* bail are only liable to the sum sworn to, with costs. *Martin* v. *Moor*, 2 Stra. 922. *Jackson* v. *Hassell*, Dougl. 316. (330). But in *C. B.* they are liable to double the sum sworn to. *Mitchell* v. *Gibbons*, 1 H. Bla. 76. So in *B. R.* bail in error are not liable beyond the original judgment and costs, and not to interest until affirmance in the Exchequer Chamber; but after affirmance of the judgment, they are liable to pay interest. *Frith* v. *Leroux*, 2 T. Rep. 57.

And the delivery, as well as the sealing of a bond, must be proved, but the latter alone will not do. *Chamberlain* v. *Staunton*, Cro. Eliz. 122. 1 Leon. 140. *Parker* v. *Gibson*, Dy. 191. marg.

So by the subscribing witness in person, the bond must be proved. *Abbott* v. *Plumbe*, Dougl. 205. (215). *Manners*, qui tam v. *Postan*, 4 Esp. N. P. 240. *Call* v. *Dunning*, 4 East. 53.

General Issue.—If the defendant plead *non est factum*, the plaintiff must prove the execution of the deed, and proof that one who called himself *B.* executed, is not sufficient, if the witness did not know it to be the defendant.—*Memot* v. *Bates*, H. 4 Geo. II.

The defendant may on the general issue give in evidence any thing which proves the deed to be avoided, though it were delivered as his deed, for the plea is in the present tense, and if it be avoided, it is not now his deed; (*Winchcombe* v. *Pigot*, T. 12 Jac. I. 11 Co. 27.) as if it have a rasure before the action brought: but if the alteration be by a stranger without the privity of the obligee in a point not material, it will not avoid it. (*Whelpdale's Case*, 2 Jac. I. 5 Co. 119.) And note, though if some of the covenants of an *indenture or conditions of a bond be against law, they are void *ab initio*, and the others stand good, (for if part of the condition be bad by the common law, and part good, the deed will be good for that part of the condition which is good, *aliter* where part is made bad by statute.) (*Francis* v. *Wingate*, E. 11 Geo. II.) *(a)* Yet if a deed contain divers distinct and absolute covenants, or a bond divers distinct and absolute conditions, if any of them be altered by additions, interlineations, or rasure, this misfeasance *ex post facto* avoids the whole deed. So if the seal be broken off, but the jury may find it was broken by chance. [*172]

Three were bound jointly and severally in an obligation, and on an action brought against one of them, he pleaded that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. (*Seaton* v. *Henson*, E. 30 Car. II. 2 Lev. 220. 2 Show. 28. S. C.) Upon demurrer, it was adjudged that the obligation by the tearing off the seal of one of the obligors became void against all; notwithstanding the obligors were bound severally as well as jointly. (*Winch-*

53. *Park* v. *Mears*, 2 Bos. & Pull. 217; unless he be interested, in which case he cannot be examined, or his hand-writing proved. *Swire* v. *Bell*, 5 T. Rep. 371; but proof of the obligor's signature will be admitted in such a case. *Godfrey* v. *Norris*, Stra. 34.

Where the subscribing witness is dead (as in *Henley* v. *Philips*, 2 Atk. 48.) or become infamous, (as in *Coghlan* v. *Williamson*, Dougl. 89 (93). or is absent abroad, (as in *Prince* v. *Blackburne*, 2 East, 250.) or cannot be found, (as in *Cunliffe* v. *Sefton*, 2 East. 183.) Proof of his signature was admitted, though in *Wallis* v. *Delancy*, 7 T. Rep. 266. (n). Lord *Kenyon* inclined to think, that the signature of the obligor, as well as the witnesses, should be proved in such a case.

(a) Where there is a covenant to save harmless against a certain person, there the covenantor is bound to the covenantee against the entry of that person, whether by wrong or rightful title; but if it be to save harmless against all persons, this extends not to tortious acts and entries, for the entry and eviction must be by lawful title. *Foster* v. *Mapes*, Cro. Eliz. 213.

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combe v. *Pigot*, T. 12 Jac. I. 11 Co. 27. But if the obligation had been only several, and the seal of one were broken off, it seems the obligation would continue good against the others.—*Law of Evid.* 111. *(a)*

The defendant may give in evidence, that they made him sign it when he was so drunk, that he did not know what he did, (or that he was a lunatic at the time. (*Cole* v. *Robins*, H. 2 Ann. *per Holt*, Salk. MSS.) *Yates* v. *Boon*, *Middleser*, M. 12 Geo. II. Str. 1104.) or that it was delivered as an escrow on a condition not performed. (2 *Rol. Abr.* 683.) But if the deed be only voidable, the defendant shall not avoid it, or take any advantage of it on the plea of *non est factum*; as that the obligor was an infant, or that it was obtained by duress. (*Whelpdale's Case*, 2 Jac. I. 5 Co. 119.) So the defendant cannot give payment in evidence on this plea; but may give in evidence that she was a feme coverte at the time of entering into such bond, for that proves it not to be her deed.—*Anon.* H. 13 W. III. 12 Mod. 609. *(b)*

Duress.—If the defendant plead duress, the deed is admitted, and the issue lies upon the defendant; and if the defendant prove the deed was given under an arrest without any cause of action, it is sufficient: or if the arrest were without good authority, though for a just debt; or if the arrest were by warrant from a justice of peace on a charge of felony, when no felony was committed, or though a felony were committed, yet if the arrest be unlawfully made use of, it may be construed a duress.—*Whelpdale's Case*, sup. *Anon.* M. 21 Car. I. Aleyn, 92. *Wooden* v. *Collins*, M. 9 Geo. II.

[173] In 1 *Rol. Abr.* 687. *pl.* 6. It is said that a man shall avoid his deed by duress of his goods, as well as of his person, but in *Sumner* v. *Feryman*, H. 1708. (11 Mod. 201.) it was holden that a bond could not be avoided by duress of goods.—*Astley* v. *Reynolds*, M. 5 Geo. II. Stra. 917. *(c)*

(a) Declaration in debt on bond against *two*, and upon oyer it appeared to be a bond by three. Plea *non est factum* of the two, or either of them; and held, that such a variance was not ground of nonsuit, but pleadable in abatement, or in arrest of judgment. *Smith assignee of Sheriff of Surrey* v. *Tanner*, 2 Taunt. 255.

(b) Upon the general issue of *non est factum* defendant may prove she was feme coverte at the execution of the bond; what shews the deed to be void is good evidence under *non est factum*; a special plea is only necessary where the deed is voidable. *Lambert* v. *Atkins*, 2 Campb. 272. It is otherwise when the bond is void by statute. *Vide* n. *(a)* 173 *a*.

(c) Duress must be pleaded, and cannot be given in evidence under the general issue, for a bond is not void for duress, but voidable only, and to this plea plaintiff may reply that defendant was at large at the time of the execution, and that he sealed the bond voluntarily. *Clayt. Ass.* 77.

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If *A.* menace me, except I make unto him a bond of £40, and I tell him I will not do it, but I will make unto him a bond of £20, the court will not expound this bond to be voluntary upon this maxim, *non videtur consensum retinuisse, si quis ex præscripto minantis aliquid immutavit.*—*Bac. Reg.* 22.

It is a rule of law, that no one can avoid a bond by averring a delivery thereof upon condition, unless he shew a writing of the condition; for as he is charged by a sufficient writing, so he must be discharged by sufficient writing, or by some other thing of as high authority as the obligation.—*Bro. Faits.* 10. *Dr. & Stud.* cap. 12. *(a)*

For the same reason, the defendant cannot aver the condition to be different from what is expressed in writing; but any averment consistent with the condition, which shews the condition against law, will be admitted; (*Buckler* v. *Millard*, M. 1 W. & M. 2 Vent. 107, *Kettley's Case*, Godb. 29. *Pratt* v. ———, M. 39 & 40 Eliz. Mo. 477.) therefore, where the consideration on which the bond is given is illegal, the defendant may take advantage of it by pleading, as simony, usury, compounding of felony, &c. and this, notwithstanding there be a different and legal consideration recited in the bond.—*Jones's Case*, H. 31 Eliz. 1 Leon. 203. *Andrews* v. *Eaton*, T. 3 Geo. II. Fitzg. 73. *Empson* v. *Bathurst*, H. 17 Jac. I. Hutt. 52. *Foden* v. *Haines*, 6 W. & M. Comb. 245. Carth. 300. *Mitchell* v. *Reynolds*, H. 1711. 1 P. W. 189.

Insolvent Act.—To debt upon bond the defendant pleaded the insolvent debtors' act, the plaintiff replied there was no notice given him pursuant to the act, and issue being joined thereon, the summoner being dead, the duplicate of the proceedings of the justices was holden to be sufficient evidence, because the notice was not a matter on which to found their jurisdiction; if it had been so, this evidence would not have been sufficient. But in this case, they are judges of the sufficiency of proof of notice, it being part of their jurisdiction, and consequently their duplicate of its being a good notice will be good evidence, the summoner being dead.—*Savage* v. *Field*, M. 9 Geo. II.

In an action by the assignee of an insolvent debtor, the certificate made at the sessions is *primâ facie* evidence of a due discharge, and of all the proceedings under the insolvent act: (*Laborde* v. *Pegus*, Sittings at *Westminster*, after M. 1772.) and if there be any fraud or irregularity

(a) Where a bond or other writing is avoided by act of parliament, the party who would avoid it cannot plead *non est factum*, but must plead the special matter. *Whelpdale's Case*, 5 Co. 119.

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in the proceedings it is incumbent on the defendant to prove it.—*Gyllom et ux.* v. *Stirrup*, B. R. T. 9 Geo. II. S. P. *(a)*

[174] *Solvit ad diem.*—If the defendant to debt on bond conditioned to pay on a day certain, plead *solvit ad diem*, the issue lies upon him, and if he prove payment before the day it is sufficient, for he could not plead it. If he were to plead it, and issue were joined thereon, it would be immaterial; therefore to such plea the plaintiff should reply, *quod non solvit secundum formam et effectum conditionis.* (*Winch* v. *Pardon*, M. 1 Geo. I.) On the issue of *solvit ad diem* the defendant may give in evidence non-payment of interest for twenty years, but in such case if the plaintiff be executor of the obligee, he will be admitted to prove an entry on the back of the bond by the testator of interest being paid. But such entry ought to appear to be made before the presumption had taken place.—*Searle* v. *Lord Barrington*, H. 2 Geo. II. 2 Ld. Raym. 1370. Stra. 827. *(b)*

To a bond of thirty years standing, the defendant pleaded *solvit ad diem,*

(a) Insolvent acts are always construed favorably for the prisoner, the number of days mentioned in his notice shall therefore be reckoned inclusively for his benefit. *Morley* v. *Vaughan*, 4 Burr. 2525. Vide etiam *Paget* v. *Wheate*, cited in *Workman* v. *Leake*, Cowp. 23, where it was held, that a prisoner shall be discharged from *debitum in præsenti solvendum in futuro.*

But if a man be discharged under such an act, he should bring himself clearly within it, for it may be that he was irregularly discharged, or that he was not dischargeable by law. *Haughton* v. *Shellcross*, 3 Lev. 190.

(b) Vide etiam *Tryon* v. *Carter*, 2 Stra. 994. *Fletcher* v. *Henning-ton*, 2 Burr. 944. 1 Bla. 210. Debt on bond, plea *non est factum testatoris. Evidence*-bond, dated *January*, 1779, conditioned for payment of £1000 to plaintiff's testator, within three months after the death of one *M. C.* who died in *December*, 1787, defendant's testator was then dead: plaintiff's testator lived three years after: no demand of payment till this action. And *Per Ellenborough*, C. J. after a lapse of twenty years a bond will be presumed satisfied: but there must be either a lapse of twenty years, or a less time, coupled with some circumstance to strengthen the presumption; if the parties had accounted together after the money became payable, it might have been inferred that it was included in the settlement, but as there is no evidence of this, and twenty years have not elapsed since the bond was forfeited, it cannot be considered as discharged. *Colsell* v. *Budd*, 1 Camp. 27.

So in *Williams* v. *Gorges*, Ib. 217. Proof of embarrassed circumstances and inability to pay is not enough to rebut the presumption of satisfaction of a judgment arising from a lapse of time.

In debt on bond dated in 1785: payment at and after the day was pleaded: Evidence, indorsements on the bond, acknowledging payment of interest down to 1793, in the hand-writing of defendant, and signed by intestate; this was acknowledged to be evidence of the bond being unsatisfied at the date of the last indorsement. Then there was certain evidence of payment in 1794, and plaintiff, to meet this, proposed to read other indorsements down to the year 1795, acknowledging the receipts of interest, and part of the principal, but these latter indorsements

diem, and relied upon the presumption; the plaintiff proved payment of interest two years after the time mentioned in the condition, but gave no evidence of any subsequent receipt or demand; and *Raymond*, C. J. was of opinion that this plea was to be taken as strictly in this case as in any other; and therefore the plaintiff having falsified the plea, it was not enough to say the other twenty eight years were enough to let in the presumption, because to take advantage of that the defendant should have pleaded upon the act for the amendment of the law, that he paid the money after the day, in which case it would have been with him upon this evidence.—*Moreland* v. *Benet*, M. 12 Geo. I. Stra. 652. *(a)*

The case of *Goddard* v. *Cox*, infra, *(b)* is worthy of notice, as shewing who has the power of applying payments.

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ments were not in the defendant's hand, nor did it appear when they were written, or even that they existed during the intestate's life-time. Lord *Ellenborough*, C. J. held, that it was necessary to prove that these indorsements were on the bond, at or recently after the times when they bear date, before the plaintiff could be entitled to read them, notwithstanding it might seem to be against the interest of the obligee to admit part payment, yet he may thereby in many cases set up the bond for the residue of the sum secured. *Rose* v. *Bryant*, 2 Camp. 321. And a distinction has been taken between cases in which the indorsements have been made prior, and those posterior to the presumption taking place. *Searle* v. *Barrington*, 2 Stra. 826. 2 Ld. Raym. 1370. *Turner* v. *Crisp*, cited 2 Stra. 826. *Glyn* v. *Bank of England*, 2 Ves. 43.

(a) Twenty years without any demand is a ground to *presume* payment, but is not a legal bar. It is to be left to the jury. Some evidence should be given in aid of the presumption within that time, as that the parties had settled an account in the intermediate time. *Per Buller*, J. this doctrine of presumption was first taken up by Lord *Hale*. He was followed by Lord *Holt*, (vide *Anon.* 6 Mod. 22.) who said, that after twenty years he should intend it paid. It was adopted by Lord *Raymond*, in the case of *Constable* v. *Somerset*, 1 T. Rep. 271. But, he said, that if a demand was proved in the mean time, he would not suffer a plaintiff to be stripped of a just debt by such a presumption. Lord *Mansfield* has held the same, and that there is a distinction between length of time as a bar, and where it is only evidence of it: the former is positive, the latter only presumptive. He believed in the case of a bond, no time had been expressly laid down by the court. It might be eighteen or nineteen years. *Sed per Buller*, J. within the twenty years, it must be left to the jury upon some evidence besides the presumption, in such cases, the slightest evidence only is sufficient. Vide *Oswald* v. *Legh*, 1 T. Rep. 270. *Eldridge* v. *Knott*, Cowp. 214. *Fisher et al'* v. *Prosser*, ibid. 217.

These two cases seem to have been decided on this principle, that where a statute has fixed a limitation, covenants will not direct a jury to presume a bar within the time limited by statute. *Aliter* if there be no statute.

(b) The leading maxim in this case, is *Quicquid solvitur, solvitur secundum modum solventis.* But the payee must, at the time of payment, apply it himself, or the right of application will devolve on the payee. Vide *Perris* v. *Roberts*, 1 Vern. 34.

S. O.

S. O. was indebted to the plaintiff for coals; he died and made his wife executrix: she continued to deal with the plaintiff, then married the defendant, who likewise had coals from the plaintiff, and made several payments, generally upon account, which, if applied to the debt from the executrix, and her debt whilst a widow, cleared both, and the present action was against the defendant only for what was delivered in his time. The question was, who had a right of applying these payments, there being no direction from the defendant, who it was agreed had the first right; and Lord Chief Justice *Lee* held, that thereby it devolved to the plaintiff, and therefore he might apply the money to discharge his wife's debt, the defendant being by marriage a debtor for that; but as to
[*175] the demand against her as executrix, *the validity of which depended on the question of assets, *&c.* he was of opinion the plaintiff could not apply any of the money to the discharge of that demand.—*Goddard* v. *Cox*, T. 16 Geo. II. 2 Stra. 1194. *(a)*

Riens per Discent.—In debt against an heir, who pleads *riens by discent*, the obligation is admitted, but the plaintiff must prove assets, and it suffices if he prove assets in *Cornwall*, though they be alleged in *London*, for assets or not, is the substance of the issue; or the plaintiff may prove that the land was devised to the defendant and his heirs, charged with a rent, *&c.* for where the devise does not vary the limitation, the heir takes by *discent*. And these and many other cases were very lately considered, in a case where the testator seised in fee devised to the defendant, his heir, all his estate real and personal, upon condition that he paid his debts and legacies; and a question was made whether he took by purchase or *discent*, the heir having pleaded *riens per discent* to debt upon a bond of his ancestor; and the whole court held that the tenure and quality of the estate not being altered, he took by *discent*, and that charging an estate makes no alteration as to the heir's taking in respect of the land.—*Dowdall's Case*, 31 Jac. I. 6 Co. 47. *Emerson* v. *Inchbin*, T. 13 W. III. 1 Raym. 728. *Clerk* v. *Smith*,

(a) But there seems to be a difference between the decisions at law and in equity on this point, for a court of equity holds, that where a debtor makes a payment generally, without appointing how it is to be applied, it shall be applied in discharge of that debt which is most burthensome on the debtor, as in payment of a debt carrying interest in preference to one that does not. *Heyward* v. *Lomax*, 1 Vern. 24. Sed vide *Perris* v. *Roberts*, ibid. 34.

Though this seems to be the general doctrine, yet in *Bloss* v. *Cutting*, cited 2 Stra. 1194, it was held, that it applies only to demands of the same nature. If however there be any relation between the fund from which the payment is to arise, and the security, the fund shall direct the appropriation. *Brett* v. *Marsh*, 1 Vern. 468.

H. 11 W. III. Salk. 241. Et vide *Allam* v. *Heber*, T. 21 Geo. II. K. B. Stra. 1270. 1 Bla. 22.

So if the heir take by a voluntary settlement made by his father, which is void as to creditors, by 13 *Eliz. c.* 3.—*Gooch's Ca.* 33 Eliz. 5 Co. 60.

In debt on bond against the heir, on the issue of *riens per discent*, the heir may give in evidence an extent against him upon a debt owing by his father upon bond to the king; but it will be necessary to produce the bond itself, or a sworn copy of it.—*Sherwood* v. *Adderley*, T. 1699. Raym. 734.

Note; Where you bring a *sci. fa.* against the heir upon a judgment on bond had against his ancestor, you can only extend a moiety of the land descended by elegit, for he is only chargeable as ter-tenant. But where you bring an action against the heir upon the bond of his ancestor, the plaintiff is entitled to take the whole land descended in execution.—*Bowyer* v. *Rivett*, H. Car. I. W. Jo. 88. 3 Bulst. 317. Poph. 153. Palm. 419. S. C.

By 3 & 4 *W. & M. c.* 14. If the heir alien before action brought, yet he shall be liable to the value of the land, and if he plead *riens per discent*, the plaintiff may reply, that he had lands from his ancestor before the original writ brought, or bill filed; and if upon issue joined thereupon it be found for the plaintiff, the jury shall enquire the value of the lands so descended, and thereupon judgment shall be given, and execution awarded as aforesaid, (*i. e.* to the value only) but if judgment be given by confession * of the action without confessing assets descended, [*176] or upon demurrer, or *nil dicit*, it shall be for the debt and damages without any writ, to enquire of the lands descended.

The plaintiff may join issue on the plea *riens per discent*, without replying as he is empowered by this statute, and in such case the jury are not to set out the value of the land descended, but it is sufficient for them to find that lands came by *discent* sufficient to answer the debt and damages.—1 *Barnes*, 329.

The defendant pleaded *reins per discent al temps del original*, the plaintiff replied, that the defendant had sufficient lands before the time of the original purchase, and on issue thereon a verdict was given for the plaintiff, but no enquiry of the value of the lands, and the court awarded a repleader; issue ought not to have been joined on the sufficiency of the land descended.—*Jefferys* v. *Barrow*, E. 12 Ann.

The heir cannot have two defences, one at common law, and one on the statute: therefore if to *riens per discent al temps del writ*, the plaintiff reply that before the time lands descended, the heir cannot rejoin that

that he sold them and paid bond debts to the amount; he ought to disclose the whole in his bar at once.—*Winder* v. *Barnes*, E. 13 Geo. II.

Debt on bond against the defendant as brother and heir to *J. S.* upon issue *riens per discent* a special verdict that the obligor was seised in fee, had issue and died seised, and the issue died without issue, whereupon the lands descended to the defendant as heir to the son of his brother, and the court held the issue was found against the plainiff; for the defendant hath nothing as immediate heir to his brother, and if he would charge him as collateral heir he ought to have made a special declaration.—*Jenks' Ca.* H. 1628. Cro. Car. 151.

But if *A.* settle an estate upon himself for life, remainder to his first and other sons in tail, remainder to his own right heirs, and enter into a bond, and die leaving a son who dies without issue, whereupon the uncle enters, he may be charged as brother and heir of *A.* for he must make himself heir to him who was last actually seised.—And note, a reversion expectant upon an estate tail is not assets to charge the heir upon the general issue *riens per discent;* but a reversion expectant upon an estate for life must be pleaded specially.—*Kellow* v. *Rowden*, T. 2 Jac. II. Carth. 126. 3 Mod. 253. 3 Lev. 386. 1 Show. 244.

Nil debet.—But in debt for rent upon the plea of *nil debet*, he cannot [*177] give in evidence disbursements for necessary repairs, where the * plaintiff is bound to repair, for he might have had covenant against him; but he may give in evidence, entry and eviction by the plaintiff. *(a)* But if the lessor enter by virtue of a power reserved, or as a mere trespasser, yet if the lessee be not evicted, it will be no suspension of the rent.—*Per Holt*, C. J. in *Bushell* v. *Lechmere*, M. 10 W. III. 1 Raym. 370.

On *nil debet* the plaintiff proved a note by which the defendant agreed to hold for a year at £15, the plaintiff was grantee of a reversion, and the life at that time dead, but he had never been in possession: the defendant was permitted to give in evidence a prior grant of the reversion notwithstanding the note: but *Holt*, C. J. said, if the plaintiff had ever been in possession, though but as tenant at will, the defendant could not give in evidence *nil habuit in tenementis*, without having been evicted. (*Chettle* v. *Pound*, E. 1701. 1 Raym. 746.) So he may plead *non de-*

(a) Mr. *Selwyn* (Abr. N. P. 540) says, he cannot find any solemn decision, that an eviction may be given in evidence on *nil debet*, though there are many *dicta* to that effect, as *Gilb. Ev.* 282. *Anon.* 1 Mod. 35. *Browne's Case*, ibid. 118. *Browne's Case*, 1 Vent. 258. and *Drake* v. *Reeve*, 1 Sid. 157, where it was admitted that the same point was questioned formerly.

Vide *Hunt* v. *Cope*, Cowp. 242, where it was held, that pulling down a summer-house is no eviction, but a mere trespass.

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misit, and give the special matter in evidence, but if the lease were by indenture he could not plead this plea, for an indenture concludes both parties.—*Co. Lit.* 47. (b) *Martaine* v. *Hardy*, Dy. 122. (b)

In debt for rent the defendant pleaded infancy at the time of the lease made, and upon demurrer the court held the lease voidable only at the election of the infant, by waiving the land before the rent day comes, but the defendant not having so done, and being of age before the rent day came, the plaintiff had judgment.—*Ketsey's Ca.* E. 1616. Cro. Jac. 320.

A lease by parol for a year and an half, to commence after the expiration of a lease which wants a year of expiring, is a good lease within the statute of frauds, for it does not exceed three years from the making. *Ryley* v. *Hickes*, M. 2 Geo. II. *per Raym.* C. J. 1 Stra. 651. *(a)*

If the defendant insist that the lease declared on is not the plaintiff's, the plaintiff may shew it was made by *A.* who had authority from him to execute it in his name, and the authority need not be produced.—*Per Holt*, at Maidstone, 1 Ann.) But the lease must be made and executed in the name of the principal.—*Frontin* v. *Small*, T. 12 Geo. I. Stra. 705. *(b)*

By the 32 *Hen.* VIII. *c.* 37. The executors and administrators of tenants in fee, fee tail, or for life of rent services, rent charges, rents seck and fee farms, may bring debt for the arrearages against the tenant who ought to have paid the same.—For the construction of this statute, *vide ante, lib.* 2. *cap.* 4. *p.* 56 *a.*—The action is local, and must be brought where the land lies.

Note; *Detinet* for rent against an executor must be brought where the lease was made, because it is for arrears in the testator's time; but when it is in the *debet* and *detinet* for rent accrued * in the executor's time, it [* 178] must be where the land lies, but if issue be joined it cannot be altered, because it is agreed to by the defendant.—*Bolton* v. *Cannon*, T. 27 Car. II. 1 Vent. 271.

Debt for rent against the lessee may be either where the land lies, or the deed was made, but an assignee is chargeable only on the privity of estate.—*Patterson* v. *Scott*, T. 13 Geo. I. Stra. 776.

(a) But by *Botting* v. *Martin*, 1 Camp. 319, the assignment of such a lease must be by deed or note in writing.

A parol lease for longer than three years is good, as creating a tenancy from year to year, and a tenant holds in all respects, excepting the duration of the term, as under the terms of the lease. *Clayton* v. *Blakey*, 8 T. Rep. 3. Et vide *Doe*, ex dem. *Rigge* v. *Bell*, 5 T. Rep. 471.

(b) If a lease be made to two, one of whom seals it and the other does not, but accepts the estate and occupies the land, he is equally bound to perform the covenants for payment of the rent, reparations, and the like. 1 *Shep. Abr.* 458.

Debt

Debt against an executor on a judgment suggesting a *devastavit*, may be either in *Middlesex* where the judgment is entered, or in the county where the *devastavit* is laid to be. But if the defendant admit the judgment and traverse the wasting, that issue must be tried in the proper county.—*King* v. *Burrel*, M. 3 Geo. II. C. B. *(a)*

To debt upon bond, the defendant being an executor, pleaded a judgment had against him on a simple contract debt *ultra*, &c. and upon demurrer the plea was holden good, for otherwise an obligee might ruin an executor by keeping the bond in his pocket: he ought to give notice of it. (*Davis* v. *Monkhouse*, T. 3 Geo. II. Fitzg. 76. *Brooking* v. *Jennings*, E. 26 Car. II. 1 Mod. 75. S.P.) Nay, it has been holden, that an executor is not bound to take notice of a judgment obtained against his testator.—*Harman* v. *Harman*, T. 12 Jac. II. 3 Mod. 115. *(b)*

The jury must answer to all they are charged with, therefore where in debt upon a charter-party, whereby the defendant was to pay fifty guineas *per* month, the plaintiff declared for £500, the defendant pleading that he had paid for all the time the ship was in his service, issue was joined thereon; the jury gave a verdict, that £357 remained unpaid, but said nothing as to the rest of the £500, and therefore on a writ of error *K. B.* reversed the judgment: (*Hooper* v. *Shepherd*, E. 11 Geo. II. Stra. 1089.) and note; that in such case, if no judgment be given, a *ven. de novo* shall issue. (*R.* v. *Hayes*, E. 1728. Raym. 1521.) The jury, beside finding the debt, ought to give damages for the detention, which is usually 1*s.* though under particular circumstances it may be more; as suppose the principal and interest due on a bond exceed the penalty, the jury ought to give the residue in damages as well as in debt upon a single bill.—*Per Wild*, J. E. 29 Car. II. *(c)*

Set off and Extinguishment.—This is a proper place to take notice of the statutes for setting off mutual debts, and also to consider what is an extinguishment of a debt.

By 2 *Geo.* II. *c.* 22. Where there are mutual debts between plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and

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(a) And note, that an administrator may be declared against as an assignee in debt for rent for the time he was in possession. *Buck* v. *Barnard*, 1 Show. 348

(b) A judgment not docketted is only in the nature of a simple contract debt. *Hickey* v. *Hayter*, 6 T. R. 384.

(c) And this is now settled that a jury may so find. *Lonsdale* v. *Church*, 2 T. Rep. 388; though contrary to *White* v. *Sealy*, Dougl. 49, where it is decided that no more than the penalty can be recovered in debt on bond.

the

the other party, one debt may be set against the other, and such matter may be given in evidence *on the general issue, or pleaded in bar, as the [* 179] nature of the case shall require; so as at the time of his pleading the general issue, where any such debt is intended to be insisted upon in evidence, notice be given of the particular sum or debt so intended to be insisted on, and upon what account it became due; and by 8 *Geo.* II. *c.* 24, mutual debts may be set against each other, notwithstanding such debts are of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all such cases the debt intended to be set off shall be pleaded in bar, in which plea shall be shewn how much is truly and justly due on either side, and in case the plaintiff shall recover, judgment shall be entered for no more than shall appear to be due after one debt set against the other. *(a)*

A notice was as follows, *Take notice that you are indebted to me for the use and occupation of a house for a long time held and enjoyed, and now lately elapsed.* The debt intended to have been set off was for rent reserved on a lease by indenture, which not being mentioned in the notice could not be given in evidence; for if this had been shewn, the plaintiff might probably have proved an eviction, or some other matter to avoid the demand. These notices should be almost as certain as declarations.—*Fowler* v. *Jones*, Sittings at Westminster, H. 8 Geo. II.

(*a*) On this statute it has been decided, that the debts which can be set off against each other are such only as are certain and liquidated, and such as assumpsit would lie for. *Howlet* v. *Strickland*, Cowp. 56. *Weigall* v. *Waters*, 6 T. Rep. 488. *Nedriffe* v. *Hogan*, 2 Burr. 1024. *Freeman* v. *Hyett*, 1 Bla. 394.

But sums in nature of liquidated damages for breach of a contract, and not merely in nature of a penalty, may be set off. *Fletcher* v. *Dyche*, 2 T. Rep. 32.

In case for money had and received to plaintiff's use, defendant pleaded *non-assumpsit*. Defendant (a ship-broker) as plaintiff's agent, recovered £2000 for damages done to plaintiff's ship, and paid him all but £40, which he retained for his labour and servitude therein, the jury thought this allowance reasonable; but *Norton* objected that defendant ought to have pleaded it, or given notice of set off. *Dunning contra*, the point was reversed. On motion in *B. R.* and cause shewn, Lord *Mansfield* had no doubt that defendant might give this in evidence. This (said he) is an action for money had and received to plaintiff's use; plaintiff can recover no more than he is in conscience and equity entitled to, which can be no more than what remains after deducting all just allowances, which defendant had a right to retain out of the very sum demanded. This is not in the nature of a *cross demand* or *mutual debt*—it is a *charge*, which made the sum of money received for plaintiff's use so much the less. The other judges concurred. Judgment for defendant as on a nonsuit. *Dale* v. *Sollet*, 4 Burr. 2134.

A debt due to a man in right of his wife cannot be set off in an action against him in his own bond.—*Paynter* v. *Walker*, C. B. E. 4 Geo. III. *(a)*

Where the plea is of an equal sum, there the action is barred, but if it be for a less sum than for what the action is brought, the defendant must pray to have it set off.—*Cook* v. *Dixon*, B. R. 1735. *(b)*

The day after the last act passed, Lord *Hardwicke*, C. J. delivered the opinion of the court of *K. B.* that a debt by simple contract might by the former act have been set off against a specialty debt.—*Brown* v. *Holyoak*, 8 Geo. II.

If there be mutual debts subsisting between the testator and *J. S.* the executor will be indemnified in setting off *J. S.*'s debt against his testator's without bringing an action against him.—*Ibid.*

In debt upon bond, the defendant pleaded a greater debt in bar, upon which the plaintiff prayed to have the condition of his bond inrolled, which was to appear at *Westminster*, and demurred; and it was holden that this bond was not within the 8 *Geo.* II. for that statute relates only to bonds conditioned to pay money, and not to bail-bonds; and it was [*180] not within the *statute 2 *Geo.* II. because the plaintiff did not bring the action in his own right, but as trustee for another, (for he was an officer in the palace court;) (*Hutchinson* v. *Sturges*, T. 14 Geo. II. C. B. Willes, 261.) *(c)* but if it had been given to the sheriff, and by him assigned to the party, it might be otherwise, and then the penalty would have been considered as the debt, because it would have depended upon 2 *Geo.* II.—*Lofting* v. *Stevens*, M. 1733. 2 Barnes, 388.

In debt on bond, the defendant craved *oyer* of the condition, which was to pay the plaintiff £10 a year during life, and then pleaded, that the plaintiff was indebted to him in the sum of £500 for money lent, *&c.* exceeding the yearly sums that had incurred for the annuity, and offered to set off as much, *&c.* and on demurrer the plea was holden good.—*Collins* v. *Collins*, T. 32 Geo. II. 2 Burr. 820.

To *assumpsit* for £40 lent, *&c.* the defendant pleaded articles of agreement with mutual covenants in a penalty of £200 for performance, and shewed a breach whereby the penalty became due, and offered to set off; on demurrer the court held this plea not within the statutes, for

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(*a*) Vide *Wilson* v. *Watson*, Esp. N. P. 240. *Grove* v. *Dubois*, 1 T. R. 112.

(*b*) See this case fully stated from a MS. report in *Selwyn N. P. Abr.* 136. Vide etiam *Blackbourn* v. *Matthias*, 2 Stra. 1267.

(*c*) Vide etiam *Kemys* v. *Betson*, 8 Vin. Abr. 561. pl. 30. and *Joy* v. *Roberts*, cited *per* Willes, C. J. in S. C. there

there may not be £5 justly due to the defendant on the balance.—*Nedriff* v. *Hogan*, E. 33 Geo. II. 2 Burr. 1024.

A debt barred by the statute of limitations cannot be set off. If it be pleaded in bar to the action, the plaintiff may reply the statute of limitations. *(a)* If it be given in evidence on a notice of set-off, it may be objected to at the trial.

A. having been appointed by *B.* his attorney to receive his rents, did, after his death, receive rent arrear in *B.*'s life-time; *B.*'s executrix brought an action for the money in her own name; the defendant gave notice to set off a debt due to him from the testator, which was not allowed at the trial, because the testator never had any cause of action against the defendant, for the money was not received till after his death.—*Shipman* v. *Thompson*, E. 11 Geo. II. C. B. Willes, 103. *(b)*

To an action on a promissory note of £30, the plaintiff took a verdict for the whole sum, the defendant had at the same sittings an action against the plaintiff for £11, to which there was a notice to set off the note of hand; and the court held, that notwithstanding the verdict, the note of hand might be set off, for if at the time of the action brought there are mutual demands, they by the statute may be set off; and justice may be done by entering a *remittitur* on the first record as to so much. —*Baskervil* v. *Brown*, T. 1 Geo. III. K. B. Sittings. 2 Burr. 1229. 1 Bla. 293. *(c)*

The assignee of a bankrupt brought an action for work and labour, the defendant gave notice of a set-off, and at the trial produced a negotiable note given by the bankrupt antecedent to *his bankruptcy to *Scott*, [*181] and *Scott*'s hand was proved to the indorsement to the defendant, but no proof was given when it was indorsed, upon which the plaintiff called two witnesses, who gave strong evidence to shew it was after the bankruptcy; however, the defendant had a verdict; but a new trial was

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(*a*) Vide *Remington* v. *Stevens*, Stra. 1271. S. P.

(*b*) Vide *Teggetmeyer* v. *Lumley*, Willes, 264, (n.) which was decided on the authority of this case.

Testator, being a seaman, gave a will and power to defendant, and afterwards gave a subsequent will and power to plaintiff. Defendant received the money due to testator. Plaintiff brought *assumpsit* for money had and received to his use, and declared as executor. Defendant pleaded that testator was indebted to him in a larger sum. Court held this not a good set-off, for such a plea, if allowed, would invert the course of administration, and a man might set off simple contract debts where there are bond debts outstanding against the testator. *MS. Ca.*

(*c*) In *assumpsit* for goods sold, defendant pleaded a set-off of more money due to him from plaintiff. Replication, that the goods were agreed to be paid for in ready money. This was holden bad on demurrer, for it was no answer to the plea. *Eland* v. *Karr*, 1 East, 376.

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granted, because such indorsee ought not to be in a better condition than the drawee, who would only have come in as a creditor under the commission.—*March Assignee of May* v. *Chambers*, T. 18 Geo. II. 2 Stra. 1234. *Ex parte Lee*, H. 1721, 1 P. W. 782. S. P. *(a)*

To an action of *indebitatus assumpsit* by the assignees of a bankrupt, for goods sold by them to the defendant, he pleaded that *Harvest* before his bankruptcy, (*viz.* 21 *April*, 1740,) was indebted to the defendant by bond in £100, conditioned to pay £50, which exceeded the £13 mentioned in the declaration; and upon demurrer it was holden, that the statute for setting off mutual debts does not extend to assignees of bankrupts, *(b)* and that these can never be considered as mutual debts, for where there are mutual debts, there must be mutual remedies, which is not the case here.—*Ryal & al*, *Assignees of Harvest* v. *Larkin*, M. 20 Geo. II. K. B. 1 Wils. 155.

But by the 5 *Geo.* II. *c.* 30. *s.* 28. Where it shall appear to the commissioners that there has been mutual credit given by the bankrupt, and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners or the assignees of the bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on the balance, and no more, shall be claimed, or paid, on either side. *(c)*

(a) In an action by the assignees of a bankrupt, on several bills of exchange, defendants, in their plea, set out two bills of exchange, drawn on and accepted by the bankrupt, and by him indorsed to the defendants before the party became a bankrupt, and that before he became bankrupt he was indebted to defendants in a larger sum of money on those bills of exchange than the money then due to the assignees, which the defendants offered to set off. Whereupon a question was made at *Nisi Prius*, whether this was such a debt as could be set off, and it was argued for plaintiff it could not; for, though 4 & 5 *Ann.* and other statutes, gave the commissioners power to settle the balance where there are mutual dealings, yet it was said it could not be done under 8 *Geo.* II. for that (as it speaks of mutual debts) must mean where there are mutual remedies, for it was intended only to avoid multiplicity of suits, where (as here) defendants could not have brought any action against the assignees. But *per Ryder*, C. J. this is within the intent of the statutes, and may clearly be given in evidence on the general issue, with notice of set-off, or by pleading where the debt set off, or that which it is set off against, accrues by specialties. *Spindler* ex dem. *Barnevelt*, Sittings at Guildhall, II. 1755. MS. Ca.

(b) But in *Ridout* v. *Brough*, Cowp. 133, it was held otherwise; that the statutes of set-off do extend to the assignees of a bankrupt, for the assignees are the bankrupts.

(c) By virtue of this statute, a debt may be set off at the trial in an action brought by assignees of a bankrupt, without either pleas or notice of set-off. *Grove* v. *Dubois*, 1 T. R. 112.

In the plea of set-off, defendant must aver what is really due to him, and such averment is traversable. *Symmons* v. *Knox*, 3 T. R. 65; although laid under a *videlicet*. *Grimwood* v. *Barritt*, 6 T. R. 460.

In

In replevin, the avowant justified under a distress for rent; the plaintiff at *Nisi Prius* insisted, that there was more due to him than the rent amounted to, and *Denison*, J. refused the evidence, and upon motion for a new trial, the court held that 2 *Geo.* II. did not extend to the case of a distress, for that is not an action, but a remedy without suit; they likewise declared, that it did not extend to *detinue*, and the like actions of wrong.—*Absolom* v. *Knight*, E. 16 Geo. II. C. B.

In covenant upon an indenture for non-payment of rent, the defendant pleaded *non est factum*, and gave a notice of set-off, Mr. J. *Denton*, at the assizes, was of opinion he could not upon this issue; but upon a motion for a new trial, the court held the evidence ought to have been received, for the general issue *mentioned in the act must be understood [*182] to be any general issue, and accordingly ordered a new trial.—*Gower & Ux'* v. *Hunt*, 1 Barnes, 204.

If a man accept a bond for a legacy, it is an extinguishment of the legacy; so if a man accept an obligation for a debt due by simple contract; otherwise for a debt due by specialty; but if a stranger give a bond for a debt due by simple contract from another, it will be no extinguishment.—*Higgin's Ca.* 3 Jac. I. 6 Co. 44. *Hooper's Ca.* T. 29 Eliz. 2 Leon. 110.

So if a man, after an act of bankruptcy committed, give a bond for a simple contract debt, it will not so far extinguish the simple contract as to deprive the creditor of petitioning for a commission.—*Ambrose* v. *Clendon*, E. 9 Geo. II. Stra. 1042. *(a)*

If an infant become indebted for necessaries, and give a bond in a penalty for the money, it will not extinguish the simple contract debt, for the bond is void, *aliter* if it be a single obligation in the very sum.—*Ayliff* v. *Archdale*, H. 45 Eliz. Cro. Eliz. 920. *(b)*

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(a) Where a man by deed assigns certain premises as a security for a simple contract debt, which deed was afterwards set aside under a commission of bankrupt, on the ground of a prior act of bankruptcy, it was held not so far to extinguish the original debt as to prevent the creditor's proof of it under the commission. *Gray* v. *Fowler*, 1 H. Bla. 462.

(b) As to a single bill, vide *Russell* v. *Lee*, 1 Lev. 86. *Roles* v. *Roleswell*, 5 T. R. 538. *Walcot* v. *Goulding*, 8 T. R. 126. It seems doubtful, however, whether such an obligation be void or voidable only. *Morning* v. *Knopp*, Cro. Eliz. 700. In *Giggham* v. *Purchase*, Noy. 85. 3 *Com. Dig.* 163, (c) 2. and in *Ayliffe* v. *Archdale*, sup. it was held that such a bond is absolutely void, and therefore the simple contract is not extinguishable. But *quære*, whether the statute 4 *Ann. c.* 16. *s.* 13. has not altered the common law in this respect? On the other hand, in *Stone* v. *Withypool*, 1 Leon. 114. 2 Rol. Abr. 146, A (4). Litt. s. 259. Perk. s. 12. 1 Bla. Com. 466. *Darby* v. *Boucher*, Salk.

The plaintiff gave a note of hand for rent arrear, and took a receipt for it when paid, the defendant afterwards distrained for the rent, the plaintiff brought trespass; and it was holden, that notwithstanding this note, the defendant might distrain, for it is no alteration of the debt till payment.' (*Harris* v. *Shipway*, at Monmouth, 1744, *per Abney*, J. *Exer* v. *Lady Clifton*, C. B. T. 1735. S. P.) But if *A.* indorse a note to *B.* for a precedent debt, and *B.* give a receipt for it as money when paid, yet if he neglect to apply to the drawer in time, and by his laches the note is lost, it will extinguish the precedent debt, and in an action he would be nonsuited.—*Smith* v. *Wilson*, E. 1738. Andr. 190.

If a landlord accept a bond for the rent, this does not extinguish it, for the rent is higher, and the accepting of a security of an equal degree is no extinguishment of a debt, as a statute-staple for a bond. (3 *Danv.* Abr. 507, A. (1)) But a judgment obtained upon a bond is an extinguishment of it.—*Higgins' Ca.* 3 Jac. 1. 6 Co. 45.

Salk. 279, and *Tapper* v. *Davenant*, as reported in 3 Keb. 798. (though differently stated *ante*, p. 155*a* n. (c)) it was held that such objections are only voidable. In *Fisher* v. *Mowbray*, 8 East, 330, however, it was held that an infant can on no account bind himself in a bond with a penalty, and payable with interest.

PART

PART III.

CONTAINING ONE BOOK OF

ACTIONS GIVEN BY STATUTE.

INTRODUCTION.

HAVING in the two former parts of this work treated of such actions as are founded either upon Torts or upon Contract, it is now proper to take notice of such actions as are given by the statute law; and they are of two sorts:

I. Such as are given to the party grieved.
II. Such as are given to the common informer.

It would be endless to mention all the acts of parliament that give actions; I will therefore only set down such as are in most frequent use; taking notice likewise of such general rules as are applicable to all actions upon statutes.

CHAPTER I. [184]

OF ACTIONS UPON THE STATUTE OF HUE AND CRY.

BY the statute of *Winton*, 13 *Ed.* I. *c.* 2, the hundred within which any robbery is committed shall be answerable for the same.

No robbery will make the hundred liable, but that which is done openly and with force and violence; therefore if a carrier's son or servant conspire to rob him, the hundred is not answerable.—*Mathew* v. *Godalming Hundred*, M. 1654. Sty. 427.

By the same statute, if the robbery be done within the division of two hundreds, both shall be answerable.—*Deane's Ca.* M. 10 Car. I. Hut. 125.

If robbers assault a person in one hundred, and he flies into another, where he is pursued and robbed, the last hundred is liable.—*Cowper* v. *Basingstoke Hundred*, H. 1702. 2 Salk. 615.

So

So if a person be carried out of the highway in the hundred of *A.* and robbed in a coppice in the highway in the hundred of *B.* it will be sufficient to charge the hundred of *B.*—*Cowper* v. *Basingstoke Hundred*, H. 1702. 2 Raym. 826.

But if one be taken in the hundred of *A.* and carried into the hundred of *B.* into a mansion-house and robbed; or taken in the day-time in *A.* and carried to *B.* and there robbed in the night, it is not within the statute; for though there be no occasion to aver in the declaration that it was done in the highway, any more than that it was done in the day, yet it must be given in evidence on the trial, else the plaintiff will be nonsuited.—*Young* v. *Tolscomb & Mudbury Inhabitants*, M. 1 W. III. Carth. 71.

Proving that the robbery was committed in a private way, will be sufficient to charge the hundred.—*Cowper* v. *Basingstoke Hundred*, sup. 12 Mod. 160. S. C.

A robbery upon the Lord's day, by 29 *Car.* II. *c.* 7, will not charge the hundred. But that statute only extends to the case of travelling, therefore where the plaintiff was robbed in going to church on a *Sunday* he recovered. (*Teshmaker* v. *Hundred of Edmonton*, M. 7 Geo. I. Stra. 406.) And upon any other day, if there be as much light as a man's countenance might be discerned by, though before sun-rise or after sun-set, the hundred shall be liable. (*Sendell's Ca.* T. 1585. 7 Co. 6.) So if robbers oblige the waggoner to drive his waggon from the highway by day, but do not take any thing till night.—*May* v. *Morley Hundred*, M. 1605. Cro. Jac. 106. *Cowper* v. *Basingstoke Hundred*, sup.

By 27 *Eliz.* *c.* 13. No person shall have an action against the hundred, unless he shall, with as much convenient speed as may be, give notice to some of the inhabitants of some town, village, or hamlet, near to the place where the robbery was committed.

[185] By 8 *Geo.* II. *c.* 16. No person shall have an action against the hundred, unless beside the notice required by 27 *Eliz.* *c.* 13, he shall, with as much convenient speed as may be, give notice to one of the constables of the hundred, or to some constable, borsholder, headborough, or tything-man of some town, parish, village, hamlet, or tything, near unto the place where, &c. or shall leave notice in writing of such robbery at the dwelling-house of such constable, &c. describing in such notice to be given or left, so far as the nature and circumstances of the case will admit, the felons, and the time and place, together with the goods and effects whereof he was robbed.

B. was

B. was robbed a little after six in the morning, his stirrups cut, his bridle and saddle thrown into a ditch, his horse turned loose two miles and a half from *Northampton*. He went there after recovering his horse, *&c.* and gave notice to the inhabitants and to three men in the way, and then rode three miles farther, and left notice in writing with the high constable of the hundred in which, *&c.* and all this within two hours of the robbery: and upon a special case stated, had judgment, though it was objected that he had given no notice to the constable at *Northampton*, which was the person it might have been given to with most convenient speed: but it was answered that it was put in the alternative, and the constable of the hundred was the most proper, and this was done with all reasonable speed: it was said, that perhaps he went to *Northampton* for advice, for men do not carry the act of parliament in their pocket.—*Ball* v. *Wymersley Hundred*, T. 15 Geo. II. Stra. 1170.

Notice given to the next village forward in the road is good, though it be in another hundred, and though there were other villages *a latere* nearer in the same hundred. The word in the act is near, not nearest, and five miles have been reckoned sufficiently near: and it is good though the village is in a different county.—*Odander* v. *Grodley Hundred*, Noy. 52.

By 27 *Eliz. c.* 13. The party robbed shall not have any action, except he first, within 20 days before such action be brought, be examined upon oath before some justice of the peace of the county where the robbery was committed, inhabiting within the said hundred or near the same, whether he knew the parties that committed the robbery, or any of them; and if upon examination it be confessed that he does know the parties, that then he *shall, before the action commenced, enter into a [*186] bond before the said justice effectually to prosecute the person so known.—*Tutter* v. *Dracon & Cash Inhabitants*, M. 1626. Cro. Car. 41. *(a)*

Though the robbery were 20 miles from the place where the justice lived, and though it were proved that there were many justices lived nearer, yet *Abney*, J. held it sufficient on a case reserved, saying the

(a) If a statute provides that no action shall be brought for a particular cause, until a certain number of days have elapsed from the time when it accrued, and the declaration states merely that the number of days have elapsed, no objection can be taken to it in error on this account. *Willan* v. *Stancliffe Hundred*; 2 Raym. 904.

act

act was only directory in that respect.—*Lake* v. *Croydon Hundred*, H. 1774.

The oath may be taken before a justice of the county, though not in the county at the time of administering it, for he acts only as a ministerial officer, and therefore an action would lie against him if he refused to take the examination.—*Helier* v. *Benhurst Hundred*, E. 1631. W. Jo. 239. Cro. Car. 211. *Green* v. *Buckland Hundred*, 1 Leon. 323.

It is sufficient for the plaintiff to prove that he who took the affidavit, acts as a justice of the peace, and it shall be read upon proof that it was delivered by his clerk to the person producing it, without proving the justice's hand.—*Per Parker*, C. J. at *Hertford*, 1722.

It is not necessary for the justice to take the examination in writing, but if he appear at the trial, and depose the substance of the usual affidavit, it is sufficient.—*Graham* v. *Becontree Hundred, per Wythens*, J. *Essex*, 1683. *(a)*

But if the justice have taken the substance of the usual affidavit in writing, and that is produced in evidence, he shall not be permitted to give evidence at the trial of any thing else the plaintiff said on his examination, *viz.* any description of the robbers or robbery different from what he shall give on the trial.—*Kemp* v. *Stafford Hundred*, T. 19 Geo. II. C. B.

By 8 *Geo.* II. *c.* 16. The party robbed must, within 20 days after the robbery committed, insert an advertisement in the Gazette, describing the felons, the time and place of the robbery, together with the goods and effects taken.

Chandler was robbed (*inter al'*) of 15 bank bills, he knew the value of each bill, and the dates and numbers of nine, but not knowing the dates and numbers of the other six, in the advertisement he only inserted the value, and not the dates or numbers of any; upon this a case being reserved for the opinion of the court of *C. B.* they were equally divided upon the question, whether he ought to recover for what was well described, *viz.* his watch, money, and the six bills, of which the dates and numbers were not known, and thereupon the *postea* could not be delivered out; *Willes*, C. J. and *Burnet*, J. for the defendant, *Abney* and *Burch*, J. for the plaintiff.—*Chandler* v. *Sunning Hundred*, Berks, 1748.

(*a*) Neither is it necessary that the declaration should set forth the oath to be taken before a justice of the hundred. *Dowly* v. *Odiam Hundred*, 2 Salk. 614.

This

This case being attended with many suspicious circumstances, and for so large a sum of money, occasioned the act of 22 *Geo.* II. *c.* 24, whereby no person shall recover against the hundred * in any action on [* 187] any of the statutes of Hue and Cry more than £200, unless at the time of the robbery there be two present at least to attest the truth of his or their being so robbed. *(a)*

By the same act of the 8 *Geo.* II. the party must, before any action commenced, enter into a bond in the manner therein mentioned, to the high constable of the hundred, for the payment of costs, *&c.*

By the 27 *Eliz. c.* 13, the action must be commenced within a year after the robbery committed, for which reason the plaintiff must produce a copy of the original, to shew the action commenced within the time, as also that the oath of the robbery was within 20 days before the *teste. (b)*

(*a*) This case, on the statutes of Hue and Cry, was reserved, because the whole sum, of which the plaintiff was robbed, was not mentioned in the Gazette, and most materially because it appeared on the trial, that one of the robbers had red eyebrows, which, not being noticed in the advertisement, was held a defective description, and therefore defendants had judgment. *Whitworth* v. *Grimshoe Hundred*, 2 Wils. 109.

(*b*) And the day on which the robbery was committed, is to be included within the year. Vide *Rex* v. *Adderley*, 2 Dougl. 449. (465.) S. P. and *Bellasis* v. *Hester*, 1 Ld. Raym. 280, therein cited, to S. P. See also *Norris* v. *Gautris Hundred*, 2 Rol. Abr. 520, pl. 8. 1 Brownl. 156, which was an action against the hundred on this statute, and the robbery was laid and proved to have been committed on the 9th *October*, 13 *Jac.* I. and the writ was tested on 9th *October*, 14 *Jac.* I. Held, that under the words of the statute, 27 *Eliz.* the day when the robbery was committed, should be included within the year, and that the action was brought too late, whereupon judgment was arrested after verdict. Vide etiam *S.C.* more fully reported in *Hob.* 139, where it is said, that the plaintiff could never have his judgment; but in the report of *S.C.* in *Mo.* 879, it is said, that *Hobart* and *IVinch* were of opinion, that there should be a fraction in a day: so that a robbery committed on 9th *October*, 13 *Jac.* I. in the afternoon, should be within the year, to bring the writ on 9th *October*, 14 *Jac.* I. in the morning; and several cases are there cited by *Hobart*, to shew that a fraction of a day may be allowed in some cases; so that *Moore*'s report is contrary to the others, unless it be supposed, that in the principal case there, it did appear at what time of the day the robbery was committed, and the writ issued; for otherwise, according to the opinions of the two judges, the plaintiff ought to have had judgment, which it appears by the other reports he had: from a *MS.* note, by the late Mr. Serjeant *Hill*, to the case of *R.* v. *Adderley*, Dougl. 446, fol. edit. in the editor's possession.

Furthermore, in the case of *Castle* v. *Burditt*, 3 T. Rep. 623, it was held, that if the computation of time is to be made from an act done, the day on which the act is done is to be included in the reckoning; therefore, where the law requires that a month's notice of an action be given, the month begins with the day on which it was served.

By

By the same act, if any one of the offenders be taken by pursuit, the hundred shall not be liable, and by 8 *Geo.* II. it is sufficient if he be apprehended within 40 days after notice in the Gazette. But this must be pleaded, and not given in evidence on the general issue.

If a servant be robbed, in the absence of his master, of his master's money, either the master or the servant may bring the action, but the servant must take the oath: (*Combs* v. *Bradley Hundred*, E. 5 & 6 W. & M. Salk. 613.) but if he be robbed in the presence of his master, of his master's money, the master must bring the action, and his oath alone will be sufficient.—*Jones* v. *Bromley Hundred*, and *Bird* v. *Ossulston Hundred*, cited in *Ashcomb* v. *Elthorn Hundred*, Carth. 147. *(a)*

The party robbed may be a witness *ex necessitate*, and by 8 *Geo.* II. c. 16. *s.* 13, a hundredor may likewise be a witness for the hundred.

If the master bring an action on the robbery of his servant, he may be a witness to prove the delivery of the money to him.—*Bennet* v. *Hertford Hundred*, M. 1650. 2 Rol. Abr. 686.

The plaintiff need not prove the robbery in the place or in the parish alledged in the declaration, if it be proved within the same hundred. (*Per Holt*, 5 Ann. at *Maidstone.*) So hue and cry need not be proved by the plaintiff though alledged in his declaration, for it is the part of the hundred to levy it.—*Bucknall's Ca.* T. 29 Eliz. Owen 7.

By 27 *Eliz.* c. 13. The inhabitants of every hundred, wherein negligence of fresh suit after hue and cry shall happen to be, shall answer the one half of the damages recovered against the hundred, *&c.* to be recovered by action of debt, *&c.* in the name of the clerk of the peace of the county, for the use of the inhabitants of the hundred in which, *&c. (b)*

(*a*) In an action on this statute, for the robbing of a servant, the declaration may alledge that the thieves robbed the servant, though it state that the master was in company. *Willan* v. *Stancliffe Hundred*, 2 Raym. 904.

(*b*) And as to who shall be chargeable to the hundred, on this act, vide *Leigh* v. *Chapman*, 2 Saund. 423.

As to the evidence necessary to support this action, it may, in a great degree, be gathered from the cases in the text; but as that material part of this subject is not distinctly treated, the editor has considered, that it would tend more to the convenience of the reader to reduce it to a methodical form: *first*, then it was held in *Ashpole's Case*, cited in *Sendell's Case*, 7 Co. 6, that the plaintiff must prove he was robbed in the day-time, *i. e.* when there was day-light enough to see a man's face; but the robbery need not be in a highway. *Cooper* v. *Basingstoke Hundred*, 2 Salk. 615. It must also be committed on a working-day, or on going to or from church, if on a Sunday. *Teshmaker* v. *Edmonton Hundred*, Stra. 406.

Though by the stat. 27 *Eliz.* c. 13. *s.* 11, the plaintiff must prove, that so soon as he could, after the robbery, he gave notice to some inhabitant

bitant of some town, village, or hamlet, near the place of the robbery, yet it need not be the nearest. *Odander* v. *Grodby Hundred*, Noy. 52; nor in the same hundred. *Tutter* v. *Dracon Inhabitants*, Cro. Car. 41.

So by statute, 8 *Geo.* II. *c.* 16. *s.* 1, plaintiff must prove, that with all convenient speed, after the robbery, he also gave notice of it to one of the constables of the hundred, or to some constable, *&c.* of some town, parish, *&c.* near the place of robbery, or that he left notice in writing at the house of such constable, *&c.* he, describing, as far as he could, the felon or felons, and the time and place of the robbery. And he is not obliged to go to the *nearest* constable. *Ball* v. *Wymersley Hundred*, Stra. 1170. And by the same statute, plaintiff must prove, that within 20 days, next after, *&c.* he caused a notice to be given in the *London* Gazette, describing, as far as he could, the felon, *&c.* and the time and place, *&c.* together with the goods and effects stolen: to do which, he must produce the Gazette, and the notice therein, which should contain every material description of the robber. *Whitworth* v. *Grimshoe Hundred*, 2 Wils. 105, 109. *Chandler* v. *Sunning Hundred*, Berks, 1748. As to what notice is sufficient to ground an action, vide *Shrewsbury* v. *Ashton Hundred*, 4 Leon. 18. *Compton's Ca.* Noy. 155. March 10. *Hall* v. *Skarrock Hundred*, 2 Sid. 45.

So by statute, 27 *Eliz. c.* 13. *s.* 11, it is required, that the party robbed shall, within 20 days, *&c.* be examined on oath before some justice, *&c. near* the same hundred; and if upon such examination, he confesses he knows the robber or robbers, he shall enter into a recognizance to prosecute him or them. To prove this, plaintiff must produce the affidavit he made before the justice, though he need not prove the signature of the justice, nor that he was a justice, but only that he acted as such. *Per Parker*, C. J. at *Hertford*, 1722. And the magistrate, if he be so, may take the oath out of the county. *Helier* v. *Benhurst Hundred*, Cro. Car. 211. W. Jo. 259. But if no examination be taken in writing, the magistrate may give verbal evidence at the trial of the substance of the usual affidavit. *Graham* v. *Becontree Hundred*, *per Wythens*, J. Essex, 1683. And the examination may be taken by a magistrate 20 miles distant from the place of robbery, though many others live nearer. *Lake* v. *Croydon Hundred*, H. 1774. But the affidavit must be made by the person actually robbed, whether he be master or servant. *Green's Ca.* Cro. Eliz. 142. And if two servants, or a servant and a stranger, to whom the money was entrusted, are robbed together, both should take the oath, so that the master may maintain his action; for if one only be examined, the master can only recover so much as was taken from him. *Ascomb* v. *Spelholm Hundred*, 2 Salk. 613. *Aishcome* v. *Spelholme Hundred*, 1 Show. 94. 241; or *Ashcomb* v. *Elthorn Hundred*, Carth. 145. If a servant, however, be robbed of his master's money, in his absence, either the master or servant may bring the action, though the servant must make the oath. *Combs* v. *Bradley Hundred*, Salk. 613. But if he should be robbed of his master's money, in his presence, the master alone may make the oath, and bring the action. *Jones* v. *Bromley Hundred*, infra. And a robbery of the servant of his master's goods in his presence, is a robbery of the master. *Wright's Ca.* Sty. 156. *Crosthwayt* v. *Lowdon Hundred*, ibid. 319. And, in order to shew that the oath was taken within 20 days before the action brought, the original writ must be produced. *Jones* v. *Bromley Hundred*, cited in Carth. 147.

Finally, the statute 8 *Geo.* II. *c.* 16, requires proof, that before the action brought, the plaintiff went before either the chief clerk, or secondary, the filazer of the county, where the robbery was, the clerk of the pleas wherein the action is commenced,

CHAPTER II.

OF ACTIONS UPON THE STATUTE OF 2 & 3 EDW. VI. C. 13, FOR NOT SETTING OUT OF TITHE.

THE statute of the 2 & 3 *Ed.* VI. *c.* 13, directs the tithe to be fairly set out under the pain of forfeiture of treble value, without mentioning to whom; but that has been always construed to be the proprietor of the tithe, as he is the party grieved.—2 *Inst.* 650. *(a)*

In

menced, or their respective deputies, or before the sheriff of the county wherein the robbery was, and entered into a bond for £100 to the high constable of the hundred, with two sureties, approved by those officers for payment of the costs in case of failure in the action, which bond must be produced and proved by a subscribing witness. *Peake's Evid.* 282.

Secondly, *as to the competency of a witness* in this action, the general rules of law have been obliged to give way to necessity, as in *Bennet* v. *Hertford Hund.* 2 Rol. Abr. 686, where the master having brought an action on the robbery of his servant, he was allowed to prove the delivery of the money to him, and on the authority of that case, *Chambre*, J. in *Porter* v. *Ragland Hund.* Peake Evid. 150, (n.) allowed the plaintiff to prove the quantity of corn which was on board his own barge at the time of a robbery by a mob, which robbery was first proved by the plaintiff's servant. So by stat. 8 *Geo.* II. *c.* 16. *s.* 15, the party robbed may be a witness *ex necessitate*, and so may a hundredor be a witness for the hundred. But no action can be brought against the hundred, where the sum lost exceeds £200, unless the truth of the robbery be attested at least by two persons present. Vide *Chandler* v. *Sunning Hund.* Berks, 1748, and the stat. of 22 *Geo.* II. *c.* 24, which was passed in consequence of the peculiar circumstances of that case.

(a) An action on this statute is the proper remedy for *predial* tithes, and it is for *predial* tithes only that it lies in cases where there is no existing contract, and the farmer has neglected to set out his tithes, or has made a colorable severance, and carried them away, but where the defendant has taken tithes under a composition and agreement with the plaintiff, *assumpsit* on the contract is the proper remedy, to support which the plaintiff need only prove defendant's occupation, his contract and the retaining his tithe in pursuance thereof.

This action lies also at the suit of the rector, or by one or more farmers of the rectory. *Day* v. *Peckwell*, Mo. 915. *Kent* v. *Penkevon*, Cro. Jac. 70; if, therefore, the rector be entitled to two parts of the tithe, and the vicar to a third, and the parson and vicar severally demise their shares to a third person, such lessee may bring this action for all the tithes.

As the right to tithes accrues immediately on the severance, this action must be brought by the person entitled to them at that time, therefore a lessee after severance cannot sue even though the tithes were not carried away when the lease was granted. *Wyburd* v. *Tuck*, 1 Bos. & Pull. 458. Neither can any but the party aggrieved maintain this action. *Johns* v. *Carne*, Mo. 911. Cro. Eliz. 621.

Where *A.* had a lease of tithes in right of his lease as executrix to her

In this action therefore the plaintiff must prove himself entitled to the tithe, the taking away by the defendant, and the value; but as the action is founded on the tort, the plaintiff may declare as *firmarius vel proprietarius*

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her former husband, and granted "all his right and interest in the "aforesaid tithes" to *C. D.*, held that this grant was good, and that *C. D.* may maintain this. *Arnold* v. *Bidgood*, Cro. Jac. 318. But where the executrix of a lessee for years marries, the husband and wife must sue jointly. *Beadles* v. *Sherman*, Cro. Eliz. 613. So tenants in common must join, for it is a personal action. *Greenwood's Ca.* Clayt. 28.

Executors may bring this action, for it is within the equity of 4 *Edw.* III. which gives them a right to sue in trespass *de bonis testatoris*. *Moreton's Ca.* 1 Vent. 30. 1 Sid. 407. 2 Keb. 502, but against executors this action lies not. *Attorney-General* v. *White*. Comy. 434. Nor is the executor of a parson entitled to the forfeiture under the statute. *Anon.* 1 Vern. 60.

The person entitled to the nine parts at the time of the severance ought to set out the tithe, and if he fails, the owner of the tithe may sue him, though his interest in the land be determined before they were carried away, provided he remain owner of the corn. *Kipping* v. *Swain*, Cro. Jac. 324.

Where there are two joint-tenants, and one only enters and occupies, this action lies against him only. *Cole* v. *Wilkes*, Hutt. 121. So if there be two tenants in common, one of whom sets out the tithe, and the other carries it away, this action lies against the latter only. *Gerard's Ca.* cited in Hutt. 122.

A purchaser of corn from the owner of a rectory must pay tithe, unless his contract specify the contrary, and if he carry it away without first setting it out, this action lies. *Moyle* v. *Ewer*, Cro. Jac. 361.

In an action on this statute for the treble value of tithe corn, defendant must do more than shew the *existence* of a custom to set out the eleventh instead of the tenth mow, for the *validity* of it is also triable in this form of action, though penal in its nature. *Phillips* v. *Davies*, 8 East, 178.

In an action by two farmers who claimed under a lease from a patentee of the king for life, an exception was taken that they did not shew the patent, but it was over-ruled, 1st. because the patent did not belong to the plaintiffs, 2d. because the plaintiffs did not demand the tithes themselves. *Dagg* v. *Penkevon*, Cro. Jac. 70.

Plaintiff declared as rector of *D.* and *S.* and that defendant being occupier of lands in *D.* and *S.* carried off the corn, but plaintiff did not shew what lands were in *D.* and what in *S.*; this declaration was held good, for this action is in nature of a trespass founded on a tort. *Fellows* v. *Kingston*, 2 Lev. 1. So where plaintiff declared, that as rector of *A.* he was entitled to lands in *A.* and that he was also entitled to tithes in *B.* but he did not shew how. This declaration was held good after verdict. *Phillips* v. *Kettle*, Hard. 173. So if plaintiff declare that he was seised in fee of tithe of corn growing in such a grange, it is good. *Sanders* v. *Sandford*, Cro. Jac. 437, but he need not specify the kinds of grain. *Beadles* v. *Sherman*, Cro. Eliz. 613. 13 Co. 47. 2 Inst. 650, or by whom sown, or the number of loads taken away. *Anon.* 1 Brownl. 171.

Plaintiff in his declaration need only state the single value of the tithes without adding the treble value, and where the treble value is stated, a miscomputation of it will not vitiate. *Coke* v. *Smith*, Selw. Ni. Pri. Abr. 1094.

A superfluous allegation will be aided

proprietarius without shewing any particular title.—*Sanders* v. *Sandford*, M. 1617. Cro. Jac. 437. *(a)*

The plaintiff declared as a farmer of the rectory of *Frihust*, and proved himself lessee of one *Bellow*, who was lessee to the dean and chapter to whom the rectory belonged, and produced the lease from *Bellow*, but not from the dean and chapter to him; however, upon proving that he received tithe of others as farmer, it was holden sufficient by *Pemberton*, C. J. in *(Selwin* v. *Baldy.) Sussex*, 1682; and at the same assizes the plaintiff being farmer under the dean and chapter of *Canterbury*, and proving he had received tithes for some years as such, it was holden sufficient without producing any lease.—*Hartridge* v. *Gibbs*.

So if the plaintiff claim as parson, if the title be not in question, it is sufficient if he prove himself in quiet possession; but if the title be in question, he must prove his ordination by the bishop, his institution and induction, subscription to the declaration in the act of uniformity in the presence of the bishop, *&c.* and his reading the 39 articles within two months, and declaring his assent to them. *(b)*

Debt

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aided by a verdict, therefore where the severance was alledged to have been before the sowing, and on that ground an exception was taken after verdict, it was disallowed, for to alledge the sowing was superfluous. *Pellett* v. *Henworth*, Degge, 398. (6th edit.) and indeed the declaration should always follow the words of the statute, by alledging that defendant is *subditus domini regis*, but it has been held equivalent to alledge that he is *occupator terræ*, for that implies that he is *subditus*. *Phillips* v. *Kettle*, Hard. 173. Neither need plaintiff set forth what interest he had, or how he was occupier, but he must alledge that he was occupier. *Anon.* March 21, pl. 49.

(a) For that is inducement only. Vide *Babington* v. *Matthews*, Bulst. 228. 1 Brownl. 86. *Moyle* v. *Ewer*, Cro. Jac. 361. *Champernon* v. *Hill*, Yelv. 63. Tithe is so collateral to the land from whence it arises, that if a lease be made of a glebe belonging to a rectory, with all the profits and advantages thereof, and there be a covenant that the rent to be paid, shall be in full satisfaction *of every kind of exaction and demand belonging to the rectory*, yet if the glebe be not expressly discharged of *tithe*, the lessee shall be liable to the payment of tithe for the glebe. Bac. Abr. 712. *Priddle* v. *Napper*, 11 Co. 13. *Parkins* v. *Hind*, Cro. Eliz. 161.

(b) This last evidence, however, has been deemed unnecessary until the contrary is shewn by the defendant ever since the case of *Powell* v. *Milbank*, 3 Wils. 355. 2 Bla. 851, and it is equally so after long possession, acquiesced in by defendant, for that is *primâ facie* evidence of the rector's title. *Anon.* Clayt. 48, pl. 83. *Chapman* v. *Beard*, 4 Gwil. 1482. and *Harris* v. *Adge*, 2 Gwil. 560.

Where a lay impropriator sues, he must, in strictness, prove that the rectory originally belonged to one of the dissolved monasteries, and was granted by the crown to those under whom he claims. *Bury St. Edmund's Corporation* v. *Evans*, Comy. 631, but as deeds may be lost, long possession and old deeds have been deemed good evidence. *Kynaston* v. *Clark*, 5 T. Rep. 205. (n).

In debt on this statute, where the

Debt upon the statute against three; upon *nil debet* pleaded, the jury found that the defendant *Hancock debet* £18, but *quoad* the other defendants *nil debent*; and upon motion in arrest of judgment, because it was an action of debt founded on a contract which is intire, the court held it was founded on a tort, and therefore one may be found guilty, and the other acquitted, as in other actions upon torts; (*Bastard* v. *Hancock*, M. 7 W. III. Carth. 362.) and upon the authority of this * case the court [*189] of *K. B.* determined the case of *Hardman* v. *Whitacre et al'*, M. 22 Geo. II. *(a)* which was an action of debt against nine for keeping a lurcher contrary to 8 *Geo.* I. *c.* 19. All pleaded *nil debent*, and verdict as to six, *quod debent* £5, and as to the three others *nil debent*. Only one penalty can be recovered against all.—*Partridge* v. *Naylor*, T. 1596. Cro. Eliz. 480. *(b)*

Upon *nil debet* a lay person cannot give a *non decimando* in evidence, but the king or a spiritual person may, without shewing any cause why discharged; for it shall be intended by lawful means: (*Allen* v. *Pory*, 2 Keb. 45.) But where a special verdict found that the abbot of *Abington* was seised in fee, and that he and his predecessors held it discharged, and granted it to *All Souls* college, it was holden that the prescription was personal, and determined by the alienation, and that it could not be intended to be a discharge by a real composition, it not being pleaded or found by the jury to be so.—*Bolls* v. *Atkinson*, T. 18 Car. II. 1 Lev. 185. 2 Sid. 320.

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the declaration stated that they were within forty years next before the statute, of right *yielded and payable*, and yielded and paid, evidence that the land had always been remembered to be in pasture, and had never within memory paid any tithe, is not sufficient to defeat the action. *Mitchell* v. *Walker*, 5 T. R. 260. But where the declaration alledged only that tithes were paid within forty years, such proof was held to be insufficient to maintain the action. *Mansfield* v. *Clarke*, 5 T. R. 264 (n.)

(a) Reported in 2 *East*, 573 (n.)

(b) Under this plea plaintiff may give a *modus*, or a customary payment in evidence, and thereby defeat. *Charry* v. *Garland*, 3 Gwil. 951, but as to the rankness of a *modus*, that is a fact triable by a jury only. *Bedford* v. *Sambell*, 3 Gwil. 1058. *Twells* v. *Welby*, ibid. 1192.

Nil debet is the general issue in this action. *Bawtry* v. *Isted*, Hob. 218. Brownl. 53, but *not guilty* has been held a good plea. *Johns* v. *Carne*, Cro. Eliz. 621. 2 Inst. 651. *Wortley* v. *Herpingham*, Cro. Eliz. 766. *Chapman* v. *Hill*, Mo. 914. *Bastard* v. *Hancock*, Carth. 361.

The statute (of 21 *Jac.* I. *c.* 16. *s.* 3.) of limitations, however, cannot be pleaded to this action, for it is confined to actions of debt grounded on a lending or contract without specialty, and to debt for arrear of rent. *Talory* v. *Jackson*, Cro. Car. 513.

Neither can defendant plead that plaintiff sowed corn, and sold it him, for such sale will not excuse the payment of tithe. *Moyle* v. *Ewer*, 2 Bulst. 183. Cro. Jac. 361.

And this leads me to take notice of the construction of the statute of 31 H. VIII. c. 13, *as to discharges of payment of tithe.* At common law temporal persons had only two ways to discharge tithe; the first was by grant of the parson, patron and ordinary; the other by prescription *sub modo*, but not by an absolute prescription.—*Winton Bp.'s Ca.* 1596. 2 Co. 45.

Spiritual persons had *four* ways of discharge. 1. *Bull of the pope.(a)* 2. *Composition. (b)* 3. *Prescription, (c)* all which were absolute. 4. *Order,* (*d*) viz. Cistertians, Templers, and Hospitallers of *Jerusalem,* and was limited to so long as the land remained in their own manurance. *(e)*

(a) Which may be proved by the bull itself, or an exemplification under the bishop's seal, shewing the lands in question. *Clanrickard Earl* v. *Denton*, Palm. 38.

(b) Which was, when lands, or other *real* recompence, were assigned as a compensation for the tithes in question, but this must be made with the parson by consent of the patron and ordinary, and may exist in the case of a layman as well as an ecclesiastic; those made with the latter, however, must have been before the restraining statute of 13 *Eliz. c.* 10. *Slade* v. *Drake*, Hob. 296. 2 Wood, T. Ca. 107, but in the case of a layman, the instrument of composition must be produced, and not presumed. *Slade* v. *Drake*, supra. *Bury Corporation* v. *Evans*, Comy. 649. From the foregoing definitions, it seems, that there are four requisites to a *composition real*, 1st. That the tithe be discharged. 2d. That a composition be given in lieu of such discharge. 3d. That it be made with the consent of the patron and ordinary, and 4th. That it be made before the restraining statute; for it has been held, that a decree in equity confirms an agreement (for the acceptance of land in lieu of tithe) made since that statute, is not binding on a succeeding incumbent, though sanctioned by the concurrence of all parties, and had been acquiesced in for one hundred and thirty years. *Jones* v. *Snow*, 3 Gwil. 1199. *Cartwright* v. *Colton*, 4 Wood, T. Ca. 88. *Attorney-General* v. *Cholmley*, Ambl. 150. 7 Bro. P. C. 34. (8vo. ed.)

(c) On a *prescription absolute*, unless it be proved that the lands have paid tithes, their having belonged to a dissolved monastery merely, will be *primâ facie* evidence, that they immemorially held it, discharged of tithes, but the religious house must have been founded before the time of legal memory, (*viz.* 1 *Rich.* I. anno 1189.) for if afterwards, there could be no such prescription. *Nash* v. *Molins*, Cro. Eliz. 206.

(d) To entitle lands to this exemption, it is necessary they should have been in the hands of those orders before the council of *Lateran*, (anno 1179.) *Stavely* v. *Ullithorn*, Hardr. 101, and if such lands have ever paid tithes, it will induce a presumption that they were purchased by them after that time. *Lord* v. *Turk*, Bunb. 122. Another restriction on this exemption is, that the lands are only privileged while in the hands of the person, who has an estate of inheritance in them, or an estate tail for a lessee for life or for years (unless under the crown immediately) is chargeable during his occupation. *Anon.* Owen, 46.

(e) But *temporal persons* had only *two* ways of discharge, 1st. By *grant* of the parson, patron, and ordinary; and 2d, by a *prescription sub modo*, and not by a prescription *absolute*.

Then

Then came 31 *H.* VIII. and enacted that as well the king, as all and every person who shall have any hereditaments who belonged to monasteries or other religious or ecclesiastical houses, shall retain, keep, and enjoy the same according to their estates and titles, discharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the said late abbots, *&c.* occupied, possessed, or enjoyed the same at the days of their dissolution.

This clause hath continued the discharge by bull, composition and order, which was before the act, and which else would have been dissolved with the spiritual bodies to which they were annexed.—*Slade* v. *Drake*, M. 15 Jac. I. Hob. 297. (*a*)

It hath likewise continued the discharge by prescription, which, though it would otherwise have continued in the king, * who is *persona mixta*; [* 190] and therefore capable of such a discharge at common law, yet it would have failed in the case of a mere layman, such a one (as I have already said) not being allowed to plead a prescription in *non decimando*, but only in *modo decimandi*. (*b*)

It

(*a*) By virtue of the above clause laymen holding abbey lands derivatively, enjoy the above exemptions from tithe, and not only tenants in fee enjoy them, but tenants for life also. *Hett* v. *Meeds*, 4 Gwil. 1515, and in tail. *Wilson* v. *Redman*, Hardr. 174, are entitled to hold tithe free, as possessors in succession, though the estate be divided under a marriage settlement.

(*b*) It is now clearly established that a layman cannot prescribe a *non decimandi*. *Allen* v. *Pory*, 2 Keb. 45. *Breary* v. *Manby*, 3 Wood, T. Ca. 43. 3 Burn Eccl. Law, 432. 3 Gwil. 904. Neither can a hundred or a county so prescribe for that which in its nature is *de jure* tithable; *sed secus* of things not in their nature tithable *de jure*; for in such case they are discharged without a custom to the contrary, and they do but insist on their ancient right, and that the custom hath not prevailed against it. *Hicks* v. *Woodson*, Ld. Raym. 137. Salk. 655. So neither shall a layman set up against a claim of tithe mere non-payment from time immemorial, whether the claimant be a lay impropriator, or ecclesiastical rector. *Bury Corporation* v. *Evans*, Comy. 643. *Jennings* v. *Lettis*, 3 Gwil. 952, and whether the non-payment extends to all or only a part of the tithes. *Nagle* v. *Edwards*, 4 Gwil. 1442. Sed vide Lord *Loughborough*'s remarks on this case in *Rose* v. *Calland*, 5 Ves. 186.

There is a distinction, however, between a prescription in *non decimandi*, and a claim of all or a portion of tithes, supported by evidence of actual enjoyment of the pernancy of them; for the former, as being unlawful, cannot be maintained or presumed, but the title to the latter not being unlawful, may be supported by evidence of long possession; therefore, where there has been an actual pernancy of all, as in *Fanshawe* v. *Rotheram*, 3 Gwil. 1178, and *Edwards* v. *Vernon*, H. 1781, *in Scacc.* or a portion of tithes, as in *Scot* v. *Carey*, T. 1799, in *Scacc.* and *Strutt* v. *Baker*, 2 Ves. jun. 625, by lay hands, under a conveyance as lay property, for a long time, equity will not interfere in favor of the rector, *&c.* to disturb such possession, by calling

It hath also created a new discharge, and that is unity of possession of the parsonage and land in one hand.

But to make this unity a good discharge within this act, it must be a perpetual one, *i. e. a tempore cujus, &c.* till the dissolution; and though it be perpetual, yet if the abbot, or his farmer, paid tithe before the dissolution, that would destroy the prescription, (*a*) because it would prove there was no real discharge, for an unity by prescription is not itself a perfect discharge, but from thence the law will *primâ facie* presume one, though it cannot be found; (*Slade* v. *Drake*, M. 15 Jac. I. Hob. 298.) and therefore if the jury find nothing but a perpetual unity, it is found against the pleader, and therefore in pleading such an unity you must add, that *ratione inde* they held discharged of payment of tithe time out of mind, for that fixes it to the statute; yet the unity and not the conclusion must be traversed.—*Ingram* v. *Thackston*, in *Scacc.* 1748.

From hence it appears, that if the appropriation were made within time of memory, upon the point of unity the statute will be of no avail; but in such case he may alledge the said branch of the act, and that the abbots, *&c. a tempore cujus* till the dissolution held the land discharged of tithe, and give such evidence that he may approve it, which must be *a posteriori.*—*Priddle* v. *Napper*, M. 1612. 11 Co. 14.

But if the abbey were founded within memory, or the land purchased to the abbey within memory, then he cannot prescribe; but if the abbey had been time of mind, and an appropriation since, yet he may prescribe in a general discharge; for that may be, though an unity came after. (*b*)

Of

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calling on defendants to shew a legal commencement.

The king is not *ex prærog.* discharged from tithes for the ancient demesnes of the crown, but he is capable of a discharge *de non decimandi* by prescription, for he, as well as a bishop, is *persona mixta*, but if the king alien any of his discharged lands, his patentee shall pay tithe. *Hotham* v. *Foster*, 3 Gwil. 869, and from the time of such alienation, the prescription is gone for ever, and can never afterwards revert even to the king by any means whatever. *Comfort* v. ———, Hardr. 315.

(*a*) Vide *Benton* v. *Trott*, Mo. 528. S. P. for, if the unity be within the time of memory, or tithe has been paid, it is not discharged by the statute. However, if the unity be proved, but the time of it cannot be ascertained, and there is no evidence of tithe having been paid, its exemption may be presumed. *Wildman* v. *Oades*, Pollexf. 1. This, therefore, is in effect a discharge by prescription, and when put specially on the record may be so pleaded. *Slade* v. *Drake*, Hob. 299.

(*b*) Lands formerly belonging to a Cistertain abbey, are discharged of tithes while in manurance of the owner, though such lands were under lease for years, at the time of the dissolution of the abbey, for the privilege, though personal, existed then in right, though not *in esse*, and the reversioners were entitled to the discharge as soon as the lands reverted into their own hands. *Cawley* v. *Keys*, 4 Gwil. 1308, where *Eyre*, C. B. recognized

Of the other ways of discharge continued by this act, it is only necessary to say, they must be properly pleaded, for tithe of right belongs to the church, and if you will discharge a just demand, you must satisfy the court of your discharge.—*Slade* v. *Drake*, M. 15 Jac. I. Hob. 299.

But note, this clause of discharge in 31 *Hen.* VIII. extends only to such religious houses as came to the king by virtue of that act, or by 32 *Hen.* VIII. *c.* 24. (*Canterbury Archbp.'s Ca.* T. 1596. 2 Co. 47.) and not to such which came to him either by virtue of 27 *Hen.* VIII. or 1 *Ed.* VI.—*Fossett* v. *Franklin*, M. 25 Car. II. T. Raym. 225.

Where the discharge is by order only, it is limited to so long as the land is in the occupation of the owners, but if the land *have never [*191] paid tithe, though it be proved never to have been in tenants' hands, yet the general presumption of a total discharge shall prevail.—*Ingram* v. *Thackston.* in *Scacc.* 1748.

In debt upon the statute 2 *Ed.* VI. the defendant pleaded not guilty, and insisted on the proviso of barren lands; the case was, he ploughed and denshired an ancient warren and sheep-walk, in which were some furzes, and the first crop upon 107 acres was of the value of £240, and upon this, without more evidence, the judge thought it sufficient to shew the land was not *suapte naturâ* barren, but profitable land.—*Bourscough* v. *Aston*, *per Dolbin*, J. 1693. (*a*)

So if a wood be stubbed and grubbed, and made fit for the plough and employed thereunto, yet it shall pay tithe presently, for wood ground is *terra fertilis et fœcunda.*—2 *Inst.* 656. (*b*)

Lord *Hardwicke* held such land only within the clause of the statute, relating to barren land, as over and above the necessary expence of inclosing and clearing, required also expence in manuring, before they could be made proper for agriculture, and therefore decreed tithe upon its being proved, that the land bore better corn than the arable land in the parish, without any extraordinary expence in manure, &c. and that it had paid tithe of milk, wood, &c. before.—*Stockwell* v. *Terry*, T. 1748. 1 Ves. 117.

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recognized the case of *Porter* v. *Bathurst*, Cro. Jac. 559. 2 Rol. Rep. 142. Palm. 118.

The lands belonging to the lesser abbies which came to the crown by 27 *Hen.* VIII. c. 28, or 1 *Ed.* VI. are not entitled to these exemptions, though such lands were discharged when in the hands of religious houses, for that statute does not contain any clause similar to the 21st section of 31 *Hen.* VIII. *c.* 13. *Anon.* Clayt. 41. pl. 70. *Canterbury Arhp.'s Ca.* 2 Co. 47. *Fossett* v. *Franklin*, T. Raym. 225.

(*a*) And the like was determined in *Stockwell* v. *Terry*, 1 Ves. 115, as to a common sheep field, which was over-run with brushwood, briars, and weeds.

(*b*) Et vide *Anon.* 2 Freem. 334.

Note;

Note; In the same cause it appearing that a *modus* of £13 was paid for the tithe of *Grange* farm, to which there was common appurtenant in the land inclosed, a parcel of which was allotted by the act for inclosing to the farm, the chancellor held the *modus* extended to such inclosed land.

If one do gain land from the sea, and plow it, he shall pay tithe, for the land is not *suapte naturâ* barren.—*Wit* v. *Bucks*, E. 14 Jac. I. 3 Bulst. 165. 1 Rol. Rep. 354.

So of any other land covered with water.—*Sherington* v. *Elewood*, T. 1596. Cro. Eliz. 475. (*a*)

This statute extends only to predial tithe, *i. e. ex fructibus prædiorum ut blada, fœnum, &c. seu ex fructibus arborum, ut poma, pyra, &c.* but tithe of cheese, milk, calves, lambs, &c. are not predial but mixed; and therefore in an action brought for not setting out tithe of cheese, milk, &c. after verdict for the plaintiff, judgment was arrested.—2 *Inst.* 648. 649. (*b*)

(*a*) But if any additional expence is required to produce the first year's crop, seven years shall be allowed. *Stockwell* v. *Terry*, 1 Ves. 117. And so if the lands require manure before they yield any crop. *Jones* v. *Le Davids*, Peake's Evid. 418.

So in *Byron* v. *Lamb*, 4 Gwil. 1594, the land was a hollow parcel of ground, surrounded by banks, the uneven and banking part of which produced nothing but briars; the flat part was so boggy, wet, and deep, that no cattle could tread upon it without danger; when drained and ploughed it could not be harrowed but by men, the uneven and banking part could not even be ploughed till it had been dug, and the crops produced, during the year for which the plaintiff claimed, were so bad, and fell so short of the expence of cultivation, that it would be impossible for defendant to reimburse himself for twenty years. This, said *Eyre*, B. (sitting for the Chancellor in *Cur. Canc.*) is a case protected by the statute.

(*b*) So where plaintiff declared for not setting out *prædial* and *other* tithes, as those of lambs, wool, &c. and the jury found a general verdict, judgment was arrested on the like objection. *Pain* v. *Nicholls*, 1 Brownl. 65.

As to the evidence, in an action on this statute, vide *Peake's Law of Evid. cap.* 16. *s.* 2.

Prædial tithes also comprehend corn, flax, hemp, hay, hops, saffron, woad, &c. *Norton* v. *Clarke*, 1 Gwil. 428. Coppice woods are also *prædial*, and must be set out on the spot at the time of falling, for, though *non annuatim renovantur*, yet when cut they grow up again, and are again cut at certain times, like saffron. *Sed secus* as to timber trees. *Walton* v. *Tryon*, Ambl. 131, which, at and after twenty years growth, are exempt by statute 45 *Edw.* III. c. 3. which comprehends all sorts of timber, whether so deemed by law or custom. *Abbot* v *Hicks*, 1 Wood, T. Ca. 320. *Larfield* v. *Cooper*, ibid. 330, and this exemption extends to the bark as well as the body of the tree. 2 *Inst.* 643, and so to the lop and top, for the subsequent use of the wood will not make that tithable which was not so before. *Walton* v. *Tryon*, sup. where it was held that lops and tops of trees above twenty years growth were exempt from tithe, and

and so are faggots and billets made therefrom. *Morden* v. *Knight*, 2 Gwil. 841.

It is laid down in 2 *Inst.* 643, that if a man cut down timber trees tithes shall not be paid for the germins growing from the roots, for the root is part of the inheritance; but *Hardwicke*, C. in *Walton* v. *Tryon*, sup. said, this had been contradicted, for most coppices grew from the germins of old timber trees.

Wood growing in hedge rows is tithable if not timber. *Biggs* v. *Martin*, 1 Wood, T. Ca. 321. *Mantell* v. *Paine*, 4 Gwil. 1504.

If the vicar be not endowed of tithe wood, or claim it not by prescription, the parson is intitled *de mero jure*. *Renoulds* v. *Green*, 2 Bulst. 27. Et vide *Norton* v. *Clarke*, 1 Gwil. 428.

In debt on this statute for not setting out tithe, the declaration stated, that within forty years before the statute, they were *of right yielded and payable*, and yielded and paid. Proof that the land had never paid tithe, but always been in pasture within living memory, will not defeat this action. *Mitchell* v. *Walker*, 5 T. R. 260. But where there is no evidence of tithe being paid at all in the like case, plaintiff cannot recover. *Mansfield* v. *Clarke*, 5 T. Rep. 260. 264 (n).

If the owner justly divide the tithe from the nine parts, and sets it out, but immediately afterwards carries it away, this is a fraud within the statute. *Heale* v. *Spratt*, 2 Inst. 649. *Anderson's Ca.* Clayt. 20. S. P.

Though a lease of tithes cannot be without deed, yet a parol agreement for retaining tithes will bar the parson of this action. This agreement is sometimes called a composition, but it must not be confounded with a composition real. *Bernard* v. *Evans*, 1 Lev. 24. T. Raym. 14.

Where a parson has agreed with the occupiers for retaining their tithes, he cannot bring this action for not setting them out till the agreement is determined, but the parson cannot determine it without giving the occupiers a reasonable notice. This point, said *Buller*, J. was quite settled in *Wyburd* v. *Tuck*, 1 Bos. & Pull. 465; and, he observed, that in *Hewitt* v. *Adams*, 7 Bro. P. C. 64, (2d edit.) where the notice has been given only a month before *Michaelmas* Day, on which the composition was payable, upon a question put to the judges as to its sufficiency, they agreed *nem. con.* that it was not a sufficient notice, for that a notice to determine a composition should be given with analogy to that given in a holding of land; and in *Bishop* v. *Chichester*, 2 Bro. Ch. Ca. 161, Lord *Thurlow* held the same doctrine. So the death of an incumbent will determine a composition between him and his parishioners, and his successor is not obliged to give notice of his intention to receive tithe in kind. *Anon.* Bunb. 294. But if the successor, after induction, receive the former composition, it is so far a confirmation of it as to oblige him to give regular notice. *Brown* v. *Barlow*, 3 Gwil. 1001.

As to the verdict, if it be found for the plaintiff, the jury must shew how much of the debt by the declaration demanded is due to him, by taking treble the value of the tithe subtracted. *Degge*, 404, (6th edit.) And as it has been held that the plaintiff shall recover according to the verdict, if in the statement of the treble value there be an error in the calculation against the plaintiff, and he demanded less than his due, for which an exception was taken, (on motion in arrest of judgment after verdict) that he ought to have acknowledged satisfaction for the whole. The court over-ruled the objection, because the demand was not for a certain sum, but only for what the jury should give, and he can recover no more. *Pemberton* v. *Shelton*, Cro. Jac. 498. 2 Rol. Rep. 54. Vide etiam *Bolls* v. *Atkinson*, 1 Lev. 185. 2 Sid. 320. *Bastard* v. *Hancock*, Carth. 361.

As to the costs, at common law the plaintiff in this action was not entitled to costs, but he now is to a certain

CHAPTER III.

OF ACTIONS UPON 5 ELIZ. C. 4.*(a)*

THE 5 *Eliz. c.* 4. enacts, That no person shall exercise any trade *(b)* who has not served as an apprentice for seven years, under the penalty of £2 *per* month, to be recovered by whoever will sue for the same.

None but what were trades at the time of making this statute are within it, therefore it ought to be averred in the declaration (or indictment) that it was a trade at the time of making the act, and it is a good exception in arrest of judgment, that it is not so averred; unless it be a trade within the very words of the act, and then no such averment is necessary.—*R.* v. *Slaughter*, H. 1699. Salk. 611. Ld. Raym. 513. *R.* v. *Monro*, H. 3 Geo. II.

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certain extent, under the stat. 8 & 9 *W.* III. *c.* 11. *s.* 3. Neither was defendant entitled to costs under stat. 23 *Hen.* VIII. *c.* 15. though the plaintiff were nonsuit, or defendant had a verdict; for an action on this statute is not one upon contract, or for an immediate personal wrong to the plaintiff, but for a misfeasance. *Downton* v. *Finch*, 2 Inst. 651. but defendant is now entitled to his costs in such cases under the 8 & 9 *W.* III.

Where a statute gives damages by creation, plaintiff shall not recover costs, because damages being given out of course, and not by the common law itself, the statute is introductory of a new law, therefore the plaintiff shall recover only what the statute gives him. *Dict. Arg.* in *Turner* v. *Gallilee*, Hard. 152.

As to the judgment. This being an action to recover treble value of tithes, where the single was not recoverable at common law, the judgment was formerly only for the debt which the jury found, the costs not being recoverable by the statute of *Gloucester. Co. Entr.* 162. so that if the jury gave damages and costs, plaintiff was bound to enter a *remittitur*, and take judgment for the debt only. *Dagg* v. *Penkevon*, Cro. Jac. 70; but the statute of 8 & 9 *W.* III. c. 11. has altered this also.

If the issue be on a collateral matter, as on the custom of tithing, (*Costerdam's Ca.* cited in Yelv. 127.) or discharge by statute, which is found against the defendant, and he has not taken the value by protestation, he shall pay the value expressed in the declaration, for by pleading the collateral matter in bar, he has confessed the whole declaration. *Bowles* v. *Broadhead*, Alleyn. 88.

If the action be against several defendants, and the verdict against one or two only, plaintiff shall have judgment against those, though the others recover against him. *Brown* v. *Nelson*, Sty. 317. Vide etiam *Bastard* v. *Hancock*, Carth. 361.

See more of this subject, so far as the decisions in Chancery and Exchequer affect the same, in *Bridgm. Anal. Dig. of Eq. Ca.* tit. *Tithes.*

(a) This act was amended, and in part repealed, by stat. 54 *Geo.* III. c. 96.—See note at the end.

(b) Or set any person to work in such mystery.

And

And note; it must be averred to be a trade within the realm (or kingdom) of *England* or *Wales* at the time of making the act.—*Queen* v. *Robinson*, T. 13 Ann.

Only such trades are within the equity of the act as require skill; but whether it were a trade or not at the time of making the statute, or whether any skill be requisite to the exercise of it, is matter of fact proper for the determination of the jury.—*R.* v. *Slaughter*, H. 1699. Salk. 611. Lord Raym. 513.

It has been objected, that the using a trade in a country village is not within the statute, (*R.* v. *Turnith*, 21 Car. II. 1 Mod. 26.) and in the case of *R.* v. *Langley*, H. 6 Geo. II. Mr. J. *Page* said he had often known indictments quashed upon such exception: however, I do not apprehend it would now be allowed; for in such case at the sittings at *Westminster* it was mentioned, but *Lee*, C. J. made slight of the objection.—*Case of London City*, 8 Co. 129. *Case of Monopolies*, 11 Co. 84.

On motion to quash an information against the defendant for exercising the trade of a baker without having served an apprenticeship at the parish of *S.* in *Kent*. The first objection was, that it did not appear that the offence was committed in the city, borough, or market town. Secondly, that it did not appear but that the defendant exercised this trade when the act was made. But the court held, that neither the enacting part of the statute, nor the preamble, gave any foundation for the first objection, and that the offence was clearly well laid; though they said, if it came out in evidence that he followed the business only in a small village, it had been the common *practice to find for the defendant. As to the second objection, the court said, it must be presumed at this length of time, though the objection would have held whilst the law was recent.—*Ball q. t.* v. *Cobus*, T. 30 & 31 Geo. II. 1 Burr. 366. [*193]

It has been holden, that serving seven years as an apprentice beyond sea, without being bound, is sufficient, and therefore an indictment was quashed, because it only said he had not served as an apprentice *infra regnum Angliæ aut Walliæ*.—*R.* v. *Fox*, E. 1699. Salk. 67. *(a)*

In an action *qui tam* for exercising a trade, the question arose, What should be a service? On which *Holt*, C. J. cited a case between *Hopkins* and *Young*, in *B. R.* on a special verdict, where it was adjudged, that if a person serving seven years in the exercise of his trade to any person exercising that trade, though that person have no right to use

(a) But serving *five* years in any country, by the law of which more is not required, will not qualify a person to use the trade in *England*. *Ca. of Law and Eq.* 7.

that

that trade, yet being employed in it seven years, that shall be a good service though he were not an apprentice; also he said he had holden that if a woman marry a tradesman, and be employed therein seven years, and then the husband die, she may use that trade after her husband's death; and also if she marry a second husband, she may continue to exercise that trade, and if she die her husband may continue to exercise it, provided he were employed in the exercise of it seven years in his wife's life-time; he said he had mentioned all these opinions of his to the rest of the judges, who all concurred.—*Peaks* v. *Johnson*, H. 1 Ann. Westminster. Salk. MSS.

The foregoing case shews that the construction put upon this statute has been a very liberal one in favour of defendants; however, there has been no case which has been determined to be within the act, unless there have been in some manner a service for seven years; therefore one who is a partner to a person qualified will not be within the act, unless he have served seven years. (*Rex* v. *Driffield*, 18 Geo. II. *per cur.*) But if the defendant can in any manner prove the following of the trade for seven years, it will be sufficient without any binding (and he shall be suffered to make it out by months and weeks): yet the word *apprentice* is the very material word of the statute, and an indictment without it would be ill.—*Regina* v. *Taylor*, E. 1 Ann. 2 Raym. 1159.

It has been holden to be sufficient if the defendant have followed the trade seven years as a master, without any prosecution against him with effect.—*Wallen* v. *Houlton*, 1759. 1 Bla. 233.

A person who follows a trade as a journeyman is not subject to the penalties of this statute, though he has not served an apprenticeship.—T. 9 Geo. II. B. R. *(a)*

[194] On a special verdict the case was, The defendant was a *Turkey* merchant, and exported woollen manufacture into *Turkey*; he employed clothiers that had served apprenticeships to work the cloth in his own house at his own charge, and with his own materials; and the court held that the defendant was the trader in this case, because he employed the rest who were but as servants; they held likewise that this was trading within the statute, for whether the utterance be within the realm, or in *Turkey*, is immaterial.—*Hobbs q. t.* v. *Young*, T. 1691. Salk. 610.

But where a special verdict found that the defendant was a money partner in the brewing trade with *Cox*, who was qualified; but that by

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(a) The statute indemnifies a man in using several trades, provided he has been apprenticed to them all. *Hobbs, q. t.* v. *Young*, Carth. 163.

agreement

agreement he was not to interfere in the trade, but that *Cox* had an allowance for that purpose, the court held it was not within the meaning of the statute.—*Reynard* v. *Chase*, M. 30 Geo. II. K. B.

Note; Freemen and their wives cannot be witnesses, where part of the penalty goes to the city or town corporate where the offence is committed.—*R.* v. *Seymour*, M. 6 Geo. II. *per Raym.* Guildhall.

Though the plaintiff in this action be not entitled to costs if he recover, yet he must pay them if the verdict be found against him.—*Jeynes* v. *Stevenson*, E. 10 Geo. C. B. *(a)*

(a) Note. By 31 *Eliz. c.* 7. all suits for using a trade, without having been brought up in it, shall be sued and prosecuted in the general quarter sessions of the peace or the assises, in the same county where the offence shall be committed.

In the construction of this statute, it has been held, that it restrains not a suit in the King's Bench or Exchequer, for the negative words are not, that such suits shall be brought in any other county; the prerogative of these high courts cannot be restrained without express words. *Shoyle* v. *Taylor*, Cro. Jac. 178. *Davison* v. *Barber*, Hob. 184. *Hicks's Ca.* 1 Salk. 373.

The stat. 5 *Eliz. c.* 4. having of late rendered divers industrious persons the sport of informers, who inquisitively sought out those who had not served an apprenticeship as the objects of their prosecution, the legislature, in the fifty-fourth year of his present majesty, thought fit to pass an act (*cap.* 96) for their relief, and by that statute it is enacted, in *sect.* 1. that so much of the statute of 5 *Eliz.* as prohibited persons from exercising any art, except they had served an apprenticeship of seven years, should be repealed; and by *sect.* 2. all other parts of the same act which respect apprentices are repealed; but by *sect.* 3. justices may hear complaints in other matters as before; and *sect.* 4. declares, that the custom of *London* respecting apprentices shall not be affected.

The above statute (says Mr. *Tidd*, p. 15.) extends to all penal statutes, whereby the forfeiture is limited to the king, or to the king and the party, whether made before or after the statute.

CHAPTER IV.

GENERAL RULES CONCERNING ACTIONS ON PENAL STATUTES.

BY 31 *Eliz. c.* 5. it is enacted, That all actions, *&c.* brought for any forfeiture upon any penal statute made or to be made, whereby the forfeiture is limited to the king, shall be brought within two years: and all actions upon any penal statute, the benefit whereof is limited to the king and to the prosecutor, shall be brought within one year.

And in default of such pursuit, then the same to be brought for the king at any time within two years after that year ended. And if any suit

suit upon any penal statute made or to be made, except the statute of Tillage, shall be brought after the time in that behalf before limited, the same shall be void and of none effect.

[195] Upon this statute it has been holden, I. That if any offence prohibited by any penal statute be also an offence at common law, the prosecution of it as an offence at common law is not restrained by this act. (*R.* v. *Marriott*, T. 4 W. III. 4 Mod. 144. *Culliford* v. *Blawdford*, T. 4 W. III. 2 Show. 353.) II. That the defendant may take advantage of this statute on the general issue, and need not plead it. (*Anon.* Noy. 71.) III. That the party grieved is not within this statute, but may sue as before: (*Culliford* v. *Blandford*, T. 4 W. III. Carth. 232.) but *quære*, where the suit is first given to the party grieved, and then to the common informer?—*Chance* v. *Adams*, E. 8 W. III. 1 Raym. 78.

On a case reserved it appeared that the action of debt was brought on 9 *Ann. c.* 14. by a common informer against Sir *T. F.* for winning £525 of *G. L.* at cards. The money was lost and paid 11th *March*, 1757, and the original not sued out till *Mich.* 1762. The court of *C. B.* held it a case within 31 *Eliz.* though the action was given in the first instance to the party grieved, and afterwards to the common informer for himself and poor of the parish: for such action would have been within the 7 *Hen.* VIII., and the 31 *Eliz.* was made to narrow the time given by that statute, and therefore could never mean to leave any actions unrestrained in time; the latter part of the clause must therefore be construed to extend to them.—*Lookup q. t.* v. Sir *T. Frederick*, 6 Geo. III. *(a)*

It has been determined that suing out a *latitat* within the year, is a sufficient commencement of the suit to save the limitation of time. (*Culliford* v. *Blandford*, supra.)*(b)* But if the writ were not sued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonsuited.—*Morris* v. *Harwood*, M. 3 Geo. III. 3 Burr. 1241.

(a) N. B. *Lookup* was indicted for perjury in this case, by Sir *T. F.* and was found guilty, but the judgment was afterwards reversed for informality. Vide *R.* v. *Lookup*, 3 Burr. 1901.

In *Cullifford* v. *Blandford*, sup. an action *qui tam* was brought in *B. R.* on stat. 23 *Hen.* VI. *c.* 15. for a false return of a burgess in parliament; by the record it appeared the bill was not filed within a year after the offence. After judgment it was resolved in the Exchequer Chamber, that, where the whole penalty is given to the informer, the stat. 31 *Eliz.* does not extend to it, for penal statutes are not extendible by equity, and it is not within the words of the act.

(b) This was determined in *Hardyman* v. *Whitaker*, 2 East, 574 (n), which recognizes *Culliford* v. *Blandford*, Carth. 232.

By

By 21 *Jac.* I. *c.* 4. *s.* 1. All offences against penal statutes, for which any common informer may ground an action, *&c.* before justices of assize, *&c.* (except offences concerning recusancy or maintenance of the king's customs, or transporting gold and silver, ammunition or wool, *&c.*) shall be commenced, sued, tried, recovered and determined by action, *&c.* before the justices of assize, *&c.* or before justices of the county, *&c.* *(a)* and the like process in every popular action, *&c.* shall be as in actions of trespass *vi et armis* at common law, and in all suits on penal statutes the offence shall be laid in the proper county; and if on the general issue the offence be not proved in the same county in which it is laid, the defendant shall be found not guilty. *(b)* *(c)*

In

(a) Where it does not appear by the record that a penal action was brought within the limited time, the plaintiff must prove that it was so. *Maughan* v. *Walker*, Peake's N. P. Ca. 163. So where the writ is only inducement in general, it is well enough for plaintiff to prove the issuing of it, but where the writ is the gist of the action, a copy of the record must be produced, or it will not be the best evidence; besides, the writ cannot be the gist of the action till it is returned. *Gilb. Evid.* 21. *Peake's Evid.* 50.

So where the declaration was not filed within two terms after the writ, the same rule, provided it was filed within a year after, *Parsons* v. *King*, 7 T. R. 6; for by the general rules of law plaintiff must declare within twelve months after the return of the writ, though by the rules of the court of King's Bench, if plaintiff does not declare within two terms after the return, defendant may sign a *non pros*, but if he omits so to do, plaintiff has the whole year to declare. *Worley* v. *Lee*, 2 T. R. 112. *Penny* v. *Harvey*, 3 T. R. 123. *Sherron* v. *Hughes*, 5 T. R. 35. But where more than one writ has issued, plaintiff must shew that the writ on which he declared was a continuation of the first, which he can only do by shewing that the first was returned, for until that is done the court is not so in possession of the cause as to award an *alias* or *pluries*. *Harris q. t.* v. *Woolford*, 6 T. R. 617.

Where a statute directs that no action shall be brought till after a limited time, plaintiff must shew that such time has elapsed, as where an attorney sued in *C. B.* for his bill, which he must have delivered a month before, and did not produce the writ, but relied on the record, which in *C. B.* does not state the day in the memorandum as in *B. R.* The court (*C. B.*) held, that the record was *primâ facie* evidence of the action being properly commenced, and that it was for defendant to disprove it by a copy of the writ. *Webb* v. *Prickett*, 1 Bos. & Pull. 263.

So in debt on the statute of usury, plaintiff having proved the offence, it was objected that the record did not shew the action was brought within the year. Plaintiff offered to produce the writ, but defendant disclaimed his right to that indulgence in a penal action after the objection was taken, but the court held that plaintiff might shew it in any stage of a cause, whether civil or penal. *Maughan* v. *Walker*, sup.

(b) To exclude superior courts, there must be express words or necessary implication—general or concurrent jurisdiction as to subject matter—and mode of proceeding to bring it within 21 *Jac.* I. *Cates* v. *Knight*, 3 T. R. 444.

(c) By *sect.* 3. the informer must make oath before some of the judges of the court, that he believes in his conscience the offence was committed within

In the construction of this act it has been holden, that it does not extend to any offence created since that statute, but that where a subse-
[*196] quent statute gives an action of debt or other remedy* for the recovery of a penalty in any court of record generally, it so far impliedly repeals 21 *Jac.* I. However, the offence must be laid within the proper county.—*Hicks's Ca.* H. 10 W. III. 1 Salk. 372. *(a)*

This

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within a year before the suit commenced.

This statute does not extend to offences since committed, 2 *H. P. C.* c. 26; and by *s.* 5. several statutes (now obsolete) are exempted from the operation of this act. Neither does this statute extend to subsequent penal laws; and as offences created by subsequent statutes are governed and remedied by the several directions therein respectively given, so it shall not be construed to affect an action founded on 12 *Ann. st.* 2. c. 16. against usury, therefore it is not necessary that there should be an affidavit that the offence was committed within a year before the action brought. *French q. t.* v. *Coxon*, Stra. 1081. *Harris q. t.* v. *Reyney*, there cited. *R.* v. *Gaul*, Salk. 372. Raym. 370. *Messenger* v. *Robson*, cited in *Garland q. t.* v. *Burton*, And. 292. Mr. *Selwyn*, however, (N. P. Abr. 562, (n.) mentions a prevalent opinion, that where a subsequent statute gives a popular action, the venue must be laid in the proper county, within the equity of 21 *Jac.* I. *c.* 4; and, he says, the only authority he is aware of for such a position is a *dictum* of Lord *Holt* in *Hicks's Case*, adopted in *Bull. N. P.* 196. Mr. *S.* has also, in the same note, given a more correct statement of *French* v. *Coxon*, than is reported by *Strange*. It is to be further observed, that where, by any act in force at the passing of the above statute, the informer might have sued by action, bill, plaint, *&c.* in the inferior courts, as well as in the courts above, he is now confined to sue in the former; but as the statute does not give any new jurisdiction to the inferior courts, the parties may still sue in the courts at *Westminster*, for all the penalties which could not before the passing of that act have been recovered in the inferior courts. *R.* v. *Gaul*, sup. *Garland* v. *Burton*, sup. therefore an informer may bring debt in the courts at *Westminster*, on the statute 1 *Jac.* I. *c.* 22. *s.* 14. for the penalties for selling goods not searched and sealed. *Shipman q. t.* v. *Henbest*, 4 T. Rep. 109. *R.* v. *Ferris*, 1 Williams' Saund. 312, c. n. (1)

(a) When a matter in one county is depending upon the matter in another, then the plaintiff may choose in which county he will bring his action, unless the defendant, upon the general issue pleaded, should be prejudiced in his trial, which would not be in this case (on action for maliciously prosecuting to outlawry where plaintiff was dead) as if two conspire to indict a man in one county, and they, by their malicious prosecution, make the execution of their conspiracy in *another* county, and then cause the party to be indicted, the plaintiff may bring his action of conspiracy in which county he will, for they put their conspiracy in one county in execution in the other, and the matter of record in the indictment is mixed with matter of fact. But if they conspire in one county, by force of which conspiracy (without any act done by them) he is indicted in another county, then the writ ought to be brought in the county where the conspiracy was, for the defendants have done nothing in the county where the indictment was laid, nor were parties or privies to the finding the indictment, but only by

This statute gives no new jurisdiction to the courts therein mentioned; therefore suits for such offences, over which they have no jurisdiction before the statute, must be brought in the courts of *Westminster*.

Where by the act creating the penalty, it is to be recovered by bill, plaint or information, in any of the king's courts of record, and no mention made of the quarter sessions or assizes, the 21 *Jac.* I. does not extend to it; for the act never meant to give a jurisdiction to the quarter sessions or assizes where they had none before. (*R.* v. *Gallilee*, M. 10 W. III. Carth. 465.)*(a)* Therefore it was holden that an information did not lie at the assizes for non-residence, the penalty (by 21 *Hen.* VIII.) being recoverable by bill, plaint, or information, in the king's courts.—*Garland* v. *Burton*, M. 12 Geo. II. Stra. 1103.

In the case of *K.* v. *Martel*, M. 25 Car. II. in an information on the 5 *Eliz.* it was holden, that it lay not originally in *K. B.* because the 21 *Jac.* I. hath negative words, but that if it be begun originally below, the party may remove it by *certiorari* if he will, and give jurisdiction to that court, for it is a statute for the ease of the subject; but the king cannot remove it.

No suit by a party grieved is within the restraint of the statute.—*Calliford* v. *Blawford*, T. 4 W. III. 1 Show. 354.

By 18 *Eliz. c. 5. s. 3.* No informer shall compound or agree with any that shall offend against any penal statute for an offence committed, but after answer made in court to the suit, nor after answer but by consent of the court. *(b)*

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by the conspiracy in the other county. *Bulwer* v. *Smith*, 7 Co. 57.

In all cases where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, then the plaintiff may bring his action in which court he will, as it is if a servant be retained in one county and departs to another. *S. C.*

In an action upon a matter in several counties, if the issue be confined to a thing in one of the counties, it ought to be tried there; as in covenant upon a lease in the county of *H.* of a house in the county of *B.* Verdict in the county of *H.* If the breach be for not repairing, and issue upon it, it is bad after verdict, for the action should have been in the county of *B.* *Gilbert* v. *Martin*, 1 Lev. 114.

So in debt, for an escape in one county, upon an arrest in another, if the issue be upon the arrest, it must be brought and tried in the county where the escape was. *S. C.*

In an action for a penalty for killing game, if the defendant gives in evidence a deputation from the lord of the manor, he shall not be put to strict proof of the boundaries of the manor, but proof of the exercise of a right upon a particular spot is sufficient. *Hawkins* v. *Bailey*, 4 T. R. 681 (n.) Nor will the judge in such an action try the boundaries of a manor, although the action be brought by consent for that purpose. *Blunt* v. *Grimes*, 4 T. R. 682 (n.) But a deputation is no defence, if it appears that the person who gave it has no colourable claims to the manor. *Calcraft* v. *Gibbs*, 4 T. R. 682.

(a) Shipman q. t. v. *Henbest*, 4 T. R. 116. S. P.

(b) The release of a common person shall not discharge a popular action, vide stat. 4 *Hen.* VII. *c.* 20.

This

This extends only to common informers. *(a)*

It extends as well to subsequent penal statutes, as to those which were in being when it was made.—*Pie's Ca.* Hut. 35.

By *s.* 1. of that statute, the common informer must sue in proper person, or by his attorney: therefore an infant cannot be a common informer, for he must sue by guardian.—*Maggs* v. *Ellis*, M. 25 Geo. II. *(b)*

A common informer cannot sue for a less penalty than the statute gives; if he do, though he have a verdict, judgment will be arrested. *Ex. gr.* If a common informer were to sue for the single value of money won at play, where 9 *Ann. c.* 14. gives treble value.—*Cunningham* v. *Bennet*, T. 1 Geo. I. C. B.

A servant, in the presence, and by the command of his master, who is qualified, may kill game.—*Turner* v. *Ld. Coningsby*, M. 1724. *(c)*

[197] In an action on a penal statute it was moved by the defendant, that the plaintiff should give security to pay the costs, upon affidavit that he was a poor man. But the court refused the motion, for the statute having given him power to sue, it is a debt due to him; but if it appeared that the action was brought in a feigned name, they would oblige the real prosecutor to give security.—*Shinler* v. *Roberts*, E. 12 Geo. II. C. B. *(d)*

The court will, on motion, give the defendant liberty to pay the penalty into court with costs.—*Walker* v. *King*, T. 31 Geo. II. *(e)*

Wherever the action is founded on a penal statute, not guilty or *nil debet* are good pleas.—*Bawtrey* v. *Isted*, M. 13 Jac. I. Hob. 218. *(f)*

If a defendant would plead a recovery in another action for the same offence in bar, he must take care to set out in his plea, that the plaintiff in the other action had priority of suit; if he do not, his plea on demurrer will be bad, but the record of a recovery in another action

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(a) Vide *Doghead's Case*, infra. 2 Hawk. P. C. 279.

(b) This statute was made perpetual by 27 *Eliz. c.* 10.

(c) *Quære tamen*, if there be not some late cases (unreported) to the contrary.

(d) In an information on the statute of 27 *Eliz. c.* 4. by the party grieved, who was nonsuited, it was held, that he should not be liable to costs and damages (under the statute of 18 *Eliz.*) for that statute is to redress disorders in common informers. *Doghead's Case*, 2 Leon. 116. And *Per Hobart*, C. J. in *Pie's Case*, sup. If the matter pass against the informer, whether by verdict or judgment, he is liable for the costs, for the makers of this statute intended to curb all vexatious informers. And if it should be suffered that informers may inform, (for instance) upon statutes not in force, and pay no costs, that would open a window to the great vexation of the subject.

(e) Vide *Tidd's Pract.* 470. 500, for the mode of this application.

(f) Vide etiam *Coppin q. t.* v. *Carter*, 1 T. R. 462.

cannot

cannot be given in evidence on *nil debet*. (*Jackson* v. *Gisling*, T. 31 Geo. II.) For if it be pleaded, the plaintiff might reply *nul tiel record*, or that it was a recovery by fraud to defeat a real prosecutor, which he cannot be prepared to shew on the general issue.—*Bredon q. t.* v. *Harman*, E. 1739. Stra. 701. *(a)*

The proviso in the *Oxford* act, 16 & 17 *Car.* II. *c.* 8. that that act shall not extend to any action or information on any penal statute, must be understood of popular actions and informations, and not of remedies given by statute to the parties grieved.—*Sewel* v. *Edmonton Hundred*, E. 7 Geo. I. C. B.

The act of 24 *Geo.* II. *c.* 18. (reciting that by the 4 & 5 *Ann.* it was enacted, that every *venire facias* should be awarded out of the body of the county, with a proviso, that it should not extend to any action or information upon any penal statute, and that the proviso had been found inconvenient) enacts, That every *venire facias* for the trial of any issue in any action or information upon any penal statutes, shall be awarded of the body of the proper county where such issue is triable.—*French q. t.* v. *Wiltshire*, H. 11 Geo. II. 2 Stra. 1085.

If the defendant plead a prior recovery, and the plaintiff reply *per fraudem*, and such recovery be found to be fraudulent, the defendant is liable to two years imprisonment by 4 *Hen.* VII. *c.* 20. *(b)*

(a) Where the defendant has compounded a former action against him for the same offence, he must plead the matter specially in bar to the second action, for the court will not stay proceeding thereon on motion and affidavits of the fact. *Harrington q. t.* v. *Johnson*, Cowp. 744.

Several matters cannot be pleaded to a *penal* action, for such a plea is expressly against the statute 4 *Ann. c.* 16. *s.* 4. which enables defendants so to plead. *Heyrick* v. *Foster*, 4 T. R. 701. This proviso, however, so far as relates to the awarding the *venire* from the body of the county, has been repealed. Vide *French q. t.* v. *Wiltshire*, 2 Stra. 1085.

(b) A new trial will be granted after a verdict for the defendant in a penal action, where there is a mistake, or any misdirection in the judge. *Wilson* v. *Rastall*, 4 T. R. 753; but where the case is properly left to the jury, though they should draw a wrong conclusion, the court is averse to disturb the verdict. *Calcraft* v. *Gibbs*, 5 T. R. 19.

As to the evidence in these actions—wherever a penal statute creates a duty, debt lies to enforce it, and defendant may plead *not guilty* or *nil debet*. *The plaintiff*, however, must prove that the defendant committed the acts imputed to him by evidence of the whole affirmative matter in the declaration, but where the declaration negatives any fact which the defendant only can prove, *he* must prove the affirmative, as in an action on the game laws, where the plaintiff need only prove the game killed, or attempted to be so, by a dog, *&c.* and defendant must shew his qualification. *Peake's Evid.* 272. But in *Rex* v. *Stone*, 1 East, 639, where a question arose whether the prosecutor must not give general negative evidence on an information before a magistrate, the court were equally divided; and even in actions where the negative matter is as capable

pable of proof by the plaintiff, as in an action for sporting without a certificate, it should seem the plaintiff must prove a search at the proper office near the defendant's residence, and that no such certificate was entered there, for though by the general rule the affirmative need only be proved, yet where one man has transgressed the law, and the other party can prove the negative, the rule admits of an exception. Mr. *Peake*, however, says, that no such evidence had been required within his experience in actions for sporting without a certificate. *Peake's Evid.* 273.

The defendant may also avail himself on the general issue of the suit not being commenced within *two* years, according to 31 *Eliz. c.* 5. *s.* 5. where the forfeiture goes wholly to the king, and within *one* year where to the king and the informer, if no other time of limitation is fixed by statute. Plaintiff, therefore, must always be prepared to shew the day the action commenced, in order to prove it was brought in due time. *Maughan* v. *Walker*, Peake's N. P. Ca. 163. *Harris* v. *Woolford*, 6 T. R. 617.

After a plea of general issue pleaded, defendant's evidence can only be such as to contradict the plaintiffs, or to shew a reasonable excuse; therefore, in an action on the game laws, the court will not try the lord's right to the manor, and if the person who appointed defendant his gamekeeper had but a colourable title, that shall not charge him in such action. *Calcraft* v. *Gibbs*, 4 T. R. 681; but if he has no other ground of claim, the mere appointing defendant is no excuse. *S. C.* 5 T. R. 19. As to the proof of qualification by estate, if defendant prove he is possessed of the land, he shall be presumed the owner till plaintiff shew that he is only renter, or that it is reduced by incumbrances. *Wetherall* v. *Hall*, Cald. 230. And a claim by defendant of an allowance from the commissioners of income, because by incumbrances his estate is reduced below £100 *per annum*, is sufficient evidence of that fact. *R.* v. *Clarke*, 8 T. R. 220.

Where defendant admits his guilt, but means to avail himself of a former conviction, he must plead it specially, and if the plaintiff reply *nul tiel record*, an issue at law is made, and defendant must prove his plea as in other cases of record. *Bredon* v. *Harman*, and *Jackson* v. *Gisling*, T. 15 Geo. II. but if *per fraudem* be replied, this will be tried by a jury, and the *onus* will lie on the plaintiff. *Peake's Evid.* 275.

PART

PART IV.

CONTAINING ONE BOOK OF

CRIMINAL PROSECUTIONS RELATIVE TO CIVIL RIGHTS.

INTRODUCTION.

THOUGH criminal prosecutions (as such) are not within the compass of the present work, yet there being two in which civil rights come in question, I am necessarily led to take notice of them.

I shall therefore in this book treat,

I. Of the writ of *Mandamus*.
II. Of informations in nature of *Quo Warranto*.

CHAPTER I. [199]

OF WRITS OF MANDAMUS.

THE writ of *Mandamus* is a prerogative writ (*a*) issuing out of the court of *K. B.* (as that court has a general superintendency over all inferior jurisdictions and persons) and is the proper remedy to enforce obedience to acts of parliament and to the king's charter, and in such case is demandable of right; but where the right is of a private nature, as to an office in which the public is not concerned, such as a deputy register, *&c.* it is discretionary in the court to grant or to refuse it.—*Bagg's Ca.* T. 13 Jac. I. 11 Co. 98. *Wheeler* v. *Trotter*, E. 8 Geo. II. (*b*)

Therefore

(*a*) Though a *Mandamus* may be called a prerogative writ, and is grantable *ex debito justitiæ*, yet the court will not grant it merely because it is asked for. They must see there is some ground for the application. Neither will the court grant it where there is any other specific remedy; but where there is none, and in justice, and for good government there ought to be one, the court will grant this writ. *Rex* v. *Barker*, 3 Burr. 1267. 1 Bla. 300. 352.

(*b*) By the statute 13 *Geo.* III. *c.* 63. *s.* 44, however, it is enacted, "that when and as often as the *East India*

Therefore in every application for a *mandamus* it must appear what the office is; and for this reason a *mandamus* to swear one who was elected to be one of the eight men of *Ashburn* court was denied, because it did not appear what the office was.—*Rex* v. *Men of Ashburn Court*, T. 34 Car. II. 2 Mod. 316.

But the court will in no case grant a *mandamus* till there has been a default; and therefore in the case of *The King* v. *Borough of St. Ives*, (M. 8 *Geo.* III.) where a *mandamus* was granted to the churchwardens and overseers of the poor, to make a poor's rate; the court would not grant a *mandamus* to the justices at the same time, to allow it: For they would not presume the justices would not do their duty; though the same justices had before refused to allow a rate, when a *mandamus* issued for that purpose, and had been taken up but the term before, upon an attachment for disobedience.

A *mandamus* is never granted to compel a mere ministerial officer to do his duty, (*a*) neither has it ever been granted to oblige a visitor, to exercise his jurisdiction.—*Rex* v. *Dr. Walker*, E. 9 Geo. II. (*b*)

This writ lies as well to restore one who has been unjustly remov-

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India Company, or any person or persons, shall commence and prosecute any suit in *Westminster-hall*, the cause whereof arose in *India*, it shall be lawful for any of the courts, on motion, to provide and award such writ in the nature of a *mandamus*, or commission for the examination of witnesses; and such examination being returned shall be read in evidence at any trial or hearing between the parties." See also the statutes of 24 *Geo.* III. *c.* 25, and 42 *Geo.* III. *c.* 85. *s.* 1. 2. On the construction of which latter statute it was held, in *R.* v. *Valentine Jones*, 8 East, 31, that the defendant being indicted for misdemeanors in the *West Indies*, in his public capacity of commissary general, is not entitled upon the common affidavit, to put off his trial till a return to the writs of *mandamus*, which were issued to the courts abroad to examine witnesses there; these writs, it seems, were granted in *Mullick* v. *Lushington*, M. 26 Geo. III. *East India Company* v. *Lord Malden*, E. 32 Geo. III. and *Taylor* v. *East India Company*, M. 33 Geo. III. and in *Spalding* v. *Mure*, T. 35 Geo. III. where the motion could not be made till the last day of term, yet the court granted the writ, though issue was not even joined. *MS. Cases*, mentioned in *Tidd's Prac.* 729. (n)

(*a*) But in *Rex* v. *Midhurst Boro'*. 1 Wils. 283, the court granted a *mandamus* to the steward, and homage of a manor, to hold a court, and present purchase deeds of burgage tenants, which, when presented, entitle the purchasers to vote for members; and the court held the homage ministerial in this case, and that if the conveyances are fraudulent and void in law, that may be returned, and this writ must go to the homage to present the conveyances, and to the steward to hold a court, admit, and swear in the purchasers. Vide etiam *Rex* v. *Montacute*, 1 Bla. 60. 62, which seems to be *S. C.* as *Rex* v. *Midhurst*.

(*b*) The court, however, in *Rex* v. *Blythe*, 5 Mod. 404, granted a *mandamus* to a visitor, to determine a disputed election of a Fellow.

ed,

ed, (*a*) as to admit one who has a right; though perhaps there may be this difference between the two cases; that where it is to swear, or to admit,

(*a*) The *cases in which the court has been induced to grant a writ of mandamus*, to restore or admit persons to the enjoyment of their rights, or to compel persons to the performance of their official duties, as well as those in which the court has refused to grant this writ, are too numerous to be set forth as annotations; neither is it the object of the present work to state all the cases which have been adjudged upon any particular subject, but rather to confine the plan to general and leading rules and principles. The Editor, therefore, for particular instances of the allowance or refusal of this writ, begs leave to refer his readers to the C. B. *Comyns'* Digest, and to the *Digest of Nisi Prius Law* by Mr. *Espinasse*, under tit. *Mandamus*, in each; at the same time the Editor takes occasion generally to observe, that in all cases where the applicant has been deprived of, or refused admission into any description of corporate office, this writ lies, and equally so to the officers of corporations, to compel them to do such duties as are connected with their official situations. 2 *Esp. N. P. Dig.* 662. 2d ed.

So to restore or admit persons having rights to appointment in public corporations or colleges, and equally so to compel persons invested with authority or power to restore or admit them to do such acts as will confirm and establish the appointments claimed. *Ibid.*

And in like manner to act with respect to persons entitled to any office under any ecclesiastical or inferior court. *Ibid.*

So with respect to persons entitled to benefices or dignities in the church or other places of ecclesiastical function. *Ibid.* 663.

So with respect to persons claiming their freedom in any public company, or to hold any office therewith connected, or thereto of right belonging. *Ibid.*

And this writ lies also to compel justices of the peace to carry into execution the several statutes under which they are empowered to act. *Ibid.*

And also to compel corporations to proceed to election under the statute 11 *Geo.* I. *c.* 4. *s.* 2 As to which, *vide infra*, p. 201 *a*. *Ibid.*

But the court will not grant a mandamus, where it is doubtful whether the person called upon has a right by law to do the act required or not. *Rex* v. *Ely Bp.* 1 Wils. 266. *Case of Churchwardens of St. Botolph, Bishopsgate*, 2 Stra. 686.

Nor where the office claimed is not of a certain permanent nature, as a lectureship not endowed. *Rex* v. *London Bp.* 1 Wils. 11.

Nor where the court cannot give complete redress. *Rex* v. *London Bp.* 1 T. Rep. 331. *Rex* v. *Field*, 4 T. Rep. 125.

But it is not necessary, nor does the court require, that the office should be freehold, for if it be annual, and has fees annexed, as a clerkship to commissioners of land tax, it will suffice. *Rex* v. *Commissioners of Land Tax for St. Martin's, Westminster*, 1 T. Rep. 146.

The court, however, will not interfere with a mere private office. *Bagg's Ca.* 11 Co. 98, and *Wheeler* v. *Trotter*, ante, 199. Vide etiam *Stamp's Ca*, 1 Sid. 40. *Hawley's Ca.* 1 Vent. 143. *White's Ca.* 6 Mod. 18.

But otherwise with offices of a public nature, as to swear in a director of the *Amicable Assurance Company*, or of the *Turkey Company*, *Anon.* 1 Stra. 696. *Rex* v. *March*, 2 Burr. 1000.

Neither will the court interfere where there is any other specific remedy. *Rex* v. *Bank of England*, Dougl. 506 (524). *Rex* v. *Street*, 8 Mod. 98. *Rex* v. *Colchester Mayor*, 2 T. Rep. 259. *Rex* v. *Chester Bp.* 1 T. Rep. 396. *Rex* v. *Canterbury Poor*, 1 Bla. 667. *Rex* v. *Gray's-Inn Benchers*, Dougl. 339. (353.)

Nor

admit, the court will, in case the right appear plain, grant the writ upon the first motion: but where it is to restore one who has been removed, they would first grant a rule to shew cause why such a writ should not issue.

And note; The rule to shew cause must be always on the same per-
[*200] sons to whom the writ is to be directed; therefore a * rule upon churchwardens and overseers, to shew cause why a *mandamus* should not issue, directed to them and the twenty principal inhabitants of the parish was holden to be bad: however, the court upon motion gave leave to amend the rule, saying it would be good on new service.—*Rex* v. *Churchwardens and Overseers of Clerkenwell*, 8 Geo. I. *(a)*

Upon a motion for a *mandamus* to the warden of the Vintners company to swear *J. S.* one of the court of assistants, the affidavit being only that he was informed by some of the court of assistants that he was elected, and no positive affidavit of an election, the court would only grant a rule to shew cause, but said, if there had been a positive affidavit of his election, they would have granted the writ in the first instance.—*Case of Vintner's Company*, M. 25 Geo. II. *(b)*

N. B.

Nor where there is any controuling or appellant power, as that of a visitor within his own province. *Rex* v. *Walker*, ante, 199 *a*. *Rex* v. *Chester Bp.* (as visitor of his own cathedral), 1 Wils. 206. *Rex* v. *Ely Bp.* (as visitor of *Peterhouse Col.*) 2 T. Rep. 290. *Rex* v. *Chester Bp.* (as visitor of *Manchester Col.*) 2 Stra. 798.

Nor where any other court has competent jurisdiction as the special court. *Rex* v. *Dr. Hay*, 4 Burr. 2295. *Smith's Ca.* 2 Stra. 892. *Rex* v. *Lee*, 3 Lev. 309. *Leigh's Ca.* 3 Mod. 332. *Rex* v. *Oxenden*, Show. 217. *et S. C. ib.* 251, nom. *Rex* v. *Lee*. *Lee* v. *Oxenden*, Skin. 290. *Lee's Ca.* Carth. 169. all which seem to be *S. C.*

Neither will the court command any man to do a thing where his power is discretionary, and he is not compelled by law to do it. *John Giles' Case*, 2 Stra. 881. *Rex* v. *Birmingham Canal Navigation*, 2 Bla. 708.

Nor will the court grant this writ where the applicant has been removed from his office on good ground, though the proceedings towards a removal, may have been irregular. *Rex* v. *London Mayor*, 2 T. Rep. 177. *Rex* v. *Axbridge Mayor*, Cowp. 523.

(a) This writ must be directed to those by whom the party was deprived. *Rex* v. *Derby Mayor*, Salk. 436. and if directed to a corporation, it must be by its corporate name. *Rex* v. *Ripon Mayor, &c.* 2 Salk. 433. or it may be directed either to the whole or to such part of the corporation as is empowered to do the act required. *Rex* v. *Abingdon Mayor*, 2 Salk. 699. *Rex* v. *Hereford Mayor*, ibid. 701. *Rex* v. *Norwich Mayor*, 1 Stra. 55. *Pees* v. *Leeds Mayor*, ibid. 640; but where it is directed to several, acting in different capacities, each person shall do his own duty. *Rex* v. *Tregony Mayor*, 8 Mod. 111. The party applying, however, must have the writ directed at his peril. *Rex* v. *Wigan*, 2 Burr. 784. *Rex* v. *Ward*, 2 Stra. 893.

(b) Though upon a motion for a *mandamus* the usual course is for the court to grant a rule to shew cause, yet in cases of imperious necessity the court will grant the writ in the first

N. B. In this case there was an affidavit that he applied to inspect the court books, in order to see whether he were elected, and was refused; without which the court would have hardly granted a rule. *(a)*

Note;

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first instance, as to sign a poor's rate, for if in such case the court were to grant a rule to shew cause, the poor might starve in the mean time. *Rex* v. *Fisher & al'*, Say. 160.

But in all cases the applicant for this writ must shew some title, or colour of title, as in *Rex* v. *Vintner's Company*, sup. and *Rex* v. *Jotham*, 3 T. Rep. 575, where the application was to restore a dissenting minister. The court, however, will grant this writ where no *particular* person is interested, as in the *Case of the Town of Nottingham*, post, 201, but in all cases it must appear that there has been a default. *Rex* v. *St. Ives*, ante, p. 199 *a*. And in the case of a corporation, the constitution of the corporation must be shewn and verified by affidavit. *Rex* v. *Vintner's Company*, Esp. N. P. Dig. 670. *et sup.*

Where the court suspects that the party who first moved for a *mandamus*, does not mean to proceed, they will grant a concurrent writ, but not as a matter of course. *Rex* v. *Wigan*, and *Rex* v. *Curghey*, 2 Burr. 782, and in such cases the court will direct a time for proceeding on the first writ. *Rex* v. *Halemere*, Say. 106. *Rex* v. *West Loe*, 3 Burr. 1386.

(a) The motion for leave to inspect books, *&c.* is founded on an affidavit, stating why the inspection is claimed, and also stating a demand and refusal. Vide *Exeter Mayor, &c.* v. *Coleman*, Barnes, 236. *Hodges* v. *Atkins*, 3 Wils. 398, where it is said that the motion for a *mandamus* is entertained only where no action is depending, but these cases seem to have been over-ruled in *Lynn Mayor, &c.* v. *Denton*, 1 T. Rep. 689. *Barnstable Corporation* v. *Lathey*. 3 T. Rep. 303. and *London Mayor, &c.* v. *Lynn Mayor, &c.* 1 H. Bla. 211. But as to this; see *Rex* v. *Newcastle Hostmen*, 2 Stra. 1223, where it was held, that every member of a corporation has a right to look into the corporation books for any matter which concerns himself, though the same matter was in dispute with others, and in which he was no party; and see also a very elaborate note by Mr. *Nolan*, the editor, (3d edit.) stating that the liberty given to inspect and take copies of books, and other instruments, under the care of other persons, is grounded either on a motion for a *mandamus*, or upon one made in an existing suit, and founded on the supposition that the matters therein contained, are necessary to the attainment of justice between the parties; as the instances of the latter kind of motions, are much more frequently to be met with in our reports than of the former, the learned Editor therefore has treated principally of them, pointing out incidentally how and where the application by *mandamus* seems to differ from them, either on the goods upon which, or the extent to which it is to be obtained; and to that note the reader is referred.

If a rule, however, be made to shew cause why an information should not be filed in nature of a *quo warranto*, the court will order the prosecutor to inspect and take copies of books and records, as soon as the rule is granted. *Rex* v. *Hollister*, Ca. temp. Hardw. 245. *Rex* v. *Surrey Justices*, Say. 145. But if a rule be made to shew cause why a *mandamus* should not be awarded, the court will not make a rule for the prosecutor to inspect and take copies of books and records till the rule is made absolute, and a return made to the *mandamus*. Vide *Rex* v. *Surrey Justices*, sup. and *Groenvelt* v. *Burrell*, 1 Ld. Raym. 253. S. P. accord. And in an action against a corporation

Note; Where there is a corporation by prescription, the constitution of it (as well as the parties' right) must be verified by affidavit. Where it is by charter, a copy of it must be produced at the time of making the motion.—*Case of Vintners Company*, M. 25 Geo. II.

Where they grant a rule to shew cause, though upon shewing cause it appear doubtful, whether the party have a right or not, yet the court will issue the *mandamus*, in order that the right may be tried upon the return.—*Rex* v. *Dr. Bland*, T. 1741.

It makes no difference by what mode the party becomes intitled to the franchise, whether by charter, prescription, or tenure; therefore where by the custom of the borough of *Midhurst*, the jury at a court baron is to present the alienation of every burgage tenement, and upon such presentment the steward is to admit the tenant, who then becomes intitled to the franchises of the borough: The jury at a court baron in 1749, having refused to present several conveyances of burgage tenements, the court granted a *mandamus* to the lord to hold a court, and to the burgesses to attend at such court and to present the conveyances. And though one *mandamus* will not lie to restore several persons, yet the court held it would lie in this case to the jury to do an act to perfect the rights of several.—*Rex* v. *Montacute et al'*, T. 24 Geo. II. 1 Black. 60, 62. (*a*)

So where by the custom, the court leet was to present to the steward the person whom the commonalty of the borough had chosen to be
[*201] mayor, the court granted a *mandamus* to the steward * to hold a court leet, and to the in-burgesses to attend at such court and to present *J. D.* who had been chosen by the commonalty.—*Case of the Borough of Christchurch*, H. 12 Geo. II.

And it is the same where no particular person is interested, as where by charter or prescription the corporate body ought to consist of a definite number; and they neglect to fill up the vacancies as they happen, the court will grant a *mandamus*.—*Case of the Town of Nottingham*, 23 Geo. II. 1 Black. 59.

But as the power of *K. B.* extends only to inforce obedience to the king's charter, there were many cases in which the court could not inter-

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tion upon a right of toll, the court refused a rule to inspect the public books, &c. of the corporation, for no issue being joined, it did not appear that such inspection would be necessary. *Hodges* v. *Atkis*, 2 Bla. 877. 3 Wils. 398. *Grannelt* v. *Burnell*, 1 Ld. Raym. 253. Carth. 421. S. C. accord.

(*a*) Vide *Rex* v. *Midhurst*, 1 Wils. 283, which seems to be *S. C.* Vide etiam *Andover Ca.* 2 Salk. 433. S. P. where it is said that several cannot have one writ, because the foundation of it is the turning out, and the removal of one is not the removal of another, besides, the causes may be different, and different wrongs may call for different remedies.

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pose; as where by the charter a particular day was fixed for the election of a mayor or other chief officer, and no election was had upon such a day: for in such case commanding the corporation to proceed to an election at another day, would not be inforcing obedience to the king's charter, but to authorize them to act in opposition to it; therefore the statute of 11 *Geo.* I. enacted, "that if no election should be had of the mayor or other chief officer upon the charter day, the corporation should not be thereby dissolved, but might meet at the town-house on the day after, and proceed to election; and if no election should be made on the charter day, nor in pursuance of that act, or being made should afterwards become void, the court of *K. B.* might grant a *mandamus* requiring an election to be made. *(a)*

This being a beneficial law for the subject, the court has been very liberal in the construction of it, therefore have granted a *mandamus* for the election of a mayor, though there had been no legal mayor for four years preceding.—*Case of the Corporation of Orford*, 9 Geo. II. *(b)*

So they have granted a *mandamus* where there was a mayor *de facto* at the time, it appearing clearly there had been no due election. But where it appears at all doubtful whether the prior election be not legal, the court will not grant such a *mandamus* till the validity of the prior election has been tried in a proper manner by information.—*Case of the Borough of Tintagel*, 9 Geo. II. 2 Stra. 1003, S. C. *(c)*

(a) Under this statute it has been held, that public notice of the election must be written and affixed in some public place in the borough; and where a *mandamus* was granted to elect a mayor to the borough of *Bodmin*, and a rule was made that public notice should be set up in the market-place, which was done, the court granted an attachment against the defendants, (whose presence was necessary) for not attending, though they had only been served with a copy of the rule, and not with the original rule, or the *mandamus*. *Rex* v. *Edyvean & Spiller*, 3 T. Rep. 352.

(b) *Qu.* if not the case of *Ordford or Orford Corporation*. Vide *Com. Dig.* vol. 5. S. C. where it is said, that two writs may be granted on the application of different parties. *Rex* v. *Evesham*, 2 Stra. 949.

And on a liberal construction of this statute, a *mandamus* was held to lie to the steward of a court leet to summon a court leet, and there to swear a jury to present all things proper, and that they may present *A.* as the person duly elected mayor. *Rex* v. *Willis*, Andr. 279.

(c) So in *Rex* v. *Cambridge Mayor*, 4 Burr. 2008, it was held, that this writ lies after a colorable election of a mayor, and that it may be directed to the late mayor without mentioning his name. So to elect a rightful mayor where there is one *de facto*, but has no colour of right. *Case of Bossiny Boro'*. Stra. 1003. *Case of Aberystwith*, ibid. 1157. But the mayor subsisting *de facto* must be made a party. *Rex* v. *Bankes*, 3 Burr. 1452. 1 Bla. 445. And not for the election of a mayor only, but for that of other officers of the corporation this writ lies. *Case of Scarborough Corporation*, 2 Stra. 1180.

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The first writ of *mandamus* always concludes with commanding obedience, or cause to be shewn to the contrary; but if a return be made to it, which upon the face of it is insufficient, the court will grant a peremptory *mandamus*, and if that be not obeyed, an attachment will issue against the persons disobeying it.

So if no return be made, the court will grant an attachment against
[*202] the persons to whom the *mandamus* was directed: with * this difference, however, that where a *mandamus* is directed to a corporation to do a corporate act, and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the *mandamus:* but where it is directed to several persons in their natural capacities, the attachment for disobedience must issue against all, though when they are before the court the punishment will be proportioned to their offence.—*Rex* v. *Churchwardens and Overseers of Salop*, H. 8 Geo. II. *(a)*

If the return upon the face of it be good, but the matter of it false, an action upon the case lies for the party injured, against the persons making such false return. (*Rich* v. *Pilkington*, H. 2 W. III. Carth. 171.) *(b)* And where the return is made by several, the action may be either joint or several, it being founded upon a tort; but if it appear upon evidence that the defendant voted against the return, but was overruled by a majority, the plaintiff will be nonsuited, and though the return be made in the name of the corporation, yet an action will lie against the particular persons who caused the return to be made; (*R.* v. *Mayor of Rippon*, E. 12 W. III. 1 Raym. 564.); or if the matter concern the public government, and no particular person be so interested as to maintain an action, the court will grant an information against the persons making the return.—*Case of Surgeon's Company*, T. 11 W. III. 1 Salk. 570.

Note; Where several join in an application for a *mandamus*, they must all join in the action for a false return.—*Green* v. *Pope*, M. 8 W. III. 1 Raym. 125.

(a) Where the writ was directed to the two bailiffs, and one was for obeying the writ, and the other not, nor would he join in the return, the court granted an attachment against both, saying, it would be endless to try which is right, and this might always be used as a handle for delay. *Rex* v. *Bridgenorth Bailiffs*, 2 Stra. 808. So if they make no return an attachment will issue. And the same principle is laid down by Lord *Mansfield* in the case of a penal action upon 3 *Geo.* III. *c.* 15, for not producing books containing the entries of freemen. *Schuldam* v. *Bunniss*, Cowp. 197.

(b) But an action for a false return to a *mandamus* lies not, unless judgment be given on the return, for perhaps the return may be bad, and the party restored, and consequently not injured. *Enfield* v. *Hall*, 2 Lev. 238.

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And if in such action or information the return be falsified, the court will grant a peremptory *mandamus;* however, no motion can be made for it till four days after the return of the *postea,* because the defendants have so long time to move in arrest of judgment.—*Buckley* v. *Palmer,* T. 11 W. III. 2 Salk. 430.

Note; The action must be brought in *K. B.* for if it be brought in *C. B.* though the plaintiff have judgment, the court of *K. B.* will never grant a peremptory *mandamus,* for that recites the fact *prout constat nobis per recordum.* (*Anon.* M. 8 W. III. Salk. 428.) *(a)* Yet where in an action for a false return judgment was given for the defendant, and upon a writ of error judgment was reversed in the exchequer chamber, the court of *K. B.* granted a peremptory *mandamus* before judgment entered, saying it was a mandatory writ, and not a judicial writ, founded upon the record.—*Green* v. *Pope,* sup.

This was the method of proceeding at common law, but now by statute 9 *Ann.* reciting, That whereas divers persons who had a right to the office of mayors or other officers within cities, towns, corporations, boroughs, and places, or to be burgesses * or freemen thereof, have either [* 203] been illegally turned out, or have been refused to be admitted thereto, and have no other remedy to procure themselves to be admitted or restored, than by writs of *mandamus,* the proceedings on which are very dilatory and expensive, it is enacted,

1. That a return shall be made to the first writ of *mandamus. (b)*

2. That the persons prosecuting such writ may plead to, or traverse all or any the material facts contained in the return, to which the persons making such return shall reply, take issue, or demur; and such farther proceedings shall be had therein, as might have been had if the person suing such writ had brought his action on the case for a false return; and in case a verdict shall be found, or judgment given for him upon a demurrer, or by *nihil dicit,* or for want of a replication or other pleading, he shall recover damages and costs; and a peremptory writ of *mandamus* shall be granted without delay for him for whom judgment shall be given, as might have been if such return had been adjudged in-

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(a) This is the same case as *Green* v. *Pope,* 1 Ld. Raym. 125; and it is also reported in Skin. 670, nom. *Rex* v. *Green.*

(b) If the corporation to which the *mandamus* is sent, be above 40 miles from *Westminster,* there shall be 15 days between the teste and return of the first writ; and if but 40 miles or under, then 8 days; the writ, however, should not be tested before it was granted by the court. *Rex* v. *Dover Mayor,* 1 Stra. 407. And in such case one day is to be taken exclusive, and the other inclusive. *Anon.* Salk. 434.

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sufficient. And in case judgment shall be given for the persons making such return, they shall recover costs.

3. All the statutes of amendment and jeofail shall be extended to writs of *mandamus*, and the proceedings thereupon. *(a)*

Before the act an attachment did not issue for want of a return till after a *pluries mandamus*, and after that a peremptory rule for a return, which created much expence and delay; (*Anon.* M. 4 Ann. 2 Salk. 434.) *(b)* indeed, in extraordinary cases, where the court apprehended much mischief from the delay, they would require a return to the *alias*.—*Rex* v. *Owen*, M. 8 W. III. Skin. 669.

If in a proceeding under the statute no damages are given by the jury, the want of it cannot be supplied by a writ of enquiry: But in such case the party may bring an action for a false return; for the act does not take away the party's right to bring such action, but only provides that in case damages are recovered by virtue of that act, against the persons making the return, they shall not be liable to be sued in any other action for making such return.—*Kynaston* v. *Mayor, &c. of Shrewsbury*, T. 9 Geo. II. 2 Stra. 1051. *(c)*

So an information may still be moved for against the persons making the return, in such cases where no particular person is so interested as to bring an action.—*Rex* v. *Mayor & Aldermen of Nottingham*, H. 25 Geo. II. Say. 36. *Case of the Surgeon's Company*, T. 11 W. III. Salk. 374. S. P.

N. B. The return must be filed and allowed before the information can be moved for.

[204] It appears from the wording of the statute that there are many cases to which it does not extend; therefore in all those cases the proceedings must be according to the course of the common law.

Though since this act a *mandamus* is in nature of an action, and error will lie upon it, yet that has been holden to be no *supersedeas* to the peremptory *mandamus*; (*Dean, &c. of Dublin* v. *Dowgatt*, E. 1717.

(*a*) Clerical mistakes therefore in the returns, may be amended after they are filed. *Rex* v. *Lyme Regis*, 1 Dougl. 130. (138.)

(*b*) Vide *Mayor of Coventry's Ca.* Salk. 428. S. P.

(*c*) Though by the stat. 9 *Ann.* *c.* 20. *s.* 2, the prosecutor of a *mandamus*, to which there is a return, and issue taken on the facts therein, had an option to try the question in the same county, in which he might have brought an action for a false return; yet, if all the material facts are alledged in one county, and issue taken thereon there, he cannot issue the *venire facias* into another county, though he might have originally alledged the facts there, and have there brought his action for a false return. *Rex* v. *Newcastle Mayor*, 1 East, 114.

1 P. W. 351.); yet *quære* as to this, for where, after a writ of error brought upon a judgment in an action upon the case for a false return, a motion was made for a peremptory *mandamus*, it was refused, and there seems to be no essential differetice between the two cases.—*Reading* v. *Newel*, T. 7 Geo. II. Stra. 983.

Having now taken a general view of this writ and the proceedings thereupon, I shall proceed to consider what will be deemed a good writ, and what a good return to it.

As to the first, what will be deemed a good writ.

1. Where the fact is to be done by part of the corporation only, (*ex. gr.* mayor and aldermen) the writ may be either directed to the whole corporation, or to the mayor and aldermen singly. (*R.* v. *Mayor of Abingdon*, E. 12 W. III. 1 Raym. 559.) But if it be to be done only by the mayor, and the *mandamus* be directed to the mayor and aldermen, it will be bad.—*Reg.* v. *Mayor of Hereford*, T. 4 Ann. 2 Salk. 701.

2. The writ must contain convenient certainty, in setting forth the duty to be performed; but it need not particularly set forth by what authority the duty exists. *(a)*

Therefore where a *mandamus* to the commissary of the archbishop of *York*, to admit a deputy register, stated *quod minus rite recusavit* to admit, it was holden sufficient, though it was objected it did not state the defendant's right to admit.—*Rex* v. *Ward*, H. 4 Geo. II. Stra. 896.

So a *mandamus* to the dean of the arches to grant probate to Lord *Londonderry*'s executors, setting out that the dean *juxta juris exigentiam recusavit*, was holden sufficient, though it was objected that it did not shew the dean's title to grant probate; not having set out that there were *bona notabilia*.—*Rex* v. *Betteworth*, H. 3 Geo. II. Stra. 857.

So a *mandamus*, reciting, "whereas there is or ought to be one bailiff and twelve capital burgesses."—*Rex* v. *Devizes Corporation*, M. 7 Ann.

(*a*) Therefore where the writ commanded defendant, on his removal, to deliver all books, *&c. to the Company of Blacksmiths*, and the officer took the rule to deliver them *to the new clerk*, the writ, for this variance, was superseded. *Rex* v. *Wildman*, 2 Stra. 879. But the writ need not set forth by what authority the duty exists. *Moor* v. *Hastings Mayor*, Ca. temp. Hardw. 362. It seems, however, that this writ can only command the doing of one act, or issue for more than one single purpose. *Rex* v. *Weobly Churchwardens*, 2 Stra. 1259. *Rex* v. *Kingston on Hull Mayor*, 1 Stra. 578. In such case, however, the writ may command several persons to act in their respective offices. *Rex* v. *Christ's Church Borough*, ante, pa. 201. *Rex* v. *Montacute*, ante, pa. 200 *a*. and *Rex* v. *Midhurst Borough*, 1 Wils. 283.

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So a *mandamus*, reciting, that whereas there ought to be a common council consisting of the mayor and 24 persons chosen by the mayor and burgesses, without stating whether by charter or prescription.—*Rex* v. *Mayor and Burgesses of Nottingham*, H. 25 Geo. II. Say. 36.

[205] Note; the time for taking exception to the writ, is after the return made, and before it is moved to be filed.—*Rex* v. *Owen*, M. 8 W. III. 5 Mod. 314.

2. What will be deemed a good return.

1. The return must be certain to every intent, (*Rex* v. *Abingdon Mayor*, E. 12 W. III. Salk. 432.) but it may contain several matters, provided they be consistent.—*Rex* v. *Mayor of Norwich*, E. 5 Ann. Ibid. 436. *(a)*

If a writ be directed to a corporation by a wrong name, they may return this special matter, and rely upon it, but if they answer the exigency of the writ, they cannot take advantage of the misnomer.—*Rex* v. *Ipswich Corporation*, H. 4 Ann. 2 Salk. 434. Et vide *Rex* v. *Rippon Mayor*, Ibid. 433.

If the supposal of the writ be false in not truly stating the constitution of the corporation, it will not be sufficient for the return to state it truly, but they must deny the supposal of the writ.—*Rex* v. *Corporation of Malden*, T. 11 W. III. 2 Salk. 431.

Mandamus to swear *A.* and *B.* churchwardens, suggesting they were *debito modo electi*, the return was *quod non fuerunt debito modo electi*, without saying *nec eorum alter*, and holden good, for one could not be sworn upon that writ; if both were not chosen, the writ was miscon-

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(*a*) The return to a *mandamus* should so precisely set out the facts, as that the court may see the removal was in a proper manner, and for a lawful purpose; for it is not enough to set out conclusions only. *Per Mansfield*, C. J. in *Rex* v. *Doncaster Mayor*, 2 Burr. 731. Vide etiam *S. C.* in Say. 37, and *Rex* v. *Lyme Regis*, 1 Dougl. 144 (148.)

A return is bad if it be in terms too general; as to say that the party had refused to obey all the rules and orders of the corporation, contrary to his duty, without saying what those rules and orders were, *Rex* v. *Doncaster Mayor*, 2 Raym. 1564; or in what respect the party's duty had been neglected. *Ibid*—Vide etiam *Rex* v. *Morpeth Balliv.* 1 Stra. 58. *Rex* v. *City of Exeter*, Show. 365. And the return must answer the material part of the writ, so as in substance to be true, and not answer the words only. *Braithwaite's Ca.* 1 Vent. 19. So it may contain any number of concurrent causes why the party should not be admitted or restored. *Wright* v. *Fawcett*, 4 Burr. 2041, provided such causes are consistent. *Rex* v. *St. James's Churchwardens, Taunton*, Cowp. 413. *Regina* v. *Norwich Corporation*, 2 Salk. 436. And so long as they are consistent, though some are bad, the court will only quash the return as to those that are bad, and put the prosecutor to plead to, or traverse the rest. *Rex* v. *Cambridge Mayor*, 2 T. Rep. 456.

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ceived. It was likewise holden that where the writ is to swear one *deb. modo electus, quod non fuit deb. modo electus* is a good return; but where the writ is *electus* only, such a return would be nought, because out of the writ and evasive.—*Rex* v. *Twitty et al'*, M. 1 Ann. 2 Salk. 433. *(a)*

If a person chosen alderman, burgess, *&c.* after notice given him of his election, sit by and see the corporation fill up his vacancy, without making any claim to be admitted, this will amount to a refusal; and the mayor may, to a *mandamus* to admit him, return that he had refused; and if issue were joined upon that return, evidence of the fact would support the return.—*Rex* v. *Jorden*, 9 Geo. II.

2. Where the *mandamus* is to restore a person who has been removed from an office, the return must be very accurate in stating the corporation's power to remove, the cause of removal, and the due execution of the power.—*Bagg's Ca.* T. 13 Jac. I. 11 Co. 99.

1. As to the power of removal, it is laid down in *Bagg's Case*, that no corporation can disfranchise a member of it before a conviction at law, unless they have authority so to do either by charter or prescription, though the modern opinion has been that the power of amotion is incident to the corporation. (*Lord Bruce's Case*, M. 2 Geo. II. Str. 819.) However, what power soever there may be in the corporation at large, there cannot be such power in any part of the corporation without charter or prescription; therefore if a return were to set out a removal by the common council,* without shewing how they were authorized, it would be bad.—*Rex* v. *Corporation of Doncaster*, H. 1759. 2 Burr. 738. *(b)* [*206]

2. As to the cause of removal, any member of a corporation for any offence committed against his oath of office, and breach of his duty as a member, is removeable without any previous conviction. But there must be a previous conviction to warrant an amoval for an offence which has no immediate relation to his office, such as perjury, forgery, *&c.* Where the offence is criminal in both respects, the difference seems to be, that if it consist of one single fact, as burning the charters of the

(a) So where the churchwardens of a parish returned to a *mandamus* to restore a sexton, that he was not duly elected according to the custom, and that there was a custom for the inhabitants to remove at pleasure, pursuant to which custom he had been removed, the return was held consistent and good. *Rex* v. *St. James's Churchwardens, Taunton*, Cowp. 413.

(b) And the law now is, that corporations may claim a power of amotion either by charter or prescription. A charter may give it to the whole or to a select body, but if it gives it to neither the law gives it to the body at large. *Rex* v. *Lyme Regis Mayor*, 1 Dougl. 144 (148.)

corporation,

corporation, bribery, &c. there must be a conviction, but not where it may be considered as abstracted the one from the other; as riot and assault upon any other member, so as to obstruct the business of the corporation.—*R.* v. *Mayor of Derby*, 9 Geo. II. *(a)*

As to such crimes whereof a previous conviction is necessary to found the disfranchisement upon, it is the infamy of them that renders him an improper person to be continued in an office of trust; therefore if the crime for which he is convicted be such as does not carry such infamy with it, it will be no cause of disfranchisement; as if he were convicted of a single assault. *(b)*

As to what shall be said to be such a breach of duty as will be a good cause of disfranchisement, it is certain that a total desertion of the duty of his office is a good cause of amoval; but it may be difficult to determine in what particular offices a bare non-residence will amount to such a desertion. *S. C. (c)*

Where offices are in perpetual execution, there must be a perpetual residence, such as that of sheriff, mayor, coroner, &c. But in other cases of local residence it is not necessary; as in the case of a recorder, freeman, &c. (*Rex* v. *Ponsonby*, M. 25 Geo. II. 1 Wils. 303.) And it would be absurd to say that non-residence barely should be a cause of amoval, when, notwithstanding such non-residence, they may do all that their duty requires. *(d)* But if such persons totally desert their office, it will be a good cause of amoval. (*Smith's Ca.* 3 W. & M. 4 Mod. 56.) As if a recorder upon notice given to him should neglect to attend at their sessions, where he ought to attend and assist the corporation in the proceedings of justice.—*Whitacre's Ca.* H. 4 Ann. 2 Salk. 434.

(*a*) Vide etiam *Bagg's Ca.* 11 Co. 99. and *R.* v. *Richardson*, 1 Burr. 539. S. P.

(*b*) Bankruptcy of a corporator therefore is no cause of removal. *R.* v. *Liverpool Mayor*, 2 Burr. 723.

(*c*) To make nonfeasance a good cause of amotion, it must amount to an absolute desertion and neglect of all the duties of a corporation, and not a mere occasional or unintentional absence. *R.* v. *Wells Corporation*, 4 Burr. 1999. *Reg.* v. *Ipswich Bailiffs*, Salk. 434. *R.* v. *Richardson*, 1 Burr. 517. *R.* v. *Carlisle Corporation*, 1 Stra. 385.

(*d*) Non-residence also (as a species of nonfeasance) may be deemed a cause of removal, but that is only where constant duties require perpetual residence, and a residence at a short distance is no ground of removal. *Smith's Case*, supra. *Vaughan* v. *Lewis*, Carth. 227. *R* v. *Doncaster Mayor*, Say. 37; but where a corporator lived two hundred miles from the borough, and had not attended for twenty-two years, that was held to be a total desertion. *R.* v. *Newcastle Mayor*, cited Say. 39; and where non-residence is the cause of removal, it is not necessary to give the party previous notice to reside. *R.* v. *Lyme Regis Mayor*, 1 Dougl. 144 (148.)

But

But in such case the return ought to be, that *recessit et officium suum reliquit*, i. e. it ought to shew a non-residence upon the office, and not barely a non-residence within the precincts of the corporation.—*Exeter City* v. *Glide*, T. 3 W. & M. 4 Mod. 33.

And though residence be made a necessary qualification for election, [207] yet, without an express clause in the charter, non-residence will not of itself be a cause of amoval.—*R.* v. *Miles*, E. 6 Geo. I.

In a *mandamus* to restore Sir *J. Jennings* to his office of alderman, the return was, that he at an assembly of the corporation came, *et personaliter, libere, et debito modo resignavit* the office, declaring he would continue to serve no longer in that office, whereupon they chose another in his room: and this declaration in a corporate assembly was holden good, especially as the corporation accepted it, and chose another in his room; but till such election he had power to waive his resignation. (*R.* v. *Mayor of Rippon*, E. 12 W. III. 2 Salk. 433.) But a return that he consented to be turned out would not be good, but if in such case they were to return, that he resigned, and they accepted and chose another in his room, such evidence would be sufficient to prove it.—*R.* v. *Lane*, M. 8 Ann. 2 Raym. 1304.

If it appear upon the face of the return, that the party has no right to the office, though in other respects the return be bad, yet the court will not grant a peremptory *mandamus*. As where the return stated the office of town clerk to be disposed of *ad libitum* of the mayor, and that the mayor had appointed another; though the reason given for his amoval was not good, yet the court refused to grant a peremptory *mandamus*.—*R.* v. *Campion*, M. 12 Car. II. 1 Sid. 14. *(a)*

So where it appeared that the person had deserted his office, and that it was filled up, though it was returned that he was for that cause amoved by the common council, without stating that they had a power so to do either by charter or prescription.—*R.* v. *Mayor, &c. of Newcastle*, M. 21 Geo. II. cited in Say. 39.

But though it appear by the return, that he is an officer *ad libitum*, yet if they do not return a determination of their will, but state particular reasons for the amoval which are not sufficient, the court will grant a

(a) Vide etiam *R.* v. *Thame Churchwardens*, Stra. 115, where a sexton held his office during pleasure, and being removed, the pleasure of the electors alone was held a sufficient cause to be assigned in the return. Et vide *R.* v. *Canterbury Mayor*, 1 Stra. 674; but that must be returned *positively*, and not by way of recital. *R.* v. *Coventry Mayor*, Salk. 430. But if the corporation, not relying on their power, return a cause of removal that is insufficient, the court will grant a *mandamus* to restore the party removed. *R.* v. *Oxford Mayor*, 2 Salk. 429.

peremptory *mandamus.*—*R.* v. *Corporation of Ipswich*, H. 4 Ann. 2 Salk. 434. Et vide *R.* v. *Oxford Mayor*, 2 Salk. 429.

A return that he had obstinately and voluntarily refused to obey orders and laws, *&c.* contrary to the duty of his office and his oath, would be too general; the particular laws ought to be specified.—*R.* v. *Doncaster Corporation*, M. 3 Geo. II. Raym. 1564.

So a return of a misbehaviour in one office (*ex gr.* chamberlain) would be no reason for his being amoved out of another, as that of a capital burgess.—*S. C.*

There cannot be any cause to disfranchise a member of a corporation, unless it be for a thing done, which works to the destruction of the body
[*208] corporate, or to the destruction of the *liberties and privileges thereof; and not any personal offence from one member to another.—*Earle's Ca.* H. 2 & 3 W. & M. Carth. 173. *(a)*

So misemploying the corporation money is no cause of amoval; because the corporation may have their action for it.—*R.* v. *Chalke*, H. 8 W. & M. 1 Raym. 226.

So razing the book; unless the razure be to the detriment of the corporation. *(b)*

Note; After restitution on a peremptory *mandamus*, the party may be removed for the former cause.—*R.* v. *Ipswich Corporation*, E. 6 Ann. 2 Raym. 1283.

3. As to the execution of the power of amoval.

If the person be within summons, *i. e.* if he be resident, he must be summoned to attend and shew cause against his disfranchisement, and that he was so summoned must appear upon the return, unless it appear he was heard, for as the end of summons is, that he may be heard for himself, if he had been heard, want of summons is no objection. (*R.* v. *Mayor of Wilton*, H. 8 W. III. Salk. 428. 1 Raym. 226. S. C.) But if it appear upon the return, that he lived out of the limits of the corporation, it is not necessary to return that he was summoned.—

(*a*) Therefore mere contempt, or contemptuous words, used to a corporation, or any member of it, is not a sufficient ground of amotion, as, where Dr. *Bentley* said to the vice-chancellor's officer, that the vice-chancellor was not his judge, and that he "*stulte egit.*" *R.* v. *Vice-chancellor of Cambridge*, 1 Stra. 557.

(*b*) Bribery, therefore, is a cause of amotion, for it is a crime of a mixed nature and indictable. *R.* v. *Hutchinson*, 8 Mod. 19. 100.

(*c*) The offence, if not on account of the infamy, must have some respect to the corporation itself, that is, an offence as is detrimental to the corporation, or some of its liberties, privileges, or franchises. *Sir T. Earle's Ca.* sup. *Reg.* v. *Ipswich Corporation*, 2 Raym. 1283.

Rex

Rex v. *Mayor, &c. of Newcastle*, 2 Geo. II. *Rex* v. *Truebody*, E. 5 Ann. 2 Raym. 1275. *(a)*

Where a burgess is constituted by a patent under the common seal, he ought to be discharged in like manner.

But if by election, an entry in the book is sufficient to discharge him.

Upon a return to a *mandamus* to restore a capital burgess, it appeared, that the power of amoving a member was in the mayor and aldermen; that the whole corporation having been summoned to elect a recorder, after that election was over, the mayor and aldermen separated from the rest, and removed the plaintiff, and the removal was holden void, because there was no summons to meet as mayor and aldermen.—*Rex* v. *Carlisle Corporation*, T. Geo. I. 1 Stra. 385. *Machell* v. *Nevinson*, 2 Raym. 1357. S. P.

Upon the issue of *non fuit electus major*, the constitution was admitted to be, that the mayor was chosen out of the aldermen, therefore defendant insisted that the plaintiff should approve his being an alderman. The fact of his being chosen an alderman was this; all the common council (who were the electors) except one, met at a public-house to drink, where they were acquainted that *W.* had resigned, whereupon it was proposed to choose the plaintiff, which was objected to by two or three; however, he was sworn in, and this was holden not to be a good election, because they were not corporately assembled for want of a previous summons, and therefore it was absolutely necessary * that every one [*209] of the common council should be present, and consent.—*Musgrave* v. *Nevinson*, E. 10 Geo. II. 2 Raym. 1358.

So where upon evidence it appeared that the corporation met upon a particular day (pursuant to a bye law) for the election of a mayor, it was holden they could not proceed to the election of an alderman for want of summons, there being no custom to warrant it.—*Machell* v. *Nevinson*, E. 10 Geo. I. Ib. 1355.

(a) To this point see also *R.* v. *Liverpool Mayor*, 2 Burr. 723. *Kynaston* v. *Shrewsbury Mayor*, 2 Stra. 1051. *R.* v. *Grimes*, 5 Burr. 2061. *Sed quære* if this summons be necessary where the meeting is held on a charter day? Et vide *R.* v. *Doncaster Corporation*, 2 Burr. 742, in which case (p. 738) it is said, that such notice should state the particular business of the meeting, as where it be to remove a man. Et vide *Machell* v. *Nevinson*, Id. Raym. 1357. S. P.

So a party who is to be disfranchised ought to have notice. *R.* v. *Doncaster Corporation*, 2 Burr. 731. And, indeed, in every case notice should be given, as in Dr. *Bentley's Case*, nom. *R.* v. *Cambridge University*, 1 Stra. 557, unless the party declare he will serve no longer, as in *R.* v. *Axbridge Corporation*, Cowp. 532. *R.* v. *Rippon Mayor*, 2 Salk. 433, or has been already heard in his own defence. *R.* v. *Wilton Burgesses*, Salk. 428.

N. B. The return need not be under the seal of the corporation, nor need it be signed by the mayor; and if an action were brought against the mayor for a false return, it would be sufficient evidence against him that the *mandamus* was delivered to him, and has such a return, unless he can shew the contrary.—*R.* v. *Thetford Mayor*, M. 1 Ann. 2 Raym. 848. *R.* v. *Exeter Mayor*, E. 9 W. III. 1 Raym. 223. S. P.

A *mandamus* was directed to the mayor, bailiff and burgesses of *A.* The mayor made a return, and brought it into the crown office; upon which a motion was made to stay the filing of it, upon a suggestion that this return was made against the consent of the majority, who would have obeyed the writ. But the court refused to enter into an examination whether the return were against the consent of the majority, and ordered it to be filed, as it was made by the mayor, who was the most principal and proper person; but said it might be another case if they were all equal parties; however, they granted an information against the mayor for this proceeding.—*R.* v. *Mayor of Abingdon*, M. 9 W. III. 2 Salk. 431. *(a)*

In an action for a false return the plaintiff set out, that he was chosen upon the 1st of *October*, according to the custom. Upon evidence it appeared, that the custom was to choose on the 29th of *September*, and that the plaintiff was then chosen; and this was holden sufficient to support the declaration, for the day in the declaration is but form.—*Vaughan* v. *Lewis*, E. 4 W. III. Carth. 228.

Upon the issue of *non fuit electus*, the plaintiff must prove that he received the sacrament within a year before his election, for else by 13 *Car.* II. his election is void, and he is not aided by 5 *Geo.* I. *c.* 6. (which enacts that no incapacity shall be incurred by reason of such omission, unless he be removed, or a prosecution commenced within six months after the election) though the trial be above six months after the election, and though the objection were never made before the trial. —*Tufton* v. *Nevinson*, E. 10 Geo. I. 2 Raym. 1354.

The mayor of *Winchelsea* must be chosen out of the jurats, the plaintiff in 1739 was chosen a jurat, and in 1740 he was chosen mayor: he
[*210] received the sacrament within a year before his *election to be mayor, but not within a year before he was chosen a jurat. And on a special

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(a) And in this case *Holt*, C. J. said, that where a writ is directed to a single officer, as a sheriff, and a stranger makes a return without his privity, he may at any time come in and disavow it during the term wherein the writ is returned, but not after the term. Vide etiam *R.* v. *Norwich Mayor*, Salk. 432.

verdict

verdict the court held that the 5 *Geo.* I. would operate so as to give him the benefit of the non-prosecution in six months with regard to the previous qualification, as otherwise he would be under some degree of disability, when the act says none shall be incurred.—*Marten* v. *Jenkin*, M. 14 Geo. II. 2 Stra. 1145.

CHAPTER II.

OF INFORMATIONS IN NATURE OF QUO WARRANTO.

THE crown is the fountain of all power and jurisdiction, therefore if any person or corporation take upon them to exercise any office or jurisdiction without being legally authorized so to do by the king's charter or act of parliament, the court of *K. B.* will punish them for such usurpations upon the crown; in order for which the court will call upon them to shew by what authority they claim to exercise any particular office or jurisdiction. *(a)*

The old method of doing this was by the writ of *Quo Warranto*, but of latter times the method has been by information in nature of *quo warranto*.

By 4 *&* 5 *W. & M. c.* 18. No information can be filed without leave of the court.

The method of obtaining leave is by laying a proper case before the court, verified by affidavit, *(b)* upon which the court will grant a rule upon the party to shew cause why an information should not be filed against him, and unless the cause shewed by him be such as puts the matter beyond dispute, the court will make the rule absolute for the in-

(*a*) The statute 13 *Car.* II. has also rendered the taking the sacrament a necessary qualification to an officer of a corporation, for by that statute it is enacted, "that no person shall be chosen to any corporate office, who has not taken the "sacrament within twelve months "preceding," and in default of so doing the election shall be void.

In *Harrison* v. *Evans*, cited in *Rex* v. *Monday*, Cowp. 535, *Wilmot*, C. J. said, this statute was not only addressed to the elected, and is a prohibition on them, but on the electors also, if they have notice. The legislature has commanded them not to choose a nonconformist, because he ought not to be trusted. Both by the statute, therefore, and authorities, the election is void, and the statute 5 *Geo.* I. *c.* 6. *s.* 3, applies only to persons in actual possession, and was made to quiet such possession, if no legal remedy was pursued within a certain time, and this doctrine was recognized by *Mansfield*, C. J. in S. C. Cowp. 517.

(*b*) As to the affidavits upon which the court is to decide, it was held in *Rex* v. *Mein*, 3 T. Rep. 596, that if the relator's affidavit is defective in stating a material fact, which the defendant's affidavit supplies, the court may use the latter in support of the prosecutor's application.

formation,

formation, in order that the question concerning the right may be properly determined.

Note; Upon a rule to shew cause, the court will grant a rule for the inspection of books belonging to the corporation.—*Per Cur'*, T. 23 Geo. II. *(a)*

By 9 *Ann. c.* 20. In case any person shall usurp, intrude into, or unlawfully hold any of the offices or franchises mentioned in the act, the [*211] proper officer of the court may, with leave of the * court, exhibit informations in the nature of *quo warranto*, at the relation of any person desiring to prosecute the same, and who shall be mentioned in the information to be the relator; and if it shall appear to the court, that the several rights of divers persons to the said offices or franchises may properly be determined in one information, the court may give leave to exhibit one information against several persons. *(b)* And the act gives costs both to the relator and defendant.—*Per Cur'*, T. 23 Geo. II.

There are many cases not mentioned in the act, in which informations in nature of *quo warranto* will lie, for the court's power of granting such informations is not founded upon that act, but that act was made for regulating the proceedings in them in certain cases relating to corporations. *(c)*

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(a) These informations being proceedings to ascertain civil rights, the court will allow a member of the corporation, filing one, to inspect the corporation books, but not *(ut semble)*, if the relator be a stranger, unless the title of a possessor in office is objected to on some public ground, as not taking the sacrament. *Rex* v. *Brown*, 3 T. Rep. 574 (n). And when a member is relator, his inspection will be limited to the documents in question. *Rex* v. *Babb*, 3 T. Rep. 579. *Benson* v. *Post*, 1 Wils. 240. See more as to the inspection of corporation books and public records, *post*, p. 249, n. (a)

(b) Vide *Rex* v. *Collingwood*, 1 Burr. 373. So there may be one information against the same person for the usurpation of several franchises. *Symmers* v. *Regem*, Cowp. 500.

(c) But no *quo warranto* information can be granted against a corporation for an usurpation on the crown, except by the attorney-general. *Rex* v. *Caermarthen*, 2 Burr. 869. Vide *Hawk. P. C.* 162, where it is stated to be the practice under this statute, to move for a rule to shew cause why an information in nature of a *quo warranto* should not be granted, *&c.* grounded on an affidavit, stating the usurpation, which rule must be served on the party, and on the return the court will use its discretion. And so positive are the directions of this statute, that the court cannot dispense with them, though the application be by a stranger to the corporation. *Rex* v. *Brown*, E. 29 Geo. III. cited in *Rex* v. *Smith*, 3 T. Rep. 574. On the return of the rule above-mentioned, defendant may shew cause why the information should not go against him, and these he may shew as good causes, *viz.* that the right has been already determined by *mandamus*; that it has been long acquiesced in, that defendant's right depends on those

If it be an information at common law there is no relator, nor ought there to be judgment for costs, but only a *capiatur pro fine.*—*Rex* v. *Williams,* M. 31 Geo. II. 1 Burr. 403.

There must be an user as well as a claim, in order to subject the party to an information, for the judgment is, that he shall be fined *pro usu & usurpatione.* But though an information will not lie for a non-user, yet it will be a good cause of amotion.—*Rex* v. *Ponsonby,* 25 Geo. II. Say. 245.

Not guilty and *non usurpavit* are not good pleas, as appears evidently from the nature of the charge, which is to shew by what warrant or authority; to which those pleas are no answer. (*Queen* v. *Blagden,* H. 12 Ann.) The defendant must either justify or disclaim.—*Anon.* M. 10 W. III. 12 Mod. 225.

Where the election of mayor, aldermen, *&c.* is by charter given to the commonalty or burgesses at large, the corporation may, to avoid popular confusion, make a bye-law to restrain the power of election to a select number (*ex gr.* to the mayor and aldermen, mayor and common council, and the like) and though there be no such bye-law to be found, yet constant usage will be a proof that there was such a one, and the court will intend it; therefore it is in daily practice to plead such a supposed bye-law to an information as made at a particular time, and then upon issue joined thereupon, support it by proving that the elections have been from about that time agreeable to such supposed bye-law.—*Case of Corporations,* M. 40 & 41 Eliz. 4 Co. 78. *(a)*

But

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those who voted for him, and which are not determined; that the franchise is of a private nature, or he may disclaim that he acted under his election. 2 *Hawk. P. C.* 162; for there must be a user as well as a claim. *Rex* v. *Ponsonby,* Say. 245.

In *quo warranto* informations defendant is bound to shew a good title in himself against the crown. *Rex* v. *Leigh,* 4 Burr. 2143, for the crown may take issue on any matter that may shew defendant's usurpation; and if but one material issue be found for the crown, judgment shall go against defendant. *Rex* v. *Latham,* 3 Burr. 1485. So where defendant relies on a title in any particular form, he must prove it as laid. *Rex* v. *Mein,* 4 T. Rep. 481. And in all cases defendant's plea should set out his title at length, and conclude with a traverse of *absque hoc quod prædict.* &c. *usurpavit,* &c. for the crown should not take issue on the general traverse, but reply to the special matter, that the defendant may know how to apply his defence. *R.* v. *Blagden,* Gilb. Rep. 145.

(*a*) *With respect to elections, there are many cases in which the court will consider them as void, and consequently the parties elected will be deprived on informations of this nature.*

1st. As where the party elected is ineligible, as an infant of five years to be a burgess of *Portsmouth,* though not intended to be sworn till twenty-one. *Rex* v. *Carter,* Cowp. 220.

2d. So where the mode of election varies from that directed by the charter. *Rex* v. *Grimes,* 5 Burr. 2598. *Rex* v. *Rees,* and *Rex* v. *Newsham,* cited *per Aston,* J. in *Rex* v. *Monday,* Cowp.

But if the charter direct the mayor, aldermen, &c. to be chosen out of the burgesses at large, a bye-law cannot restrain the election, and order [*212] that the mayor, aldermen, &c.* shall be chosen out of the common council or other select number, for such bye-law would not be advantageous

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Cowp. 537. *Rex* v. *Smart*, 4 Burr. 2241. *Cotton* v. *Davies*, 1 Stra. 53. *Foot* v. *Prowse*, 1 Stra. 625.

3d. So where the bye-laws are contrary to law, an election under them is void, as where the number of electors is directed by the charter, the corporation cannot restrain that number by a bye law. *Rex* v. *Cutbush*, 4 Burr. 2204. *R.* v. *Helston Freeman*, 4 Burr. 2515, or require a qualification not required by the charter. *R.* v. *Spencer*, 3 Burr. 1827. But where the power to make laws is in the whole body, they may delegate a select number to make them. *Per Mansfield*, C. J. in *S. C.* And where the mode of electing officers is not regulated by the charter, bye-laws may be made to regulate it. *Newling* v. *Francis*, 3 T. Rep. 187.

As to what bye-laws are lawful, and what not, see *Barber* v. *Boulton*, 1 Stra. 314. *Green* v. *Durham Mayor*, 1 Burr. 128. *Rex* v. *Barber-Surgeons*, 2 Burr. 892.

4th. Elections made before improper officers, are all void, as against those against whom judgment of ouster had passed. *Rex* v. *Smart*, 4 Burr. 2241. *Rex* v. *Grimes*, 5 Burr. 2598. *Rex* v. *Dawes*, 4 Burr. 2277.

5th. So by matters subsequent, an election may be rendered void. *R.* v. *Godwin*, 1 Dougl 382. (397.) n. 22. *Rex* v. *Pateman*, 3 T. Rep. 777, *Milwood* v. *Thatcher*, 2 T. Rep. 80. *Rex* v. *Trelawney*, 3 Burr. 5615.

6th. So where the entries of admissions are not duly stampt, they are void. *Rex* v. *Reeks*, 2 Stra. 716.

7th. And there are other informalities by which an election may be rendered void, as where the whole of a corporation in whom the election lies, are not previously summoned to attend. *Musgrave* v. *Nevinson*, 2 Ld. Raym. 1358. 1 Stra. 584. Unless they be not resident, and not within summons. *Rex* v. *Grimes*, sup. So where an usual mode of giving notice is not complied with. *R.* v. *May*, and *R.* v. *Little*, 5 Burr. 5681.

And where several are to be elected, they should be put up singly. *R.* v. *Monday*, Cowp. 530. in which case it is said, that when a corporate assembly is once convened, no partial number of the members can stop the election, but in *Oldknow* v. *Wainwright*, and *R.* v. *Foxcroft*, 2 Burr. 1017, a question arose whether defendant, or one *S* was duly elected town clerk of *Nottingham*. In that case all the electors, in number twenty-five, were summoned, and twenty-one met, the mayor put up one *S.* and none other was nominated; nine voted for *S.* and the other twelve did not vote, but eleven of them protested against any election being then held, for they alledged that the office was already filled by *F.* though his right was then in contest, and ten of them signed a written protest to that effect, the eleventh declaring he would not interfere, whereupon the mayor declared *S.* duly elected, and his election was confirmed by the court, saying, that the dissentients ought to have voted for some one, and that their protest was of no avail.

Where an election has been in pursuance of the statute 11 *Geo.* II. the directions of the statute must be pursued, or the person is removable by *quo warranto*. *Rex* v. *Malden*, 4 Burr. 2130.

Where a particular officer is appointed before whom a person elected is to be sworn, such officer must assent to his taking the oath, for the elected cannot take up the book, and swear

vantageous but prejudicial to the corporation, as it would confine them in their choice.—*Rex* v. *Phillips*, M. 6 Geo. I. 1 Stra. 394. *(a)*

Hitherto I have taken notice only of such informations as are brought against particular persons for usurping offices, but this sort of information will lie likewise against persons or corporations for usurping franchises.

Therefore where the mayor and common council of *Hartford* took upon them to make strangers free of the corporation without being qualified according to the charter, the court granted an information in nature of a *quo warranto* against them, because the injured freemen of the town had no other way of remedying themselves or of trying the right.—*Anon.* M. 10 W. III. 12 Mod. 225.

So it will lie against a private person, or against a corporation, for holding a market, or holding a court leet or other court, or for exercising any other franchise. And as the defendant must in his plea set out a title, it is necessary to observe in this place what franchises may be claimed by prescription, and in what cases it is necessary to shew a grant, or an allowance in eyre, which is tantamount to a grant.

It is laid down in *Foxley's Case*, (E. 43 *Eliz.* 5 Co. 109.) that whatever may be gained by usage without matter of record, may be claimed by prescription, such as waifs, estrays, treasure trove, *&c.* But such things as are not forfeited but by matter of record, as felons' goods, cannot be prescribed for.—*Case of the Abbot of Strata Marcella*, M. 33 & 34 Eliz. 9 Co. 24.

So a man may prescribe *tenere placita*, but not to have conuzance of pleas; therefore if the charter granting it be before time of memory, *viz.* before the 1 *Rich.* I. it cannot be pleaded; but by the statute *de quo warranto* you may lay an usage time out of mind, which is an argument of an ancient grant, and shew the allowance in eyre.—*Foster* v. *Milton*, H. 10 W. III. 1 Salk. 183. *(b)*

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swear before him against his consent. *Rex* v. *Ellis*, 2 Stra. 994, for it is essential to a man's investment in office, that he be duly and formally sworn. *Penryn Mayor's Case*, 1 Stra. 582.

(a) The defendant in this case claimed as mayor of *Bodmin*, under a charter of 5 *Eliz.* whereby he had a power to hold over till a new mayor was chosen, but it appearing that the mode of election was altered by a charter of thirty-six, which abolished the former modes, *elegendi*, *nominandi*, and *appunctuandi*, the mayor; this was held to abolish the right of holding over. *Rex* v. *Phillips*, Salk. 167.

(b) The defendant in *quo warranto* made title to the freedom of *Newcastle*, under a custom in the corporation to admit all persons of the age of twenty one, *ad libitum*. The prosecutor in reply put in issue both the custom, and the admission under it, and then went on and stated a custom

There is a point of law which sometimes comes in question in trials of this sort of informations, which therefore ought to be taken notice

tom to admit in right of servitude only. This part of the replication was held bad, as being contradictory and irrelevant to the plea. *Rex* v. *Knight*, 4 T. Rep. 419.

Furthermore, *as to the rules laid down by the court in granting* quo warranto *informations*, it was held, in *Rex* v. *Heaven*, 2 T. Rep. 777, that no information will be granted against a person exercising a corporate franchise, to which he was duly elected, though his offence may amount to a forfeiture, unless he has been removed by the corporation. It was questioned in that case, however, whether if a derivative title can be impeached, where the person from whom it was derived had died in possession undisturbed, but it is decided that such title cannot be impeached by those who have acqueisced, and acted under it; and *Blackstone*, J. was of opinion, that a derivative title could not be so impeached in any case where the party under whom the defendant claimed, was dead. *Rex* v. *Stacey*, 1 T. Rep. 1. Vide etiam *Rex* v. *Spearing*, there cited.

Vide etiam *Symmers* v. *Regem*, Cowp. 489, where it was held, that evidence of an order of admission of a burgess, together with a proof of his having acted as such, is sufficient to shew that he was a burgess *de facto*, without proof that he was actually admitted. And in *S. C.* it was also held, that an order of restoration of a voter illegally disfranchised, relates to the original right, and may be given in evidence to rebut the order of disfranchisement, and to shew that his vote ought to have been received at an election made between the two orders.

And on the issue of *non fuit electus*, in *quo warranto*, against a corporator, where the right of election is in the freemen in their corporate capacity, it was held that evidence cannot be given to shew that the electors who were freemen *de facto*, were not so *de jure*, for their votes could not be refused at the election, nor can their right be thus brought into question, collaterally, especially without appearing on the record. *S. C.*

Where the relator and the defendant stand in the same circumstances, or where the granting an information against many, may endanger the dissolution of a corporation, the court will refuse it. *Rex* v. *Bond*, 2 T. Rep. 767.

In a rule for an information against defendant, the objection to his election was, that it was made on the same day he was proposed, whereas it ought, under a bye-law, to have been on the day following, replied, that the relator was a party to an agreement not to enforce this bye-law, and that if any one's title was impeached who had been elected under it, he should be defended at the public expence, and on this ground the court rejected the application.

The court will not grant *quo warranto* information on the application of one who was present, and concurred in defendant's election. *Rex* v. *Stacey*, 1 T. Rep. 1. *Sed secus* where many join, and one that has not concurred will avow himself relator. *Rex* v. *Symmons*, 4 T. Rep. 223. Yet it is not so where the disability, avoiding the election is a latent one, as where the ground of application was, that defendant had not taken the sacrament within a year, and it was opposed because the applicants had concurred in the defendant's election; the court held, however, that such objection was good only where the relator had concurred, knowing of the defect. *Rex* v. *Smith*, 3 T. R. 573.

On a *quo warranto* information against defendants, to shew wherefore they acted as burgesses, not having been admitted, the only act alledged was, their having voted for members of parliament. *Per curiam*, as they

notice of in this place, and that is the operation and effect of a new charter. (*a*)

If a corporation refuse a new charter, it is void; but if they accept and put it in execution, it is good. Whether a corporation have accepted a new charter or not, is commonly matter of evidence, not of law; and proof of acting under it is proof of an acceptance.—*Rex* v. *Larwood*, 6 W. III. Comb. 316.

A new charter was granted in consideration of the surrender of the old one; the old one was in fact surrendered, but the surrender was not inrolled, wherefore the new one was void; but the members under both charters being the same, what they did being warranted by the old charter was holden good.—*Bully* v. *Palmer*, M. 10 W. III. 12 Mod. 247. *Piper* v. *Dennis*, ibid. 253. (*b*) [213]

By accepting a new charter, granting new rights, or giving a new name of incorporation, without a surrender of their old charter, the corporation will not lose any of their former franchises.—*Case of Corporations*, 4 Co. 78. *Haddock's Ca.* T. 33 Car. II. 1 Vent. 355.

By charter of *Hen.* IV. *Norwich* was made a county, and to have two sheriffs to be chosen by the commonalty. *Car.* II. by charter confirmed

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they claimed a right to vote, that right was properly triable by the house only. Rule refused. *Rex* v. *Harvey*, 1 Stra. 547. But in the case of *Horsham Borough*, H. 30 Geo. III. cited in *Rex* v. *Mein*, 3 T. Rep. 599, it was said to have been often ruled, that such an information would lie against a person claiming a right to vote by virtue of a burgage tenure.

On an information against defendant for not having taken the oaths of allegiance and supremacy, the town clerk swore, that though he had made an entry of such oaths having been taken, yet he never administered them, the court refused the rule on account of the danger of allowing a town clerk to falsify the record by his own oath. *Rex* v. *Williams*, 1 Stra. 677. Neither will the court grant the rule where the applicant's affidavit goes on to his belief. *Rex* v. *Newling*, 3 T. Rep. 310.

Formerly the rule was never to allow an information against any person who had been twenty years in possession of his corporate franchise. *Winchelsea Cases*, 4 Burr. 1962. But in *Rex* v. *Dickin*, 4 T. Rep. 282, the court limited the time to six years, and that is now confirmed by statute 32 *Geo.* III. *c.* 58.

(*a*) As to how far the granting of a new charter shall effect the corporate proceedings, it was held, in *Rex* v. *Pasmore*, 3 T. Rep. 199, that where the integral part of a corporation is gone, and the corporation has no power to restore it, or to do any act, the corporation is dissolved, and the crown may grant a new charter, as at *Helston*, where the corporation was reduced to one alderman and seven burgesses, who were incompetent to hold any corporate assembly.

(*b*) And in *Newling* v. *Francis*, 3 T. Rep. 189, it was held, that the proclamation made by king *Jac.* II. (*anno regni* 4°) for restoring such corporations as had surrendered their charters to king *Charles* II. (but which surrenders were not inrolled), shall operate as a grant of revival of such charters (if accepted) and restore them.

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their former charter, but granted further, that one sheriff should be chosen by the mayor, sheriffs, and aldermen only; *per Holt*, C. J. The king cannot resume an interest he has already granted, unless the grantees concur; the corporation might have used this as a new grant or confirmation, but having made their elections according to it, it is evidence of their consent to accept it as a grant.—*Rex* v. *Larwood*, H. 6 W. III. Salk. 167.

PART

PART V.

CONTAINING ONE BOOK OF

TRAVERSES AND PROHIBITIONS.

INTRODUCTION.

THERE still remain two other species of suits which may be tried at *Nisi Prius*, and which therefore fall within the compass of this treatise; and they are Traverses of Inquisitions of office, and Prohibitions.

CHAPTER I. [215]

OF TRAVERSES.

THERE are two sorts of offices; the one vests the estate and possession of the land, *&c.* in the king where he had only right or title before. The other is when the estate is lawfully in the king before, but the particularity of the land does not appear of record, so that it may be put in charge. The first of these is called the office of intituling; the second is called the office of instruction.—*Legat's Case*, M. 10 Jac. I. 10 Co. 115. *(a)*

By the common law, wherever the king was in possession by virtue of the inquisition, the subject was put to his petition of right, unless the right of the party appeared in the inquisition, and then at the common

(*a*) The traverse of an office is only the proving that an inquisition made of lands or goods by the escheator is defective and untrue. No person therefore shall traverse an office unless he can shew a good title, and if one be admitted to traverse an office, this admission of the party to the traverse supposes the title to be in him, or he has no cause of traverse. Vaugh. 641. 2 Lill. Ab. 590.

Offices however are not the only matters that are traversable, for in pleading, many subjects of traverse are to be found, so indictments and presentments are traversable, but as the text is for the most part confined to the traverse of offices, the Editor deems it unnecessary to enlarge his notes on this title.

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law he might have a *monstrans de droit*; but where the inquisition only intitled the king, and he was obliged to bring a *sci. fa.* against the party to recover possession, there at common law the party might traverse the king's title, for there the king being in nature of a plaintiff, the party in possession might by pleading put him to prove the title upon which he would recover. But where the king was in possession by virtue of the inquisition, there the party that would get that possession from him was in nature of a plaintiff, and therefore had no method to proceed in but by way of petition; for no action could lie against the king, because no writ could issue, as he could not command himself.—*Warden & Commonalty of Sadler's Case*, T. 30 Eliz. 4 Co. 54.

But as this suit by petition was of great delay and charge to the party grieved, the statutes of 34 *Ed.* III. *c.* 14, 36 *Ed.* III. *c.* 13, and 2 & 3 *Ed.* VI. *c.* 8, were made to enable the subject to traverse inquisitions, or otherwise to shew their right.

Thus were traverses and *monstrans de droit* introduced in lieu of petitions. (3 *Hen.* VII. 3.) The only difference between the one and the other is, that in a traverse the title set up by the party is inconsistent with the king's title found by the inquisition, which he therefore must traverse; in a *monstrans de droit* he confesses and avoids the king's title. But in both cases he must make a title in himself, *(a)* and if he cannot

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(a) Where the inquisition is to give a title to the crown to lands in the possession of another, the crown is in the nature of a plaintiff; but the defendant cannot defend himself upon his possession alone, but must shew a title in himself by traversing the inquisition. In this case the usual practice is for the crown to open the pleadings, including the inquisition, and then the traverser is called upon to go into his case, and to support his traverse. *Obs.* The issue upon the seisin returned in the inquisition is taken differently either upon the seisin returned, or the crown, by replication to the plea of traverse of seisin, may admit the deed set up by the plea in bar, and traverse by the replication, that the deed was fair and for valuable consideration; and the only difference seems to be, that where the seisin is traversed alone, the due execution of the deed is put in proof.

Where the king sues upon a forfeiture, he can only have what the party had at the time; otherwise, where the crown is a creditor, for there the title commences from the title which binds the property. 1751. *Rex* v. *Cotton*, 2 Ves. 296.

Traverse of a seisin in fee is ill, where a less estate would be sufficient, for it ties up the plaintiff to prove an estate in fee. *Palmer* v. *Ekins*, 2 Stra. 818. Vide etiam *Colborne* v. *Stockdale*, 1 Stra. 493.

Where a party confesses and avoids, he ought not to traverse, but it may be passed over, and issue taken on the traverse. *R.* v. *Armagh Archbp. and Whaley, Clerk*, 2 Stra. 837.

The substance and body of a plea may be traversed. *Digby* v. *Fitzherbert*, Hob. 232. But a traverse, that *A.* died seised of lands in fee, *modo et forma*, as the defendant had declared, was held good. *Edwards* v. *Lawrence*, Hutt. 123.

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prove his title to be true, although he be able to prove that the king's title is not good, it will not * serve him. (*Stamf. Prerog.* c. 20. pa. 65.) But in traverses at common law the party is in nature of a defendant, and therefore need not set up any title in himself.—*Rex* v. *Mason*, T. 1 Ann. 2 Salk. 447. Far. 32. S. C. [*216]

The method of proceeding at common law, by petition was that the king's title being found by inquisition, the party petitioned to have an inquest of office to inquire into his title; if his title was found by such office, then he came into court and traversed the king's title: so that the record began by setting out the first inquisition found for the king, after that the return of the inquisition taken upon the petition, and then went on with *et modo ad hunc diem venit*, and so traversed the king's title. In conformity to these proceedings at common law, the traverse and *monstrans de droit* given by the statute begin by stating the inquisition, and then go on "*et modo ad hunc diem venit, &c.*"

(Note; the only difference between the pleading in a traverse and *monstrans de droit* is, that one is *pro placito dicit*, the other *pro placito et monstratione juris dicit.*)

And from this manner of pleading, some have considered the party traversing as defendant; but when it is considered that this traverse comes in lieu of the petition at common law, and that it does not suspend the vesting in the king by the inquisition, (*Rex* v. *Roberts*, E. 17 Geo. II. Stra. 1208.) *(a)* and that the judgment for the party is an *amoveas manum*, and the judgment against him *a nil capiat*, it seems clear he ought to be deemed a plaintiff, and as such is capable of being nonsuited.—*Rex* v. *Mason*, T. 1 Ann. Salk. 448. 4 Hen. VI. 12.

These proceedings are in the petty bag-office, and the record is brought from thence into the king's bench by the chancellor, in order that it may be tried.—*Trem. P. C.* 652. *(b)*

(a) In this case it was said, that the traverse of an inquisition for the king is considered as a debt, and the prosecutor may carry down the record.

(b) In traverse these rules are to be observed: 1. That the traverse of a thing, not immediately alledged, vitiates a good bar: 2. That nothing must be traversed, but what is expressly alledged: 3. That surplusage in a plea doth not enforce a traverse: 4. That it must be always made to the substantial part of the title: 5. That where an act may indifferently be intended at one day or another, there the day is not traversable: and 6. That, in trespass, the day is not generally material, unless the matter be to be done on a particular day. *Wood* v. *Sherby*, 2 Rol. Rep. 37. *Rex* v. *Norwich Bp.* 1 Rol. Rep. 235. *Lane* v. *Alexander*, Yelv. 122. 2 Lill. Abr. 313. So if the parties agree on the day for a thing to be done, the traverse of the day is material, otherwise, not; and though it is proved to be done on another day, it is sufficient. *Heydon* v. *Godsale*, Palm. 280.

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It is not clear, that a person found by inquisition to be a lunatick or idiot, can himself traverse the inquisition; (*Sir J. Cutt's Ca.* 8 Jac. I. Ley. 26.); however it is certain, that such traverse will not suspend the grant of the custody thereof. (*Ex parte Smithie,* 1728.) The practice has always been for the party to petition the chancellor for leave to traverse, and then the chancellor will upon proper grounds give such leave, and suspend the grant of the custody in the mean time.—*Sir J. Knaper's Ca.* 10 Ann.

And it is not uncommon to grant such leave upon terms, such as upon condition that some third person who claims under conveyances from the party, will agree to be bound by the event of the traverse. And this is much for the advantage of such third person, for though he would be entitled to come in and traverse the inquisition *pro interesse*
[*217] *suo,* yet he must do that at * his own expence; whereas where leave is given for the party to traverse, the expence must be paid out of the estate; besides, it comes with less prejudice before the jury when the chancellor so far countenances the traverse, as upon inspection and enquiry to give leave for it to be carried on at the expence of the party against whom the inquisition has been found.—*Rex* v. *Roberts,* M. 1743. in Canc.

But beside these inquisitions of office in which the king is concerned, there are others which may likewise be traversed by the parties interested; such is the inquisition taken on the writ of *noctanter,* which is given by *Westminster* 2. 13 *Ed.* I. *st.* 1. *c.* 46, *(a)* where any one having a right to approve waste ground makes a hedge or a ditch, and it is thrown down in the night-time, the neighbouring vills shall make it good at their own expence, in case they do not indict such as are guilty, and for that purpose this writ commands the sheriff to inquire into the truth of the fact, and who did it; and if the jury return that they are ignorant who did it, the return being filed in the crown-office, there goes out a writ of enquiry of damages and *distringas* to the sheriff, to distrain the neighbouring vills to make new hedges and ditches at their own expence, and

(*a*) By the better opinion, this writ lies for the prostration, as well of all inclosures, as those improved out of commons; but if it be not in the night, this writ will not lie, and there ought to be a convenient time (which the court will judge of) before the writ is brought for the county to enquire of, and indict the offenders, which, Lord *Coke* (in 2 *Inst.* 476,) says, should be a year and a day. Vide *Rex* v. *Epworth Inhabitants,* Cro. Car. 440. 1 Kebl. 545. If, however, any of the offenders be indicted, that must be pleaded by defendants.

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also to restore the damages, *(a)* and upon this *distringas* the defendants may come in and traverse the fact of the inquisition, or they may plead that some of the offenders have been indicted, or traverse that the party sustained damages to the sum found: (2 *Inst.* 476.) But in other cases of writs of enquiry of damages the party cannot traverse the *quantum* of the damages found, because he has confessed himself liable by letting judgment go against him; besides, he may give evidence on the writ of enquiry, because he is before the court; but in this case the writ of enquiry is founded upon the return of the first inquisition, and the parties are never before the court till they are so brought by the *distringas*, therefore have had no previous opportunity of controverting the matter.—2 *Lil. Abr.* 217.

(a) The charges for the defence of the several vills, should be raised by agreement, and if they cannot agree, each vill must bear its own charge, as in case of a suit against an hundred, till execution, and then the statute 37 *Eliz.* c. 13, has provided a remedy.

CHAPTER II. [218]

OF PROHIBITIONS.

THE courts of *Westminster Hall*, having a general superintendency over all other courts, will grant a prohibition to stay the proceedings of an inferior court, either *pro defectu jurisdictionis, pro defectu triationis*, or for proceeding as the law of the land does not warrant: And if the judge or party proceed notwithstanding the prohibition, an attachment may be had against him, or an action upon the case. *(a)*

When

(a) In notion of law, and in a practical sense, this action is founded on an attachment against defendant for a contempt, in proceeding after service of a prohibition; but it is a mere fiction to try whether the inferior court ought to proceed further in the suit, for, in fact, the defendant is not served with any prohibition, and therefore cannot be actually in contempt; yet this matter is alledged *pro forma*, and to give the action the requisites of a suit. The supposed contempt is the reason of its being a *qui tam* action; for it is a rule, that in all cases of contempt to the king, the action must be to answer the king as well as the plaintiff. *Anon.* Mo. 64. This fiction seems to have been derived from the ancient practice, for, formerly, the court of common law, it is said, could not grant a prohibition, unless the party were in contempt for proceeding after service of a prohibition, and an *alias* and *pluries* directed to him out of chancery; and in that case an attachment *sur* prohibition issued against

When a prohibition is moved for, the method is for the party to file a suggestion in court, stating the proceedings that have been had in the court below, and then suggesting the reason why he prays the prohibition; upon this the court grants a rule for the other party to shew cause why a writ of prohibition should not issue; and if it appear to the court that surmise is not true, or not clearly sufficient to ground the prohibition upon, they will deny it; otherwise they will make the rule absolute for the prohibition, and if the matter be doubtful, they will order the party to declare in prohibition.—*Aston Parish* v. *Castle Birmidge*, Hob. 67. *(a)*

When the court inclines to grant the motion for a prohibition, the defendant has a sort of right to insist that the plaintiff shall declare; but where the court inclines against the motion, the plaintiff has no such right, for there might be judgment by default, and the court be obliged to prohibit against their own opinion; and it is no injury to the plaintiff, as he may apply to another court.—*Rex* v. *Ely Bp.* M. 30 Geo. II. 1 Bla. 81. 1 Burr. 198. S. C.

Note; Where the party is ordered to declare in prohibition, he ought not to take out the writ, but serving the other side with a rule is sufficient;

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against him, returnable in *B. R.* or *C. B.* Whereupon the party who issued out the prohibition might declare to recover the damages he has sustained by defendant's obstinacy. *Longdale's Ca.* 12 Co. 58, wherein Sir *E. Coke* says, the attachment is only a *judicial* writ; but that is a mistake; it is certainly an *original* writ, for, like all other original writs, it begins, *Si A. B. fecerit te securum, &c. tunc pone, &c.* Vide *Jefferson* v. *Durham Bp.* 1 Bos. & Pull. 121. But the present practice is to file a suggestion in court, stating the nature of the case, and proceedings below, and then to pray for a prohibition.

For the doctrine in prohibition at large, vide 2 *Inst.* 601. 618; and see the opinion of the judges delivered by *Eyre*, C. J. in *Dowo Prec.* cand *Home* v. *E. Camden*, 2 H. Bla. 533, for a masterly illustration of the nature and object of this proceeding, where the Chief Justice, after stating the use and application of a prohibition to restrain the spacial courts, thus proceeded: "If "any man who hears me shall think "that he observes something of ob- "liquity in the proceeding, let him "look to the effect of it, and he will "be satisfied. So long as the tem- "poral courts direct parties to de- "clare in prohibition, a prohibition "cannot arbitrarily issue, nor upon "any but the most substantial "grounds, and the balance in "which are to be weighed all the "different jurisdictions in which "the public justice of the county "is administered to the people, will "be holden by your lordships."

(a) Which he does by serving the other side with the rule, without taking out a writ, and then delivering a declaration; but as the direction to declare is in favor of the defendant, he may afterwards submit, and refuse the declaration, and then the court will, on his application, stay the proceedings without costs. *Gegge* v. *Jones*, 2 Stra. 1149.

cient; and if in that suit he obtain judgment, the judgment is *stet prohibitio*, otherwise it is *quod eat consultatio*; therefore, if the party be excommunicated, the mandatory part of the writ to assoil the party is not to be obeyed till after trial had.—*The Dean* v. *Bishop of Wells*, M. 25 Geo. II.

In cases of tithe and such sort of matters where many things are in controversy, it is very frequent to order the prohibition * to stand as to [*219] part, and a consultation to go as to the other part. *(a)*

Where

(a) Where the suggestion is to stay a suit in the ecclesiastical court for substraction of tithes or other ecclesiastical dues, it must be proved by two witnesses, by virtue of statute 2 & 3 *Ed.* VI. *c.* 13. *s.* 14; but this statute extends only to tithes payable *de jure*, and not to such as are against common right. 2 *Inst.* 662. So, it is said, that proof is not necessary, where the suggestion is in the negative, as that the parsonage is not impropriate, or that the lands do not lie in the parish, or that the parson is not inducted, because a negative cannot be proved. *Ibid.* So where the suggestion is, that the parson has made a contract for his tithes, no proof is necessary. *Tanner* v. *Small*, Yelv. 102. *Cobb* v. *Hunt*, ibid. 119. However, where the party must prove his suggestion, an entry of the proof which he has made is drawn out and entered on the record, and upon this the court grants a rule to shew cause why a prohibition should not issue, which is afterwards made absolute or discharged, according to circumstances. See Mr. Serjeant *Williams'* n. (1.) to *Croucher* v. *Collins*, 1 Saund. 136.

The cases in which the courts at *Westminster* have interfered to restrain the proceedings of inferior jurisdictions, or have refused so to do, are too numerous to be brought within the present compass: the general ground, however, for granting a prohibition, is an excess of jurisdiction, as where the courts below have assumed to themselves a power to act in matters not within their cognizance. *Grant* v. *Sir Charles Gould*, 2 H. Bla. 100. And of late years, the court has interfered in some particular cases. As where it appeared that a court of appeal had no jurisdiction, the court of *K. B.* granted a prohibition, even after they had remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that court. *Darby* v. *Cozens*, 1 T. Rep. 552. So where a *modus* is pleaded in an ecclesiastical court, a prohibition may be granted at any time before final sentence. *S. C.* And it will be granted after sentence, if it appears on their proceedings, that they have exceeded their jurisdiction. *Leman* v. *Goulty*, 3 T. Rep. 3. Therefore, though they may compel churchwardens to deliver in their accounts, yet, as they cannot decide on the propriety of their charges, the court will grant a prohibition, if they do it.

So, to stay a suit in the special court, for breaking open the church chest, and taking away the title-deeds to the advowson, a prohibition lies. *Gardner* v. *Parker*, 4 T. Rep. 351.

So, a prohibition issued to the bishop of *C.* who claimed a right to present by lapse, under a pretence of his visitatorial power, to the office of canon residentiary of his church, it being a freehold office, and the right of election being in the dean and chapter. *Chichester Bp.* v. *Harwood*, 1 T. Rep. 650.

After sentence in the ecclesiastical court,

Where an issue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they shall give no more than 1s. damages, for it is in nature of an issue to inform the conscience of the court; but after he has had judgment, *quod stet prohibitio*, he may bring

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court, in a matter of tithe, whether the question turned on the construction of an act upon a doubt raised whether that court had not misconstrued the act, the court of *K. B.* directed the plaintiff to declare in prohibition, for the more solemn adjudication of the question, which, supposing the court below to have misconstrued the act, a prohibition should go after sentence in a matter in which the court below had original jurisdiction, or whether it were only a ground of appeal. *Gare* v. *Gapper*, 3 East, 472.

A prohibition was granted in this case, on an affidavit that the defendant (to a libel for tithes in kind in the spiritual court) answered on oath, or pleaded a *modus*, without its appearing that the *modus* was regularly pleaded below, so as to be put in issue there. *French* v. *Trask*, 10 East, 348.

But the court will not grant a prohibition after sentence below, if the spiritual court has cognizance of part of the charge only, and not the rest. *Carslake* v. *Mapledoram*, 2 T. R. 473.

Nor after a sentence of the special court pronounced on a libel importing that a woman was of most licentious habits. *Lee's Dict. of Pract.* tit. *Prohibition.*

Nor where the subject of a suit in an inferior court is within its jurisdiction, though a matter be stated in the proceedings which is out of its jurisdiction, unless the inferior court be about to try such matter. *Dutens* v. *Robson*, 1 H. Bla. 100.

Nor would the court of *C. B.* grant a prohibition to prevent the execution of the sentence of a court martial passed against *A.* who had received soldiers' pay (but had assumed the military character merely for the purpose of recruiting), even the proceedings in the court martial appeared to be irregular. *Grant* v. *Sir Charles Gould*, 2 H. Bla. 69.

Nor after sentence, where the party applying had permitted the question of fact as to the quality of a meadow, to be tried below. *Stainbank* v. *Bradshaw*, cited 10 East, 349.

Nor to the special court upon its rejecting a certain optional *modus* set up there, such *modus* not ascertaining any certain time when the money payment was to be made, in case the option were to take it in money. *Roberts* v. *Williams*, 12 East, 33.

And where a rector was cited in the Episcopal Consistorial court, to shew cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church, to erect a monument, to the granting of which the rector dissented, notwithstanding which the court below were proceeding to grant the faculty with the consent of the ordinary. This was held no ground for a prohibition, but a mere matter of appeal, if the rector's reasons for dissenting were improperly over-ruled. *Bulwer* v. *Hase*, 3 East, 217.

Where the special court incidentally determines any matter of common law cognizance, such as the construction of a statute, otherwise than as the common law requires, a prohibition lies after sentence, though the objection do not appear on the face of the libel, but is collected from the whole of the proceedings below. *Gould* v. *Gapper*, 5 East, 345. Vide etiam *Palmer* v. *Allicot*, Comb. 14.

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his action upon the case, and recover the damages he has sustained.—*Carter* v. *Leeds*, M. 2 Geo. II. *(a)*

A prohibition *pro defectu jurisdictionis* is granted as well where the inferior court has a jurisdiction, but exceeds it, as where it has no jurisdiction at all; *(b)* for if the judge of such inferior court do not act agreeable to the power he has, it is the same as if he had no jurisdiction, therefore though the court will not intermeddle with the determinations of visitors, but presume they have done right while they keep within their visitatorial power, yet if they exceed it, or do not act in a regular visitatorial manner, they will grant a prohibition.—*Dean and Bishop of Gloucester's Ca.* T. 24 Geo. II. *Smith* v. *Bradley*, E. 24 Geo. II.

Note; Where there is no *defectus jurisdictionis*, but only *triationis*, the defendant must plead it below, and have his plea disallowed before he can be entitled to a prohibition.

As to the third cause for which prohibitions are grantable, the rule is, that where the ecclesiastical court proceeds in a matter merely spiritual, if they proceed in their own manner, though that is different from the common law, no prohibition lies; (*Chadron* v. *Harris*, Noy. 12.); as in probate of wills if they refuse one witness; but if they have conusance

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(a) By the statute 8 & 9 *W.* III. *c.* 11, in suits upon prohibitions, the plaintiff obtaining judgment, or an award of execution after plea pleaded, or demurrer, shall recover his costs; and if the plaintiff shall be nonsuited, or discontinue, or a verdict pass against him, the defendant shall recover his costs.

After plea pleaded, or demurrer found, plaintiff in prohibition is entitled to his costs, from the time of the suggestion, which is taken to be from the commencement of a suit, in lieu of an original writ in prohibition. *Palmer* v. *Williams*, Barnes, 136. And after damages or enquiry, from the time the rule for a prohibition was made absolute. *Seed* v. *Wolfenden*, ibid. 148.

And where plaintiff was nonsuited, the defendant was denied costs of opposing the rule for the prohibition. *Say. on Costs*, 137. But where either party succeeds as to part of what is in issue, he seems entitled to costs. *Middleton* v. *Croft*, 2 Stra. 1056. 1062. *Malton* v. *Acklam*, Barnes, 138.

If the defendant succeeds on demurrer, he is not entitled to costs. *Brymer* v. *Atkins*, 1 H. Bla. 164, in which case a consultation was awarded, but no mention of costs; and Mr. *Tidd*, (Prac. 851,) cites *S. C.* as an authority of a long-standing period, as from a *MS.* Neither are executors or administrators within the statute 8 & 9 *W.* III. for that act, *sec.* 3, provides, that it shall not extend to them. *Scammell* v. *Wilkinson*, 3 East, 202.

(b) Where the court below has originally no cognizance of the cause, and some matter arises in the course of it, which is properly triable at common law, there, if the parties submit, and the court below examines witnesses, and tries the matter (as a custom) and gives sentence, it is too late to apply for a prohibition afterwards. *Hull* v. *Hutchins*, Cowp. 424.

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of the original matter, and an incident happen which is of temporal conusance, or triable at common law, they must try it as the common law would; (*Brown* v. *Wentworth*, T. 4 Jac. I. Yelv. 92.); as in a suit for a legacy, if the defendant plead a release or payment, they must admit the evidence of one witness; but if they admit the proof, they are to judge whether he be credible or not: therefore if they determine against his evidence, the party has no remedy but by appeal.—*Shotter* v. *Friend*, H. 1 W. III. Salk. 547.

Note; Where a person is sued in the ecclesiastical court for a seat in the church, if he would obtain a prohibition and oust the ordinary of jurisdiction, he must shew such a legal title as cannot be tried in the ecclesiastical court, which can only be by prescription, and prescription can in such case be no otherwise proved than by shewing repairs; there-
[*220] fore in a *declaration in prohibition, the plaintiff regularly ought to set out a custom of repairing; but if he do not, if the defendant do not demur, but go to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict, unless he prove a custom to repair.—*Stedman q. t.* v. *Hay*, 9 Geo. I. Comy. 368.

PART

PART VI.

CONTAINING ONE BOOK OF

EVIDENCE IN GENERAL.

HAVING already taken notice of the several actions which may be brought, and the various defences to be made in such actions; as also the Evidence necessary to support the same, it will be proper now to consider the theory of evidence in general, and to lay down such rules as are equally applicable in all causes. In pursuing this enquiry, I have made great use of Lord Chief Baron *Gilbert's* treatise on the same subject: However, have endeavoured to new-model it in such manner as to render it more useful.

Evidence is two-fold.

A. *Written.*

B. *Not written.* (a)

A. *Written Evidence is,*

I. Public.

II. Private. (b)

As to Public, that is likewise two-fold, viz.

1. *Records.*

2. *Matters of an inferior Nature.* (c)

I. *Public written Evidence.*

1. RECORDS are the memorials of the legislature and of the king's courts of justice, and are authentic beyond all manner of contradiction; for there can be no greater demonstration in a court of justice than to appeal to its own transactions.

(a) *Vide* post, p. 283.
(b) *Vide* post, p. 249. b
(c) *Vide* post, p. 234. b

Statutes.

Statutes.—The first sort of records are acts of parliament: these are the memorials of the legislature, and therefore are the highest and most absolute proof; and they either relate to the kingdom in general, and are called general acts, or only to the concerns of private persons, and are thence called private. *(a)*

A general act of parliament is taken notice of by the judges and jury without being shewn; but a particular act is not taken notice of without being shewn; for the court cannot judge of particular laws which do not concern the whole kingdom, unless that law be exhibited to the court: for they are obliged by their oaths to judge of all matters coming before them *secundum leges et consuetudinem Angliæ*, and therefore they cannot be obliged *ex officio* to take notice of a particular law, because it is not *lex Angliæ*, a law relating to the whole kingdom; and therefore, like all other private matters, it must be brought before them to judge thereon.

But a private act of parliament, or any other private record, may be brought before the jury, if it relate to the issue in question, though it be not pleaded; for the jury are to find the truth of the fact in question, according to the evidence brought before them; (*Needler* v. *Winton Bp.* 1614. Hob. 227.) and therefore, if the private act do evince the truth of the matter in question, it is as proper evidence to the jury as any record, or any other evidence whatever: nay, since such records are most authentic, it is the most proper sort of evidence.—*Talentine* v. *Denton*, T. 1605. Cro. Jac. 112.

On an attaint a particular act of parliament cannot be given in evidence to the grand jury, which was not given in evidence to the petit jury; for since on the attaint the former verdict is called in question,

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(a) Public Acts are presumed to be known to all men as the general law of the land, and the printed statute books are evidence, unless where they differ, and then those which have been examined with the original roll shall be preferred. *Rex* v. *Jeffries*, 1 Stra. 446.

But *Private Acts* are not laws, but facts, and must, therefore, be proved by copies from the rolls of parliament; yet, in one case, contrary to the universal practice, *Parker*, C. B. allowed a private statute, touching the College of Physicians, to be given in evidence, without comparing it with the record. *Gilb. Evid.* 10. 13. So the king's printer's copy of an act which concerns a whole country may be given in evidence. Vide *Dupays* v. *Shepherd*, 12 Mod. 216. These inconveniences, however, are now frequently prevented by the declarations of the legislature, that acts in their nature *private* shall be deemed *public*.

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and the jury are to be punished for the iniquity of that verdict; it follows of consequence, that no more evidence can be given than was offered to the petit jury; for they could not make any discernment but upon the evidence offered, and therefore ought not to be called in question upon different evidence.—*Needler* v. *Winton Bp.* 1614. Hob. 227.

But a general statute may be offered in evidence to the grand jury in an attaint, though it were not offered in evidence to the petit jury; because of a general law every person who lives under it is supposed to take notice, and by consequence the first jury in their decision were obliged to understand it, otherwise they ought to have referred it back to the decision of the court; for when the jury take upon them * to judge of the whole matter, they do at their peril take upon themselves the understanding of the law: and if the petit jury have judged without being apprised of the general law of the kingdom, as they ought to be; yet that may nevertheless be offered to the grand jury, who may be made sensible of such general laws on which their judgment must be founded.—*Needler* v. *Winton Bp.* sup. [* 223]

Now the distinction between a general and a particular law is this; whatever concerns the kingdom in general is a general law; whatever concerns a particular species of men, or some individuals, is a particular law.—*Holland's Case,* 1597. 4 Co. 76.

From this definition it is plain, that the same law may be both general and particular in different parts; *ex. gr.* 3 *Jac.* I. against recusants in general in disabling them to present; yet the clause giving their presentations to the universities is particular, and must be pleaded or found.—*Needler* v. *Winton Bp.* sup.

A law which concerns the king is a general law, because he is the head and union of the common wealth. A law that concerns all lords is a general law, beeause it concerns the whole property of the kingdom, it being all holden under lords mediate or immediate. But a law that concerns only the nobility, or lords spiritual, is a particular law, because it relates to no more than one set of persons; as if a law make them liable to such and such process. Yet perhaps, if a law related to the body of the peerage, it would be deemed a general law, for as such they are part of the legislature, and what relates to the constitution is a general law.

What relates to all officers in general is a general law, because it concerns the universal administration of justice; as that no sheriff or other officer

officer should take a reward for his office. *(a)* But if it relate only to particular officers, and not to the administration of justice, it is a particular law. *(b)*

What relates to all spiritual persons is a general law, inasmuch as the religion of the kingdom is the general concernment of the whole kingdom, as 21 *Hen.* VIII. 13 *Eliz.* 10. 18 *Eliz.* 11. But what relates to one set of spiritual persons is particular; as the act of 11 *Eliz.* of Bishops' leases.

An act that comprehends all trades is general, because it relates to traffick in general: but an act that relates to grocers or butchers is particular. *(c)*

[224] If the matter of a law be ever so special, yet if it relate equally to all, it is a general law: But a law relating to some counties or parishes is special.

Though it be regularly true, that a private law shall not be taken notice of, unless it be shewn, yet it will be otherwise in case such private law be recognized by a public one: *Ex. gr.* the 23 *Hen.* VI. *c.* 10. relative to sheriff's bonds is a private law, yet 4 & 5 *Ann.* having enabled the sheriff to assign such bond, the court must take notice of the law that enables him to take such bond.—*Saxby* v. *Kirkus*, H. 27 Geo. II. K. B. Say. 116.

But there are some cases in which public as well as private statutes ought to be pleaded, and that is where they make void any legal solemnities; for in this case the construction of the law is not that the solemn contracts shall be deemed perfect nullities, but that they are voidable by the parties prejudiced by such contracts, and one reason of this construction arises from this rule in expounding statutes, *viz. Quisquis potest renunciare juri pro se introducto.* But if such contracts were construed to be perfect nullities, that rule must be laid aside, and the party must receive benefit by the law, whether he would or not. And therefore such

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(a) Vide *Bentley* v. *Hore*, 1 Lev. 86. *Oky* v. *Sell*, 2 Lev. 103. which state, that the statute 23 *Hen.* VI. *c.* 9, relating to bail bonds, is a general law.

(b) Vide etiam *Holland's Ca.* 4 Co. 76. *Benson* v. *Welby*, 2 Saund. 154, 155, with a special note by Serjeant *Williams*, referring lastly to *Samuel* v. *Evans*, 2 T. R. 569, in which all the authorities were cited, and where it was adjudged that the statute 23 *Hen.* VI. *c.* 9. is a public act, and therefore need not be pleaded.

(c) The statute 2 *Ph. & M. c.* 11. concerning using the trade of a dyer, *&c.* not being a cloth-worker, *&c.* though it concerns a particular thing, and therefore is private in its nature, yet the *forfeiture being to the king*, the king is concerned, and that makes it a public act. *R.* v. *Buggs*, Skin. 429.

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acts of parliament must be pleaded, that the party may appear to take the benefit of them. Another reason of this construction is, that as what shall constitute the solemnities of a contract is matter of law, so it is matter of law how these solemnities ought to be defeated and destroyed. And inasmuch as it is matter of law by what solemnities a contract is to be constituted, therefore, when any action is founded upon any solemn contract, that contract ought to be preferred to the court; now it were preposterous that the law should require the contract to be offered to the court, that it may appear to be legally made; and that it should not require it to be offered to the court, how it is defeated: Both certainly must be determined by the same judicature. Therefore you cannot give the act of *Eliz.* touching usurious contracts, in evidence on the general issue, though a general law, but it ought to be pleaded.—*Humberston* v. *Howgell*, T. 1614. Hob. 72. *(a)* So the statute of the sheriff's bonds cannot be given in evidence on the general issue, but ought to be pleaded. So a fine is made void by the statute of *Westminster* 2. *c.* 1. but construed only to be voidable. And a recovery by a wife with a second husband is made void by 11 *Hen.* VIII. but construed only voidable.—*Case of Sadler's Comp.* T. 30 Eliz. 4 Co. 59. 2 Inst. 336.

If an action or information be brought upon a penal statute, and there [225] be another statute that exempts or discharges the defendant from the penalty, this ought to be pleaded, and cannot be given in evidence on the general issue; for the general issue is but a denial of the plaintiff's declaration, and the plaintiff has proved him guilty, when he has proved him within the law upon which he has founded his declaration; so that the plaintiff has performed what he has undertaken: but if the defendant would exempt himself from the charge, he should not have denied the declaration, but have shewed the law that discharges him.

Another difference is taken between where the proviso in a statute is matter of fact, and where it is matter of law. *(b)*

For where it is a mere matter of fact it may be given in evidence; as if an action of debt be brought against a spiritual person for taking a

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(a) Samuel v. *Evans*, 2 T. R. 569; and ante p. 223 *a*, n. (b) *contra*.

(b) The statute 2 *Geo.* II. *c.* 24. *s.* 8. against bribery at elections, having provided that an offender having, before his own conviction, discovered and convicted another offender, shall be exempted from the penalties, *&c.* Such discovery and conviction may be given in evidence under the plea of *nil debet*, and need not be pleaded specially. *Sutton* v. *Bishop*, 4 Burr. 2283. *Sibly* v. *Cuming*, ibid. 2464; and *Gardiner* v. *Horne*, cited ibid. 2467.

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farm, and the defendant plead *quod non habuit nec tenuit ad firmam contra formam statuti:* The defendant may give in evidence that it was for the maintenance of his house, according to the proviso in the statute. But on an information on 5 *Ed.* VI. *c.* 14. for ingrossing, the defendant cannot upon the general issue give in evidence a licence of three justices according to the proviso, because whether there be a sufficient authority given is matter of law, and therefore cannot be given in evidence, but must be pleaded. *Anon.* Godb. 144, 145. (*a*)

A saving proviso may be given in evidence on the general issue, because, if the party be within the proviso, he is not guilty on the body of the act on which the action is founded. *Ibid.* (*b*)

Of general acts of parliament the printed statute book is evidence: (*c*) Not that the printed statutes are perfect and authentic copies of the records themselves; but every person is supposed to know the law, and therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already.

But in private acts of parliament the printed statute book is not evidence, (*d*) though reduced into the same volume with the general statutes: But the party ought to have a copy compared with the parliament roll; for they are not considered as already lodged in the minds of the people.

However, a private act of parliament in print that concerns a whole
[*226] country, as the act of *Bedford* levels, for rebuilding • *Tiverton*, &c. may be given in evidence without comparing it with the record. (*Dupays* v. *Shepherd*, M. 1698. 12 Mod. 216.) And these things are the rather admitted, because they gain some authority from being printed by the king's printer; and besides, from the notoriety of the subject of them they are supposed not to be wholly unknown. (*Goodright* v. *Skinner*, M. 7 Geo. II. C. B.) And for this reason printed copies of other things of as public a nature have been admitted in evidence without being com-

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(*a*) And it has been held, a defendant cannot, in any action upon *not guilty* pleaded, give a *licence* in evidence. *Vin. Abr.* (Evid.) O. b. pl. 1. *Et vide post* 250.

(*b*) Vide *R.* v. *Talbot*, W. Jo. 320. S. P.

(*c*) Where the body of an act is general, and an exception to that generality is afterwards introduced by way of proviso or exception, he who would bring his case within that exception must plead it. *Stowell* v. *Zouche*, Plowd. 376, cited in *Horn* v. *Horn*, 7 East, 532.

(*d*) And Lord *Kenyon* refused to receive in evidence the stat. 11 & 12 *W.* III. for preserving the navigation of the rivers *Avon* and *Frome*, printed by the king's printer. *Edgar* v. *Lewis*, Guildhall, H. 30 Geo. III.

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pared with the original:*(a)* as the printed proclamation for a peace was admitted to be read without being examined by the record in chancery.—*Dupays* v. *Shepherd*, sup.

Copies of Records.—The next thing is the copies of all other records; for they, being things to which every man has a right to have recourse, cannot be transferred from place to place to serve a private purpose, and therefore the copies of them must be allowed in evidence; a true copy being the best evidence you can have.*(b)* But a copy of a copy is no evidence,

(a) Mr. *Peake* says, that *parliamentary journals* were, in the opinion of Sir *Edward Coke*, entitled to the authority of *records*, and he has referred us (in 4 *Inst.* 23) to the stat. 6 *Hen.* VIII. *c.* 16. which prohibits the absence of any of the members without licence entered *of record* in the clerk's book. The general opinion, however, now is, that the house itself not being a court of record, none of its proceedings are so, and though formerly copies of nothing short of records could be received as evidence of the originals, yet now copies from the books of either house, examined with the originals, are equally received as evidence of the proceedings of the house. *Jones* v. *Randal*, Cowp. 17. *Rex* v. *Lord George Gordon*, Dougl. 569 (590); yet in cases where either house merely comes to a resolution as a foundation for other proceedings, such resolutions are no evidence of the fact resolved. *Peake's Evidence*, 53. Therefore, in the case of *Titus Oates*, 4 State Trials, 39, the resolution of the two houses, as to the existence of the Popish plot, was held to be no evidence in a court of justice of the truth of that fact. And in *Rex* v. *Stockdale*, Peake's Evid. 53, where the house of Commons had resolved that a publication was a libel on the house; and in *Rex* v. *Reeves*, ibid. that it was a libel on the constitution, and the attorney-general was ordered to prosecute; the jury were, nevertheless, directed to consider the intentions of the defendants, and both parties were acquitted.

(b) Upon the trial of Lord *George Gordon*, sworn copies of certain entries in the journals of the house of Commons were produced and read as evidence on the part of the crown, without being objected to. *R.* v. *Gordon*, 2 Dougl. 572 (590). In 12 *Geo.* III. *Dunning* moved for a rule on the *East India Company*, to produce their original transfer books, because copies from them could not be read in evidence, alledging that the copies of nothing but records are admissible where the originals can be produced. But the court denied the rule, and mentioned several instances where copies of matters not of record are admissible, as copies of courts roll, parish registers, *&c.* and copies of journals of the house of Commons, as in *Birt* v. *Barton*, 1 Dougl. 166 (174). Vide *R.* v. *Gordon*, 573 (593), n. 3. And the court added, that the reason *ab inconvenienti* for not producing *records*, applied with still greater force to such public books as the transfer books of the *East India Company*, for the utmost confusion would arise if they could be transported to any the most distant part of the kingdom whenever their contents were thought material on the trial of a cause. The court granted a rule to shew cause why copies of those entries in the transfer books, which the party meant to make use of, should not be taken and read in evidence on the trial; the rule to be served both on the solicitor for the company and the opposite party. But the correct principle seems to be laid down by Lord *Holt*, in *Lynche* v. *Clerke*, 3 Salk. 134, that whenever an original is of a *public nature*, and would be evidence

evidence, for the rule demands the best evidence the nature of the thing admits, and the further off any thing lies from the first original truth, the weaker must be the evidence; besides, there must be a chasm in the proof; for it cannot appear that the first was a true copy.

These copies are two-fold;

1. *Under seal.*
2. *Not under seal.*

First, *Under seal*, and they are called exemplifications, and are of better credit than any sworn copy: for the courts of justice, that put their seals to the copy, are supposed more capable to examine, and more exact and critical in their examination, than another person is or can be.

Exemplifications are two-fold;

1. *Under the broad seal.*
2. *Under the seal of the court.*

First, *Under the broad seal*; and such exemplifications are of themselves records of the greatest validity, and to which the jury ought to give credit under the penalty of an attaint.

When a record is exemplified under the broad seal, it must either be a record of the court of chancery, or be sent for into the court of chancery by *certiorari*, which is the centre of all the courts, and from thence the subject receives a copy under the attestation of the great seal. *(a)*

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dence if produced, an immediate sworn copy thereof will be evidence. *R.* v. *Gordon*, 2 Dougl. 572 (593) n.

In proving a copy of a record, it is enough if the person producing it swear that he examined the copy whilst another person read the original, it is necessary that he should have himself read the original, but the other side may shew it is not a true copy. *Reid* v. *Sheriff of Sussex*, 1 Camp. 469. In this case defendant produced as evidence a book, purporting to be a collection of treaties concluded by *America*, which was declared to be published by authority there, as a regular copy of the archives in *Washington*, and he would have proved by the *American* minister resident at this court that it was the rule of his conduct. But Lord *Ellenborough* refused to admit this evidence, and held that it was necessary to have a copy examined with the archives in *America*. He said, he would not have admitted a book of treaties with *Spain*, proved to have been printed by the king's printer there. *Richardson* v. *Anderson*, 1 Camp. 65, (n).

(a) Vide *Gilb. Evid.* 14. 3 Inst. 173. Such an exemplification is the only evidence where the record is put in issue by a plea of *nul tiel record*, in an equal or inferior court to that which gave the judgment. But if the record be put in issue in an action in a superior court to that in which it is, the superior court may issue a *certiorari* to the inferior court to certify it. Vide *Hewson* v. *Brown*, 2 Burr. 1034; and if a record of the same court be denied, the record itself is inspected by the judges, (*Tidd's Pract.*

If letters patent be given in evidence, in which it is recited that a certain office was before granted to *J. S.* and that *J. S.* surrendered it to the king, who accepted the same, and granted it to *J. D.* this is not enough to avoid the title of *J. S.* but the *record of the surrender must be shewn, or a true copy of it, for the recital of such surrender is not the best evidence the nature of the thing will admit; and it would be of dangerous consequence, if by such sort of suggestion, a man's title might be avoided. (*Meade* v. *Lenthall*. *Salisbury* v. *Spencer*, M. 1637. 2 Rol. Abr. 678.) But if letters patent were given in evidence whereby, in consideration of the surrender of former letters patent, the king grants a particular estate to the party; this would be good proof of a surrender, for the taking of an estate by the second letters patent is itself a surrender of the first: now the second letters patent are the best proof of taking such estate; and then the surrender is by operation and construction of law. (2 *Rol. Abr.* 681 (C.) *pl.* 5.) And in the case first put, if the defendant will take advantage of the recital of a former grant as proof of such former grant, he will be bound by the recital of the surrender; for if he will take any advantage of the recital he must admit the whole; but if he produce a former patent, that will put the plaintiff to produce the surrender. (*Montague* v. *Preston*, E. 1691. 2 Vent. 170.) So if letters patent recite a former grant to another, and grant [*227]

Pract. 690, edit. 3.) *Leyfield's Ca.* 10 Co. 90. *Abbot of Strata Marcella's Ca.* 9 Co. 30. Co. Lit. 117 (b). Bro. Tr. pl. 30; and the jury are bound to credit such an exemplification. Yet when the record, being a mere inducement to the action, forms only a part of the evidence to the jury, as in escape, then the examined copy shall be sufficient evidence of it. *Rigg* v. *Wharton*, Palm. 524. So in debt on a bail bond by the sheriff's assignee, plaintiff alledged a bill of *Middlesex*, issued in the original action, which defendant denying, plaintiff replied, that "the writ appeared by the records of the court," and prayed an inspection of them. On demurrer, the court held that the issuing of a writ from another court as an original out of chancery is never a record in *B. R.* till the return is filed, but the issuing of a writ from *B. R.* is always a matter of record on the roll of that court. *Whitmore* v. *Rooke*, Say. 299, and the cases there cited.

Every matter that can be tried by the record itself shall be so tried, and the party shall not bring it *ad aliud examen*. *Foster* v. *Cale*, 1 Stra. 76.

All matters of fact connected with a record shall be tried by a jury. *Hoe* v. *Marshall*, Cro. Eliz. 131. *Abbot of Strata Marcella's Ca.* sup. and Bro. Tr. pl. 113. 2 Rol. Abr. 574. pl. 7, 8. *Hynde's Ca.* 4 Co. 71. *R.* v. *Knollys*, Ld. Raym. 14.

As to failure of record.—If it be imperfectly set out or impartially it will do, if enough appear to prove the matter in dispute. *Bro. Fail. Rec.* pl. 2, 3, 4. And a variance in an *immaterial* part, is not fatal. *Ibid.* pl. 1. *Coachman* v. *Halley*, Hob. 179, *Secus* if in a *material* part. *Parry* v. *Paris*, Hob. 209. *Rastall* v. *Stretton*, 1 H. Bla. 48. *Vanderberg* v. *Vanderberg*, Hardr. 200. *Serjeant's Ca.* Dy.

grant the office to commence from the determination thereof: the party claiming under the second must produce a copy of the first grant, that the court may see that it is determined; for there can be no other proof of the determination of the grant but the grant itself; though perhaps in such case, if the recital were, that it was determined, the whole recital would be taken together.—*Cragg* v. *Norfolk*, H. 1675. 2 Lev. 108. *(a)*

Nothing but records exemplified under the broad seal may be admitted in evidence, for these being preserved by the proper officer of every court from all razure and corruption, are supposed to be so fair and unblotted, that there can be no danger in the exemplification. But the exemplification of deeds under the broad seal cannot be admitted in evidence; for they being in the custody of the party, and not of the law, are subject to razures and interlineations, and therefore ought to be produced themselves, as the best evidence of the contract.

When any record is exemplified, the whole must be exemplified, for the construction must be taken from a view of the whole taken together. However, this rule is to be taken with some restriction, as will appear by what is after said concerning the giving sworn copies of such records in evidence.—3 *Inst.* 173.

Secondly, The second sort of copies under seal are *Exemplifications*
[*228] *under the seal of the court*, and they are of higher credit *than a sworn copy, for the reasons formerly mentioned; for such exemplifications can only be of the records of the court, under whose seal they are exemplified. *(b)*

A recovery in the grand sessions of *Wales* under the seal of that court may be given in evidence.—*Olive* v. *Guin*, H. 1658. 2 Sid. 145. Hardr. 118. *(c)*

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Dy. 87. Bro. Fail. Rec. 11. 16. And on failure of record judgment goes against the public pleading it; but it is only the records of the *English* courts that are in themselves conclusive evidence, for those of the courts in *Jamaica* are not so. *Walker* v. *Witter*, Dougl. 1. Neither are those of the courts of great session in *Wales*, county courts, hundred courts, and courts baron, for they are not courts of record. *Co. Lit.* 117.

(a) Patents under the great seal are matters of record, and may be read without further proof; and by statutes 3 & 4 *Edw.* VI. *c.* 4. and 18 *Eliz. c.* 6. patentees may make title by shewing the exemplification or constat of the roll, and these statutes have been held to extend to all the king's patents. *Page's Ca.* 5 Co. 53.

(b) Vide *Tooke* v. *Beaufort Duke*, Say. 297.

(c) And so of a county palatine, by stat. 37 *Eliz. c.* 9; and so of any other court established by parliament.

But exemplifications under the seal of *inferior* courts are not evidence of themselves. The production of a diploma under the private seal of *St. Andrew's*,

The second sort of *copies* are those that are *not under seal*, and they are likewise two-fold;

1. *Sworn copies.*
2. *Office copies.*

First, *Sworn copies:* These must be of the records brought into court in parchment, and not of a judgment in paper signed by the master, though upon such judgment you may take out execution; for it does not become a permanent matter, till it be delivered into court, and is there fixed as a roll of the court, and, until it become a roll of the court, it is transferable any where, and so does not come under the reasbn of the law that permits the giving of a copy in evidence. *(a)*

Where a record is lost, a copy of it may be admitted without swearing it a true copy; for the record is in the custody of the law, and therefore, if lost, there ought to be no injury arising to the party's right, and consequently the copy must be admitted without swearing any examination of it, since there is nothing with which it can be compared. (*Green* v. *Proude*, T. 1674. 1 Mod. 117. *Price* v. *Torrington*, T. 1703. Salk. 285.) But in such cases the instrument must be according to the rule required by the civil law, *vetustate temporis aut judiciaria cognitione roborata*.—Corvin. Dig. 292.

So the copy of a decree of tithe in *London* has often been given in evidence without proving it a true copy, because the original is lost.—*Anon.* E. 1764. 1 Vent. 257.

Andrew's, therefore, is no evidence. *Moises* v. *Thornton*, 8 T. R. 303; but the seal of the city of *London* is public, and will prove itself. *Woodmass* v. *Mason*, 1 Esp. N. P. Rep. 53. So will the *prerogative* seal of *Canterbury*, to an administrator in a cause relating to personal estate. *Kempton* v. *Cross*, Ca. temp. Hardw. 108. And so will the seal of a *notary* to a protest in a foreign country. *Anon.* 2 Rol. Rep. 346. *Whitehorne* v. *Portsmouth Mayor*, 10 Mod. 66.

Foreign proceedings are generally proved by copies under the seal of their own court, if acting on the law of nations, but some evidence should be given to authenticate the seal of a municipal court; therefore, though the plaintiff proved the judge's signature to a *Grenada* judgment, yet not being able to prove the seal affixed thereto to be the island seal, he was nonsuited. *Henry* v. *Adey*, 3 East, 221.

(a) In contradiction to a judgment in the king's superior courts, no evidence can be received, so there all men may have access; but as they cannot be removed, they must be proved by exemplifications or sworn copies, and the keeper may be examined as to the condition of them, but no further. *Leighton* v. *Leighton*, 1 Stra. 210. Therefore, if words be erazed, though witnesses may be examined to shew the record was improperly obliterated, yet the record shall not be falsified by shewing that an alteration, whereby the record was made correct, was improperly introduced. *Dickson* v. *Fisher*, 1 Bla. 664. 4 Burr. 2279.

Copies of judgments must in general be stamped; but in *Jones* v. *Randall*, Cowp. 17, it was held that no stamp was necessary on a copy of the minutes of a judgment in *Domo Proc.*

So the copy of a recovery of lands in ancient demesne was given in evidence where the original was lost, and possession had gone a long time according to the recovery.—*S. C.* and vide *Green* v. *Proude, sup. (a)*

When a man gives in evidence a sworn copy of a record, he must give the copy of the whole record in evidence, for the precedentor subsequent words or sentence may vary the whole sense and import of the thing produced, and give it quite another face. (3 *Inst.* 173.) However, this rule admits of some exceptions. In cases of inquisitions *post mortem*, and such private offices, you cannot read the return without also reading the commission; but in cases of more general concern, such as the minister's return to the commission in *Henry* the VIIIth.'s time, to inquire into the value of livings, it would be of ill consequence to oblige the
[*229] parties to *take copies of the whole record, and the commission is a thing of such public notoriety, that it requires no proof.—*Per Hardw. C.* in *Sir Hugh Smithson's Case.*

Secondly, *Office-copies.* Here a difference is to be taken between a copy authenticated by a person trusted for that purpose, for there that copy is evidence without proof; and a copy given out by an officer of the court, who is not trusted for that purpose, which is not evidence without proving it actually examined.

The reason of the difference is, that where the law has appointed any person for any purpose, the law must trust him as far as he acts under its authority; therefore the chirograph of a fine is evidence of such fine, because the chirographer is appointed to give out copies of the agreements between the parties that are lodged of record.

If a rule of the court be produced under the hand of the proper officer, there is no need to prove it to be a true copy, for it is an original.—*Selby* v. *Harris*, E. 1698. Ld. Raym. 745. *(b)*

Where the deed is inrolled, the indorsement of the inrolment is evidence without further proof of the deed, because the officer is intrusted to authenticate such a deed by inrolment; *(c)* but if the officer of the

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(a) In cases of lost records, however, the strongest evidence is required, and the collateral evidence should prove the same facts as the regular would have done if subsisting. *Knight* v. *Dauler*, Hardr. 323. This sort of evidence, however, can only be applied to cases where very ancient records are lost, for if a modern record be lost, and the contents can be ascertained, the court will permit a fresh one to be engrossed. *Douglas* v. *Yallop*, Burr. 722.

(b) In proving a copy of a record, it is enough if the person producing it swear that he examined the copy whilst another person read the original, for it is not necessary that he himself should read the original, but the other side may shew it is not a true copy. *Reid* v. *Sheriff of Sussex*, 1 Camp. 469.

(c) Vide *Kinnersley* v. *Orpe*, Dougl. 56, S. P.

court

court make out a copy, when he is not intrusted to that purpose, they ought to prove it examined, because being no part of his office, he is but a private man, and a private man's mere writing ought not to be credited without an oath. Therefore it is not enough to give in evidence a copy of a judgment, though it be examined by the clerk of the treasury, because it is no part of the necessary office of such clerk, for he is only intrusted to keep the records for the benefit of all men's perusal, and not to make out copies of them. So if the deed inrolled be lost, and the clerk of the peace make out a copy of the inrolment, that is no evidence without proving it examined; because the clerk is intrusted to authenticate the deed itself by inrolment, and not to give out copies of the inrolment. *(a)*

The office copies of depositions are evidence in chancery, but not at common law without examination with the roll; for though that court have, for their own convenience, impowered their officers to make out such copies as should be evidence; yet the particular rules of their courts are not taken notice of by the courts of common law, and therefore they are not evidence in those courts.

Where the fine is to be proved with proclamations (as it must be to bar a stranger) the proclamations must be examined * with the roll, for the chirographer is authorised by the common law to make out copies to the parties of the fine itself, yet is not appointed by the statutes to copy the proclamations, and therefore his indorsement on the back of the fine is not binding.—*Chettle* v. *Pound*, E. Ass. 1700. *Allen's Case*, 13 Car. I. Clayt. 51. S. P. *(b)* [*230]

(a) On a proviso in a duchy lease, that it shall be inrolled with the auditor, the certificate of the auditor on the margin is sufficient evidence of the inrolment. The memorandum on the margin is the certificate of the proper officer, not of a private person. I cannot distinguish this case, said *Willes*, J. and that of a bargain and sale, where the indorsement on the back of the deed by the proper officer is always received as evidence of the inrolment. This case, too, is fortified by long possession under the lease, (*from* 1753 *to* 1777.) At any rate, third persons cannot avail themselves of a forfeiture of this kind; but I think the inrolment is sufficiently proved if it were against the grantor; besides, the lease is admitted, for it is stated in the pleadings, and not traversed. *Per Ashhurst*, J. The memorandum is sufficient evidence of inrolment: for what other purpose is it made? *Per Buller*, J. The lease, with the certificate under the hand of its own officer, would bind the crown itself. The act of 27 *Hen.* VIII. c. 16. does not provide that the indorsement by the officer shall be evidence of the inrolment, and yet it is constantly admitted. *Kinnersley* v. *Orpe*, Dougl. 56.

(b) The proclamations make the bar. By the alterations in the 4th of *Hen.* VII. if a proclamation is made of a *Sunday*, or other festival, it is error, because it is not *dies juridicus*. Dy. 181. 6. Plowd. 265.

Having thus shewn how the record is to be given in evidence by producing a copy; we must next inquire in what manner, and in what cases they ought to be evidence.

1. It is regularly true, that where the record is pleaded and appears in the allegations, it must be tried by the court on the issue of *nul tiel record*, and in such case the record itself must be produced, in case it be a record of the same court; and in case it be a record of another court, then an exemplification of it must be brought in *sub pede sigilli*: but to this there is this exception, that where the record is inducement and not the gist of the action, there it is not traversable, but must be given in evidence on the proof of the declaration; for nothing can be of itself traversable that does not make a full end of the matter, and it cannot make a full end of the matter, if fact be joined with it: in such case therefore the issue must be upon the fact and tried by a jury, and the record may be given in evidence to support the fact; and whenever a record is offered to a jury, any of the aforementioned copies are evidence.

2. As to recoveries and judgments. *A præcipe* doth not lie against a person that is not seised of the freehold; therefore when you shew a recovery, you must prove seisin in the tenant to the *præcipe*: (*a*) however, in an ancient recovery, seisin will be presumed, especially where possession has gone agreeably to it ever since; for that fortifies the presumption, that every thing is rightly transacted; but in a modern recovery the seisin must be proved, because from the recency of the fact it is easy to be done, and the presumption is not in such case equally fortified by the subsequent possession.—*Green* v. *Proude*, E. 26 Car. II. 1 Mod. 117.

If there be a tenant for life, remainder in tail, and they join in a common recovery with single voucher, this will not bar the tail; because the *præcipe* is brought against both as joint-tenants, and he in remainder has no immediate estate of freehold, and a remainder-man is not bound by a recovery had against tenant for life, unless he come in upon the aid-prayer, or as vouchee upon a double voucher; for where any person is properly in court, and does not defend his title, he is barred the same as
[*231] if he had no title at all; and when tenant in tail is *barred for want of title, the issue can never after recover in a *formedon*.—*Leach* v. *Cole*, 41 & 42 Eliz. 2 Rol. Abr. 395. *Briscot* v. *Chamberlain*, 29 & 30 Eliz. Mo. 256. (*b*)

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(*a*) As to seisin, although a man had a right *before* time of memory, if he or his ancestors were never seised *after* time of memory, he is ousted of his right. *Dict. per Herle*, C. J. in the case of a prior, who, in many cases, shall not be so prejudiced by the laches of his predecessors as a private man. *Bucknall's Ca.* 9 Co. 34.

(*b*) Tenant for life, and remainder in fee, he in the remainder in fee suffers

By 14 *Geo.* II. *c.* 20. it is enacted, That all common recoveries suffered, or to be suffered, without any surrender of the leases for life, shall be valid. Provided it shall not extend to make any recovery valid, unless the person intitled to the first estate for life, or other greater estate have or shall convey, or join in conveying, an estate for life at least to the tenant to the *præcipe*. And by the same act, where any person has or shall purchase for a valuable consideration any estate, whereof a recovery was necessary to compleat the title, such person, and all claiming under him, having been in possession from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed making a tenant to the *præcipe*, and declaring the uses; and the deed so produced (the execution thereof being duly proved) shall be deemed sufficient evidence that such recovery was duly suffered, in case no record can be found of such recovery, or the same should appear not regularly entered: Provided, that the person making such deed had a sufficient estate and power to make a tenant to the *præcipe*, and to suffer such common recovery. It is further enacted, That every common recovery suffered, or to be suffered, shall, after the expiration of twenty years, be deemed valid, if it appear upon the face of such recovery that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate or power to suffer the same, notwithstanding the deed to make a tenant to such writ shall be lost. It is further enacted, That every recovery shall be deemed valid, notwithstanding the fine or deed making a tenant to such writ shall be levied or executed after the time of the judgment given, and the award of seisin: provided the same appear to be levied or executed before the end of the term in which such recovery was suffered, and the persons joining in such recovery had a sufficient estate and power to suffer the same.

Though regularly no recovery or judgment is to be admitted in evidence but against parties or privies, yet under some circumstances they may; (*a*) as in the case of *The King* v. *Hebden*, (E. 12 Geo. II. 2 Str. 1109. Andr. 389. S. C. at large,) where in an information in nature of a *quo warranto*, a judgment of *ouster* was allowed to be given in evidence to prove the **ouster* of a third person, (the mayor) by whom the [*232] defendant was admitted.

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fers a common recovery with a single voucher, and this recovery is *ancient*, the court will presume a surrender of the tenement, because, if there has been a constant enjoyment under that recovery, it shall be supposed to have a lawful foundation. *Aliter* if the recovery is *modern*, for if the freehold is in the tenant for life, the *precipe* ought to be brought against him. *Anon.* 1 Vent. 257. Gilb. Evid. 21.

(*a*) In *R.* v. *Grimes*, 5 Burr. 2601, a judgment was held admissible, but not conclusive.

3. As

3. As to verdicts, the rule is, that no verdict shall be given in evidence, but between such who are parties or privies to it. (*Pike* v. *Crouch*, 1696. 1 Raym. 730.) (*a*) Therefore if there be several remainders limited by the same deed, a verdict for one in remainder shall be given in evidence for one next in remainder. (*Rushworth* v. *Pembroke*, 1668. Hardr. 462.) But if there be a recovery by verdict against tenant for life, this is no evidence against a reversioner; for the tenant for life is seised in his own right, and that possession is properly his own, and he is at liberty to pray in aid of the reversioner or not, and the reversioner cannot possibly controvert the matter where no aid is prayed. But if he come in upon an aid-prayer, he may have an attaint; and consequently the verdict will be evidence against him.—*Brode* v. *Owen*, 44 & 45 Eliz. Yelv. 22.

If a verdict be had on the same point, and between the same parties, it may be given in evidence, though the trial were not had for the same lands, for the verdict in such case is a very persuading evidence, because what twelve men have already thought of the fact may be supposed fit to direct the determination of the present jury; but then this verdict ought to be between the same parties, because otherwise a man would be bound by a decision, who had not the liberty to cross-examine; and nothing can by more contrary to natural justice, than that any one should be injured by a determination, that he, or those under whom he claims, was

(*a*) But the benefit of this rule is generally mutual. It is, however, liable to *exception*, in cases where a man is privy in estate with him who recovers the verdict, for then the verdict will be evidence for him, though he would not have been bound by it had it been the other way. *Gilb. Ev.* 34. Vide *Pike* v. *Crouch*, sup. and *Rushworth* v. *Pembroke*, Hard. 462, where it was held, that if there are several remainders in the same deed, and the possessor recovers a verdict in a suit against him for the land, another remainder-man may give this verdict in any action against him for the land at the suit of the same plaintiff. for had the verdict been against the former, the remainder-man would have been dispossessed. So had there been a verdict for the tenant for life in ejectment, where no aid can be prayed, the reversioner (*ut semb*) might give this verdict in evidence, because he would have been prejudiced by such verdict, for his reversion would thereby have been turned into a naked right. This, however, is doubted, (vide *Gilb. Ev.* 35.) and the point seems not to have been determined; yet in *Com. Dig. Ev.* (A.) 5. it is said, that a verdict for or against the plaintiff, with proof of the evidence by him given, shall be evidence in an action by another against him for the same thing. *Per Holt*, C. J. in *Tiley* v. *Cowling*, 1 Ld. Raym. 744. and *S. C.* is mentioned *post*, p. 243; but it there seems, that the verdict was not given in evidence, as the *verdict of a jury on any particular point*, but as evidence of a confession on record to lay a ground for proving what a deceased witness had sworn. *Peake's Evid.* 39 (n) But when it is said that a verdict is not evidence for or against one who is not a party to the cause,

was not at liberty to controvert. But it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question, and every matter is evidence, that amounts to a proof of the point in question.—*Sherwin* v. *Clarges*, 1700. 12 Mod. 343. S. C. *nom.* *Charges* v. *Sherwin*. (*a*)

If there be a trial of a title between *A.* lessee of *B.* and *E.* and afterwards there be a trial between *C.* lessee of *E.* and *B.* *C.* may give in evidence the verdict found against *B.* for this was the sense of a former jury on the fact, on which trial *B.* had the liberty to cross-examine; for the court will take notice, that in ejectment the lessor is the real party interested, and that the lessee (or nominal plaintiff) is a fictitious person (*Lock* v. *Norborne*, 3 Jac. II. 3 Mod. 141. *Rushworth* v. *Lady Pembroke*, H. 19 & 20 Car. II. Hardr. 472.) But a person that has no prejudice by the verdict against *B.* could never give it in evidence, though his title turn on the same point, because if he be an utter stranger to the fact, it is perfectly *res nova* between him and the defendant; and [*233] if it could be no prejudice to the plaintiff, * had the fate of the verdict been as it would, he cannot be entitled to reap a benefit; (*b*) for no record,

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cause, it is not to be understood that a man who uses another's name for his own benefit is not bound by the verdict which is given against him, for the court will examine who the real plaintiff or defendant is. *Gilb. Evid.* 35. Vide *Kinnersly* v. *Orpe*, Dougl. 499. (517.)

(*a*) As to *real* as well as to *personal* property, the rule is, that when a judgment is given for defendant on the merits, the plaintiff is precluded from making any fresh demand, therefore if any fact come *directly* in issue, the finding of a jury on that fact is evidence of it in any future dispute between the same parties, or claimants under them, though in respect of other lands. *Lewis* v. *Clarges*, Gilb. Evid. 29. Et supra *S. C.* nom. *Sherwin* v. *Clarges*. And if, in trespass, the right to an easement in land be put on the record, traversed and found against the party pleading it, such finding is conclusive against the right; and if the same plea be pleaded to another action, it will operate by way of estoppel. *Outram* v. *Morewood*, 3 East, 346. But though a judgment in one action be conclusive evidence in all others of the same degree, it is no bar to any other of a higher nature. *Ferrars* v. *Arden*, Cro. Eliz. 668. 6 Co. 7. Nor will it in any case be conclusive to bar other actions, or preclude another defence of the same nature, unless the point be directly raised. *Evelyn* v. *Haynes*, cited 3 East, 365. And observe, that it is only against the party to an action, or a claimant under him, that a verdict or judgment is evidence; for it is none against third persons in a civil case, the first principles of natural justice requiring that a man should be heard before his cause is decided; and if he were to be bound or prejudiced by a verdict, where he had no opportunity of cross examining the witnesses, the most salutary rule of jurisprudence would be overturned. *Peake's Evid.* 38.

(*b*) If *A.* prefers a bill against *B.*, and *B.* exhibits his bill, in relation to the same matter, against *A.* and *C.*, and a trial at law is directed, *C.* cannot give in evidence the depositions in the cause between *A.* and *B.*, but it must be tried entirely *ut res nova*. *Rushworth* v. *Lady Pembroke*, sup.

If

cord or conviction or verdict shall be given in evidence, but such whereof the benefit may be mutual, *viz.* Such whereof the defendant, as well as the plaintiff, might have made use, and given it in evidence in case it made for him; therefore a conviction at the suit of the king for a battery cannot be given in evidence in trespass for the same battery.—*Richardson* v. *Williams*, M. 11 W. III. 12 Mod. 319. (*a*)

When it is said, that a verdict may be given in evidence between the same parties, it is to be understood with this restriction. that it is of a matter which was in issue in the former cause; for otherwise it will not be allowed in evidence, because, if such verdict be false, there is no redress, and the jury are not liable to an attaint.—*Foster* v. *Jackson*, T. 10 Jac. I. Hob. 53.

The exception of its being *res inter alios acta*, is not allowed against verdicts in case of customs or tolls; for the custom or toll is *lex loci*, and facts tending to prove that may be given in evidence by any person, as well as those who have been parties to such facts or to such verdicts as have found and determined them; and in such case it is not material, whether such verdicts be recent or ancient.—*London City* v. *Clarke*, 1692. Carth. 181. (*b*)

A commission under the seal of the exchequer, and the inquisition taken thereon, is admissible, though not conclusive evidence: and so are

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If two tenants will defend a title in ejectment, and verdict should be had against one of them, it shall not be read against the other, but by rule of court. *Lock* v. *Norborne*, 3 Mod. 142.

(*a*) A conviction in a court of criminal jurisdiction is conclusive evidence of the fact, if it comes collaterally in controversy in a court of civil jurisdiction; yet an acquittal in such courts is no proof of the reverse. So a copy of a conviction for killing game was agreed to be evidence in bar of an action brought for the same offence. *R.* v. *Midlam*, 3 Burr. 1720.

(*b*) Another exception to this rule is, that a judgment is only evidence between the parties, and claimants under them, where the disputed matter is a public right, in which case all persons standing in the same situation as the parties, are affected by it, as a verdict finding a prescriptive mode of tithing. *Gilb. Evid.* 36. The right of a city to a toll. *London City* v. *Clarke*, supra. Of election of churchwarden. *Berry* v. *Banner*, Peake's Ni. Pri. 156. A customary right of common, or the liability of a parish to repair a road. *Rex* v. *Pancras*, ibid. 219. A public right of way. *Reed* v. *Jackson*, 1 East, 355, n.; the like is evidence for or against the right, though neither of the parties are named in the record, or claim under them. *Peake's Evid.* 40, 41.

So where in an information, in nature of a *quo warranto*, against defendant, as bailiff of *S.* he made title as elected under the bailiffship of *A.* and *B.*, and on issue joined, whether they were bailiffs, or not, a record of *ouster* was read, and allowed against them. *Rex* v. *Hepden*, 2 Stra. 1109. Yet this is not conclusive evidence. *Rex* v. *Grimes*, 2 Burr. 2598.

depositions

depositions taken thereon, though the parties in the cause had no notice of it, nor had any opportunity of defending it.—*Tooker* v. *Duke of Beaufort*, Burr. 146.

Another case, in which this exception ought not to be allowed, is, where the fact to be proved is such whereof hearsay and reputation are evidence, and therefore a special verdict between other parties stating a pedigree would be evidence to prove a descent; for in such case, what any of the family, who are dead, have been heard to say, or the general reputation of the family, entries in family books, monumental inscriptions, recital in deeds, *&c.* are allowed. And of this opinion was Mr. Justice *Wright* in the Duke of *Athol*'s case, which opinion is generally approved, though the determination by the rest of the court was contrary:—(*Neal*, ex dem. *Duke of Athol* v. *Wilding*, E. 1740. 2 Str. 1151.) perhaps founding themselves on the case of Sir *William Clarges* v. *Sherwin*, (M. 11 W. III. 12 Mod. 343.) where, in a trial at bar, the only question was upon the legitimacy of the Duke of *Albemarle*, and the court would not suffer a former verdict between other parties concerning other land depending upon the same question and title to be read in evidence; but there it did not appear either from * the [*234] issue or verdict, that the same question was inquired into and determined. Besides, the giving a verdict in evidence to prove a particular fact, *viz.* that *John* had a son *Thomas*, is very different from giving it in evidence to shew the opinion of a former jury, which is only their deduction from a variety of facts proved to them.

A verdict will not be admitted in evidence without likewise producing a copy of the judgment founded upon it (*a*), because it may happen that

(*a*) It is an established rule, that a fact which has been once decided, shall not be again disputed between the same parties; therefore, a judgment of the same, or a concurrent jurisdiction, whether on verdict demurrer, or by default, if directly on the point, may be pleaded in bar, or given in evidence on the general issue, as conclusive between the same parties against another suit for the same matter. Vide 11 *State Trials*, 261. *Marriot* v. *Hampton*, 7 T. Rep. 269. *Brown* v. *M'Kinally*, 1 Esp. N. P. Ca. 279. It was otherwise held, however, in *Moses* v. *Macferlan*, 2 Burr. 1009. But that authority was questioned in *Philips* v. *Hunter*, 2 H. Bla. 414. *Marriott* v. *Hampton*, sup. And by the same rule, as a judgment recovered concludes the defendant from afterwards disputing the debt, it also precludes the plaintiff from recovering more than had been awarded to him. *Seddon* v. *Tutop*, 6 T. Rep. 607. And in general it is a rule as to *personal* property, as well as real, that where a judgment is given for defendant on the merits, plaintiff cannot make another demand, either in the same, or any other form of action. *Hitchen* v. *Campbell*, 2 Bla. 827. *Ferrars* v. *Arden*, Cro. Eliz. 668. 6 Co. 7.

Sed

that the judgment was arrested, or a new trial granted; but this rule does not hold in the case of a verdict on an issue directed out of chancery, because it is not usual to enter up judgment in such case; and the decree of the court of chancery is equally proof, that the verdict was satisfactory and stands in force.—*M otgomerie* v. *Clarke*, 1745, at Delegates. (*a*)

4. As to writs. (*b*) When a writ is only inducement to the action, the taking out the writ may be proved without any copy of it, because possibly it might not be returned, and then it is no record; but where the writ itself is the gist of the action, you must have a copy from the record, in as much as you are to have the utmost evidence the nature of the thing is capable of, and it cannot become the gist of the action till it is returned. (*c*)

In an action of trespass against a bailiff for taking goods in execution, if it be brought by the party against whom, the writ issued, it is sufficient for the officer to give in evidence the writ of *fieri facias*, without shewing a copy of the judgment: but if the plaintiff be not the party against whom the writ issued, but claim the goods by a prior execution (or sale) that was fraudulent, there the officer must produce not only the writ, but a copy of the judgment: for in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he has proved himself guilty of no trespass; but in the other case they are not the goods of the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within 13 *Eliz. c.* 5. for which purpose it is necessary to shew a judgment.—*Kent* v. *Wright*, 1669. 1 Raym. 733. (*d*)

2. *Public*

Sed secus where the first action fails, through error, misconception, or misprision. *Lechmere* v. *Toplady*, 2 Vent. 169.

(*a*) But, as applicable to *verdicts*, it is a rule, that the *postea* is no evidence, nor are they, till final judgment is entered; but a *postea* is good evidence of the trial being had to let in an account of what a deceased witness had there proved. *Pitton* v. *Walter*, 1 Stra. 161.

(*b*) Writs are not records until they are returned and filed in court. *Sup.* Et vide *Whitmore* v. *Rooke*, Say. 299.

(*c*) In *C. B.* the officer of the court always inserts the day on which the writ issues in the seal, which he affixes to the writ, and he sees that the day indorsed on the writ is agreeable to the truth: the writ itself, therefore, is held sufficient evidence, *primâ facie*, of the day on which it issued. *M.* 25 *Geo.* III. B. R.

(*d*) All writs issued in vacation are tested as of a day in the preceding term; and when an issue is made up by bill, plaintiff is stated to have brought his bill into court on the first day of the term, or of the

2. *Public matters of an inferior nature.*—The next thing to be considered is, all *public matters that are not records*; and they all come under this general definition, that they must be such as are an evidence of themselves, and do not expect illustration from any other thing, (*a*) such are court rolls and transactions in chancery; and the copies of such matters * may be given in evidence, in as much as there is a plain coherent proof, for there is proved upon oath a matter which, if produced, would carry its own lights with it, and by consequence would need no proof. [*235]

The reason why the proceedings in chancery are not records is this, because they are not the precedents of justice, for the judgment there is *secundum æquum et bonum*, and not *secundum leges et consuetudines*. And the reason why any record is of validity and authority is, because it is a memorial of what is the law of the nation; now chancery proceedings are no memorials of the laws of *England*, because the chancellor is not bound to proceed according to the laws.

If a party wants to avail himself of the decree only, and not of the answer or depo itions, the decree being under the seal of the court and enrolled may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to shew that the point in issue there was not *ad idem* with the present issue.—*Lord Thanet* v. *Patterson*, K. B. East. 12 Geo. II. (*b*)

Inferior

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the term generally; but where it is necessary to shew the exact day on which the writ issued, either party may do it. *Johnson* v. *Smith*, 2 Burr. 950. *Morris* v. *Pugh*, 3 Burr. 1241. But, generally, the filing of the bill is considered the commencement of the suit, and therefore may give in evidence any cause of action arising before it, though after the writ. *Foster* v. *Bonner*, Cowp. 454. Whether the action is bailable or not. *Best* v. *Wilding*, 7 T. Rep. 4.

(*a*) The general rule is, that wherever an original is of a public nature, and would be evidence, if produced, a sworn copy shall be received in evidence. *Per Holt*, C. J. in *Lynch* v. *Clerke*, 3 Salk. 154: therefore,

1. Sworn copies of entries in the journals of the Commons were received as evidence on the part of the crown without being objected to. *Rex* v. *Gordon*, Dougl. 572. (590.) *Vide ante*, pa. 226 *a*. n. (b)

2. Sworn copies of the books of public companies are admissible; and in *M.* 12 *Geo.* III. a rule was made on the *East India* Company, and the adverse party, to shew cause why copies of entries on their transfer-books, should not be taken and read in evidence. *Vide* note (3.) to *Rex* v. *Gordon*, sup.

3. So sworn copies of proceedings in courts not of record are admissible.

4. And so are parish registers.

(*b*) Yet, in *Wheeler* v. *Lowth*, Com. Dig. tit. *Evidence*, c. 1. *Trevor*, C. J. held it sufficient, if the bill and answer be *recited* in the decretal order, but if only so much be recited as is necessary to introduce the decretal part, the bill and answer must be proved.

Inferior Courts.—Also the rolls of the county courts, (*a*) and the proceedings of the ecclesiastical court, (*b*) are no records, because these courts are not derived by immediate authority from the king, but from the bishop or the baron of the county; and there is no court declarative of the sense of the common law, but such as receive an immediate authority from the king, the person intrusted with the executive power of the law. (*c*)

Transactions in Chancery.—The bill in chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed true; nor shall it be supposed to be preferred by a counsel or solicitor without the party's privity, and therefore it amounts to the confession and admission of the truth of any fact, and if the counsel have mingled in it any fact that is not true, the party may have his action; but in order to make the bill evidence against the complainant, there must be proceedings upon it; for if there were no proceedings upon it, it should rather be supposed to be filed by a stranger to bar the party of his evidence.—*Snow* v. *Phillips*, 1664. 1 Sid. 220. Modern practice is otherwise. (*d*)

If a patron sue the parson on a bond, and the parson prefer his bill in chancery to be relieved, stating it to be a simoniacal contract; the bill and

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proved. *Le Caux* v. *Eden*, Dougl. 579 (601.) Doubts, however, have existed, whether the decree under seal, which does not state the bill and answer, can be read without evidence of those proceedings. Vide *Trowell* v. *Castle*, 1 Keb. 21.

(*a*) See more of court rolls, *post*, p. 247.

(*b*) A copy of a probate is good evidence, when the will itself is of chattels, for there the probate is an original, taken by authority, and is of a public nature. *Aliter* where the will is of things in the realty, because, in such cases, the ecclesiastical court has no authority to take probates; therefore, such probate is but a copy, and the copy of it no more than the copy of a copy. *Hoe* v. *Nelthrope*, 3 Salk. 154.

The copy of an original is evidence wherever the original is evidence, (if proved a true copy;) but the copy of a probate of a will of lands is no evidence, because the probate is not an original taken by authority, but only a copy of a copy. *R.* v. *Haines*, Comb. 337. Vide *Burn's Ecc. Law*, 185.

In ejectment tried at bar, plaintiff made title as administratrix, and proved her administration by the act of the court for the grant of it to her; and this was admitted sufficient evidence by the whole court, without shewing any grant thereof under the seal of the court. *Peaselie's Case*, 1 Lev. 101.

(*c*) The proceedings of inferior courts, though not records, are sometimes required to be produced in evidence, in which cases it is unusual to produce the book of their original minutes, as well those previous to the judgment as the judgment itself, which, not being commonly drawn up in form, has been allowed to support an action on a judgment in a county court. *Chandler* v. *Roberts*, Peake's Evid. 75; or to prove an attachment in the mayor of *London*'s court, *Fisher* v. *Lane*, 2 Bla. 836, though the plaintiff is not thereby precluded from pleading to the original jurisdiction of such courts. *Herbert* v. *Cooke*, Willes, 36 n. (a)

(*d*) But now the courts consider the allegations as mere suggestions to extort

and proceedings upon it may be given in evidence in an ejectment, in order to make void the parson's living.

But on an issue directed out of chancery to try the validity of a deed, where one *J. N.* was produced to prove he wrote it, by the direction of Lord *Ferrers*, in 1720, and, to contradict his evidence, the plaintiffs produced a bill in chancery, preferred in 1719, by the defendant, which mentioned the deed; the court would not suffer it to be read, though an answer had been put in, because it was no more than the surmises of counsel for the better discovery of the title.—However, in all cases * where the matter is stated by the bill as a fact on which [*236] the plaintiff founds his prayer for relief, it will be admitted in evidence, and will amount to proof of a confession.—*Ld. Ferrers* v. *Shirley*, H. 4 Geo. II. Fitzg. 196.

Admission and comparison of hands.—Analogous to this is a confession under the party's hand by letter or otherwise; (*a*) however, there is a great difference between the manner of giving them in evidence. A bill is proved by shewing there have been proceedings upon it, for it must be supposed to be the party's bill where his adversary has been compelled by the process of the court of chancery to answer it. But a confession by letter must be proved to be of the party's hand-writing; and, where nobody saw the writing, that must be by the comparison of hands. (*b*) Now the reason why the comparison of hands is allowed to be evidence

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extort an answer from the defendant, and hold it only evidence to shew that such a bill was filed, or to prove such facts as are the subject of reputation and hearsay evidence, such as the plaintiff's pedigree, *&c.* *Doe* ex dem. *Bowerman* v. *Sybourn*, 7 T. R. 2.

(*a*) See more as to the party's confession, *post*, p. 237, n. (a)

(*b*) *Hand-writing* may be proved by belief, as presumptive evidence. *R.* v. *Hensey*, 1 Burr. 642. But that presumption must be supported either by habitual correspondence, (*Ferrers* v. *Shirley*, Fitzg.) 195, or by the witness having seen the party write, and nothing less. *Gould* v. *Jones*, 1 Bla. 384. *Cary* v. *Pitt*, Peake's Evid. 105. In forming this belief, however, the witness must speak from the impression which the hand-writing made on his mind when he looked at it. *Da Costa* v. *Pym*, ibid. App. xli. *Balcetti* v. *Serani*, Peake's N. P. Ca. 142.

Comparison of hands, unsupported by other evidence, is inadmissible, *Macferson* v. *Thoyts*, Peake's N. P. Ca. 20, unless the instrument be so old as to render it impossible to procure a living witness who saw the party write. *Brookbard* v. *Woodley*, ibid. n. (a) But where some witnesses have been called to prove *similitude* of writing, and others have drawn different conclusions from the same materials, the court has allowed a well informed jury to inspect and compare them. *Allesbrook* v. *Roach*, 1 Esp. N. P. Rep. 351. But in *Da Costa* v. *Pym*, *Kenyon*, C. J. said, that though the jury may take all circumstances into their consideration, yet the witness should only form his opinion from the character of a hand-writing; and his lordship added, that the best rule was

evidence is, because men are distinguished by their hand-writing as well as by their faces; for it is very seldom that the shape of their letters agree any more than the shape of their bodies. Therefore the likeness induces a presumption that they are the same; and every presumption that remains uncontested hath the force of an evidence. But in the case of high treason comparison of hands is not sufficient for the original foundation of an attainder, because there must be proof of some overt act, and writing is not an overt act; but it may be used as a circumstantial and confirming evidence, if the fact be otherwise proved.—(*Rex* v. *Crosby*, E. 7 W. III. 12 Mod. 72.) And in any other criminal prosecution it will be evidence the same as in a civil suit; as on an indictment for writing a treasonable libel, proof of the hand-writing will be sufficient without proof of the actual writing. (*Taylor's Case*, 25 Geo. II. at *Stafford*. *Rex* v. *Hensey*, 31 Geo III. 1 Burr. 644.)—The case of the seven bishops went upon the witness not being enough acquainted with their hand-writing, and not upon the nature of the evidence.—In general cases the witness should have gained his knowledge from having seen the party write, but under some circumstances that is not necessary; as where the hand-writing to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence would be admitted to prove it, though he had never seen him write. So where the antiquity of the writing makes it impossible for any living wit-

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was that laid down by *Yates*, J. in *Brookbard* v. *Woodley*, sup. for, if the jury were to look at the papers, their judgment would depend on their knowledge of writing, which some might possess more than the rest, and though it was best to rely on those well acquainted with the character of defendant's hand, yet the jury may compare the different signatures.

In *Goodtitle*, d. *Revitt* v. *Braham*, 4 T. Rep. 497, an inspector of franks was allowed to prove, that a signature was, in his opinion, a forgery, from the appearance of it; but *Kenyon*, C.J. in *Cary* v. *Pitt*, Peake's Evid. 107. said, that such evidence was wholly inadmissible. Mr. *Peake*, however, does not admit of Lord *K.*'s doctrine to its full extent, though he says such evidence should be received with great caution, (*Law of Ev.* 105, 106.) but, he says, the true distinction seems to have been taken by *Hotham*, B. in *Rex* v. *Cator*, 4 Esp. N. P. Rep. 417, where a clerk from the post-office, who had never seen defendant write, was allowed to give general evidence, that the anonymous letter produced, was in a feigned hand, but his evidence was rejected when asked whether, on comparing that letter with others in the defendant's avowed own hand, he could swear it was the disguised hand of the same person. Mr. *Peake* therefore adds, that *Revitt* v. *Braham*, sup. may still be deemed an existing authority to shew, that, for the purpose of proving a hand-writing not genuine, such evidence, is with great caution, admissible, for the want of freedom in writing may arise from infirmity, or other causes, which those unacquainted with the genuine hand of the writer cannot consider of, but which a jury should seriously before they decide. *Peake's Evid.* 106, 107.

ness

ness to swear he ever saw the party write. (*Gould* v. *Jones*, at *Westminster*, T. 2 Geo. III.)—As where a parson's book was produced to prove a *modus*; the parson having been long dead, a witness who had examined the parish books, in which was the same parson's name, was permitted to swear to the similitude of the hand-writng, for it was the best evidence in the nature of the thing, for the parish books were not in the plaintiff's power to produce.—*Per Hardw. Canc.* 6 Dec. 1746. (*a*)

An admission of a debt, if satisfactorily proved, is the strongest evidence. But an offer to pay money by way of compromise is not evidence of a debt. The reasons often assigned for it by Lord *Mansfield* were, that it must be permitted to men "to buy their peace" without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether any thing or what is due.—If the terms "buy their peace" are attended to, they will resolve all doubts on this head of evidence: But for an example I will add one case. If *A.* sue *B.* for £100, and *B.* offer to pay him £20, it shall not be received in evidence; for this neither admits or ascertains any debt, and is no more than saying he would give £20 to get rid of the action. But if an account consists of ten articles, and *B.* admits that a particular one is due, it is good evidence for so much.—*Vide etiam*, post, p. 294. n.

Admissions of particular articles before an arbitrator are also good evidence, for they are not made with a view to a compromise, but the parties are contesting their different rights as much as they could do on a trial.—*Westlake* v. *Collard et al'. Bridgewater* Summer Assizes, 1789. *cor. Buller*, J. (*b*)

(*a*) But in another case, where plaintiff in prohibition offered to produce the book of a parson long since dead, to prove a *modus*, and also a number of returns from the spiritual court, of births and burials in the parson's time, signed with his name, and on comparing that book with the returns, it was said it would appear that the hand-writing was the same; yet *Yates*, J. refused to receive this evidence, and said he knew of no case where comparison of hands had been allowed to be evidence at all. *Brookbard* v. *Woodley*, MS. Ca. at *Worcester* Summer Assizes, 1770, which case was cited with approbation before *Kenyon*, C. J. at *Guildhall*, in M. 1788.

(*b*) A bill of plaintiff's demand was delivered to defendant, who put marks and made objections to some of the articles, and then ordered a copy to be made, with the objections indorsed, and the same to be returned to plaintiff. *Holt*, C. J. held this returned copy a good admission of the rest of the articles, and though it was said an admission should be received *in toto*, he would not let it establish the objections, upon the principle that the admission was complete and entire as to the other items. *Worrall* v. *Holder*, Skin. 692.

Answer,

Answer.—If the bill be evidence against the complainant, much more
[*237] is the answer against the defendant; because this is *delivered in upon oath. But then when you read an answer the confession must be all taken together, and you shall not take only what makes against him; for the answer is read as the sense of the party himself, and if it be taken in this manner you must take it entire and unbroken; *(a)* therefore, if upon exceptions taken a second answer has been put in, the defendant may insist upon having that read to explain what he swore in his first answer.—*Earl of Bath* v. *Bathersea*, M. 1694. 5 Mod. 10. *Rex* v. *Carr*, T. 1669, 1 Sid. 418. *(b)*

An infant's answer by his guardian shall never be admitted as evidence against him on a trial at law; for the law has that tenderness for the affairs of infants, that it will not suffer him to be prejudiced by the guardian's oath. So the answer of a trustee can in no case be admitted as

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(a) To this point the text refers to 2 *Vent.* 194 and 288, but the references do not apply. The answer cannot be read without producing the bill, for otherwise it does not appear there was a cause depending. But the answer is stronger evidence against the defendant, because it is on oath; but when the answer is read, the whole must be taken together, as well what makes for the defendant as against him. The answer of one defendant cannot be read against the other, unless such person's answer is referred to for greater certainty. *Anon.* 1 P. W. 301.

A defendant's confession is evidence against him, but whatever he insists on by way of avoidance must be proved. An answer need not be proved to be sworn, because it is a proceeding in a court of justice, and is to be taken as upon oath. The copy of the answer is sufficient evidence: but a voluntary affidavit, not being a proceeding in a court of justice, must be proved by the original, and proved to be sworn; and depositions may be read without producing the bill and answer, because, if depositions are taken, it is presumed a cause was depending; but these depositions cannot be read in any case but between the same parties, and not strangers, and after the death of the party, for, if living, *vivâ voce* evidence is to be proved; but depositions were admitted to be read, though not between the same parties, inasmuch as the cause related to the same lands, and the terre-tenants were parties to it. *Sed quære. Terwit* v. *Gresham*, 1 Ch. Ca. 73.

(b) A defendant at law is entitled to have his whole answer read; and Mr. *Peake* says, that so far was this rule carried in *Earl of Bath* v. *Bathersea*, sup. that where a defendant had answered, and, on exceptions, put in a second answer, he was allowed to have that read in explanation, on an information for perjury. *R.* v. *Carr*, supra. When, therefore, an answer is read, the party producing it makes the whole of it evidence for the defendant, of the facts stated in it, yet not so conclusive, but that the plaintiff may contradict it by other evidence, or the jury may, from the result of the whole, draw their own conclusions as to their belief of the contents. *Bermon* v. *Woodbridge*, Dougl. 758. (788.)

evidence

evidence against *cestui que trust.*—*Eggleston* v. *Speke*, M. 1 W. & M. 3 Mod. 259. *Anon.* M. 1 W. & M. 2 Vent. 72.

A bill was brought by creditors against an executor, to have an account of a personal estate; the executor set forth by answer that there were £1100 left by the testator in his hands, and that coming afterwards to make up accounts he gave the testator a bond for £1000, and the £100 were given him for his trouble and pains that he had employed in the testator's business, and there was no other evidence in the cause that the £100 were deposited; it was argued that the answer, though it was put in issue, should be allowed to discharge him; since there was the same rule of evidence in equity as at law: But it was answered and resolved by the court that, when an answer was put in issue, whatever was confessed and admitted need not be proved; but it behoved the defendant to make out by proofs whatever was insisted upon by way of avoidance. But this was holden under this distinction, that where the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, that he ought to prove that matter of defence, because it may be probable that he admitted it out of apprehension, that it might be proved, and therefore such admittance ought not to profit him, so far as to pass for truth whatever he says in avoidance. (*b*) But if it had been one fact, as if the defendant had said the testator had given him a hundred pounds, it ought to have been allowed, unless disproved; because nothing of the fact charged is admitted, and the plaintiff may disprove the whole fact, if he can do it. (*c*) Though an answer is good evidence against the defendant, yet it is not against his alienee; (*Ford* v. *Grey*, H. 2 Ann. Salk. 286.)

(*a*) Vide *Eccleston* v. *Speke* or *Petty*, Carth. 79. And doubts were entertained in *Wrottesley* v. *Bendish*, 3 P. W. 235, how far a *féme coverte* should be prejudiced by her answer, for, in that case, upon the question, whether a wife should answer jointly with her husband, or not, *Talbot*, C. said, he would not give any opinion whether or not the answer might be read against the wife, when discoverte, but as in all times thentofore a wife had been compelled to answer, he would not alter the practice, but said, the wife should not, by answering, subject herself to a forfeiture, though the husband submitted to answer.

(*b*) The consequence of an answer being considered as an admission only, is, that the objection of its being *res inter alios acta*, does not apply, as in case of other legal proceedings; therefore, in an action against *B.* the answer of *A.* his partner, to a bill filed against him by other creditors, was admitted as evidence of the facts stated in it. *Grant* v. *Jackson*, Peake's Ni. Pri. Ca. 203.

(*c*) And on its being urged, that the probability was on the defendant's side, *Cowper*, C. said, there was some presumption in that, but not enough to carry so large a sum without better attestation. *Anon.* Gilb. Ev. 52. But see Mr. *Peake*'s observations on this case, in *Law of Evid.* 56, *in notis*, which gave rise to some remarks by Mr. *Evans*, in his notes on *Pothier*, vol. II. pa. 157, and which Mr. *Peake* has stated in his 3d edit. *in notis.*

nor is it any evidence for the defendant in a court of law (except so ordered by the court on an issue out of chancery) unless the plaintiff have made it evidence by producing it first. As where on an issue out of chancery, to try the terms of an agreement, which was proved by one witness, but denied by the defendant, the witness being dead before the trial, the plaintiff was under a necessity of producing the bill and answer in order to read his deposition, and by that means made the whole answer evidence, which was accordingly read by the defendant; (*Bourn* v. *Sir Thomas Whitmore*, *Salop*, 1747) but, where an answer in chancery of the witness was produced to shew him incompetent, he having there sworn that he had an annuity out of the land in question; Serjeant *Maynard* insisted to have the answer read through, but the court refused it, as the answer was produced only to shew that he was not a competent witness in the cause, and not to prove the issue.—*Sparin et al'.* v. *Drax*, M. 27 Car. II. C. B. at Bar. (*a*)

Affidavits.—Analogous to this is a man's mere voluntary affidavit, which may also be read against the person who made it: (*b*) However there is great difference between the manner of giving it in evidence. An answer is proved by shewing the bill, which is the charge, and the answer which is as it were the defence, and this in civil cases shall be intended to be sworn, because the defence in chancery is upon oath. But a mere voluntary affidavit, which is no part of any cause in a court of justice, must be proved to be sworn; for if you only prove it signed by the party, the proof goes no further than to support it as a note or letter, and as such you may give it in evidence without more proof.—(*Smith* v. *Goodier*, M. 1683. 3 Mod. 36.) But if an affidavit be made in any cause, proof of such cause depending, and that such affidavit was used by the party, would perhaps be sufficient proof of its being sworn even on an indictment for perjury, (*c*) and certainly would be evidence in a civil suit.—*Rex* v. *James*, 4 W. & M. 1 Show. 397.

(*a*) And as all proceedings under a commission of bankruptcy are admitted under stat. 5 *Geo.* II. *c.* 30. *s.* 41. a man's examination before the commissioners may be read in evidence against him, and no evidence shall be allowed to shew that the depositions were not fairly set down. *Per Kenyon*, C. J. in *Casser*, *Assignee of White* v. *Gough*, at Westm. Sittings, M. 30 Geo. III. MS. Ca. Vide etiam post, p. 242 *a*, n. (b) where an inaccuracy in the 41st section of the act is pointed out.

(*b*) Vide *Vicary's Case*, Gilb. Evid. 57, where the voluntary affidavit of one man, who was jointly interested with another, in an action brought against them both, was admitted as evidence of the facts stated in it.

In *Anon.* Sty. 446, it was said, that a voluntary affidavit made before a master in chancery, cannot be given in evidence on a trial.

(*c*) Vide *Rex* v. *Morris*, 2 Burr. 1189. S. P.

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A second difference between them is, that the copy of an answer may be given in evidence, but the copy of a voluntary affidavit cannot. The reason is, because the answer is an allegation in a court of judicature, and being a matter of public credit, the copy of it may be given in evidence, for the reasons formerly given: But a voluntary affidavit has no relation to a court of justice, and therefore is not intitled to public credit, and being a private matter, the affidavit itself must be produced as the best evidence; besides it must be proved to be sworn, which it cannot * be without it be produced; therefore where in an action for a [*239] malicious prosecution, the plaintiff to increase damages offered the office copy of an affidavit made by the defendant in chancery, of his being worth £2500. Lord *Raymond* refused to let it be read, and the plaintiff was obliged to send for the original which was filed in chancery. And, notwithstanding the office copy of an answer may be given in evidence in a civil suit, yet it will not be sufficient on an indictment for perjury, though, perhaps, such copy would be sufficient for the grand jury to find the bill; but upon the trial the original must be produced, and positive proof made, that the defendant was sworn by a witness acquainted with him: (*Chambers* v. *Robinson*, T. 12 Geo. I.) But proof that a person calling himself *J. S.* was sworn, and that he signed the answer (or affidavit), and proof also by another witness of the hand-writing, would be sufficient. (*Anon.* M. 2 Jac. II. 3 Mod. 116. 117.) So an answer being brought out of the proper office, and jurat under the master's hand, and proof of its being signed by the defendant by proof of his hand-writing, is sufficient to prove it sworn by him even on an indictment for perjury: But no return of commissioners (or of a master in chancery) of the party's swearing will be sufficient without some other proof of the identity of the person.—*Rex* v. *Morris*, E. 1 Geo. III. K. B. 2 Burr. 1189. Vide etiam *Rex* v. *Nunez*, Stra. 1043.

Depositions.—The next thing is the depositions, and they may be read when the witness is dead, for when the witness is living, they are not the best evidence the nature of the thing is capable of.—*Anon.* Godb. 326.

They may be read when a witness is sought and cannot be found, for then he is in the same circumstances, as to the party that is to use him, as if he were dead. (*a*)

(*a*) Vide *Benson* v. *Olive*, 2 Stra. 920; but where a witness can be found, his deposition can only be read to confront and contradict him. *Tilly's Ca.* Salk. 286. Vide etiam *Baker* v. *Fairfax Lord*, 1 Stra. 101. If, however, a witness after his examination become blind, his deposition may be read in a court of law, he being produced to support it by parol evidence. *Kinsman* v. *Crooke*, 2 Raym. 1166.

If it be proved that a witness was subpœnaed, and fell sick by the way; for in this case likewise the deposition is the best evidence that can be had, and that answers what the law requires. *(a)*

A deposition cannot be given in evidence against any person that was not party to the suit; and the reason is, because he had not liberty to cross-examine the witness: and it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party. For this reason depositions in chancery shall not be read for or against the party defendant upon an information or indictment, for the king was no party to the suit.—*Vide* ante, pa. 16. 233. *(b)*

Yet this rule admits of some exceptions; as in cases of customs and
[*240] tolls, and in general in all cases where hearsay and *reputation are evidence; for undoubtedly what a witness, who is dead, has sworn in a court of justice, is of more credit, than what another person swears he has heard him say:—So a deposition taken in a cause between other parties will be admitted to be read to contradict what the same witness swears at a trial.—*Sparin* v. *Drax*, M. 27 Car. II.

Depositions taken thirty years since were admitted to be read in chancery, though the parties were not the same, in as much as the cause related to the same lands, and the ter-tenants were parties to it, and the witnesses were since dead; the plaintiff's title then not appearing: (*Terwit* v. *Gresham*, E. 18 Car. II. 1 Ch. Ca. 73.) And this is an indulgence of the chancery beyond the strict rules of the common law, and it is admitted for pure necessity, because evidence shall not be lost: But a man shall not regularly take advantage of a deposition who was not a party to the suit, for, as he cannot be prejudiced by the deposition, he shall never receive any advantage from it.—*Rushworth* v. *Lady Pembroke*, H. 1668. Hardr. 472.

Depositions before an answer put in are not admitted to be read, unless the defendant appear to be in contempt; for if there do not appear to be a cause depending, the depositions are considered as mere voluntary affidavits; (*Ray* v. *Whitelage*, T. Raym. 335 (n.)) but if the

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(a) This is doubted by Mr. *Peake*, though, he says, it may be a good ground for putting off the trial. *Law of Evid.* 59, (n.)

(b) The foregoing rule, that a verdict cannot be given in evidence against a man who is not a party to the cause, equally applies to depositions which, as to strangers, are mere *ex parte* examinations, and therefore they cannot be admitted against him, unless where the legislature has made them against all persons, as in the case of bankruptcy, where, if a witness prove an act of bankruptcy and die, his deposition, when inrolled under the stat. 5 *Geo.* II. *c.* 30, may be given in evidence of that fact against any person whomsoever, or to overturn a subsequent execution. *Janson* v. *Willson*, Dougl. 244 (257.)

adverse

adverse party were in contempt, the depositions shall be admitted; for then it is the fault of the objector that he did not cross-examine the witnesses.—*Howard* v. *Tremain*, 4 W. & M. 4 Mod. 147.

If the witness after his deposition taken become interested, his deposition shall not be read; for the intent of taking such deposition is only to perpetuate his testimony in case the witness die.—*Telly's Ca.* M. 2 Ann. Salk. 286, and vide note subjoined.

If a witness be examined *de bene esse*, and before the coming in of the answer, the defendant not being in contempt, the witness die, yet his deposition shall not be read, because the opposite party had not the power of cross-examination and the rule of the common law is strict in this, that no evidence shall be admitted but what is, or might have been, under the examination of both parties: But in such cases the way is to move the court of chancery, that such a witness's deposition should be read, and if the court see cause they will order it, and this order will bind the parties to assent to the reading.—*Brown's Ca.* M. 14 Car. II. Hardr. 315.

Formerly they did not inrol their bill and answer, and therefore ancient depositions may be given in evidence without the bill and answer; so depositions taken by the command of Queen *Elizabeth* upon petition, without bill and answer, were, upon a solemn hearing in chancery, allowed to be read.—*Rex and Lord Hunsdon* v. *Lady Arundell*, Hob. 112.

Also the ancient practice was, that they never published the depositions in the life-time of the witnesses, because the depositions *in perpetuam rei memoriam*, were of no use till after the death of the witnesses; but the practice was found very inconvenient, because thereby witnesses became secure in swearing whatever they pleased, inasmuch as they never could be prosecuted for perjury. [241]

When the bill is dismissed because the matter is not proper for equity to decree, yet the depositions on the fact in the cause may be read afterward in a new cause between the same parties; for, though the matter is not proper for equity to decree, yet there was a cause properly before the court, for it is proper for the jurisdiction of equity to consider how far the law ought to be relaxed and moderated; and where there is a cause properly before the court, however that cause may be decided, the depositions must be evidence. (*Smith* v. *Veale*, 1709. 1 Ld. Raym. 735.) But if a cause be dismissed for the irregularity of the complaint, the depositions can never be read; as where a devisee, upon a suit depending by his devisor, brings his bill of revivor, and after depositions taken, the bill is dismissed, because a devisee cannot bring a bill of revivor; upon a new

a new original bill the devisee cannot use the depositions in the former cause; for there being no cause regularly before the court, there could be no deposition in it.—*Backhouse* v. *Middleton*, T. 1670. 1 Ch. Ca. 173. (*a*)

In cross causes, an agreement was proved in one of the causes, and in that it was not set forth in the allegations of the bill or answer: In the other cause the agreement was set forth but not proved, an order was obtained before publication, that the same depositions should be read in both causes; and this might well be, for since the order was before publication in the second cause, the defendant had liberty to cross-examine the witnesses on what particulars he pleased, and the sight of the depositions was to his advantage.—*Norcliffe* v. *Worsley*, M. 26 Car. II. 1 Ch. Ca. 236.

From what has been said it is evident, that (as there can be no cross-examination) a voluntary affidavit is no evidence between strangers, except in such cases where a confession of the person making the affidavit would be evidence; as where a widow came for administration, the marriage being contested, an affidavit of the man himself was read. So on an issue directed out of chancery to try the legitimacy of the plaintiff, the father's oath before the judges on a private bill was allowed to be evidence.—*Sacheverel* v. *Sacheverel*, 5th March, 1716, at delegates. *May* v. *May*, K. B. at bar, ante 122.

[242] It is a general rule, that depositions taken in a court not of record, shall not be allowed in evidence elsewhere. (2 *Rol. Abr.* 679. tit. *Evidence* (B). (*b*) So it has been holden in regard to depositions in the ecclesiastical court, though the witnesses were dead. (*Anon.* M. 4 Car. I. Lit. Rep. 167.) So where there cannot be a cross-examination, as deposi-

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(*a*) It is a general rule in all equity proceedings, that, in order to give any interlocutory matter in evidence in a cause, a foundation must be laid by proving all its former stages. *Roch* v. *Rix*, Gilb. Evid. 56. As the bill to make way for the answer, the bill and answer of the defendant's contempt for the depositions, &c. *Piercy* v. ———, T. Jo. 164. Gilb. Evid. 65. *Anon.* Sty. 446.

(*b*) The present practice of the superior courts is, where witnesses are, or are about to go abroad, or their lives are doubtful, to take their depositions in a cause by consent, or under the direction of the court, on a bill for that purpose; and where the cause of action arises in *India*, the depositions may be taken there and read in *England*, under statute 13 *Geo.* III. *c.* 63. *s.* 44, which has made that provision in civil suits. Vide *Francisco* v. *Gilmore*, 1 Bos. & Pull. 177. But in cases of secondary evidence, the party must shew that he cannot give better, as where a witness was usually resident in *England*, or was examined there, it must be proved that he was abroad when his deposition was offered to be read. *Anon.* Salk. 691.

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tions taken before commissioners of bankrupts, they shall not be read in evidence; *(a)* yet if the witnesses examined on a coroner's inquest be dead, or beyond sea, their depositions may be read; for the coroner is an officer appointed on behalf of the public, to make enquiry about the matters within his jurisdiction; and therefore the law will presume the depositions before him to be fairly and impartially taken. *(Bromwick's Ca.* 18 Ca. II. 1 Lev. 180. *Thatcher* v. *Waller,* T. 28 Car. II. T. Jo. 58). And by 1 & 2 *P. & M. c.* 13. and 2 & 3 *P. & M. c.* 10. justices of the peace shall examine of persons brought before them for felony, and of those who brought them, and certify such examination to the next gaol-delivery; but the examination of the prisoner shall be without oath, and the others upon oath, and these examinations shall be read against the offender upon an indictment, if the witnesses be dead.

Verdict and Oral Testimony.—Another way of perpetuating the testimony of a person deceased, analogous to this of giving depositions in evidence, is by giving the verdict in evidence and the oath of the party deceased.—As to which the rule is, that when you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross-examine: Besides otherwise, as you cannot regularly give the verdict in evidence, you cannot give the oath on which it is founded; for, if you cannot shew there was such a cause, you cannot shew there was such a person examined in it; and without shewing there was a cause, no man's oath can be given in evidence, inasmuch as it appears to be no more than a voluntary affidavit.—*Sherwin* v. *Clarges,* M. 12 W. III. 1 Raym. 730.

(a) These depositions, when recorded according to stat. 5 *Geo.* II. *c.* 30. *s.* 41. (or a copy of the record, if the original be lost) may be read in evidence where the deponent is dead, and they may be admitted to shew the precise time of an act of bankruptcy committed, if specified therein. *Janson* v. *Willson,* 1 Dougl. 244 (257).

Note. In section 41 of the above statute, there is a remarkable inaccuracy, for, after directing the manner of entering these proceedings and certificate of record, it says, that these copies, "signed and attested *as therein mentioned,*" shall and may be given in evidence, but no provision is made for signing or attesting such copies. It is only enacted, that the chancellor shall appoint a person who shall, by himself or his deputy, by writing under his and their hands, entered of record, such commissions, *&c. Quære,* therefore, How is the copy of the deposition in this case to be signed and attested? Vide *Dougl.* 244 (257) n. Mr. *Peake,* in his Law of Evidence, p. 66, observes, that, on a liberal construction of the act, it might possibly be implied that power was given to such officer to certify his inrolment, and then his act would, as in other cases, be sufficient evidence of the copy, but the safer way would certainly be to prove it examined with the original also.

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What a man himself, who is living, has sworn at one trial, can never be given in evidence at another to support him, because it is no evidence of the truth; for if a man be of that ill mind to swear falsely at one trial, he may do the same at another on the same inducements, (*Qu.* and vide post, 294.) (*a*) But what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him, because that shews that what he swears is not from any undue influence. But if a man have sworn at one trial different from what he has sworn at another, this is good evidence to his discredit.

[243] A witness was sworn in a trial at bar in *C. B.* between the same parties on the same issue, and he was subpœna'd by the defendant to appear at a second trial in *K. B.* and his charges given him, but he not appearing persons were admitted to swear what he swore in *C. B.* for the court said they would presume he was kept away by the plaintiff's practice.—This supposition was strengthened by his having been produced by the plaintiff at the former trial.—*Green* v. *Gatewick*, Mic. 24 Car. II.

On an appeal for murder the plaintiff cannot give the indictment in evidence against the prisoner, and what a person swore upon it at the trial; for as the indictment cannot be evidence (between other parties) by consequence the oath on the indictment cannot be evidence: And as the evidence on the indictment cannot be shewn by the plaintiff in the appeal, neither can it be by the defendant for the reason already given in regard to giving verdicts in evidence.—*Sampson* v. *Tothill*, 19 Car. II. 1 Sid. 325.

However to this general rule there are the same exceptions as have been already taken notice of in regard to depositions.

A verdict with the evidence given, in an action brought by the carrier for goods delivered to him to be carried, shall be given in evidence in an action brought by the owner against the carrier for the same goods,

(*a*) In an information for obstructing revenue officers, defendant called a witness to prove an *alibi*, and being asked whether he had not given a different account of the matter on his former examination, he said he had not. The fact was, that defendant had been antecedently convicted before two magistrates for having had spirits in his possession, and on that occasion the present witness was then a witness also. The counsel for the crown proposed to put in the record of the conviction, containing the witness's testimony on that occasion, according to act of parliament, when Lord *Ellenborough* said, he would admit the record to prove the condemnation, but not to contradict the witnesses, for that he should require the evidence on oath of persons who were present before the magistrates, and heard all that was sworn. *Rex* v. *Howe*, 1 Camp. 461.

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for it is a strong proof against him that he had the plaintiff's goods; and in case the witness be dead, or cannot be found, is the best evidence that can be had, for it amounts to a confession in a court of record.—*Per Holt*, 14 W. III. at *Guildhall*. (*a*)

Postea.—Note; though the bare producing the *postea* is no evidence of the verdict, without shewing a copy of the final judgment, because it may happen that the judgment was arrested, or a new trial granted; yet it is good evidence that a trial was had between the same parties, so as to introduce an account of what a witness swore at that trial who is since dead. So a nonsuit, with proof of the evidence upon which the plaintiff was nonsuited, may be given in evidence in another action brought by the same party.—*Pitton* v. *Walter*, H. 5 Geo. I. 1 Stra. 162.

On an indictment for perjury committed on the trial of a former cause, the *postea* alone is sufficient evidence to prove that there was a trial, without shewing a copy of the final judgment. (*b*) In *Rex* v. *Minns*, the objection was made and over-ruled accordingly.—*Rex* v. *Iles*, sittings in *London*, Mic. 14 Geo. II. *cor. Raymond*. Sittings at *Westminster* after Trin. 20 Geo. III.

Decree, Sentence, or Judgment.—*A decree in chancery* may be given in evidence between the same parties, or any claiming under them, for their judgments * must be of authority in those cases, where the law gives [*244] them a jurisdiction; for it were very absurd that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof. (*c*)

A decretal order in paper with proof of the bill and answer (or if they are recited in the order) may be read.—*Trowell* v. *Castle*, E. 1661. 1 Keb. 21. (*d*)

And note; Wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, (*e*) ecclesiastical or civil, having

(*a*) In the case of *Tilcy* v. *Cowling*, 1 Ld. Raym. 744. Vide *Peake's Law of Evidence*, 39, (n.) Et vide ante, p. 232 *a*, n. (*a*)

(*b*) And in a civil action, the evidence of a witness on a former trial between the same parties may, after his death, be read upon producing the *postea*. *Coker* v. *Farewell*, 2 P. W. 563. *Sed secus* in a criminal prosecution. *Sir John Fenwick's Case*, 4 State Trials, 265.

(*c*) A decree in equity, being equal to a judgment at law, is governed by the same rules, and upon *private* questions, it is evidence against parties and claimants under them only but in *public* cases *Case of Manchester Mills*, Dougl. 222. (n.) 13.

(*d*) Vide *Lord Thanet* v. *Paterson*, ante 235, and n. (a.)

(*e*) The rule, that a judgment, when destroyed, may be proved by secondary

having competent jurisdiction, is conclusive evidence of such matter; (*a*) and in case the determination be final in the court of which it is a decree, sentence or judgment, such decree, sentence or judgment, will be conclusive in any other court having concurrent jurisdiction. (*b*)

In consequence of the first part of this rule; if in ejectment a question arose about the marriage of the father and mother of the plaintiff, a sentence in the ecclesiastical court in a cause of jactitation, would be conclusive evidence. (*Jones* v. *Bow*, 4 W. & M. Carth. 225. *Dane* v.

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secondary evidence, applies equally to every sort of evidence. *Koch* v. *Rix*, Gilb. Evid. 56. *Barclay's Ca.* 5 Mod. 211. Therefore, where it appeared that the proper office has been searched, and the bill could not be found, the answer alone was allowed to be read. *Blower* v. *Ketchmore*, 2 Keb. 31. So ancient depositions have been received as evidence without bill or answer, but the party must shew that the bill has once been there, and account for its loss. *Peake's Evid.* 67, 68.

(*a*) Unless there be a glaring vice or absurdity on the face of a foreign judgment, in which case it is objectionable in evidence. *Buchanan* v. *Rucker*, 1 Campb. 63.

(*b*) In the ecclesiastical or admiralty courts, on questions arising within their jurisdiction, the depositions, answers to libels, and sentences, are of equal authority with similar proceedings in equity; therefore, a probate of a will of personalty, letters of administration, or a sentence in a matrimonial cause, or an adjudication of a prize, are evidence of the rights of the parties. *Trotter* v. *Blake*, 2 Mod. 231. *Mildmay* v. *Mildmay*, 1 Vern. 53. *Kempton* v. *Cross*, Ca. temp. Hardw. 108. Yet in *Mildmay* v. *Mildmay*, it was doubted whether depositions in the spiritual courts were admissible. Mr. *Peake*, (Law of Evid. 69, (n.)) says clearly, they are not, when taken in any cause out of their jurisdiction. Vide etiam *Gilb. Evid.* 67.

There are, however, certain rules and principles as applicable to all judgments and sentences, *viz.*

Though a judgment, sentence, or decree, of the same court, or one of concurrent jurisdiction, directly upon the point, may be pleaded in bar, or given conclusively in evidence between the same parties, upon the same matter directly in question; and though, in like manner, the judgment of a court of exclusive jurisdiction, directly upon the point, be conclusive upon the same matter, between the same parties coming incidentally in question in another court for a different purpose, yet neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by agreement from the judgment. 11 *Sta. Tri.* 261. *Peake's Ev.* 75, 76. And although judgment on mere questions of property between party and party are evidence only against the parties, and those claiming under them, yet judgments *in rem*, or in the ecclesiastical courts, on matrimonial causes, are evidence against third persons. *Bunting's Ca.* 4 Co. 29. And in such cases a stranger may always shew that such judgment was obtained by fraud and collusion, for fraud is an extensive collateral act which vitiates every thing in a court of justice, and it is competent to shew that the court was misled, though not mistaken. *Brownsword* v. *Edwards*, 2 Ves. 245.

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Degberg, H. 11 W. III.) (*a*) So where the defendant in an action of assault and battery, justified a maihem done by him as an officer in the army for disobeying orders, and gave in evidence the sentence of the counsel of war upon a petition against him by the plaintiff, and the petition being dismissed by the sentence, it was holden to be conclusive evidence in favour of the defendant. (*Hughes* v. *Cornelius*, 32 Car. II. 2 Show. 232.) So in an action upon a policy of insurance, with a warranty that the ship was *Swedish*, the sentence of a *French* admiralty court condemning the ship as *English* property, was holden conclusive evidence, and an exemplification of the sentence is sufficient evidence without further proof, (*Anon.* M. 10 Geo. I. 9 Mod. 66.) (*b*) So in an action of trover for goods, judgment of condemnation upon an information in the exchequer would be conclusive.

But this part of the rule must be taken with this restriction, that the matter determined by such decree, sentence, or judgment, was determined *ex directo*, and not in a collateral way. Therefore, if in an information against *A.* issue were taken on *J. S.* being mayor of such a borough in such a year, and it were found he was not mayor, such finding and judgment thereon would not be evidence on the like issue in an information against *B.* So if a suit were instituted in the ecclesiastical court by *B.* against C. for a divorce *causa adulterii* with *D.* and she were to plead that she was married to *D.* and upon proof made the

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(*a*) So in an indictment for assaulting a fellow-commoner, and turning him out of the college gardens, a sentence of expulsion unappealed from was held to be conclusive evidence for the defendant, and the prosecutor was not allowed to give any evidence to bring the legality of the sentence in question. *Rex* v. *Grundon*, Cowp. 315.

(*b*) Where one, who claims the benefit of a foreign sentence, applies to a British court to enforce it, and submits it to British jurisdiction, it is not treated as obligatory, to the extent it would be in the country where it was pronounced, nor to the extents to which British judgments are treated. *Phillips* v. *Hunter*, 2 H. Bla. 409. Therefore, though a foreign judgment be *primâ facie* evidence of a debt, it is not so conclusively. *Walker* v. *Witter*, Dougl. 1. But the court will receive evidence of what the foreign law is, in order to ascertain whether the judgment is warranted by that law or not. *Phillips* v. *Hunter*, sup. Yet in all other cases the court will give entire credit to foreign sentences, and take them as conclusive, as where a foreign court, acting on the law of nations, adjudge a ship to be a lawful prize for breach of neutrality, the sentence is complete evidence of that fact against all the world; and if the foreign sentence state the evidence on which it was founded, no British court can enquire into the rectitude of such a conclusion. *Garels* v. *Kensington*, 8 T. R. 230. *Christie* v. *Secretan*, ibid. 192. Such an adjudication, however, is only evidence of the conclusion on which the sentence is founded, and not of the facts stated in evidence. Vide *Park on Insurance*, 353.

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court should so pronounce, and accordingly dismiss *B.*'s libel; yet that would be no evidence, in an ejectment in which the marriage between
[*245] *C. D.* came in dispute. (*Robin's Case*, in C. B. 1760.) So if in *an ejectment between a devisee and the heir at law, the defendant obtaining a verdict upon proof that the will was not duly executed, yet he could not give it in evidence on another ejectment brought by another devisee.

In consequence of the second part of the rule, if *A.* having killed a person in *Spain* were there prosecuted, tried, and acquitted, and afterwards were indicted here, he might plead the acquittal in *Spain* in bar; because a final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction. So in dower, if the defendant plead *ne unques accouple*, and upon this issue the bishop certify the marriage, and such certificate be enrolled, and judgment given for the demandant thereon; in the like action against any other tenant, the defendant will be concluded from pleading the like plea; for the fact having been *ex directo* determined between the parties, so that it can never again be controverted by them, the record is conclusive evidence of such fact against all the world.—*Hutchinson's Case*, 29 Car. II. cited in *Beak* v. *Tyrrell*, E. 1 W. & M. 1 Show. 6.

Though a conviction in a court of criminal jurisdiction be conclusive evidence of the fact, if it afterwards come collaterally in controversy in a court of civil jurisdiction; yet an acquittal in such court is no proof of the reverse. (*a*) As, suppose the father convicted on an indictment for

(*a*) The effect of verdicts in *criminal* cases on the *civil* rights of the parties, does not appear to be clearly settled. In *Richardson* v. *Williams*, 12 Mod. 319, it is said, that the verdict in a *civil* cause may be given in evidence in a *criminal* one, but not *vice versâ*: and the court said, they would hardly grant a new trial, where a verdict might become evidence in a criminal cause. In *Gilb. Evid.* 32, a *quære* is made, whether such verdict can be given in evidence, because the party could not attaint the jury as he could in a civil action; but there are many cases where a verdict is given in evidence against a party who could not have an attaint, as those which establish customs and public rights, where the verdict is always received in evidence against those who are not parties or privies. Again, in *Gibson* v. *M'Carty*, Ca. temp. Hardw. 311, on an issue, to try whether certain notes were forged, or genuine, the evidence was objected to, on the rule, that no record of a criminal action could be given in evidence in a civil suit, because such conviction might have been upon the evidence of a party interested in the civil action, and Lord *Hardwicke* is reported to have admitted this evidence. Again, in *R.* v. *Whiting*, Salk. 283, where a man was prosecuted for a fraud, in obtaining a bill, the person defrauded was called as a witness; but Lord *Holt* rejected his testimony, because, though the verdict could not be given in evidence in an action on the note, he was sure to hear

for having two wives, this would be conclusive evidence in an ejectment, where the validity of the second marriage was in dispute. (*Boyle* v. *Boyle*, H. 1687. 3 Mod. 164.) But an acquittal would not prevent the party from giving evidence of the former marriage, so as to bar the issue of the second; for an acquittal ascertains no fact as a conviction does; *(a)* nor would a conviction be conclusive, so as to bar the party in a writ of dower or appeal, where the legality of the marriage comes in question. However, it would be evidence before the bishop on the issue *ne unques accouple*; for though the fact of the marriage be not conclusive evidence of the legality of it, yet it is *primâ facie* a proof of it.—*Ld. Howard* v. *Lady Inchiquin*, 1700.

Probate and Administration.—If a man devise lands by force of the statute of *H.* VIII. of wills, or by custom, the probate of the will in the spiritual court cannot be given in evidence; for all the proceedings, as far as relate to lands, are *coram non judice*, for they have no power to authenticate any such devise, and therefore a copy produced under their seals is no certain evidence of a true copy.—*Nettar* v. *Brett*, H. 10 Car. I. 2 Rol. Abr. 678. *(b)*

But the probate of a will is good evidence as to the personal estate, because they have the custody of all wills that concern * the personal [*246] estate, and they are the records of that court, and therefore a copy of

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hear of it to influence the jury. The authority of this case, however, is destroyed, and it is now clearly settled, that a verdict cannot be used by the party on whose evidence it was obtained, as evidence for him of the fact found upon it; for in *Bartlett* v. *Pickersgill*, Peake's Evid. 148, (n.) the party attempted to avail himself of the conviction by a supplemental bill, but failed; and in *R.* v. *Boston*, 4 East, 572, the court held the party injured to be a competent witness on the indictment, on the express ground, that the conviction would be no evidence in support of his civil rights.

(a) This appears by the authority in 3 *Mod.* 164. to have been said *arguendo* only. It is, however, agreed, that had the party been acquitted, this would have been no evidence in support of the second marriage, for it proves no fact: defendant might have been acquitted for many reasons, without supposing the second a legal marriage. So where there has been a judgment for the crown, on an information *in rem* in the Exchequer, it has been held to be conclusive evidence to vest the property in the crown, and not to be controverted in any civil action, but a verdict of acquittal does not seem to operate so strongly in favour of the party. *Scott* v. *Shearman*, 2 Bla. 977. *Cooke* v. *Sholl*, 5 T. R. 255. A sentence of acquittal, however, has been considered as conclusive. Vide *Dane* v. *Degberg*, ante 244 *a. b.* Vide etiam *Vin. Evid.* (A) b. 22.

(b) Where it is necessary to make title to lands under a will, where the original will is lost, an examined copy must be produced, for the probate under the seal of the ecclesiastical court is inadmissible. *Ash* v. *Calvert*, 2 Camp. 388. So where a will is proved to be lost, parol evidence of its contents may be given. *Ibid.* (n).

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them under the seal of that court must be good evidence; and this is still the more reasonable, because it is the use of the court to preserve the original wills, and only to give back to the party the copy of the will under the seal of the court. (*a*)

The ecclesiastical court never grants an exemplification of letters of administration, but only a certificate that administration was granted; therefore when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence. (*Kempton* v. *Cross*, E. 8 Geo. II. K. B.) So would the book of the ecclesiastical court, wherein was entered the order for granting administration. (*Garrett* v. *Lister*, E. 13 Car. II. 1 Lev. 25.) So would the copy of the probate of the will be evidence of *S. S.* being executor, but a copy of the will would not be evidence of it.—*Smartle* v. *Williams*, 3 Lev. 387, cited by *Hardw.* C. Et vide *post*, 255 a.

Where a person in ejectment would prove the relation of a father and son by his father's will, he must have the original will, and not the probate only, for where the original is in being, the copy is no evidence; (*b*) beside, the seal of the court does not prove it a true copy, unless the suit only related to personal estate. (*Dike* v. *Polhill*, E. 1701. Raym. 744.) But the ledger book is evidence in such case, because this is not considered merely as a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove a relation, the rolls of the spiritual court, that has authority to inrol all wills, are sufficient proof of such testament. (*Pettit* v. *Pettit*, 1701). And under particular circumstances the ledger book may be evidence even in a devise of a real estate; (*c*) as where in an avowry for a rent-charge, the avowant could not produce the will under which he

(*a*) The *probate* is the only proof of a right to personal property under a will. *Rex* v. *Netherseal Inhabitants*, 4 T. R. 258; and no man can shew it was improperly granted to avoid a payment under it. *Allen* v. *Dundas*, 3 T. R. 125. But a forgery of the seal may be shewn, *Noel* v. *Wells*, 1 Sid. 359, or a repeal of letters of administration. *Chichester* v. *Phillips*, T. Raym. 405.

(*b*) A will exemplified under the great seal is not evidence before a jury in ejectment. *Anon.* Comb. 46.

(*c*) Proving the ordinary's ledger book, that contains a registry of the will, shall be evidence in the case of will of lands, where the party was not entitled to the custody of the will as the grantee of a rent-charge.

But where a person claims as heir at law in ejectment, some deduction of pedigree is necessary to make out a title, *Roe*, ex dem. *Thorne* v. *Lord* 2 Bla. 1099; for otherwise the testator, from a misapprehension of heirship and general relationship, might be induced to leave his estate to the half blood. But in ejectment to recover the remainder of a long term of years, it will be sufficient to shew the original lease, and possession in himself, and those under whom he claimed; but the mesne assignments were dispensed with, for the jury shall presume all mesne assignments. *Earl*, ex dem. *Gooduin* v. *Baxter*, Ibid. 1228.

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claimed, that belonging to the devisee of the land; but producing the ordinary's register of the will, and proving former payments, it was holden, to be sufficient evidence against the plaintiff, who was devisee of the land charged. But it has been often holden, that a copy of the ledger book is not evidence; yet, since the original would be read as a roll of the court without further attestation, it seems fit the copy should be read. The contrary practice has been founded upon the mistake, that the ledger book is read as a copy, so that the copy of that is but the copy of a copy; whereas the ledger book is read as a roll of the court.—*Anon.* E. 12 W. III. 12 Mod. 375.

Though in a suit relating to a personal estate, the probate of the will under the seal of the ecclesiastical court is sufficient evidence *, yet the [*247] adverse party may give in evidence that the probate is forged, because such evidence supposes that the spiritual court has given no judgment, and so there is no reason for the temporal court to be concluded by it. (*Chichester* v. *Philips*, E. 32 Car. II. T. Raym. 405.) So the adverse party may prove, that the testator left *bona notabilia* against the probate by an inferior court, for then such court had no jurisdiction.—*Noel* v. *Wells*, 20 Car. II. 1 Sid. 359. *(a)*

So if letters of administration be shewn under seal, you may give in evidence that they were revoked, for this is an affirmance of the proceedings in the spiritual court, and does not at all controvert the righteousness of their decision.—*S. C.* (*b*)

Of other Public Matters not Records.

The rolls of a court baron are evidence, for they are the public rolls by which the inheritance of every tenant is preserved; and they are the rolls of the manor court, which was anciently a court of justice relating to all property within the district. *(c)*

(*a*) And, consequently, the whole being *coram non judice*, is void. *Peake's Evid.* 70. Vide ante, 235, n. (c)

(*b*) An examined copy of the act book in the registry of the prerogative court of *Canterbury*, stating that administration was granted to defendant of her husband's goods at such a time, is proof of her being such administratrix in an action against her as such, without giving her notice to produce the letters of administration. *Davis* v. *Williams*, 13 East, 232. *Elden* v. *Keddell*, 8 East, 182. S. P.

(*c*) So are *descent rolls* of a manor evidence between two tenants to prove a descent within the custom, and even an entry on an ancient roll, of a finding by the homage what the customs were, though not accompanied by any particular instance, or supported by other evidence, is itself admissible to prove the custom, for that is *lex loci*, and not the claim of an individual, consequently it may be proved by tradition and received opinion. *Doe*, ex dem. *Mason* v. *Mason*, 3 Wils. 63. *Roe*, ex dem. *Beebee* v. *Parker*, 5 T. R. 26.

A copy

A copy of a court-roll under the steward's hand is good evidence to prove the copyholder's estate.—*Snow* v. *Cutler*, M. 15 Car. II. 1 Keb. 567. *Lee* v. *Boothby*, E. 16 Car. II. Ibid. 720. *(a)*

So an examined copy of the court roll is good evidence, if sworn to be a true one.—*Case of the Manor of Bray*, E. 4 W. & M. 2 Mod. 24. *Tuckey* v. *Flower*, M. 1 W. & M. Comb. 138. *R.* v. *Hains*, T. 7 W. III. Comb. 337.

The register of christenings, marriages, and burials, is good evidence, *(b)* or the copy of it. Nay, proof *vivâ voce* of the contents of it without a copy has been admitted; yet the propriety of such evidence may well be doubted, because it is not the best evidence the nature of the thing is capable of. *(c)*

Though it appear in evidence, that the register was made from a day-book, kept by the minister for that purpose, yet the day-book will not be admitted to contradict the entry in the register, *ex. gr.* to prove a child base born, where no notice is taken of it in the register, which would therefore be evidence to prove him legitimate.—*May* v. *May*, E. 1736. 2 Stra. 1073. *(d)*

A copy of an entry in the books of the office of faculties was disallowed; *sed quære*, for it is of a public nature.—*Selby* v. *Harris*, E. 10 W. III. Ld. Raym. 745.

The pope's licence, without the king's, has been holden good evidence of an impropriation, because antiently the pope was taken for the supreme head of the church, and therefore was holden to have the disposition of all spiritual benefices, with the concurrence of the patron,

(*a*) So a parchment writing, produced by the steward of a manor, as the customary of a manor, and received by him from his predecessor, who had also received it from his, and had possession of it all the time, and which was said to be *ex assensû omnium tenentium*, was admissible to prove the course of descent. *Denn*, ex dem. *Goodwin* v. *Spray*, 1 T. R. 466.

(*b*) In all civil cases, except cases of *crim. con.* in which some person present must be produced, or the original registry, or an examined copy, must be produced, and the parties identified; and so on an indictment for bigamy. *Morris* v. *Mullin*, 4 Burr. 2057. *Birt* v. *Barlow*, Dougl. 162 (171.) But the *Fleet* books are no evidence of a marriage, or of the unlawfulness of it, before the act, but because of the infamy of the characters by whom the ceremony was performed. *Howard* v. *Burtonwood*, Peake's Evid. 87, 89, (n.) *Read* v. *Passer*, Peake's N. P. Ca. 231. Esp. N. P. Rep. 213. *Cooke* v. *Lloyd*, Peake's Evid. App. xxxvi. Yet *Heath*, J. in *Doe*, ex dem. *Passingham* v. *Lloyd*, Shrewsbury Ass. 1794. admitted the *Fleet* books in evidence.

(*c*) Entry in a vestry book, that, at a vestry duly held, pursuant to notice, *A. B.* was appointed treasurer of the parish, is good evidence of the appointment. *Rex* v. *Martin*, 2 Campb. 100.

(*d*) Et vide *Rex* v. *Head*, Peake's Evid. 86, (n.) which was decided on the same principles.

without

without any regard had of the prince of the country; and these ancient matters must * be judged according to the error of the times in which [*248] they were transacted.—*Cope* v. *Bedford*, E. 1626. Palm. 427.

A pope's bull is evidence upon a special prescription to be discharged of tithe; where you only say that the lands belonged to such a monastery, and were discharged at the time of the dissolution, for then they continue discharged by the act of parliament; but it is no evidence on a general prescription to be discharged, because that would shew the commencement of such a custom, and a general prescription is that there was no time or memory of things to the contrary.—*Claurickard* v. *Denton*, M. 1619. Palm. 38. *(a)*

Domesday-book.—If the question be, whether a certain manor be ancient demesne or not, the trial shall be by domesday-book, which will be inspected by the court.—*Anon.* T. 1617. Hob. 188. *(b)*

In ejectment for the manor of *Artam*, the defendant pleaded ancient demesne, and when domesday-book was brought into court, would have proved that it was anciently called *Nettum*, and that *Nettam* appears by the book to be ancient demesne; but he was not permitted to give such evidence, for if the name be varied, it ought to have been averred on the record.—*Gregory* v. *Withers*, H. 28 Car. II. 3 Keb. 588.

To know whether any thing be done in or out of the ports, there lies in the *exchequer* a particular survey of the king's ports which ascertains their extent.

(*a*) And an exemplification under the bishop's seal is good evidence of the pope's bull. *Sir T. Read's Case*, cited Hardr. 118.

(*b*) That book having been held of sufficient authority to shew whether the manor was part of the socage tenure of *Edward* the Confessor or not. So if a question arise as to the extent of the ports, a particular survey which will ascertain it is to be found in the Exchequer. *Gilb. Evid.* 78.

So where a commission was issued from the Exchequer *regn. Eliz.* and directed to commissioners to enquire whether a prior was seised of certain lands as parcel of a manor, and whether, after the dissolution, the crown was seised, with directions to summon a jury, the inquisition taken under that commission, and the depositions of witnesses, were held admissible, but not conclusive evidence of the fact. *Tooker* v. *Beaufort D.* 1 Burr. 146. So an inquisition taken by order of *Cromwell's* government, to ascertain the lands belonging to the prebend of the *monastery of St. Paul's*, was received against one claiming under them, as evidence of the extent of their rights. *Doe*, ex dem. *Powell* v. *Harcourt*, Peake's Evid. App. xxxvi. And that taken by order of the House of Commons in 1730 was received as conclusive evidence of the tenures and fees of the offices noticed in it. *Green* v. *Hewitt*, Peake's N. P. 182. And even when the commission has been lost, the survey taken under it has been allowed as evidence. *Kellington Vicar* v. *Trin. Coll. Camb.* 1 Wils. 170; for they are public acts to determine a public question. *Peake's Evid.* 85.

An old terrier or survey of a manor, whether ecclesiastical or temporal, may be given in evidence, for there can be no other way of ascertaining the old tenures or boundaries. *(a)*

A terrier of glebe is not evidence for the parson, unless signed by the churchwardens as well as the parson; nor then either, if they be of his nomination; and though it be signed by them, yet it seems to deserve very little credit, unless it be likewise signed by the substantial inhabitants; but in all cases it is strong evidence against the parson. *(b)*

Rolls or ancient books in the heralds' office are evidence to prove a pedigree; but an extract of a pedigree proved taken out of records shall not, because such extract is not the best evidence in the nature of thing, as a copy of such records might be had.—*King*, d. *Earl Thanet*, v. *Foster*, 34 Car. II. T. Jo. 224.

Camden's Britannia would not be evidence to prove a particular custom; *(c)* but a general history may be given in evidence to prove a matter relating to the kingdom in general; (*Stainer* v. *Droitwich Corporation*, M. 1696. Salk. 281. 12 Mod. 85. S. C. nom. *Stayner* v.
[*249] *Droitwich Burgesses*,) * as in the case of *Neal* v. *Jay*, *(d)* (cited in *S. C.*) chronicles were admitted to prove, that king *Philip* did not take the stile in the deed at that time, *Charles* V. of *Spain* not having then surrendered.

(*a*) The *ecclesiastical terriers* were surveys made by virtue of the 87th canon, which directs them to be kept in the bishop's registry. *Repert. Canon. App.* 12. But in *Atkins* v. *Hutton*, 2 Anstr. 386, it was held, that a paper writing, purporting to be a terrier found in the charter-chest of *Trinity College*, *Cambridge*, (who were land-holders in the parish,) was no evidence to disprove a *modus*, but as against one of the prebendaries of *Litchfield*, a terrier found in the chest of the dean and chapter was held good evidence. *Miller* v. *Forster*, 2 Anstr. 387.

Ancient maps also, though partaking of the nature of *private* instruments, are usually classed as *public* writings, and received in evidence where they have accompanied possession, and agree with the boundaries as fixed by ancient purchases. *Yates* v. *Harris*, Gilb. Evid. 78. So where two manors were in the hands of the same person, who made a map of them, and afterwards one of the manors were conveyed to another, and long afterwards disputes arise as to the boundaries, such map will be evidence. *Bridgman* v. *Jennings*, 1 Ld. Raym. 734. But if the person who made the map had only one manor, or the church-wardens cause a copper-plate map to be engraved, wherein they describe lands claimed by an individual to be a public highway, it is no evidence against the rights of those who did not make it. *Anon.* 1 Stra. 95. *Pollard* v. *Scott*, Peake's N. P. Ca. 18.

(*b*) Neither would *Dugdale's Monasticon*, or any other printed history. *S. C.* Neither can an anonymous printed history be read as evidence in a court of law in any case. Vide etiam *Peake's Evid.* 81. 83.

(*c*) Vide *Earl* v. *Lewis*, 4 Esp. N. P. Ca. 1. *Theory of Evidence*, 45.

(*d*) The proper name of this case is *Mossam* v. *Ivy*, 7 St. Tr. 571. Vide *Peake's Evid.* 84.

The

The register of the navy office, with proof of the method there used to return all persons dead, with the mark Dd. is sufficient evidence of a death.—Ex dem. *Whitcomb*, E. 6 Ann. C. B.

An inventory taken by a sheriff on an execution, is evidence between strangers to prove the quantity and value of the goods; for the law intrusting him with the execution must trust him throughout.—*Baxter* v. *Camfield*, M. 19 Car. II. 2 Keb. 277. *(a)*

II. *Private*

(*a*) The *Gazette* also is of itself *primâ facie* evidence of matters of state, and of public acts of the government. It is published by authority of the crown; it is the usual way of notifying such acts to the public, and therefore is entitled to credit in respect of such matters. It is evidence of a proclamation for performance of a quarantine; and so of a proclamation of peace. Vide *Dupays* v. *Sheppard*, ante, p. 226. But the *Gazette* is no evidence of an appointment to a commission in the army. *Rex* v. *Gardener*, 2 Camp. 513.; nor of the dissolution of partnership therein inserted, unless it be proved that the *Gazette* came to the party's hands. *Graham* v. *Hope*, Peake's N. P. Ca. 154. But if published in the neighbourhood, it is evidence for the jury to decide whether or not there was notice. *Godfrey* v. *Turnbull*, ibid. (n.)

Addresses by different bodies of subjects going to offer their loyalty at the foot of the throne, and received by the King in his public capacity, they then become acts of state, and of such acts announced to the public in the *Gazette*. It is admitted that the *Gazette* is evidence in courts of justice; every thing which relates to the King as *King* is public, and a *Gazette* which contains any thing done by his Majesty in his character as King, or which has passed through his Majesty's hands, is admissible evidence in a court of justice to prove such thing.

In *Rex* v. *Drinklin*, *Rex* v. *Holt*, 5 T. R. 443, the court admitted the journals of the Lords to prove not only their address to the King, but the King's answer.

The *articles of war*, printed by the king's printer, would have been sufficient evidence.

A public advertisement is not sufficient to prove a notice, unless it be proved that the defendant used to read that particular newspaper, and this though the same notice were published in almost all the daily papers. *Boydell* v. *Drummond*, 2 Campb. 157.

But if a person be proved to have been in the habit of reading the paper in which such advertisement is, it is a notice to him. *Gallway Lord* v. *Matthew*, 10 East, 264.

As to corporation books, vide *Rex* v. *Mothersall*, 1 Stra. 93, and the case of *Thetford*, 12 Vin. Abr. 90, pl. 16, where it is held, that entries made of public matters by the proper officer are good evidence, but as examined copies are evidence, the court will not on slight grounds order the originals to be produced. *Brocas* v. *London Mayor*, 1 Stra. 307. So where an old agreement was in the *Bodleian* library, from whence by the statutes it cannot be removed, a copy was allowed to be read, but it is not so generally with a private instrument, for where a letter fifty years old was found in a corporation chest, the court held that it must be produced. *Rex* v. *Gwin*, 1 Stra. 401.

And the books of the *Bank*, though not records, are by analogy construed public books, and copies are allowed as evidence of the transfer of stock. *Bretton* v. *Cope*, Peake's N. P. Ca. 30. So the books of the *East India* Company seem to come within

II. *Private written Evidence.*

We come now in the second place to that which is only private evidence between party and party, and that is also two-fold, *viz.*

1. *Deeds.*

the principle laid down in *Lynch* v. *Clarke*, 3 Salk. 154, that wherever an original is of a public nature, and could be evidence if produced, an immediate sworn copy is evidence. This, however, has not been expressly decided. Vide *Rex* v. *Gordon (Lord George,)* Dougl. 572. 593, (n.)

But inquisitions taken before the sheriff, *&c.* are of very different authority, for being traversable in their nature, they are seldom admitted as evidence against third persons. *Latkow* v. *Eamer*, 2 H. Bla. 437; and in *Jones* v. *White*, 1 Stra. 68, the court of K. B. were equally divided whether the coroner's inquest, whereby a man was found *non compos*, was admissible evidence against his executrix. So in *Latkow* v. *Eamer*, sup. it was held that an inquisition taken by the sheriff, to whom the goods seized by him under an execution against *A.* belonged, by which the property was found to be in *B.* was no evidence in an action brought by him against the sheriff, who had been indemnified.

As to the inspection of public writings, it has been held, that *the proceedings of courts of justice* should be always open to inspection. Vide *Herbert* v. *Ashburner*, 1 Wils. 297. *Wilson* v. *Rogers*, 2 Stra. 1242, and *Edwards* v. *Vesey*, Ca. temp. Hardw. 128, where such leave was given as against inferior courts to proceedings against the party in each action; and in *Welch* v. *Richards* the like leave was given for a man to have a copy of the information against him from the magistrate. But in *Groenvelt* v. *Burnell*, 1 Ld. Ray. 252, where an action was brought for false imprisonment, under the sentence of the college of physicians, the court would not allow plaintiff to inspect books in the custody of persons not parties to the suit. And so in *Abney* v. *Dickenson*, Say. 250, which was a case of imprisonment under an order from the commissioners of hackney coaches.

Copies from the books of public offices may also be had by an interested party, where public policy will allow it; therefore an officer's widow may have access to the books of the commissioners for settling the debts of the army. *Moody* v. *Thurston*, 1 Stra. 304. But not inspection of the revenue accounts to determine as to the duties. *Atherfold* v. *Beard*, 2 T. R. 616.

The books of a corporation may be inspected by any member to ascertain his rights. *Rex* v. *Hollister*, Ca. temp. Hardw. 245. *Rex* v. *Newcastle Hostmen*, 2 Stra. 1223. But in a suit by a corporation against a stranger for tolls, the demandants cannot supply themselves with evidence out of their own books. *Southampton Mayor* v. *Graves*, 8 T. R. 590.

So as to court rolls, if the lord claim an amercement, as in *Baldwin* v. *Trudge*, Barnes, 237; or tenants differ about the custom of the manor, as in *Hobson* v. *Parker*, ibid. the tenants may inspect the court rolls, and use them as evidence. But in a dispute between the lord and a stranger respecting a *modus*, as in *Hereford Bp.* v. *Bridgwater D.* Bunb. 269; or if the lord claim lands as copyhold which are freehold, as in *Smith* v. *Davies*, 1 Wils. 104; or if two adjacent lords dispute their boundaries, as in *Talbot* v. *Villeboys*, cited 3 T. R. 142, the lord will not be compelled to produce his manor rolls: and if they are wanted in evidence, they must be proved as private deeds in the possession of the adversary.

This inspection, however, is only allowed in claims for civil rights. *Rex* v. *Cornelius*, 2 Stra. 211. *Rex* v. *Purnell*,

1. *Deeds.*

2. *Private Matters of an inferior Nature.* (*a*)

1. *Of deeds.—First, of the profert.*—The rule is, that when any person claims by a deed in the pleadings, he ought to make a profert of it to the court; (*b*) and where he would prove any fact in issue by a deed, the deed itself must be shewn.

In every contract there must be apt words to shew what right is transferred, and to whom, and the sense and signification of these words must be expounded by the law. There must therefore be a profert made of all solemn contracts. 1. For the security of the subject, that what right is transferred may be adjudged of according to the rules of law. 2. Because all allegations in a court of justice must set forth the thing demanded; now the thing demanded cannot be set forth without shewing the instrument upon which the demand arises.

But where a man shews a good title in himself, every thing collateral to that title shall be intended, whether it be shewn or not.

A matter collateral to a title is what does not enter into the essence or being of a title, but arises *aliunde*, so that there must be a derivation of title without it. (*Co. Litt.* 310.) As where a man declares of a grant of feoffment of a manor, the attornment (which is collateral to the title) shall be intended. (*Ferrers* v. *Wignall*, H. 1585. Cro. Eliz. 401. *Bellamy's Case*, E. 3 Jac. I. 6 Co. 38.) So in trespass the defendant conveyed the house in which, &c. by feoffment from *J. S.* and justified damage feasant; the plaintiff *replied that *J. S.* before the [*250] feoffment made a lease to *J. N.* who assigned to him; the defendant rejoined that the lease was made on condition, that if *J. N.* assigned over without licence by deed from *J. S.* that then *J. S.* should re-

Purnell, Wils. 240. 1 Bla. 351. *Regina* v. *Mead*, 2 Ld. Raym. 927. Therefore the court will not allow the inspection of such documents to aid a prosecution against corporation justices for granting licences, &c. *Rex* v. *Cornelius*, sup.; or against the vice-chancellor of *Oxon.* for misbehaviour in office. *Rex* v. *Purnell*, sup. or against a man for election bribery. *Rex* v. *Heydon*, 1 Bla. 351. or against overseers for an illegal rate. *Rex* v. *Lee*, cited in *Rex* v. *Purnell*, sup. But as informations in nature of a *quo warranto* appertain to civil rights, a member of a corporation filing one may inspect the corporation books. *Sed secus ut semb.* if the relator be a stranger, unless the title of a person in office be objected to on public ground. *Rex* v. *Brown*, 3 T. Rep. 574, (n.) And even when a member is relator, his inspection of all documents will be confined to the point in question. *Rex* v. *Babb*, 3 T. Rep. 579. *Benson* v. *Post*, cited 1 Wils. 240.

(*a*) Vide post. 269.

(*b*) If plaintiff makes profert he must produce the deed, and cannot give in evidence that it is destroyed, or in the hands of defendant, for to enable him to do so he must state it specially in his declaration. *Smith* v. *Woodward*, 4 East, 585.

enter;

enter; *(a)* the plaintiff sur-rejoined that *J. S.* did by deed give licence, without making a profert of the deed; this sur-rejoinder was allowed to be good, because the plaintiff's title was by assignment of the lease from *J. N.* and consequently the licence of *J. S.* is but a matter collateral to the assignment, and by consequence the deed must be intended to be well and legally made, though it be not shewn to the court.—*Walker* v. *Ballamie*, E. 1606. Cro. Jac. 102. *(b)*

But there is another difference, and that is where the deed is necessary *ex institutione legis*, and where it is necessary *ex provisione hominis*; for where the deed is necessary *ex institutione legis* there you must shew it; for it is repugnant that the law should require a deed, and not put you to shew that deed when it is made; as if you are obliged to shew the attornment of a corporation you must shew a deed, in as much as incorporate bodies by the rules of law cannot act but by incorporate instruments; therefore no attornment is shewn unless a deed be shewn also. *(c)* But where a deed is necessary *ex provisione hominis*, there when it is collateral, as in the case of a licence before mentioned, it need not be shewn; for the private act of the parties shall not controul the judgment of the law, that intends all such collateral matters without shewing.—*Bellamy's Case*, sup.

Nor can privies in estate take any advantage of a deed without shewing it; as if there be tenant for life, remainder in fee, and there be a release to him in remainder, tenant for life cannot take advantage of it without shewing the deed; for since the right passes merely by the deed, to say any person released without shewing the deed, would not be a good plea.—*Leyfield's Case*, 1610. 10 Co. 92. Vide *Co. Litt.* 267.

And to explain this matter further, a difference is to be taken between things that lie in livery and things that lie in grant; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant regularly a deed must be shewn.

Therefore a man may plead that *J. S.* infeoffed him without saying *per indenturam*, and yet give the indenture in evidence, because the feoff-

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(a) And alledged that the plaintiff assigned without licence.

(b) Lord *Mansfield* has ruled, that where it appears from *plaintiff*'s own evidence, that the supposed trespass was done in plaintiff's presence, or by his licence and authority, defendant may take advantage of it, without having pleaded a licence specially. But if plaintiff prove a *primâ facie* trespass defendant cannot give licence in evidence, without pleading specially. *Green Book*, 57, (b.)

(c) It was also held in *Bellamy's Case*, 6 Co. 38, that the licence need not be shewn, because it was executed, and had not continuance, *i. e.* it was *functo officio*.

ment

ment is made by the livery, and the indenture is only evidence of such feoffment. (2 *Rol. Abr.* 682. tit. *Evidence* D. pl. 5.) But if a man plead that *J. S.* infeoffed him by deed, it may reasonably be doubted, *whether [*251] he can give a parol feoffment in evidence, because he has bound himself up to a feoffment by deed.—*Co. Lit.* 281.

And though since the statute of frauds the ceremony of livery only is not sufficient to pass an estate of freehold or term of years, but there may be a deed or note in writing, yet it is not necessary to set out such conveyance in the pleadings, for they are as they were formerly, *feoffavit et demisit*,

A man may plead a condition to determine an estate for years without deed, for it begins without any livery, and therefore the party is not estopped by any notorious ceremony from averring the condition: but where a man sets out a feoffment, the other party may reply that it was by deed, and shew the condition, for then there is an estoppel against an estoppel, and so the matter is in equal balance, and therefore must be determined according to truth.—*Vide* post, 252.

Things that lie in grant are all rights; as fairs, markets, advowsons, and rights to land where the owner is out of possession; and as they cannot visibly be delivered over, therefore they must pass by the next sort of conveyance, that hold the second place in point of solemnity, and that is by grant under the hand and seal of the party.—*Co. Lit.* 225.

Now a person that claims any thing lying in grant must shew his deeds, or otherwise he must prescribe in the thing he pretends to, and the prescription being supposed immemorial, supplies the place of a grant.—*Dr. Leyfield's Ca.* H. 8 Jac. I. 10 Co. 92.

He also that has a particular estate by agreement of parties, must shew not only his own conveyance but the deeds paramount, for there can be no title made to a thing lying in agreement, but by shewing such agreement up to the first original grant.—*S. C. (a)*

But where any persons claim any particular estate by act in law, they may make their claim without shewing their deeds; as tenant in dower, or by elegit, or guardian in chivalry, may claim an estate in a thing lying in grant without shewing the deed, for when the law creates an estate, and yet does not give the particular tenant the property of the deeds, it must allow the estate to be demanded without them.—*S. C.*

So they may plead a condition without shewing the deed, because they claim an estate by act of law, and therefore are not estopped by the

(a) Care therefore should be taken to bind the grantor to shew the deeds to the court, when need should be. *S. C.*

act

act of livery, and therefore they may claim an estate defeated by the condition without a deed.—*Co. Lit.* 225. (b)

[252] But tenant by the curtesy cannot claim any estate lying in grant without the deed, because he has the property in, and custody of the deeds in right of his wife, and that property cannot be divested out of him during the continuance of his estate.—*Dr. Leyfield's Ca.* sup.

So also he cannot defeat an estate of freehold without shewing the deed, for the act of livery is an estoppel that runs with the land, and bars all people to claim it by virtue of any condition, without the condition appear in a deed, and since the custody of the deed resides with him he must shew the deed.—*Vide* ante, p. 251.

But where a person is an utter stranger to any deed, there in pleading he is not compelled to shew it. As if a man mortgage his land, and the mortgagee let the land for a year, reserving rent, and then the condition be performed, and the mortgagor re-enter; the lessee in bar of an action of debt may plead the condition and re-entry without shewing the deed, for the lessee was never entitled to the custody of the deed.

So if a man bring a *præcipe* against him, he may plead that he was only a mortgagee, and that the condition was performed, so that he has no longer seisin of the estate, and this without shewing the deed; for upon performance of the condition the property of the deed is no longer in the mortgagee, but it ought to be rebailed to the mortgagor.

So if in action of waste, or in discharge of the ancestor's rent, the tenant plead a grant of the reversion and attornment after, he need not shew such grant.

As no party shall take advantage of his own negligence in not keeping of his deeds, which in all cases ought to be fairly produced to the court; so his adversary shall not take any advantage in his violent detaining of them; for the one by the violent taking away of the deeds gives a just excuse to the other for not having them at command; (*Co. Lit.* 226) and no man can ever take advantage of his own injury, and therefore it is a good plea for one party to say, that the other entered and took away the chest in which the deeds were.—*Wymark's Ca.* M. 35 & 36 Eliz. 5 Co. 75.

Letters patent inrolled in the same court, or records of the same court, need not be profered to the court, but a deed inrolled must; for all records that are public acts, and that lie for the direction of that court in matters of judicature, must be taken notice of, and therefore they need

[*253] not be referred to with a *prout* * *patet per recordum*, for the court will take notice of the course and orders of the court upon reference to them. The deeds

deeds inrolled are no more than the private acts of the parties authenticated by the court, and they do not lie for the direction of the court, but take hold of the authority of the court to give them credit, and therefore the court does not take notice of them, unless they be pleaded. (*Co. Lit.* 225 (b).) But by 19 *Ann. c.* 18. where any bargain and sale inrolled is pleaded with a profert, the party to answer such profert, may produce a copy of the inrolment.

Since the term (to avoid entering the several continuances of business) is reckoned as one continued law day; therefore the deeds pleaded shall be in the custody of the law during the whole term, being the day wherein they are pleaded; and being then before the court, any body may take advantage of them; but since they belong to the custody of the party, if the deed be not denied, it shall go back to the party after the term is over, and then no body can take advantage of it without a new profert. Therefore the plaintiff in *K. B.* may take advantage of the condition of a deed in his replication, because it runs, *et prædict' A. dicit*, as of the same term; but he cannot take advantage in his replication of a deed in *C. B.* because they enter an imparlance to another term. (*Wymark's Ca.* sup. Co. Lit. 231. b.) But where the deed comes in and is denied, it remains in court till the plea is determined; therefore while it is tied up to one court, and is impossible to be removed, it shall be pleaded in another without shewing. And if on the issue of *non est factum* it be found against the deed, it shall be kept in court for ever, to hinder any more use being made of it.—*Fitch* v. *Wells*, H. 4 Ann. 1 Salk. 215.

In an action of debt upon bond, it is matter of substance to make a profert of the deed, because it is the contract on which the court ought to found their judgment, and therefore it ought to be exhibited to the court. (*Daubeny* v. *Banister*, T. 2 Jac. I. Cro. Jac. 32.) But it is not matter of substance to shew letters of administration, for whether they be legally granted or not belongs to the cognizance of the spiritual court, and therefore their legality cannot be weighed at common law.

Wherever the plaintiff is bound to make a profert, the defendant is by law entitled to *oyer*, nor can the court upon any pretence dispense with the giving of it.—*Soresby* v. *Sparrow*, E. 16 Geo. II. Str. 1186. *(a)*

Secondly, *Of giving deeds in evidence to the jury.*

And the general rule is, that the deed itself must be given in evi- [254] dence, and must be proved by one witness at the least. *(b)*

But

(*a*) As to where *oyer* of a counterpart is good *oyer*, vide *Read* v. *Brookman*, 3 T. Rep. 160.

(*b*) It has been held, however, that subscribing witnesses are not necessary to the validity of a deed. *Com.*

But there are some exceptions to the general rule of giving the deed itself in evidence, viz:

As to the first part of this rule.—1. Where the deed is proved to be in the hands of the opposite party, who upon being called upon refuses to produce it, a copy of it will be good evidence; (*Peterborough* v. *Mordaunt*, E. 1672. 1 Mod. 94.) but such copy ought to be proved by a witness who has compared it with the original, for otherwise there is no proof of its being a true copy.—*Eden* v. *Chalkill*, M. 13 Car. II. 1 Keb. 117. *(a)*

If the opposite party produce the deed on notice, it shall be read without any proof of the execution.—*Thompson* v. *Jones*, M. 18 Geo. III.

Where a will remains in chancery by the order of the court, a copy may be given in evidence, because the original is not in the power of the party. (*Rex* v. *Inhabitants of Middlezoy*, T. 27 Geo. III. 2 T. Rep. 41.) *(b)* So where it is proved, that the deed itself is destroyed by fire, a copy of it may be given in evidence; but perhaps in such case, if it came out in evidence that there are two parts executed, and the loss of one only was proved, a copy would not be admitted. (*Dr. Leyfield's Ca.* H. 8 Jac. I. 10 Co. 90.) So if it were proved, that the deed came into the hands of the defendant's brother, under whom the defendant claims, a copy ought to be read, even though the defendant have sworn in an answer in chancery that he has not got the original. (*Thurston* v. *Delahay*, Hereford Ass. 1744. *Pritchard* v. *Symonds*,

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Com. Dig. tit. *Fait*, B. 4. Et vide *Garrett* v. *Lister*, 1 Lev. 25. Therefore, if there be none, or if a subscribing witness, being called, deny seeing it executed. *Grellier* v. *Neale*, Peake N. P. 146. *Abbot* v. *Plumbe*, Dougl. 206. (216.) *Lowe* v. *Joliffe*, 1 Bla. 365; (which it is not necessary that he should see. *Park* v. *Mears*, 2 Bos. & Pull. 217;) or if it appear that a fictitious name has been put as a witness by the party who executed the deed. *Fassett* v. *Brown*, Peake N. P. 23; or that the person attesting was interested at the time, and so continues at the time of the trial. *Swire* v. *Bell*, 5 T. Rep. 371; or if one of two witnesses was administrator of the obligee and plaintiff in the action, and the other could not be found, the instrument itself appearing *primâ facie* to be sealed and delivered. *Cunliffe* v. *Sefton*, 2 East, 183. In these cases proof of the party's handwriting will be sufficient.

(*a*) If a deed be in the hands of an adverse party, or lost or destroyed (after notice to produce it), an examined copy may be produced, or parol evidence may be given of its contents. *Reed* v. *Brookman*, 3 T. R. 151. *Robinson* v. *Davies*, 1 Stra. 526. *Young* v. *Holmes*, 1 Stra. 70. But it must be first proved, that the original was genuine. *Goodier* v. *Lake*, 1 Atk. 446.

(*b*) According to *Gordon et al'* v. *Secretan*, 8 East, 548, this case has been over-ruled, and it appears that the production of a deed at the trial, by notice from the other party, does not supersede the necessity of proving it by a subscribing witness; and in *Wetherston* v. *Edginton*, 2 Camp. 94, it was held, that an agreement must be proved, as if it came from the party calling for it.

Hereford,

Hereford, 1744. *Bartlett* v. *Gawler*, T. 14 Geo. II. K. B.) And in these cases, if the party have no copy he may produce an abstract, nay even give parol evidence of the contents. And where possession has gone along with a deed many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence without being proved to be true, because in such case it may be impossible to give better evidence.—(*Sty.* 205, is here referred to, but there is no such point.)

And as to the second part of the rule; the deed must be proved to the jury by one witness at least, for though the deed be produced under hand and seal, and the hand of the party be proved, yet that is no full proof of the deed; for the delivery is necessary to the essence of the deed, and there is no proof of a delivery but by a witness who saw it. (*a*)

But

(*a*) By statute 26 *Geo.* III. *c.* 57, *s.* 38, bonds and other deeds, and writings, executed in the *East Indies*, may be given in evidence, on proof of the writing of the obligor, party or parties respectively, and of the witness or witnesses respectively, and that such witness or witnesses is or are resident in the *East Indies*.

If a subscribing witness go abroad after the execution of the deed, and be so at the time of the trial, or if he die, or become interested, proof of his hand-writing, as the next best evidence, must be given. *Coghlan* v. *Williamson*, 1 Dougl. 89. (93.) *Holmes* v. *Pontin*, Peake N. P. 99. *Barnes* v. *Trompowsky*, 7 T. R. 265. *Adams* v. *Kerr*, 1 Bos. & Pull. 360. *Prince* v. *Blackbourne*, 2 East, 250. *Jones* v. *Mason*, 2 Stra. 833. *Goss* v. *Tracey*, 1 P. W. 289. *Godfrey* v. *Norris*, 1 Stra. 34. But in all these cases it has been usual; and in *Adams* v. *Kerr*, sup. it was held necessary to prove the hand-writing of the party to the deed also. Vide *Wallis* v. *Delancey*, 7 T. Rep. 266, n. (c.) A foundation, however, must always be laid, by shewing the situation in which the party stands. Vide *Peake's Evid.* 100, 101.

The subscribing witness to a deed, being a Frenchman, generally resident in *France*, Lord *Kenyon* received the deed in evidence, on proof of his hand-writing; but he said, if the witness had been an Englishman, occasionally absent in *France*, such proof could not have been admitted. *Holmes* v. *Pontin*, sup.

But if a subscribing witness is living, and able to attend, he alone must prove the deed, and his evidence cannot be dispensed with by any confession of the deed offered in proof either against him, *Johnson* v. *Mason*, 1 Esp. N. P. Rep. 89; or against a third person. *Abbott* v. *Plumb*, Dougl. 206. (216.) *Laing* v. *Raine*, 2 Bos. & Pull. 85. Nor is the admission of the execution of a bond, by answer to a bill filed to obtain it, sufficient, without accounting for the absence of the witness. *Call* v. *Dunning*, 4 East, 53. But when a man, on his examination before commissioners of bankruptcy, produced the bankrupt's bill of sale, and, in his deposition, admitted the execution of it, this will be held sufficient evidence in trover by the assignees for the goods. *Boulcs* v. *Langworthy*, 5 T. Rep. 366.

Furthermore, upon the subject of the execution of deeds, and of the proof thereof, by the subscribing witnesses, it has been determined, that an admission of the signature of the attesting witness to a bond, admits all he would have proved (presumptively,) and therefore is an admission of the delivery by the defendant. *Milward* v. *Temple*, 1 Camp. 375. Et vide *Call* v. *Dunning*, 4 East, 53. *Cunliffe* v. *Sefton*, 2 T. R. 183.

But to this part of the rule there are likewise exceptions. As where the witness to a deed being subpœned did not appear, but to prove it the party's deed they proved an indorsement, reciting a proviso within, that if

183. *Prince* v. *Blackbourn*, ibid. 250.

In *Phipps* v. *Parker*, 1 Campb. 412, an instrument purported to have been executed by two persons in the presence of *I. S.* *I. S.* swore it had not been executed by either of them in his presence. It was then proposed to prove the execution of the deed by evidence of the hand-writing of the two, and by shewing that they had subsequently acknowledged it to be their deed. *Per* Lord *Ellenborough*. The policy purports to have been executed in the presence of the witness; if it was not so, the conclusion is, that it was never executed as a deed, although it may have been signed by these two. Nor can I admit evidence of their acknowledgment, since the attestation points out the specific mode in which the execution is to be proved. But he allowed that in such a case as *Lowe* v. *Jolliffe*, 1 Bla. 365. where the witnesses conspired to perjure themselves, other evidence will be admitted to prove the fact. Here was no imputation on the witness.

According to 19 *Car.* II. c. 6. with respect to leases dependent on lives, and also according to the statute of Bigamy (1 *Jac.* I. c. 11.) the presumption of the duration of life with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living. *Doe* v. *Jesson*, 6 East, 85.

Strict proof is required of the diligent search after an attesting witness, and to no effect, before the hand-writing of the witness can be proved. In this case the attesting witness was an attorney, and they proved he had disappeared a year ago, and had not since been heard of; that he was not to be heard of at his office, but no evidence was given of inquiry at the house he had occupied. Held that this was not enough. Then they proved a commission of bankruptcy had been taken out, to which he never appeared. And Lord *Ellenborough* said, this was sufficient to let in proof of the hand-writing, as he would presume, from his not surrendering, that he was out of the kingdom. *Wardell* v. *Fermor*, 2 Campb. 282.

If the name of a fictitious person be put as a subscribing witness, proof of the party's hand-writing is sufficient evidence of its execution. *Fasset* v. *Brown*, Pea. Ca. 23.

Upon a subscribing witness to a deed denying she had seen it executed, evidence was admitted of the hand-writing of several of the parties to it, and Lord *Kenyon* directed the jury to presume the sealing and delivery. *Grellier* v. *Neale*, ib. 146. If there be a subscribing witness to a deed, who is living, and in a situation to be examined, the execution can only be proved by his testimony, and the acknowledgment by the party will be insufficient; and even an admission of the execution of a bond in an answer to a bill in chancery, filed for that purpose, will be insufficient, unless it be proved that the subscribing witness had been searched for and could not be found. *Johnson* v. *Mason*, 1 Esp. N. P. Ca. 89, cited in *Phipps* v. *Parker*, 1 Campb. 414 n.

It appeared that a subscribing witness to a bond was in *Scotland*, and that a letter was sent by post to him by plaintiff, requesting his attendance on the trial; that an answer was received from him, stating his inability to attend on account of illness; the hand-writing was not proved, but a witness, who had corresponded with him, proved it by that kind of knowledge. The plaintiff's attorney also proved he had given directions to plaintiff's agent in

if he paid such a sum the deed should be void, and acknowledging that the sum was not paid, and by the indorsement he expressly owned it to be his deed, and upon this it was read.—*Dillon* v. *Crawley*, E. 13 W. III. 12 Mod. 500.

So it has been holden, that a deed to lead the uses of a fine or recovery may be read without proof of its being executed; (*Glascock* v. *Sir William Warren*, H. 12 W. III.) the reason of which seems to be, that, by the fine being levied, it appears the parties intended to convey the land to some use or other, and therefore the law will admit of slight proof to shew what use was intended; since the slightest proof without other to contradict it, will turn the presumption on that side; and therefore though a counterpart of a deed without other circumstances be not evidence in other cases, (*Anon.* M. 1704. Salk. 287.)*(a)* yet it has been holden so to be in the case of a fine and recovery. However, in a case, reserved from *Hereford* assizes by Mr. Justice *William Fortescue*, all the judges were of opinion that such a deed to lead the uses of a fine [255]

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in town to inquire for the witness, and the inquiry had been without effect. The above-mentioned letter to the witness was dated *July* 29th, 1810. The answer was dated *August* 2d. The place of residence was *Dysart*, in *Scotland*, 430 miles from *Cambridge*, and the assizes at *Cambridge* were on the 14th of *August*. Upon this evidence Sir *James Mansfield* let in secondary evidence of the hand-writing of the subscribing witness. *Anderson* v. *Stephens*, Cambridge Assizes, 1810.

Though a deed be cancelled, it can only be proved by a subscribing witness, if there be one. *Breton* v. *Cope*, Pea. Ca. 32.

If an attesting witness swear that he did not see the deed executed, it is to be treated as if there was no attesting witness, and evidence of the hand-writing of the party is sufficient proof of its execution. *Per Lawrence*, J. in *Fitzgerald* v. *Elsee*, 2 Camp. 635. So in the case of a promissory note. *Lemon* v. *Dean*, ib. (n.)

(*a*) It has been said, that a counterpart cannot be given in evidence, without giving some account of the original. Vide *Anon.* Salk. 287, sup. and it is the general practice to give a tenant notice to produce his lease in an action at the suit of his landlord. But Mr. *Peake* (Law of Evid. 98, (n.)) considers, that the duplicate of a deed, executed by the party himself, should be received as evidence of the whole contents *against him;* though, otherwise, if the demise came in question in an action against the lessor, or other person. So in an ejectment by a landlord against his tenant, plaintiff proved the tenant's execution of the counterpart, but did not give him notice to produce the original; wherefore defendant's counsel objected to the counterpart being read. But *Lawrence*, J. said, it was sufficient, as an acknowledgment by the defendant, under his hand and seal, that the lessor of the plaintiff had demised to him, and that he had become tenant under the terms mentioned in the counterpart; and a motion for a new trial in this case was afterwards refused. *Roe*, ex dem. *West* v. *Davies*, 7 East, 363.

must

must be proved, and therefore it seems, as if the case in *Salk.* likewise were not law.—*Griffith* v. *Moore.*

If the deed be thirty years old it may be given in evidence without any proof of the execution of it: however, there ought to be some account given of the deed, where found, &c. And if there be any blemish in the deed by razure or interlineation, the deed ought to be proved, though it were above thirty years old, by the witnesses if living, and if they be dead, by proving the hand of the witnesses, or at least one of them, *(a)* and also the hand of the party, in order to encounter the presumption arising from the blemishes in the deed, and this ought more especially to be done, if the deed import a fraud; as where a man conveys a reversion to one, and after conveys it to another, and the second purchaser proves his title; because in such case the presumption arising from the antiquity of the deed is destroyed by an opposite presumption; for no man shall be supposed guilty of so manifest a fraud.—*Chettle* v. *Pound,* Heref. Assize, 1701. Gilb. Evid. 103.

It has been said, that a deed of bargain and sale inrolled may be given in evidence, without proving the execution of it, because the deed by law does need inrolment, and therefore the inrolment shall be evidence of the lawful execution: but that where a deed needs no inrolment, there, though such deed be inrolled, the execution of it must be proved; because since the officer is not intrusted by the law to inrol such deed, the inrolment will be no evidence of the execution, and the following cases are cited in support of this doctrine. (*Page's Case,* 29 & 30 Eliz. 5 Co. 54. *Eden* v. *Chalkill,* M. 13 Car. II. 1 Keb. 117. *Goodson* v. *Jones,* E. 1655. Sty. 445.) However, the law may well be doubted, notwithstanding that deeds of bargain and sale inrolled have frequently in trials at *Nisi Prius* been given in evidence without being proved. In
[*256] * support of which practice, the case of *Smartle* v. *Williams,* in Salk. 280, is much relied on; but that case is wrong reported, for it appears by *S. C.* in 3 *Lev.* 387, that the acknowledgment was by the bargainor, and so it is stated in *Salk.* MS. besides, it appears from both the books that it was only a term that passed, and consequently it was no inrolment within the statute.

If divers persons seal a deed, and one of them acknowledge it, it may be inrolled, and may ever after be given in evidence as a deed inrolled; but it would be of very mischievous consequence to say there-

(*a*) Evidence of a dying confession, by the subscribing witness, to a deed, may be given to prove it forged. *Aveson* v. *Lord Kinnaird,* 6 East, 195.

fore

fore that a deed inrolled upon the acknowledgment of a bare trustee, might be given in evidence against the real owner of the land without proving it executed by him. (*Thurle* v. *Madison*, M. 1655. Sty. 462.) However, that has been the general opinion, and it seems fortified in some degree by 10 *Ann. c.* 18, before taken notice of.

On the other hand it seems as absurd to say that a release, which has been inrolled upon the acknowledgment of the releasor, should not be admitted in evidence against him without being proved to be executed, because such release does not need inrolment; and, in fact, such deeds have often been admitted; and that was the case of *Smartle* v. *Williams* the deed did not need inrolment, yet being inrolled on the acknowledgment of the bargainor, it was read against him without being proved.

A deed may be given in evidence on a rule of court by consent, without being proved; for the consent of parties is conclusive evidence, as the jury are only to try such facts whereiu the parties differ.—*Anon.* 17 Car. II. 1 Sid. 269 (n.)

Though a deed of feoffment be proved to be duly executed, yet that is not sufficient to convey a right, unless livery of seisin be likewise proved. However, where the deed is proved, and possession has always gone with the deed, there livery shall be presumed: but if possession have not gone along with the deed, the livery must be proved; for since livery is to give possession on the deed, where there is no possession, the presumption is, that there was no livery, and consequently livery must be proved to encounter that presumption. *(a)* If the jury find a deed

(*a*) So if a bond, above 30 years old, be found amongst the papers of an intestate, *Forbes* v. *Whale*, Peake's Evid. 113; or of a public company, *Chelsea Waterworks Company* v. *Cowper*, 1 Esp. N. P. Ca. 275, the due execution will be presumed from the place where it was found, if there be no erasure or alteration in it; and in *Rex* v. *Ayton Inhabitants*, 5 T. Rep. 259, the bare production of a parish certificate, 30 years old, was allowed. *Sed secus*, where a contrary presumption is raised by circumstances, as in *Chettle* v. *Pound*, *ante*, 255 *a*, and *Howell* v. *Lloyd*, Peake's Evid. App. lxxxix. 3d edit.

So the *recital* of one deed in another has been deemed sufficient evidence of the recited deed, against the party to the deed, in which it was recited, or any claimants under him, but not as against a stranger. *Ford* v. *Grey*, 1 Salk. 286. *Fitzgerald* v. *Eustace*, Gilb. Evid. 100. In some cases, however, a recital has been deemed but secondary evidence against the party to the deed, reciting, and admissible only when the recited deed was shewn to be lost, or some other good reason for not producing it. Vide *Cragg* v. *Norfolk*, 2 Lev. 108. *Ford* v. *Grey*, 6 Mod. 45. The general received opinion now, however, is, that even the admission of a deed, on oath, will not prevent the necessity of giving regular evidence of its execution. Vide *Johnson* v. *Mason*, 1 Esp. N. P. Ca. 89. *Abbott* v. *Plumbe*, Dougl. 206. (216.) *Laing* v. *Raine*, 2 Bos. & Pull. 85.

of

of feoffment, and that possession has gone along with the deed, yet, unless they expressly find a livery, the court cannot adjudge it a good
[1257] conveyance; for they are only judges of what * is law and have nothing to do with any probability of fact; therefore they cannot conclude that there was a lawful conveyance, unless the jury find a delivery of the fee.

If the issue be *feoffavit vel non*, and a deed of feoffment and livery be proved, it cannot be given in evidence that it was made by covin to defraud creditors; for it is a feoffment *tiel quel*, and the covin ought to have been specially pleaded; *aliter* if the issue be seised or not seised: for he remains seised as to creditors notwithstanding the feoffment.—*Humberton* v. *Howgill*, H. 12 Jac. I. Hob. 72.

This leads me to take notice of the several acts of parliament that have been made to prevent fraudulent conveyances, and the determinations thereupon; that it may be seen by what evidence a conveyance may be defeated after the execution of it has been proved.

Fraudulent Conveyances.—By 13 *Eliz. cap.* 5, for the avoiding and abolishing of any feigned covenous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, contrived to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs; it is enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands and tenements, hereditaments, goods and chattels, by writing or otherwise, and all and every bond, suit, judgment, and execution, had or made for any intent or purpose before declared, shall be taken (only as against them whose action, &c. by such covenous practice is disturbed, delayed, or defrauded) to be void; any pretence, colour, feigned condition, expressing of use or other matter, or thing to the contrary notwithstanding; provided it shall not extend to any estate, or interest in lands or tenements, goods, or chattels, had, made, conveyed, or assured upon good consideration, and *bonâ fide* to any person not having at the time of such conveyance or assurance, notice of such covin, fraud, or collusion. *(a)*

It

(a) As to sales void by this statute, it has been held, that where a man makes a bill of sale, or other conveyance of his effects, and no possession accompanies the transfer, it shall be deemed a fraud, and trover will lie for the goods so sold. *Edwards* v. *Harben*, 2 T. Rep. 595. Even though such an assignment be made for the benefit of creditors signing a deed of composition. *Bamford* v. *Baron*, 2 T. Rep. 594, (n.) And if, after the death of the assignor, in possession of the goods, the

It seems settled that no conveyance shall be deemed fraudulent within the statute, unless it can be proved that the person was indebted at the time, or very near, so that they may be connected together, though there have been determinations to the contrary both by *Sir J. Jekyll*, and *Fortescue*, M. R.—*Walter* v. *Burrows*, in Canc. 1745. *Taylor* v. *Jones*, 1743. 2 Atk. 600. *(a)*

A. being

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the assignee sell them, he thereby makes himself executor *de son tort*. *Edwards* v. *Harbin*, sup. Et vide *Hawes* v. *Leader*, post, pa. 258 *a*. In the above cases, however, the conveyance was absolute, but even had the deed been conditional, the vendors remaining in possession would have avoided it. *Per Buller*, J. in S. C.

So where the want of immediate possession is consistent with the deed, as where, on the marriage of Lord *M.* his household goods were (*inter alia*) conveyed to trustees in strict settlement, and a creditor afterwards took them in execution, it was held, that the statute was only intended to operate against frauds, and that possession alone was no evidence of fraud; besides, as Lady *M.*'s fortune was adequate to pay all her Lord's debts, the goods were fairly protected by this settlement. *Cadogan* v. *Kennet*, Cowp. 432, and *Foley* v. *Burnell*, there cited.

So where some cows were made subjects of a marriage settlement, they were held not liable to the husband's debts. *Haselinton* v. *Gill*, cited 2 T. Rep. 597; but in a full report of S. C. in 3 T. Rep. 620, (n.) Lord *Mansfield* said, that the courts had gone every length to protect the personal property of the wife, in cases clear of fraud, where trustees were interposed *before* marriage, but where the conveyance is made *after* marriage, it is void against creditors, *S. C.*; unless the portion is paid at the time, or where the settlement is made after marriage, in consideration of a portion paid before, as *White* v. *Thornborough*, post, p. 259.

But an assignment of a ship at sea, is not void for want of possession, for the delivery of the grand bill of sale is a delivery of the ship itself. *Atkinson* v. *Maling*, 2 T. R. 462. Yet an absolute bill of sale of a ship at sea, is void under 26 *Geo.* III. *c.* 60. *s.* 17, unless there has been a registry of the ship, and a certificate thereof be recited in the bill of sale, even though the vendee has given an undertaking to restore the ship on a certain day, on repayment of the money advanced on her credit. *Rolleston* v. *Hibbert*, 3 T. R. 406.

(a) One being indebted by settlement before marriage, in consideration of such marriage, and of £10,000, his wife's fortune, (which was supposed to be more than the amount of his debts), conveyed all his real estates, household furniture, &c. to trustees, to the uses of his marriage settlement, which was approved by a master in chancery, of which his lady was a ward. This conveyance was held not fraudulent against a creditor, at the date of the settlement. *Cadogan* v. *Kennet*, sup. Vide *Jarman* v. *Woolloton*, 3 T. R. 618. *Haselinton* v. *Gill*, sup.

One *S.* recovered a judgment against *C.* in E. 1791; and in E. 1792, judgment was affirmed on a writ of error brought by him: on 7th *May*, costs were taxed, and on same day, *C.* wrote to *S.* for further time, which was refused: on the next day, *C.* knowing that *S.* would issue execution, sent to plaintiff, who was also a creditor, and executed a warrant of attorney to him, on which judgment was immediately entered, and a *fi. fa.* issued, which was delivered to defendant (the sheriff) two hours before a *fi. fa.* from *S.* was lodged. The sheriff levied under *S.*'s writ, and returned *nulla bona* to the plaintiff's, who thereupon

 brought

A. being indebted to *B.* in £400, and to *C.* in £200, *C.* brings debt,
[*258] and pending the writ, *A.* makes a secret conveyance of * all his goods and chattels to *B.* in satisfaction of his debt, but continues in possession, and sells some sheep, and sets his mark on others; and it was holden to be fraudulent within this act. 1. Because the gift is general. 2. The donor continued in possession, and used them as his own. 3. It was made pending the writ, and it is not within the proviso; for though it is made on a good consideration, yet it is not *bonâ fide*. But yet the donor continuing in possession, is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money.—*Twyne's Case*, M. 44 Eliz. 3 Co. 83. *(a)*

If *A.* make a bill of sale to *B.* a creditor, and afterward to *C.* another creditor, and deliver possession at the time to neither, and afterward *C.* get possession, and *B.* take them from him, *C.* cannot maintain trespass, because, though the first and second bill of sale are both fraudulent against creditors, yet they both bind *A.*, and *B.*'s is the elder title. (*Baker* v. *Lloyd, Per Holt*, C. J. 1706.) *(b)* S. P. in *Cowell* v. *Lane*, and others, cor. *Buller*, J. at *Worcester*, September, 1783, where the action brought by *C.* was trover, and he held it would not lie.

No person can take advantage of this statute but the creditors themselves, and therefore, where *A.* made a fraudulent gift of his goods to *B.* and then died, *B.* brought an action against *A.*'s administrator for the goods, and the court held he could not plead the statute, or maintain the possession of the goods, even to satisfy creditors: but the cre-

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brought his action for a false return, and therein the question was, whether the plaintiff's judgment was void by the statute. *Per cur.* such a preference may be given to a fair creditor, in the same manner as an executor may confess a judgment to one creditor, pending an action by another; and held, that the rule concerning creditors of unequal degrees, did not hold *inter vivos*. Judgment for plaintiff. *Holbird* v. *Anderson*, 5 T. Rep. 235.

(a) Plaintiff purchased of the sheriff under an execution, and then allowed the original owner to continue in possession. Plaintiff was not originally a creditor. *Per* Lord *Eldon*. This is not within the principle of *Twyne's Case* (which is a leading case on this point), and the other cases where the parties stood in the relation of the debtor and creditor, and where their object was to defeat the other creditors. *Per Heath*, J. This case is clearly distinguished from *Twyne's Case*, there being great notoriety in the transaction. Now it is to be observed, that Lord *Coke*, in *Twyne's Case*, recommends, that gifts in satisfaction of a debt by one who is indebted to others, also should be made in a public manner before the neighbours, and not in private, for secrecy is a mark of fraud.

(b) Here they are in *pari passu*, because possession is delivered to neither.

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ditors may charge the vendee as executor *de son tort.*—*Hawes* v. *Leader*, H. 8 Jac. I. Cro. Jac. 270.

Judgment against *T. K.* who died, and *scire facias* against the tenants, the sheriff returned *B.* a ter-tenant, who came in and pleaded, that *T. K.* enfeoffed him long before the judgment, *absque hoc* that he was seised at the time of the judgment, or at any time after, whereupon issue, and the jury find the feoffment, but further add, that it was by covin to defraud the plaintiff and other creditors, and judgment for the plaintiff; for *T. K.* remained still seised as to the creditors notwithstanding the feoffment; but if the issue had been taken directly, enfeoffed or not enfeoffed, it had been found against the plaintiff; for it is a feoffment *tiel quel.*—*Humberton* v. *Howgill*, H. 12 Jac. I. Hob. 72.

A settlement being voluntary is only an evidence of fraud, yet it has always been reckoned sufficient in respect to creditors; but where a father and son join in making a settlement, though after marriage, yet it shall be taken to be a bargain, and * therefore will of itself make a [*259] consideration, but that must be where neither could make such settlement alone.—*Hamond* v. *Russel*, M. 12 Geo. II. in Canc.

So a settlement after marriage, the portion being paid at the same time, is good against creditors. (*White* v. *Thornborough*, M. 1715. Pre. in Ch. 426.) So it has been holden, that a settlement after marriage, recited to be in consideration of a portion secured, where in fact such portion has been secured, shall be presumed to be in pursuance of an agreement previous to the marriage, though no proof of it, and so will be good against creditors.—*Anon.* M. 1699. ib. 101.

R. surrenders a copyhold to his son; afterwards on a treaty of marriage for his son, he tells the wife's friends this copyhold was settled, in consideration of which and some leasehold lands the marriage was had, and two thousand pounds paid as a portion; and upon this the surrender was holden not to be voluntary or fraudulent as against creditors.—*Kirk* v. *Clark*, H. 1708. ib. 275.

The wife joined with the husband in letting in an incumbrance upon her jointure and barring the intail, and then the uses were limited to the husband for life, remainder to the wife for life, remainder to the sons in tail, remainder to the daughters in tail, who were not in the former settlement; and it was holden that the daughters were not purchasers, so as to shut out a judgment creditor, though the wife's parting with her jointure had been a good consideration to them if it had been so expressed.—*Ball* v. *Burnford*, T. 1700. ib. 113.

A. brought an action against *M.* for lying with his wife; *M.* before judgment made a conveyance of his land in trust for payment of debts

mentioned in a schedule. *A.* recovered £5000, and brought a bill to be relieved against the deed as fraudulent, but it was holden not to be so, either in law or equity; for this being a debt founded *in malitia*, it was conscientious to prefer his real creditors before it.—*Lewkner* v. *Freeman*, Eq. Ca. Abr. 149.

Where the heir made a fraudulent conveyance to defraud his father's creditors, it was holden that the creditor might take advantage of this statute upon the issue *riens per discent*. However, since the 3 & 4 *W. & M. c.* 14. this point cannot come in question.—*Gooch's Case*, M. 32 & 33 Eliz. 5 Co. 60. *(a)*

The next statute to be taken notice of is 27 *Eliz. c.* 4. which enacts that every conveyance, *&c.* of, in, or out of any lands, *&c.* had or made for the intent or purpose to defraud and deceive such persons as shall *purchase* in fee, for life or years, the same lands, *&c.* shall be deemed
[*260] only as against that person, * and those claiming under him, to be void. Provided, it shall not extend to impeach any conveyance, for good consideration, and *bonâ fide*. And if any person shall make any conveyance with a clause of revocation, and after such conveyance shall bargain, sell, convey, or charge the same land for money or other good consideration paid or given, (the first conveyance, *&c.* not by him revoked according to the power reserved) the former conveyance, *&c.* as against the said bargainees, vendees, *&c.* shall be deemed void; provided that no lawful mortgage made *bonâ fide*, and without fraud, upon good consideration, shall be impeached by this act.

Upon this statute it hath been holden, that if a man having a future power of revocation sell the land before the power commences, yet it is within the act. (*Twyne's Ca.* M. 44 Eliz. 3 Co. 82.) So if the power of revocation be reserved to be with the consent of *A.* who is one within his power.—*Buller* v. *Waterhouse*, H. 28 & 29 Car. II. T. Jo. 94.

No purchaser shall avoid a precedent conveyance for fraud or covin, but he who is a purchaser for money or other valuable consideration.—*Twyne's Ca.* sup. *(b)*

Tenant

(a) The heir must have assets in fee-simple by descent, and not in fee-tail, or by any conveyance, and the land described must be in the possession of the heir at the time of the action brought, for if, after the death of the ancestor, he sold the lands, the heir was not liable, but it is now otherwise. All devises of lands to defraud creditors are void, and the party, or his heir, may have an action against the heir of the obligor and the devisee jointly; where the heir is such, he is considered the debtor in the *debet* and *detinet*, but an executor or administrator in the *detinet* only. *Martin* v. *Martin*, 1 Ves. 212.

(b) It is not necessary it should be for money, but it must be a fair *bonâ fide* transaction. Vide *Doe*, d. *Watson* v. *Routledge*, Cowp. 705, in which

Tenant in tail articled to settle his land in strict settlement; his wife dying, and he, having only daughters, levied a fine and declared the uses to himself for life, with power to make a jointure, remainder to his first and other sons in tail; afterwards he married and executed the power as to the jointure; but shewing the deed made no settlement on the issue, had a son, and died; the daughters brought a bill to have the articles carried into execution, and it was so decreed; for the son cannot be considered as a purchaser, there being no particular contract to make him so. —*White* v. *Sampson*, Canc. 1746.

Whatever conveyance is fraudulent against creditors, by 13 *Eliz.* will be so against subsequent purchasers; for the 27 *Eliz.* has always received the most liberal construction.

The subsequent purchaser having notice of such conveyance is of no consequence, for the statute expressly avoids such conveyance.—*Gooch's Ca.* M. 22 & 23 Eliz. 5 Co. 60.

A deed, though it be fraudulent in its creation, yet by matter *ex post facto* may become good; as if one makes a fraudulent feoffment, and the feoffee make a feoffment to another for valuable consideration, and afterwards the feoffor for valuable consideration make a second feoffment.—*Prodgers* v. *Langham*, E. 15 Car. II. 1 Sid. 134. *Smartle* v. *Williams*, 6 W. & M. 3 Lev. 387.

If the brother have in his hands any of his sister's money, and refuse [261] to pay it to her husband, unless he will make a settlement upon her, such settlement will not be fraudulent.—*Brown* v. *Jones*, M. 1744.

A mother, on her eldest son's marriage, gave up an annuity issuing out of the whole estate for an annuity of the like amount issuing out of part of the estate only; but which was clearly sufficient to pay the annuity; this is a sufficient consideration to prevent the limitations in the eldest son's marriage settlement to his brothers, in default of issue of

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which case it was held that a settlement is not void by this statute against a subsequent purchaser, merely because it is voluntary, unless it is also covinous and fraudulent, as a surrender of a copyhold estate to the use of the surrenderor for life, remainder to a nephew, was held good, the surrenderor appearing not to be indebted at the time, nor any fraud being shewn.

So in a case, cor. *Hardwicke*, C. where a woman had an estate, and having children by a former husband, she made a voluntary settlement, (in contemplation of a second marriage) in favour of such children. Afterwards her husband prevailed on her to join in a sale of this estate for a valuable consideration, and thereon a question arose, whether this settlement was void. But the court held that her doing a rational act, without a view to defeat any body, would not render the settlement fraudulent, though it was absolutely voluntary. *Neusted* v. *Searle*, cited *per Mansfield*, C. J. in the above case, Cowp. 708.

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himself, being fraudulent against a subsequent purchaser.—*Hamerton* v. *Mitton*, C. B. M. 8 Geo. III.

If the father make a fraudulent lease of his land, in order to deceive the purchaser, and die before he makes any conveyance, and afterwards his son convey to *J. S.* for valuable consideration, *J. S.* shall avoid the lease.—*Burrell's Ca.* E. 5 Jac. I. 6 Co. 72. (b)

Upon not guilty in trespass the defendant gave in evidence articles by which Sir *Robert Hatton* (under whom the plaintiff claimed as heir) sold to him three hundred of the best trees in such a wood, to be taken between such a time and such a time, and that he within the time took the trees; upon which the plaintiff proved that Sir *Robert* was only tenant in tail; but this being a voluntary settlement of Sir *Robert*'s own, *Jones*, C. J. held clearly that this sale, being proved to be for a valuable consideration, bound the heir as a case within this act; besides, the settlement was with a power of revocation, and the plaintiff was nonsuited.—*Hatton* v. *Neale*, in Surry, 1683.

The next statute is 3 & 4 *W. & M. c.* 14. and that enacts, that all wills, dispositions, and appointments of any lands, *&c.* shall be deemed, as against any creditor of the devisor, to be fraudulent and of none effect: with a proviso that any devise or disposition for the raising or payment of any just debt or any portion for any child, other than the heir at law, in pursuance of any marriage contract, or agreement in writing *bonâ fide* made before marriage, shall be in full force.

A tenant for life, remainder to his first and other sons in tail, remainder to his own right heirs for ever, entered into a bond and died, his son entered, devised away the estate, and died without issue. This devise of the reversion was holden to be within this act, for the heir is debtor, being bound in the bond.—*Kynaston* v. *Clarke*, in Canc. 1741.

If land be devised to the heir for payment of debts, he ought not to plead *riens per discent*, for notwithstanding the devise he is in by descent. —*Allam* v. *Heber*, T. 21 Geo. II. Stra. 1270.

[262] By 1 *Jac.* I. *c.* 15. *s.* 5. it is enacted, that if any person, who shall afterwards become a bankrupt, shall convey or cause to be conveyed to any of his children, or other person, any lands or chattels, or transfer his debts into other mens' names, except upon marriage of any of his children, (both the parties married being of the years of consent), or some valuable consideration, the commissioners may convey or dispose thereof the same as if the bankrupt had been actually seised or possessed, and such sale or disposition of the commissioners shall be good against the bankrupt, and such children and persons, and all other claiming under them.

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The 21 *Jac.* I. *c.* 19. *s.* 11. recites, that many persons before they become bankrupts convey their goods upon good consideration, yet still keep the same, and are reputed owners thereof, and dispose of the same as their own; and therefore enacts, that if any person shall become bankrupt, and at such time shall, by the consent and permission of the true owner, have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, the commissioners may dispose of them for the benefit of the creditors.

Upon this clause it has been holden, that possession of lands being no proof of title as possession of goods is, a mortgagor continuing in possession is not within this clause if he deliver up the title deeds: but a mortgage of goods, where possession does not go along with the sale, is within it, unless it be a *chose en action*, and there, as possession cannot be delivered, delivery of the muniments and means of reducing it into possession is sufficient: for the delivery of the muniments is in law a delivery of the thing itself; as a delivery of the key of a warehouse is a delivery of the goods in it; but things fixed to the freehold, till separated, are part of the freehold, and therefore of them a mortgage will be good without a delivery.—*Ryal* v. *Rolle*, H. 23 Geo. II. in Canc. 1 Wils. 260. *(a)*

Note; There may be a delivery from one parcener to another, or of things in parcenary to a third person.

Goods left in the bankrupt's possession for safe custody only seem not to be within this clause. So goods left with the bankrupt to sell: for one who deals by commission, can gain no credit by his visible stock.—*Hartop* v. *Hoare*, E. 1743. 3 Atk. 43. 53. *(b)*

Wills.—By the statute of frauds, all devises of land must be in writing, and signed by the party devising the same, or by some other *person in his presence, or by his express directions, and attested and subscribed in the presence of the devisor by three or more credible witnesses. *(c)* [*263]

(*a*) Vide etiam *L'Apostre* v. *Le Plaistrier*, 1 P. W. 316. *Copeman* v. *Gallant*, ibid. 314. *Bucknall* v. *Roiston*, Pre. in Ch. 285.

(*b*) Vide *Meggott* v. *Mills*, 1 Raym. 286. *Jacob* v. *Shepherd*, cited 2 P. W. 431.

(*c*) The same point was decided in *Davy* v. *Smith*, 3 Salk. 395, and *Casson* v. *Dade*, 1 Bro. Ch. Ca. 99, where the testatrix was in a carriage when the will was attested in an attorney's office, through the window of which she might see what passed; but if it appears that the testator could not see the witnesses attest, the will is void, though they retire for the purpose at his request. *Eccleston* v. *Petty* or *Speke*, Carth. 79. Comb. 156. 1 Show. 89. Holt, 222. *Broderick* v. *Broderick*, 1 P. W. 239. *Machell* v. *Temple*, 2 Show. 228. Et vide *Longford* v. *Eyre*, 1 P. W. 740. So if the testator, though present at the time of the attestation, be insensible, it is insufficient. *Right*, ex dem. *Cater* v. *Price*, 1 Dougl. 229. (241.)

If

If a will be attested by two witnesses, and afterwards the testator make a codicil, which he declares to be part of his will, and that is likewise attested by two witnesses, yet it will not be a good will within the statute. (*Lea* v. *Libb*, 1 W. & M. Carth. 35.) But if a man publish his will in the presence of two witnesses, who sign it in his presence, and a month after he send for a third witness, and publish it in his presence, this will be good.—*Jones* v. *Lake*, H. 16 Geo. II. *Anon.* T. 34 Car. II. 2 Ch. Ca. 109. S. P.

Lord Chief Justice *Holt* appears to have been once of opinion, that it was necessary that the testator should sign the will in the presence of the witnesses; but it seems to have been since settled to be sufficient for him to own it before them to be his hand.—*Lea* v. *Libb*, T. 1 W. & M. Show. 69. *Dormer* v. *Thurland*, H. 1728. 2 P. W. 509. *Stonehouse* v. *Evelyn*, E. 1734. 3 P. W. 254.

The statute requires three witnesses to one single act of execution, and not three several executions before a single witness to each only. Therefore if a man acknowledge his seal and hand-writing before three several witnesses, this will be a good execution within the statute, because the acknowledgement to all amounts to but one execution: but if he actually sign and seal the will every time before each witness separately, so as to make each a distinct execution, that will not be good.—*Ellis* v. *Smith*, in Canc. 15th May, 27 Geo. II. cor. *Lord Chancellor, Master of the Rolls*, and *two Chief Justices*. (*a*)

The statute requires attesting in the testator's presence, to prevent obtruding another will in the place of the true one. But it is enough if the testator might see, it is not necessary he should actually see them sign; therefore where the testator had desired the witnesses to go into another room seven yards distance to attest it, in which there was a window broken, through which the testator might see them, it was holden good. So if the testator being sick should be in bed, and the curtain drawn.—*Shires* v. *Glascock*, E. 3 Jac. II. Salk. 688. (*b*)

Note; signing need not be by setting the name to the bottom, it is enough if the will be of the testator's hand-writing, and begin with I, *J. S. &c.* and it has been said, that sealing is signing, and was so determined in the case of *Wangford* v. *Wangford*, by Lord *Raymond*, at *Guildhall*. (*Lemayne* v. *Stanley*, T. 33 Car. II. 3 Lev. 1. *Webb* v. *Grenville*, H. 12 Geo. I. Stra. 764.) But this may well be doubted, because the meaning of the statute, in requiring it to be signed by the

(*a*) Vide *Grayson* v. *Atkinson*, 2 Ves. 454, where Lord *Hardwicke* determined that it is not necessary the testator should sign in presence of the witnesses. Vide etiam *Stonehouse* v. *Evelyn*, 3 P. W. 252.

(*b*) *Vide* n. (c) 263, and the cases there mentioned.

testator,

testator, was for a further security against imposition, which can be only by his putting his name or mark; and of this opinion was the court of exchequer in a *late cause, grounding themselves upon the opinion of [*264] *Levinz*, J. in *Lemayne* v. *Stanley*, and in the case there cited by him out of 1 *Rol. Abr.* 245. pl. 25. And if a man make a will on three pieces of paper, and there be witnesses to the last paper, and none of them ever saw the first, this is not a good will.—*Lee* v. *Libb*, ante, 263 *a*.

However, where a will consisted of two sheets, and the connection went on regularly from one sheet to the other, and in the first sheet the testator gave lands to trustees after mentioned, upon trusts there specified, and in the last sheet appointed persons to be trustees; though the testator never executed the first sheet, and the witnesses never saw it; it was holden by all the judges of *England*, that if the first sheet were in the room at the time of the execution of the second, that was sufficient: for it is not necessary that the witnesses should see or know how many sheets the will consisted of, or whether it is a will or not: and it is clear that a will, properly attested, may by reference bring in another instrument as part of it.—*Bond* v. *Seawell*, B. R. M. 6 Geo. III. 3 Burr. 1773. 1 Bla. 407. 422. 454. S. C. 1 Ves. 487.

Though the statute require the attestation of the witnesses to be in the presence of the testator, yet it need not appear upon the face of the will to have been so done, but it is matter of evidence to be left to a jury.—*Croft* v. *Pawlet*, E. 12 Geo. II. Str. 1109.

Though the common way is to call but one witness to prove the will, yet that is only where there is no objection made by the heir; for he is intitled to have them all examined, but then he must produce them, for the devisee need produce only one, if that one prove all the requisites; and though they should all swear that the will was not duly executed, yet the devisee would be permitted to go into circumstances to prove the due execution; (*Per Lee*, C. J. in *Ansty* v. *Dowsing*, E. 19 Geo. II. 2 Str. 1253. 1 Blac. S. S. C. in Cam. Scacc.) *(a)* as was the case of *Austin* v. *Willes*, cited by Lord *Hardwicke*, Chancellor, in *Blacket* v. *Widdrington*, M. 11 Geo. II. in which, notwithstanding the three witnesses all swore to its not being duly executed, the devisee obtained a verdict. In *Pike* v. *Badmering*, cited in Stra. 1096, before Lord *Raymond*, upon an issue of *devisavit vel non*, the witnesses denying their hands, the devisee would have avoided calling them, but his lord-

(a) The proper way to examine a witness to the proof of a will as to lands, is to prove the execution of it by the testator, and that he subscribed in his presence, and that the other witnesses signed it in the presence of the testator, and then one witness proves the full execution of the will, but the heir at law has a right to examine the three witnesses.

ship

ship obliged him to call them, whereupon, the first and second denying their hands, it was objected he should go no farther; for it was argued, that though, if you call one witness, who proves against you you may call another, yet if he prove against you too, you can go no farther; but the chief justice admitted him to call other witnesses to prove the will, and he obtained a verdict.

[265] Where the attestation was only "signed, sealed, published, and declared in the presence of us," the witnesses being dead, and their hands proved, the court held it to be evidence to be left to a jury of a compliance with all circumstances.—*Croft* v. *Pawlet*, E. 12 Geo. II. 2 Stra. 1109.

It was laid down by *Lee*, C. J. in delivering the opinion of the court of *K. B.* in the case of *Ansty* v. *Dowsing*, that a devisee of any part of the estate, or a legatee, where the legacy is charged upon the land, will not be a good witness, nor would a release make him so, as that would not alter his credibility at the time of attesting. However, it has been said, that the judgment of the court was in that case founded upon the particular circumstances of the case, and not on any general doctrine, as there was not, nor could be any payment or tender made of the annuity given by the will in that case to the witness's wife; and the general doctrine laid down by Lord Chief Justice *Lee* has been since denied by the court of *K. B.* in the case of *Wyndham* v. *Chetwynd*, M. 31 Geo. II. 1 Burr. 414. 1 Black. 95.

To prevent however the inconveniences which would have arisen from the above opinion given in *Ansty* v. *Dowsing*, in case it had been followed, as there are few wills in which the witnesses have not had legacies or debts charged upon land, the 25 *Geo.* II. enacts,

1. That any beneficial devise, legacy, estate, interest, gift, or appointment, made to any person being a witness, after 24th of *June*, 1752, to any will or codicil, shall be void, and such person be admitted as a witness. *(a)*

2. That any creditor attesting any will or codicil, made or to be made, by which his debt is charged upon land, shall be admitted as a witness to the execution of such will or codicil, notwithstanding such charge. *(b)*

3. That any person who had attested any will or codicil then made, to whom any legacy or bequest was given, having been paid or released,

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(*a*) A bequest of an annuity to a wife, under a will attested by her husband, is bad. *Ansty* v. *Dowsing*, 2 Stra. 1253.

(*b*) In *Bettison* v. *Bromley*, 12 East, 250, one of the attesting witnesses was the wife of the acting executor, but he was neither a creditor upon the testator or his estate, nor did he take any beneficial interest under the will. Held, that the wife was a good witness under the statute of frauds.

or

or upon tender made having refused to accept such legacy or bequest, shall be admitted as a witness to the execution of such will or codicil.

4. That any legatee, having attested a will or codicil then made, who shall have died in the life-time of the testator, or before he shall have received or released his legacy, shall be deemed a legal witness to such will or codicil.

After which there is a proviso, that the credit of every such witness in any of the cases before mentioned, shall be subject to the consideration of the court and jury before whom he shall be examined, or of the court of equity in which his testimony * shall be made use of, in [*266] like manner as the credit of witnesses in all other cases ought to be considered of and determined.

Though the devisee had proved the will duly executed according to the statute; yet if the heir at law can prove any fraud in obtaining it, the jury ought to find against the will; for fraud is in this case examinable at law, and not in equity.—*Bransby* v. *Kerridge*, 28th *July*, 1718, in *Dom. Proc.*

By the statute of frauds, a will executed as before mentioned, shall continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or in his presence, and by his directions and consent, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or more witnesses declaring the same.

If a man devise his land to *A.* and then make a second will, and devise it to *B.* and upon that cancel the first will by tearing off the seal; if the second will be not good as a will to pass the land to *B.* (the witnesses not having signed it in his presence) it will be no revocation; neither will the tearing off the seal, because no self-subsisting independent act, but done from an opinion that the second revoked it.—*Onyons* v. *Tyrer*, H. 1716. 1 P. W. 345.

A. devised to *B.* and afterwards made another will, and thereby devised to *C.* and expressly revoked all former wills. At the testator's death, both wills were found amongst his papers; the first uncancelled, but the seal and name torn off from the last. The first is a good will: for one will cannot be a revocation of another, till it becomes a perfect will, which is not till the testator's death, and at that time the last will did not exist.—*Glazier* (ex dem.) v. *Glazier*, B. R. Hil. 10 Geo. III.

And note; There are many other ways of revoking a will than what are mentioned in the statute; as by levying a fine of the land devised: (*Lord Lincoln's Case*, Show. P. C. 154) so if the devisor marry and make

make a settlement on the issue, reserving the fee in himself, though he afterwards die without issue &c.—*Martin* v. *Savage*, 1740. (*a*)

But where tenant in tail by bargain and sale conveyed to *J. S.* in fee in order to make him tenant to the *præcipe* in a common recovery, the use of which was declared to him in fee, and 8th *June* (*Trinity* term beginning the 7th) made his will, and afterwards a writ of entry was sued out returnable in *Quind. Tr.* (17th *June*) and the recovery suffered: it was holden that the land passed by the will; and the reason seems to have been that the deed and recovery make only one conveyance, of which the deed is the most substantial part, and therefore to it every subsequent part must refer. (*Selwin* v. *Selwin*, T. 32 Geo. II. K. B. 2 Burr. 1131. 1 Black. 222. 251.) But a lease and release and recovery suffered after the will, is a revocation.—*Darley* v. *Darley*, C. B. Trin. 7 Geo. III. 3 Wils. 6.

[267] We must next consider where razures and interlineations, and where breaking off the seal avoids a deed.—Vide Dr. *Leyfield's Ca.* H. 8 Jac. I. 10 Co. 92.

Formerly, if there were any razure or interlineation, the judges determined upon the profert or view of the deed, whether the deed were good or not: But when conveyances grew so voluminous, such vast room was left for the misprision of the clerk, that the courts thought it necessary not to discharge a deed razed or interlined as void, upon demurrer, but referred it to the jury, whether the deed thus razed or interlined were the individual contract delivered by the party.

If a deed be altered by a stranger in a point not material, this does not avoid the deed, but otherwise, if it be altered by a stranger in a point material; for the witnesses cannot prove it to be the act of the party where there is any material difference, but an immaterial alteration does not change the deed, and consequently the witnesses may attest it without danger of perjury. But if the deed be altered by the party himself, though in a point not material, yet it avoids the deed; for the law takes every man's own act most strongly against himself.—*Pigot's Ca.* T. 12 Jac. I. 11 Co. 27.

If there be several covenants in a deed, and one of them be altered, this destroys the whole deed; for the deed cannot be the same, unless every covenant of which it consists be the same also.—*Ibid.* 28, 29.

If there be blanks left in an obligation in places material, and filled up afterwards by assent of parties, yet is the obligation void, for it is

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(*a*) But a partition by deed between tenants in common, does not revoke a will. *Swift* v. *Roberts*, 3 Burr. 1490.

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not the same contract that was sealed and delivered. (*Pigot's Case*, 2 Rol. Abr. 29. pl. 2. 3.)—As if a bond were made to *C.* with a blank left for his Christian name, and for his addition, which is afterwards filled up.—But if *A.* with a blank left after his name, be bound to *B.* and after *C.* is added as a joint obligor, yet this does not avoid the bond, for it does not alter the contract of *A.* who was bound to pay the whole money before any such addition.—*Zouch* v. *Clay*, H. 23 & 24 Car. II. 1 Vent. 185. 2 Lev. 35.

It has been said, that where a thing lies in livery, a deed formerly sealed may be given in evidence, though the seal be afterwards broken off, for the interest passed by the act of livery: (*Argoll* v. *Cheney*, E. 1 Car. I. Palm. 403. 405. *Waddy* v. *Newton*, T. 10 Geo. I. 8 Mod. 278.) So, they say, if the conveyance were made by lease and release, and the uses were once executed by the statute, they do not return back again by cancelling the deed: (*Clerke*, ex dem. *Prin* v. *Heath*, M. 21 Car. II. 1 Mod. 11.) But, it is said, if a man shew a title to a thing lying in grant, there he fails if the seal be torn off, for a man cannot shew a title to the thing lying in solemn agreement but by solemn agreement, and there can be no solemn * agreement without seal. (*Moor* [* 268] v. *Salter*, infra.) However, it may well be doubted, whether this distinction will hold. In *Argoll* v. *Cheney*, sup. it was holden, that a deed leading the uses of a recovery was good evidence of such uses, though the seals were torn off, it being proved to have been so done by a young boy: And I take it, that in any case a deed so proved would be evidence to be left to a jury. But, perhaps, there may be a difference where the issue is directly on the deed, and where the deed is only given in evidence to prove another issue. (*Mathewson's Case*, H. 39 Eliz. 5 Co. 28.) On *non est factum*, producing a deed without seal would not prove the issue, however they might account for the seal being torn off: but on not guilty in ejectment, a deed might be given in evidence without seal, and in case they proved the seal torn off by accident, the jury ought to find for the party.—*Moor* v. *Salter*, M. 13 Jac. I. 3 Bulst. 79.

If an obligation were sealed when pleaded, and after issue joined the seal were torn off, yet the plaintiff shall recover his debt, because the deed, when proffered to the court, was in the custody of the law, and therefore the law ought to defend it; (*Michael's Case*, Ow. 8.) besides, the truth of the plea which is to be proved must have relation to the time when the issue was taken. (*Thirkettle* v. *Reeve*, M. 31 Eliz. Cro. Eliz. 110.)—If the seal of a deed be broken off in court, it shall be there inrolled for the benefit of the parties.—2 *Inst.* 676.

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If there be a joint contract or obligation, and the seals of one of the obligors be torn off, it destroys the obligation; (*Mathewson's Case*, sup.) but if they be severally bound, the obligation continues as to the other whose seal was not torn off, because they are several contracts. (*Pigot's Case*, T. 12 Jac. I. 11 Co. 28.) But if two men be jointly and severally bound, and the seal of one of them be torn off, this is a discharge of the other, for the manner of the obligation is destroyed by the act of the obligee; (*Leaton* v. *Henson*, M. 30 Car. II. 2 Lev. 220. 2 Show. 28, 29. S. C.) and therefore that is, according to the rule of law, which construes every man's own act most strongly against himself, a discharge of the obligation itself.—*Bayly* v. *Garford*, M. 17 Car. I. Mar. 125.

There is now by act of parliament a further requisite to a deed than heretofore, and that is the stamps. *(a)* The stamp duties imposed by parliament upon deeds and other instruments were first required by the statute 5 *W. & M. c.* 21, since which they have been at various times altered and greatly increased. [The statute now existing, and in force, is that of 55 *Geo.* III. *c.* 184, which commenced its operation on 1st *September*, 1815, and to its contents, the reader (for brevity sake) is referred.*] These stamps have been frequently the means of detecting forgeries;

(a) In an action on warranty of a horse, plaintiff gave in evidence a written instrument, signed by defendant, which had a receipt stamp, and contained a receipt for the price of the horse, with the words subjoined: "warranted sound." It was objected, that this ought to have been upon an agreement stamp, for the purpose of proving the warranty. But held, that this was evidence of the warranty, within the exception in 23 *Geo.* III. *c.* 58. *s.* 4, being an agreement *relating to the sale of goods, wares, and merchandizes.* Afterwards it was found to have both a receipt stamp, and an agreement stamp. *Skrine* v. *Elmore*, 2 Camp. 407.

So a written agreement by a broker, who buys goods for his principal, to indemnify him for any loss arising on the resale, need not be stamped. *Curry* v. *Edensor*, 3 T. R. 524.

But an agreement for goods to be made, or the produce of land to be grown, does not come within the exception. *Buxton* v. *Bedall*, 3 East, 303. *Waddington* v. *Bristow*, 2 Bos. & Pull. 452.

It was held, in this case, that a paper (on a regular stamp) acknowledging the receipt of money as the price of certain goods, taken as a distress, and containing further an undertaking to allow them to remain on the premises, could be received in evidence as a receipt, as the two matters were not mixed together; *secus* if they had been so mixed. *Grey* v. *Smith*, 1 Camp. 387.

The plaintiff and defendant were father and son; at a settlement of accounts, the defendant gave the plaintiff an unstamped slip of paper, upon which was written, in his own hand, "I owe my father £470. "*James Israel.*" And *Ellenborough*, C. J. received it in evidence, upon the authority of *Fisher* v. *Leslie*, 1 Esp. N. P. Ca. 426, in which an I. O. U.

* This passage the Editor has taken the liberty to introduce.

forgeries; for the stamp-office have secret marks on the stamps, which from time to time are varied; *(a)* so that where a deed is forged of a date antecedent, it may easily be discovered by stamps being upon it not in use at the time it bears date.

A written agreement in these words, "A. *doth lett and sell to* B. for [269] "the term of three years," *&c.* was offered in evidence in an action of *assumpsit* on a special agreement. The defendant objected to its being read, because it was a lease and was not stamped. For the plaintiff it was said, this was only a memorandum of a parol lease, which being for three years only is good as such, and that the statute, in using the words "indenture, lease, or deed poll" meant only deeds. But it was holden, that though a parol lease for three years is good, yet if a man through caution will reduce it into writing, he must pay for the stamp, otherwise the court are inhibited from receiving it in evidence.

2. *Private matters of an inferior nature.*—To come now to other private written evidence that is not under hand and seal.

And first *of Notes;* they are either such as pass according to the custom of merchants, or that pass between party and party.

Merchants' notes are in nature of letters of credit passing between one correspondent and another in this form, "Pray pay to *J. S.* or order, such "a sum, Witness my hand, *J. N.*" Now, if the correspondent accept the note he becomes chargeable in a special action on the custom. *(b)*

In this custom there are four things considerable;

First, The bill.—*Secondly,* The acceptance.—*Thirdly,* The protest.—*Fourthly,* The indorsement.

First.

I. O. U. was held good evidence under the money count. *Israel* v. *Israel*, 1 Camp. 499.

Action for money had and received, to recover £20, paid by plaintiff to defendant for the assignment of a lease, which had been previously forfeited; defendant proved plaintiff in possession of a stamped agreement upon this subject, and gave him notice to produce it. Defendant not producing it, plaintiff, by way of secondary evidence, tendered another part of the agreement unstampt, which had been executed by both parties, at the same time with the former, and delivered to plaintiff. Held, that as the other agreement was not produced, plaintiff might give parol evidence of its contents, or produce a copy of it; and that this might be received as a copy, though, if properly stampt, it might be used as an original. It is offered, said the Court, not as the agreement obligatory upon the parties, or as direct evidence of the contract, but as evidence of the contents of the paper-writing in the hands of the defendant, which had been stampt as the law requires. *Waller* v. *Horsfall*, 1 Camp. 401.

(a) So it has been frequently said, but from what authority remains to be ascertained; moreover, a deed may be antedated where there has been no alteration in the stamp since its date, without a discovery by any one who is not acquainted with the secret mark if there be one.

(b) Two objections were taken to a bill of exchange: 1st. That it was not

First—*The bill is* in nature of a letter, desiring the correspondent to pay so much money either at sight, or, as they term it, at single, double, or treble usance, which is commonly at one, two, or three months, to be computed from the date of the bill; but as such usances vary, it is necessary for the plaintiff in his declaration to shew what they are, else he cannot have judgment.—*Buckley* v. *Campbell*, H. 7 Ann. Salk. 131.

A foreign bill of exchange was drawn, payable at 120 days after sight, but when the bill was presented for acceptance, that was refused; upon which an action was immediately brought against the drawer, without waiting till the expiration of the 120 days. On the trial the defendant objected that he was not liable till the expiration of the 120 days, and offered to call evidence to prove that the custom of merchants was such. But Lord *Mansfield* said the law was clearly otherwise, and refused to hear the evidence: So the plaintiff recovered.—*Bright* v. *Purrier*, London, Sittings after Tr. 1765. *(a)* *Blissart* v. *Hirst*, M. 11 Geo. III. *(b)*

Though regularly there ought to be three persons concerned in a bill of exchange, yet there may be only two; as if *A.* draw in this manner, "Pray, pay to me or my order, value received by myself."—*Buller* v. *Crips*, M. 2 Ann. 6 Mod. 29.

[270] Secondly—*The acceptance* is giving credit to the bill so far as to make the acceptor liable, and to trust for a repayment to his correspondent. *(c)*

In the case of two joint traders, the acceptance of the one will bind the other; but if ten merchants employ one factor, and he draw a bill

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not made payable to order, which was necessary to make it negotiable within the custom of merchants, and enables the indorsee to bring his action against the maker. 2d. That it did not express to be for value received. And the last objection being left to the jury, they found it not to be within the custom of merchants. *Banbury* v. *Lisset*, 2 Stra. 1212.

But it is now a settled point, that the words "value received" are not necessary. *White* v. *Ledwick*, Bailey on Bills, 16, n. (b.) MS. Ca. (3d ed.)

A bill, payable to *A. or bearer*, is not assignable, so as to enable the indorsee or assignee to sue the drawer, but it is good as between the indorsee and indorsor. *Hodges* v. *Steward*, Salk. 125.

(a) And such action may be brought against an indorsor as well as against a drawer. *Ballingalls* v. *Gloster*, 3 East, 481.

(b) In 5 Burr. 2670, a case of *Blesard* v. *Hirst* is reported, but that was on a question of neglect of notice.

(c) *Indebitatus assumpsit* will not lie by an indorsee against the acceptor of a bill of exchange, for he has a special action on the custom of merchants. *Browne* v. *London*, 1 Mod. 286. 1 Vent. 152. *Hodges* v. *Steward*, 1 Salk. 125. And the modern practice is to bring a special action on the case, founded on this custom. *Simmonds* v. *Parminter*, 1 Wils. 185.

upon

upon them all, and one accept it, this shall only bind him and not the rest.—*Pinkney* v. *Hall*, H. 8 W. III. Salk. 126.

A small matter amounts to an acceptance, as saying "Leave the bill "with me, and I will accept it," for it is giving credit to the bill, and hindering the protest; but if the merchant say, "Leave the bill with me, "and I will look over my accounts between the drawer and me, and "call to-morrow, and accordingly the bill shall be accepted." This is no acceptance, because it depends upon the balance of accounts. *(a)*

A bill was drawn as follows, "To Mr. *R. Whithy*; Sir, please to "pay Mr. *Scot or* order £30. *Tho. Newton.*" *Scot* indorsed it to the plaintiff, who presented the bill to the drawee for acceptance, and the defendant (the drawee) underwrites thus:—"Mr. *Jackson*, please to pay "this note, and charge it to Mr. *Newton's* account. *R. Whithy.*" It was insisted that this was no acceptance, for the defendant did not mean to become the principal debtor. *(b)* It was only a direction to *Jackson*, to pay £30 out of a particular fund; and if there were no such fund, the money was not to be paid. But, *per curiam*, the underwriting is a direction to *Jackson* to pay the sum; and it signifies not to what account it is to be placed when paid: That is a transaction between them two only; and this is clearly a sufficient acceptance.—*Moor* v. *Wilby*, T. 7 Geo. III. B. R. *(c)*

An acceptance may be qualified, as to pay half in money and half in bills. (*Petit* v. *Benson*, T. 9 W. III. Comb. 452.) So to pay when goods sent by the drawer are sold: (*Smith* v. *Abbot*, E. 14 Geo. II. Str. 1152.) But he to whom the bill is due may refuse such acceptance, and protest the bill, so as to charge the drawer. The proof of the acceptance is a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand of his correspondent; therefore in an action against the acceptor, the plaintiff shall not be put to prove the hand of the drawer; (*Wilkinson* v. *Lutwidge*, M. 12 Geo. I. Str. 648.) however, proof of the acceptance will not be conclusive evidence against the acceptor, if he can prove the contrary.—*Smith* v. *Sear*, E. 14 Geo. III. *(d)*

Thirdly.

(*a*) Vide *Molloy de Jur. Mar.* lib. 2. c. 10. s. 20.

(*b*) Any words written on a bill, which do not negative the drawer's request, will amount to an acceptance, and the drawer need not sign his name. *Anon.* Comb. 401. *Powell* v. *Monnier*, 1 Atk. 611.

(*c*) A parol acceptance only will bind as effectually as if it had been actually signed and subscribed in the usual manner. *Lumley* v. *Palmer*, Stra. 1000. *Julian* v. *Shobrooke*, 2 Wils. 9. *Powell* v. *Monnier*, 1 Atk. 612. *Pillans* v. *Van Mierop*, Burr. 1662. *Sproat* v. *Matthews*, 1 T. R. 182.

(*d*) So the drawee may accept a bill to pay it at a longer day than that on which it was made payable, and different alterations in the bill, with respect to the date, will not destroy

Thirdly—*The protest* is made before a notary public in case of non-acceptance or non-payment, to whose protestation all foreign courts give credit; and the protest is evidence that the bill is not paid; but in *England* they must shew the bill itself, as well as the protest, because the whole declaration must be proved. *(a)*

[271] When the bill is returned protested, the party that draws the bill is obliged to answer the money and damages, or to give security to answer the same beyond sea, within double the time the first bill run for. *(b)*

In case of foreign bills of exchange the custom is, that three days are allowed for payment, and if not paid on the last day, the party ought to protest the bill and return it, and if he do not, the drawer will not be chargeable; but if the last of the three days be a *Sunday*, or

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destroy it. *Molloy*, 2813. *Molloy*, lib. 2. c. 10. s. 28.

But a promise to accept a bill, to be afterwards drawn, is no acceptance. *Johnson* v. *Collings*, 1 East, 98.

Yet a letter, promising that a bill *then drawn*, shall meet due honor; (*Clarke* v. *Cock*, 4 East, 57); or that the writer will accept, or certainly pay it, is an acceptance; *Wynne* v. *Raikes*, 5 East, 514; though such letter be not received till after the bill is due. *S. C.*

(a) A protest on a foreign bill is part of its constitution, and it is made necessary on an inland bill only to recover interest, costs, and damages against the drawer. But a protest is of no other avail than to subject the drawer to answer, in case of non-acceptance or non-payment by the drawer, for it does not discharge the acceptor, as the payee has his remedy against both; and upon this protest the party shall recover the principal, interest, costs, and damages. *Barnaby* v. *Rigalt*, Cro. Car. 301.

This protest on a foreign bill was considered absolutely necessary at common law to recover against the drawer; but it was not necessary on an inland bill, in order to sue the drawer, and it is now only necessary, by statute, to recover interest and costs. Vide *Brough* v. *Perkins*, Ray. 992. 6 Mod. 80. Salk. 131.

The protest is good evidence of non-acceptance or non-payment. The attestation of the notary, under his seal, is evidence of the protest, without further proof, or shewing how he came by it. *Anon.* 12 Mod. 345.

(b) A drawer of a bill of exchange is always answerable by the value received, though there be no tender of the bill for payment, or it be not protested, unless the person on whom it is drawn, break, and then it is otherwise; for in that case the party who paid the money for the bill, must lose it. *Mogadara* v. *Holt*, 1 Show. 319.

It is now fully settled, that in an action against the indorsor of a bill, the plaintiff need not prove an application to the drawer for payment. Vide *Bromley* v. *Frazier*, Stra. 441. *Jacob* v. *Lawrence*, ib. 515. *Heylin* v. *Adamson*, Burr. 669. *Sed quære*, whether he must not present it to the drawee. Et vide *Bayley on Bills*, c. iv.

Where a bill is drawn, payable at a future day, and is not accepted, an action lies immediately against the drawer, at the suit of the holder. *Milford* v. *Mayor*, 1 Dougl. 55. So by an indorsee against an indorsor, every indorsor being in nature of a new drawer. *Ballingalls* v. *Gloster*, 3 East, 481.

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great holiday, he ought to demand the money on the second day, and if not paid, protest it on the same day, otherwise it will be at his own peril.—*Tassell* v. *Lewis*, 1 Raym. 743. *(a)*

If the indorsee accept any part of the money from the acceptor, he cannot afterwards resort to the drawer for the remainder of the money; unless he give timely notice to the drawer that the bill is not duly paid: for where a man takes a part of the money only, and does not apprize the drawer that the whole is not paid, he gives a new credit for the remainder. But where timely notice is given that the bill is not duly paid, the receiving part of the money from an acceptor or indorsor, will not discharge the drawer or other indorsors: for it is for their advantage that as much should be received from others as may be.—*Johnson* v. *Kenyon* or *Kennion*, C. B. H. 5 Geo. III. 2 Wils. 262. *(b)*

If a bill be left with a merchant to accept, he to whom it is payable, in case it be lost, is to request the merchant to give him a note for the payment according to the time limited in the bill; otherwise there must be two protests, one for non-payment, the other for non-acceptance.

A. draws a bill on *B.* and *B.* living in the country, *C.* his friend accepts it, the bill must not be protested for non-acceptance of *B.* and then *C.*'s acceptance shall bind him to answer the money.

Fourthly—*The indorsement.*—If the drawee indorse the bill over to another, the receiver has not only the original credit of the drawer at stake, and that of the acceptor of the bill, if accepted, but also of the indorsor, and he may have an action against either; but a bill of exchange cannot be assigned over for a payment in part, so as to subject the party to several actions.—*Hawkins* v. *Cardy*, M. 10 W. III. Carth. 466. Raym. 360. 12 Mod. 213. Salk. 65.

A. drew a bill of exchange in the *West Indies*, on *T.* in *London*, at sixty days sight, to *W.* or order; *W.* indorsed to *G.* who presented the bill to *T.* who refusing, *G.* noted it for non-acceptance, and at the end of sixty days protested it for non-payment, and then wrote a letter to *A.* and also to his agent in the *West Indies*, acquainting them that the bill was not accepted. In an action * brought against *A.* by *G.* on this [*272] case he was nonsuited, for, by not sending the protest for non-acceptance, he made himself liable. The use of noting is, that it should be done

(a) These days of grace are different in different countries: in *Hamburgh*, 12 days are allowed. *Beawes*, s. 260. (1st ed.) pa. 449.

(b) If the holder, after a partial satisfaction, takes a verdict for more than the balance due, the court will grant a new trial, or make him correct the verdict at his own expence. *Pierson* v. *Dunlop*, Cowp. 571. *Bacon* v. *Searles*, 1 H. Bla. 88.

the very day of refusal, and the protest may be drawn any day after by the notary, and be dated of the day the noting was made.—*Goostrey* v. *Mead*, at Westminster, 1751.

It was doubtful whether inland bills of exchange were within this custom of merchants, but by 9 & 10 *W.* III. *c.* 17, and 3 & 4 *Ann. c.* 9, they are put upon the same foot with foreign bills; and though they require the acceptance to be in writing, in order to charge the drawer with damages and costs, yet there is a proviso that it shall not extend to discharge any remedy against the acceptor, so that an action will still lie on a parol acceptance.—*Lumley* v. *Palmer*, M. 8 Geo. II. Stra. 1000.

By the 3 & 4 *Ann. c.* 9. All notes in writing, that shall be made and signed by any person, whereby such person promises to pay to another or his order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to such person to whom the same is made payable; and every note made payable to any person or his order, shall be assignable or indorsable over, and the person to whom such sum of money is by such note made payable, may maintain an action for the same; and any person to whom such note is indorsed may maintain his action for the same, either against the person who signed such note, or against him that indorsed it; and in every such action the plaintiff shall recover his damages and costs. (*a*)

There are no prescribed forms of these promissory notes, and therefore whatever imports an absolute promise to pay will be sufficient; as a promise to be accountable to *J. S.* or order. (*Morris* v. *Lea*, T. 11 Geo. I. 1 Stra. 629. 2 Raym. 1396. 8 Mod. 362. S. C.) (*b*) But a promise to pay on an incertain contingency, depending perhaps on the will of the drawer, is not within the act, because it will not answer the intent; nor within the words which import an absolute promise to pay; and therefore a promise to pay upon his marriage is not good; (*Beardsly* v. *Baldwin*, E. 14 Geo. II. Str. 1151.) but a promise to pay on a return of a ship has been holden good, because it respects trade. (*An-*

(*a*) Vide 17 *Geo.* III. *c.* 30. for the regulation of promissory notes above 20*s.* and under £5, for under 20*s.* they are void by 15 *Geo.* III. Vide etiam 27 *Geo.* III. *c.* 16, by which both the above acts are made perpetual. Vide etiam 48 *Geo.* III. *c.* 88. *s.* 3, which renders persons issuing or negociating such notes otherwise than directed by the statutes, liable to a penalty of not less than £5 or more than £20.

(*b*) There is a case named *Morris* v. *Lee*, in *Bayley on Bills*, 123, n. (b) 3d edit. but it is not *S. C.* for that was determined in H. 26 *Geo.* III.

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drews v. *Franklin*, H. 3 Geo. I. 1 Stra. 24. (*a*) So a promise to pay, or do another act, has been holden not to be within the act; as a promise to pay, or deliver the body of *J. S.* So a promise to pay, if his brother did not, is not within the act, for the same reason of incertainty. (*Appleby* v. *Biddulph*, H. 3 Geo. I. cited in 1 Stra. 219.) So a promise to pay money and do some other thing, *ex. gr.* deliver a horse, is not within the statute. (*Moor* v. *Vanlute*, E. 1 Geo. I. C. B.) So a promise to pay £300 to *B.* or * order, in three good *East India Bonds*, is not [*273] a note within the statute. But a promise to pay on the death of another, as that is a contingency which must happen, will be good.—*Coke* v. *Colehan*, M. 18 Geo. II. (*b*)

A note payable to an infant, when he should come of age, *viz. June* 12th, 1750, was holden to be within the statute.—*Goss* v. *Nelson*, H. 30 Geo. II. Burr. 226.

A bill payable to a man's order is payable to himself, and he may bring an action, averring he made no order.—*Butler* v. *Crips*, T. 2 Ann. 1 Salk. 130.

A note payable to a feme sole or order, who marries, can only be indorsed by the husband.—*Conner* v. *Martin*, E. 8 Geo. I. Str. 516. (*c*)

So likewise such note may be indorsed by an executor or administrator.—*Robinson* v. *Stone*, 20 Geo. II. 2 Stra. 1260. (*d*)

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(*a*) In *Evans* v. *Underwood*, 1 Wils. 262, where an action was brought by the payee against the maker of a note, payable on receipt of the payee's wages from his majesty's ship *Suffolk*, the court thought the case like that of *Andrews* v. *Franklin*, and after looking into that case, *are said* to have given judgment for the plaintiff. *Sed quære*, because it was uncertain, though the payee's wages were paid, that the maker might receive them. The case of *Evans* v. *Underwood* is but a hearsay determination.

So where *A.* promised to pay £10 out of defendant's money, that should arise from his reversion of £43 when sold. The court held, that the object of the statute of *Anne* was to put promissory notes on the same footing with bills of exchange; and, said Lord *Kenyon*, it would perplex the commercial transactions of mankind if paper securities of this kind were issued forth to the world with conditions and contingencies, and if the persons to whom they were offered were obliged to enquire when these uncertain events would probably be reduced to a certainty. This, he said, would not be negotiable as a bill of exchange, neither can it as a promissory note. *Carlos* v. *Fancourt*, 5 T. R. 485. *Jenny* v. *Herle*, 2 Ld. Raym. 1361.—N. B. the same reason given in *Dawkes* v. *De Loraine*, Bla. 783. 3 Wils. 207.

(*b*) Vide *Coke* v. *Colehan*, Stra. 1217, which is *S. C.* but see a full report of the judgment in *Willes*, 393.

(*c*) Cited in *Rawlinson* v. *Stone*, 3 Wils. 5. Et vide *Mills* v. *Williams*, 10 Mod. 246. S. P.

(*d*) This is a wrong name; it is *Rawlinson* v. *Stone* in 3 Wils. 5. Burr. 1225, and Barnes, 164. Et vide *King*

In an action by the indorsee against the drawer, upon *non assumpsit* the plaintiff proved the drawer's hand, and that when the note with the indorsement was shewn to the indorsor, he acknowledged it was his hand-writing, but this was holden not sufficient to charge a third person.—*Hemming* v. *Robinson*, M. 6 Geo. II. Barnes 436. (3d ed.) (*a*)

There is a distinction between a note payable to *B. or order*, and to *B. or bearer*; in the first case, in an action against the indorsor the plaintiff must prove a demand on the drawer, but not in the last, for there the indorsor is in nature of an original drawer. (*b*) In the first case, if the indorsee give credit to the drawer, without notice to the indorsor, it will discharge him: (*Wilmore* v. *Young, per Eyre*, at *Guildhall*, M. 1 Geo. II.) So receiving part of the money from the drawer will for ever discharge the indorsor; for by such receipt the indorsee has made his election to have his money from the drawer.—*Kellock* v. *Robinson*, H. 13 Geo. II. Str. 745.

A cash note on a banker, payable to *the ship, Fortune, or bearer*, is a good and negotiable bill of exchange, and the bearer may maintain an action on it in his own name: Or he may recover on it in an action for money had and received to his use. But in either case he must prove that he got the bill fairly, and *bonâ fide*.—*Grant* v. *Vaughan*, B. R. T. 4 Geo. III. Burr. 1516. (*c*)

King v. *Thom*, 1 T. Rep. 487, where it was held, that if an executor or administrator indorse a bill, he binds himself personally, and not the assets in his hands.

(*a*) Vide etiam *Gray* v. *Palmer*, 1 Esp. Rep. 135. In *Carvick* v. *Vickery*, Dougl. 630. (653) n. 134, a bill was made payable to the order of father and son, who were not partners. The son only indorsed it, after which it was presented, and the drawee directed it to his banker for payment. In an action against the drawee the question was, whether this indorsement was sufficient? *Willes*, J. thought, that the direction to the banker was a recognition of the indorsement, but *Ashhurst* and *Buller*, Justices, thought not. However, in *Hankey* v. *Wilson*, Say. 223, in an action by an indorsee against the acceptor, there was no proof of the signature of one of the indorsors; but it appearing that the indorsement was on the bill when defendant accepted it, and that he promised to pay it, *Ryder*, C. J. left the case to the jury, who found for the plaintiff; and upon a rule for a new trial, the court thought it a question for the jury, whether the acceptance was not an admission that every indorsement was authentic, and refused the rule.

(*b*) Where a bill is drawn, payable to *A. B.* or *bearer*, an assignee must sue in the name of him to whom it is made payable, and not in his own. *Sed aliter*, if made payable to *A. B.* or *order*. *Nicholson* v. *Seldnith*, 3 Salk. 67. 1 Raym. 180. S. C. nom. *Nicholson* v. *Sedgwick*.

(*c*) Et vide *Clerke* v. *Martin*, Raym. 758. *Carter* v. *Palmer*, 12 Mod. 380, and *Smith* v. *Kendall*, 6 T. Rep. 123.

If

If the indorsor have paid part of the money, that will dispense with the necessity of proving a demand on the drawer.—*Vaughan* v. *Fuller*, H. 19 Geo. II. Str. 1246. (*a*)

In an action against the indorsor the plaintiff need not prove the drawer's hand, for if it be a forged bill, yet the indorsor is liable.—*Lambert* v. *Pack*, E. 11 W. III. 1 Salk. 127. (*b*)

The indorsee must give a reasonable notice to the indorsor in convenient time, upon default of payment by the drawer; but proof of making enquiry after defendant, who could not be found, will be sufficient to excuse the giving such notice, unless the defendant can prove he was to be found.—*Truby* v. *Delafountain*, M. 2 Geo. II. *per Raym.* at *Guildhall*. *Berrington* v. *Packhurst*, 2 Str. 1087. S. P.

In an action against the indorsor of a note of hand, where the note was due the 5th, and there was no demand on the drawer till the 8th, and no notice to the indorsor till the 19th: Mr. Justice *Denison* thought the plaintiff had not made use of due diligence either in demanding the money, or in giving notice to the indorsor, and said there were no days of grace on a note as there are on a bill of exchange; but the jury said it was commonly understood that there were three days of grace, and therefore thought the demand was made in time; but the judge said the law was otherwise, and directed them to find for the defendant.—*Dexlaux* v. *Hood*, 7th Feb. 1752, at *Guildhall, tamen quære*, in *Brown* v. *Harraden*, K. B. H. 31 Geo. III. 4 T. Rep. 148. it was adjudged that there were three days of grace on a promissory note. (*c*) [274]

In an action against the indorsor, Lord *Raymond* would not allow the defendant to give in evidence, that the plaintiff desired him to indorse the note to enable him to bring an action against the drawer, but declared he would not sue the defendant. (*Collet* v. *Griffith*, H. 2 Geo. II. at *Guildhall.*) But where the action was brought by the drawee against the drawer, the defendant was let in to shew it was delivered as an escrow, *viz.* as a reward in case he procured the defendant to be restored to an office, which it being proved he did not effect, there was a verdict for the defendant.—*Jefferies* v. *Austin*, M. 12 Geo. I. 1 Str. 674. (*d*)

(*a*) Vide etiam *Lundie* v. *Robertson*, 7 East, 321. *Horford* v. *Wilson*, 1 Taunt. 12. *Gibbon* v. *Coggon*, 2 Campb. 188. *Potter* v. *Rayworth*, 13 East, 417. S. P.

(*b*) Vide Raym. 443. 12 Mod. 244. Holt, 117. S. C. *Critchlow* v. *Parry*, 2 Campb. 182. S. P.

(*c*) Vide *Smith* v. *Kendall*, 6 T. Rep. 123. *Ward* v. *Honeywood*, Dougl. 62. *May* v. *Cooper*, Fortesc. 376, S. P.

(*d*) Vide *Jackson* v. *Warwick*, 7 T. Rep. 121, which was decided upon the same principle. Vide etiam *Guichard* v. *Roberts*, and the other cases referred to post, p. 278 *b*. n. (*b*).

And

And it seems a reasonable distinction which has been taken between an action between the parties themselves, in which case evidence may be given to impeach the promise and an action by or against a third person, *viz.* an indorsee or an acceptor.—*Snelling* v. *Briggs*, at *Reading*, 1741.

Where the defendant borrowed money of *J. S.* who lent it knowingly to game with, and assigned the note for a valuable consideration to the plaintiff, who had no notice, yet it was holden void by 9 *Ann. c.* 14. *s.* 1.—*Boxyer* v. *Bampton*, T. 14 Geo. II. 2 Str. 1155. (*a*)

Sir *John Bland* gave a bill of exchange to *Robinson* for £672, *viz.* £300 lent at the time and place of play, and £372 lost. The play was very fair, and there was not any imputation on *Robinson's* behaviour. He brought an action of *assumpsit* against Sir *John's* representative on the bill of exchange, and also for money lent. Upon a case reserved, the court held that he should not recover on the first count, the bill of exchange being void by 9 *Ann.* But they held, as to the second count, though no action could be maintained for money won at gaming, the statute prohibiting any recovery upon a gaming consideration, yet as to the money lent, the statute only avoids the security, and not the con-
[* 275] tract, which, when fair, is good, and therefore gave judgment * for the plaintiff for £300. In the same case it was made a question, whether the plaintiff should recover any, and what interest. As to the first, the court said, that though the security were void, yet he had agreed to pay interest. As to the second, though the practice had been to stop interest at the bringing of the action, yet they held the plaintiff entitled to interest to the time of the judgment, and said, the Court ought always to give interest to the verdict at least.—*Robinson* v. *Bland*, T. 34 Geo. II. Burr. 1077. 1 Bla. 234. 256. (*b*)

Though

(*a*) But in *Wettenhall* v. *Wood*, 1 Esp. N. P. Ca. 19, an action was held to lie for the recovery of money lent to defendant to game with; for, said Lord *Kenyon*, that the statute only avoided securities for money lent to play with, and did not extend to mere loans. Vide etiam *Barjeau* v. *Walmsley*, 2 Stra. 1249.

(*b*) As to the allowance of interest Lord *Ellenborough* said (in *De Havilland Executor* v. *Bowerbank*, 1 Campb. 50.) it appeared to him, that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c. or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that such was their intention, or where it could be proved that the money had been used, and the interest had actually been made. And further that it would not be right to consider so widely how far the plaintiff might be damnified.

In *De Bernales* v. *Fuller*, 2 Campb. 426,

Though it be sufficient for the plaintiff in an action on a note of hand to prove the note to have been given by the defendant, yet the defendant will be at liberty to shew it was given on an illegal consideration, and so avoid the lien of it.—*Guichard* v. *Roberts*, M. 4 Geo. III. K. B. 1 Bla. 445.

Where in the declaration the indorsement was set out to be for value received, but being produced, had it not: Lord Chief Justice *Eyre* allowed the indorsement to be filled up in court, notwithstanding the case of *Clements* v. *Jenkins*, E. 3 Geo. II. was cited, where Lord *Raymond* refused to let it be done.

But a bare indorsement of a name transfers no property, and therefore where the plaintiff produced the note with his own name indorsed, *Lee*, C. J. suffered him to strike it out.—*Theed* v. *Lovell*, M. 12 Geo. II. 2 Str. 1103. (*a*)

A note

426, which was an action for money had and received, to recover £894. 16*s*. 9*d*. and interest thereon, Lord *Ellenborough* held, that where there is no contract, express or implied, to pay interest, interest cannot be allowed, and cited *De Havilland* v. *Bowerbank*, sup. The principal case was shortly this, plaintiff held a bill of exchange, to the above amount accepted, payable at defendants' banking-house. The bill became due *September* 23d, and on that day the clerk of the acceptors paid in money at the banking-house of defendants, but defendants, instead of paying the money to plaintiff as holder of the bill, detained it, as in satisfaction of the balance due to themselves from the acceptors. It was settled on the trial that this was money had and received by defendants, to the use of plaintiff, and plaintiff now insisted upon interest to the time of signing final judgment; but Lord *Ellenborough* said, that the rule having been established in *De Havilland* v. *Bowerbank*, he would not save the point.

In *Becher* v. *Jones*, in Scacc. 2 Campb. 428. (n), interest was allowed in an action for not giving a bill of exchange for goods, agreeable to the stipulation, from the time that such bill, if given, would have become due: and upon that a question arose in *Gordon* v. *Swan*, ibid. 429. (n), whether interest ought not to be allowed in an action for goods sold, to be paid for at a certain day; but *Ellenborough*, C. J. said, that what he had determined in *De Havilland* v. *Bowerbank*, sup. must be taken to refer to written instruments only. Rule refused.

(*a*) In *Peacock* v. *Rhodes*, 2 Dougl. 611, (633), Lord *Mansfield* said, he saw no difference between a note indorsed in blank and one payable to bearer, for they both passed by delivery. Within these few years however the attention of the courts has been engaged by a class of bills, almost unknown till the year 1778, when a vast number of bills and notes were sent forth into the world, made payable to fictitious persons. These bills became the subjects of repeated discussion, till at length it was finally determined, that if a bill or note imports to be made payable to a person not *in esse*, or his order, and is issued with an indorsement in blank, purporting to be made by him thereon, it is as against the drawer or maker considered as a bill or note, payable to bearer, and so is a bill as against the acceptor, if he knew

A note payable to *B.* or order, was indorsed thus, "Pray pay the contents to *C.*" In the declaration, the indorsement was set out as payable to *C.* or order; at the trial it was objected, there was a variance; but the court held, that as the note was in its original creation indorsable, it would be so in the hands of the indorsee, though not so expressed in the indorsement, and therefore in substance it was agreeable to the count, and therefore no variance.—Cited by Mr. *Fazakerley*, in *Rex* v. *Morris*, H. 4 Geo. II.

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knew at the time of the acceptance that the payee was a fictitious person. The first of these cases which came before the court was *Tatlock* v. *Harris*, 3 T. Rep. 174, which was an action on a bill, drawn by defendant, as a partner in a house at *Nottingham*, upon himself, in *London*. This bill was made payable to *Grigson* and Co. by whom it purported to be first indorsed, and afterwards by *Lewis* and *Potter*. There was no such house as *Grigson* and Co.; but defendant paid the bill to *Lewis* and *Potter*, to whom he was indebted, and from them it came into the hands of the plaintiff. On this case the court held the holder intitled to recover for money had and received to his use as such holder.

The next case was *Vere* v. *Lewis*, 3 T. Rep. 182, which only differed from the last case in regard that there was no evidence that defendant had received any value for the bill, but the court held that the acceptance by defendant was evidence of his having received value from the drawers.

Next followed the case of *Minet* v. *Gibson*, 3 T. R. 481. 1 H. Bla. 569. where a bill was drawn by *Livesay* and Co. on defendant, and made payable to *John White*, who, on a special verdict, was found to be a fictitious person; and it was also found that his name was indorsed by *Livesay* and Co., and that defendant, when he accepted the bill, knew there was no such person as *John White*, upon which the court of *K. B.*, considering this case as decided by *Vere* v. *Lewis*, sup. gave judgment for plaintiff. And on a question before the lords, whether the bill might not be deemed in law to be payable to bearer, Barons *Hotham*, *Perryn*, and *Thompson*, and *Gould*, J. were of opinion it might, but *Eyre*, C. B. and *Heath*, J. differed. After which Lords *Kenyon*, *Loughborough*, and *Bathurst*, spoke in favor of the judgment, and Lord *Thurlow* against it; and the judgment was affirmed without a division.

After the above judgment in *B. R.* and before its decision in *Domo Proc.* came on the case of *Collis* v. *Emmet*, 1 H. Bla. 313, where *Livesay* and Co. who were authorized by defendant to draw for him, by his subscribing a piece of blank paper with a stamp thereon, made a bill to *George Chapman* or order, and indorsed it with *Chapman*'s name, when, in fact, there was no such person. In this case the court of *C. B.* held (after two agreements and great consideration), that the action might fairly be supported on a count that stated the bill to be payable to bearer, and there being such a count in the declaration, plaintiff had judgment. Vide etiam *Bennett* v. *Farnell*, 1 Campb. 130. 180. (c) pl. 9, where in a similar case Lord *Ellenborough* said, that the doctrines on this subject must be taken with this qualification, "unless it can be shewn that "the circumstance of the payee be- "ing a fictitious person was known "to the acceptor." The last case of this sort, before *Bennett* v. *Farnell*, sup. was *Gibson* v. *Hunter*, 2 H. Bla. 187. 288. which came before the lords on a demurrer to evidence, and in that case it was held, that in an action of this nature against the acceptor, it must be shewn that he was aware the payee was fictitious.

I have

I have already said, that if the indorsee give credit to the drawer, without notice to the indorsor, it will discharge him: it is therefore to be seen what shall be construed a giving of credit; and not demanding the money of the drawer in a reasonable time, is giving credit. (*Sir J. Hankey* v. *Trotman*, M. 19 Geo. II. 1 Bla. 1.)(*a*) What shall be deemed a reasonable time must depend upon the circumstances of the case; and is a question of law arising out of the fact. However it may not be improper to shew what in general has been deemed a reasonable time.—*Metcalf* v. *Hall*, K. B. T. 22 Geo. III. Cited in *Tindall* v. *Brown*, 1 T. Rep. 168 (n).

In *Mainwaring* v. *Harrison*, (H. 8 Geo. I. 1 Str. 508.) the case was, upon the 17th of *September*, being a *Saturday*, about two in the afternoon, the defendant gave the plaintiff a goldsmith's note, who paid it away the same day to *J. S.* The goldsmith paid all that day * and [*276] all *Monday*. *J. S.* came on *Tuesday*, but then payment was stopped; upon which the plaintiff paid back the money to *J. S.* and asked it of the defendant, who refused, upon which the action was brought; the C. J. left it to the jury, who would have found it specially, but he would not let them, saying it was a matter proper for their determination; upon which they gave a verdict for the defendant, and held there was laches in *J. S.* saying they were all agreed that two days was too long.

So where *Chitty* had given the *East India* Company a note on *Caswell*, at eleven in the morning, they did not send it for payment till two o'clock the next day; and it was holden that they had made it their own by their laches.—*East India Company* v. *Chitty*, E. 16 Geo. II. 2 Str. 1175.

But it has been since determined that the next day after a banker's draft is given is the time allowed by law for demanding payment of it.—*Metcalf* v. *Hall*, sup.(*b*)

In *Hill* v. *Lewis*, Salk. 132. the defendant indorsed to *Z.* who the same day indorsed to the plaintiff, who afterwards the same day received money upon other bills of the same banker, and might have received the

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(*a*) Sed vide *Rickford* v. *Ridge*, 2 Campb. 537, and *Robson* v. *Bennett*, 2 Taunt. 394, where Sir *J. Mansfield*, C. J. said, that *Hankey* v. *Trotman* had been over-ruled by *Appleton* v. *Sweetapple*, in *B. R.* M. 23 Geo. III. *Bayley on Bills*, 106. n. (c), 3d ed. in which case the jury found for the defendant, against the opinion of the court. See also *Reynolds* v. *Chettle*, 2 Campb. 596.

(*b*) In *Tindall* v. *Brown*, 1 T. Rep. 167. *Buller*, J. said, that the numerous cases on the subject of the notice necessary to be given to the drawer, reflect great discredit on the courts of *Westminster*, and do infinite mischief in the mercantile world; and this evil can only be remedied by doing what the court wished to do in *Metcalf* v. *Hall*, by considering the reasonableness of time as a question of law, and not of fact.

money

money upon the bill in question, if he had demanded it. The night following the banker broke, and the jury upon consideration (it being left to them by the Lord Chief Justice) found for the plaintiff.

The defendant having a promissory note, payable to him or order, two months after date, indorsed it to the plaintiff, who sent his servant to the drawer for the money, who said the defendant had promised not to indorse the note over without acquainting him; that he had not so done; and therefore he was not prepared to pay it, but promised payment in three or four days; and in like manner put him off from time to time. After three weeks the plaintiff wrote to the defendant (not having sooner learned his direction, though it was proved he sooner enquired after it, and was told where he might learn it,) that *Smith*'s note was not paid; that he had often promised payment, but had alledged, that the defendant promised not to make use of it without acquainting him first: *Smith* became a bankrupt; the plaintiff writes a second letter; the defendant answers, that when he comes to town he will set that matter to rights; upon this evidence the jury gave a verdict for the plaintiff, notwithstanding it appeared *Smith* continued solvent three weeks, and paid above a hundred pounds in the time.—*Anson* v. *Bailey*, M. 1748, at *Guildhall*. (*a*)

[277] A bill was drawn by the defendant upon *H.* for work done by the plaintiff on the defendant's farm, in the possession of *H.* The plaintiff did not give notice to the defendant, that the bill was not paid till three months after it was drawn: and after a verdict for the plaintiff, the court granted a new trial; holding this to be such a laches as discharged the defendant.—*Chamberlayne* v. *Delaryfe*, C. B. T. 7 Geo. III. 1 Wils. 353. S. C. *nom. Chamberlyn* v. *Delarive*.

The defendant had a note of £60 of one *Bellamy*, a goldsmith, payable to him or bearer at a day then to come, about a week before which he discounted it at the bank without indorsing the bill; *Bellamy*, about two months after broke without having paid the bill, upon which the

(*a*) Every one who transfers a bill or note is, *primâ facie*, entitled to sue after payment of it, and therefore entitled to insist on a want of notice, or a neglect to make a proper presentment; but the contrary may be proved. *Bickerdike* v. *Bolman*, 1 T. R. 405. *Rogers* v. *Stephens*, 2 T. R. 713. *Goodall* v. *Dolley*, 1 T. Rep. 712. Payment of part, however, or a promise to pay a part after full notice of default, sufficiently evinces the contrary. *Vaughan* v. *Fuller*, Stra. 1246. *Rogers* v. *Stephens*, sup. *Anson* v. *Bailey*, sup. *Wilkes* v. *Jacks*, Peake 202. But a payment or promise without such notice does not. *Blisard* v. *Hirst*, Burr. 2670. *Goodall* v. *Dolley*, sup. *Lundie* v. *Robertson*, 7 East, 321. *Horford* v. *Wilson*, 1 Taunt. 12. *Gibbon* v. *Coggon*, 2 Campb. 188. *Potter* v. *Ragworth*, 13 East, 417.

bank

bank brought *assumpsit* for money lent, and upon this evidence obtained a verdict; but the court granted a new trial, holding it to be a verdict against law; for if the owner of a bill, payable to bearer, deliver it for ready money paid down for the same, and not for money antecedently due, or for money lent on the same bill, this is selling of the bill like selling of tallies, *&c.* But if there be an indorsement thereon, the indorsee may have remedy on that indorsement, provided he demand the money in a convenient time.—*Bank of England* v. *Newman*, E. 11 W. III. Salk. MSS. 1 Raym. 442. S. C.

As the intent of the 3 & 4 *Ann.* was to put promissory notes upon the same footing with inland bills of exchange; all that has been before said in regard to promissory notes is applicable to such inland bills. However the analogy between promissory notes and bills of exchange should be attended to, in order the better to understand the cases. Whilst the promissory note continues in its original shape, there is none: but when the note is indorsed the resemblance begins; for then it is an order to pay the money to the indorsee, and this is the very definition of a bill of exchange: therefore the indorsee, before he brings an action against the indorsor of a promissory note, ought to demand the money of the drawer: but it must be made on the drawee before an action is brought against the indorsor of a bill of exchange; and no inquiry need be made after the drawer.—*Heylin* v. *Adamson*, M. 32 Geo. II. K. B. 2 Burr. 669. (*a*)

It may be proper further to take notice, that 9 & 10 *W.* III. *c.* 17. gives power of protesting any inland bill of exchange of £5 or upwards, (in which is acknowledged and expressed the value to be received;) but this act has no effect, unless the party on whom the bill was drawn, accept it by under * writing; therefore by the 3 & 4 *Ann. c.* 9. the same [*278] power is given in case the party refuse to accept it, with proviso that no protest shall be necessary, unless the bill be drawn for £20 or upwards.

It has been holden upon these statutes, that in declaring upon an inland bill, a protest need not be set forth, as it must upon a foreign bill,(*b*) for the statute does not take away the plaintiff's action for want of a protest, but only deprives him of damages or interest.—*Borough*

(*a*) And the same doctrine prevails in *Brown* v. *Harraden*, 4 T. R. 148. *Carlos* v. *Fancourt*, 5 T. Rep. 482. *Edie* v. *East India Company*, Burr. 1224.

(*b*) The protest is a part of the custom in the case of foreign bills of exchange. *Gale* v. *Walsh*, 5 T. Rep. 239. Vide etiam *Orr* v. *Maginnis*, 7 East, 359. It is not absolutely necessary, however, that a copy of the protest should accompany the notice of non-payment. Vide *Bayley on Bills*, 3d edit. p. 117, n. (1).

v. *Perkins*,

v. *Perkins*, M. 2 Ann. Salk. 131. Raym. 992, S. C. nom. *Brough* v. *Parkins*.

But if any damages accrue to the drawer for want of a protest, they shall be borne by him to whom the bill is made, and if, in such case, the damage amount to the value of the bill, there shall be no recovery.—6 *Mod.* 81. S. C. nom. *Brough* v. *Perkins*. (*a*)

It is not necessary to set forth the custom in an action upon a bill of exchange, for *lex mercatoria est lex terræ*; and if he set it forth, and do not bring his case within it, yet if by the law merchant he have right, the setting forth the custom shall be rejected as surplusage.—*Mogadara* v. *Holt*, M. 3 W. III. 1 Show. 317.

If *A.* write his name on the back of the bill, and send it to *J. S.* to get it accepted, which is done accordingly, *A.* may, notwithstanding, bring an action against the acceptor, for *J. S.* has it in his power to act either as servant or assignee; (*Clarke* v. *Pigot*, E. 10 W. III. Salk. 126.) for he may witness his election by filling up the blank over the name to receive it as indorsee, or by omitting it, act only as servant.—*Lucas* v. *Haynes*, E. 2 Ann. 2 Raym. 871. (*b*)

Note; In a writ of enquiry before the sheriff, on a judgment by default in an action on a promissory note, the plaintiff must prove his note the same, as if the defendant had pleaded *non assumpsit*; (*c*) though in debt on bond and judgment by default it is otherwise. (H. 18 Geo. II.

(*a*) Vide etiam *Harris* v. *Benson*, Stra. 910.

(*b*) In an action against an acceptor of a bill of exchange by an indorsee, it is competent to acceptor to shew, that the name of the payee on the bill is not the signature of the real payee, and the indorsee cannot recover. If, therefore, the acceptor undertakes to pay one *H. Davis*, another *H. D.* into whose hands it may come, he does not undertake to pay, and the indorsee who has taken it from this other *H. Davis*, has no claims on the terms of acceptance. *Mead* v. *Young*, 4 T. Rep. 28. (*dis. Kenyon*). *Aliter*, where it is payable to bearer; for there acceptor undertakes to pay whoever shall bring him the note. *Miller* v. *Race*, 1 Burr. 452. Vide *Bayley on Bills*, p. 51. (3d ed.) where it is said, that if a bill be lost or stolen, and it is assignable by mere delivery, the finder, or thief, may confer a title, by transferring it; *sed secus* if it requires indorsement. See also the authorities cited in the notes to p. 51 and 52.

In *Brown* v. *Davis*, 3 T. Rep. 83, (n), *Buller*, J. said, it had never been determined that a bill or note is not negotiable after it becomes due, but if there are any circumstances of fraud in the transaction, and it comes into the hands of a plaintiff, by indorsement, after it is due, he always left it to the jury, upon the slightest circumstances, to presume that the indorsee was acquainted with the fraud.

(*c*) At this day the court will give judgment *in debt* on a promissory note.

per

per Ch. Bar.)(*a*) Yet in *Bevis* v. *Lindsell*, H. 14 Geo. II. Stra. 1149. the court of K. B. held, that on executing a writ of enquiry on judgment by default in *assumpsit* upon a promissory note, it was not necessary to produce the subscribing witness, for the note being set out in the declaration is admitted, and the only use of producing it is to see whether any money is indorsed to be paid upon it; it must therefore be proved to be his note, which may be by proving his hand. (*b*)

By the statute of frauds, (29 *Car.* II. *c.* 3.) several things must be evidenced by writing (*c*), or mark, of which, before that statute, parol evidence had been sufficient.

1. All leases, estates, interest of freehold, or term of years, created [279] by parol (*d*), and not put in writing and signed by the parties making the same, or their agents thereunto lawfully authorised by writing, shall have the effect of estates at will only, except leases not exceeding three years from the making, (*e*) whereupon the rent reserved amounts to two-thirds of the improved value, and that no such estate or interest shall be (*f*) granted, or surrendered, but by deed or note in writing.

2. All declarations and assignments of trusts shall be proved by some writings signed by the party, or by his last will, except trusts arising, transferred or extinguished by implication of law.

(*a*) *Quære tamen*, Whether the court ever did issue a writ of inquiry *in debt* on a bond, after judgment by default.

In *assumpsit* also the practice now is, on judgment by default, upon a promissory note or bill of exchange, not to execute a writ of inquiry, but to move for a reference to the master, to ascertain what is due for principal and interest, and on the master's *allocatur*, to sign final judgment, tax costs, and issue execution *instanter*.

(*b*) Though it be sufficient for the plaintiff, in an action on a note of hand, to prove the note to have been given by the defendant, yet the defendant will be at liberty to shew it was given on an illegal consideration, and so avoid the lien of it; *Guichard* v. *Roberts*, 1 Bla. 445; or that it was delivered in nature of an escrow, *viz.* as a reward for something not effected. *Jefferies* v. *Austen*, 1 Str. 674.

But a holder coming fairly by a note for money won at play, or upon an usurious contract, cannot recover. *Lowe* v. *Waller*, Dougl. 708 (736). Vide *Peacock* v. *Rhodes*, ibid. 614 (636). *Bowyer* v. *Bampton*, Stra. 1155.

Where a bill of exchange is really assigned for a valuable consideration, the assignee will recover, though no original value was given; but if it was passed to the use of the original payee, he may avail himself at law against the payments, or may file a bill for relief. *Anon.* Comy. 43.

(*c*) And signing of the party, or mark.

(*d*) Or by livery of seisin.

(*e*) For if they be above three years, then they are to have the force only of leases at will, and if under three years, there must be reserved two-thirds at least of the full improved value of the thing demised.

(*f*) Assigned.

3. It

3. It is enacted, that no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorised. And that no contract for the sale of goods, wares, and merchandize, for the price of £10 *sterling* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged, or their agents thereunto lawfully authorised. *(a)*

Upon this clause it has been holden, that the plaintiff need not in his declaration shew any note in writing, but it will be sufficient for him to produce it on the trial; but if such promise be pleaded in bar of another action, it must be shewn to be in writing, so that it may appear to be such a contract on which an action will lie.—*Case* v. *Barber*, T. 33 Car. II. T. Raym. 450. *(b)*

The defendant bespoke a chariot, and when made refused to take it: In an action for the value, *Pratt*, C. J. held this not to be a case within the statute, which relates only to contracts for the actual sale of goods, [*280] where the buyer is immediately answerable * without time given him by

(a) Vide *Wright* v. *Dannah*, 2 Campb. 303, where it was held, that the agent must be some third person, not one of the contracting parties.

(b) Neither the 4th nor 17th sections of this act mention that the person signing as agent must be authorized thereto by writing, which sect. 3. does; and in the case of *Stansfield* v. *Johnson*, 1 Esp. N. P. Ca. 105, respecting a contract for the sale of lands by an auctioneer, it was determined that the authority need not be in writing; and in a case of a promise of a marriage portion, *Kenyon*, C. J. cited *Wedderburn* v. *Carr*, 3 Woodes. 427, and ruled accordingly. See also 7 *East*, 565, (n), and *Sugd. on Vend. and Purch.* 73, where the Author has cited various authorities, to shew, that though an agent may be authorized by parol to treat for an estate, yet the contract itself must be in writing.

special

special agreement, and the seller is to deliver the goods immediately.—*Towers* v. *Osborne*, Stra. 506. *(a)*

The

(*a*) And the following decisions have, moreover, been made, upon the construction of the clauses in this act:—

Where the promise or agreement is entire, and one part of it is void, and the other valid, it shall be void for the whole, as where the widow of a lessee promises to pay £160 rent for the lessee, and £100 for herself, the first promise not being in writing, makes both void. *Lexington* v. *Clarke*, 2 Vent. 223.

It is singular that an idea could ever prevail, that sect. 17. of this statute was only applicable to cases where the bargain was immediate, for it seems plain from the words, that it was meant to regulate *executory* contracts, and it is from bargains to be completed at a future period, that the uncertainty and confusion which the statute was meant to prevent, will probably arise; the case of *Simon* v. *Metivier*, post, 280 *b*, was determined on the ground that the auctioneer was the agent of both parties, and the contract reduced to writing.

Plaintiff had a demand on a bankrupt, whose creditors he called together, with a view to effect a composition, but afterwards he commenced an action. The creditors, however, agreed to take 10*s*. in the pound; but this the plaintiff refused, unless the defendant would promise to accept bills, drawn by plaintiff, for his debt, to the amount of this composition, and also to pay the plaintiff's expences in consideration of his withdrawing his action, on which plaintiff withdrew it. The bills were paid, but defendant refused to pay the expences. Plaintiff paid his attorney, and then brought an action. *Per Kenyon*, C. J. In this case the bankrupt was indebted to the plaintiff, and defendant undertook to pay part of that debt, and to pay certain other expences. This promise is certainly void in part by the statute, and the agreement being entire, the plaintiff cannot now separate it, and recover on one part of the agreement; the other being void, there is an end of the case, for, where there is an express promise one cannot be implied. As to the costs the defendant's was not a promise to pay the attorney, but to pay the plaintiff the expences he had incurred: but the plaintiff was originally liable to pay those expences to his own attorney, and when he paid them, he only paid his own debt; this cannot be considered as money paid to the use of the defendant. *Chater* v. *Beckitt*, 7 T. Rep. 201. 204.

"You must supply my mother-"in-law with bread, and I will see "you paid." This is a void promise, and plaintiff was nonsuited. *Jones* v. *Cooper*, Cowp. 227, in which case *Nares*, J. over-ruled the determination of Lord *Mansfield*, in *Maxbrey* v. *Carrington*, cited in that case. If the person for whose use the goods are furnished be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds. *Matson* v. *Wharam*, 2 T. Rep. 81.

Bill for a specific performance of an agreement with one (since become a lunatic) for the sale of a reversion of an estate for life. The instrument not being signed by the plaintiff, or his agent, though signed by the other parties, it was argued, that he was not bound by it; but the court said, that an agreement, if acquiesced in, and acted upon, is binding, though not signed by all the parties; here part of the purchase-money has been

The defendant bought a lot for more than £10 at an auction, catalogues and conditions of the sale were printed, and the defendant was the best bidder. The auctioneer wrote the defendant's name and the price against the lot in the printed catalogue by the order and assent of the defendant. Between the day of the sale, and the time for taking the lot away, the defendant sent his servant to see them weighed; which he did. The defendant neglecting to take away the goods, they were re-sold at a considerable loss; and this action was brought for the difference, and the court strongly inclined that sales by auction were not within the statute of frauds, because multitudes are generally present who can testify the terms of the contract. 2. They held the contract was here sufficiently reduced into writing, and signed by an agent of the defendant's; for the auctioneer for that purpose was his agent. 3. They held the weighing by his servant was a delivery. 4. *Yates*, J. held, that as the contract was executory, *viz.* the lot to be fetched away in six weeks, that therefore it was not within the statute.—*Simon* v. *Metivier*, B. R. T. 6 Geo. III. S. C. 3 Burr. 1921. nom. *Simon* v. *Motivos*. (*a*)

Mutual

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paid, and it is the agreement of all, though signed only by some. *Owen* v. *Davies*, 1 Ves. 82.

A prospectus was circulated for publishing a series of prints in numbers, by subscription, the whole delivery of which would occupy some years. The first sum was to be paid down, and the rest on the delivery of each number. Defendant entered his name as a subscriber. Held, that this being an agreement not to be performed within a year, and not evidenced in writing, signed by the party charged, was a void contract. *Boydell* v. *Drummond*, 2 Campb. 157.

(*a*) This case is not out of the statute because executory, but because it was for work and labour *to be* done, and materials, and other necessaries, *to be* found, which is different from a mere contract of sale, to *which species of contract alone* the statute is applicable. In *Clayton* v. *Andrews*, 4 Burr. 2101, which was on an agreement to deliver corn at a future period, there was also some work to be performed, for it was necessary that the corn should be threshed before delivery. This, perhaps, may seem a nice distinction, but still the work to be performed in threshing made a part of the contract, though in a small degree. Something direct and specific is to be done, to shew that the agreement is complete, that there may be no room for doubt and hesitation. *Per* Lord *Loughborough*, in *Rondeau* v. *Wyatt*, 2 H. Bla. 63. The above was recognized by Lord *Kenyon* in *Cooper* v. *Elston*, 7 T. R. 17. The thing contracted for, (said his lordship,) did not exist at the time, and something was to be done before it could be delivered. (There was a sample in this case, but it was expressly stated, that the sample was no part of the goods sold.) The case of *Towers* v. *Osborne*, 1 Str. 506, (cited) was a mere contract for work and labour. *Per Grose*, J. the case of *Towers* v. *Osborne* went upon the general principle, that executory contracts were not with in the statute. If

by

Mutual promises to marry are not within this act, which relates only to contracts in consideration of marriage.—*Cocke* v. *Baker*, H. 3 Geo. II. C. B. *Anon.* E. 5 W. & M. Salk. 280.

So a promise to pay upon the return of a ship is not within the statute, for the ship by possibility may return in a year.

So a promise to pay £6 a year wages, and to leave an annuity of £16 *per ann.* for life, by will, is not within this act, for it might by possibility be perfected within the year.—*Fenton* v. *Emlyn*, B. R. H. 2 Geo. III. 3 Burr. 1278. S. C. nom. *Fenton* v. *Emblers*, 1 Bla. 353. *(a)*

Where the undertaker only comes in aid to procure credit to the party, there is a remedy against both; and both are answerable according to their distinct engagements. But where the whole credit is given to the undertaker, so that the other party is only as his servant, and there is no remedy against them, this is not a collateral undertaking. Therefore if two come to a shop, and one buy, and the other, to gain him credit, promise the seller, "If he do not pay you, I will," this is a collateral undertaking, and void without writing: but if he say, "Let him have the

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by that, were meant contracts for the sale of goods to be executed on a future day, such a construction would repeal the act; but if it only meant such contracts as were incapable of being executed at the time, such decision was right. *Cooper* v. *Elston*, 7 T. R. 17.

So, where a broker, on a view of samples of tobacco, agreed with the seller, that he should have until a certain hour to consult with his principal on the price demanded, and if he assented to it, then the tobacco, which was in the king's warehouse, was to be received within a month, and to be paid for on delivery. Lord *Kenyon* held this contract not to be within the statute; but it was afterwards held by the court to be *nudum pactum*, and the judgment was reversed. *Cook* v. *Oxley*, 3 T. Rep. 653.

Plaintiff agreed to buy sheep of defendant at a fair, and to take them away at a certain hour. No money was paid, or any sheep delivered, nor any memorandum reduced to writing. At the time appointed, plaintiff came not, nor did he send for the sheep; defendant therefore sold them to another. Held, that their value was not recoverable in trover. *Alexander* v. *Comber*, 1 H. Bla. 20. *Sed quære* if plaintiff had gone at the appointed hour, and tendered the price, and defendant had refused the sheep, whether he might not have brought case specially for not performance of the contract?

A parol contract to purchase flour, to be delivered to plaintiff on board vessels in the *Thames*, was held within the statute. *Wilmot*, J. dissent. *Rondeau* v. *Wyatt*, 2 H. Bla. 63.

If defendant, in his answer to a bill in equity, confess the contract, but plead the statute, such a confession will not entitle the plaintiff to recover. *S. C.*

(*a*) In the case, as reported in *Salkeld*, this section is said to be confined to cases where, by the express stipulation of parties, the agreement is not to be performed within the year. As to the case in *Burrow*, the party there had no means of enforcing performance within the year. *Per Loughborough*, C. J. *Clayton* v. *Andrews*, 2 Burr. 2101, went further, but still there was an alteration of the commodity. *Fenton* v. *Emblers*, sup.

goods, I will be your paymaster," this is an undertaking for himself, and he shall be intended the very buyer, and the other to act as his servant. (*Birkmyr* v. *Darnell*, M. 3 Ann. 1 Salk. 27.) But if *A.* promise *B.* that if he will cure *D.* of a wound, he will see him paid, it is only a promise to pay if *D.* do not, and therefore ought to be in writing.

[*281] (*Watkins* v. *Perkins*, E. 9 W. III. 1 Raym. 224.) *However it is impossible to lay down any precise rule for the construction of such sort of words, but it must be left to the jury to determine upon the whole circumstances of the case, to whom the original credit was given.—*Birkmyr* v. *Darnell*, sup.

Wherever a person is under a moral obligation to do a thing, and another does it without request from him, a subsequent promise to pay is good, though not in writing: as where a pauper is taken ill, and an apothecary sent for without the knowledge of the overseers of the poor, who attends and cures her, and after the cure the overseers promise payment by parol, this is good; for overseers are under a moral obligation to provide for the poor.—*Watson* v. *Turner & al', Exchequer*, T. 7 Geo. III.

An action was brought against the defendant and two others, for appearing for the plaintiff without a warrant, and the defendant promised, that, in consideration the plaintiff would not prosecute that action, he would pay him £10 and costs of suit. This was holden not within the statute. (*Stephens* v. *Squire*, E. 8 W. III. 5 Mod. 205.) But, *per Holt*, if *A.* say, "Don't go on against *B.*, and I will give you £10, in full satisfaction of the action," this would be within the statute.—*S. C.* Comb. 362.

In consideration that the plaintiff would not sue *A. B.* the defendant promised to pay the plaintiff the money due, *viz.* £4, in a week; (*Rothery* v. *Curry*, T. 21 Geo. II. C. B.) this was holden to be within the statute of frauds; for no consideration laid that the plaintiff had promised not to sue, and if he had *A. B.* could in no sort have availed himself of this agreement; but the debt is still subsisting, and consequently the promise collateral.—*Lee* v. *Bashpole*, M. 1 W. & M. *King* v. *Wilson*, T. 4 Geo. II. Stra. 873. *(a)*

But

(*a*) If *A.* promise to pay the debt of *B.* in consideration of forbearance of suit against *B.* this is within the statute. But where a bill was drawn and accepted, and the acceptor paid it away in discharge of a debt of his own, and no value ever passed from the acceptor to the drawer, and then, on the bankruptcy of the acceptor, the holder sued the drawer to judgment; and thereupon, in consideration that the holder would release the drawer, and prove the bill, and receive the dividend, the acceptor promised

But where, in consideration that the plaintiff in an action of assault and battery against *J. S.* would withdraw the record and forbear to proceed, the defendant promised to pay him £30, the court held this to be a new consideration sufficient to raise a promise, and not within the statute.—*Read* v. *Nash*, H. 23 Geo. II. K. B. 1 Wils. 305.

So if *A.* promise *C.* that in consideration of his doing some particular act, *B.* will pay him such a sum, *A.* is the principal debtor, for the act done is on his credit, and not on *B.*'s.—*Gordon* v. *Martin*, T. 5 Geo. II. Fitzg. 302.

Many of the doubts upon this statute have arisen by making use of the word *collateral*, which is not a word used in the act of parliament. *(a)* The proper consideration is, whether it be or not a promise to answer for the debt of another; for if it be, though it be upon a new consideration, and therefore, strictly speaking, not a collateral undertaking, yet it is within the statute, and the adding to the promise of the payment of *the debt a promise to pay the costs of the action would make no difference.—*Fish* v. *Hutchinson*, T. 31 Geo. II. C. B. 2 Wils. 94. *Watkins*, v. *Perkins*, E. 9 W. III. 1 Raym. 182. *(b)* [*282]

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promised to be answerable for the difference. The acceptor being in conscience liable, notwithstanding his bankruptcy, this promise was held not within the statute. *Williams* v. *Dyde*, Peake, 68.

(*a*) A collateral promise to pay the debt of another, must mean an actual debt at the time; but if it be a contingent or unliquidated demand, it does not fall within the statute. *Fish* v. *Hutchinson*, 2 Wils. 94. Also a promise to pay the rent, in consideration of the landlord's forbearing to distrain, is not within the statute; for the goods are the debtor's, and the defendant in nature of bailiff for the plaintiff, the promise by the defendant was a new contract. *Williams* v. *Leaper*, 2 Wils. 308.

(*b*) The rule is, that where an action will lie against the party himself, there an undertaking by *I. S.* is within the statute; but where an action will lie against the party it is otherwise. *Birkmyr* v. *Darnell*, 2 Ld. Raym. 1085.

A parol promise to pay *for goods sold to* B. *if* B. *did not pay for them*, though made *before delivery* of the goods, is a collateral undertaking within the statute of frauds. *Jones* v. *Cooper*, Cowp. 227.

The law now is settled, as to collateral promises, that if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds. Therefore, where defendant applied to *M.* (one of the plaintiffs) and asked "If he was willing to serve one *C.* of *P.* with groceries." Plaintiff *M.* answered, "They dealt with nobody in that part of the country, and did not know *C.*" Defendant answered, "If you do not know him you know me, and I will see you paid." *M.* then said he would serve him. *W.* answered, "He is a good chap, but I will see you paid." The court held this promise void, not being in writing, and denied the distinction between a promise *before* delivery of the goods and *after*. *Matson* v. *Wharam*, 2 T. Rep. 82. *Vide* ante, 280 *a* n. (a)

Note;

Note; *per Treby*, C. J. a contract for the sale of timber growing upon land is not within the statute, but may be by parol; because it is a bare chattel.

Upon that part of the clause which directs, that no action shall be brought on any agreement not to be performed within one year from the making, unless the agreement be in writing; it has been holden, that a promise to pay money on the return of a ship, which happened not to return within two years after the promise made, is not within the statute; for by possibility, the ship might have returned within a year; and though by accident it happens not to return so soon, yet it does not bring the case within this clause of the statute, which extends only to promises, where by the express appointment of the party the thing is not to be performed within a year.—*Anon.* E. 5 W. III. Salk. 280.

A man contracts to pay £100, on the day of marriage, this need not be put in writing, for it depends on a contingency, which may, or may not be performed within a year.—*Anon.* Comb. 463. *Francam* v. *Foster*, M. 4 W. III. Skin. 326. (*a*)

Production of Books.—Before we conclude with written evidence, it is proper to take notice of 7 *Jac.* c. 12. which enacts, that the shop-book of a tradesman shall not be evidence after a year. (*b*) However, it

(*a*) *Holt*, C. J. dissented, considering (as he afterwards decided in *Smith* v. *Westall*, Ld. Raym. 316.) that the intent of the statute was, not to trust to the memory of witnesses for a longer time than one year, which might be the case, if the marriage should not take effect within the year.

(*b*) Furthermore, on the subject of private written evidence, the following cases have been decided, *viz.* In *Doe*, d. *Baggally* v. *Jones*, 1 Campb. 367, the question was, whether certain ground was parcel of certain freehold property held by plaintiff under the Bishop of *L.* or of a copyhold tenement within the manor of *H.* and purchased by defendant. There was a paper produced signed by one *B.* who was proved to have been the owner of the copyhold, and in the occupation of both forty or fifty years ago, in which he stated that no part of the garden ground was copyhold, but that he paid 20*s.* rent for one part of it, and £1. 11*s.* 6*d.* for the residue. Held, that this evidence was receivable, as *B.*'s interest lay the other way, and he charged himself by this representation with the payment of rent, to which he would not have been liable had the garden ground been part of his own tenement. *Brune* v. *Rawlings*, 7 East, 279. S. P.

Entries in private books or memorials are only admissible evidence to affect the rights of third persons, upon proof that the writer is dead, and that they are in his hand-writing. *Marlborough Duchess* v. *Guidot*, cited 2 Ves. 193.

But entries by a third person, deceased, of receipts of rent from his tenant, for a particular piece of ground, are not evidence to prove that the ground had belonged to him, because he was interested to make these entries. *Outram* v. *Morewood*, 5 T. Rep. 121. Vide etiam *Stead* v. *Heaton*, 4 T. Rep. 669.

A person who has looked at a log-book from time to time, while the events recorded in it were fresh in his mind,

it is not evidence of itself within the year, without some circumstances to make it so. As if it be proved that the servant who wrote it is dead, and that it is his hand-writing, and that he was accustomed to make the entries. (*Pitman* v. *Maddox*, H. 11 W. III. Salk. 690.) So where the evidence was, that the usual way of the plaintiff's dealings was, that the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered out, which he set down in a book, to which the draymen set their hands, and that the drayman was dead, and this is his hand; it was holden to be good evidence of a delivery. (*Lord Torrington's Case* T. 2 Ann. Salk. 285.) But where the plaintiff, to prove delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, and a witness was ready to prove his hand; Lord Chief Justice *Raymond* would not allow it, saying, it differed from Lord *Torrington's Case*, because there the witness saw the drayman sign the book every night.—*Clerk* v. *Bedford*, M. 5 Geo. II.

Upon an issue out of chancery, to try whether eight parcels of *Hudson's Bay* stock, bought in the name of of Mr. *Lake*, were * in trust for [*283] Sir *Stephen Evans*, his assignees (the plaintiffs) shewed first that there

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mind, and always found them accurate, was allowed to look at the book to refresh his memory. *Burrough* v. *Martin*, 2 Campb. 113. Et vide *Jacob* v. *Lindsay*, 1 East, 460.

A witness may speak to a general balance from the knowledge which he has obtained by inspecting the account books, though he could not state the particulars of the books without producing them. *Roberts* v. *Dixon*, Peake's N. P. Ca. 83.

The log-book of a man of war is evidence to prove the time of the sailing of a ship, forming part of the convoy which the man of war escorted. *D'Israeli* v. *Jowett*, 1 Esp. N. P. Ca. 427.

To prove the fact of a surrender of an interest in an estate, the books of an attorney since deceased, who had made an entry of having prepared the writings, and of the charge for the same as due to himself, and then an entry that they were paid, were admitted in evidence, and afterwards agreed by the court to be so. *Warren* v. *Greenville*, Stra. 1129.

To prove soil and freehold, the entries made by a former steward of the manor in his day-book, of receipts of sums of money for trespasses on the common in question, were held to be good evidence, as the steward thereby charged himself with receipt of money, and they may even be in his own hand-writing, or in a book signed in his handwriting; for, *Per Ashhurst*, J. the rule is, that if a steward's entry be sufficient to charge him, it is admissible evidence. *Barry* v. *Bebbington*, 4 T. R. 514.

Upon a question, which of two parishes *A.* and *B.* ought to contribute in certain proportions, entries by the former wardens of *A.* of their having received certain sums from the parish of *B.*, in consequence of *B.* having disputed the question with *A.* were held to be good evidence on the part of *A.* as against *B.*, by reason that the wardens by such entries charged themselves with the receipt of such sums. *Stead* v. *Heaton*, 4 T. R. 669.

was

was no entry in the books of Mr. *Lake* relating to this transaction. Secondly, six of the receipts were in the hands of Sir *Stephen Evans*, and there was a reference on the back of them by *Jeremy Thomas* (Sir *Stephen*'s book-keeper) to the book *B. B.* of Sir *Stephen Evans*. Thirdly, *Jeremy Thomas* was proved to be dead, and upon this the question was, whether the book of Sir *Stephen Evans* referred to, in which was an entry of the payment of the money, should be read. And the court of king's bench at a trial at bar, admitted it not only as to the six, but likewise as to the other two in the hands of Sir *Biby Lake*, the son of Mr. *Lake*. (*Evans* v. *Lake*, 3d May, 1738.) And in *Smartle* v. *Williams*, (cited by Lord *Hardwicke*, in *Montgomerie* v. *Turner*, 1751.) where the question was, whether the mortgage money was really paid; a scrivener's book of accounts (the scrivener being dead) was holden to be good evidence of payment.

If *J. S.* be seised of the manors of *A.* and *B.* and he cause a survey to be taken of *B.* and afterwards convey it to *J. N.* and after disputes arise between the lords of the two manors concerning the boundaries, this survey may be given in evidence. (*a*) *Aliter* if the two manors had not been in the same hands at the time of the survey taken.—*Bridgman* v. *Jennings*, 1699. 1 Raym. 734.

Evidence not written.—To come now to unwritten evidence, or proof *vivâ voce* as to which every person may be a witness, but such who are excluded for want of integrity, or discernment. (as to whom vide post, p. 293.)

As to want of integrity, it is a general rule,

First, That no person interested in the question can be a witness. (*b*)

Secondly, Nor any person stigmatized. (post, p. 291.)

Thirdly, Nor Infidels. (post, p. 292 *a*)

Fourthly, Nor persons excommunicated. (post, p. 292 *b*)

Fifthly, Nor popish recusants. (post, *ibid.*)

First.—*Of interest in witnesses.*

The strict notion of the objection to the competency of a witness is upon

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(*a*) But if the person under whose direction the map was taken, had only one manor, or a lord describes the boundaries of his wash; (*Anon.* Stra. 95.) or the churchwardens cause a copper plate map to be made, in which they describe the lands claimed as a public road; (as in *Pollard* v. *Scott*, Peake's N. P. Ca. 18.) in any of these cases the map so taken is not evidence against the rights of persons not parties to the making of it.

(*b*) And it is sufficient that the party *thinks* himself interested. *Fotheringham* v. *Greenwood*, Stra. 129. But

upon a *voyer dire*, whether he be to get or lose by the event of the cause; *(a)* (*Per Hardw.* in *Rex* v. *Bray*, H. 10 Geo. II. Ca. Temp. Hardw.

But where a man, who is interested in the matter in question, would himself prove it, it is rather a ground for distrust than any just cause of belief, for men are generally so short-sighted as to look at their own private benefit, which is near to them, than to the good of the world, which is remote, and from the nature of human passions and actions, there is more reason to distrust such a biassed testimony than to believe it. It is also easy for persons who are prejudiced and prepossessed to put false and unequal glosses for what they give in evidence, and the law removes them from testimony to prevent their sliding into perjury; and it can be no injury to truth to remove them from the jury whose testimony may hurt themselves, and can never induce any rational belief. *Gilb. Evid.* 122.

In an action for goods sold to *A. B.* on the credit of defendant, to prove the credit to have been given to defendant, *A. B.* was called as a witness, but it was held that she could not be a witness without a release from defendant. *Sed quære*, whether *A. B.* being a fême coverte, the release ought not to have been made to her husband? *Wright* v. *Wardle*, 2 Camp. 200.

The intestate's estate being insolvent, and a person who had a demand upon it being called as a witness in this action, (which was for work and labour done by the intestate for defendant) it was held, that he was not a competent witness for this purpose, as his evidence tended to make the estate more solvent. *Craig* v. *Cundell*, 1 Camp. 381. *Sed secus* if he had sold the chance of recovering his demand. *Granger* v. *Furlong*, 2 Bla. 1273.

A landlord cannot, in an action against his tenant, be called to prove a right of common as belonging to the tenant in respect to the leased premises, it being for the benefit of his reversionary estate. *Anscomb* v. *Shore*, 1 Camp. 290.

In replevin, cognizance as bailiff to *M.* for rent in arrear. Plea in bar *non tenuit*. It was proposed by the plaintiff to give in evidence the declarations of *M.* and not to call him, he being really the defendant, though not on the record. On the other side, it was said *M.* was a good witness, and must be called, if they wish to have the benefit of his declaration. But *Heath*, J. rejected evidence of the declarations of *M.* *Hart* v. *Horn*, 2 Campb. 92.

Lease by *A.* to plaintiff. *A.* became bankrupt. Defendant claimed by a lease from *A.* of a date subsequent to lease to plaintiff. Defendant called *A.* to prove that the premises in dispute were not included in the premises demised by that deed. Lord *Kenyon* held, that as he had parted with the reversion by assignment under the commission, he was an admissible witness. He then released his allowance and surplus, and gave evidence. *Longchamps*, ex dem. *Evitts* v. *Fawcett*, Peake's N. P. Ca. 71.

In *Bell* v. *Harwood*, 3 T. R. 308, a lessor was admitted as a witness. Vide etiam *Doe* v. *Burt*, 1 T. R. 701.

In an action for money had and received, plaintiff owed money to the defendant, and also to one *A.* He sent the amount of *A.*'s bill to *A.* by a carrier, who, by mistake, paid it to defendant. Plaintiff afterwards sent to defendant the amount of *his* bill by the same carrier, who duly paid the same. Held, that the carrier was of necessity a good witness to prove the two payments to *A.* *Barker* v. *Macrae*, 3 Camp. 144.

To the rule that no person interested can be a witness, there are five exceptions, for which see *post*, p. 287 b. to 291.

(a) The ancient rule of law was to examine on the *voir dire*, but if you are examined in chief you waived it;

Hardw. 358.) therefore, if the right of common be claimed by custom, and the witness also claims under the same custom, he cannot be received, for the verdict and judgment on a custom though *res inter alios acta*, would be evidence for or against him to prove or disprove the custom. But if the common be claimed by prescription as belonging to the estate of *A. B.* who likewise claimed common as belonging to his estate by prescription may be a witness, for if *A.* has such right of common, it does not follow that *B.* has, nor would the verdict in the action of *A.* be evidence in *B.*'s action.—*Walton & al.* v. *Shelley*, K. B. T. 26 Geo. III. 1 T. R. 301. *Bent* v. *Baker*, B. R. Hil. 29 Geo. III. 3 T. R. 27. (*a*)

So in an *action on a policy* of insurance, any who have insured upon the same ship may be witnesses. (*b*) In an action by a master for beating his servant *per quod servitium amisit*, the servant may be a witness, for he is not only not interested in the cause, but not in the question: For there the question is the loss of service, and the action he is entitled to is of a different kind.—*Jewell* v. *Harding*, T. 10 Geo. I. (*c*)

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it; now he may be examined and rejected; *Peake's Evid.* 195. But of late years the courts have let the objection go to the credit rather than to the competency of a witness, but it is a rule of law that no person shall be allowed to invalidate any instrument he has signed, because by being a party to it he has given credit to it. *Walton* v. *Shelley*, infra.

Incompetency arising from interest is a total disqualification, and it may be disclosed on the *voir dire*, or upon a cross examination after an examination in chief, but a cross examination as to the merits sets up this evidence.

As to the practice of examining witnesses on the *voir dire*, and cross examining them, see the liberal observations of Mr. *Peake*, Law of Evidence, 195, *et seq.*

The contents of written instruments may be examined into on the *voir dire*, though they be not produced, but it must be before the examination in chief, and it cannot be on cross examination. In this case the question was on cross examination, and was, "What interest the witness took under the will of plaintiff's late husband?" *Non allocatur.* *Howell* v. *Lock*, 2 Campb. 15.

But in *Courteen* v. *Touse*, 1 Campb. 43, after exhausting a witness's memory as to the contents of a lost letter, he was asked whether it contained a particular circumstance which was mentioned. This was asked on cross examination, and for the purpose of contradicting another witness who had sworn *contra*. It was held that this question might be put.

(*a*) The point determined in *Walton* v. *Shelley* was, that no person is a competent witness to impeach a security which he himself has given, *i. e.* that a promissory note indorsed by himself was given on a usurious consideration, even though he be not interested in the event of the suit.

Sed vide *Jordaine* v. *Lashbrooke*, 7 T. R. 601, where *Walton* v. *Shelley* was denied.

(*b*) But if a broker, who procured the underwriters to subscribe, afterwards subscribe himself, he may be a witness for those who subscribed before him, for they had gained an interest in his testimony which he could not devest. *Bent* v. *Baker*, sup.

(*c*) But in an action against the master for his servant's negligence, the

It must be a present interest, for a future contingent interest will not be sufficient to prevent him from being a witness; therefore an heir at law may be a witness, but a remainder-man cannot.—*Smith* v. *Blackham*, M. 1699. 1 Salk. 283.(*a*)

By 27 *Geo.* III. *c.* 19. In actions on penal statutes, inhabitants of any place are witnesses to prove an offence, notwithstanding the penalty be given to the poor, or otherwise for the benefit of the parish or place, provided the penalty does not exceed £20.

An interest is when there is a certain benefit or advantage to the witness attending the determination of the cause one way. Therefore a naked trust does not exclude a man from being a witness. (*Goss* v. *Tracy*, 1 P.W. 290.)(*b*) And though in such cases it has been usual

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the servant is not competent to disprove the negligence of his master without a release, for the verdict may be given in evidence in a subsequent action by the master against the servant, to ascertain the amount of the damages, though not to prove the negligence. *Green* v. *New River Company*, 4 T. R. 589.

(*a*) For he hath a present interest in the land; but the heirship of the heir is a mere contingency. So where there is a tenant in tail, with remainder in tail, he in remainder cannot be a witness concerning the title of those lands, for he hath but the estate, such as it is. *Smith* v. *Blackham*, sup.

Where the heir of bankrupt was brought to prove a debt to him by the assignee, it was objected, that the surplus of the real estate, which is only to come in aid of the personal, being to go to the bankrupt and his heirs, the heir, by swearing as to the personal estate, has this benefit, that he discharges the real estate as to so much; but the Chief Justice allowed him to be a witness, saying, it was too remote a contingency. *S. C.*

(*b*) Therefore a guardian in socage may be sworn for his ward; but where an infant brings his action by guardian, the guardian, on record, will not be allowed to be a witness, because, if the action be frivolous, the expence of such action will not be allowed him in his discharge; *Clutterbuck* v. *Huntingtower*, 1 Stra. 506; and the guardian that would be sworn to affect this action, swears to the maintaining his own interest, and consequently he is not a competent witness. *Gilb. Ev.* 123. So an executor may be sworn in a cause relative to a will, where he is not residuary legatee, because he is no more than a trustee, (Vide *Anon.* 1 Mod. 107.) and has no interest; for a plaintiff executor pays no costs. This is not, however, by the express words of the statute 23 *Hen.* VIII. *c.* 15, but only by an equitable construction thereof, because, what he recovers is not for himself, but in trust for his testator. *Rachfield* v. *Careless*, 2 P. W. 161.

So where the plaintiff sued as an infant by her father, as *prochein amie*, for assault and battery, the father was refused as a witness by Lord *Hardwicke*, he being liable to costs. *Hopkins* v. *Neale and Newman*, 2 Stra. 1026.

Where the devisee of the remainder of a copyhold estate was called to prove the sanity of the testator, on his offering to release all his interest to the heir at law, he was held a competent witness, although the heir at law refused to accept the release. *Goodtitle*, ex dem. *Fowler* v. *Welford*, Dougl. 134. (139.)

A witness to a contract between buyer and seller, who was to have

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usual to have a release from a trustee, yet that is not necessary, for such person has in fact no interest to release. However, a trustee shall not be a witness to betray the trust; therefore where the defendant pleaded to debt on bond the 5 & 6 *Edw.* VI. against buying ing and selling offices, and upon the trial *A.* was produced as a witness to give an account upon what occasion the bond was given, Lord Chief Justice *Holt* refused to admit him, because it appeared he was privately intrusted to make the bargain by both parties, and to keep it secret.—*Holt* v. *Tyrrel*, E. 13 Geo. I. K. B. at Bar.

And the case is the same as to the counsel and attornies, who ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose; for it is the privilege of the client and not of the counsel or attorney. (*a*) It is contrary to the policy of the law to permit any person to betray a secret with which the law has intrusted him; and it is mistaking it for the privilege of the witness that has sometimes led judges into the suffering of such a witness to be examined. But to this there are some exceptions: First, as to what such persons knew before the retainer; for as to such matters they are clearly in the same situation as any other person: Secondly, to a fact of his own knowledge, and of which he might have had knowledge, without being counsel or attorney in the cause. (*Lindsey* v. *Talbot*, T. 12 Geo. I. Oct. Str. 140.) As suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution. So if the question were about a razure in a deed or will, he might be examined to the question, whether he had ever seen such deed or will in other plight, for that

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1*s.* in the pound, is a good witness, as a factor, for he was a go-between, and concerned for both parties. *Dixon* v. *Cooper*, 3 Wils. 40. Et vide *Benjamin* v. *Porteus*, 2 H. Bla. 590.

(*a*) But the question put must be a matter of secrecy, *confided to him by his client*, and not of his own knowledge. Vide *Wilson* v. *Rastall*, 4 T. R. 753. See also note (a.) *post*, p. 285.

If a fact be admitted by the attorney on the record, with intent to obviate the necessity of proving it, his client will be bound by the admission; but whatever the attorney says in the course of conversation, is not evidence. *Per Ellenborough*, C. J. in *Young* v. *Wright*, 1 Camp. 141.

Communications to an attorney, by his client, whether prior or subsequent to the relation of client and attorney subsisting between them, are not privileged. But what such attorney says in that character will be evidence. *Gainsford* v. *Grammar*, 2 Camp. 9. Vide etiam *Cobden* v. *Kendrick*, 4 T. Rep. 431. *Wilson* v. *Rastall*, ibid. 753. *Robson* v. *Kemp*, 5 Esp. N. P. 52. *Spencely* v. *Schulenburgh*, 7 East, 357. And in *Dennison* v. *Spurling*, 1 Stra. 506. where an action was brought by an infant, the wife of the *prochein amie* was admitted as a witness.

So where an infant brought an action of assumpsit, and declared by guardian; and to prove that the witness was the prosecutor of the cause, and at the expence of it, the Chief Justice allowed the defendant to give the guardian's declaration, to that purpose, in evidence, he being a person liable to costs. *James* v. *Hatfield*, Stra. 548.

is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such head: (*Lord Say & Sele's Case*, M. 10 Ann. *Per* Sir *O. Bridgman*, with the advice of the judges.) So if an attorney were present when his client was sworn to an answer in chancery, upon an indictment for perjury, he would be a witness to prove the fact of taking the *oath, for it is a [*285] fact in his own knowledge, and no matter of secrecy committed to him by his client.—*Rex* v. *Watkinson*, M. 13 Geo. II. 2 Str. 1122. *è contra. (a)*

A *scire facias* was brought by the king to avoid a patent, and exception was taken to a witness, because he was to be deputy to the persons that would avoid it, and the exception was disallowed, because the *scire facias* is in the king's name, and therefore it cannot be presumed that the interest is in another, which would destroy the very being of the *scire facias*, but the proof of that ought to come on the defendant's side to destroy the proceedings.—*Hanning's Case*, M. 21 Car. II. 1 Mod. 21. *(b)*

It is no good exception to a witness that he has common *per cause de vicinage* of the lands in question, for this is no interest but only an excuse for a trespass. *(c)*

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(a) Giffard, an attorney, was proposed to be examined against the defendant, his client, and admitted by the whole court, upon this ground, that the confidence must be *necessary* and *lawful*, and not a *criminal secret*, to which his confidence did not necessarily extend; in fine, it must be a secret deposited with him in the employment of attorney, and not committed to him as a mere acquaintance; for otherwise the privilege of secrecy does not hold. *Annesley* v. *Anglesea*, MS. Ca. In 1744, *Cur. Scacc. Ireland.*

So an attorney may give in evidence a communication to him by his client, after a writ of enquiry; for the object of the suit being obtained, all instructions for the conduct of the cause have ceased. *Cobden* v. *Kendrick*, 4 T. Rep. 431.

And as this privilege is confined to matters disclosed to an attorney, in his professional character, it was held, that he must give evidence of matters communicated to him by a person, as to his defence in an action which he was not employed to defend. *Wilson* v. *Rastall*, 4 T. Rep. 753.

An attorney is not at liberty to disclose what is communicated to him confidentially by a client, although the latter be not in any shape before the court. *Per Ellenborough*, C. J. in *R.* v. *Withers*, 2 Camp. 579. And therefore, where the prosecutor has given evidence, upon an indictment for forcibly entering his house, the attorney cannot be called to prove that the prosecutor, upon consulting him, gave a different account of the transaction, or that a third person, who then accompanied the prosecutor, *in his hearing*, represented the house as his own. *S. C.*

(b) Per three judges, (*Twisden*, J. *dissent.*) because this suit is between the king and the patentee.

(c) Or rather, perhaps, because the right is not, in any way, assisted by the evidence; but, let who will recover the lands, the whole right of common remains, so that the witness is certainly indifferent, in point of interest,

From this rule it is apparent, that the plaintiff or defendant cannot regularly be a witness in his own cause, for he is most immediately interested; *(a)* therefore an answer in equity is of very little weight where there

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interest, between the two contenders. The same law holds good as to common of shecker (*i. e.* common for hogs in *Norfolk*). The general question amounts to this, whether the record in the cause will affect his interest. *Bent* v. *Baker*, 3 T. Rep. 27.

As to commoners, it is a rule, that one cannot be a witness for another, but the admissibility of their evidence seems better founded on this rule, *viz.* if the issue be on the right of common, which depends on a custom pervading the whole manor, the evidence of the commoner is not admissible, for as it depends on a custom, the record in that action would be evidence in a subsequent action, brought by that witness, to try the same right; but the reason does not hold, where the common is claimed by prescription, in right of a particular estate, because it does not follow, that if *A.* has a prescriptive right of common to this estate, *B.* who has another estate in the same manor, must have the same right, neither would the judgment for *A.* be evidence for *B.* *Per Buller*, J. in *Walton* v. *Shelley*, 1 T. Rep. 302.

A tenant at will has been allowed to prove livery of seisin in the lessor, for a man cannot be said to get or lose, where he has only such a precarious interest, and not such certain benefit or charge out of the estate, as he may recover by an action; nor tenant at will can maintain an action for the possession in his own right, and by his oath he doth not defend any estate or interest of his own, he is but in nature of a bailiff or servant to the freeholder; and the law doth not exclude servants to be sworn on behalf of their masters. *Gilb. Evid.* 124. But if a man promise a witness, that if he recover the lands, he shall have a lease of them for so many years, this excludes the evidence; for here the witness would have a fixed and certain advantage by the event of the verdict, and by consequence, his attestation is to derive an interest to himself. *Per Twisden*, J. in *Hanning's Case*, 1 Mod. 21.

(a) Even though he be a mere trustee, for as such he is liable to costs, and his indemnity against them is but a chance. *Rex* v. *Bermondsey Parish*, 3 East, 7.

But where a corporation are made defendants, in that capacity, an individual member may be a witness, for he is not individually liable to costs. *Weller* v. *Foundling Hospital*, Peake's N. P. Ca. 157.

But where members have any private interest, as a freedom of toll, right of common, &c. they cannot be witnesses. *Howard* v. *Bell*, Hob. 92. *Sandy* v. *Custom-House Officers*, Skin. 174.

But a freeman of *London* was held a competent witness for the corporation, in an action by them for tonnage on wine, imported by defendant, by *Scroggs*, C. J. *Dolbin* and *Raymond*, J. contra *Jones*, J. *Case of London Corporation*, 1 Vent. 351. *R.* v. *London Mayor*, 2 Lev. 351. S. P. and the like in *R.* v. *Carpenter*, 2 Show. 47; *Jones*, J. only dissenting. But on an issue to try whether the whole manor of *H.* was within the county of *S.*, some witnesses were called to prove that the manor house was in another county, and objected to as being men of that county. *Sed per Cur.* any man may be a witness, who is not of the same hundred; for every hundred pays a proportion of the county tax. *Salop County* v. *Stafford County*, 1 Sid. 192. Vide etiam 1 *Ann. stat.* 1. *c.* 18, which makes the inhabitants of any county, division, &c. good witnesses in indictments, for not repairing bridges, &c.

there are no proofs in the cause, to back it; yet, if there be but one witness against a defendant's answer, the court will direct a trial at law to try the credibility of the witness; and in such case will order the defendant's answer to be read to the jury.—*Ibbotson* v. *Rhodes*, E. 1706. Eq. Ca. Abr. 229. pl. 12. (*a*)

But if any person be arbitrarily made a defendant to prevent his testimony, the plaintiff shall not prevail by that artifice; but the defendant, against whom nothing is proved, shall be sworn notwithstanding, for he does not swear in his own justification, but in justification of another. However, this rule is to be understood where there is no manner of evidence against the defendant; for if there be, his guilt or innocence must wait the event of the verdict.

In trespass, if one whom the plaintiff designed to make use of as a witness be by mistake made a defendant, the court will, on motion, give leave to omit him, and have his name struck out of the record, even after issue joined: (*Anon.* H. 1670. 1 Sid. 441.) for the plaintiff can in no case examine a defendant though nothing be proved against him: (*b*) and

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&c. and 8 *Geo.* II. *c.* 16. *s.* 15, which makes hundredors good witnesses for the hundred, on the statute of hue and cry; as to which, *vide ante*, pa. 197.

So where plaintiff claimed as lessee of *Kingston* Corporation, who had approved the land for which plaintiff paid rent, a freeman of *Kingston* could not be a witness. *Burton* v. *Hinde*, 5 T. Rep. 174.

Neither can a stranger who acts in defiance of a custom, on which a corporation brought an action, be a witness in the cause. *Carpenters' Company* v. *Hayward*, Dougl. 360. (374.)

For the cases, however, in which corporators and others are to be examined as witnesses on public questions, see *Peake's Evid.* 161, 3d edit. And as to the manner in which a corporator must be disfranchised to qualify him as a witness for the body, the mode is, to file an information against him, in nature of a *quo warranto*, which information he must confess, and then judgment will pass to disfranchise him. *Colchester Corporation* v. ———, 1 P. W. 575, (n.)

Therefore where the *Sadlers'* Company brought debt for a forfeiture, three of their members being disfranchised, declared on the *voir dire*, that they had no assurance of being restored, and they were admitted. *Sadlers' Company* v. *Jones*, 6 Mod. 165. But where a freeman was called, and on being objected to, the corporation produced a judgment in the mayor's court, on which a *sci. fa.* had been awarded, and two *nihils* returned, he was adjudged to be disfranchised; but the man saying he was not summoned, and knew nothing of the matter, Lord *Holt* rejected his testimony. *Brown* v. *London Corporation*, 11 Mod. 225.

(*a*) Sed vide *Norden* v. *Williamson*, 1 Taunt. 378, where it was held, that defendant may call the plaintiff as a witness, and he will be a good witness, if he submits to be examined.

(*b*) In trespass, a co-trespasser, not sued, is a competent witness for the plaintiff; but if one of several defendants allows judgment to go by default, he is not a competent witness for the plaintiff, though he is

and therefore in an information for a misdemeanor, the attorney-general (*Trevor*) offering to examine a defendant for the king, which the court would not permit, he entered a *nolle prosequi*, and then examined him.—If a material witness for the defendant in ejectment be also made a defendant, the right way is for him to let judgment go by default; but
[*286] if he plead, and * by that means admit himself to be tenant in possession, the court will not afterwards upon motion strike out his name. But in such case, if he consent to let a verdict be given against him, for as much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant. (*Dormer* v. *Fortescue*, M. 9 Geo. II. Willes, 343. (n.))—In trespass, the defendant pleaded *quod actio non quia dicit* that *Richard Mawson*, named in the *simul cum*, paid the plaintiff a guinea in satisfaction, and issue thereon; the defendant produced *Mawson*; and *per Eyre*, C. J. he may be examined, for what he is now to prove cannot be given in evidence in another action, and in effect he makes himself liable by swearing he was concerned in the trespass. (*Poplet* v. *James*, T. 5 Geo. II.) But if the plaintiff can prove the persons named in the *simul cum* in trespass guilty, and parties to the suit, which must be by producing the original or process against them, and proving an ineffectual endeavour to arrest them, or that the process was lost, the defendant shall not have the benefit of their testimony.—*Reason* v. *Exbank*, H. 1 Geo. I. *Per omnes just.* Oct. Str. 19. *(a)*

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is for his co-defendants. *Chapman* v. *Graves*, Lanc. Sum. Ass. 1810, cor. *Le Blanc*, J. 2 Camp. 333, (n.) and in the cases there cited, it is said, that he who suffers judgment to go by default may be a witness to exculpate his co-defendants, but not to inculpate them.

(a) Upon the question of competency, with regard to interest, it has been also held, that one underwriter may be examined for another. *Per Buller*, J. in *Bent* v. *Baker*, 3 T. R. 27.

So persons, not rated, but liable to be so, are competent witnesses. *Rex* v. *Prosser*, 4 T. Rep. 17. And so is an inhabitant, not rated, on an appeal between his parish and another. *Rex* v. *Little Lumley*, 6 T. R. 157. Even though left out of the rate for the purpose of making him a witness. *Rex* v. *Kirdford Inhabitants*, 2 East, 559. And by stat. 27 *Geo.* III. *c.* 29, parishioners are made competent witnesses in prosecutions for penalties given to the parish, not exceeding £20.

So a man, who conveys lands, may be a witness, to prove that he had no title, because that is swearing against himself, but he is not compellable to give such evidence. *Title* v. *Grevett*, 2 Ld. Raym. 1008.

When the question arises between the immediate parties to any instrument, or those who stood in their place, as in the case of securities not negotiable, the rule is, that, *in pari delictu potior est conditio possidentis;* and as persons are continually allowed, "*allegare suam turpitudinem*," as in simony, confessing felony, sale of offices, &c. and possibly,

From what has been said, it appears, 1. That a *particeps criminis* may be witness for the plaintiff, though left out of the declaration for that purpose; yet this mightily lessens his credit, especially in trespasses where satisfaction from one is a discharge for all the rest. In a criminal prosecution, according to the opinion of some, he can only be a witness in two cases, *viz.* if he be actually pardoned; or if he have no promise of pardon. But others have holden that such a promise will be no exception to his competency, but only to his credit; therefore in *Layer*'s trial the court refused to let a witness be examined on a *voyer dire*, whether he had such a promise.—2 *Hawk. P. C.* 434.

2. That husband and wife cannot be admitted to be witness for each other, because their interests are absolutely the same; *(a)* nor against each other, because contrary to the legal policy of marriage. However, there are some exceptions to this rule: first, in case the of high treason it has been said, that a wife shall be admitted as a witness against her husband, because the tie of allegiance is more obligatory than any other. Secondly, by the 5 *Geo.* II. the wife of a bankrupt may be examined by the commissioners touching his estate, but not his bankruptcy. Thirdly, if a woman be taken away by force and married, she may be an evidence against her husband indicted on 3 *Hen.* VII. 2. against the stealing of women: for a contract obtained by force has no * obligation in law. So upon an indictment on 1 *Jac.* I. [*287] *c.* 11. for marrying a second wife, the first being alive, though the first cannot be a witness yet the second may, the second marriage being void: *(b)* and whether a wife *de jure* may not be a witness against her husband on an indictment for a personal tort done to herself, seems to be

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sibly, that maxim of our law may be confined to persons making a demand, *in turpi causâ*, and to those cases of defence where innocent persons may be prejudiced.

To the general rule of interest in witnesses, however, there are some exceptions, and instances have arisen, where persons substantially interested, and even parties in a cause, have been examined as witnesses; but these exceptions have arisen *ex necessitate rei*, as will appear hereafter; and therefore the extent of such an exception should be very accurately defined.

(a) Therefore in an action against a sheriff for taking goods, under an execution against the husband, and which had been conveyed to the plaintiff at the time of the marriage, in trust for the separate use of the wife, it was held, that the husband was not a competent witness to prove the identity of the goods. *Davis* v. *Dinwoody*, 4 T. Rep. 678.

(b) So in *Broughton* v. *Harpur*, 2 Raym. 752. a first wife was refused (in a civil action) to be admitted to prove her marriage, and in *Rex* v. *Cliviger Inhab.* 2 T. R. 263, a first wife was not allowed to be called, for *(Per Ashhurst*, J.) a husband and wife shall not be permitted to give evidence, even tending to criminate each other; indeed, there is a great differ-

be matter of doubt. In Lord *Audley's* Case she was allowed to be a witness to prove her husband assisted to a rape upon her; and though this case has been denied to be law, yet it was in cases where the indictment was not for a personal tort to the wife; and in the case of *Azire*, on an indictment for the battery of the wife, Lord *Raymond* suffered the wife to give evidence; and the wife is always permitted to swear the peace against her husband; (*R.* v. *Azire*, T. 11 Geo. I. 1 Stra. 633.) and her affidavit has been admitted to be read on an application to the court of king's bench for an information against the husband for an attempt to take her away by force after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution upon, and not afterwards to be a witness at the trial. (*Lady Lawley's Case.*) Fourthly, in an action between other parties, the wife may be a witness to charge her husband, *ex. gr.* to prove the goods, for which the action is brought, sold on the credit of the husband. (*Williams* v. *Johnson*, H. 8 Geo. I. Stra. 504.) So perhaps in some cases, in an action against her husband, though she will not be admitted to be a witness, yet a confession of her's may be given in evidence to charge him: as where an action was brought for nursing his child, the plaintiff was allowed to give in evidence, that the wife declared the agreement to have been for so much *per* week, because such matters are usually transacted by the women.—*Anon.* T. 8 Geo. I. 1 Stra. 527.

But no other relation is excluded, because no other relation is absolutely the same in interest: therefore in *Pendrel* v. *Pendrel*, (H. 5 Geo. II. Stra. 925.) before Lord *Raymond*, which was an issue out of chancery to try whether the plaintiff were heir to *T. O.* the marriage and birth being admitted by order, the mother was admitted to prove the father had access to her. So in *Lomax* v. *Lomax*, (2 Stra. 940. nom. *Lomax* v. *Holmden*,) before Lord *Hardwicke*, the mother was admitted to prove the marriage; and in an ejectment against *Sarah Brodie*, at *Hereford*, 1744, Mr. J. *Wright* admitted the father to prove the daughter legitimate; her title being as heir to her mother. (*a*)

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ence between a wife *de jure* and a wife *de facto*, for a wife *de jure* cannot be a witness for or against her husband, but a wife *de facto* may. *Gilb. Law of Evid.* 137.

(*a*) What that interest is which shall exclude a man's testimony, has been a subject of great discussion, in a variety of cases, some of which are above referred to. In *Rex* v. *Bray*, Rep. Temp. Hardw. 360, Lord *Hardwicke* said, that when a question on this point arose, on which a doubt might be raised, he always inclined to restrain it to the *credit*, rather than to the *competency*, of a witness, making such observations to the jury as the case might require. And Lord *Mansfield*, afterwards, in *Walton* v. *Shelley*, 1 T. R. 300, said, that the old cases, upon the *competency* of witnesses, had gone upon

To consider now the exceptions to this rule, that no person interested can be a witness, (of which there are five).

1. *Exception*; A party interested will be admitted in a criminal prosecution in most instances. (*a*) [288]

H. had a promise of a note of £5, from his mother-in-law, and by some slight got her hand to a note for £100, and it was holden by *Holt*, at *Guildhall*, that the mother could not be a witness in an information for the cheat; for though the verdict cannot be given in evidence in an action upon the note, yet, he said, they were sure to hear of it to in-

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upon very subtile grounds, but the court of late endeavoured, as far as possible consistent with those authorities, to let the objection go to the *credit*, rather than to the *competency*, of a witness; so that *the general established rule* now is, that no objection can be made to a witness, on the ground of interest, unless he be *directly* interested, *i. e.* unless he be immediately benefited or injured by the event of the suit, or unless the verdict, to be obtained by his evidence, or given against it, will be evidence for or against him in another action, in which he may afterwards be a party: any smaller degree of interest resting on possibility, though it furnishes a strong argument against his *credibility*, yet it does not destroy his *competency*. *Carter* v. *Pearce*, 1 T. Rep. 163. *Vide etiam* Lord *Mansfield*'s Comments on the word "Credibility," in the Stat. of Frauds, in *Wyndham* v. *Chetwynd*, 1 Burr. 417. And it was on the same principle, that Lord *Kenyon* determined this point, in *Bent* v. *Baker*, 3 T. Rep. 27.

(*a*) On the trial of *Mathews*, a bailiff, for perjury, in an affidavit that he did not forcibly break open a door to arrest a Mr. *Martin*, on an execution, Mr. *Martin* was admitted a competent witness, though it was objected that he was an interested witness, as he swore for his liberty and property; for if there was a conviction on his evidence, the arrest was illegal, and he would be discharged. But the best rule seems to be that laid down in *Reg.* v. *Mackartney*, Salk. 286, where it was held, that if there can be no other witness to the transaction, or where the nature of the thing allows no other evidence, then the credit shall be left to the jury.

The rule is the same in criminal or penal actions, as in civil, for there also the question of interest goes generally to his credit, unless the judgment in the prosecution, in which he is a witness, can be given in evidence in the cause wherein he is interested. *Abrahams* v. *Bunn*, 2 Burr. 2255. *Bell* v. *Harwood*, 3 T. Rep. 308. *Smith* v. *Prager*, 7 T. Rep. 60. An exception to this rule, however, seems to have been established in the case of *Forgery*; for it has been often decided, that one, whose hand has been forged to an instrument, whereby (if good) he would be charged with a payment, or one, who has paid money, in consequence of such a forgery, cannot be a witness on the indictment. Still, however, where the party injured cannot possibly derive any benefit from the verdict, as in indictments for personal injuries, his competence has never been doubted. *Watt's Case* Hardw. 331. Yet the cases on this subject were so contradictory, that it was difficult, before the late case of *R.* v. *Boston*, 4 East, 572, which recognizes *Bartlett* v. *Pickersgill*, cited in 4 Burr. 2255, to reconcile them; vide autem *Peake's Law of Evidence*, where the doctrine on this point is fully and ably discussed.

fluence the jury: (*Rex* v. *Whiting*, M. 10 W. III. Salk. 283.) but in *Rex* v. *Bray*, (*H.* 10 *Geo.* II. Ca. Temp. Hardw. 358.) Lord *Hardwicke* said, if this case had not been settled by so great a judge, it would go to the credit only, and not to the competency; and in *Far.* 119, it is said by *Holt*, that if a woman give a note or bond to a man, to procure her the love of *J. S.* by some spell or charm, in an indictment for the cheat, she shall be a witness, though it tend to avoid the note, for the nature of the thing allows no other evidence. (*Rex* v. *Sewell*, M. 1 Ann. 7 Mod. 119. *R.* v. *Macartney*, M. 2 Ann. Salk. 286. S. P.) So if the doing of the act, which he is now evidence to invalidate or set aside, were a mean to obtain his liberty, he shall be a witness, as in the case of a bond given by duress. The defendant was indicted for tearing a note, whereby he promised to pay so much money to *A. B.* who was produced as a witness, and notwithstanding it was objected that he was going to swear to set up his own demand, because, if convicted, the court would compel the defendant to give a new note, yet he was admitted.—*R.* v. *Moise*, T. 10 Geo. I. 1 Stra. 595.

Mrs. *L.* gave a promissory negotiable note to the defendant in trust to assign it to Mrs. *T.* who was indebted to Mrs. *L.* the defendant broke his trust, and negotiated the note; Mrs. *L.* having paid the note, brought a bill in chancery against the defendant, who, in his answer, denied the trust, upon which he was indicted for perjury, and Lord *Hardwicke* refused to admit Mrs. *L.* to give evidence of the trust, and compared it to the case of forgery, where the person whose hand is forged is not admitted, and said it differed from the case of usury, where the party is admitted to be an evidence, if the money is paid; the reason of which is, being party to the crime, he will not be permitted to have any remedy for it again.—*Rex* v. *Nunez*, E. 9 Geo. II. Stra. 1043. (*a*)

And in a late case in which all the former resolutions were thoroughly considered, the court held, that the person who borrowed money on a pawn, was a good witness in an action for usury against the pawnbroker, though the payment of the money borrowed was proved by no other
[*289] person but himself: * for the judgment in this action could not be given in evidence in an action against him for the money lent.—*Abrahams* v. *Bunn*, T. 8 Geo. III. 4 Burr. 2251.

(*a*) In *Strange*'s Report of this case, it is said, that defendant promised not to sue Mrs. *L.* on the note, but to obtain payment of Mrs. *T.*, and that defendant broke his promise, and sued Mrs. *L.*, whereupon she brought her bill in the Exchequer for an injunction.

Though,

Though, as is said, a person whose hand is forged is not admitted to prove the forgery, yet under many circumstances he may, where he is not directly interested in the question; as in *Well's Case*, (*Per Willes*, C. J. at Oxon.) who was indicted for forging a receipt from a mercer at *Oxford*, the mercer having before recovered the money in an action against *Wells*, was admitted to prove the forgery.

So in an indictment for perjury on the statute, the person injured cannot be a witness, because the statute gives him £10, but in an indictment at common law the party injured may be a witness.—2 *Hawk.* 433. (*a*)

2. *Exception*; A party interested will be admitted for the sake of trade and the common usage of business.

Therefore a porter shall be evidence to prove a delivery of goods.—So a banker's apprentice to prove the receipt of money. (*b*) So an indorsement on a bond by the obligee of the receipt of interest has been admitted to bring it within the twenty years.—*Searle* v. *Barrington*, H. 2 Geo. II. Stra. 826.

3. *Exception*; A party interested will be admitted where no other evidence is reasonably to be expected.

(*a*) At a trial for perjury, *cor.* the Recorder (*Adair*) the drawer of a bill having a release from the drawee who had paid it, was allowed to swear that his signature was forged. *Sed quære*, if he might not be admitted without a release? for it seems the verdict on the indictment could not have been given in evidence in an action by the drawee against the drawer. *MS. Ca.*

(*b*) And upon the same principle the cases of *Spencer* v. *Goulding*, Peake's N. P. Ca. 129, and *R.* v. *Phipps & Archer*, post, p. 289 *b*, (at Cambr. *per Lee*, C. J.) were decided, and so was *Martin* v. *Horrell*, 2 Stra. 647, and *Benjamin* v. *Porteus*, 2 H. Bla. 290. So where plaintiff's servant delivered his master's money to defendant for illegal insurances in the lottery, but as the transaction was not in the ordinary course of business, he was first released by his master. *Clarke* v. *Shee*, Cowp. 198.

And a factor, who was to have a poundage on the amount of the sale, was allowed to prove the contract by his principal. *Dixon* v. *Cooper*, 3 Wils. 40. And so was a factor, who was to have all above a certain sum. *Per Heath* and *Rooke*, J. contra *Eyre*, C. J. in *Benjamin* v. *Porteus*, sup.

And a party who stands indifferent in point of interest may be a witness, as where *A.* had received money from *B.* to pay to *C.* he was allowed to prove his own agency in an action by *B.* for the money, though not a case of necessity. *Ilderton* v. *Atkinson*, 7 T. R. 480.

So where a captain of an *Indiaman* had borrowed money of the plaintiff, he was allowed to prove that he had done so for the use of the ship in an action against the owners. *Evans* v. *Williams*, 7 T. R. 481, (n.)

So the master of a ship, which plaintiff had victualled, was allowed to prove defendant's ownership. *Rowcroft* v. *Bassett*, Peake's Evid. 173.

As

As upon the statute of Hue and Cry, where the party robbed is admitted, even though he be himself plaintiff. (*a*)

So in actions by informers for selling coals without measuring by the bushel, the servants are witnesses for their master, notwithstanding 3 *Geo.* II. inflicts a penalty upon them for not doing it, though *Eyre*, C. J. did, on that account, in two or three instances refuse to receive them. *Per Lee*, C. J. in *East India Company* v. *Gosling*, 1 Geo. II. (*b*)

So where the question was, whether the defendants had a right to be freemen, though it appeared there were commons belonging to the freemen, yet an alderman was admitted to prove them no freemen, it appearing that none but aldermen were privy to the transactions of the corporation with regard to making persons free.—*Rex* v. *Phipps & Archer, at Cambridge, Per Lee*, C. J. (*c*)

(*a*) As to which, see *Bennet* v. *Hertford Hundred*, 2 Roll. Abr. 685. *Porter* v. *Ragland Hundred*, Peake's Evid. 159, (n.) and stat. 8 *Geo.* II. *c.* 16. *s.* 15. Vide etiam *ante*, p. 184.

(*b*) So a man who bribes another at an election is competent to prove that fact, though he discharges himself thereby. *Meade* v. *Robinson*, Willes, 422; and so is the person bribed, *Bush* v. *Rawlings*, cited Cowp. 199. or *Bush* v. *Ralling*, Say. 289, which is *S. C.* This doctrine, however, was denied in *Edwards* v. *Evans*, 3 East, 451; but in *Heward* v. *Shipley*, 4 East, 180, the court confirmed it as a case of necessity.

So in an action for a malicious prosecution, where nobody but defendant's wife was present at the supposed felony, though she could not be a witness to prove it on the indictment, yet *Holt*, C. J. allowed the oath which she made at the trial to prove a felony in such an action. *Johnson* v. *Browning*, 6 Mod. 216.

In *Gilb. Law of Ev.* p. 132. it is said, that, on the same principle of necessity, an informer shall be a witness, though he takes part of the penalty, as on the statute against hunting deer, the statute of conventicles, and the navigation act; and the only case which seems to support that doctrine is *Jenings* v. *Hankeys*, 3 Mod. 114; but the contrary appears from *Rex* v. *Tilly*, 1 Stra. 315. *Reg.* v. *Cobbold*, Gilb. Rep. 111. *Reg.* v. *Shipley*, there cited. *Reg.* v. *Cooper*, 12 Vin. Abr. 13. pl. 43. *Rex* v. *Stone*, 2 Raym. 1545. *Rex* v. *Piercy*, Andr. 18. *Rex* v. *Blaney*, ib. 240, and *Rex* v. *Collins*, cited Ca. temp. Hardw. 176. Besides which, in *Rex* v. *Blackman*, 1 Esp. N. P. Ca. 95, a witness, on an information for stealing naval stores, was rejected as being the informer, and entitled to half the penalty; though in *Rex* v. *Cole*, ib. 169, *Pea. Ca.* 218. *Kenyon*, C. J. allowed a similar witness to be examined, because he had no vested interest in the penalty, for the court might inflict corporal punishment instead. Vide *Rex* v. *Bland*, 5 T. R. 370. But in cases of rewards for apprehending felons, the thief-taker, though rewarded, may be a witness. *Leach's Cro. Ca.* 353, (n.) Et vide *Peake's Evid.* 160, (n.)

(*c*) So on an issue to try whether any person could be admitted to the freedom of a borough, without first being made a brother of the guild. *Kenyon*, C. J. said, he would permit evidence to be given of what deceased brothers of the guild had said of the usage, and he desired he might seal a bill of exceptions to such evidence, but none was ever tendered to him. *Bennett* v. *Carlisle Mayor*, M. 1790. MS. Ca.

So

So where the question was, whether the master had deserted the ship, *(Sussex)* without sufficient necessity; a sailor, who had given bond to the master, (as a trustee for the company) not to desert the ship during the voyage, was admitted evidence for the master, it appearing all the sailors entered into such bonds.—*East India Company* v. *Gosling*, sup. (*a*)

So where a son having a general authority to receive money for his father, received a sum, and gave it to the defendant; * the son was admitted as a good witness (his testimony being corroborated by other circumstances) for his father in an action of trover for the money.—*Anon.* Salk. 289. [*290]

So in trover against a pawnbroker, the servant embezzling his master's goods, and pawning them, will be admitted to prove the fact.—M. 1752. C. B. at *Westminster*.

4. *Exception*; A party interested will be admitted, where he acquires the interest by his own act after the party, who calls him as a witness, has a right to his evidence. (*b*)

And therefore though one, who lays a wager at the time of the original wager, is no witness, yet one who lays a wager afterwards ought to be admitted; and perhaps a person who laid a wager at the same time will be admitted, in case he has received the money without any condition to

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(*a*) *Tamen quære*, et vide *Green* v. *New River Company*, 4 T. R. 540, where plaintiff sued for damages in bursting a pipe. Plaintiff proved that he told the turn-cock of the accident. Defendants called the turn-cock to disprove the fact, without a release, as he came to display his own negligence, which, if established by the verdict, would be the ground of an action against his employers. *Erskine* contended that the verdict could not be given in evidence, and he was not interested, and if interested, he must be admitted from necessity, on the same ground that coachmen and sailors are admitted to give evidence to disprove their own negligence, in actions against their employers for damages done in their several employments, or that a servant of a tradesman is admitted to prove the delivery of goods. But *per cur.* the last instance cited is an exception to the general rule. Such a person is admitted to give evidence from necessity, but the exception does not extend to the two other cases mentioned of the coachmen and sailors: the verdicts against the proprietors of those may be respectively given in evidence in actions to be brought by them against their servants as to the question of damages, though not as to the fact of the injury. So the verdict in this case may be given in evidence in an action by the defendants against the witness, and therefore he is an incompetent witness without a release.

(*b*) It is a rule of evidence, that all proof is to be weighed according to the evidence it was in the power of one side to have produced, and the other to have contradicted; and whether there be any evidence is a question for the judge, but whether the evidence given be sufficient is for the jury to decide. *Carpenters Company, &c.* v. *Hayward*, Dougl. 360 (375.)

return

return it; for the money will be intended to be duly paid.—*Barlow* v. *Vowell*, T. 7 W. III. Skin. 586.

A broker who effects a policy of insurance, and subscribes it himself after the defendant and several others had subscribed it, is a good witness for them, though he be a party to a suit in equity depending between the insurers and the insured, he offering to dismiss the bill, with costs, as to the plaintiff.—*Bent* v. *Baker*, B. R. Hil. 29 Geo. III. 3 T. Rep. 27.

5. *Exception*; A party interested will be admitted where the possibility of interest is very remote.

As where an information, in nature of a *quo warranto*, was brought against the mayor, citizens, and commonalty of *London*, for taking two-pence *per* chaldron for all sea coals brought to *London*; freemen were admitted to prove the prescription, it appearing that the mayor and sheriffs have the whole profits of this toll, though they have it for the benefit of the corporation, of which all the freemen are members; yet these having no particular profit to themselves were sworn as witnesses; for it cannot be presumed, that, for an advantage so small, and so remote, they would be partial and perjure themselves.(*a*) And *Scroggs*, C. J. said, that it ought not to be a general rule, that members of corporations shall be admitted or denied to be witnesses in actions for or against their corporations; but every case stands upon its own particular circumstances, *viz.* whether the interest be so considerable as by presumption to produce partiality or not. (*R.* v. *London Corporation*, M. 30 Car. II. 2 Lev. 231. *tamen quære*, Whether this case be law.) And this exception has of late years been a good deal extended (*b*). In the case of *The King* v. *Bray*, H. 10 Geo. II.(*c*) Lord Chief Justice *Hardwicke* said,

(*a*) In *Burton* v. *Hinde*, 5 T. Rep. 174, which was an issue to try whether a sufficiency of common was left on an action brought by the feoffee of a corporation, who, by permission of the corporation, had approved part of the waste; it was held, that a freeman was not competent to prove the sufficiency, though the feoffment was to be held in fee-farm, and the rent, which was very small, was reserved to the mayor and bailiffs.

(*b*) *Vide* stat. 27 *Geo.* II. *c.* 29, by which the inhabitants of any parish, township, or place, are competent witnesses to prove the commission of any offence within such parish, *&c.* Notwithstanding the penalty of such is given to the poor of the parish, unless the penalty shall exceed £20.

And by 1 *Ann.* stat. 1. *c.* 18. *s.* 13. in indictments against private persons for not repairing highways and bridges, the inhabitants of counties, *&c.* may be witnesses.

(*c*) This seems to be *S. C.* as *Rex* v. *Robins*, 2 Stra. 1069, and the case, as reported by *Strange*, was thus: upon an information in nature of a *quo warranto*, for the office of mayor of *Tintagel*, the question on which the plaintiff's title turned was, whether the former mayor had a *right* to name two elisors to return a jury, if the town clerk, who might name one,

said, that unless the objection appeared to him to carry a strong danger of perjury, and some apparent advantage might accrue to the witness, he was always inclined to let it go to his credit only, in order to let in a proper light to the case, which would otherwise be shut out; and, in a doubtful case he said it was generally his custom to admit the evidence, and give such directions to the jury as the nature of the case might require. That was an information in nature of *quo warranto* for the defendant, to shew by what authority he claimed to be mayor of *Tintagel*, and issue taken upon this custom, *viz.* That at a court leet, annually holden on the 10th of *October*, the mayor for the ensuing year is to be chosen, and for that purpose two elizors are to be nominated, one by the mayor, the other by the town clerk; these elizors are to nominate twelve jurymen, who are to present the mayor for the year ensuing; and in case the town clerk refuse to nominate his elizor, that then the mayor shall nominate the second elizor. At the trial *P. Hoskins*, who was second elizor, nominated by the mayor, upon the default of the town clerk's nomination at the election of the defendant, and *P. Hoskins*, who served as a juryman at the said election, were both offered as witnesses to prove the custom, but rejected *in toto*, as not competent witnesses to any part of it: But upon motion a new trial was granted; the Chief Justice said, the having of an elizor is intended a franchise in the *borough*, but in the elizor himself it is only an authority, and the execution of it past and over. And he said he knew no case where a man who has acted under a bare authority has been refused to prove the execution of it. Persons that have been themselves in office, are often called to shew what the usage is, and what they did when in office, and yet if their acts be illegal, they are liable to *quo warranto*, and he said the case in 3 *Keb.* 90. (*Champion* v. *Atkinson*), was very material; for there, upon an issue to try whether by the custom of the manor the tenants were to pay fines and be re-admitted upon the death of the last admitting lord, the steward was admitted to prove the custom, though he had fees upon admission.—*R.* v. *Bray*, H. 10 Geo. II. Ca. Temp. Hardw. 358. [*291]

Secondly, *Persons stigmatised are excluded from testimony.*

Now there are several crimes that so blemish the reputation that the party is ever after unfit to be a witness; as treason, felony, and every

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one, was absent or refused. The second elisor named by the mayor was called as a witness to prove the custom, and objected to, because he was liable to an information for acting under such a nomination, and Lord *Hardwicke* allowed the objection, but the court granted a new trial, considering that the objection went only to the credit of the witness.

crimen

crimen falsi, as perjury,(*a*) forgery, and the like: For where a man is convicted of those glaring crimes against the common principles of humanity and honesty, his oath is of no weight.

The common punishment that marks the *crimen falsi*, is being set in
[*292] the pillory, and therefore, anciently, they held that no * man legally set in the pillory could be a witness;(*b*) but the rigour of this piece of law is reduced to reason; for now it is holden, that unless a man be put in the pillory *pro crimine falsi*, as for perjury or forgery, or the like, it is no blemish to his attestation;(*c*) it is the crime and not the punishment that makes the man infamous; (*Rex* v. *Ford*, M. 1700. Salk. 690.) therefore where a man was convicted of barratry, though he was only fined, the court held him incompetent; so a person convicted of petit larceny is equally infamous with one convicted of grand larceny, for they are both felony.—*Mackinder's Case*, H. 27 Geo. II. C. B. 2 Wils. 18. S. C. nom. *Pendock ex. dem. Mackender* v. *Mackender*.

After a general statute pardon a person attainted is a good witness; and so it is after burning in the hand, which amounts to a statute pardon. (*d*)

If one found guilty on an indictment for perjury *at common law*, be pardoned by the king, he will be a good witness, because the king has power to take off every part of the punishment; (*e*) but if a man be indicted

(*a*) A person may be called to prove that what he had sworn before was false, and he is competent to the fact which is contrary to his former evidence; but it is a question strongly against his credit. *Rex* v. *Teal*, 11 East, 309.

(*b*) Vide *Co. Lit.* 6 (b). *Com. Dig.* tit. *Testmoigne*, (A. 2.)

(*c*) Therefore, standing in the pillory for a libel, though against government, will not destroy a man's competency. *Chater* v. *Hawkins*, 3 Lev. 426. Nor will a verdict for perjury, if no judgment be entered thereon. *Fitch* v. *Smallbrooke*, T. Raym. 32. Therefore a copy of the record must be produced. *Lee* v. *Gansell*, Cowp. 3. *Wickes* v. *Smallbrooke*, 1 Sid. 51. *Spenchley q. t.* v. *De Willott*, 7 East, 118.

(*d*) For it is the benefit of clergy that restores to his competency a person who has been convicted of grand larceny, and whipped. Such a man was therefore admitted by Lord *Kenyon*, *ut semb.*

So a person convicted of bigamy, for which he was fined and imprisoned, was admitted a witness on *Thelwall's* trial at the *Old Bailey*, 2d *Dec.* 1794.

And in *Rex* v. *Edwards*, 4 T. Rep. 440, a witness was allowed to be asked whether he had not stood in the pillory, because his answer could not subject him to punishment.

(*e*) Vide *Anon.* 1 Vent. 349. 4 State Trials, 682. A pardon, however, will not cure a *civil* disability. *Rex* v. *Crosby*, 1 Ld. Raym. 39. And an actual pardon must be shewn under the great seal, for a warrant under the sign manual will not do. *Gully's Case*, Leach. Cro. Car. 115. *Rex* v. *Count de Castlemain*, T. Raym. 380. So burning in the hand for an offence within clergy amounts to a state pardon, and restores competency. *Com. Dig.* tit. *Testmoigne*, (A. 2.)

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dicted for perjury *on the statute*, the king cannot pardon, for the king is divested of that prerogative by the express words of the statute. (*a*)

Note; The party who would take advantage of this exception as a witness, must have a copy of the record of conviction ready to produce in court. (*b*)

Thirdly, *Infidels cannot be witnesses*, *i. e.* such who profess no religion that can bind their consciences to speak truth. But when any person professes a religion that will be a tie upon him, he shall be admitted as a witness, and sworn according to the ceremonies of his own religion; for it would be ridiculous to swear a witness upon the Holy Evangelists, who did not believe those writings to be sacred. The Jews are always sworn upon the Old Testament; Mahometans on the Koran; those of the Gentoo religion according to the ceremonies of that religion, &c. (*c*).

Fourthly;

So if a man be fined or whipped, instead of burnt, for a clergyable offence, his competency will be restored by stat. 19 *Geo.* III. *c.* 74.

(*a*) For the statute 5 *Eliz. c.* 9. makes incompetency part of the punishment. *Rex* v. *Crosby*, Salk. 289.

(*b*) Even though the party acknowledged that he was convicted of felony. Vide *Spenchley q. t.* v. *De Willott*, 7 East, 118. *Rex* v. *Castel Careinion Inhabitants*, 8 East, 78, where it was held, that a record cannot be proved by the admission of any witness.

If the conviction is within the same court, it seems to be the practice at the *Old Bailey* to admit the minutes of the clerk of the arraigns, without formally making out the record.

(*c*) Upon this subject, so interesting to humanity, our modern legislators have judged with more liberality than their forefathers, whose zeal, during the dark ages of superstition and bigotry, often misled them into the most intemperate and extravagant opinions, which even the milder sentiments imbibed during the reformation did not wholly root out. See Lord *Coke*'s opinion of an *infidel* in *Calvin's Ca.* 7 Co. 17. Mild and charitable as the sentiments of Sir *M. Hale* were on this point, they did not correct the general opinion that *infidels* could not be admitted as witnesses, till the united abilities of the bench and bar concurred, in the great case of *Omichund* v. *Barker*, 1 Atk. 21. 1 Wils. 84. Willes, 538, when *Hardwicke*, Chan. (assisted by *Lee*, C. J. *Willes*, C. J. and *Parker*, C. B.) solemnly determined that a *Gentoo*, sworn *according to the ceremonies* of his own religion, was admissible, and the general principle was then established, that the testimony of all *infidels*, who are not professed *Atheists*, was to be received. It was, however, previously held by the council, in the presence of the two chief justices, in *Fachina* v. *Sabine*, 2 Stra. 1104, that a *Mahometan* might be sworn on the Koran. And since, in *Rex* v. *Alsley*, at the *Old Bailey*, a *Chinese* was sworn, by dashing a saucer on the ground. *Peake's Evid.* 149, (n.) *Buller*, J. also, in *Rex* v. *Taylor*, Peake's N. P. Ca. 11, would not allow the particular opinions of a man professing the Christian religion to be examined into, but confined the question to this, whether he believed the sanction of an oath, the existence of a Deity, and a future state of rewards and punishments? for he who has no idea of the being of a God, or of a future state, can in no shape be admitted a witness. *Rex* v. *White*, Leach's Cro. Ca. 482.

So

Fourthly; *Persons excommunicated* cannot be witnesses, because, being excluded out of the church, they are supposed not to be under the influence of any religion.

Fifthly; *Popish Recusants.*—The same law, it is said, holds place in relation to popish recusants. This opinion is founded on the statute of 3 *Jac.* I. *c.* 5. which enacts, that every popish recusant convict shall stand, to all intents and purposes, disabled, as a person lawfully excommunicated: (*R.* v. *Griffith & al'.* H. 11 Jac. I. 2 Bulst. 155.) But Mr. Serjeant *Hawkins*, in his Pleas of the Crown, vol. the 1st. fol. 23, 24.
[*293] *has very sensibly said, that this construction is over severe, as the purport of the statute is satisfied by the disability to bring any action.

But persons outlawed may certainly be witnesses, because they are punished in their properties and not in the loss of their reputation, and the outlawry has no manner of influence on their credibility.—*Co. Litt.* 6.

As to those who are excluded from testimony for want of skill and discernment, they are ideots, madmen, and children.

In regard to children, there seems to be no precise time fixed wherein they are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination to the court. (*a*)

On an indictment for assaulting an infant of five years of age, with an intent to ravish her, the child shall be received as a witness if she appear

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So a variation in the ceremony of administering a Christian oath will not affect its validity. *Mildrone's Ca.* Leach's Cro. Ca. 459. *Mee* v. *Read*, Pea. N. P. Ca. 23. *Rex* v. *Gilham*, 1 Esp. N. P. Rep. 285. For, said *Parker*, C. B. in *Omichund* v. *Barker*, sup. "Oaths are to be administered to all persons according to their opinions, and as most affects their consciences;" agreeable to which the affirmations of Quakers are tolerated in civil cases. *Rex* v. *Gardner*, Burr. 1117. Vide etiam stat. 7 & 8 *W.* III. *c.* 34., 1 *Geo.* I. *st.* 2. *c.* 6., 8 *Geo.* I. *c.* 6., and 22 *Geo.* II. *c.* 30. *s.* 46, upon a further construction of which it was held, that in an appeal of death (*Castle* v. *Bambridge*, 2 Stra. 854), and a motion for an information, (*Rex* v. *Wych*, 2 Stra. 872), or for an attachment, (*Rex* v. *Bell*, Andr. 200), or to answer matters in an affidavit, (*Oliver* v. *Lawrence*, 2 Stra. 946), are criminal proceedings, but a motion to quash an appointment of overseers, (*Rex* v. *Turner*, 2 Stra. 1219), or a *qui tam* action, (*Atcheson* v. *Everett*, Cowp. 382), are not so, and therefore a Quaker's affirmation may be received.

(a) Yet a general rule seems to have been laid down that fourteen is an age at which a child may be supposed to have a competent knowledge of right and wrong, but short of that age the admission of a child's testimony must always depend on that sense of religion which the court may discover and approve. *Gilb. Evid.* 147.

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to have any notion of the obligation of an oath. (*a*) And it was agreed by all the judges, that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath, and consequently, that evidence of what she had said ought not to be received.—*Brazier's Case*, 12th *April*, 1779. Leach's Cro. Ca. 237. (*b*)

In cases of foul facts done in secret, where the child is the party injured, the repelling their evidence intirely is, in some measure, denying them the protection of the law; yet the levity and want of experience in children, is undoubtedly a circumstance which goes greatly to their credit.

View of General Rules.—I have, in the course of the foregoing survey, necessarily taken notice of some of the more general rules; but, for better understanding the true theory of evidence, it will be proper to take a view of them all (being nine in number).

The first general rule is, That you must give the best evidence that the nature of the thing is capable of: the true meaning of this rule is, that no such evidence shall be brought, that *ex natura rei* supposes still a greater evidence behind in the parties possession or power; for such evidence is altogether insufficient and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced. For if the other greater evidence did not make against the party, why did he not produce it to the court? As if a man offer a copy of a deed or will where he ought to produce the original, * this carries a presumption [*294] with it that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore the proof of a copy in this case is not evidence; (*c*) but if he prove the ori-

(*a*) And the court will put different questions to her, and judge from the result of her answers, whether she has such a notion, and if she appear to have, the court will receive her evidence, though she may have said at first that she did not understand the nature of an oath. *Murphy's Case*, at *Old Bailey*, Sept. Sess. 1794.

(*b*) This point seems to have been formerly considered in *Rex* v. *Travers*, 2 Stra. 700, where defendant was indicted for a rape on a girl six years old, but Lord Chief Baron *Gilbert* rejected her testimony, and he was acquitted. Afterwards he was indicted for the assault, with an attempt, &c. the girl being then seven years old, but Lord *Raymond* said, that no child had ever been admitted as a witness under nine years old, and very seldom under ten, wherefore defendant was again acquitted, Lord *Raymond* observing, that in that respect there was no distinction between capital and lesser offences.

(*c*) In a criminal as well as a civil prosecution, notice may be given to defendant to produce a paper in his possession, and if he does not, other evidence may be given of it. *Attorney-general* v. *Le Marchant*, 2 T. R. 201. (n.) *Cates q. t.* v. *Winter*, 3 T. R. 306. *Vin. tit. Evid.* 47.

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ginal deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence: The presumption of greater evidence behind in the party's possession being overturned by positive proof. (a)

The second is, That no person interested in the question can be a witness: there is no rule in more general use, and none that is so little understood; I have therefore endeavoured, in the foregoing part (p. 283 b.

(a) Where a witness, being subpœnaed to give evidence on a trial, fell sick on the way, his depositions in Chancery were admitted to be read. *Lutterell* v. *Reynell*, 1 Mod. 283. But depositions taken in the Ecclesiastical Court, though in the case of tithes, and the witness dead, shall not be read at law, but a sentence, being a judicial act, may. *Salisbury Earl* v. *Spencer*, 2 Rol. Abr. 679. *Quære*, If not between the same parties, where there is but one witness in a bill in equity to oppose the defendant's answer, the plaintiff can have no decree, therefore an issue may be directed, and in that case the defendant's answer may be directed to be read, for whose consideration the credit of the answer is to be left. So if a witness examined at the time, and after became interested, his deposition shall be read; so likewise if the witness to a bond become afterwards the executor of the obligee, and is forced to bring an action, his hand-writing as a witness must be proved. Vide *Glyn* v. *Bank of England*, 2 Ves. 43.

It was likewise a notion at common law, that after a year a ship book was evidence for the ship proprietor, though in his own hand, which made the act necessary, but entries by servants or clerks after their death have been admitted.

It is a rule that a witness is not competent to impeach his own security, though not interested in the event of the suit. *Walton* v. *Shelley*, 1 T. R. 297.

Where the notice in a carrier's office was upon a board, inlaid in the wall, Lord *Ellenborough* held, that an examined copy should be produced. *Cobden* v. *Bolton*, 2 Camp. 108, (n.)

In an action for an attorney's bill, the book from which the bill was made out and delivered cannot be read in evidence; but if there be two cotemporary writings, counterparts of each other, one of which is delivered to the opposite party and the other preserved, they may both be considered as originals, and the one which is preserved may be read in evidence to prove that a bill was delivered. *Philipson* v. *Chase*, 2 Camp. 110.

Where an act of parliament makes a copy of any document evidence, which document itself is not evidence at common law, the copy itself must be produced, and the original cannot be admitted. *Burdon* v. *Ricketts*, 2 Camp. 121, (n.)

Two writings or agreements were copied from a draft; one was stamped, the other unstamped, and admitted as secondary evidence of the first. Held, that being copies of the draft, they were both copies of each other, and it was requisite that the copy produced as secondary evidence should be a copy *of* the original, and not *from* the original. *Waller* v. *Horsfall*, 1 Camp. 501.

Where a witness has been released out of court, the release must be produced, but where it is lost or destroyed, the witness must be again released in court. *Corking* v. *Jarrard*, 1 Camp. 37.

et. seq.)

et. seq.) to explain it, and set down the several exceptions to it; and I can add nothing to what I have said upon the subject.

The third is, That hearsay is no evidence. For no evidence is to be admitted but what is upon oath; *(a)* and if the first speech were without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice. Besides, if the witness be living, what he has been heard to say, is not the best evidence: (*Lutterell* v. *Reynell,* M. 22 Car. II. 1 Mod. 283.) *(b)* But though hearsay be not allowed as direct evidence, yet it has been admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant to himself: *(c)* but clearly it is not in evidence in chief, and it seems doubtful whether it is so in reply or not.—*Holliday* v. *Sweeting,* M. 16 Geo. III. *(d)*

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(a) How high soever the rank, or pure the morals, of the witness may be, vide *Meers* v. *Lord Stourton,* 1 P. W. 146. *Lord Shaftesbury* v. *Lord Digby,* 2 Mod. 99. Vide etiam 2 *St. Tr.* 809. 3 *St. Tr.* 141. 5 *St. Tr.* 98. *Regicides' Ca.* 1. Kel. 12.

(b) In *R.* v. *Erriswell,* 3 T. Rep. 707, a question arose, whether hearsay evidence, or the declarations of a person deceased or insane, might be admitted to prove the settlement of a pauper. *Buller,* J. and *Ashhurst,* J. thought they might. *Grose,* J. and *Kenyon,* C. J. *contra.*

(c) And the party may, if he pleases, waive his right, to insist on the examination of witnesses on oath, and bind himself by their declarations. *Daniel* v. *Pitt,* Peake's Evid. 10, (n.)

(d) The few instances in which this general rule has been departed from, are such as, in their very nature, are incapable of direct proof, as those which can only depend on reputation, and arise in cases of pedigree, prescription, or custom. Vide *Neal,* d. *Duke of Athol* v. *Wilding,* 2 Stra. 1151, *et ante,* pa. 233. *Skinner* v. *Lord Bellamont,* post, pa. 295, and *Meath Bp.* v. *Lord Bellfield,* ib. *Stevens* v. *Moss,* Cowp. 591. Vide etiam *Ratcliffe* v. *Chapman,* 4 Leon. 242, where it was held, that, to prove a custom, it must be shewn by precedents to have been put in use, and reputation only is not sufficient. So in ejectment, where defendant claims by descent, under the custom of a manor, he cannot produce the customs of adjacent manors, as to title by descent, in evidence. *Doe,* d. *Jamieson* v. *Sisson,* 12 East, 62. But reputation of a custom, for the descendants of the eldest daughter or sister to take, where the others are dead, is evidence for the jury, upon the question, whether there was a custom for the grandson of an eldest sister to take, though the only evidence of the using of the custom was of the eldest sister, and the son of the eldest sister taking. *S. C.* For cases of reputation, also recitals in deeds, and a verdict stating a pedigree, and inscriptions on grave-stones, heralds' books, and entries in family bibles, (*ante,* pa. 233,) and the statement of a pedigree in a bill in chancery, *&c.* are good evidence. *Taylor* v. *Cole,* 7 T. Rep. 3, (n.) See also instances of reputation being received in evidence, in *Davis* v. *Pearce,* 2 T. Rep. 53. *Barry* v. *Bebbington,* 4 T. Rep. 514. *Stead* v. *Heaton,* ibid. 669. *R.* v. *Hammersmith Parish,* Peake's

So where the issue is on the legitimacy of the plaintiff or defendant, it seems the practice to admit evidence of what the parents have been heard to say, either as to their being or not being married; and with reason, for the presumption arising from the cohabitation is

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Peake's Evid. App. 2d ed. A distinction, however, is to be observed between hearsay Evidence of mere facts, and of general reputation. *R.* v. *Erriswell*, ib. *Ireland* v. *Powell*, Peake's Evid. 13. There are some cases also not within the exception as to hearsay evidence, in which the law admits a memorandum in writing, made at the time by a person deceased, in the ordinary way of business, and which is corroborated by other circumstances, as evidence of the facts it records. *Price* v. *Torrington*, Salk. 285. *Pitman* v. *Maddox*, ib. 690. *Clerk* v. *Bedford*, ante, 282. *Cooper* v. *Marsden*, 1 Esp. N. P. 1. *Digby* v. *Stedman*, 1 Esp. N. P. Ca. 329. *Warren*, d. *Webb* v. *Grenville*, 2 Stra. 1129. *Sir Step. Evans' Case*, ante, 282. *Smartle* v. *Williams*, ib. 283. So what a party has himself been heard to say, does not fall within the objection. *Bauerman* v. *Radenius*, 7 T. Rep. 663. But evidence of what his wife or any of his family have said, is not admissible, unless they were interested in the management of his business. *Hall* v. *Hill*, Stra. 1094. *Alban* v. *Pritchett*, 6 T. Rep. 680. *Winsmore* v. *Greenbank*, Willes, 577. Yet where the wife makes a contract, and her husband confirms it, her declarations shall charge him. *Anon.* 1 Stra. 527. Vide etiam *Emerson* v. *Blonden*, 1 Esp. N. P. Ca. 142. So the admissions of an undersheriff are evidence against the sheriff in an action for an escape. *Yabsley* v. *Doble*, Ld. Raym. 190. Yet it is still doubtful how far the admissions of a servant or agent can be received against the principal. *Biggs* v. *Lawrence*, 3 T. Rep. 544. But this case was afterwards questioned; and Lord *Kenyon*, alluding to it in *Bauerman* v. *Radenius*, sup. doubted, whether the evidence was properly admitted, and whether the agent himself must not be called as a witness. This, however, says Mr. *Peake*, (pa. 18,) is applicable only to mere admissions of antecedent facts, and not to what an agent says, when he does regular business, for then his words are part of the act, and admissible against his principal. Vide *Daniel* v. *Hill*, ibid. et sup. *Fairlie* v. *Hastings*, 10 Ves. 126. *Avison* v. *Kinnaird*, 6 East, 188. *Vide etiam ante*, pa. 236, as to the distinction between an admission, and an offer of compromise; and see also *Slack* v. *Buchanan*, Peake N. P. Ca. 5. So proof of what a man says will be received as presumptive evidence of the fact he has so admitted, and acts done by him will sometimes preclude him from disputing his situation; for if a man appears to fill a particular station, he prevents the necessity of evidence against him, to prove that he is legally intitled to it. *Bevan* v. *Williams*, 3 T. Rep. 635, (n.) *Radford* v. *Briggs*, 3 T. Rep. 637. *Watson* v. *Threlkeld*, 2 Esp. N. P. Ca. 637.

So if one man treats with another, as filling a particular station, and derives a benefit from him, he shall not dispute his title. *Radford* v. *M'Intosh*, 3 T. Rep. 632. *Cook* v. *Loxley*, 5 T. Rep. 4. But there being no proof of the particular fact, in most of the above cases, they may be classed under the head of Presumptive Evidence.

In *R.* v. *Erith*, 8 East, 539, Hearsay Evidence by a pauper, of the declarations of his putative father, deceased, as to the place of the pauper's birth, was deemed inadmissible.

But if plaintiff refers defendant to a third person, as to any fact, evidence may be given of what was said by that person as to that fact. *Williams* v. *Innes*, 1 Camp. 364.

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either strengthened or destroyed by such declarations, which are not to be given in evidence directly, but may be assigned by the witness as a reason for his belief one way or other. But in *Pendrel* v. *Pendrel*, H. 5 Geo. II. 2 Stra. 925, Lord *Raymond* would not suffer the wife's declarations, that she should not know her husband by sight, &c. to be given in evidence till after she had been produced on the other side. *(a)* So hearsay is good evidence to prove, who is my grandfather, when he married, what children he had, &c. of which it is not reasonable to presume I have better evidence. So to prove my father, mother, *cousin, [* 295] or other relation beyond the sea, dead, and the common reputation and belief of it in the family gives credit to such evidence; and for a stranger it would be good evidence if a person swore that a brother or other near relation had told him so, which relation is dead. (*Grimwade* v. *Stephens*, *Kent*, 1697.) In an ejectment between *The Duke of Athol* and *Lord Ashburnham*, E. 14 Geo. II. Mr. *Sharpe*, who was attorney in the cause, was admitted to prove what Mr. *Worthington* told him, he knew and had heard in regard to the pedigree of the family, Mr. *Worthington* happening to die before the trial. So in questions of prescription it is allowable to give hearsay evidence in order to prove a general reputation; and where the issue was of a right to away over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed. (*Skinner* v. *Lord Bellamont*, *Worcester*, 1744.) In a *quare impedit* the plaintiff derived his title from Lord *R.* on whom he laid a presentation of one *Knight*; the bishop set up a title in himself, and traversed the seisin of Lord *R.* The plaintiff gave in evidence an entry in the register of the diocese of the institution of *Knight*, in which there was a blank in the place, where the patron's name is usually inserted, upon which he offered parol evidence of the general reputation of the country, that *Knight* was in by the presentation of Lord *R.* *(b)*—Upon a bill of exceptions this came on a writ of error into K. *B.* where the better opinion was that the evidence was allowable; the register which was the proper evidence being silent. (*Bishop of Meath* v. *Lord Belfield*, 1747. 1 Wils. 215.) A presentation may be by parol,

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(a) The wife being living, her declarations would not be evidence in chief, though they might be admitted to contradict her evidence.

(b) Vide *Rex* v. *Erriswell Inhabit.* 3 T. Rep. 719. 723, where Lord *Kenyon* said, such a presentation might be proved by a witness who was present, but not by common reputation.

and what commences by parol, may be transmitted to posterity by parol, and that creates a general reputation. *(a)*

The fourth general rule is, that in all cases where a general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally. This has sometimes occasioned a question in chancery, whether it were in issue or not. As where a bill was brought by a kept mistress for an annuity; the defendant in his answer said, "She was a lewd woman of infamous character before Mr. *P.* became acquainted with her;" and it was holden to be sufficiently putting her character in issue, to enable the defendant to prove
[*296] particular facts. But where upon a bill * brought by a wife, the husband in his answer said, "She had not behaved herself with duty and tenderness to him as became a virtuous woman, much less his wife;" this was holden not to put adultery in issue, so as to enable the husband to prove particular facts. (*Clarke* v. *Periam*, 27th *July*, 1742. 2 Atk. 333.) In an action for criminal conversation, the defendant may give in evidence particular facts of the wife's adultery with others, or having a bastard before marriage; because by bringing the action, the husband puts her general behaviour in issue. And as the defendant may examine

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(a) A *presentation* is an offering of the clerk to the ordinary, to be instituted to a benefice; and this is done either by parol, in the presence of the ordinary, of which reputation will be sufficient evidence, or by a letter missive, which must be proved. 1 *Inst.* 120. 2 *Rol. Abr.* 353. pl. 4. A man is said to be collated to a living when the ordinary institutes a clerk to a benefice of his own gift.

Institution is performed by the bishop personally, or by his *fiat* to the chancellor or vicar-general. The form of the institution is written and repeated to the clerk, kneeling, and is afterwards registered in the bishop's court; and this states the presentation or collation by *institution* or *collation*. The clerk may enter into the possession of the glebe, and may take the tithes; but he must be *inducted* to give him a right to grant or to sue, as this gives him a freehold in the benefice. 2 *Rol. Abr.* 294.

Induction is generally performed by the archdeacon under the bishop's mandate, who, in consequence thereof, gives the clerk seisin of the church, by the key, or other matter, and indorses it on the back of the mandate.

After induction, the clerk must perform the following requisites, viz. *admission*, *institution*, and *induction*, *subscription* to the 39 articles, within two months after induction, computing 28 days to the month, (*Brown* v. *Spence*, 1 Lev. 101.) after reading them publicly in the parish church, with declaration of full assent to the common prayer-book, and unless he so subscribes the articles, and declares his assent, the living becomes *ipso facto* void; so that he must prove, not only that it was legally filled at first, but that it continued full to the time of bringing the action, but after 10 or 20 years, possession shall not be precise proof of the subscription; for long possession is a presumption, unless the contrary be proved; but the right of the patron to present, or the bishop to collate, must be contended with them.

to particular facts, *a fortiori* he may call witnesses to her general character. (*Doneraile* v. *Doneraile*, Dom. Proc. 1734.)(*a*) So in cases where the defendant's character is put in issue by the prosecution, the prosecutor may examine to particular facts, for it is impossible without it to prove the charge. (*Roberts* v. *Malston*, cor. *Willes*, C. J. at *Hereford*, 1745.) Yet there is one case of that sort in which the prosecutor is not allowed to examine to any particular fact without giving previous notice of it to the defendant; and that is, where a man is indicted for being a common barretor; and the reason is, such indictments are commonly against attornies, whose profession it is to follow law-suits; and it is a difficult matter to draw the line between that and acting as a barretor; therefore it makes it necessary for him to know what particular facts are to be given in evidence, that he may be prepared to shew, that he was fairly employed in those cases, and acted in his profession. But in other criminal cases, the prosecutor cannot enter into the defendant's character, unless the defendant enable him so to do, by calling witnesses in support of it, and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put in issue, but coming in collaterally.—*Hurd* v. *Martin*, Cowp. 441.

In an ejectment by an heir at law to set aside a will for fraud and imposition committed by the defendant, he shall not be permitted to call witnesses to prove his general good character.—*Goodright*, ex dem. *Faro* v. *Hicks*, *Winton* Summer Assizes, 1789. cor. *Buller*, J.(*b*)

For the same reason if you would impeach the credit of a witness, you can only examine to his general character, and not to particular facts; every man is supposed to be capable of supporting the one, but it is not likely he should be prepared * to answer the other without notice; and unless his general character and behaviour be in issue, he has no notice. [*297]

But other witnesses may be called to impeach his credit respecting any matter relative to the issue: for whatever is material to the issue, each party must come prepared to support or deny. But a party never shall be permitted to produce general evidence to discredit his own

(*a*) But he cannot give in evidence any instance of misconduct subsequent to the act of adultery. *Elsam* v. *Faucett*, 2 Esp. N. P. Ca. 562.

(*b*) But where the surviving subscribing witness was called to impeach a will for fraud in obtaining it, Lord *Kenyon* permitted the devisee to call persons to the general good character of the two subscribing witnesses, who were dead. *Doe*, d. *Stephenson* v. *Walker*, 4 Esp. N. P. Ca. 50.

witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only.—*Hardwell* v. *Jarman*, *Taunton* Spring Assizes, 1789. cor. *Buller*, J. *Hastings's Case*, *Per Lord Chancellor*, 11th *June*, 1789. in Dom. Proc. *(a)*

If a particular fact go to the competency of a witness, it may be proved by other testimony, as the copy of a record for perjury, felony, &c. So of an interest in a witness in the event of a cause: and whether he be interested or not shall be decided by the judge.—*Ibid.* and *Per Ashhurst*, J. *Taunton* Summer Assizes, 1773. After consulting B. *Adams*.

(a) A witness may, on cross examination, be examined as to any improper conduct of which he may have been guilty, for the purpose of trying his credit, but when these questions are irrelevant to the issue on record, other witnesses cannot be called to contradict the answers he gives. *Per Lawrence*, J. in *Harris* v *Tippett*, 2 Camp. 637.

So in a prosecution for larceny, the witness was asked whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged of him, and would soon fix him in *Monmouth* gaol; he denied both. The prisoner's counsel then proposed to prove those facts, *Sed per Lawrence*, J. His answer must be taken down as to the former, but as the words were material to the guilt or innocence of the prisoner, evidence may be adduced that they were spoken by the witness. *Yewry's Ca.* ibid. in notis.

It is not competent to counsel, on cross examination, to question a witness concerning a fact, (which, if answered affirmatively, is wholly irrelevant to the matter in issue) merely for the sake of discrediting him if answered in the negative, by calling witnesses to disprove what he said. *Spencely q. t.* v. *De Willott*, 7 East, 110.

If a witness answers questions that he might have objected to, his answers may be used against him in an action against him for a penalty. *Smith* v. *Beadnell*, 1 Camp. 30.

In *Durham Bp.* v. *Beaumont*, 1 Camp. 207, Lord *Ellenborough* refused to allow evidence that a witness was of good character when fraud and falsehood were imputed to him. But he agreed to the case of *Doe*, d. *Stephenson* v. *Walker*, 4 Esp. N. P. Ca. 50, where evidence was admitted to shew the character of two subscribing witnesses to a will, who were dead, and a third subscribing witness having sworn to a fact relating to the execution of the will, which, if believed, would have destroyed the validity of the will, Lord *Ellenborough* saying, that they ought to have their credit supported, as they would have had if they had been alive; and he cited *Wright*, d. *Clymer* v. *Littler*, 3 Burr. 1245. S. P. and *Aveson* v. *Lord Kinnaird*, 6 East, 195, for evidence of confession of a forgery by a deceased witness *in extremis*.

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The fifth general rule is, Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum, verificatione facti tollitur. Therefore where the testatrix devised her estate to her cousin *John Cheere*, there being both father and son of that name, parol evidence was admitted to prove that the son was the person meant; for the heir's objection arose from parol evidence, and therefore parol evidence ought to be admitted to answer it. (*Jones* v. *Newman*, T. 24 Geo. II. 1 Bla. 60. *Cheney's Case*, 1590. 5 Co. 68. S. P.) *(a)* So if a man having two manors called *Dale*, levy a fine of the manor of *Dale*, circumstances may be given in evidence to prove which manor he intended; for this is not to contradict the record, but to support it. (2 *Rol. Abr.* 676.) Lord *Bacon*, in his reading upon this maxim, distinguishes ambiguity into *patens* and *latens*, and saith that *latens* is that which seems certain and without ambiguity, for any thing that appears upon the deed or instrument; but there is some collateral matter out of the deed that breeds the ambiguity; but *ambiguitas *patens, i. e.* that which appears to be ambiguous upon the deed or instrument, is never holpen by averment; for that were in effect to make that pass without deed, which the law appoints shall not pass but by deed; therefore where the devisee's name is totally omitted, parol evidence cannot be admitted to explain an ambiguity which is *patent*, much less will it be admitted to alter the apparent meaning of the will: (*Ballis* v. *Church* v. *Attorney-General*, 29th *Jan.* 1741, *Per Hardwicke*, Canc. 2 Atk. 240.) therefore when a man gave £2000 to his brother *John*, and in case of his death, to his wife, Lord Chief Justice *Lee*, would not suffer proof to be given that the testator meant his brother should have it only during life. (*Lowfield* v. *Stoneham*, at *Guildhall*, 1746. 2 Str. 1261.) But where *A.* devised £400 to his wife, and made her executrix, without disposing of the surplus; Lord Chancellor *Hardwicke* admitted parol evidence to shew the testator meant his wife should have it, for there was no ambiguity in the will, nor was it to alter the apparent intent of the testator; for by law she was intitled to the surplus as executrix, therefore the evidence was admitted only to rebut the equity. (*Lake* v. *Lake*, 2d *Nov.* 1751. Ambl. 126.) But in *Brown* v. *Selwin*, in Dom. Proc. [*298]

(*a*) Where a father, in a letter written to a person in treaty with him for the marriage of his daughter, promised to give her £500 on the marriage, and security for £500 more at his death, which security was never given, and the daughter died before the father. In an action by the husband against the father's executors, Lord *Kenyon* would not allow parol evidence of the father's intention to bequeath his daughter £500 if she should survive him, but he permitted the plaintiff to recover. *Whiting* v. *Richards*, at *Guildhall*, M. 30 Geo. III. MS. Ca. 1735.

1735. (Ca. Temp. Talb. 240. 4 Bro. P. C. 179, fol. edit. 3 Bro. P. C. 607, 8vo. edit.) the testator having expressly devised the residue of his personal estate to his executors, one of whom owed him money upon bond, parol evidence was refused to be admitted to prove the testator meant to extinguish the bond debt by making the obligor executor; for that would have been to have altered the apparent intent, and not simply to have rebutted an equity.—See more of *Parol Evidence*, ante.

The sixth general rule is, In every issue the affirmative is to be proved. A negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed until it be proved; but when the affirmative is proved, the other side may contest it with opposite proofs; for this is not properly the proof of a negative, but the proof of some proposition totally inconsistent with what is affirmed: *(a)* as if the defendant be charged with a trespass, he need only make a general denial of the fact; and if the fact be proved, then he may prove a proposition inconsistent with the charge, as that he was at another place at the time, or the like.

But to this rule there is an exception of such cases where the law presumes the affirmative contained in the issue. Therefore in an information against Lord *Halifax* for refusing to deliver up the rolls of the auditor of the exchequer; the court of exchequer put the plaintiff upon proving the negative, *viz.* that he did not deliver them; for a person shall be presumed duly to execute his office till the contrary appear. *(b)*

The seventh general rule is, That no evidence need be given of what is agreed by the pleadings: for the jury are only sworn to try the matter in issue between the parties, so that nothing else is properly before them. *(c)* In replevin the defendant avowed taking the cattle, damage feasant *in loco in quo*, as parcel of his manor of *K.* the plaintiff replied,

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(*a*) To this rule, however, says *Gilb.* (Law of Evid. 148.) there is an exception of such cases where the law presumes the affirmative contained in the issue, as where a man is charged with not doing an act, which by the law he is liable to do, for the law presumes every man does his duty to society till the contrary is proved.

(*b*) So where an action was brought against the *East India* company, for putting on board plaintiff's ship a cask containing combustible varnish, without noticing its contents, whereby the ship was destroyed. This exception to the rule was recognized, and held that plaintiff should prove that defendants did not give notice, and for that purpose he must call either the man who delivered or he who received the cask on board, to shew what then passed. *Williams* v. *East India Company*, 3 East, 192.

(*c*) Where matters of law and fact are limited, they must be pleaded specially, (as coverture) otherwise the matters of law are referrable to a jury.

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that it was parcel of the manor of *K.* and made title to it, and traversed that the manor of *K.* was the freehold of the defendant: he was not admitted to prove that *K.* was no manor, for that is admitted by the traverse.—*Anon.* Dy. 183. c. 58. *(a)*

The jury cannot find any thing against that which the parties have affirmed and admitted of record, though the truth be contrary; but, in other cases, though the parties be estopped to say the truth, the jury are not; as in *Goddard's Case,* (1583. 2 Co. 4 b.) where the bond was dated nine months after the execution, and after the death of the obligor.

In trespass for throwing down and carrying away stalls, as to all the trespass but the throwing them down, the defendant pleaded not guilty; and as to the throwing them down a special justification, and therein justified both the throwing down and carrying away; and on the issue joined, the judge at the assizes would not try, whether the defendants were guilty or not of carrying away the stalls, because they had confessed it by their justification: and on motion for a new trial it was denied, because the jury could never find the defendants not guilty, contrary to their own confession upon the record, though in another issue.—*E.* 4 *Anne, K. B. Salk.* MSS. Note. This case was before the statute enabling defendants to plead double. *(b)*

(a) To trespass brought defendant pleaded, that, from time whereof, *&c.* an ancient messuage and twelve acres of land were a customary tenement of a manor, and that from time whereof, *&c.* there was a custom within the manor that the customary tenants of said customary tenement should have a right of common. The replication traversed the custom, and issue was joined upon it. Plaintiff offered evidence that the messuage had been built within the last twenty years, and not upon the scite of the ancient messuage. This evidence was held good to disprove the custom, and admissible. *Dunstan* v. *Tresider,* 5 T. Rep. 2.

(b) In trespass, the defendant pleaded, 1st. not guilty; 2d. by leave of the court, he pleads *liberum tenementum* in *D.*; 3d. as to taking furniture out of the house, he justifies as bailiff to *D.* and that he took them as a distress. Objected, that the defendant could not plead the several pleas without leave of the court. But it was determined, that upon not guilty pleaded, a freehold may be given in evidence, and that, since the statute which introduced double pleadings, the practice has been to shew it was with leave of the court; when the defendant justifies he confesses the trespass, or rather the facts charged as a trespass. *Bartholomew* v. *Ireland,* Andr. 109.

The rule of pleading a special justification is, where the matter of it cannot be given in evidence upon the general issue.

If a verdict is given without any evidence at all, or against plain evidence, or if against the weight of evidence, or against law, it ought not to stand. *Per Wilmot,* J. in *Grant* v. *Vaughan,* 3 Burr. 1525.

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The eighth general rule is, That whensoever a man cannot have advantage of the special matter by pleading, he may give it in evidence on the general issue. (2 *Rol. Abr.* 682.) For example, *A.* cannot justify the killing another, therefore he may give the special matter in evidence
[*299] on the general issue, as that it was **se defendendo, &c.* (*Co. Litt.* 283.) So in trover for goods, the defendant may give in evidence, that he took them for toll on the general issue of not guilty, because he could not plead it; but it would be otherwise in trespass for taking the goods, because there he might have pleaded it.—*Colchester City* v. *London City*, E. 1631. W. Jo. 240.

The ninth general rule is, That if the substance of the issue be proved, it is sufficient. *(a)* (*Co. Litt.* 282.) in an action of waste for cutting twenty ash trees, proof that he cut ten is sufficient, for, in effect, the issue is waste or no waste. (*Foster* v. *Jackson*, T. 1612. Hob. 53.) So in debt upon a bond conditioned to perform covenants, and breach assigned in cutting down twenty trees. (*S. C.*) So in account, if the defendant plead an account before *A.* and *B.* and issue thereon, proof of an account before *A.* is sufficient. But if the issue were, whether *A.* and *B.* were churchwardens, proof that one was and not the other would not be sufficient?—2 *Rol. Abr.* 706. pl. 38.

If the issue be, whether Lord *Delaware* demised, proof that *A. B.* who was not then, but now is, Lord *Delaware*, is not sufficient, for whether he were at the time of the demise, Lord *Delaware*, is part of the issue. So in replevin, if the defendant avow damage feasant, and the plaintiff justify for common, and aver that the cattle were levant and couchant, and issue thereon, proof only for part of the cattle is not sufficient.—*Sloper* v. *Allen*, T. 1619. 2 Rol. Abr. 706.

The plaintiff declared, that he had *J. S.* and his wife in execution, and that the defendant suffered them to escape. Special verdict that the husband only was taken in execution, (it being for a debt due from

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(a) As the evidence must be applied to the particular fact in dispute, evidence which does not relate to the issue, or is in some manner connected with it, cannot be received. Nor can character be called in question in a *civil* cause, unless put in issue by the very proceeding itself, for every case is to be decided on its own circumstances, and not to be prejudiced by any matter foreign to it. *See* (the fourth general rule) *ante*, p. 295 *a*. And so in *criminal* cases evidence of character is only admitted in prosecutions which subject a man to corporal punishment, and not in actions for informations or penalties, though founded on the fraudulent conduct of the defendant. *Attorney-general* v. *Bowman*, cor. *Eyre*, C. B. cited in 2 Bos. & Pull. 532, n. (a)

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the wife before coverture) and that he escaped. The court held that the substance of the issue was found and gave judgment for the plaintiff.—*Roberts* v. *Herbert*, M. 1660. 1 Sid. 5.

In error to reverse a fine, for that the plaintiff was beyond, *&c.* If the defendant plead that the plaintiff returned into the realm in *August*, and issue thereupon, if it be proved that he returned at any time within five years it is sufficient. (*Oxford* v. *Waterhouse*, E. 15 Car. I. Mar. 25.) In debt against an executor the defendant pleads that the testator was taken in execution by a *ca. sa.* if it be proved that he was taken by an *alias ca. sa.* it is enough, but proof that he had been taken by a *capias pro fine*, or by a *capias utlagatum*, would not maintain the plea. If outlawry at the suit of *A.* be pleaded, and the record prove outlawry at the suit of *C.* it is sufficient.—*Foster* v. *Jackson*, T. 1612. Hob. 53. 54.

Debt upon bond against the defendant, as brother and heir to *J. S.* upon issue *riens per descent*, the jury found that the * obligor was seised [*300] in fee, had issue and died seised, and that the issue died without issue, whereupon the land descended to the defendant, as heir to the son of his brother, and the court held that the issue was found against the plaintiff; for the defendant had nothing as immediate heir to his brother, and if he would charge him as collateral heir, he ought to have a special declaration.—*Jenk's Ca.* H. 1628. Cro. Car. 151. *Anon.* Dy. 368.

But if *A.* settle an estate upon himself for life, remainder to his first and other sons, in tail, remainder to his own right heirs, and enter into a bond and die, leaving a son, who dies without issue, whereupon the uncle enters, he may be charged as brother and heir of *A.* for he must make himself heir to him who was last actually seised.—*Kellon* v. *Rowden*, T. 1686. Carth. 126.

It is necessary towards the better comprehending of this rule, to see in what cases *modo et forma* is of the substance of the issue; for where it is, it must be proved. (*a*)

Where the issue is joined on the point of the action, there *modo et forma* is mere form, and need not be proved; as where a demandant *in casu proviso* counts of an alienation in fee, and the tenant says, *non alienavit modo et forma*, and the jury find (or evidence is given of) an alienation in tail, it is sufficient; for the point and gist of the writ is, whether tenant in dower aliened to the disherison of the demandant. (*Co.*

(*a*) It is a general rule, that the words "*modo et forma*," go only to the substantial, and not to the circumstantial part of the plea. *Harris* v. *Ferrand*, Hardr. 39.

Litt.

Litt. 281.) So in replevin, where the defendant avowed the taking, as a commoner, damage feasant, the plaintiff in bar said *J. S.* was seised of an house and land, whereto he had common, and demised unto him the 30th of *March*, to hold from the feast of the *Annunciation* next before for a year, the defendant traversed the lease *modo et forma*; the jury found that *J. S.* made a lease to the plaintiff on the 25th of *March* for one year; (*a*) and though this be not the same lease as pleaded, for this begins on the day, and the other from the day, yet the plaintiff had judgment; for the substance of the issue is, whether the plaintiff have such a lease, as by force thereof he might use the common. (*b*) Yet it must not depart altogether from the form of the issue, as if it had been found that he had a right of common by lease from another.—*Pope* v. *Skinner*, T. 1614. Hob. 72.

L. brought an action upon a promissory note of thirty pounds, to which the defendant pleaded that the plaintiff was indebted to him in
[* 301] a larger sum, *scilicet* sixty pounds, which far exceeded the *damage laid in the declaration; the plaintiff replied, that he was not indebted to the defendant in the sum of sixty pounds *modo et forma*, and on demurrer (for the plaintiff might, for any thing appearing to the contrary in his replication, owe the defendant fifty-nine pounds, nineteen shillings, and eleven pence halfpenny; and therefore it was insisted, that he had tendered an immaterial issue) the court held that the substance of the replication was, that the plaintiff was not indebted to the defendant in so much as would exceed his own demand in the declaration, and that was the question for the court and jury, whether he were so indebted to the defendant as to exceed his demand, and not precisely how much; (*Langdon* v. *Knight*,) and a case was cited by Mr. *Filmer*, (*Joy* v. *Roberts*, 5 & 6 Geo. II. in Scacc.) which was allowed to be law, where in debt upon bond conditioned to pay one thousand pounds the defendant pleaded, that at the time of the bill the plaintiff owed the defendant fifteen hundred pounds, to which the plaintiff replied, that he was not indebted to him in fifteen hundred pounds *modo et forma*, as alledged, and issue thereon, and verdict for the plaintiff, and upon mo-

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(*a*) From thence next ensuing.

(*b*) Lord *Hobart* adds, "*N. B.* That "in this case, the jury might have "found directly against the plain- "tiff, *non dimisit modo et formâ*, "and could not safely have found a "general verdict for plaintiff, so that "the judgment of law upon the ver- "dict, is in manner against the ver- "dict." And in *S. C.* it was granted, that if he had declared in the same manner in *ejectione firmæ*, it would have been against him clearly, for there he demands and recovers the term. *Pope* v. *Skinner*, Hob. 73.

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tion in arrest of judgment, one question was, whether the issue were well joined, and the court held it was. (*a*)

Covenant by a lessee against his lessor, and breach assigned on the covenant for quiet enjoyment, for that the lessor ousted him,—the defendant pleaded that he entered to distrain for rent, and traversed that he ousted him *de præmissis*; the plaintiff demurred, for that he did not traverse, that he ousted him *de præmissis* or of any part thereof. *Sed per curiam* the plea is good, and proof of any part, had the plaintiff joined issue, would have been sufficient.—*Rex* v. *Harris*, E. 11 W. III, 1 Salk. 260.

But when a collateral point in pleading is traversed, then *modo et forma* is of the substance of the issue and must be proved; as if a feoffment be alledged by two, and this is traversed *modo et forma*, and it is found the feoffment of one, there *modo et forma* is material: So if a feoffment be pleaded by deed, and it is traversed *absque hoc quod feoffavit modo et forma*, the jury cannot find a feoffment without deed. (*b*) But though the issue be upon a collateral point, yet if by finding part of it, it shall appear to the court that no such action lies for the plaintiff, no more than if the whole had been found, there *modo et forma* are but words of form; as in trespass, *quare vi et armis*, if the defendant plead, that the plaintiff holds of him by fealty and rent, * and [*302] for rent behind, he came to distrain, and the plaintiff deny that he holds of him *modo et forma*, and the jury find (or evidence prove) that he holds of him by fealty only, the writ shall abate, for by the statute of *Marlb.* c. 3. no tenant can maintain trespass against his lord, (*c*) so the matter of the issue is, whether he hold of him or not; but it would have been otherwise in replevin, for there the avowant being to have a return must make a good title *in omnibus*.—*Co. Litt.* 282.

See

(*a*) An immaterial issue is, when issue is joined upon a fact, which does not tend to the determination of the dispute between the parties; yet if there be a verdict upon it, it may ascertain the fact. so as to settle the dispute. *Ca. Temp. Hardw.* 326.

(*b*) But an issue merely informal, is aided by the statute of jeofails.

(*c*) At the common law, trespass *vi et armis* did lie. By stat. *Marlb.* c. 3, sup. "*Si quis major vel minor* "(i. e. Dominus,) *districtionem facit* "*super tenentem suum pro servitiis* "*et consuetudinibus, quæ sibi debere* "*dicat, vel pro re alterâ unde ad* "*dominum feodi pertinent districtiones facere, et postea conveniatur,* "*quod tenens ea sibi non debeat, non* "*ideò puniatur dominus per redemptionem, si permittat districtiones* "*deliberari secundum legem et consuetudinem regni, sed amercietur,* "*vel ut hactenus consuetum est, et* "*tenens versus eum recuperet damna* "*sua.*"

This branch is interpreted, that the lord shall pay no fine, therefore, since this act, no action of trespass

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See more of the nature and general rules and principles of the law of evidence, and of the *onus probandi*, in Mr. *Peake's Law of Evidence*, 4th ed. at large; and briefly in *Bridgm. Anal. Dig.* of *Eq. Ca.* tit. Evid. sect. I. (2d ed.)

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vi et armis, lieth against the lord, in this case, for then he should pay a fine. But this is to be intended, where the lord himself doth distrain; for if his bailiff take a distress where nothing is in arrear, there trespass *vi et armis* lieth against him, because the bailiff is not *dominus*; and so it is against a guardian in socage. And if the lord himself doth cut any wood, or break the house, or feed the ground of his tenant, or the like, which he doth not in respect of his seigniory, trespass *vi et armis* lieth, for he doth not these things as *dominus*.

And *dominus* in this act is extended to the lessor upon a lease for life, or for years, made; for lessee for years shall do fealty also; but if the lessor put out the lessee for years, or disseize tenant for life, or do any act not as *dominus*, the lessee shall have trespass *vi et armis* against him. 2 *Inst.* 105, 106.

Ergo, if a landlord distrains in person, trespass *vi et armis* does not lie, *si permittatur*, but the tenant may replevy.

Where plaintiff declared that defendant retained him in husbandry, and defendant pleaded, that he did not retain him *modo et forma*, and it appeared that he was retained in another service, the issue was found against the plaintiff. *R.* v. *Coventry Bp.* 2 And. 183.

But where in waste plaintiff declared, that defendant was seised in fee, and made a feoffment to the use of himself for life, remainder to plaintiff in fee, and defendant pleaded, that he was seised in fee, *absq. hoc*, he made a feoffment, *modo et forma*, on which the jury found, that he made a feoffment to the use of himself for life, and then for the use of *J. S.* for life, *sans* waste, though it appeared the plaintiff had no cause of action, yet that not being in issue, he recovered a verdict. *Kayre* v. *Deurat*, Ow 91.

PART

PART VII.

CONTAINING ONE BOOK OF

GENERAL MATTERS RELATIVE TO TRIAL.

INTRODUCTION.

HAVING, in the several foregoing parts of this work, taken notice of the various actions which may be brought, the several issues that may be joined thereon, and the evidence which is proper to be admitted on such issues, as also of the nature of evidence in general, and of such rules relating thereto as are universal and equally applicable to all cases, I shall conclude by treating of some other general matters relative to trials at *Nisi Prius* under the following heads:

Chap. 1. Of Juries.
2. Of Pleas *puis darraign* continuance.
3. Of Abatement by the death of parties.
4. Of Demurrer to evidence.
5. Of Bills of exception.
6. Of Defects amendable after verdict, or aided by it.
7. Of New Trials.
8. Of Costs.

CHAPTER I.

[304]

OF JURIES.

AT common law the issue was tried in the court where the suit was depending; but this being attended with great inconvenience and expence, the statute of *Westminster* 2. *c.* 30. ordained, that all pleas in either bench,

bench, which require only an easy examination, shall be determined in the country before the judges of assize. *(a)*

This was the origin of trials at *nisi prius*, the 42 *E.* III. *c.* 11. afterwards regulated the process of the *venire*, &c. and put them upon the footing they now are.

N. B. The statute of *Westminster* 2. extending only to the courts of *K. B.* and *C. B.* whenever an issue is joined in the exchequer, and to be tried in the county, there is a particular commission authorizing the judges of assize to try it.

Before the statute of 3 *Geo.* II. *c.* 25. the sheriff used to return a separate jury in every cause; but that act ordains that he shall return only one panel for the trial of all causes, such panel not to consist of less than forty-eight, nor more than seventy-two, (without the particular order of the judges who go the circuit) and their names are to be put into a box, and drawn in the manner we daily see.

However, as there is a clause in that act empowering the court upon motion to grant *Special Juries*, it will be proper to take some notice of what is particularly relative to them, before I enter into such matters as are equally relative to *Juries in general.*

From the penning of the act it appears to extend only to trial of any issue joined, therefore the court will not grant a special jury upon a writ of enquiry.—*Symonds* v. *Parminter*, M. 21 Geo. II. *(b)*

Special Juries.—The method of striking them is, for the sheriff to attend the secondary or master with his book of freeholders at the time appointed by the master for that purpose, who is to give notice to their attornies on both sides to be present, the master then takes forty-eight, out of which each party strikes twelve, and the remaining twenty-four are re-
[*305] turned. If the attorney on one *side only attends, the master is to strike out the twelve for him who is absent. *(c)*

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(*a*) At common law, the jurors who made default were excused their issues, if a full jury appeared.

Juries try issue on facts, either at *Nisi Prius*, or in cases of great value and difficulty at bar, under the statute of *Westminster* 2. In this case there is a special jury struck, of the most considerable freeholders.

(*b*) This case is reported in 2 *Stra.* 1269. 1 *Wils.* 78. 86. 1 *Bla.* 20, but not to this point. The most important case on the subject of special juries, seems to be that of *Rex* v. *Perry*, 5 T. Rep. 453. 460. Though the court will not grant a special jury on a writ of enquiry, yet when it is to be executed before the C. J. or a judge of assize, it is usual to move the court for the sheriff to return a *good* jury. *Tidd's Prac.* 510. 712, (4th ed.)

(*c*) So if the defendant neglects to attend the striking a special jury, the master may strike out the twenty-four *ex parte*. *R.* v. *Hart*, Cowp. 412.

And if it be not expressed in the rule

In order to prevent improper applications for special juries, the 3 *Geo.* II. enacted, that the party applying for such special jury to be struck should pay the fees for striking, and not be allowed the same upon taxation of costs. However, that being the smallest part of the expence was found insufficient, therefore the 24 *Geo.* II. *c.* 18. enacts, that he shall pay all the expences of the special jury, and shall not be allowed it in costs, unless the judge certify in open court on the back of the record, that it was a cause proper to be tried by a special jury. And in order to lessen the expence of special juries, the same act directs that no special juryman shall have more than one guinea for his attendance.

The party at whose request the special jury was struck, may notwithstanding that, challenge the array. (*Rex* v. *Johnson, quæ. tamen.*) So he may challenge the polls. *(a)* And if from such challenges, or from non-attendance, there are not sufficient to make a jury, either party may pray a *tales*. *(b)* The usual method now-a-days is to draw such *tales* out of the box; though, where it is desired by the gentlemen of the panel who appear, and consented to by the parties, the sheriff may return such other gentlemen as can be procured to attend, to whom the parties have no objection, though by the 7 & 8 *W.* III. *c.* 23. *s.* 3. the sheriff is directed to return such as are returned upon some other panel. *(c)* And note; that in indictments and informations neither the prosecutor nor the defendant can pray a *tales* without a warrant from the attorney-general.—*Verni q. t.* v. ———, T. 19 Car. II. 1 Lev. 223. *R.* v. *Banks*, M. 3 Ann. 6 Mod. 246. *(d)*

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rule for the master to strike a special jury, that he shall strike forty-eight, and each of the parties shall strike out twelve, the master is to strike out twenty-four, and the parties have no liberty to strike out any. *Anon.* Salk. 405.

So, if the sheriff be changed after the jury is nominated, and before it is struck, yet the parties may proceed. *R.* v. *Hart*, sup.

And where, after the jury has been struck, the cause goes off for want of jurors, no new jury can be struck, but the cause must be tried by the jury first nominated. *R.* v. *Perry*, 5 T. R. 453.

(*a*) Note, The late act makes no difference in challenges, whether a special jury or not. Either plaintiff or defendant may challenge *propter defectum* or *delictum*, where no knight is returned, &c. But the challenge, *propter affectionem* can only be made by the person to whom he is not related. The oath of the trier is as follows: "*You shall well and truly say whether* A. B. (the juror) *stands indifferent between the parties to this issue.*" *Anon.* Salk. 152. If the sheriff be related to both parties, either may challenge him.

(*b*) Vide 14 *Eliz. c.* 9. 35 *Hen.* VIII. *c.* 6. *s.* 6.

(*c*) If a man be challenged as a juryman, he cannot afterwards be sworn as a talesman. *Parker* v. *Thornton*, 2 Raym. 1410. Stra. 640.

(*d*) So a warrant for a *tales* in a county palatine must come from the *Attorney-General*. *R.* v. *Lamb*, 4 Burr. 2171.

To

To come now to such matters as are relative to Juries in general.

And first, as to their having a view, *(a)* the 4 & 5 of *Ann. c.* 16. *s.* 8. enacts, that where it shall appear to the court to be proper the jury should have a view, the court may order special writs of *distringas* or *habeas corpus* to issue, by which the sheriff shall be commanded to have six out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who shall there have the matters in question shewed to them by persons appointed by the court. *(b)*

And by the 3 *Geo.* II. *c.* 25. where a view shall be allowed, six of the jurors who shall be named in such panel, or more who shall be
[* 306] * mutually assented to by the parties, or in case of their disagreement, by the proper officer of the court, shall have the view, and shall be first sworn to try the cause before any drawing out of the box, pursuant to that act. *(c)*

N. B. The usual way of granting views now is on the parties entering into a rule by consent, that in case no view be had, (as if no jurors attend) or if a view be had by any of the jurors whomsoever, (though not being six of the first twelve) yet the trial shall proceed, and no objection be made on account thereof, or for want of a proper return. *Ordo curiæ*, for granting rules for views by which the practice is now fully settled.—H. 30 *Geo.* II. 1 *Burr.* 252 to 259.

Having now brought the jury to the bar, the next thing to be looked into is the doctrine of challenges.

Challenges may be either to the *array*, or to the *polls*. *(d)*

Challenges *to the array* are on account of the partiality or insufficiency of the sheriff, or other officer returning the jury. *(e)*

(*a*) View is grantable only where the title is in question, and before any order is made, the view should be returned, that so many of them may view the premises. But if they should hear evidence upon the view, it is a good cause of challenge, for at common law, wherever the plaintiff is to recover *per visum juratorum*, the six of the jury who have had that view must appear. *Co. Litt.* 158. Et vide *Dalston* v. *Nicholls*, Palm. 363.

(*b*) As this statute does not extend to criminal cases, there can be no rule for a view in them, without mutual consent. 1 *Burr.* 253.

(*c*) A juror withdrawn for a view may be sworn on the second panel. *Blewitt* v. *Barnard*, 1 Stra. 71.

(*d*) That is, either to the whole panel, or to any particular juror.

(*e*) And a challenge may be to the array, if the names of the jurors in the *distringas* differ from those in the *venire*.

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If the sheriff be liable to the distress of either party, or in his service, or related, or contributory to the expences of the cause, the array may be well challenged. *(a)*

Before the 4 & 5 *Ann.* the want of hundredors used to be a frequent cause of challenge. But by that act and the 23 *Geo.* II. the *venire* is always to be *de corp. comitatus. (b)*

So before the 23 *Geo.* II. it was a good cause of challenge that there was no knight returned in a cause wherein a lord of parliament was party.

If either party be apprehensive that the other side will challenge the array on account of relationship or interest in the sheriff, the right way in order to save time is for him to suggest such matter to the court, and pray a *venire* to the coroners, and if all of them be interested, then to two elizors to be appointed by the court. *(c)* If upon shewing cause the other party admit the fact, the process shall be directed accordingly. (*Co. Litt.* 137. b. *Anon.* Dy. 367.) If the other party deny the fact, the process shall be directed to the sheriff, and the other party shall not afterwards be admitted to challenge the array on that account.— *Baynham's Ca.* T. 1588. 5 Co. 37. *Playter's Ca.* M. 25 & 26 Eliz. 5 Co. 36. Tr. per Pais, 15. *(d)*

(*a*) The defendant may challenge the array, if the sheriff or under-sheriff who arrayed them be a party, or interested in the event of the suit; if he be either of blood or affinity to either party; if the sheriff return the jury at the nomination of either party, it is sufficient ground to suspect his partiality, and good cause for challenging the array; so likewise if the sheriff be liable to the distress of either party, or contributes to the expence of either party; likewise, if an alien be party to the suit, if one half of the jury be not foreigners. *Quære tamen*, if the alien has not demanded it, and applied to the court for that purpose. This challenge to the array must be tried, and proved, if issue is joined by the plaintiff, and the facts controverted, and for this purpose the court appoints two triers, who are sworn, and if the issue is proved, they find, "that the "jury is not indifferently impan-"nelled," and this is entered of record, and puts an end to the trial; but if they find otherwise, the trial goes on, and there is no entry made of the finding. *Newman* v. *Edmunds*, 1 Bulst. 114.

The polls may be challenged upon four principal grounds: 1st. If a peer; 2d. For defect of birth, as an alien, or sex, as a woman (except in a writ of *ventre inspiciendo*, or a woman after conviction); next, For defect of qualification; 4th. For consanguinity, being an interested party in the cause, an arbitrator on either side, that he was formerly a juror in the same cause. And these may be considered principal challenges, because, if true, the law rejects them without farther inquiry.

(*b*) But this extends only to civil causes, and not to appeals of felony, indictment, &c.

(*c*) Elizors are appointed when the sheriff and coroner are both parties; but this matter must be suggested on the note, otherwise it would be error. 1 *Barn.* 58.

(*d*) For causes of challenge to the array and polls, see *Burn's Just.* tit. *Jurors.*

If the suggestion be, that the sheriff is related to the other party, or interested on the other side; if that be denied, the court will order it to be tried, and then direct the process according to the event of such trial.

[307] If the challenge to the array be determined against the party, he may afterwards have his challenge to the polls, but neither party shall take a challenge to the polls which he might have had to the array. It is to be seen therefore what is a good cause of challenge to the polls. *(a)*

If the jury upon a view hear evidence, it is a good cause of challenge, and such a misdemeanor for which they may be punished by the court. *Dalston* v. *All Souls*, E. 21 Jac. I. Palm. 363. *(b)*

By 4 & 5 *W. & M.* all jurors, other than strangers upon trials *per medietatem linguæ*, must have £10 a year, of freehold or copyhold lands, or ancient demesne, or in rents in fee or for life; and by 3 *Geo.* II. £20 a year leasehold, over and above the reserved rent, is a qualification, the lease being for the absolute term of 500 years or more, or for any other term determinable upon lives.

The jurors ought to be *omni exceptione majores;* therefore if a juryman be related to either party, or interested in the cause, or have declared his opinion, or have been arbitrator in the cause, it is a good cause of challenge; but I do not enter at large into these matters, because, since the 3 *Geo.* II. by which one panel is returned for the whole county, and not less than forty-eight in such panel, causes of challenge to the polls are not so minutely entered into as formerly.

It is a rule, that there can be no challenge to the array before a full jury appears, for if there be not a full jury the cause will remain *pro defectu juratorum;* therefore if a full jury do not appear, the party who intends to challenge the array may pray a *tales*, and afterwards challenge the jury; but the challenge must be made before any of the jury are sworn.—*Vicars* v. *Langham*, Hob. 235.

So if you would *challenge the polls*, you must do it before the juryman is sworn.

In what manner the truth of the challenge, when it is denied, is to be tried by triers appointed for that purpose, may be seen at large in

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(*a*) The ground of challenge to the polls, is for favour, which arises from a variety of circumstances and situations. This challenge must be tried (by triers), if to the first juror, by any two indifferent persons, and afterwards the two first jurors *sworn* shall try the rest. *Litt.* sec. 234.

(*b*) Where a juror on the principal panel was challenged, and he was afterwards sworn on the *tales*, by a wrong name, the court granted a new trial, though the verdict was just. *Parker* v. *Thornton*, Stra. 640.

Co.

Co. Litt. 156. therefore need not be repeated. But if a challenge be taken, and the other side demur, and upon debate the judge over-rule it, it is to be entered on the original record, and then advantage may be taken of it above. But if the judge over-rule the challenge without a demurrer, it is proper for a bill of exceptions.—*R.* v. *Worcester City*, H. 35 Car. II. Skin. 101.

Having now seen in general how a jury is to be got together, it is necessary to enquire what ought to be their behaviour after they are sworn. [308]

An officer of the court ought always to be placed at the door of the box where they sit, to prevent any one from having communication with them. And when they depart from the bar, they are to be attended by a bailiff sworn for that purpose. (*a*)

The jury, after going out of court, shall have no evidence with them, but what was shewn to the court as evidence, nor that without the direction of the court. (2 *Rol. Abr.* 686. *pl.* 2.) The court may permit them to take with them letters patent, and deeds under seal; (*Vicary* v. *Farthing*, M. 1695. Cro. Eliz. 411.) and the exemplification of witnesses in chancery if dead, but not a writing without seal unless by consent of parties. (*Tomlinson* v. *Croke*, E. 10 Jac. I. 2 Rol. Abr. 687. pl. 3. Co. Litt. 411.) But though the jury take with them patents, deeds, &c. without leave of the court, or writings without seal, books, &c. without consent of court or party, it shall not avoid the verdict, though they be taken by the delivery of the party for whom the verdict was given. (*Graves* v. *Short*, M. 1598. Cro. Eliz. 616. *Vicary* v. *Farthing*, sup.) So though one of the jury shew a writing, which was not given in evidence to his companions. But if they examine witnesses by themselves, though the same evidence which was given in court, it would avoid the verdict; but they may come back into court to hear the evidence of a thing whereof they are in doubt. (2 *Rol. Abr.* 676. *pl.* 7.) So if the party for whom the verdict is given, or any for him, deliver a letter or other writing not given in evidence, it will avoid the verdict. (*Co. Litt.* 227.) And note; such cause must be returned upon the *postea*, or made parcel of the record, otherwise it will not stay judgment, or be error.—*Graves* v. *Short*, sup. (*b*)

It is fineable for the jury to eat at their own charge after they are departed from the bar: but it will not avoid the verdict, as it will if they

(*a*) A judge at *Nisi Prius* cannot adjourn the jury to the court above, after they have been sworn, though all the parties consent thereto. *Dawson* v. *Howard*, 1 Raym. 128.

(*b*) The court alone will never order the plaintiff to stand non-suited, after the plaintiff had appeared before, and a verdict for him. 2 *Bla.* 1222.

eat at the charge of him for whom the verdict was given, before they are agreed on their verdict. (But note, this ought to be certified by the judge on the *postea*.) But they may eat at his charge after a privy verdict.—*Harebottle* v. *Playcock*, H. 1603. Cro. Jac. 21.

[309]

CHAPTER II.

OF PLEAS PUIS DARRAIGN CONTINUANCE.

AS matter may happen during the continuance of a suit, which may give the defendant a plea in his defence which he had not to make at the commencement of the action, it is to be seen what pleas *puis darraign continuance* are good, and what shall be done upon them; I will confine myself however to such as may be tendered at *nisi prius*, and they may be either in abatement or in bar.

If after issue joined in ejectment the plaintiff enter into part of the premises, the defendant may plead it in abatement.—*Moore* v. *Hawkins*, M. 8 Jac. I. Yelv. 180, 181.

If after the last continuance the plaintiff give the defendant a release, he may plead it in bar. *(a)*

If the plaintiff be outlawed in a civil suit, or excommunicated since the last continuance, it may be pleaded in bar: so if feme plaintiff have taken baron. So in debt by one as administrator, the defendant may plead that the plaintiff's letters of administration are revoked *puis darraign continuance*.

It seems dangerous to plead any matter *puis darraign continuance*, unless you be well advised, because if that matter be determined against you, it is a confession of the matter in issue, and no *nisi prius* shall be granted. (*Cockaine* v. *Witnam*, T. 28 Eliz. Cro. Eliz. 49.) And the plea put in cannot be amended after the assizes are over: but it may during the assizes be amended before the judge of *nisi prius*.—*Moore* v. *Hawkins*, sup. *Abbot* v. *Rugely*, E. 30 Car. II. Freem. 252.

It is in the breast of the judge whether he will accept of such plea or

(*a*) If after a plea in bar defendant pleads *puis darrein continuance*, this is a waiver of his former plea, and no advantage shall be taken of any thing in the bar. *Barber* v. *Palmer*, Salk. 178. 1 Raym. 693. And need not be pleaded *puis dar. contin.* where it happens between the action brought and plea pleaded. *Moor* v. *Green*, Salk. 178. 5 Mod. 11.

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not, *i. e.* whether he will or will not proceed in the trial,(*a*) therefore the party ought to make it appear to the judge that it is a true plea; (*b*) yet the plaintiff is not to reply to this plea at the assizes, for the judge has no power to accept of such replication, nor to try it, but only to return the plea as parcel of the record of *nisi prius*; and if the plaintiff demur, it cannot be argued there.—*Abbot* v. *Rugely*, E. 30 Car. II. supra. 3 Mod. 307.

It is not good pleading to say, "*quod post ultimam continuationem*" such a thing happened; but he must alledge precisely the very day, time, and place, for the *venue* must be laid in this as in all other pleas.—*Ewer* v. *Moile*, M. 6 Jac. I. Yelv. 141. Freem. 112. *Beaton* v. *Forest*, E. 24 Car. II. Al. 66.

These pleas are twofold, in abatement, and in bar, if any thing happens pending the writ to abate it, this may be pleaded *puis darraign continuance*, though there be a plea in bar; for this only waives all pleas in abatement that were in being at the time of the plea in bar pleaded, but not matter subsequent: (*c*) and though pleaded in abate- [310]

(*a*) In an action for a tailor's bill, the defendant offered to give evidence, that after issue joined, he paid the plaintiff his demand, who accepted it in satisfaction of the action, and that the attorney was now proceeding for the sake of costs, without authority from him. Lord *Kenyon* said, he would not receive this as evidence, though perhaps it might be matter to be pleaded *puis dar. contin.*, and a verdict was given for the plaintiff, the sum about £3. *Denham* v. *Davies*, *Westminster* Sittings, E. 30 Geo. III.

Issue was joined, and a *venire facias* was awarded, returnable 15 *Hil.* viz. 27th *January*. After this last continuance, the defendant, of the 30th *January*, pleaded generally, that *puis dar. contin.* viz. on such a day, he became bankrupt, and verified this plea by an affidavit. On a motion to set it aside as a dilatory plea, alledging it discretionary in the court whether they would receive it or not, *Pratt*, C. J. said, that "such "discretion was contrary to the ge- "nius of the common law of *Eng-* "*land*, and would be more fit for an "eastern monarchy than for this "land of liberty." But the plea in this case was held bad, because it did not aver, *that the defendant had conformed himself, &c.* according to the several statutes concerning bankrupts. *Paris* v. *Salkeld*, 2 Wils. 137. Ibid. 140. S.C. Vide etiam *Martin* v. *Wyvill*, 1 Stra. 492.

(*b*) For the court will immediately require some evidence of the truth of it. *Martin* v. *Wyvill*, sup. So where defendant (after a verdict against him, obtained a rule for a new trial, which was afterwards discharged), pleaded *puis dar. contin.* entitled of the term generally, the court refused to order a special memorandum of the day when it was filed, but held that they were bound to receive his plea, if filed and verified on oath, and that they cannot set it aside on motion. *Lovell* v. *Eastaff*, 3 T. Rep. 554.

(*c*) As a plea of *puis dar. contin.* waives all former pleadings, it is not allowed to be put in if any continuance has intervened between the arising of the fresh matter and the pleading it. *Paris* v. *Salkeld*, sup. For then the defendant is guilty of laches, and is supposed to rely on the merit of his former plea. *Wilson* v. *Wymonsold*, Say. 268. *Barber* v. *Palmer*, Ld. Raym. 693. *Moor* v. *Green*, Salk. 178.

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ment, yet after plea in bar pleaded, it is peremptory as well on demurrer as on trial, because after a plea in bar pleaded, which is an answer in chief, the defendant can never have judgment to answer over.—*Gilb. Hist. of C. B.* 84. *Abbot* v. *Rugely*, E. 30 Car. II. Freem. 252.

When it is pleaded in abatement, it must conclude "*quod breve cassetur*," when in bar "*quod actionem ulterius manutenere non debet*," and not that the former inquest should not be taken; because it is a substantive bar in itself, and comes in the place of the former, and therefore must be pleaded to the action.—*Gilb.* sup. *Campion* v. *Baker*, H. 35 Car. II. Lutw. 1143. *Cockaine* v. *Witnam*, *ante*, 309. Dy. 361. a.

Note; A plea *puis darraign continuance* may be pleaded after the jury are gone from the bar, but not after they have given their verdict.—*Pearson* v. *Perkins*, H. 3 Geo. I.

Note; Likewise there are some *pleas* which may be pleaded at *Nisi Prius*, that cannot properly be termed pleas *puis darraign continuance*, because the matter pleaded need not be expressly mentioned to have happened after the last continuance.—*Thel. Dig.* 204.

As in trespass after issue joined, the defendant may plead that the plaintiff was outlawed of felony, without saying after the last continuance, so he may in like manner plead that the plaintiff was covert the day of the writ purchased, though he cannot plead that the plaintiff took barou pending the writ, without pleading it after the last continuance. The diversity seems to be between such things as disprove the writ in fact, and such as disprove it in law.—*Bro. Continuance*, 57.

The last continuance where such plea is pleaded at the assizes, is the day of the return of the *venire facias*, from whence the plea is continued by the award of the *distringas* or *habeas corpus* till the next term *nisi prius*, &c.—*Dy.* 361. 1 *Bla.* 497. (*a*)

If the matter of the plea arise by deed it ought to be pleaded with a *profert*.—*Pierce* v. *Paxton*, T. 11 W. III. 2 Salk. 519.

The form of the plea, if at the assizes, is as follows: "And now "at this day, that is to say, *&c.* comes the said *C. D.* by *R. H.* his "counsel, and says, that the said *A. B.* ought not further to maintain this
[*311] "action against him the said **C. D.* because he says that after the "day of last past, from which day until the day of "in *Mich. Term* next (unless the justices of our lord the king, assigned "to hold the assizes of our lord the king in and for the county of *C.* "should first come on the day of at *B.* in the said county

(*a*) And on this day, if any matter of defence has arisen after the last continuance, it may be pleaded.

"of

" of *C.*) the action aforesaid is continued, to wit, on, *&c.* at, *&c.* the " said *A. B.* by his deed dated, *&c.* did release."——And so shew the particular matter, and conclude, " And this he is ready to verify, where- " fore he prays judgment if the said *A. B.* ought further to maintain " this action against him," *&c.*—*Gilb. C. P.* 105.

In trespass against four, after several continuances three of them plead the death of the fourth after the last continuance, *et petunt judicium de brevi, et quod breve illud cassetur.* And on demurrer the conclusion of the plea was holden to be bad; for it should have been, *petunt judicium si curia ulterius procedere vult,* because in fact the writ was abated before by the death of the party.(*a*) Had it been a matter which only made the writ abateable, such conclusion seems right.—*Hallowes* v. *Lacy,* E. 25 Car. II. 3 Lev. 120.

Note; It seems agreed that the defendant can have but one plea after the last continuance.—*Bro. Continu. pl.* 5. 41. Jenk. 160.

Where a plea is certified on the back of the *postea,* and the plaintiff demurs, if the defendant on the expiration of a rule given for him to join in demurrer, refuses to do so, the plaintiff may sign judgment.—*Abbot* v. *Rugely,* E. 30 Car. II. Freem. 252.

(*a*) Vide *Ellwaies* v. *Lucy,* 3 Salk. 117, and *post,* p. 312 *a*, n. (*a*)

CHAPTER III.

[312]

OF ABATEMENT BY THE DEATH OF PARTIES.

THIS was a curious learning as it stood at common law in cases where there were more plaintiffs and defendants than one; for the rule laid down by Lord Chief Baron *Gilbert,* in his history of *C. B.* 195. though founded in reason, does not seem to be warranted intirely by the cases; the rule laid down by him is, that wherever the death of any party happens pending the writ, (and yet the plea is in the same condition as if such party were living,) there such death makes no alteration.(*a*) However, now by 8 & 9 *W.* III. *c.* 11. if there be two or more plaintiffs or defendants, and one or more of them should die, if

(*a*) At common law, in contract, if one dies, the action shall abate; otherwise in trespass. *Worrall* v. *Brand,* T. Raym. 131.

the

the cause of action survive, the action shall not be thereby abated, but such death being suggested on the record, shall proceed, &c.

By the same act, if any plaintiff happen to die after an interlocutory judgment, the action shall not abate, if it might originally be maintained by the executors of such plaintiff, and if the defendant die after such interlocutory judgment, the action shall not abate, if it might originally be maintained against the executors of such defendant; and the plaintiff or his executors may have a *sci. fa.* against the defendant or his executors, to shew cause why damages should not be assessed, &c.

By the 17 *Car.* II. *c.* 8. it is enacted, That in all actions personal, real or mixed, the death of either party between the verdict and judgment shall not be alledged for error, so as such judgment be entered within two terms after such verdict.

The death of either party before the assizes is not remedied by this statute, but if the party die after the assizes begin, though the trial be after his death, that is within the remedy of the statute, for the assizes is but one day in law. Yet the court said it was in their discretion, whether they would arrest the judgment; but in *(Plommer* v. *Webb,)* Raym. 1415. (n) it was holden not assignable for error, it appearing by the record that the defendant appeared *per attornatum suum.—Anon.* M. 1707. Salk. 8. (*a*)

(*a*) Furthermore, it has been held, that, where trespass was brought against four, to which they appeared, and after some continuances, three pleaded that the fourth had died after the last continuance, the death of the fourth will abate the writ. *Ellwaies* v. *Lucy*, 3 Salk. 117.

So it has been held, that where the defendant dies between the commission day and the day of trial, it is not a sufficient ground to set aside the plaintiff's verdict. *Jacobs* v. *Miniconi*, 7 T. Rep. 31. But if the defendant dies the night before the trial at the sittings in term, a verdict obtained in such a cause, and the judgment entered up thereon, will be set aside upon application. *Taylor* v. *Harris*, 3 Bos. & Pull. 549.

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CHAPTER IV.

OF DEMURRER TO EVIDENCE.

IF the plaintiff or defendant give in evidence matter of record, or writings, or parol evidence on which a doubt in law arises, the other side may demur to the evidence; otherwise if there be a doubt whether the fact be well proved, for the jury may find it on their own knowledge.

ledge. (*Co. Litt.* 72 (a). *Baker's Ca.* T. 42 Eliz. 5 Co. 104. *Fitzharris* v. *Bouin*, M. 14 Car. II. 1 Lev. 87.) He that demurs to evidence admits it to be true, and if the matter of fact be uncertainly alledged, or it be doubtful whether it be true or not, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, so that the truth of the fact as well as the validity of evidence be referred to the court, he that alledges this matter cannot join in demurrer, but ought to pray judgment of the court that his adversary may not be admitted to his demurrer, unless he will confess the matter of fact to be true; and if he do not so do, but join in demurrer, he has likewise misbehaved, and the court cannot proceed to judgment, but a *venire de novo* shall go. (*Wright* v. *Pindar*, T. 23 Car. I. Al. 18.) Where there is a demurrer to evidence, the judge orders the associate to take a note of the testimony, and that is signed by the counsel on both sides, and the demurrer is affixed to the *postea*. (Co. Lit. 72. *Terry* v. *Westmore*, at *Maidstone*, 1682, *per Pemberton*, C. J.) If one demur properly, the other ought to join, except it be in an information at the suit of the king; *a fortiori* the king himself need not, as in a *quare impedit*, but the judge must direct the jury to find the matter specially. In *assumpsit* to prove a consideration, an arrest was to be proved by the plaintiff, and for that he did not produce the writ, the defendant demurred; and it was agreed by the court that the writ ought to have been produced, but by the demurrer it is confessed; the arrest being matter of fact, though to be proved by matter of record; and the jury might of their own knowledge know there was a writ; and by the demurrer all matters of fact are confessed that the jury could know of their own conusance.—*Fitzharris* v. *Bouin*, sup.

On a demurrer to evidence, the only question for the consideration of the court is, whether the evidence given be such as ought to be left to the jury in support of the issue joined; *(a)* and no objection can be made to the declaration or other pleadings in that stage of the cause. (*Cocksedge* v. *Fanshaw*, E. 19 Geo. III. B. R. 1 Dougl. 114 (118). *(b)* The judgment on such a demurrer is, that the evidence is, or is not

(*a*) On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove. *Gibson* v. *Hunter*, 2 H. Bla. 187.

(*b*) For the party ought to admit the whole effect of the evidence, and not merely the facts which compose it; so that if it be only presumptive, he must distinctly admit every conclusion which the jury might have drawn from it. *Gibson* v. *Hunter*, supra.

sufficient

sufficient to maintain the issue joined.—*Cort* v. *Birbeck*, H. 19 Geo. III. 1 Dougl. 208. (218.)

[314] On a demurrer to evidence the most usual course is to discharge the jury without more inquiry, (though they may find damages conditionally) and for a writ of inquiry to be executed after. (*Herbert* v. *Walters*, M. 7 W. III. Lord Raym. 60. *Darrose* v. *Newbote*, M. 1627. Cro. Car. 143.) But if the matter be clear, the court need not admit a demurrer. (*Worsley* v. *Filisker*, M. 7 Jac. I. 2 Ro. 119.) If the judge admit that for evidence, which is not, the party cannot demur for that cause, but must tender a bill of exceptions.—*Thruston* v. *Slatford*, M. 12 W. III. Salk. 284.

The following form of a demurrer to evidence and joinder thereto, may perhaps be found useful at an assizes:—

"Afterwards on the day, and at the place within contained, before "Sir *Richard Adams*, knight, one of the barons of our lord the king, "of his court of *Exchequer* at *Westminster*, Sir *Richard Aston*, knight, "one of the justices of our said lord the king, assigned to hold pleas in "the court of our said lord the king, before the king himself, and others "their fellows, justices of our said lord the king, assigned to take the "assizes in and for the city of *W*——, in the county of the same city, "according to the form of the statute, *&c.* come as well the within-"named *Charles Withers*, esq. as the within-named *George Wingfield*, "esq. by their attornies within-named. And the jurors of the jury, "whereof mention is within made; that is to say, *R. L. &c.* being "called, likewise come, and being chosen, tried and sworn to say the "truth of the premisses within contained; as to the first issue between "the parties within joined, say that the said *George Wingfield* is guilty "of the trespass within complained of, in manner and form as the said "*Charles Withers* hath above complained; and they assess the damages "of the said *Charles Withers* by reason thereof, to sixpence. And as "to the issue lastly within joined between the said parties, the said "*George Wingfield* shews in evidence to the jury aforesaid, to prove "and maintain the issue lastly within joined on his part by one witness, "that" (so state the evidence) "And the said *Charles Withers* says, that "the aforesaid matter to the jurors aforesaid, in form aforesaid shewn "in evidence by the said *George Wingfield*, is not sufficient in law to "maintain the said issue lastly within joined, on the part of the said "*George Wingfield*, and that he the said *Charles Withers*, to the mat-"ter aforesaid, in form aforesaid shewn in evidence, hath no necessity, "nor is he obliged by the laws of the land to answer; and this he is "ready to verify: wherefore for want of sufficient matter in that behalf

"shewn

"shewn in evidence to the jury aforesaid, the said *Charles Withers* "prays judgment, and that the jury aforesaid may be discharged from "giving any verdict upon the said issue; and that his damages by reason "of the trespass within complained of, may be adjudged to him, *&c.*" "And the said *George Wingfield*, for that he hath shewn in evidence to "the jury aforesaid, sufficient matter to maintain the issue lastly within "joined, on the part of the said *George Wingfield*, and which he is "ready to verify; and for as much as the said *Charles Withers* doth not "deny, nor in any manner answer the said matter, prays judgment; and "that the said *Charles Withers* may be barred from having his aforesaid "action against him, and that the jury aforesaid may be discharged "from giving their verdict upon the issue lastly joined, *&c.* Wherefore "let the jury aforesaid be discharged by the court here, by the assent of "the parties, from giving any verdict thereupon."

CHAPTER V.

OF BILLS OF EXCEPTIONS.

BY *Westminster* 2. (13 *E.* I. *c.* 31.) it is enacted, That if one impleaded before any of the justices, alledge an exception, praying that the justices will allow it, and if they will not, if he write the exception and require the justices to put their seals to it, the justices shall so do, and if one will not, another shall. And if the king, on complaint made of the justices, cause the record to come before him, and the exception be not in the roll, on shewing it written with the seal of the justice, he shall be commanded at a day to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judge and allow, or disallow the exception.

The bill of exceptions must be tendered at the trial. *(a)* The nature and reasoning of the thing requires the exception should be reduced into writing when taken and disallowed, like a * special verdict or a demurrer [*316] to evidence, not that they need to be drawn up in form, but the substance must be reduced into writing while the thing is transacting. *(Wright* v. *Sharp*, E. 1709. Salk. 288.) If a judge allow the matter

(*a*) Whether the trial be at *Nisi Prius* or *at Bar*, for the words of the statute are, that the *justices* shall sign it. *Thruston* v. *Slatford*, 3 Salk. 155.

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to be evidence, but not conclusive, and so refer it to the jury, no bill of exception will lie; as if a man produce the probate of a will to prove the devise of a term for years, and the judge leave it to the jury, but he may have an attaint against the jury if they find against the will.—*Chichester* v. *Philips*, M. 32 Car. II. T. Raym. 405.

A bill of exception ought to be upon some point of law, either in admitting or denying of evidence, or a challenge, or some matter of law arising upon fact not denied, in which either party is over-ruled by the court: if such bill be tendered and the exceptions in it are truly stated, then the judges ought to set their seal in testimony that such exceptions were taken at the trial; but if the bill contain matters false, or untruly stated, or matters wherein they were not over-ruled, they are not obliged to affix the seal. *(a)* A bill of exceptions is not to draw the whole matter into examination again, it is only for a single point, and the truth of it can never be doubted after the bill is sealed, for the adverse party is concluded from averring the contrary, or supplying an omission in it.—*Bridgman* v. *Holt*, Show. Par. Ca. 120.

If the judges refuse to sign the bill, the party grieved by the denial may have a writ upon the statute, commanding the same to be done *juxta formam statuti*; it recites the form of an exception taken and over-ruled, and it follows "*vobis præcipimus quod si ita est, tunc sigilla vestra apponatis*;" and if it be returned "*quod non ita est*," an action will lie for a false return, and thereupon the surmise will be tried, and if found to be so, damages will be given, and upon such a recovery a peremptory writ commanding the same.—*Bridgman* v. *Holt*, sup. 2 Inst. 426. *(b)*

In Sir *H. Vane's* case, (who was indicted for high treason) the court refused to sign a bill of exceptions, because they said criminal cases were not within the statute, but only actions between party and party. But in *(Paget* v. *Coventry Bp.)* 1 Leon. 5. it was allowed in an indictment for a trespass, and in (*R.* v. *Higgins*, H. 34 & 35 Car. II.) 1 Vent. 366. in an information in nature of a *quo warranto*.—*Vane's Ca.* T. 14 Car. II. 1 Lev. 68.

(a) If the justices bring the bill of exceptions into court, they thereby acknowledge their seal, otherwise there must be a *scire facias* against them. When the record and errors are assigned, the plaintiff must issue a *scire facias ad audiendas errores*, for the assignment of errors is the ground of the *sci. fa.* and this is record that the notice is removed, and upon two *nihils* returned *non est inventus*., the court examine the errors in the absence of the defendant, if the plaintiff delay. Vide *Blackmore's Case*, 8 Co. 310, as to errors assignable. The defendant may have a *sci. fa.* against the plaintiff, why he should not have execution of the former judgment.

(b) So upon all writs that command or prohibit, the party may have his action for disobedience. *Marshalsea Ca.* 10 Co. 75. 2 Inst. 55.

A bill

A bill of exceptions is only to be made use of upon a writ of error, and therefore where a writ of error will not lie, there can be no bill of exceptions.—*Rex* v. *Inhabitants of Preston*, E. 9 Geo. II. 2 Str. 1040. Ca. Temp. Hardw. 249. S. C. (*a*)

Though *ex rigore juris* the party shall not have advantage of his bill of exceptions, but on a writ of error; yet where the * action has been [*317] brought in the court of *K. B.*, that court, to prevent delay and expence, has sometimes examined the matter before judgment.—*Enfield* v. *Hall*, H. 30 Car. II. 2 Lev. 236. (*b*)

If the bill of exceptions be not tacked to the record, it seems necessary to set out the whole record in it in the following manner:—

" Be it remembered, that in the term of the Holy Trinity, in the " third year of the reign of our sovereign lord *George* the third, now " king of *Great Britain*, and so forth, came *William Hickell*, by *James* " *Philips*, his attorney, into the court of our said lord the king of the " bench at *Westminster*, and impleaded *John Money*, *James Watson*, " and *Robert Blackmore*, in a certain plea of trespass, on which the " said *William* declared against them, that" (set out the declaration and other pleadings;) " And thereupon the issue was joined between the " said *William* and the said *John Money*, *James Watson*, and *Robert* " *Blackmore*; and afterwards, *to wit*, at the sittings of *Nisi Prius*, held " at the *Guildhall* of the city of *London* aforesaid, in and for the said " city, before the right honourable Sir *Charles Pratt*, knight, chief " justice of our said lord the king of the bench at *Westminster*, *Thomas* " *Lloyd*, esq. being associated to the said chief justice, according to " the form of the statute in such case made and provided; on *Wed-* " *nesday*, the sixth day of *July*, in the third year of the reign of our " said lord the present king, the aforesaid issue so joined between the " said parties as aforesaid, came to be tried by a jury of the city of

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(*a*) But where a bill of exceptions is resorted to, there can be no new trial granted on the same points. *Fabrigas* v. *Mostyn*, 2 Bla. 929.

(*b*) In *Davenport* v. *Tyrrell*, 1 Bla. 679, however, it was held, that a bill of exceptions, being in nature of a writ of error, cannot be delivered in the court out of which the record issues.

A court of error, generally speaking, cannot award a *venire de novo*, when the proceedings originate in an inferior court. *Trevor* v. *Wall*, 1 T. Rep. 151. But where there was a bill of exceptions to the rejection of evidence in the court of Great Session in *Wales*, and upon error brought in *K. B.* the evidence was deemed admissible, the latter court considered that they were called upon to award a *venire de novo* into the next *English* county, as, without the intervention of a jury, no final judgment could be given on the record. *Davis* v. *Pierce*, 2 T. Rep. 125. Et vide *Johnson* v. *Sutton*, 1 T. Rep. 528, as to the power of a court of error to award a *venire de novo*.

" *London*,

" *London* aforesaid, for that purpose duly impanelled, that is to say, " *A. B.* and *C. D. &c.* good and lawful men of the said city of *London*; " at which day came there as well the said *William Hickell*, as also the " said *John Money*, *James Watson*, and *Robert Blackmore*, by their " respective attornies aforesaid. And the jurors of the jury aforesaid, " impanelled to try the said issue being called, also came, (*a*) and were " then and there in due manner chosen and sworn to try the same issue; " and upon the trial of that issue the counsel learned in the law for the " said *William Hickell*, to maintain and prove the said issue, on his part " gave in evidence, that" (So set out the evidence on the part of the plaintiff, and then set out the evidence on the part of the defendants, and
[*318] then proceed as * follows): " Whereupon the said counsel for the said " defendants, did then and there insist before the chief justice aforesaid, " on the behalf of the defendants above-named, that the said several " matters so produced and given in evidence on the part of the said de- " fendants as aforesaid, were sufficient, and ought to be admitted and " allowed as decisive evidence, to entitle the said defendants to the be- " nefit of the statute made in the 24th year of the reign of his late ma- " jesty king *George* the Second, intitled, An act for rendering justices of " the peace more safe in the executions of their office, and for indemni- " fying constables and others, acting in obedience to their warrants; and " that therefore the said *William Hickell* ought to be barred of his " aforesaid action, and the said defendants acquitted thereof, and there- " upon the said defendants, by their counsel aforesaid, did then and " there pray of the said justice to admit and allow the said matters and " proof so produced and given in evidence for the said defendants afore- " said, to be conclusive evidence to intitle the said defendants to the be- " nefit of the statute aforesaid, and to bar the said *William* of his action " aforesaid. But to this, the counsel learned in the law, on behalf of " the said *William Hickell*, did then and there insist before the chief " justice aforesaid, that the matters and evidence aforesaid so produced

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(*a*) And the jurors aforesaid being impanelled and sworn to try the issue aforesaid, counsel for the plaintiff to maintain and prove the said issue on his part offered in evidence, *&c.*; and the counsel for the defendant having offered, *&c.* they insisted on the part of the defendant, that the several matters so given in evidence were sufficient in law, and ought to be admitted and tried by the court as legal evidence to go before the jury. But the counsel for the plaintiff did pray of the court not to admit the said evidence to go to the jury, not being legal evidence. And the court, notwithstanding, has permitted and allowed said evidence to be given. Counsel on the part of the plaintiff excepted to the said assignment of the court thereon, and requested the said judge to put his seal to this bill of exceptions, according to the form of the statute, and thereupon, *&c.*

" and

" and proved on the part of the said defendants as aforesaid, were not " sufficient nor ought to be admitted or allowed to entitle the said de- " fendants to the benefit of the statute aforesaid; or to bar the said " *William Hickell* of his aforesaid action, and that neither the said de- " fendants, or any of them, nor the said earl of *Hallifax*, were or was " within the words or meaning of the statute made in the seventh year of " the reign of his late majesty king *James* the First, intitled, An act for " ease in pleading against troublesome and contentious suits, prosecuted " against justices of peace, mayors, constables, and certain other his " majesty's officers, for the lawful execution of their office, nor of the " statute made in the 21st year of the reign of the same late king, in- " titled, An act to enlarge and make perpetual the act made for ease in " pleading against troublesome and contentious suits prosecuted against " justices of the peace, mayors, constables, and certain other his ma- " jesty's officers, for the lawful execution of their office, made in the " seventh year of his majesty's most happy reign: nor of the said statute " made in the 24th year of the reign of his late majesty king *George the [*319] " Second; nor in any way entitled to the benefit of any of these sta- " tutes: and the counsel for the said *William Hickell* further insisted, " that the seizure and imprisonment of the said *William Hickell* were " not made or done in obedience to the said warrant, nor have the said " defendants, or any of them in that behalf, any authority thereby. " And the said chief justice did then and there declare and deliver his " opinion to the jury aforesaid; that the said several matters so pro- " duced and proved on the part of the defendants were not upon the " whole case sufficient to bar the said *William Hickell* of his aforesaid " action against them, and with that direction left the same to the said " jury; and the jury aforesaid then and there gave their verdict for the " said *William Hickell*, and £300 damages; whereupon the said coun- " sel for the said defendants did then and there, on the behalf of the " said defendants, except to the aforesaid opinion of the said chief jus- " tice, and insisted on the said several matters and proofs as an absolute " bar to the aforesaid action, by virtue of the last mentioned statute: " and in as much as the said several matters so produced and given in " evidence, on the part of the said defendants, and by their counsel " aforesaid objected and insisted on as a bar to the action aforesaid, do " not appear by the record of the verdict aforesaid, the said counsel for the " aforesaid defendants did then and there propose their aforesaid excep- " tion to the opinion of the said chief justice, and requested the said " chief justice to put his seal to this bill of exception, containing the said " several matters so produced and given in evidence on the part of the

" said

"said defendants as aforesaid, according to the form of the statute in "such case made and provided; and thereupon the aforesaid chief "justice, at the request of the said counsel for the above named defen- "dants, did put his seal to this bill of exception, pursuant to the afore- "said statute in such case made and provided, on the sixth day of *July* "aforesaid, in the third year of the reign of his said present majesty."(*a*)

The above precedent is taken from a bill of exceptions, which was made use of within these few years past: but it does not seem necessary to state the whole record in the bill, provided the bill be tacked to the record; which the statute plainly shews may be done, by saying, *if the exceptions be not in the roll:* and there are precedents to warrant this mode of proceeding.

[320] The bill of exceptions would then begin as follows, "Which said issue "in form aforesaid joined between the parties aforesaid, afterwards, *to* "*wit*, at the Sittings, *&c.*" *(and then pursue the former precedent.)*— *Vide* Bill of Exceptions in *Todd* v. *East India Company*, Dom. Proc. 1787. and *April* 1788.

(*a*) Vide etiam *Money* v. *Leach*, 3 Burr. 1692, 1742. 1 Bla. 555, for the proceedings on a bill of exceptions.

CHAPTER VI.

OF DEFECTS AMENDABLE AFTER VERDICT OR AIDED BY IT.

THE rule is to allow amendments wherever the judge has an authority to try the cause. (*Wildare* v. *Handy*, T. 14 Geo. II. 2 Stra. 1151.)(*a*) As if the *Nisi Prius* roll differ from the plea roll in a matter which does not alter the issue, for it is only a transcript of it to carry

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(*a*) The rule laid down by Lord *Mansfield*, in *Bonfield* v. *Miller*, 2 Burr. 1099, is, that, whilst all the proceedings are on paper, an amendment may be made *at common law*, and in such an amendment, there is no difference between civil and criminal prosecutions. Vide etiam *Goff q. t.* v. *Popplewell*, 2 T. Rep. 707. But the amendment of the record itself, by the statutes of amendment, extends not to criminal prosecutions. Vide *Hoyle* v. *Pitt*, 3 Salk. 38. *R.* v. *Walcott*, Salk. 632. *Atcheson* v. *Everett*, 1 Cowp. 382.

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the issue of it into the county. (*Child* v. *Harvey*, M. 11 W. III. Carth. 506.) But in ejectment, if the *venire* be *de placito transgressionis*, omitting *et ejectionis firmæ*, it is ill, because not in the same action; but if the *distringas* or *hab. corp.* is right, the *venire* will be null, and the want of it is aided. So in *sci. fa.* against an executor to have execution of a judgment for damages in trover, it was moved in arrest of judgment, that the *venire* was in *placito debiti*, and a new *venire* was awarded. The verdict itself may be amended by the memory of the judge who tried the cause. (*Eliot* v. *Skypp*, M. 1634. Cro. Car. 338.) And on the authority of that case in *Cro. Car.* the *postea* was amended by the judge's notes; where the associate had mistaken and entered 1*d.* damages in covenant, taking it for debt instead of entering damages £274. (*Newcomb* v. *Green*, M. 17 Geo. II. 2 Str. 1197.) So a special verdict may be amended by the minutes taken by the clerk of assize, but nothing can be added to the minutes though ever so strongly proved, for that would be to subject the jury to an attaint for what was not found by them.—*Rex* v. *Keat*, H. 1697. Salk. 47.

If an issue be tendered by the plaintiff, and the defendant join the *similiter* by the plaintiff's name, or *vice versa*, this shall be amended, there being a negative and an affirmative between the parties.—*Briton* v. *Mandell*, E. 1606. Cro. Jac. 67. (*a*)

It is an established doctrine, that a verdict will aid a title defectively set out, but not a defective title. (b) As in trespass for * taking dung [*321] without saying *fimum suum* or *ipsius querentis*, for that is a plain defect of title; but it will cure all the omissions of the parties in the allegations, which must be presumed to have been given in evidence to the jury; (*R.* v. *Landaff Bp.* H. 8 Geo. II. 2 Stra. 1006.) as in a *quare impedit*, if a presentation be not alledged, yet if the issue were such as to make it necessary for the plaintiff to prove one, the want of the allegation will be cured by the verdict.—*Lancaster* v. *Lowe*, M. 3 Jac. I. Cro. Jac. 94. (*c*)

So surplusage doth not vitiate after a verdict, but if it be repugnant to what is before alledged, it is void. As in trover, if the plaintiff declare that on the 4th of *March* he was possessed of goods, and that after, *viz.* 1st of *March*, they came to the defendant's hands.

(*a*) Vide *Rowbone* v. *Pickman*, 1 Stra. 551. But the want of a *similiter* is not to be aided. *Cooper* v. *Spencer*, 1 Stra. 641.

(*b*) Vide *Small* v. *Cole*, 2 Burr. 1159.

(*c*) For the statutes of jeofails extend to suits by the crown; in *quare impedit*. *R.* v. *Meath Bp.* 1 Stra. 62.

If the gist of the defendant's bar be bad, it will not be cured by a verdict found for him, but the plaintiff shall have judgment if the verdict pass for him, either for the badness or the falseness of the bar; as if in debt on a single bill the defendant plead payment without any acquittal, and it is found for him, yet he shall not have judgment because the gist of the plea is bad, since the obligation is in force till dissolved, *eo ligamine quo ligatum est*; but if it had been found for the plaintiff, he should have had judgment.—*Wingfield* v. *Bell*, M. 1618. Cro. Jac. 377.

Note; In fact such plea would at this day be good by 4 *Anne*, *c.* 16. *s.* 12. but the case equally serves for illustration.

A verdict cannot help an immaterial issue, but will an improper or an informal one; as if not guilty be pleaded in debt, though this be an improper issue, yet if found for the plaintiff, he shall have judgment. (*Jones* v. *Bodiner*, H. 7 W. III. Carth. 371. *Wentworth* v. *Wentworth*, 38 Eliz. Noy. 56.) So in assault and battery the defendant justified *quod moderatè castigavit*, the plaintiff replied *quod non moderatè castigavit*, and after a verdict for him had judgment, though the traverse was informal, for it ought to have been *de injuria sua propria*. (*Alebery* v. *Jones*, E. 22 Car. II. 1 Vent. 70.) So in replevin, where the defendant avowed for rent, for that *A.* being seised in fee married *B.* and had issue *D.* and that *B.* and *D.* after the death of *A.* granted the rent, the plaintiff traversed the seisin of *A.*, the defendant had a verdict, and it was holden good, though the issue was not so apt as it might have been, for the seisin of the grantor was what ought properly to have been traversed.—*Pigot* v. *Pigot*, M. 2 Jac. I. Yelv. 54.

But for the better understanding what defects are amendable after ver-
[*322] dict, or are aided by it, it will be necessary to take a * cursory view of the several statutes of amendments and jeofails, and to note some of the determinations thereupon.

By 14 *E.* III. *c.* 6. No process shall be annulled or discontinued by the misprision of the clerk in writing one syllable or letter too much or too little, but it shall be amended.

The judges construed this statute so favourably as to extend it to a word; but not being agreed whether they could make these amendments as well after judgment as before, occasioned the making the 9 *H.* V. *c.* 4. and 4 *H.* VI. *c.* 3. by which such power is given to them as long as the record or process is before them.—*Blackmore's Case*, M. 1610. 1 Co. 157.

By 8 *H.* VI. *c.* 12. No judgment or record shall be reversed or annulled for error in any record, process, or warrant of attorney, original writ or judicial panel, or return, by razure, interlining, or by addition, substraction

substraction or diminution of words, letters, titles, &c. but the judges in affirmance of judgment may amend all that which to them seems to be the misprision of the clerk.

By 8 *H.* VI. *c.* 15. The judges in any records or process before them by error or otherwise, or in returns of sheriffs, coroners, &c. may amend the misprision of the clerk of the court, *(a)* or of the sheriffs, coroners, their clerks, or other officer whatsoever, in writing a syllable or letter too much or too little. *(b)*

32 *H.* VIII. *c.* 30. enacts, That if (1) any issue be tried (2) by oath of 12 men, for the (3) party, plaintiff or demandant, or for the party tenant, or defendant, in any courts of record, judgment shall be given, any (4) mispleading, lack of colour, insufficient pleading, or jeofail, any miscontinuance or (5) discontinuance or (6) misconceiving of process, misjoining of the issue, lack of warrant of attorney of the party against whom the issue shall be tried, or other negligence of the parties, their counsellors or attornies notwithstanding, and the judgment shall stand according to the (7) verdict without reversal.

Upon this last statute the following decisions have been made:

1. If in replevin the plaintiff is nonsuited after evidence, and the jury assess damages for the avowant, this is no trial within the act, for it is only in nature of an inquest of office.—*Cro. Jac.* 359. *(c)* *Vide* 4 & 5 *Ann. c.* 16.

2. An issue upon *nul tiel record* is not within the act.—*Priddle* v. *Napper*, M. 10 Jac. I. 11 Co. 8.

3. So an issue between the demandant and vouchee is not within the act.—*Heydon's Ca.* H. 10 Jac. I. 11 Co. 6.

4. If as to part the defendant join issue, but say nothing to the rest, [323] and this issue be found for the plaintiff, he shall have judgment; *S. C.* but if pleaded to the whole, it is a bad plea, and not helped by the statute.—*Workman* v. *Chappell*, T. 15 Car. II. Hardr. 331.

5. This statute extends to discontinuances on the part of the plaintiff as well as those on the part of the defendant; and to those after as well as before verdict.—*Warren* v. *Smith*, E. 18 Jac. I. 1 Rol. Rep. 161.—*Smith* v. *Bower*, E. 1620. Cro. Jac. 528.

6. Misconceiving of process within this act is, as if a *distringas* be awarded where it should be a *ha. cor.* But it is otherwise if a *venire* (or

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(a) But mistakes made in the pleadings by the party himself, cannot be amended. *Green* v. *Rennett*, 1 T. Rep. 783.

(b) Inferior courts, however, cannot amend errors in process under these statutes. *Merse* v. *James*, Willes, 125.

(c) No case to this point is to be found in *Cro. Jac.*

other process) be awarded to a wrong officer.—*Woodroffe* v. *Venalio*, Sav. 35. *Corne* v. *Pastow*, M. 44 & 45 Eliz. Yelv. 15.

7. If the judgment be not given upon the verdict, it is not within the act; as in debt against an heir who pleads *riens per discent*, except 20 acres in *D.*, upon which issue is joined, and verdict for the defendant. If the plaintiff take judgment upon the confession, it may be reversed by reason of a discontinuance.—*Molineux* v. *Molineux*, H. 7 Jac. I. Yelv. 169.

18 *Eliz. c.* 14. enacts, That after verdict judgment thereupon shall not be reversed for want of form touching false *Latin*, or variance from the register or other faults in form or for want of any (1) writ, original or judicial, or by reason of any (2) imperfect or insufficient return of any sheriff or other officer, or for want of any warrant of attorney, or for any fault in process upon or after any aid, prayer, and voucher.

And upon this statute it has been resolved,

1. That an ill writ in substance, or a good writ which warrants not the declaration, is not aided by the statute: but the want of a bill on the file, which is in nature of an original, is aided by the equity of the act.—*Greenfield* v. *Dennis*, M. 1600. Cro. Eliz. 722.

2. But if there be no return, or the writ be *album breve*, this is not helped by this act, however, it seems remedied by the following statute. *Holsworth* v. *Proctor*, M. 5 Jac. I. Yelv. 110.

21 *Jac.* I. *c.* 13. enacts, That after verdict, judgment thereupon shall not be stayed or reversed for any variance in form only between the original or bill, and the declaration, plaint, or demand, or for lack of the averment of any life, so as it be proved they are living; or because the *venire ha. cor.* or *distringas* was awarded to a wrong officer upon any insufficient suggestion, or for misnaming any of the jury in surname or addition in any of the writs or returns thereof, so as they be proved to be the same as were meant to be returned; or for that there is no return
[*324] upon any of the writs, so as a panel *be returned and annexed thereto; or for that the sheriff or other officers' names be not set to the return of such writ, so as it appears by proof that the writ was returned by him; or for that the plaintiff in ejectment or other personal action being under age appeared by attorney: if a verdict pass for him.

There were but 24 returned upon the panel annexed to the *venire facias*, but there were 48 upon the *ha. cor.* upon which the defendant made no defence; and upon motion the verdict was set aside, without costs, the court saying that the 21 *Jac.* I. means only the formal words upon

upon the writ, for there must be a panel annexed to the return.—*Brown* v. *Johnston*, C. B. Tr. 11 Geo. II.

16 & 17 *Car.* II. *c.* 8. (which was called by Justice *Twisden*, the omnipotent act) enacts, That after verdict, judgment thereupon shall not be stayed or reversed for want of form, or pledges returned upon the original, or for want of pledges upon any bill or declaration, or for want of a profert of any deed, or of letters testamentary or of administration, or for the omission of *vi et armis* or *contra pacem*, or for or by reason of the mistaking of the Christian or surname of either party, sums, day, month, or year, in any bill, declaration, and pleading, being right in any writ, plaint, roll or record preceding, or in the same, to which the plaintiff might have demurred, and shewed the same for cause, or for want of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or for that that there is no right *venue*, so as a trial was by a jury of the proper county where the action is laid, or for want of a *misericordia* or *capiatur*, or because one is entered for the other; and that all such omissions, variances, and defects, and other matters of like nature, not being against the right of the matter of the suit, or whereby the issue of the trial are altered, shall be amended, where such judgments are or shall be removed by writ of error.—*Catterell* v. *Marshall*, M. 22 Car. II. 1 Vent. 99. 100. (*a*)

In an action for words the plaintiff declared, that the defendant said *apud London*, that he had stolen plate at *Oxford*; the defendant justified that he did steal plate at *Oxford*, *per quod* he spoke the words at *London*; the plaintiff replied *de injuria sua propria*; and upon issue tried in *London*, obtained a verdict; and though it was allowed, that the only point in issue was, whether the felony were committed, which was triable at *Oxford*, yet it was holden to be aided by this act, and the plaintiff had judgment.—*Croft* v. *Boite*, E. 21 Car. II. 1 Saund. 247.

Note; An actual amendment is never made upon this act, but the benefit of the act is attained by the court's over-looking the exception.— *R.* v. *Landaff Bp.* H. 8 Geo. II. 2 Str. 1011. [325]

4 & 5 *Anne*, *c.* 16. enacts, That no judgment, by confession, &c. or upon any writ of enquiry of damages executed thereon, shall be stayed or reversed for any imperfection, matter or thing whatsoever, which would have been cured by any of the statutes of jeofail, in case of a ver-

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(*a*) So it has been holden no objection, after verdict, that an action of covenant for not repairing, &c. was brought and tried in a foreign county, that defect being cured by the above statute. *Litchfield Corporation* v. *Slater*, Willes, 431.

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dict, so as there be an original writ or bill, and warrant of attorney duly filed according to the law, as is now used.

Note; The foregoing statutes are construed not to extend to criminal proceedings, on account of the words "plaintiff and defendant," made use of in them. But by 9 *Ann. c.* 20. it is enacted, that all the statutes of jeofail shall be extended to all writs of *mandamus* and informations in nature of a *quo warranto*.—*Rex* v. *Ellames*, E. 1734. 2 Stra. 976. (*a*)

5 *Geo.* I. *c.* 13. After the clause of amendment of writs of error, says, that where any verdict hath been, or shall be given in any action, suit, bill, plaint, or demand, &c. The judgment thereupon shall not be stayed or reversed for any defect or fault either in form or substance, in any bill, writ, original or judicial, or for any variance in such writs from the declaration or other proceedings. (*b*)

(*a*) In *Harvey* v. *Stokes*, Willes, 5, the two last-mentioned statutes were held to extend only to mistakes in the names of the plaintiff or defendant, and not of third persons; but in *Poitvin* v. *Tregeagle*, Raym. 771, it was held, in *B. R.* that the christian name of the plaintiff cannot be amended in a declaration by the bye.

The following decisions have also been made upon the subject of defects amendable, viz.

In *Anon.* Loft. 155, it was held, that all rules to amend shall be on payment of costs.

But no issue can be offered that is contrary to the record; yet a *latitat*, without a bill of *Middlesex*, will save the statute of limitations. *Crokatt* v. *Jones*, 2 Stra. 734. 2 Raym. 1441.

In an action for usury, the court will not allow sums and dates to be amended in the declaration, after the time limited by the statute is expired. *Goff q. t.* v. *Popplewell*, 1 Dougl. 114, (n.) 2 T. Rep. 707. Nor after the time for bringing a new action, where there has been unnecessary delay on the plaintiff's part. *Steel q. t.* v. *Sowerby*, 6 T. Rep. 171. *Ranking q. t.* v. *Marsh*, 8 T. Rep. 30. *Sed secus*, where the plaintiff has not unnecessarily delayed. *Cross* v. *Kaye*, 6 T. Rep. 543. *Maddock q. t.* v. *Hammett*, 7 T. Rep. 55. But not, if, by such amendment, any new substantive cause of action, or any new charge against the defendant, is to be introduced. *S. C.*

A declaration in covenant against executors, in their own right, and who had merely acted in the disposition of the testator's effects, cannot be amended after a demurrer. *Anon.* 1 H. Bla. 37.

In an action against the hundred of *P.* on the stat. of 9 *Geo.* I. *c.* 22, for the value of a stack of corn maliciously burnt, the declaration stated, that notice was given to the inhabitants of the *parish*, instead of the *town*, *village*, or *hamlet*, which are the words of the act. Held, that this allegation is good, for the law intends every *parish* to be a *vill*, unless the contrary be shewn, or it appears that the parish consisted of several vills. *Cooke* v. *Pimhill Hundred*, 8 East, 173.

In *assumpsit* for breach of promise (*inter alia*) to execute a release, which defendant had agreed to give, the declaration described a release not co-extensive with that agreed to be given. Held, that this defect cannot be cured by a verdict. *Smith* v. *Woodhouse*, 2 Bos. & Pull. 233.

(*b*) All amendments being discretionary in the court, they can only be permitted under particular circumstances, and in furtherance of justice. *R.* v. *Grampound Corporation*, 7 T. Rep. 669.

CHAPTER

CHAPTER VII.

OF NEW TRIALS.

WE have seen, in the first chapter of this book, how the jury are to demean themselves during the time of the trial, and in their consultations after they are withdrawn from the bar. However, as it often happens, that the verdict which they give is not satisfactory, it is worth enquiring for what causes a verdict may be set aside, and a new trial granted. (*a*)

It

(*a*) *The principles* on which new trials are granted, are (said *Denison*, J. in *Bright* v. *Eynon*, 1 Burr. 390,) difficult to explain, so as to lay down one absolute general rule; but "the "granting a new trial must depend "on the legal discretion of the court, "guided by the nature and circum-"stances of the case, and directed "with a view to the attainment of "justice." And it is not enough, that the cause is of value and importance, to induce the court to grant a new trial, for it must also involve a doubt, though the value certainly weighs much with the court in granting a rule to shew cause. *Vernon* v. *Hankey*, 2 T. Rep. 113.

It was formerly a prevalent rule, that there should not be a new trial where evidence was given on both sides; but in *Norris* v. *Freeman*, 3 Wils. 38, the court said, it was frequently determined otherwise; and indeed that rule is not regarded in modern practice; for where the evidence is such as is proper to leave to the jury, upon the facts, the court will not grant a new trial, because the judge might have drawn a different conclusion from the jury, upon the matters of fact. *Ashley* v. *Ashley*, 2 Stra. 1142. *Anon.* 1 Wils. 22. *Swain* v. *Hall*, 3 Wils. 45. *Hankey* v. *Trotman*, 1 Bla. 1. *Camden* v. *Cowley*, 1 Bla. 418. For whether there be *any* evidence, is a question for the judge, and whether the evidence be *sufficient* is for the jury to determine. *Carpenter's Company* v. *Hayward*, Dougl. 360. (374.) But a new trial will be granted, if the jury, upon the facts, find a verdict contrary to law. *Hodgson* v. *Richardson*, 1 Bla. 463. *Tindall* v. *Brown*, 1 T. Rep. 167. *Pillans* v. *Van Mierop*, 3 Burr. 1363. So where a point has been improperly left to the jury. *Forcroft* v. *Devonshire*, 3 Burr. 950. 1 Bla. 195. *Edie* v. *East India Company*, 2 Burr. 1216. 1 Bla. 295. *Liverpool Corporation* v. *Golightly*, Salk. 644, (n.) *Bright* v. *Eynon*, sup.

Of late years, new trials have been granted, not only after trials at *Nisi Prius*, but also after trials *at Bar*, and it is equally reasonable, that it should be so in the latter case as in the former, or indeed more so, as the former must be done upon what actually came before a single jury, whereas the latter is grounded upon what must have manifestly appeared to the whole court. *Bright* v. *Eynon*, sup. For instances of new trials after trials at bar, see *Musgrave* v. *Nevinson*, Stra. 584, *S. C.* 2 Ld. Raym. 1358, and *Rex* v. *Bewdley Corporation*, 1 P. W. 212, and the cases there cited.

In ejectment, a new trial may be had after a trial at bar. *Smith* v. *Parkhurst*, 2 Stra. 1105. But in

Argent

It is a general rule, that you shall not move for a new trial, after you have moved in arrest of judgment. (*Tuberville* v. *Stamp*, M. 1697. [* 326] 2 Salk. 647.) However, this *rule extends only to such cases where the party

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Argent v. *Darrell*, Salk. 648. 1 Raym. 514, it was refused, as not being conclusive. *The grounds on which the court will be induced to grant a new trial are very numerous, and the causes of their refusal to grant one are still more so. It is sufficient, therefore, to shew, by general observations*, first, *On what grounds the court will grant, and* secondly, *For what causes they will refuse to grant a new trial, on any terms, simply referring to various authorities, by name, as they occur:*

First then, it has been held, that, where the judge mistakes the point of law before him, a new trial will be granted. Vide *Buscall* v. *Hogg*, 3 Wils. 146.

So if he misdirects the jury, *Anon.* Salk. 649; especially in a penal action, *Calcraft* v. *Gibbs*, 5 T. R. 19; or in an ejectment cause, *Rice* v. *Shute*, 2 Bla. 695. And so where he allows or over-rules the evidence contrary to law. *How* v. *Strode*, 2 Wils. 269.

So where the sheriff mistakes the law on a writ of inquiry. *Markham* v. *Middleton*, 2 Stra. 1259; and equally so, where the sheriff's jury mistake the law. *Woodford* v. *Eades*, 1 Stra. 425. *Hayward* v. *Newton*, 2 Stra. 490. *Tatton* v. *Andrews*, Barnes, 448. *Anon.* 12 Mod. 347.

So where the jury find a verdict contrary to the judge's direction in point of law, as in *Jackson* v. *Duchaire*, 3 T. R. 553; or contrary to law upon the facts proved, *Hodgson* v. *Richardson*, 1 Bla. 463. *Tindall* v. *Brown*, 1 T. R. 167. *Pillans* v. *Van Mierop*, 3 Burr. 1363; or manifestly against the evidence. *Smith* v. *Parkhurst*, 2 Stra. 1105. *Musgrave* v. *Nevinson*, Stra. 584.

So where a point has been improperly left to the jury. Vide *Foxcroft* v. *Devonshire*, 3 Burr. 930. 1 Bla. 195.

So where the principal question in the cause came not before the jury, *Rex* v. *Malden*, 4 Burr. 2135, or the witnesses were but partially examined. *Norris* v. *Freeman*, 3 Wils. 38.

So where a juror or talesman was sworn by a wrong name. *Parker* v. *Thornton*, Stra. 640.

So for any misconduct or partiality in the jury. *Dent* v. *Hertford Hundred*, Salk. 645. *Hale* v. *Core*, 1 Stra. 642. *Vasie* v. *Delaval*, 1 T. R. 11. *Philips* v. *Fowler*, Comy. 525. *Chambers* v. *Caulfield*, 6 East, 244.

So where the damages are flagrantly and extravagantly excessive, or influenced by passion or partiality. *Jones* v. *Sparrow*, 5 T. R. 257. *Pleydel* v. *Dorchester*, 7 T. R. 529.

So where the plaintiff, against the judge's opinion, refuses to submit to a nonsuit, and a verdict is found for him. *Pochin* v. *Pawley*, 1 Bla. 670.

So where there are two concurrent verdicts. *Goodwin* v. *Gibbons*, 4 Burr. 2108.

So where a verdict is properly given on one count and improperly on the other. *Edie* v. *East India Co.* 2 Burr. 1216. 1 Bla. 295.

So where the testimony of the witnesses at the trial have been falsified. *Lister* v. *Mundell*, 1 Bos. & Pull. 427.

So where any artifice has been used. *Anderson* v. *George*, 1 Burr. 352. *Anon.* Loft. 212.

So in some cases on a suggestion of surprise. *Street's Case*, 7 Vin. 24. *Bayley* v. *Boorne*, Stra. 392. *Rex* v. *Urling*, Fortesc. 198.

And so where, after trial, a new discovery has been made. *Broadhead* v. *Marshall*, 2 Bla. 955. *Fabrilius* v. *Cock*, 3 Burr. 1771. *Turner* v. *Pearte*, 1 T. R. 717.

Secondly, As to the causes of refusal by the court to grant a new trial, it has been held, that, though the

party has knowledge of the fact at the time of moving in arrest of judgment, therefore a new trial was granted after such a motion on affidavits of

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the judge may have been mistaken in point of law, yet where complete and substantial justice has been done, a new trial ought not to be permitted. *Edmondson* v. *Machell*, 2 T. Rep. 4. *Wilkinson* v. *Payne*, 4 T. Rep. 468. *Hankey* v. *Trotman*, 1 Bla. 1. *Anon.* 1 Wils. 22. *Swain* v. *Hall*, 3 Wils. 45. *Sampson* v. *Appleyard*, 3 Wils. 272.

Nor is value or importance alone a sufficient inducement, unless some doubt arises also. *Vernon* v. *Hankey*, 2 T. Rep. 113.

Neither will the court grant a new trial to gratify litigious passion upon every point of *summum jus*. *Farewell* v. *Chaffey*, 1 Burr. 54. *Burton* v. *Thompson*, 2 Burr. 664. *Marsh* v. *Bower*, 2 Bla. 851.

Nor where the verdict was against evidence, if the suit be frivolous. *Macrow* v. *Hall*, 1 Burr. 11.

Nor merely because the case was a very hard one. *Smith* v. *Bramston*, or *Frampton*, Salk. 644. 5 Mod. 87. *Dunkly* v. *Wade*, Salk. 653. *Reeveley* v. *Mainwaring*, 3 Burr. 1306. *Sparkes* v. *Spicer*, Salk. 648.

Nor for excessive damages, unless they are outrageously extravagant. *Leman* v. *Allen*, 2 Wils. 160. *Huckle* v. *Money*, 2 Wils. 205. *Gray* v. *Grant*, 2 Wils. 252. *Beardmore* v. *Carrington*, 2 Wils. 246. *Sharpe* v. *Brice*, 2 Bla. 942. *Benson* v. *Frederick*, 3 Burr. 1845. *Fabrigas* v. *Mostyn*, 2 Bla. 929. *Leith* v. *Pope*, 2 Bla. 1327. *Gilbert* v. *Burtonshaw*, Cowp. 230. *Ducker* v. *Wood*, 1 T. R. 277. Nor unless passion, resentment, or partiality in the jury appears. *Wilford* v. *Berkeley*, 1 Burr. 609. *Duberley* v. *Gunning*, T. Rep. 651, which latter case, Lord *Kenyon* said, in *Jones* v. *Sparrow*, 5 T. R. 257, was *sui generis*, and could not govern any other.

Nor will a new trial be granted simply on account of the smallness of the damages. *Barker* v. *Dixon*, 2 Stra. 995. *Mauricet* v. *Brecknock*, Dougl. 491 (509.)

Nor in all cases merely because the matter in dispute is small. *Jackson* v. *Duchaire*, 3 T. R. 553.

Nor for a mere mistake in the proceedings. *Leman* v. *Allen*, sup. *Malker* v. *Brinker*, 2 Wils. 243.

Nor for a mistake in point of law against the equity of the case. *Deerly* v. *Mazarine*, Salk. 646. 1 Ld. Raym. 147. *Smith* v. *Page*, Salk. 644. *Wilkinson* v. *Payne*, sup. *Cox* v. *Kitchen*, 1 Bos. & Pull. 338.

Nor where the verdict could not be supported by the form of action adopted, though the same effect might be had upon other proceedings. *Gosling* v. *Wilcock*, 2 Wils. 302. *Foxcroft* v. *Devonshire*, 3 Burr. 396. *Sampson* v. *Appleyard*, sup. *Aylett* v. *Lowe*, 2 Bla. 1221. *Goodtitle* v. *Bailey*, Cowp. 579. 601.

Nor, where there are two contrary verdicts, shall he against whom the last is given have a third trial. *Parker* v. *Ansell*, 2 Bla. 693.

Nor for the supposed incompetency of a witness called to prove a fact not disputed, and where another witness was produced to establish the same fact, though the verdict turned on another point. *Edwards* v. *Evans*, 3 East, 451.

Nor where evidence was neglected to be produced at the first trial. *Richards* v. *Syms*, post, 326c. Et vide *Spong* v. *Hog*, 2 Bla. 802. *Gist* v. *Mason*, 1 T. Rep. 84. *Anon.* Fortesc. 40. *Rogers* v. *Stephens*, 2 T. R. 718. *Cooke* v. *Berry*, 1 Wils. 98. *Price* v. *Brown*, Stra. 691. *Rex* v. *Helston Corporation*, 10 Mod. 202.

Nor merely upon an after discovery that an adversary's witness was interested. *Turner* v. *Pearte*, 1 T. R. 717.

Nor because sufficient evidence was

of two of the jury, and they drew lots for their verdict.—*Phillips* v. *Fowler*, C. B. 9 Geo. II. reported in Comy. 525.

An information was exhibited against three, and a verdict against all three; and a new trial granted as to *Fern*, because he had not sufficient notice given him, and this special cause entered upon the record, and judgment was against the other two. (*Fern's Case*, H. 27 & 28 Car. II. *tamen quære.*) Yet the authority of this case may well be doubted, for where there were several defendants, and the verdict as to some was against evidence, yet the court would not grant a new trial, for they said the verdict must stand or fall *in toto*.—*Collier* v. *Morris*, M. 1735. *Captain Crabb's Case*, M. 23 Geo. S. P.

So where one issue out of four was against evidence, the court granted a new trial, not only as to that issue, (for that they said cannot be) but for the whole.—*Rex* v. *Pool*, E. 1734.

But then, the issue found against evidence must be a material one; for if out of three issues two were found against evidence, yet if the material issue in the cause be agreeable to evidence, the court will not grant a new trial.—*Dexter* v. *Barrowby*, E. 25 Geo. II. *(a)*

As the granting of a new trial is absolutely in the breast of the court, they will often govern their discretion by collateral matters; and therefore will not grant a new trial in hard actions, such as case for negligently keeping his fire; nor where the equity of the cause is on the other side.—*Smith* v. *Brampston*, M. 7 W. III. 2 Salk. 644.

In an action for a libel, the jury found a verdict for the defendant, which the judge reported to be against evidence, but said he should have been satisfied with half-a-crown damages; whereupon the court of *K. B.* refused to grant a new trial, saying it was no matter of contract, no special damages laid or proved, but only a vindictive action, and courts of justice are not to assist the passions of mankind.—*Burton* v. *Thompson*, M. 32 Geo. II. 2 Burr. 664.

In an issue out of chancery, upon a motion for a new trial, because the defendant had produced evidence by surprize, which the plaintiff, if

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was not brought down at the trial. *Wits* v. *Polehampton*, Salk. 647. *Ford* v. *Tilly*, Salk. 653. *King* v. *Alberton*, 3 Salk. 361. *Cook* v. *Berry*, 1 Wils. 98, even though the want of it could not be foreseen. *Walker* v. *Scott*, post. 327.

Nor because counsel, attorney, or witness was absent. *Anon.* Salk. 645. *Coate* v. *Thackery*, Loft. 151.

New trials are not usually granted after a verdict for defendant in ejectment. *Sed secus* where it is for the plaintiff. *Clymer* v. *Littler*, 1 Bla. 348. *Goodtitle* v. *Clayton*, 4 Burr. 2224.

(a) Vide etiam *Goodright* v. *Saul*, 4 T. Rep. 359.

prepared,

prepared, could have answered; one main reason for denying the motion was, that the plaintiff suffered a verdict to be given, when he might have been nonsuited, which I mention as a caution in cases of the like kind.—*Richards* v. *Syms*, 1742. (*Vide Spong* v. *Hog, and other cases in a note, ante*, 326 *a*.)

New trials are often granted for the misbehaviour of the jury, as if they cast lots for their verdict; or if any of them declare, that the plaintiff or defendant shall not have a verdict, * let him produce what evidence he will. So if they eat at his expence for whom they give the verdict, &c. (*See the note on this point, ante*, 326 *a*.) [*327]

The court will not grant a new trial, because the defendant came unprepared, even though it be in a matter which it was impossible for him to foresee, *ex. gr.* Where a witness was produced to prove a fact committed at *Canterbury*, who could be proved at the time to be at another place.—*Walker* v. *Scott*, H. 23 Geo. II.

In actions founded upon torts, the jury are the sole judges of the damages, and therefore in such cases the court will not grant a new trial on account of the damages being trifling or excessive. But in actions founded upon contract, and where debt would lie, (and before *Slade's Case*, 4 Co. 92, would have been brought) the court will enquire into the circumstances of the case, and relieve if they see reason.—*Markham* v. *Middleton*, T. 29 Geo. II. (reported 2 Stra. 1259, but not S. P.)

Upon a motion for a new trial, the way is to grant a rule to shew cause, and then the puisne judge of the court speaks to the judge who tried the cause, (if it be not one of the same court) and obtains a report from him of the trial, and also a signification of what his sentiments are upon it. If the judge declare himself satisfied with the verdict, it hath been usual not to grant a new trial on account of its being a verdict against evidence. On the other hand, if he declare himself dissatisfied with the verdict, it is pretty much of course to grant it. But in a case where the judge only reported evidence, without declaring himself to be satisfied or dissatisfied with the verdict, the court of *K. B.* were under a difficulty how to behave; however they seemed inclined to hear it spoken to; but through their interposition the parties agreed to abide by the determination of the point of law.—*Rex* v. *Phillips*, 23 Geo. II.

A new trial may also be moved for on account of the misdirection of the judge in a matter of law, or for his admitting or refusing evidence contrary to law.—(*Vide note, ante*, 326 *a*.)

So

So the want of due notice is a proper ground for a motion for a new trial; but the defendant is precluded, if he appear at the assizes and make defence.—*Thernolin* v. *Cole*, H. 1696. Salk. 646.

Note; That in giving notice of trial according to the distance of place, the miles must be by reputation and not admeasurement.—*Bates* v. *Pettifer*, M. 1733.

Though the usual method is to grant a new trial upon payment of
[* 328] costs, where it is a verdict against evidence; yet under * particular circumstances it may be granted without costs, as where an action was brought on two bills of exchange payable to *A. B. or order*, one of them being indorsed to the plaintiff, the other to *J. S.* without adding *or order*, and by him indorsed to the plaintiff, wherefore the jury found for the plaintiff, on the first bill, and for the defendant on the second; apprehending that by the usage of merchants, it was not assignable by *J. S.* without the words *or order*. On motion a new trial was granted without costs, because the plaintiff (if the verdict were to stand) would be entitled to costs.—*Edie and Laird* v. *East India Company*, T. 1 Geo. III. 2 Burr. 1216. 1 Bla. 295. *(a)*

A material witness for the defendant concealed himself in the plaintiff's house, to avoid being served with a subpœna, by which means the plaintiff obtained a verdict, but the court set it aside without costs, it being unreasonable for the plaintiff to carry the cause down to trial, when she knew the defendant could not make a defence.—*Montpesson* v. *Randle*, H. 20 Geo. II.

(*a*) *As to the costs*, it was formerly the rule to grant a new trial only upon the merits, and *on payment of costs*, except in particular cases, but now it is generally held to be in the discretion of the court. Still, however, (as has been already shewn in the preceding note) the court will grant a new trial, *without costs*, where the judge mistakes the law, or the jury find a verdict contrary to his direction, or the plaintiff refuses to become nonsuited contrary to the judge's opinion, and a verdict is found for him; or where a verdict is properly given for the plaintiff on one count, and improperly against him on another; or where a verdict has been obtained by concealing an adversary's witness, or by any other artifice or trick.

In *B. R.* if a new trial be granted, and nothing is said about the costs of the former, and the same verdict is given, the costs of the second only are allowed. *Mason* v. *Skurray*, Dougl. 421 (438.) *Schulbred* v. *Nutt*, ibid. in notis. *Hankey* v. *Smith*, 3 T. R. 507. But in *C. B.* if two concurrent verdicts are given, the successful party is allowed the costs of both trials, but if the second verdict differs from the first, then of the second only. *Parker* v. *Wells*, H. Bla. 639, (n.) *Trelawny* v. *Thomas*, H. Bla. 641.

CHAPTER

CHAPTER VIII.

OF COSTS.

THE statute of *Gloucester*, 6 *Ed.* I. *c.* 1, is the first statute in relation to costs; by which in an assize, *&c.* damages upon the insufficiency of the disseisor are given against him that is found tenant, and damages are given in a writ of *mort d'ancestor, aiel, &c.* reciting, that whereas before that time, damages were not taxed but to the value of the issues of the land, it is provided the demandant may recover the costs of his writ against the tenant, together with his damages, and that this act shall hold place in all cases where the party is to recover damages.

Where a man before, or by this act did not recover damages, though simple, double, or treble, are given by a subsequent act, the plaintiff shall recover no costs; as in *quare impedit*; *decies tantum:* So in an action upon 5 *Edw.* VI. *c.* 14, of ingrossers: but in all cases where damages were recovered before, or by this act, the plaintiff shall recover his costs also.—2 *Inst.* 288. *(a)*

This was the original of costs de incremento; (b) but as there are several statutes since made, I shall consider them in order. [329]

I. As to the plaintiff's costs.

II. As to the defendant's costs.

III. As to costs in waste, tithe, *seire facias*, and prohibitions.

IV. As to persons entitled to or exempt from costs.

V. As to costs in traverses.

VI. As to double or treble costs.

VII. How to be assessed in such cases.

VIII. Costs on a special jury.

I. *Where the plaintiff shall have no more costs than damages.*

By 43 *Eliz. c.* 6. If upon actions personal, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall be certified by the judge before whom it shall be tried, that the debt or damages to be recovered therein do

(a) The statutes, however, must be strictly construed, for the costs are a kind of penalty. *Cone* v. *Bowles*, Salk. 205.

(b) Which may be doubled, as well as costs given by the jury. *Smith q. t.* v. *Dunce*, 2 Stra. 1048.

not

not amount to 40*s*. the plaintiff shall have no more costs than damages.*(a)*

By 21 *Jac*. I. *c*. 16. If the damages be under 40*s*. in actions on slander, the plaintiff shall have no more costs than damages.

By 22 & 23 *Car*. II. *c*. 9. In all actions of trespass, assault, and battery, and other personal actions, wherein the judge at the trial shall not certify that an assault and battery was sufficiently proved, or that the freehold or title of the land was chiefly in question, if the jury find damages under 40*s*. the plaintiff shall recover no more costs than damages.

Declaration was, that the defendant made an assault on the plaintiff, and then and there pushed him down on the ground, the said ground being covered with water, and thereby wetting and spoiling his coat, whereby he became sick and weak, &*c*. after verdict for the plaintiff for 20*s*. there being no certificate, the court on motion held the plaintiff not entitled to full costs, for the wetting of the cloaths is not a distinct thing from the assault, but is laid as a consequence of it; it is an injury arising from the original cause of action.—*Hamson* v. *Adshead*, T. 27 Geo. II. K. B.—S. C. Say. 53.

Note; On writs of inquiry in cases within this statute, the plaintiff shall have full costs, though he do not recover so much as 40*s*. damages.—*Sheldon* v. *Ludgate*, C. B. T. 3 Geo. I. *(b)*

From the wording this statute of 22 & 23 *Car*. II. it has been holden to extend to no other personal action than such as relate to the freehold, or things fixed to the freehold, *i. e.* only to such cases where the freehold may by presumption come in question. *(c)* Therefore in trover or trespass *de bonis asportatis*, of goods not fixed to the freehold, the plaintiff shall have his full costs. *(Ven* v. *Philips*, E. 1704. Salk.

(a) Therefore where, in trespass for chasing a bull, and plaintiff recovered 1*s*. only, held he shall have no more costs. *Thompson* v. *Berry*, 1 Stra. 551. So where plaintiff recovered less than 40*s*. for beating his dog. *Dand* v. *Scaton*, 3 T. R. 37. So where plaintiff recovered less than 40*s*. against defendant for hunting as a dissolute person, contrary to 4 & 5 *W*. & *M*. having failed to prove defendant dissolute, though trespassing, he shall have no more costs. *Pallant* v. *Roll*, 2 Bla. 900.

(b) But if defendant lets judgment go by default, or justifies the assault and battery, his damages will recover the costs. If he justifies the *assault only*, or the *assault only* is certified, if he recover less than 40*s*. he shall have no more costs than damages. *Smith* v. *Neesam*, 2 Lev. 102. *Page* v. *Creed*, 3 T. Rep. 391.

(c) Vide *Batchelor* v. *Bigg*, 3 Wils. 330, where it was held that trespass found upon a personal chattel is clearly out of this statute. *Per Burnet*, J.

208.)(a) So in trespass *quare clausum fregit*, and impounding his cattle, because the impounding is a personal injury, but then the defendant must be found guilty of the impounding.(b)

But where an action of trespass was brought for breaking and entering the plaintiff's close, and cutting down, lopping, and spoiling trees there growing; and the plaintiff recovered a * verdict, and two-pence [*330] damages; it was holden he was intitled to no more costs than damages.—*Hill* v. *Reeves*, E. 3 Geo. I. C. B.

So in trespass for breaking and entering a house, breaking down the window shutters, and breaking to pieces and spoiling the bolt belonging to the window shutters; the plaintiff obtained a verdict, and one shilling damages, and held he was intitled to no more costs.—*Birch* v. *Daffey*, C. B. Tr. 3 Geo. II.

So in trespass for breaking and entering a dwelling-house and making a great noise there, and continuing there until the plaintiff and another person were compelled to give and did give their note for £6, the plaintiff is intitled to no more costs than damages.—*Appleton* v. *Smith*, K. B. Hil. 2 Geo. III. 3 Burr. 1282. (c)

Where the cause originally began in an inferior court, and was removed into *K. B.* or *C. B.* the plaintiff shall have his full costs, though the damages under 40*s.* and no certificate.—*Roop* v. *Scritch*, H. 6 W. III. 4 Mod. 379. (d)

There needs no certificate where it appears by the pleading that the interest of the land is in question, as where a view is granted. (*Kempster* v. *Deacon*, E. 8 W. III. 1 Raym. 76.) *Cockerill* v. *Allanson*, K. B. T. 22 Geo. III. adjudged that where defendant justified for a right of way, and the plaintiff replied *extra viam*, and the defendant pleaded not guilty, the plaintiff should have no more costs than damages, un-

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(a) The asportation of personal property entitles the plaintiff to full costs, though complained of in the same declaration as a trespass, but no more costs than damages were allowed for digging peat, and carrying away the same, the asportation being only a mode and qualification of the injury to the land. *Clegg* v. *Molyneux*, Dougl. 749, (780.)

(b) So in trespass *quare clausum fregit*, if defendant plead not guilty, and a justification which does not make title to the land, and plaintiff recovers under 40*s.* he shall have full costs. *Peddle* v. *Kiddell*, 7 T. R. 659.

(c) So for throwing stones at and breaking the glass windows of plaintiff's dwelling-house, plaintiff shall have no more costs than damages if he recover less than 40*s.* unless the judge certifies that the title of the house came in question. *Adlem* v. *Grinaway*, 6 T. R. 281.

(d) And so it has been held in an action on the case for words where special damage is received, &c. *Canterbury Archbp.* v. *Fuller*, 1 Ld. Raym. 395. *Barry* v. *Perry*, 2 ibid. 1588.

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less the judge certified; for the title does not necessarily come in question. It may or it may not; and if it does, the judge ought to certify. (*a*) So in assault and battery, if the defendant justify, for that admits the battery. But if the defendant justify, and thereupon the plaintiff make a new assignment, to which the defendant pleads the general issue, the plaintiff will have no more costs than damages without a certificate.—*Richards* v. *Turner*, T. 6 Geo. I. C. B. (*b*)

Note;

(*a*) So where in trespass *qu. cl. freg.* defendant pleaded not guilty, and justified for a right of way, and plaintiff, after traversing the right of way, assigned *extra viam*, and recovered 1*s.* damages on the new assignment, though defendant had a verdict on his justification, yet plaintiff shall have his full costs, deducting defendant's costs on the issue against him. *Martin* v. *Vallance*, 1 East, 350. But where the title to the land is not drawn into question, as where plaintiff complained of an injury to his right of common by digging turf there, and the judge certified, under stat. 43 *Eliz.* c. 6. s. 2. that the damages were under 40*s.* he shall have no greater costs. *Edmondson* v. *Edmondson*, 8 East, 294.

(*b*) According to the construction which has, by a uniform train of decisions, been applied to 22 & 23 *Car.* II. c. 9, the doctrine laid down in *Venn* v. *Philips*, Salk. 208, (*viz.* that the plaintiff is only deprived of full costs where his damages are under 40*s.* in cases where a certificate of an actual battery, or that the title comes in question, can be given,) is fully established. The principal questions relative to this subject must arise where the injury is of a mixed nature, or distinct injuries are complained of in the same declaration, on some of which a certificate can be granted and on others not. The material distinction seems to be, that where the complaint that would alone carry costs in a material and substantial part of the case, and upon the establishment of which the plaintiff is entitled to a verdict, he is not excluded from full costs by its being joined with a complaint for an assault or trespass; but where it is only a collateral circumstance, a matter of aggravation, or a mode of committing the other injury, the costs will be no more than the damages.

Thus full costs are given for breaking the plaintiff's close and impounding his cattle. *Barnes* v. *Edgard*, 3 Mod. 39.

So where one count was for a trespass on land, and another for carrying away a hog. *Knightley* v. *Buston*, Say. on Costs, 39.

So for a trespass in a house and consuming victuals. *Smith* v. *Clarke*, 2 Stra. 1130.

So for entering the plaintiff's close and cutting his cable, whereby he lost the use of his boat. *Hains* v. *Hughes*, Comb. 324.

So for bringing diseased cattle into plaintiff's close, and infecting his cattle. *Anderson* v. *Buckton*, 1 Stra. 192.

So for trespass and assault in *crim. con.* *Batchelor* v. *Bigg*, 2 Bla. 854. 3 Wils. 319.

So for assault and false imprisonment. 1 *Bac. Abr.* 315.

So for assault and battery, and spoiling plaintiff's coals and his roller. *Milborn* v. *Read*, Barnes, 134. cited in 3 Wils. 322.

So in an action on the riot act, 1 *Geo.* I. c. 5. the plaintiff shall have full costs. *Witham* v. *Hill*, 2 Wils. 91.

And so on the 9 *Geo.* I. c. 22. of Hue and Cry, though the costs with damages exceed £200. *Jackson* v. *Colesworth Inhab.* 1 T. R. 71.

In the foregoing cases a double injury

Note; Judges have differed as to their notions of giving these certificates; many having thought themselves bound by the verdict; others thinking the statute meant to leave it to their discretion on the whole circumstances of the case: And this seems to be now the prevailing opinion, as otherwise the statute would be intirely useless.

By 8 & 9 *W.* III. *c.* 11. *s.* 4., in trespass, if it shall be certified by the judge, that it was wilful and malicious, the plaintiff shall have his full costs, although the verdict shall be for less than 40*s.* (*a*)

II. *Of awarding defendants their costs.*

By 23 *H.* VIII. *c.* 15. In trespass upon 5 *R.* II. debt or covenant upon any specialty on contract, detinue, account charging as bailiff or receiver, case, or upon any statute for any offence or wrong immediately done to the plaintiff, if the plaintiff be nonsuited after appearance of the defendant, or any verdict against him, the defendant shall have his costs.

This statute does not extend to an action for an escape, nor to an action upon 8 *H.* VI. for a forcible entry, nor to an action * upon 1 & 2 [*331]
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jury is charged, and in such cases the jury may find for the plaintiff as to the assault and trespass, and for the defendant as to the other causes, but yet there shall be no more costs than damages. *Beck* v. *Nicholls*, 1 Stra. 577. *Cotterell* v. *Jolly*, 1 T. R. 655; or where there is no evidence of such other cause, a general verdict will be amended by the judge's notes. 1 *Bac. Abr.* 514. (in marg.) *Hullock on Costs*, 84, (n.) See also the Editor's note to *Venn* v. *Philips*, Salk. 208.

It has been held, however, that the plaintiff is not entitled to full costs in an action for an assault and disturbance in his quiet possession. *Boiture* v. *Woolrick*, 1 Ld. Raym. 566. Nor for an assault on plaintiff and striking his horse, whereby he lessened the value of it. *Clarke* v. *Othory*, 1 Stra. 624.

Nor for breaking plaintiff's house, and keeping him out of possession at a great expence, and whereby he lost the use of it. *Blunt* v. *Mither*, 1 Stra. 645.

Many cases have arisen where the plaintiff complained of an assault and injury to his clothes, as in *Hamson* v. *Adshead*, ante 329*a*; but it now seems settled, that where the injury to the clothes is a consequence of the assault, or part of the same transaction, it will not entitle the plaintiff to more costs than damages. *Mears* v. *Greenaway*, 1 H. Bla. 295. *Lockwood* v. *Stannard*, 5 T. R. 482. See also *Batchelor* v. *Bigg*, 3 Wils. 319, and *Hullock on Costs*, for this subject at large.

It is to be observed, that in the cases where the plaintiff is not deprived of full costs by the statute of 22 & 23 *Car.* II. his right to them may be prevented by a judge's certificate under 43 *Eliz. c.* 6.

(*a*) But such certificate must be made in court, or it will be void. *Sullivan* v. *Montague*, 1 Dougl. 106, (n.) And if it appear that the trespass committed is wilful and malicious, the judge is bound (under the 8 & 9 *W.* III. *c.* 11. *s.* 4.) to certify that fact, to entitle the plaintiff to his costs. *Reynold* v. *Edwards*, 6 T. R. 11; but in *Good* v. *Watkins*, 3 East, 495, it has been decided that a judge has a discretionary power,

Ph. & M. for an unlawful impounding of a distress, nor to an action for perjury upon the statute of 5 *Eliz.* nor to an assize, nor to an action given by a subsequent statute.—*Anon.* 19 Eliz. 2 Leon. 9. *Tyrrel's Ca.* T. 29 Eliz. 3 Leon. 92. 1 Brownl. 66. 28.

By 4 *Jac.* I. *c.* 3. If any person commence any action of trespass, or other action wherein the plaintiff might have costs, and after appearance the defendant become nonsuited, or any verdict pass against him, the defendant shall have his costs.

In an action on 9 *Geo.* I. by the party grieved (whose barns were burnt) against the hundred; the court held that the defendants were intitled to costs on this statute: they having obtained a verdict.—*Gretham* v. *Hund. of Theal*, C. B. Tr. 5 Geo. III. 3 Burr. 1733. (*a*)

By the 8 & 9 *W.* III. *c.* 11. In trespass, assault, false imprisonment, or ejectment against several, if any one or more be acquitted by verdict, every person so acquitted shall recover his costs, unless the judge shall immediately after trial in open court certify upon record, that there was a reasonable ground for making such person a defendant.

This statute extends only to trespass *vi et armis*, and not to trespass on the case, nor to replevin.—*Dibbon* v. *Cook*, H. 8 Geo. II. 2 Stra. 1005. (*b*)

III. *Costs in waste, tithe, sci. fa. prohibition.*

By the 8 & 9 *W.* III. In all actions of waste, debt for not setting out tithe, where the single value found by the jury does not exceed twenty nobles; and in a *sci. fa.* and suits upon prohibition, the plaintiff shall recover his costs; and if the plaintiff be nonsuited or discontinued, or

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and if he declines to certify, the court will not interfere.

(*a*) So if plaintiff enter *noli prosequi*, defendant shall have his full costs under 8 *Eliz. c.* 2. *s.* 2. *Cooper* v. *Tiffin*, 3 T. Rep. 511.

(*b*) Furthermore as to a *defendant's costs*, it has been held, that where in *assumpsit* against an inhabitant, within the jurisdiction of the county court of *Middlesex*, plaintiff recovers less than 40*s.* the defendant shall have double costs, whether plaintiff sue in his own right or as personal representative. *Wase* v. *Wyburd*, 1 Dougl. 234 (246). If there be a plea of tender as to part, and *non assumpsit* as to the residue, and the issue on the tender being found for defendant, the balance proved was under 40*s.* yet defendant, though within the jurisdiction of the county court of *Middlesex*, is not entitled to costs under the statute 23 *Geo.* II. *c.* 33. *s.* 19. *Heaward* v. *Hopkins*, 2 Dougl. 431. (448) nor if the debt is reduced under 40*s.* by a set-off. *S. C.* But under the statute 3 *Jac.* I. *c.* 15. where the damages are under 40*s.* defendant shall have his costs if he shew that he is resident in the city of *London*. *Woolley* v. *Cloutman*, 1 Dougl. 232. (240 n.) And, generally, where plaintiff is entitled to costs, defendant is so reciprocally. *Gretham* v. *Theal Hund.* sup.

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a verdict pass against him, the defendant shall recover his costs.—*Ingles* v. *Wadworth et al'*. H. 2 Geo. III. 3 Burr. 1284. 1 Bla. 355. (*a*)

Note; Costs in prohibition shall be taxed from the suggestion, so as to take in the costs of the motion. The statute extends only to cases after plea pleaded or demurrer joined, but if there be judgment by default, and the plaintiff have damages on a writ of enquiry for the contempt in proceeding after the prohibition delivered, which is confessed by the default, he will be entitled to costs at common law. However, as this part of the declaration is no more than form, costs are allowed only from the time of the rule for a prohibition.—*Wills* v. *Turner*, H. 2 Geo. I. C. B. Sir *E. Bettison* v. Dr. *Hinchman*, M. 7 Geo. I. C. B.

IV. *The persons intitled to, or exempt from, costs are*

1. Executors or administrators.
2. Officers.
3. Informers.
4. Parties grieved.
5. Defendants in informations.

1. *An executor or administrator* pays costs in all cases where he is defendant. (*Harris* v. *Hennah*, T. 8 & 9 Geo. II. K. B.) So when he is defendant, and judgment is given * for him, he shall have his costs: [* 332] But when he is plaintiff, he shall pay no costs; however this must be understood to be when he is under a necessity of naming himself executor or administrator, for if he were under no such necessity, he shall pay costs.—*Marsh* v. *Kelloway*, H. 12 Geo. II. B. R. 2 Stra. 1106. S. C. *nom. Marsh* v. *Yellowley*. (*b*)

(*a*) In debt for the penalty of the stat. 2 & 3 *Edw.* VI. *c.* 13. *for not setting out tithe*, with a count for the single value. After demurrer the case was left to arbitration, and the award was for £6. 13*s.* 4*d.* single value. Held that plaintiff should not have his costs on the counts for the penalty under the stat. 8 & 9 *W.* III. *c.* 11. *s.* 5. the value not having been found by a jury, but he was allowed costs on the count for the single value. *Barnard* v. *Moss*, 1 H. Bla. 107.

The stat. 8 & 9 *W.* III. does not extend to a *sci. fa.* to repeal a patent prosecuted in the king's name. *R.* v. *Miles*, 7 T. Rep. 367. So though defendant had judgment on demurrer in *qua. impedit*, the court of C. B. held him not entitled to costs under *s.* 2. of this stat. *Thrale* v. *London Bp.* 1 H. Bla. 330.

On a judgment in demurrer against executors upon a question, whether they were entitled to a general or limited probate, no costs can be awarded on a *prohibition* against them. *Scammell* v. *Wilkinson*, 3 East, 202.

(*b*) If an executor bring an action in his own right, as for trespass, conversion, &c. in his own name, and a verdict is given against him, he shall pay costs. 2 Danv. Abr. 224. *Townley* v. *Steele*, Hut. 79. *Drake* v. *Royman*, Sav. 434.

An executor pays costs for not going on to trial; but not on judgment as in case of nonsuit.—Vide *Baynham* v. *Mathews*, T. 4 Geo. II. Stra. 871. (*a*)

And where the plaintiff declared singly as executor, and on the defendant's pleading other executors named with him, moved the court for leave to discontinue without paying costs, the court refused it; for he ought to have known his own title.—*Harris* v. *Jones*, M. 4 Geo. III. B. R. 1 Bla. 451. 3 Burr. 1451. (*b*)

2. Officers.

(*a*) For that is his wilful default.

(*b*) So where a man and his wife declare as executors, on an *assumpsit* to them, after their testator's death, and they are nonsuited, they shall pay costs, as they need not have named themselves executors, the contract being with themselves. *Jenkins* v. *Plume*, Salk. 207. Vide etiam *Nicholas* v. *Killegrew*, 1 Ld. Raym. 436. *Goldthwaite* v. *Petrie*, 5 T. Rep. 234. *Hullock on Costs*, 174. And indeed from all the authorities it appears, that an executor's exemption depends on the obligation he is under, to sue *as executor*, or not, for if he could sue *in jure proprio* he is not protected merely by naming himself executor. *Portman* v. *Came*, Stra. 682. *Marsh* v. *Kelloway*, sup. *Howard* v. *Radbourn*, 1 Barnes, 130. *Hole* v. *King*, Comy. 162. *Marsh* v. *Jennedy*, And. 357. *Cockerill* v. *Kynaston*, 4 T. R. 277. *Goldthwaite* v. *Petrie*, sup.

But where an executor brought *assumpsit* for his testator's money, received by the defendant to plaintiff's use, as executor, and was nonsuited, he shall not pay costs, for he could not sue, but as executor. *Eaves* v. *Mocatto*, Salk. 314. In *Goldthwaite* v. *Petrie*, however, this point is denied to be law, and the authority of the case, as reported, is expressly over-ruled in *Marsh* v. *Jennedy*, sup. The case, however, is more correctly stated by Lord *Holt*, in *Jenkins* v. *Plume*, sup. to which the reader is referred.

If an executor improperly lends his name to a third person, he shall pay costs. *Comber* v. *Hardcastle*, 2 Bos. & Pull. 115.

In *Cockerill* v. *Kynaston*, sup. it was held, that where a man (and wife, executrix,) sued in trover, the first count on a trover and conversion in testator's life-time, the second on trover, *before*, and conversion *after* his decease, and the third *on both*, after his death, and were nonsuited, they are not liable to costs. But if an executor bring trover, stating the conversion *after* testator's death, and fail, he shall pay costs. *Bollard* v. *Spencer*, 7 T. Rep. 358. So an executor or administrator shall pay costs if he delay the suit, *Hullock*, 189; but not on a judgment of *non pros.* *Hawes* v. *Saunders*, 3 Burr. 1584. *Lamley* v. *Nicholls*, Ca. Prac. in C. P. 14; contra *Higgs* v. *Warry*, 6 T. R. 654. So where an administrator withdrew his record before trial, he paid costs; but that point was not in dispute. *Hullock*, 192. And, as leave to discontinue is in the discretion of the court, it is given with or without costs, according to circumstances, though, in general, laches will incur costs. So where an executor, pending an action on bond against the heir, discovered that the estate on which he relied, as assets, had been alienated by the ancestor, he was allowed to discontinue without costs, on undertaking to bring a fresh action. *Bennett* v. *Coker*, 4 Burr. 927. Et vide *Baynham* v. *Mathews*, sup. where it was held, that an administrator should pay costs for not going to trial. *Sed secus* on a judgment, as in case of a nonsuit; but where one executor alone brought the action, he was allowed to discontinue, on payment of costs. *Harris* v. *Jones*, sup. In *Bigland* v. *Robinson*,

2. Officers.

By 7 *Jac. c.* 5. If case, trespass, battery, or false imprisonment shall be brought against any justice of peace, mayor, bailiff, constable, *&c.* concerning any thing by them done by virtue of their office, they may plead the general issue, *&c.* and if the verdict shall pass with the defendant, or the plaintiff shall be nonsuited or suffer any discontinuance thereof, the defendant shall have his double costs allowed by the judge before whom the matter is tried.

This act has been construed to extend to under sheriffs and deputy constables, though they are not particularly mentioned.—Sir T. Raym. 34. (*a*)

Note; The 21 *Jac.* I. *c.* 12. extends this act to churchwardens and overseers of the poor.

The officer must get a certificate from the judge, that the action was brought against him for something done in the execution of his office, in order to intitle himself to double costs.—*Anon.* E. 1 W. & M. 2 Vent. 45. (*b*)

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binson, 3 Salk. 105, and *Booth* v. *Holt*, 2 H. Bla. 277, it was held, that, in general, executors do not pay costs on a nonsuit. Nor on judgment, as in case of a nonsuit. *Bennett* v. *Coker*, sup. In *Williams* v. *Braham*, or *Riley*, 1 H. Bla. 566. it was held, that where executors are liable to costs in the original action, they are equally so in error. And where defendant pleads bankruptcy to an action by an executor or administrator, and obtains a verdict, plaintiff shall not pay costs, under 5 *Geo.* II. *c.* 30. *s.* 7. *Martin* v. *Norfolk*, 1 H. Bla. 528. So where an executor sued on a policy effected by his testator for himself and two others, who survived him, and was nonsuited, the court of *C. B.* held, he should not pay costs, though the survivors might have sued alone. *Wilton* v. *Hamilton*, 1 Bos. & Pull. 445. So where an administratrix sued on a breach of covenant, after her intestate's death, and had judgment against her, on demurrer she shall not pay costs. *Tattersall* v. *Groote*, 2 Bos. & Pull. 253. So where executors sued their testator's lessor on his covenant for not finding timber for repairs, upon a demand made by them after testator's death, they were held not liable to costs on judgment, as in case of a nonsuit; for though the breach happened in their own time, they could not declare as executors, on a contract made with their testator. *Cooke* v. *Lucas*, 2 East, 395.

On a view of all the foregoing cases, it is submitted to be sound doctrine, that if an executor or administrator must sue as such on the contract, made with his testator or intestate, he shall not pay costs, though the cause of action arose after the death of him whom they represent. And perhaps the firm principle on which the exemption of representations rests, is not the ignorance under which they may be supposed to lie, but the description in the stat. of 23 *Hen.* VIII. *c.* 15. of the actions in which costs are to be paid, *viz.* "Upon any especialty "made to the plaintiff, or any con- "tract supposed to be made between "the plaintiff and any other person." *Tattersall* v. *Groote*, sup. and *Cooke* v. *Lucas*, sup.

(*a*) No case to this point in *T. Raym.* or in *Ld. Raym.*

(*b*) Vide *Grindley* v. *Holloway*, Dougl. 294 (307). S. P.; unless it so appear

In trespass for taking a gun, the plaintiff discontinued with leave of the court, and upon motion for a direction to the master to tax double costs, upon producing an affidavit that the action was brought against him for what he did in the execution of his office as justice of peace, a rule was granted accordingly, the court saying that where there was a verdict for the defendant, and no certificate from the judge, (or after a nonsuit) a suggestion on the roll was proper, but that it was not necessary in the present case; for where there is a discontinuance with leave of the court, it is always upon payment of costs; and therefore here it must be upon payment of double costs.—*Devenish* v. *Martin*, E. 1734. 2 Stra. 974. (*a*)

3. Informers.

[333] *A common informer* can in no case recover costs, except expressly given by the statute; (*Plymouth* v. *Collings*, E. 4 W. III. Carth. 230.) but in an action on a statute by the party grieved for a certain penalty, the plaintiff shall recover costs within the statute of *Gloucester*, which gives costs in all cases where the party is to recover damages. (*Shore* v. *Madisten*, Salk. 206.) But where the duty is incertain, as to recover treble damages upon the statute of waste, or on 2 *Ed.* VI. for not setting out of tithe, there the plaintiff shall not have any costs.—*North* v. *Wingate*, M. 1640. Cro. Car. 560.

Note; Where the penalty is given to a common informer, though the party grieved happen to bring the action, he must bring it as a common informer, and shall not have costs.—T. 15 Geo. II. C. B.

4. Parties grieved.

By 5 *W. & M. c.* 11. All parties indicted, prosecuting a *certiorari* to remove an indictment or presentment of trespass or misdemeanor before trial had from the general or quarter sessions, shall before the allowance thereof find two sufficient mainucaptors, who shall enter into recognizance before one or two justices of the county or place in the sum

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appear upon the facts found on a special verdict. *Rann* v. *Pickins*, Dougl. 294 (307.) in notis. And the judge's certificate must also state that the defendant was such an officer as the act intends. *Harpur* v. *Carr*, 7 T. Rep. 448.

(*a*) A judge's certificate that a custom-house officer had probable cause for seizing goods, does not extend to injuries accompanying such seizure, so as to prevent plaintiff from recovering damages and costs, under 23 *Geo.* III. *c.* 70. *s.* 29. and 26 *Geo.* III. *c.* 40. *s.* 31. *Baldwin* v. *Tankard*, 1 H. Bla. 28.

If in an action against excise officers for seizing goods, they do not tender amends before suit, but pay money into court, they shall on a verdict have but single costs under 23 *Geo.* III. *c.* 70. *s.* 31. though it is doubtful whether, if they tender amends, they are not entitled to treble costs. *Collins* v. *Morgan*, 1 H. Bla. 244.

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of £20, with condition to appear and plead, and to prosecute the issue to be tried at the next assizes, and such recognizance shall be certified into the court of *K. B.* and the name of the prosecutor (if he be the party grieved or injured, or some public officer) to be indorsed on the back of the indictment returned; and if the defendant be convicted, the court of *K. B.* shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, *&c.* who shall prosecute on account of any fact that concerned him as an officer to prosecute or present. (*a*)

A party injured within the meaning of this act must be such a one as has received some real injury, (*b*) and therefore where the defendant was prosecuted for an attempt to burn the house of *J. S.* and for that purpose soliciting *M.* to assist her, it was holden that the prosecutors (who were *M.* and *G.* next door neighbours to *J. S.*) were not intitled to costs, and it was said neither would *J. S.* if he had prosecuted.—*Rex* v. *M. Incleton*, M. 20 Geo. II. 1 Wils. 189. S. C. *nom. Rex* v. *Ingleton.*

5. Defendants in informations.

By 18 *Eliz. c. 5.* (which is made perpetual by 27 *Eliz. c.* 10.) if any informer or plaintiff upon a penal statute shall willingly delay his suit, or discontinue or be nonsuited, or have a verdict against him, or judgment

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(*a*) A justice of peace, who prosecuted a gaoler to conviction, for suffering a charged felon to escape, is not entitled to the costs of the conviction under the 5 & 6 *W. & M. c.* 11. *s.* 3. *Rex* v. *Sharpness*, 2 T. Rep. 47. But if he were to present a road, and the defendant were indicted and convicted, he would be entitled to costs as a public prosecutor, *ut semb.* in *S. C.* Et vide *Rex* v. *Kettleworth*, 5 T. Rep. 33 S. P.

So if he were to indict an inferior officer for disobedience, and convict him. *R.* v. *Sharpness*, sup. where it is said that the clerk of the peace is a public prosecutor within the act, but the prosecutor in a trial at bar is not. And it seems doubtful whether the real prosecutor, who is the person aggrieved, is entitled to costs, if his name appear not on the back of the indictment. *S. C.*

(*b*) Further, as to parties grieved within this act, it has been held that a prosecutor, for stopping a common footway, which he had always used as such. *R.* v. *Williamson*, 7 T. Rep. 32.

So it has been held, that one who recovered damages against the sheriff for not taking bail under the 23 *Hen.* VI. *c.* 9. is entitled to costs. *Creswell* v. *Houghton*, 6 T. Rep. 355.

So is a prisoner suing as a party grieved under the *ha. cor.* act, and recovering for refusal a copy of the warrant of his commitment. *Ward* v. *Snell*, 1 H. Bla. 10.

And where a judge on the trial of an indictment for not repairing a road, certify that the defence was frivolous, without awarding costs in express terms, under 13 *Geo.* III. *c.* 78. the prosecutor shall have his costs. *Rex* v. *Clifton Inhabitants*, 6 T. Rep. 344.

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at law, he shall pay the defendant his costs.—*Duthy* v. *Tita*, H. 17 Geo. II. 2 Stra. 1203.

[334] This statute extends only to common informers, who are to have the benefit of the penalty, and not where the penalty or part of it is given to the party grieved.—*Kirkham* v. *Wheeley*, T. 1695. Salk. 30.

N. B. Prosecutors *q. tam*, are looked upon as common informers.—*S. C. Doghead's Ca.* E. 30 Eliz. 2 Leon. 116. *(a)*

There is a proviso that it shall not extend to any officers who are used to exhibit informations, but it must appear upon record, else the court will take him to be a common informer, and will not admit affidavits to the contrary.—*Elde q. t.* v. *Stephens*, H. 10 Geo. I. 2 Raym. 1333.

By 4 & 5 *W. & M. c.* 18. The informer is to enter into a recognizance of £20 to prosecute the information, and abide by such orders as the court shall direct; and if the prosecutor do not, within one year after issue joined, procure the same to be tried, or if upon such trial a verdict pass for the defendant, or in case of a *nolle prosequi*, the court of *K. B.* is authorized to award the defendant his costs, unless the judge before whom such information shall be tried, shall at the trial, in open court, certify upon record, that there was a reasonable cause for exhibiting such information.

If there be several defendants, some of which are acquitted and others found guilty, none of them shall have costs, for till 8 & 9 *W.* III. *c.* 11. the plaintiff never paid costs in any action if but one defendant were found guilty; and the 4 & 5 *W. & M.* cannot be intended to make prosecutors otherwise liable than as plaintiffs were in other actions.—*R.* v. *Danvers*, 1707. Salk. 194. *(b)*

V. *Costs in traverses.*

The statute of *Gloucester* extends only to give costs in actions real, personal, and mixed, therefore traverses of inquisitions are not within it.

(*a*) The 3d sect. of this statute, which gives costs to defendants in popular actions if plaintiff be nonsuit, extends to subsequent as well as prior statutes; and where a penalty is given by an action, subsequent to the stat. of *Gloucester*, to the party grieved, he shall have his costs if he succeed; and if he be nonsuit, or a verdict against him, he shall pay defendant's costs. *Williams q. t.* v. *Drewe*, Willes, 392. *Plymouth Mayor, &c.* v. *Werring*, ibid. 440.

(*b*) Where a *q. t.* informer in debt on 21 *Hen.* VIII. *c.* 13. (for non-residence) is nonsuited, defendant shall have his costs. *Wilkinson q. t.* v. *Allott*, Cowp. 366.

On a rule for an information, though the court refused to make it absolute, yet (for the first time) they ordered defendant to pay the costs under the particular circumstances of the case. *R.* v. *Morgan*, Dougl. 300 (314).

And

And note; a *noctanter* is not an action but a traverse.—*R.* v. *Glassenby Inhab.* H. 1737. Stra. 1069. (*a*)

VI. *Costs, where doubled or trebled.*

Where damages were before recoverable, and are by any statute increased to double or treble the value; costs also as parcel of the damages shall likewise be doubled or trebled.—*Child* v. *Sands*, H. 5 W. III. Carth. 297.

But where a statute gives damages double or treble, where no damages were formerly recoverable, no costs shall be allowed.—*S. C.* (*b*)

VII. *How to be assessed where pleadings are double or treble.*

By 4 & 5 *Ann. c.* 16. any defendant or plaintiff in replevin may, with leave of the court, plead as many several matters as he shall think necessary for his defence, provided that if any such matter shall upon demurrer joined be judged insufficient, * costs shall be given at the dis- [* 335] cretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or defendant, costs shall also be given in like manner, unless the judge who tried the said issue shall certify, that the said defendant or plaintiff in replevin had a probable cause to plead such matter.

In trespass the defendant pleaded three different justifications to three different counts, and on issue joined had a verdict for him on two, and against him on the third. On motion this was holden not to be a case within this act, and the plaintiff intitled at common law to costs on the whole declaration.—M. 4 Geo. III. C. B.

In trespass the defendant pleaded not guilty and several justifications; upon the trial, the plaintiff not proving his possession in the *locus in quo*, the defendant had a verdict, and by direction of *Denison*, J. the verdict was entered upon the general issue only; upon which there was a motion for a *venire de novo*. (*Bartlet* v. *Spooner*, E. 1751. C. B.) But

(*a*) In the traverse of an inquisition in an extent in aid, if the jury find part for the king, and part for the defendant, the latter must pay the court fees. *R.* v. *Woodward*, 1 Raym. 736.

(*b*) In case for a *rescous* of a distress for rent upon the statute 2 *W. & M. sess.* 1. *c.* 5. plaintiff shall recover treble the costs and damages, for the latter are not given, but increased by the statute. *Lawson* v. *Storie*, Salk. 205. 1 Ld. Raym. 19. But plaintiff in such a case is not entitled to treble damages and costs unless he shews that the distress was appraised, and expressly refers to the statute. *Anon.* 1 Ld. Raym. 342. Nor is a plaintiff entitled to double costs under the statute 11 *Geo.* II. *c.* 19. *s.* 22. on an averment for a rent charge, if he be nonsuited. *Lindon* v. *Collins*, Willes, 429. But he is entitled to treble costs, though nonsuited, under the 100th sect. of the building act of 14 *Geo.* III. *c.* 78. *Collins* v. *Toney*, 9 East, 322.

the

the court refused the motion, saying the verdict was complete, and determined the cause, that the plaintiff was not intitled to damages, though they said the plaintiff might have insisted to have a verdict entered on the other issues, for the sake of costs which he would be entitled to, unless the judge certified that the defendant had probable cause to plead such plea.—*Dayrel* v. *Briggs*, T. 25 Geo. II. K. B. S. P. (a)

VIII. *Where*

(a) *As to costs where there are several defendants, or various issues, it has been held*, That in an action against two, one suffered judgment by default, and the other obtained judgment as in a nonsuit, yet he shall not have any costs. *Welker* v. *Goyton*, 1 Burr. 357.

Nor shall one out of two defendants, in replevin, where he alone is acquitted. *Ingles* v. *Wadworth*, 1 Bla. 355. 3 Burr. 1284.

On amending a plea, with liberty for plaintiff to reply *de novo*, costs will only be allowed in proportion to the necessary alterations occasioned by amending the plea. *R.* v. *Phillips*, 2 Burr. 757.

Where issues were joined on several counts, and on some defendant obtained a verdict, yet he shall not have his costs, even on that part of the record which was found for him. *Butcher* v. *Green*, 2 Dougl. 652, (677).

So where there were two counts, and a joinder in demurrer on the plea to one, and a plea to the other, and judgment was for defendant in the former, though in the latter the verdict was against him, yet the plaintiff shall have his costs on the verdict, but not so shall the defendant on his judgment on the demurrer. *Astley* v. *Young*, 2 Burr. 1232.

If plaintiff take issue on several pleas, one of which issues is found insufficient, and he recovers on all the rest, and enters up judgment, yet he shall not have costs on the issue found for the defendant, but if the judgment had been arrested, he would not have been allowed any costs. *Kirk* v. *Nowill*, 1 T. Rep. 266. 2 Dougl. 678 (n), 8vo. edit.

If an avowant in replevin, after verdict for the plaintiff, obtain judgment *non obstante veredicto*, in consequence of plaintiff's pleas in bar being bad, he shall not have any costs subsequent to such pleas, for he should have demurred to them. *Da Costa* v. *Clarke*, 2 Bos. & Pull. 376.

Two defendants in assumpsit, one suffered judgment by default, and the other had a verdict, the latter shall have his costs. *Shrubb* v. *Barrett*, 2 H. Bla. 28.

If defendant plead several pleas, and one be adjudged bad on demurrer to plaintiff's replication, plaintiff is entitled to deduct his costs from those taxed for the plaintiff on the *postea*, if defendant should afterwards recover on the other pleas, even though it appear by the record, that plaintiff had no cause of action. *Duberly* v. *Page*, 2 T. Rep. 391.

If there be two counts for distinct causes of action, and defendant makes default as to one, but obtains a verdict as to the other, he shall have costs on the latter count, and the plaintiff on the first. *Day* v. *Hanks*, 3 T. Rep. 654, which case was recognized by *Le Blanc*, J. in *Griffiths* v. *Davies*, 8 T. Rep. 467, where in trespass there was but one count, but several pleas of justification, on which issue was taken, and a new assignment, whereupon default was made, and a *venire* issued to assess as well the damages on the judgment by default, as to try the issues joined; and all being found for defendant, he was held entitled to the costs on such issues.

Where defendant in assumpsit pleaded the general issue, and the statute

VIII. *Where a special jury.*

By 24 *Geo.* II. the party who moves for the special jury shall pay the whole expence occasioned thereby, and in the taxation of costs be allowed no

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statute of limitations, as to the whole demand, and as to part, that the promises were made by her testator, and one *A. B.* jointly, which *A. B.* survived, and the last issue was in favour of defendant, the two others being found for the plaintiff, who had judgment for the rest with costs. Held, that defendant was not entitled to deduct the costs on the issue found for her, from the costs of the plaintiff on the issues found for him. *Sed secus* where all the issues at the trial are found for the defendant, but plaintiff has judgment in demurrer, and recovers damages in a writ of inquiry. *Postan* v. *Stanway*, 5 East, 261.

In replevin, where some issues are found for the plaintiff, and some for defendant, the latter shall be allowed the costs of those found for him out of the general costs of the verdict, unless the judge certifies that the plaintiff had probable cause for pleading the matters on which those issues are joined. *Dodd* v. *Joddrell*, 2 T. Rep. 235. And defendant is entitled not only to the costs which form, but also of the trial of, those issues which are found in his favour. *Brook* v. *Willett*, 2 H. Bla. 435.

Where, in a *quo warranto* information, any one of several issues is found for the prosecutor, and judgment of *ouster* is given on that, he shall have his costs on all. *R.* v. *Downes*, 1 T. Rep. 453.

To a single count in trespass, defendant justifies in part only, and plaintiff new assigns, without taking issue on the special plea, and obtains a verdict, he shall have the costs of all the pleadings. *Gundry* v. *Sturt*, 1 T. Rep. 636.

An inclosure act having directed that dissatisfied parties might try their rights at law, adding, "that if "the verdict should be in favour of "the commissioners' award, the "plaintiff should pay the costs, and "if against it, then that the costs "should be borne by the proprietors "at large," a proprietor brought his action, claiming nine distinct rights, but he only recovered for three. Held, that he should only have his costs for the three on which he recovered. *Braithwaite* v. *Bradford*, 6 T. Rep. 599.

In *Vellum* v. *Simpson*, 2 Bos. & Pull. 369, *Heath*, J. held, that the stat. of 4 & 5 *Ann.* c. 16, being remedial, it should be so construed as to advance the remedy, and the constructions adopted upon it have been analogous to that put on the statute of *Gloucester*, which has been held to give all the costs of the suit, though in terms it gives only the costs of the writ; and a defendant in error was held entitled to *all* his costs under this act, where the writ was quashed for having been brought by a *feme coverte*, without the consent of her husband. *M'Namara* v. *Fisher*, 8 T. Rep. 302.

If there be several issues, and any one of them be found for the plaintiff, he shall have his costs. *Tempest* v. *Metcalfe* (in *B. R.*) 1 Wils. 331. And though his verdict be on one count only, yet his costs shall be taxed for the whole declaration. *Bridges* v. *Raymond*, (in *C. B.*) 2 Bla. 800. *Norris* v. *Waldron*, (in *C. B.*) 2 Bla. 1199. *Spicer* v. *Teasdale*, (in *C. B.*) 2 Bos. & Pull. 49. But in *Penson* v. *Lee*, 2 Bos. & Pull. 330, the court of *C. B.* declared, that their practice on this point should, in future, be conformable to that of the court of *K. B.*, and accordingly in an action on a policy, with a count for money had and received, where the defendant paid no money into court,

no more than if it had been a common jury; unless the judge, immediately after trial in open court, certify that it was a cause proper to be tried by a special jury: and the special jury shall have only what the judge allows, not exceeding one guinea. *(a)*

As there are some cases relating to costs which could not be taken notice of under the foregoing heads, it will not be improper to insert them together in this place.

One defendant gave a general release to the plaintiff after the costs of nonsuit taxed, and upon motion he was ordered to pay the other defendants their shares.—*Darlow* v. *Collinson*, T. 24 Geo. II.

Each defendant is answerable for the whole costs: therefore in an ejectment against several, where the defendants defended severally; at
[*336] the assizes one confessed and had a verdict *against him; and others did not confess; the court upon application said the officer must tax the same costs against all the defendants. If after the plaintiff has had satisfaction against one, he should take it against another, such defendant may apply to the court.—*Wilson* v. *Foore*, E. 32 Geo. II. C. B.

Costs upon feigned issues were formerly held to follow the event of the verdict in like manner as if it were an adversary suit.—*Herbert* v.

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court, but established in his defence that the risk never commenced, and the plaintiff only recovered the premium. It was held, that the plaintiff should only have the costs of the count on which he recovered, and so much of the costs of the trial as he had incurred in support of that count, but that neither party should have the costs of the special count.

And, in general, it is a rule, that wherever the plaintiff would be entitled to costs, the defendant is reciprocally so. *Miller* v. *Yerraway*, 3 Burr. 1723. But costs cannot be set against costs. *Duthy* v. *Tito*, 2 Str. 1203. And as to the method of taxing costs, where defendant pleads doubly, on one of which pleas a verdict is found for the plaintiff, and on the other judgment is given for the defendant, vide *Cook* v. *Sayer*, 2 Stra. 1203.

To the eight foregoing sections or divisions of this subject, it is submitted, that four more might have been satisfactorily added to the text, viz. IX. Of costs on feigned issues. X. Of the costs of a former action, or trial, and therein of the costs of not proceeding to trial, or executing a writ of inquiry, according to notice. XI. Of the costs on payment of money into court. And, XII. Of security for costs. *But as the learned Author has not deemed it necessary to frame distinct subdivisions, though he has* (in pa. 336 a.) *supplied the reader with a solitary case on both the IXth and Xth additional points, the present Editor considers it would be improper for him, in this instance only, to interfere with the text, more especially as his duty is here confined to the office of a bare annotator upon it.*

(a) Upon this act it was held, that if the verdict is for the party who moved for the special jury, the extra allowances, and all expences, except for the actual striking, should be taxed against the losing party. *Hamilton* v. *Style*, and *Wilkes* v. *Eames*, 2 Stra. 1080.

Williamson,

Williamson, E. 25 Geo. II. 1 Wils. 324. But vide *Hoskins* v. *Lord Berkley*, 4 T. Rep. 402. (*a*)

In cross actions of assault each party being nonsuited, *S.* had his costs taxed at £9. 10*s.* and *P.* his at £13. 10*s.* whereupon he moved to be at liberty to deduct the £9. 10*s.* out of the £13. 10*s.* paid by him into the sheriff's hands; rule to shew cause, but the defendant not consenting, the court said they could not do it.—*Powel* v. *Smith*, T. 25 Geo. II. *Duthy* v. *Tito*, Stra. 1203. S. P.

So in an action of trespass against four three were acquitted, and motion on their behalf that their costs might be deducted out of what the fourth defendant was to pay upon an affidavit that the plaintiff was a travelling Jew, &c. denied. (*Mordica* v. *Nutting & al'*, 1749.) But where *Roberts* had brought an action against *Biggs* and others, and *Biggs* had brought a cross action against *Roberts*, the court of *C. B.* ordered that upon *Biggs* acknowledging satisfaction for £—— on the record in the cause in which he was plaintiff, the plaintiff in the other cause in which he (*Biggs*) and others were defendants, should be restrained from taking out execution.—*Roberts* v. *Biggs*, E. 27 Geo. II. S. C. Barnes, 146.

So where a plaintiff being nonsuited the defendant took out a *fi. fa.* and levied part of the costs, and at the same time took out a *ca. sa.* for the rest, and took the plaintiff in execution, which being irregular, the court set it aside with costs; the defendant moved that the proceedings against him on account of these costs should be stayed, upon his entering up satisfaction upon the judgment obtained by him for the sum at which the costs for the irregularity were taxed, and upon shewing cause the rule was made absolute.—*Wills* v. *Crabb*, E. 24 Geo. II.

Motion for judgment as in case of a nonsuit, and that the master should tax the costs for not going on to trial at the same time, refused, for the costs in the two cases ought not to be blended, being founded upon different rights: but if on shewing cause against the judgment of nonsuit, the court give the plaintiff further time, it is always on paying the costs for not going on to trial, unless there were a countermand in time.—*The Earl of Leicester* v. *Wooden*, M. 1748. K. B. (*b*)

(*a*) In *Hoskins* v. *Berkley*, 4 T. R. 402. it was held, that though the costs follow the verdict on a feigned issue, yet when the court permit the parties to try one, it is doubtful whether they will not compel them to consent that the costs shall be in the discretion of the court; and in *Thomas* v. *Powell*, 1 Burr. 603. the costs on a feigned issue were directed to be taxed from the time it was first ordered by the consent of parties.

(*b*) As to the costs for not proceeding to trial, &c. according to notice,

tice, though such an omission will subject the plaintiff to them, as was held in *Sutton* v. *Bryan*, 2 Stra. 728, and *Shadford* v. *Houston*, 1 Stra. 317, yet he shall not pay them where he is prevented by any thing not of his own default; *R.* v. *Righton*, 3 Burr. 1694; but he may save them by countermanding his notice in due time, *Whitlock* v. *Humphrey*, 2 Stra. 849.

The crown pays no costs for not going to trial, but on an amendment it does; *R.* v. *Edwards*, 1 Salk. 193; and by the course of the court defendant shall have costs for not going to trial on informations for misdemeanours, where the prosecutor does not countermand in time. *Rex* v. *Heydon*, 3 Burr. 1270. 1304. 1 Bla. 336.

After judgment, as in case of a nonsuit, however irregular, defendant shall not have costs for not going to trial, for he has made his election. *Newman* v. *Goodman*, 2 Bla. 1093.

Where an indictment or cause is made a *remanet* for want of jurors, and defendant has done all that is necessary to enable plaintiff to go to trial, the plaintiff shall not be excused, but costs shall be payable, though the cause is afterwards tried. *R.* v. *Lowfield*, 2 Stra. 937. *Sparrow* v. *Turner*, 2 Wils. 366.

Furthermore, as to general and miscellaneous matters. It has been holden, that where a defendant in ejectment suffered judgment by default, he shall not pay costs; for he is but a nominal party. But an action may be brought for the mesne profits, and costs shall follow. *Anon.* Loft. 451.

Costs are always of the same nature as the original debt, and costs out of pocket is considered as a term for the largest costs. *Anon.* Loft. 617.

The rule, that costs shall attend the final issue, where a cause is made a *remanet*, has been extended by both courts to cases of a similar nature. *Birchall* v. *Bellamy*, 5 Burr. 2693.

Where one refuses to admit evidence, which is only formally necessary to be shewn, he shall pay costs. *Anon.* Loft. 248.

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Where plaintiff releases part of his damages he need not release any of the costs given him by the jury. *Cutler* v. *Goodwin*, 1 Stra. 420.

Where costs of suit are given by an award they must be deemed common costs, unless otherwise specified by the order of reference. *Barker* v. *Tibson*, 2 Bla. 953. *Marden* v. *Cox*, Cowp. 127. S. P.

Where there is a trial by consent the costs follow the judgment. *R.* v. *Philips*, 1 Wils. 261.

An avowant shall pay costs on the special avowries found against him, but he shall not have costs on a writ of error affirmed in his favor. *Stone* v. *Forsyth*, 2 Dougl. 683 (709).

A land-owner, whose ground had been converted to the purposes of a canal company, under the authority of the canal act, distrained upon the goods of the company for his recompense, under the powers given by the same act, held that an avowant, stating a distress under this statute, is not entitled on a verdict to double costs by the provisions of 11 *Geo.* II. *c.* 19. *s.* 22. *Leominster Canal Company* v. *Norris*, 7 T. R. 500. *Same* v. *Cowell*,

Cowell, 1 Bos. & Pull. 213. Nor is a rent charge within the act. *Ibid.*

By an order of reference, at *Nisi Prius*, the costs were directed to abide the event, *i. e.* the legal event; for though defendant justified under various rights of way, yet the arbitrator awarded one different from any of those pleaded. Held the plaintiff shall have no more costs than damages, for the award is not equal to a judge's certificate, under 22 & 23 *Car. c.* 9. *Swinglehurst* v. *Altham*, 3 T. Rep. 138. Vide etiam *Ward* v. *Mallinder*, 5 East, 489.

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THE END.

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