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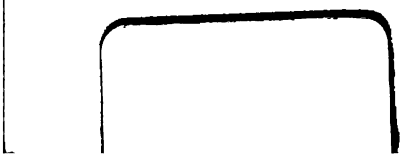

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GENERAL ABRIDGMENT

OF

Law and Equity,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES;

WITH NOTES AND REFERENCES TO THE WHOLE.

BY CHARLES VINER, ESQ.

FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY OF OXFORD.

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(Z) Of ſtinting and Incloſure of Commons otherwiſe than by the Statute of Approvements.

1. UPON a bill for title of common, and to have certain lands incloſed laid open, it was decreed, that the defendant and his heirs *ſhould hold the lands ſo incloſed diſcharged of common*, becauſe it ſeem'd that the inhabitants had *common enough beſides*, and that the laying open the lands in difference would be a great *decay of huſbandry*. Toth. 118. cites 36, 37 & 38 H. 8. Daniel & al' inhabitants of (Cudworth or) Crudworth in Warwickſhire v. Ardern.

2. It is decreed the plaintiff, his heirs, and his or their farmers of the ſaid farm or tenement called Stubbles, ſhall from henceforth hold and *enjoy appendant* to the ſame farm or tenement called Stubbles all the ſame *fould, courſe or common of paſture for the full number of* 300 *ſheep*, within the Field of Wentworth al' Wenford. Cary's Rep. 65. cites 2 *Eliz.* fol. 137. & 155. Baſill Fielding and Alice v. Wren.

3. The ſuit was *for common of paſture and turbary*, the defendant demurred, for that the plaintiff may have *remedy at the common law*, but ordered to anſwer. Cary's Rep. 91. cites 19 Eliz. Lawrence and Moregate & al' v. Windham.

4. The plaintiff's ſuit is to be relieved for a common, and a ſubpœna is awarded againſt the defendant to ſhew cauſe why an *injunction* ſhould not be granted *to ſtay the ſuit at the common law*. Cary's Rep. 118. cites 21 and 22 Eliz. Chock v. Chea and Waſt.

5. Lands that had been incloſed for 30 *years by conſent of moſt of the pariſhioners*, were therefore ordered to continue incloſed. Toth. 174. cites 4 Jac. Piggot v. Kniveton. *A common that has been incloſed for 30 years, ſhall not afterwards be flung open.* Vern. 32. pl. 29. Hill. 1681. Silway v. Compton.

6. Incloſure of common *is a private wrong*, and no publick nuſance, and preſentment at the *Leet* is void. 9 Rep. 113. Trin. 10 Jac. in Robert Mary's caſe, cites 27. Aſſ. 6.

7. Incloſure of *waſte and common* decreed being for the common good. Toth. 175. cites 12 Jac. Freak v. Loveden.

8. The court *compelled certain men* that would not agree to incloſures, to yield unto the ſame, *and binds a college that would not conſent*, having lands within the ſaid manor ſo incloſed. Toth. 174. cites Mich. 17 Jac. Cartwright v. Drop. S. P. Toth. 174. cites P. 10 Jac. Magdalen Coll. in Oxon. v. Hide.——Toth. 175. cites 8 Car. S. P. Barkley v. Evet.

9. A decree made to overthrow incloſures, if the defendant will not recompence the plaintiff ſo much as he hath been prejudiced by the incloſure, being a depopulation, altho' a remedy at law upon the ſtatute. Toth. 175. cites Mich. 20 and 21 Jac. Trigg v. Payte.

10. Incloſures *with gaps in* an incloſure. Litt. R. 267. Paſch. 5 Car. C. B. Poſton v. Utbert.

11. If a man incloſes where by the law he may, he is bound to *leave a good way*, and alſo to keep it in *repair* continually at his own charge, and the county ought not to be contributary; ſaid by the judges to have been ſo adjudged. Jo. 296. 8 Car. in Itin. Windſor. Henn's Caſe.

[2] 12. The defendant *agreed* to an incloſure, *but afterwards diſſented.* Decreed according to the agreement. Toth. 176. cites 13 Car. Fox v. Shrewſbury.

3 Chan. Rep. 13. Anon. but S. C. in totidem verbis.—

13. *Parties* that have intereſt in the common, and *not privy* to the agreement to incloſe, ſhall not be bound; but decreed that it ſhould not be in the power of one or two wilful perſons to oppoſe a publick good. Chan. Caſes 48. 16 Car. 2. Thirveton v. Collier.

Nelſ. Chan. Rep 78. 16 Car. 2 Anon. but S. C. in totidem verbis.—The court will not bind a man to an incloſure that never conſented. Toth. 175. 2 Car. Ingram v. Wells.

An agreement for incloſing lands was confirmed by a decree againſt ſeveral, and *againſt the parſon of the pariſh*, the terms offered him being much more advantageous, and he and his ſucceſſors *bound as to the tithes*. Finch's Rep. 18. Mich. 25 Car. 2. Edgerly v. Price & al'.—S. P. Toth. 175. cites 5 Car. New-Elm Chapel v. Erbury.

14. *Bill* is brought againſt the parſon, he being the *only freeholder within the manor, to compel him to conſent to an incloſure.* The defendant demurs, for that there are *no articles of agreement* to compel an incloſure, *nor doth the bill charge that the defendant is like to receive any benefit by the incloſure towards the benefit of the church*, and that although he be the only freeholder within the manor in right of his church, yet the ſame is no ground in equity to compel him to an incloſure. This court, as to the compelling the defendant to agree to an incloſure, allowed the demurrer. Chan. Rep. 259. 17 Car. 2. Conſtable v. Davenport.

15. Upon an incloſure *lands were allotted* by an agreement with the predeceſſors of the *parſon for lands before belonging to the church*; the parſon brought a bill for an execution of this agreement. The defendant inſiſted on after agreements with other parſons, and on an award between one of them and one of the anceſtors of the defendant, and confirm'd by decree of this court: On the proofs and anſwers of this and former cauſes, the court decreed for the plaintiff, and a commiſſion to ſet out lands. Fin. R. 144. Mich. 26 Car. 2 Unwin & Fawnt.

16. If a commoner *recovers damages at law*, as 1s. or other ſmall ſum, for an oppreſſion, or for uſing the common where he ought not, the defendant may, by bill, pray that any other commoner may *accept like damages* for what was paſt, to prevent charges at law; and it is in nature of a bill of peace. By North K. Vern. 308. pl. 302. Hill. 1684. in the caſe of Pawlet v. Ingreſs.

17. A com-

17. A commoner ought not to come into chancery to *examine in perpetuam rei memoriam*, to prove his right of common, till he has recovered at law in affirmance of his right; by North K. Vern. 308. pl. 302. Paſch. 1684. Pawlet v. Ingreſs.

Right of common is too trivial to examine to and not allowable,

at leaſt till after a recovery at law; per North K. for the examination coſts more than the value of the thing. Vern. 312. in pl. 308. Hill. 1684.

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18. A former decree, and an award by which the *commons and incloſures* between the lord and his tenants, and lands in the bill mentioned were *bound and aſcertained*, till the defendant, who had now purchaſed the manor, refuſed to be bound by it, was confirmed accordingly. Fin. R. 154. Mich. 26 Car. 2. Meadows v. Patherick.

19. A *decree* made *for an incloſure* 20 *years ſince*, to which the defendant, the lady Widrington's huſband, had agreed in his life-time, and ſhe having an eſtate of about 25 *l.* per ann. within the manor, would now diſturb the incloſure; and tho' in ſtrictneſs her *huſband's conſent* could not bind her intereſt, yet it being proved in the cauſe that her eſtate was much improved by the incloſure, and that ſhe deſigned only to make an unreaſonable advantage to herſelf, the court decreed the incloſure ſhould ſtand. Vern. 456. Paſch. 1687. Rothwell v. Widdrington.

S. C. cited 2 Vern 225. in pl. 206.

[3]

20. *Agreement* between lord and tenants *to ſtint* a common, is more to be favour'd than to incloſe; and 1 or 2 humourſome people ſtanding out, and not agreeing, will not hinder the court's decreeing it; and decreed accordingly. 2. Vern. 103. pl. 98. Trin. 1689. Delabeere v. Bedingfield.

But where ſuch agreement was made by the greateſt part of the landholders,

and oppoſed by the rector, and about 9 others, the court could not decree it, though it was inſiſted that a decree was made 1 W. 3. for a like ſtint in the hamlet of Southam in the ſame pariſh; but the bill was diſmiſſed at the rolls, and affirmed upon an appeal. Vern. 575. pl. 520. Hill. 1706. Bruges v. Curwin.

21. Bill for *over ſtocking a common* was brought by the grantee againſt the grantor, praying an injunction againſt over-ſtocking, but diſmiſſed. 2 Vern. 116. pl. 113. Mich. 1689. Fines v. Cobb.

22. The greateſt part of the landholders intitled to a right of common *agree to a ſtint*, and brought a bill to confirm it; but the bill was diſmiſſed, firſt at the rolls, and now by lord Cowper. 2 Vern. 575. pl. 520. Hill. 1706. Bruges v. Curwin & al.

23. A bill was brought *to quiet poſſeſſion* of a right of commonage in a common, part of the manor of Moreton in Surry, *and to prevent diſtreſſes*. An anſwer and demurrer were put in, and then plaintiffs amend their bill, and obtain an *injunction* till anſwer and further order. The defendants now moved to diſſolve it, and the *plaintiffs produced affidavits of above* 50 *years quiet poſſeſſion, and evidence of their right in queen Elizabeth's time*; yet the *court refuſed to interpoſe till one or more verdicts at law*, and diſſolved the injunction that it may be tried immediately. G. Eq. R. 183. Hill. 12 Geo. 1. ſays it was ſo ruled by lord king in caſe of the manor of Moreton in Surry.

24. Lord of a manor brings a bill againſt a tenant, to hold *a down belonging to the manor*, diſcharged of a right of common thereto; this is an improper bill, in regard the plaintiff may, by the ſame reaſon, bring a ſeparate bill againſt every tenant of his manor making the like claim. 3 Wms's Rep. 256, 257. pl. 63. Paſch. 1734. Holder v. Chambury.

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(A. a) Approvement thereof by Statute.

So if he plows it, yet he that incloſes or plows ſhall have his

1. IF *two have enter-commoning* of land, &c. and after the *one incloſes*, there the other cannot incloſe likewiſe, unleſs it be by common aſſent at firſt. Br. Common, pl. 47. cites 14 H. 3. and Fitzh. Droit 59.

common with the other, and the other ſhall have his writ againſt him to have his common. Fitzh. Droyt. pl. 59. cites S. C.

Hereby it appears that the *lord*

2. *Stat. Merton*, 20 *H.* 3. *cap.* 4. *Becauſe great men having infeoffed others their tenants of ſmall tenements in their great manors,*

could not approve by the order of the *common law*, becauſe the common iſſued out of the whole waſte, and of every part thereof; and yet ſee Tr. 6 H. 3. where the lord approved 2 acres, and left ſufficient, the tenant brought an aſſiſe, and the ſpecial matter being found, the plaintiff retraxit ſe. The purview of this ſtatute extends only for the lord to make an approvement againſt his tenant, and not againſt any ſtranger, nor where the lord had common appendant in the tenancy, as he may have: but ſee the ſtatute of W. 2. 2 Inſt. 85.

Coke Ch. J. ſaid, that the ſtatute of Merton was *only an affirmance of the common law*; for at the common law the lord might approve leaving ſufficient for his tenants, and that ſo are divers caſes in time of H. 3. Fitzh. tit. Approvement; which was before the ſtatute, and this appears by the writ of quod permittat, which is quod tantam habeat paſturam, &c. having regard to his franktenement; and the writ of admeaſurement is, quod habeat plura animalia quam debeat in reſpect of his franktenement, to which the lord chancellor agreed. Roll. Rep. 365. pl. 18. Paſch. 14 Jac. in the Star-chamber, in caſe of Proctor v. Mallorie.——Before the ſtatute the lord could not approve, per Windham J. Sid. 106. pl. 17. Hill. 14 & 15 Car. 2. B. R.

*[4]

When a *lord* of a manor (wherein

* *Complained that they could not make the profit of the reſidue of their manors, as of waſtes, woods and paſtures, though the feoffees had paſture ſufficient for their tenements.*

was great waſte grounds) did *enfeoff others of ſome parcels of arable land*, the feoffees ad manutenend. ſervitium ſocæ, ſhould have common in the ſaid waſts of the lord for 2 cauſes; 1ſt. As incident to the feoffment; for the feoffee could not plough and manure his ground without beaſts, and they could not be ſuſtained without paſture, and by conſequence the tenant ſhould have common in the waſts of the lord for his beaſts which do plough and manure his tenancy, as appendant to his tenancy, and this was the *beginning of common appendant*. The ſecond reaſon was, for maintenance and advancement of agriculture and tillage, which was much favoured in law. 2 Inſt. 85, 86.

The lord may approve againſt a tenant that

It was provided, that when ſuch feoffers being an aſſiſe for the common of paſtures, and alledge that they have not ſufficient paſtures for their tenements, nor ſufficient ingreſs and regreſs,

hath common of paſture appendant; but if the *lord grants common paſture* within his waſte, there is no approvement by this act againſt a common in groſs; for the words of the ſtatute be, quantum pertinet ad tenementa ſua, &c. And ſo was the law taken and adjudged ſoon after the making of this act, and latter authorities agree with the ſame; and albeit the common appendant be without a certain number, as to have ſufficient paſture for beaſts, quantum pertinet ad tenementa ſua, which may be reduced to a certainty, for id certum eſt quod certum reddi poteſt, and therefore this act doth extend to it; and the writ of *admeaſurement of paſture doth lie only for and againſt ſuch commoners as have common appendant*, for the words of the writ be, Et ad ipſos pertinet habendum ſecundum liberum tenementum ſuum, &c. ſo as common appendant be it certain or uncertain is within this ſtatute;

tute; and ſo is common appurtenant certain or uncertain, for (pertinet extends as well to common appurtenant as appendant. 2 Inſt. 86.

Throughout all this ſtatute, Paſtura & communia paſturæ is named, ſo as this ſtatute of approvements doth *not extend to common of piſcbary*, of *turbary*, of *eſtovers*, or the like. 2 Inſt. 87.

By the approvement of part, according to this ſtatute, that part by this act is diſcharged, inſomuch as if the *tenant*, which hath the common, *purchaſes that part*, his common is not extinguiſhed in the reſidue. 2 Inſt. 87.

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The truth ſhall be inquired by aſſiſe; And yet it may be tried in an *action of treſpaſs*; for many times he ſhall fail to have an aſſiſe. Or if the lord doth incloſe any part, and leave not ſufficient common in the reſidue, the commoner may break down the whole incloſure, becauſe it ſtandeth upon the ground which is his common. 2 Inſt. 88.

And if found ſo by aſſiſe, they ſhall recover ſeiſin by view of the jurors; ſo that by their diſcretion and oath they ſhall have ſufficient, &c. and the diſſeiſors ſhall be amerced and yield damages as they were wont to do before; but if found, that the plaintiffs have ſufficient paſture, ingreſs and regreſs, then the other may make his profit of the reſidue, and go quit of the aſſiſe. A commoner brought an aſſiſe of common of paſture belonging to his freehold, the tenant ſaid he was lord, &c. and approved part of his waſte, and left the plaintiff ſufficient common, &c. The plaintiff denied that he left ſufficient common, and thereupon iſſue was taken, and Sir William Herle, Ch. Juſt. of the court of C. B. took the aſſiſe, and the aſſiſe *found, that the plaintiff had not ſufficient common*; whereupon the court did award that the plaintiff ſhould recover his common, &c. and the recognitors of the aſſiſe were going from the bar; and albeit the iſſue was found againſt the tenant, yet for his advantage the *recognitors* of the aſſiſe ought to come back again; and to *ordain, by their diſcretion and oath, ſufficient common to the plaintiff, ſo that the defendant might approve of the remnant*, by this ſtatute of Merton, as Trewood affirmed; whereupon Sir Wm. Herle peruſed the ſtatute, and found the ſtatute as Trewood had ſaid, and therefore was in purpoſe to have cauſed the jurors to come again (the record yet being in his breaſt) to appoint ſufficient common to the plaintiff, according to the ſtatute; but it was prevented, for that the parties agreed. 2 Inſt. 88.

3. *Weſtm. 2. cap. 46. 13 E. 1. The ſtatute of* **Merton ſhall not only bind the lord's tenants, but* ‡ *neighbours alſo which claim common of paſture as appurtenant to their tenements; but if any claim common by ſpecial feoffment or grant for a certain number of beaſts, or otherwiſe, which is due to him of common right, he ſhall recover the ſame according to the form of ſuch grant.*

*Here is the ſtatute of Merton recited; and becauſe in that act no mention was made *between neighbour and neighbour*, the doubt was, whether that ſtatute extended only between lord and tenant; and therefore many lords of waſtes, woods, and paſtures, have been letted to make approvement by the contradiction of neighbours, tho' they had ſufficient paſture; for remedy whereof this ſtatute was made. 2 Inſt. 474.

‡ Note, it is ſaid that the lord could not improve againſt a neighbour, but that the lords were hindered by the contradiction of the neighbours; for by the common law the lord might improve againſt any that had common appendant, but not againſt a commoner by grant. 2 Inſt. 474. [5]

Vicinus is properly qui una in eodem vico eſt, but here it is *taken for a neighbour, tho' he dwells in another town*, ſo that the commons and towns be adjoining together; and if the lord *hath common in the tenant's ground, the tenant may improve* within this act, for there the lord is in this caſe vicinus. 2 Inſt. 474.

4. * *By occaſion of a windmill, ſheepcote, dairy, enlarging of a court,* † *neceſſary, or curtilege, none ſhall be grieved by aſſiſe of novel diſſeiſin for common of paſture.*

* Here be 5 *kinds of improvements* expreſſed, that both between lord and tenant, and neighbour and neighbour, may be done without ſufficient common to them that have it (any thing either herein, or in the ſtatute of Merton to the contrary, notwithſtanding) and theſe 5 are *put but for examples*; for the lord may erect a houſe for the dwelling of a beaſt-keeper, for the ſafe cuſtody of the beaſts as well of the lord as of the commoners d. paſturing there in that ſoil; and yet it is not within the letter of this law. 2 Inſt. 476.

† The word *(neceſſary)* is *to be applied to curtilage*, both in congruity and by our books, and neceſſary ſhall *not be taken according to the quantity of the freehold he hath* there, *but* according *to his perſon, eſtate or degree, and for his neceſſary dwelling* and abode; for if he hath no freehold there in that town but his houſe only, yet may he make a neceſſary enlargement of his curtilage. 2 Inſt. 476.

5. *The lord made a feoffment of parcel of his waſte* land; the *feoffee may incloſe*; for this is an improvement in the lord by the feoffment; per Ston. and Mutf. but contra per Scrope and Berr. Br. Common, pl. 51. cites 16 E. 2. and Fitzh. Garrantie de Chart. 31.

6. A man has *common in three vills*, the lord may *approve in the one* vill, *leaving ſufficient common in the other* two vills. Br. Common, pl. 53. cites 3 E. 3. Itinere Derb.

7. If the lord improve part of the common, he *ſhall not have common for the land improved* out of the reſidue of the common. Godb. 97. cites 5 Aſſ. 2.

8. Aſſiſe *of common of paſture*; the *defendant ſaid, that he had approved of the waſte, ſaving to others ſufficient common*, and free coming in and going out, &c. The plaintiff ſaid, that he had not ſufficient common; Priſt &c. and the aſſiſe ſaid that he had not ſufficient common, by which it was awarded, that he recover his common; and it was held that the jury, by their diſcretion, ſhall ordain ſufficient common to the plaintiff, ſo that the tenant may approve of the reſt; for ſo are the words in the ſtatute of Merton; quod nota; by which the parties agreed; quod nota. Br. Aſſiſe, pl. 125. cites 7 Aſſ. 16.

9. Aſſiſe of common; the *defendant ſaid, that he has approved according to the ſtatute* by reaſon that he is lord, leaving to the tenant ſufficient common; there the plaintiff ſhall recover immediately. But by the opinion of the court the aſſiſe ſhall inquire of the ſufficiency of the common, and ſo they did in Trin. 8. E. 3. and the bar good without colour given, and the aſſiſe awarded upon ſeiſin and diſſeiſin alſo; quod nota. Br. Aſſiſe, pl. 423. cites 7 E. 3. 67.

10. Aſſiſe *of common*; *J. ſaid that W. is lord, and approved, &c. and left to the plaintiff and other tenants ſufficient common*, and the aſſiſe was charged of the ſufficiency of the common, which ſaid that they had not ſufficient common; but the plaintiff was diſſeiſed, and it was ſaid by ſome, that *if at the time of the approvement ſufficient common was ſaved* to the plaintiff, *this ſuffices*. Br. Aſſiſe, pl. 135. cites 8 Aſſ. 18.

11. In aſſiſe, by ſome, where *ſufficient common at the time of the approvement* is left to the commoner it *ſuffices, though it be not ſufficient after*. Br. Common, pl. 21. cites 8 Aſſ. 18.

12. In aſſiſe, lord and tenant were, and the *lord had common in the ſoil of the tenant, which is held of him of his manor of D. of which the land in which the lord claim'd common is held, and yet*, per cur. the *tenant may approve his own ſoil*; for tho' the ſtatute does not ſpeak, but that the lord may approve againſt his tenant and againſt
[6] his neighbour, yet the *lord in this caſe is not but as a neighbour to the owner of the ſoil*, and the tenant as owner of the ſoil may approve, per cur. by which aſſiſe was awarded to enquire of the ſufficiency of the common; for the owner may well approve, Br. Common, pl. 22. cites 18. Aſſ. 4.

13. In

13. In aſſiſe it was adjudged that the *lord may approve in his own ſoil* againſt his tenants and his neighbours. And where the lord of a manor approves, and the *lord of whom the lord of the manor holds the manor has common there by vicinage*, yet the approvement is good againſt him alſo; for he *has no common but as neighbour*; quod nota; by which the aſſiſe was awarded, to inquire if the plaintiff, who was lord paramount, had ſufficient common or not, quod mirum! for *by the demurrer* that he is lord, *it is not denied but that he has ſufficient common*, and alſo is party. Br. Aſſiſe, pl. 447. (446.) cites 18 E. 3.

14. Aſſiſe of common of piſcary; per Feneot, if *I grant common throughout my manor with all manner of beaſts*, I cannot approve; but if I *ſave to myſelf certain parcel of land for my ſeveral*, I ſhall have it, and he ſhall not have common there; quod non negatur. Br. Common, pl. 26. cites 34 Aſſ. 11.

15. If the lord leaves ſufficient common, but *the way is not at ſo good eaſe* or plight *as it was before*, aſſiſe of common lies. F. N. B. 125. (D) in the new notes there (C) cites 11 H. 4. 26. by Stourt.

16. In treſpaſs it was agreed that where a man has *common appendant* out of certain land, yet the lord may approve the ſoil, and this *it ſeems by leaving to the tenant ſufficient common with egreſs and regreſs*, according to the ſtatute. Br. Common, pl. 20. cites 15 H. 7. 10. Br. Common, pl. 9. cites S. C. & S. P.

17. Treſpaſs of houſe broken, the defendant juſtified becauſe he has common there, and therefore he broke the houſe; the plaintiff ſaid that he is owner of the ſoil, and did it to *harbour a man to keep the ſoil*; but the ſtatute *W. 2. cap. 46*, does not ſpeak but of *Windmill, ſheep-cote, dairy, and augmentation of court*; but it ſeems by Huls, that it may be *taken by the equity*; quere. Br. Common. pl. 19. cites 7 H. 8. 38.

18. *Stat. 3 & 4 E. 6. cap. 3. The ſtatute of Merton, cap. 4. & Weſtm. 2. cap. 46. are confirmed.*

19. *Upon judgment for the plaintiff, in an aſſiſe upon any branch of the ſaid ſtatutes of Merton, or W. 2. the court ſhall award* treble damages.

20. *This act ſhall not extend to houſes heretofore built upon waſtes, or commans, not having above 3 acres of ſuch waſte or common ground belonging to them; nor to any garden, orchard or pond there, not exceeding 2 acres; neither yet ſhall it cauſe any perſon to loſe or forfeit any pain or damage for the ſame, but ſuch houſes and grounds ſhall ſtill ſtand and remain; howbeit the owners of ſuch waſtes or commons may lay open ſo much thereof as ſhall exceed 3 acres.*

21. *And where one uſurpeth common in the time that heirs are within age, or a woman is covert, or whilſt the paſture is in the hands of tenants in dower, or of other particular eſtates; they who have ſuch entry from time in which the writ of Mordanceſter runneth, if they had no common before, ſhall have no recovery by writ of Novel Diſſeiſin, if they be deforced.*

22. It was moved, whether in caſe of *common appurtenant by preſcription without number* the lord of the waſt might improve? for

it is not admeaſurable, therefore not improveable; for the common being without number, the ſufficiency cannot be proved. Dyer & Manwood J. held, that altho' it be without number, yet it may be reduced to a certainty being by preſcription; as the *number of the cattle which the beſt and moſt ſubſtantial tenant of the ſaid tenement, at any time within time of memory, had kept upon the ſaid waſt*, and then the plaintiff, the lord, might improve leaving ſufficient according to ſuch rate. 4 Le. 41. pl. 112. Mich. 19. Eliz. C. B. Anon.

[7] 23. If 2 *lords of* 2 *manors have* 2 *waſts adjoining*, without incloſure or ſeparation, but the bounds of each are well known by certain marks, the one may incloſe againſt the other, tho' the tenants of each manor have reciprocally common'd there by reaſon of vicinage. 4 Rep. 38. b. Mich. 26 and 27 Eliz. cited by the reporter, as lately adjudg'd in B. R. in caſe of Smith v. How.

24. The lord may make *fiſh-ponds* upon the common, and the commoner can't deſtroy them. Per cur. Ow. 114, 43 Eliz. B. R. in the caſe of Pelling v. Langden.

Where they have *common in groſs ſans nombre* the lord cannot approve againſt them, per Powel J. Ld. Raym. Rep. 407. Mich. 10 W. 3.—It is to be obſerved, that neither this ſtatute, nor the ſtatute of Merton *extends* to any common, *but to common appendant or appurtenant to his tenement*, and not to a common in groſs to a certain number. 2 Inſt. 475.

25. Where men have *common in groſs for a certain number of beaſts*, the lord may approve leaving ſufficient for them [but Roll ſays, quære this, for the ſtatute W. 2. cap. 50. [46.] ſeems to be e contra.] Common ſans number is uſually put in caſes, but Coke ſays, he never knew ſuch common granted, and therefore when it comes in queſtion, he ſaid he will deliver his opinion thereof; but ſays, that notwithſtanding ſuch grant the lord may common with him, and alſo the grantee ought to uſe the common with a reaſonable number. [Roll remarks here, that F. N. B. is the writ of admeaſurement lies not of common ſans number] per Coke Ch. J. and the lord chancellor agreed particularly to all ſaid by Coke. Roll Rep. 365. pl. 18. Paſch. 14. Jac. in the Star-chamber, in caſe Proctor v. Mallorie.

26. A *lord that is in by wrong* may improve by virtue of the ſtatute of Merton againſt the tenants and commoners. Clayt. 38, Auguſt 11 Car. before Barkley J. Hamerton v. Eaſtoff.

Sid. 79. pl. 4. C. 27. The lord can't erect an *houſe*, within the ſtatute of Merton, unleſs it be *for his own habitation or his ſhepherd's*, and he muſt alledge, that he built it for one of thoſe purpoſes; for otherwiſe he may build a great houſe to let to a nobleman, which may require a greater curtilage than the lord or his herdſman. Lev. 62. Paſch. 14. Car. B. R. Nevil v. Hammerton.

Lev. 62. S. C. adjudged. Exception was taken, that it was *not averr'd, that there was ſufficient common left*, and to 28. One incloſed 2 acres of common (where all the common was but 3 acres) to enlarge the curtilage of his houſe, and ſo juſtified by the ſtatute Weſt. 2. cap. 46. It was argued, that it was not good becauſe he did *not allege, that his houſe was an ancient houſe, nor that his curtilage was ſtraight*, and if it was, yet it would be unreaſonable *to incloſe* 2 *acres out of* 3; but it was anſwered, that the ſtatute ſpeaks of houſes, without ſaying ancient houſes, and therefore if it were material it ſhould come of the other ſide. Windham J. held,

held, that the houſe ought to be an ancient houſe; (Mr. Twiſden J. ſeem'd e contra,) but it not appearing that it was for his neceſſary reſidence it was adjudged, that he could not incloſe. Sid. 79. pl. 4. Trin. 14. Car. 2. B. R. Nevel v. Hamerton.

this Twiſden inclin'd, but Windham e contra, that this is to be aver'd only *where the incloſure is for improvement of the land*, and not where it is for the enlargement of the curtilage.

29. An approvement *may be againſt all commoners, unleſs ſans nombre or in groſs*; per Keeling; but per Windham one can*not* improve *againſt his own grant, tho'* it be *to a certain number*. Keb. 830. in pl. 8. Hill. 16 & 17 Car. 2. B. R. in caſe of the King v. St. Brivil's inhabitants.

30. Lord of a manor incloſed part of a common, and there being young wood and timber growing thereon, the plaintiff inſiſted, it was an improvement within the ſtatute of Merton, W. 2. 46. The court thought fit to continue the injunction, and directed a *trial* to be had at *the next aſſiſes *whether ſufficient common was left for the tenants*. 2 Vern. 301. pl. 290. Mich. 1693. Weekes v. Staker.

In a like caſe 2 iſſues were directed to be try'd *whether ſome of the defendants had right of common there*, and whether ſufficient common was left for the tenants; and an *injunction to quiet the poſſeſſion in the mean time* was continued, tho' *a new incloſure*, and made not above 2 years before the bill exhibited. 2 Vern. 356. pl. 322. Hill. 1697. Arthington v. Fawkes.

*[8]

31. *Agreement* between lord and tenants *for incloſing* a common, that the tenants ſhould quit their right of common, and the lord ſhould releaſe them all quit-rents; the incloſure was prevented by pulling down the fence, and the tenants continued to uſe the common and ſome of them to pay their quit-rents. This is a waiver of the agreement, MS. Tab. January 2, 1719, lady Laneſbury v. Ockſhoth.

32. Owner of lands bound by *agreement of* his *bailiff* for incloſing of a common, having acquieſced 30 years, MS. Tab. March 1720, Tufton v. Wentworth.

33. Bill brought by plaintiffs as tenants of the manor of Walton, in the county of Surry, to eſtabliſh their right of common of paſture and turbary in the waſte of the ſaid manor, and for *injunction againſt* defendant Palmer, *leſſee of the manor* for years under the crown, *to ſtay his digging of brick-earth, and making brick, and incloſing part of the common*, &c. Motion upon the bill filed, and affidavits of making brick and incloſing part of the common till anſwer and further order. King C. aſſiſted by J. Jekyle maſter of the rolls, denied the motion; for that the lord of common right was intitled to the ſoil of the waſt, and the *tenants had only a right to take the herbage by the mouth of their cattle*; and by ſtatute of Merton, the lord might incloſe part of the waſt leaving ſufficient common; that at common law, in an action brought againſt the lord, the tenant muſt alledge in the declaration, that there is not ſufficient common left or he can't maintain the action; and if that ſhould be the preſent caſe (tho' no ſuch matter is made out by the affidavits) the tenants may have their remedy at common law; that the lord has a *right to open mines in the waſt* of the manor, and why not to dig brick-earth, eſpecially in the preſent caſe, where the bricks are

made

of the court notwithſtanding the ſecond damages given by the ſecond verdict. Sid. 212. pl. 10. Trin. 16 Car. 2. B. R. the king v. Upwood and Ravely Vills in Com. Huntington.

3 Salk. 167. S. C.

8. *Diſtringas* upon the ſtatute of *Weſtm.* 2. for throwing down incloſures againſt the inhabitants of proximis villis; two of each vill came, and *pleaded* for themſelves and the other inhabitants of the ſeveral vills, *that the fences were thrown down in the day-time when the perſons might be known, abſque hoc* that they were thrown down in the night, or at ſuch time that the offenders could not be known, and ſo *iſſue join'd in the diſjunctive*; and now at the trial at bar 'twas ſaid for the defendants, that if the throwing down was either *in the day, or in the night, ſo* * *publickly that the malefactors were known, 'tis not within the ſtatute*, to which the court agreed; for the *ſtatute* was to give remedy in caſes where the malefactors not being known, the parties were without remedy by treſpaſs, &c. But if it was done *in the day or night before the face of the owners*, ſo that they have remedy by treſpaſs, &c. this is not within the ſtatute; and upon the evidence it appearing to be done publickly, and yet by the defendants, the jury, by direction of the court, found for the defendants. Lev. 108. Trin. 15 Car. 2. the king v. inhabitants of Woodford, Chingford and other vills in Eſſex.

*Lutw. 157. Malabar's caſe.

2 Keb. 663. pl. 21. The king v. the inhabitants of East Grinſtead, the court præter Keeling Ch. J. inclined

9. An *inquiſition* was returned upon the ſtatute againſt pulling down incloſures. They *took iſſue as to the damages only*. It was moved that before the trial for the damages, there might be judgment given to have them ſet up again, having been long down; Twiſden ſaid, when you have judgment for the damages, then *one diſtringas will ſerve for ſetting up the incloſures and the damages too.* Mod. 66. pl. 12. Mich. 22 Car. 2. B. R. Anon.

to grant a new diſtringas, as to the rebuilding the fences, being confeſs'd to be down by the other iſſue; but time was given to plead de novo.——Ibid. 683. pl. 2. the court ordered the iſſue as to the damages to be tried firſt, and then a writ may be granted for ſetting up the fences, and for the damages alſo.——Ibid. 723. pl. 127. S. C. The trial at bar being over as to the damages, the court granted a diſtringas to levy and ſet up the fences, but would not order it by any day certain, but to follow the proceſs of the court, and ſo for the iſſues.

But this muſt be taken by proteſtation *before the firſt iſſue found* againſt them.

10. If the *damages* are *exceſſive*, when the parties come in to plead the noctanter, they may take, by *proteſtation*, that the damages were exceſſive, and after *plead* that the damages were not but of ſuch a value. Per Cur. Lutw. 157. Paſch. 32 Car. 2. Malabar's caſe.

The ſtatute provides no remedy for cutting down trees. Skinn. 94. Hill. 35 Car. 2. B. R. in Creſwick's caſe.——2 Show. 255. pl. 263. The king and Chiſwick v. Bitton inhabitants. S. C. & S. P. by Jones J.

* 11. The *cutting down timber trees* by perſons unknown noctanter, *is not within the ſtatute* W. 2. Cap. 46; for the words of the ſtatute are foſſatum & ſepem proſtraverunt. Reſolved by Saunders, Ch. J. Raym. 487. Hill. 34 & 35 Car. 2. B. R. The king v. Bitton inhabitants.

* [11]

12. *Upon the return of an inquiſition a diſtringas was awarded*, whereupon it was objected that inſtead thereof a ſcire facias ſhould have iſſued, to ſhew cauſe, &c. but adjudged that a *ſci. fa. was not neceſſary*. 3 Salk. 167. Paſch. 1 W. 3. B. R. The King v. Penrith inhabitants.

13. *Diſ-*

13. *Diſtringas* for throwing down fences, &c. was *quaſhed*, becauſe there were not 15 *days between the teſte and return*. Show. 80. Mich. 1 W. & M. Symſon v. Penrith. 3 Salk. 167. The king v. Penrith inhabitants S. C. and the court held it ill.

15. An *information for a riot* lies in the crown-office for breaking fences and incloſures in Hertfordſhire. Show. 106. Mich. 1 W. & M. the King v. Berchet & al'.

16. Upon the *return of an inquiſition* for flinging down the fences of S. &c. it was objected that it did *not appear that S. was lord of the manor, or had a right to theſe fences*; but it was held that this need not be ſhewn; for if he had no right, this ought to be ſhewn on the other ſide. 3 Salk. 167. Paſch. 1. W. 3. B. R. The king v. Penrith inhabitants.

17. In writ of inquiry of damages for fences thrown down in the night, it was held per cur. that there was *no need of notice of the execution of the writ*, becauſe traverſeable; but per cur. it was quaſhed, becauſe it was *intereſſatus fuit pro reſiduo cujuſdam termini*, where it ought to have been *poſſeſſionatus*, *fuit*; it might have been a concurrent leaſe, or leaſe not commenced, and no poſſeſſion laid, and therefore it was ill. Show. 106. Mich. 1 W. & M. The King v. Hermitage (inhabitants). Carth. 114, 115. Paſch. 2 W. & M. in B. R. S. C. and it was objected that by thoſe words he might have only a right to the herbage of this waſte, or might be only a commoner, and ſo have no right to incloſe, and ſo not within the ſtatute; but the court reſolved, that ex vi termini, the words import that he had an intereſt in the land of this waſte, and not in the herbage only. And Holt, Ch. J. held that he who had only the herbage might incloſe, and therefore the return in the inquiſition was held good; for it is not neceſſary to ſet forth what eſtate the party had.——In debate of this caſe it was agreed per cur. that a grantee of a common might have this writ, and that ſo might the owner of the waſte, or grantee of the herbage. Show. 106.

He that has reaſonable herbage cannot incloſe, but he that has herbage may. Arg. Godb. 417. Trin. 21 Jac. B. R. in caſe of lord Zouch v. Moor.

18. In a nocſtanter it is not neceſſary to *ſet forth what eſtate a man hath*; per Holt. Ch. J. Carth. 114. Paſch. 2 W. & M. in B. R. The King v. the inhabitants of the Hermitage. The reporter, ibid. 115. Marg. cites Cro. C. 280, 440, 580; and ſays that in thoſe caſes the eſtate of the party is not ſet forth.——Show. 106. S. C. ſays that in debate of this caſe it was agreed per cur. that grantee of a common might have this writ, and ſo might owner of the waſte, and alſo grantee of the herbage.

19. The *inquiſition found* 100 *perches*, *and* 2 *gates*, *and* 10 *ſtiles pulled down*; but it appeared upon the *evidence* that no more than 3 *perches* of hedge and fence, *and* 9 *gates*, *and* 3 *ſtiles* were pulled down, &c. But per cur. this matter cannot be inquired into, becauſe the defendant *had not traverſed the number*, *and ſo that was not an iſſue*; quod nota; for it was an overſight of the pleader. Carth. 242. Paſch. 2 W. & M. in B. R. The King v. inhabitants of Hermitage.

20. A. *licences B. to* make and continue an incloſure of common to him and his heirs; C. the heir of A. breaks down the fences, and juſtifies for right of common; B. pleads as above; per cur. 'tis ill by way of licence, but *'tis good by way of releaſe of common*, but a licence is determined by his death. Show. 349. Paſch. 4 W. & M. Miles v. Etteridge. [12]

21. In treſpaſs for *pulling up* and throwing down a hedge, the court would give *no more coſts than damages*; there being no aſportation. Comb. 420. Hill. 9 W. 3. Br. Anon.

They may appear, and traverſe the fact tho' they have no day in court.

22. The neighbouring vills upon the diſtringas may come and *traverſe the facts* being done *noctanter*, or that they were the *next vills*, or even the *damage*. 12 Mod. 340. Mich. 12 W. 3. per curiam. In caſe of More v. Watts.

1 Sulk. 383. pl. 3. per Holt, Ch. J. in S. C.

23. This ſtatute not extending to every lord, but to ſuch only as had right to approve; the defendants, to ſhew that the lord had *no right to approve*, pleaded a preſcription to common thus; viz. *that divers freeholders had a right to common, without confining their preſcription to any certain particular tenements.* It was admitted that by way of *cuſtom* this general way of pleading had been good, but not by way of preſcription, and to this opinion the court inclined. 10 Mod. 157, 158. Paſch. 12 Ann. B. R. the Queen v. Gruelthorp inhabitants.

24. As to the *form of proceeding againſt profiterners* of fences of lands approv'd out of the common, and ſeveral pleas of the defendants, ſee Cro. C. 280, 439, 580. and Lutw. 157, 158. and ibid. 179 to 180.

(C. a) Apportion'd. In what Caſes.

Common *appendant* may be apportion'd, becauſe it is of common right, and therefore, if *commoner purchaſes parcel of the land in* [illegible] yet the common ſhall be apportion'd. 4 Rep. 37. 6. Mich. 26 & 27 Eliz. B. R. reſolv'd in Tirringham's caſe.

2. In caſe of common for a *certain number* of cattle, if *ſo ſmall a parcel be demiſed which will not keep one ox nor a ſheep*, then the whole common ſhall remain with the leſſor ſo always, as that the land in which be not ſurcharged. 13 Rep. 66. Hill. 7. Jac. C. B. Morſe v. Webb.

Rep. 60 b. C.

3. Common *appendant and appurtenant is all one as to ſeverance*; for if ſuch commoner grants parcel of the land to which the common is appurtenant or appendant, the grantee ſhall have common *pro rata*; agreed. 2 Brownl. 297. Hill. 7 Jac. C. B. Morſe v. Webb.

4. Common, *ſans nombre in groſs*, cannot be apportion'd by purchaſe of part of the land; per Powell J. Ld. Raym. Rep. 407, Mich. 10. W. 3.

[23]

(D. a) Admeaſurement and Surcharge of Common. In what Caſes the Writs lie.

1. 13 E. 1. *Weſtm.* 2. *cap.* 8. 2. 13 E. 1. cap. 1.

UPON *a ſecond ſurcharge of paſture, if the paſture were admeaſured before the juſtices, the remedy ſhall be by writ judicial returnable before the juſtices under*

the

the ſeal of the ſheriff and jurors; and then the juſtices ſhall award damages to the plaintiff, and ſhall eſtreat into the exchequer the value of the beaſts (wherewith the paſture was ſo overcharged) to be anſwer'd to the king.

12. ſays, that in caſe of a ſurcharge after an admeaſurement of paſture, no remedy had been yet provided; yet lord Coke ſays, he had ſeen a *record in* 11 *H.* 3. in the archives of the Tower of London, *where a* writ de *ſecunda ſuperoneratione was granted.* 2 Inſt. 370.

S. 2. *If the admeaſurement were made in the country, the ſheriff, by a chancery writ ſhall inquire of the ſurcharge and value of the beaſts, and ſhall anſwer the ſame to the king in the exchequer.*

S. 3. *To prevent fraud in the ſheriff, all ſuch writs de ſecunda ſuperoneratione ſhall be enrolled, and alſo at the year's end tranſcribed in the exchequer; and ſo likewiſe ſhall writs of rediſſeiſin.*

When the *plea is removed* before the juſtices there upon pleading, or confeſſion before them after admeaſurement made and returned, judgment ſhall be given by the juſtices; *but if* the plea be *not removed*, the admeaſurement ſhall be enquired of, and made before the ſheriffs. 2 Inſt. 370.

By the writ of *ſecunda ſuperoneratione* the plaintiff ſhall recover his *damages* againſt him that was defendant in the firſt writ, and alſo he ſhall *forfeit* unto the king *the cattle* which he *put in over the due number* after the admeaſurement made. And all this is by the ſtatute of Weſtminſter. F. N. B. 126. (H).

2. Note, The *lord* may have an admeaſurement; but he *himſelf ſhall not admeaſure.* F. N. B. 125. (D) in the new notes there (b) cites Temp. E. 1. Admeaſurement 12. See 6 Co. 54. Corbert's Caſe.

Fitzh. Admeaſurement, pl. 12. is, that in writ of admeaſurement of paſture, he that brings the writ ought to be admeaſured as well as he againſt whom the writ is brought, unleſs where the chief [the lord] himſelf brings it, &c. ——— And 6 Rep. 54. Corbet's caſe, is a wrong quotation.

3. If the defendant has *common appendant to his freehold in three vills*, it may be admeaſured for the lands in one of the vills. F. N. B. 125. (D) in the new notes there (c) cites Fitzh. admeaſurement 15. in time of E. 1.

4. If *one has common appendant, and the lord of the ſoil grants him common there for* 200 *beaſts more*, whereby the *common is ſurcharged*, admeaſurement lies againſt him, and he ſhall admeaſure within the number granted him, and ſhall be put to vouch his grantor to warranty. F. N. B. 125. (D) in the new notes there (c) cites Temp. E. 1. ibid. 16. & Brief 862. * See 22. Aſſiſe 65. Admeaſurement 11.

* This is a D. P.

5. The writ of admeaſurement lies, tho' the *plaintiff* has *diſſeiſed the tenant of the common*, if he continues ſeiſed of the land to which F. N. B. 125. (D) in the new notes there (c) cites 8 E. 3. Admeaſurement 14.

Fitzh. Admeaſurement, pl. 18. cites 8 E. 2. S. P.

6. Note, by all the juſtices, that writ of admeaſurement of paſture *does not lie againſt him who has common appendant, nor* againſt him who has common *by ſpecialty for beaſts without number, but* againſt him *who has common appurtenant, and upon ſpecialty to a certain number* of beaſts; but then the other ought to plead it, and ſhew that he has it by ſpecialty for ſo many beaſts, and has put beyond the number of ſo many beaſts. Br. admeaſurement, pl. 5. cites 22. Aſſiſe 65.

Fitzh. Admeaſurement, pl. 6. cites S.C. — F.N.B.125. (C) in the new notes there (a) cites 22. Aſſ. 55. S. P. [but ſeems miſprinted, and that it ſhould be (65) as in Br.]

7. Ad-

The *writ* shall be brought *against him only who surcharges*; and in this writ all shall be admeasured, but not to their prejudice, seeing they are not parties to the suit.

7. Admeasurement of pasture against one who *said, that there is another who has* 20 *acres of land, to which he has common there*, and demanded judgment of writ, because he is not named; for all the tenants shall be admeasured where action is brought by one, and yet non allocatur; for *none shall be impleaded, but he who did the tort*, and the admeasurement of all is not material, for they should be justly admeasured, and then they have no wrong; *but monstraverunt* shall be brought by all the tenants, and by Babb. Ch. J. the view well lies in writ of admeasurement. Br. admeasurement, pl. 3. cites 8 H. 6. 26.

F. N. B. 125. (B) in the new notes there (b) cites 8. H. 6. 26.

8. In action brought *against one* all the tenants shall be admeasured. Br. joinder in action, pl. 32. cites 8 H. 6. 26. per Elerker.

9. If the *sheriff returns nihil* in writ of admeasurement of pasture, yet the plaintiff shall have judgment as if the process had been return'd served, quod non negatur. Br. admeasuremt. pl. 7, cites 11 H. 6. 3.

The writ is vicontiel and directed to the sheriff. F.N.B.126. (F)—2 Inst. 369. The writ is vicontiel, and the parties may thereupon plead before the sheriff in the county.

10. Admeasurement of pasture *is vicontiel, and the suitors are judges*, and not the sherliff; for he has no other court in which he may hold plea but the county, and if he does otherwise it is coram non judice. Br. admeasurement, pl. 6. cites 7. E. 4. 22.

It may be removed out of the county-court by *pone* at the suit of the plaintiff, without shewing cause in the writ; but at the suit of the defendant he ought to shew cause. 2 Inst. 369. cites 44. E. 3. 10.

11. *And* per Jenny, because it is not in a court of record, therefore it ought to be *removed by pone or* by *recordare, or* by writ *of false judgment*, and not by certiorari; for this is to remove out of a court of record. Ibid.

If a man be once admeasured by a writ of admeasurement directed unto the sheriff by the sheriff &c. and afterwards he surcharges the common again, then the party who sued the first writ shall have a writ to the sheriff, called a writ de secunda superoneratione. F. N. B. 126. (E)———Upon the writ of admeasurement awarded to the sheriff, by which he makes admeasurement, if the defendant surcharge the common after, the writ of secunda superoneratione shall be awarded out of the chancery; but upon a judgment given in the common pleas of admeasurement, &c. if the defendant surcharged the common, the writ of secunda superoneratione shall be awarded out of C. B. F. N. B. 126. (F.)

12. *Writ of secunda superoneratione* pasturæ *does not lie but* where the admeasurement was made before the justices, but not where it is made before the sheriff and suitors; but where the admeasurement is removed after by writ of false judgment, and after the judgment in pais is affirmed in bank, there writ of secunda superoneratione pasturæ may issue upon it, for now the first admeasurement is of record. Ibid.

13. The writ of admeasurement of pasture *lieth betwixt commoners who have common appendant* to their freeholds, if one of them surcharge the common, by putting in more cattle in the common than he ought to have common for there, then that commoner shall have this writ of admeasurement of pasture. F. N. B. 125. (B).

14. If

14. If the *tenant ſurcharges* the common with his cattle, &c. the *lord ſhall not have the writ of admeaſurement* againſt the tenant; *but* it ſeemeth the lord *may diſtrain ſurpluſage* of the cattle damage-feaſant. F. N. B. 125. (D).

He *cannot* diſtrain the ſurplus *where the tenant has common appendant till it be admeaſured.*

F. N. B. 125. (D) in the new notes there (b) cites 10. E. 3. 51. 18. E. 3. Admeaſurement, 7. per cur. and yet he may approve it.

[15]

15. The *lord may have an aſſiſe* againſt the tenant *for the ſurcharge*, for that he is diſturbed of the profit of his land. Quære of theſe caſes. F. N. B. 125. (D). But if the *lord ſurcharges* the common, the tenant ſhall not have a writ of admeaſurement *againſt the lord*, but he ſhall have an *aſſiſe* of common againſt the lord. F. N. B. 125. (D).

See Bracton, 229. that the lord may have admeaſurement againſt his tenant, or e converſo for a commoner

againſt the lord. Temp. E. 1. Admeaſurement 16. Not againſt the lord, becauſe he cannot approve but againſt the tenant, who is not lord. Ibid. 11. 18 E. 80. Admeaſurement 7. If there are *two neighbours* in a vill, *who intercommon each in the other's land*, admeaſurement does not lie between them; *but if* there are *three neighbours*, A, B, and C, and each *intercommons* in the other's land, if one of them ſurcharge, the whole admeaſurement lies, for he had common in the lands of the three, &c. But *where there are only two* neighbours, A, and B, admeaſurement does not lie; for there, on a ſurcharge, *the remedy is by aſſiſe as tertenant, and not as a commoner*; and a tertenant cannot be admeaſured; but where there are three commoners or more who intercommon, each ſhall be admeaſured in the lands of the other. 18 E. 3. 43. Admeaſurement 30. F. N. B. 125. (D) in the new notes there (c.) ——— And it appeareth by the Book of Entries, fol. 123. that a writ of admeaſurement does not lie againſt the lord of the ſoil. F. N. B. 126. (D) Mich. 9 H. 6. 41. b. pl. 16. S. P. that admeaſurement lies not againſt the lord. ——If the lord makes *approvement of the common* unto himſelf, and *leaves not ſufficient common to the tenant*, the *tenant ſhall have an aſſiſe*, and not a writ of admeaſurement. F. N. B. 125. (D).

16. In the time of E. 1. it was agreed, that *one neighbour* ſhall have a writ of admeaſurement *againſt another*, where they intercommon by reaſon of neighbourhood. F. N. B. 125. (E).

17. He who hath *common appurtenant certain*, *or* common *by grant certain*, ſhall be admeaſured; and a tenant ſhall have an admeaſurement againſt him; *but* he who hath a *common appurtenant without number*, *or* common *in groſs* without number, ſhall not be ſtinted, nor a writ of admeaſurement doth not lie againſt him. F. N. B. 125. (D).

18. By the writ of admeaſurement *all* the commoners *ſhall be admeaſured as well as thoſe who were parties to the writ.* F. N. B. 126, 127. (I).

S. P. *As well thoſe who have not ſurcharged* the

common, *as he who hath* ſurcharged it, and he who bringeth the action ſhall alſo be admeaſured. F. N. B. 125. (B).

19. *But* yet *if any* of thoſe who are commoners, which were *not parties* to the writs of admeaſurement, &c. *do ſurcharge the common after admeaſurement, they ſhall not forfeit their cattle, nor the value of them* that were in the paſture above the due number, becauſe they were not parties to the firſt writ, *nor the party ſhall not recover damages againſt them* for this ſurcharge in this writ; for the writ of ſecunda ſuperoneratione lies not but only againſt him againſt whom the firſt writ was ſued forth. F. N. B. 126, 127. (I).

But note, the judgment on the admeaſurement is only to extend between the parties; for if any other be aggriev'd, he ought to

bring a new admeaſurement. F. N. B. 126, 127, (I) in the new notes there (a) cites 18 E. 3. [30] Admeaſurement 7. ——— 2 Inſt. 370. S. P. accordingly.

(E. a) Extinguiſhment thereof.

1. *ASSISE of common of paſture*, the tenant *pleaded that in the time of E. 2. the one land and the other were in the ſeiſin of W. and ſo by unity the common is extinct*; the *other ſaid that the land to which he claimed to be appendant is ancient land to which common has been appendant time out of mind*, and therefore the aſſiſe was awarded. Br. Extinguiſhment, pl. 27. cites 13 Aſſ. 21. & concordat. * 15 Aſſ. 2. It. North't. But Brook ſays it ſeems that 'tis againſt law, and that the unity is extinguiſhment for ever.

* Br. Extinguiſhment, pl. 40. cites S. C. accordingly. But Brook ſays quære; for 'tis not law.

[16] 2. In *replevin*, the *defendant avowed for damage feaſant*, the *plaintiff claimed common appendant*, and the *defendant alledged unity of poſſeſſion in the one land and the other ſince time of memory*; this is a good extinguiſhment of the common; per cur. Br. Extinguiſhment, pl. 19. cites 24 E. 3. 25, 45.

Br. Common, pl. 10. cites S. C.

3. Common is obtained by *long ſufference*, and may be loſt by *long negligence*. 3 Le. 202. cites Britton. 144. & Bracton. 222, 223.

4. A. has common appendant to his tenement in a great waſte, the *lord improves part* of the waſte, leaving ſufficient common and way to it in the waſte, and afterwards he *infeoffs the commoner of the improvement*. This is no extinguiſhment of the common in the reſidue of the waſte. * D. 339. pl. 45. Mich. 16 & 17 Eliz. Anon.

Ibid. Marg. cites 40 Eliz. that 'twas ſaid the reaſon was becauſe the land improved was utterly diſcharged of common. Green.—S. C. cited Arg Goldſb. 117.

* S. C. cited Cro. E. 594, in caſe of Rotheram v.

5. Such *common* as is *admeaſurable* ſhall remain after ſeverance of part of the land to which, &c. Per cur. 4 Rep. 38. a. Mich. 26 & 27 Eliz. Br. in Tirringham's caſe.

6. Common *appurtenant* cannot be extinct *for part*, and in eſſe for part, *by act of the parties*; agreed. 4 Rep. 38. a. Mich. 26 & 27 Eliz. B. R. in Tirringham's caſe.

7. *Unity of poſſeſſion of the intire land in* which, &c. *or to which*, &c. *extinguiſhes common appendant*, contrary to the opinions 11 E. 3. tit. Common. 11. 14 Aſſ. 21. 15 Aſſ. 2. 20 E. 3 Admeaſurement 8. The reaſon of which opinions was for advancement of tillage, and the land to which, &c. was antient land, hide and gayne; but it being againſt a rule in law, viz. that when a man has as high and perdurable eſtate in rent, common, &c. iſſuing out of the ſame land, there it is extinct, and with this accords 24 E. 3. 25. 4 Rep. 38. a. Mich. 26 & 27 Eliz. B. R. reſolv'd in Tirringham's caſe.

Goldſb. 3. pl. 6. S. C. held accordingly.

8. In treſpaſs, &c. the caſe was, that the *abbot of D. was ſeized of a common out of the lands of the abbey of S, as appendant* to certain lands of the abbey of D. Afterwards both *thoſe abbeys were diſſolved*, and the *poſſeſſions of both given to the king to hold in tam amplo modo, as the lands of late abbots*, &c. who *granted the lands of one abbey to A. and of the other* abbey *to B*; adjudg'd that the words in tam amplo modo, &c. are to be conſtrued according to law, and no further, and by the law, the ſaid common cannot ſtand againſt the *unity of poſſeſſion*. 3 Le. 128. pl. 179. Paſch. 27 Eliz. C. B. Nelſon's caſe.

9. J. S.

9. J. S. was seised of 140 acres, and had common appurtenant *in 46 acres, 2 in the occupation of A. and the other 44 of B*; and he purchased the 2 acres in the occupation of A. yet the common concerning that is intire and extinct by the purchase. Goldsb. 53. pl. 4. Trin. 29. Eliz. Kimpton's case. Le. 44. pl. 56. Kimpton v. Bellamy, S. C. accordingly. —And. 159. pl. 203. S. C.

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adjudg'd, that by the purchase of part the whole common was extinct.——D. 339. Marg. pl. 45. cites 29 Eliz. S. C. adjudg'd.——S. C. cited Cro. E. 594. pl. 35. by Anderson Ch. J. by the name of Rampton's case adjudg'd.——The difference is between common appendant and appurtenant; for in the last case, by purchase of parcel of the land in which, &c. all the common is extinct. 8 Rep. 79. a. Trin. 7 Jac. resolv'd in Wiat Wild's case.

If a *commoner purchases parcel* of the land in which he has *common appurtenant*, this extinguishes all the common; Agreed. 2 Brownl. 297. Hill. 7. Jac. C. B. Morse v. Webb.——Brownl. 180. S. C. & S. P. accordingly, but otherwise it is of *common appendant*.

[17]

11. Prescription for common * appendant. *Unity* extinguishes this, but not common for arable land. Mo. 462. pl. 651. Hill. 39 Eliz. Bradshaw's case. Common appendant not extinguish'd by

unity as common appurtenant is. Mo. 463. pl. 654. Hill. 39 Eliz. C. B. Smith v. Bowsall.

* Quære if it is not false printed for (appurtenant) especially as common appendant is properly for arable land.

12. Common appurtenant to house and land is extinguished by *purchase of the land*. Cro. E. 570. pl. 6. Trin. 39 Eliz. B. R. per 2 J. Bradshaw v. Eyre.

13. A man who has common for his cattle levant to his tenement in such a field, *releaseth all his right and his common in part of the land*; Anderson, Beaumont, and Owen, J. contra Walmsley held that the whole common is extinct, and cited Rampton's case adjudged that when one purchaseth 1 acre of the field wherein he hath common, it is extinct. Cro. E. 593, pl. 35. Mich. 39 & 40 Eliz. B. R. Rotheram v. Green. Noy. 27. S. C. but seems not very clear. —2 And. 89 pl. 53. S. C. adjudg'd by 3 judges, that all the common was extinct.

14. A copyholder had common of estovers in the lord's woods appurtenant to his copyhold; and he purchased the freehold inheritance in the copyhold, and had words in his deeds of purchase, of all commons, &c. appertaining to the said messuage; yet it was adjudged, that the common, which he had, belonged to the copyhold estate, and was extinct; but if there had been special words to make a new grant of the like common as he had in the copyhold before the surrender, it seems it had been good. Mo. 667. pl. 915. Mich. 40 & 41 Eliz. Fort v. Ward. S. C. cited Cro. J. 253.

15. A copyholder had used to take *estovers to repair his hedges*; and the *lord granted unto him the freehold of the copyhold by the words of (grant unto him all the lands, tenements, and hereditaments thereto appertaining, and therewith used and occupied)* yet it was resolved he should not have common in the land of the lord. Cro. J. 253. pl. 8. cites 42 & 43 Eliz. B. R. Forth v. Ward. Mo. 667. pl. 915. Mich. 40&41 Eliz. Fort v. Ward, S. C. and says, that the grant had the words (of all

commons &c. appertaining to the said messuage) but adjudg'd, that the common belong'd to the customary estate which is determined, and so it did not pass; but if he had special words to make a new grant of such common as he had appurtenant to the copyhold before the surrender, it seems it had been good.——S. C. cited Gilb. Treat. of Ten. 210, 211. and observes the difference between the words of Grant in Cro. J. and those in Mo. and that in Mo. another reason is added, viz. that now he claims by the lord who cannot have common in his own ground; but this is a reason only where the

common is in the lord's ſoil; but the other holds where it is in another's ſoil, which is a much ſtronger caſe; for, as it ſeems, in ſuch caſe there is no way to continue the common; for by the grant of the freehold it is gone, and the lord can make no new grant of it, but in his ſoil he may.

A copyholder of inheritance, to which common belong'd by cuſtom, purchaſed the freehold by theſe words *(grant, bargain, and ſell the ſaid meſuage, with all the commons thereunto belonging.)* It was agreed, that it could not paſs by way of bargain and ſale. Holt Ch. J. ſaid, that the word (grant) being in the deed, if it had been pleaded by the way of grant, it had been good. But this being in treſpaſs, wherein the defendant juſtified for his common, it was adjudged for the plaintiff, Niſi, &c. Comb. 127. Trin. 1 W. & M. in B. R. Speaker v. Styant.

16. In caſe of a common *appendant*, if one *tenant of the manor purchaſes the ſeigniory*, and then *grants over the tenancy*, the common which he had before ſhall be ſtill appendant; for 'tis not extinguiſhed by the *unity*, but ſhall paſs with the tenancy, but otherwiſe of a *common in groſs*. Per Popham. Ow. 122. Mich. 3. Jac. B. R. in caſe of Jourdan v. Atwood.

[18] 17. If the *lord ſells his waſte, and the copyholder dies*, and the lord grants a new copy, he ſhall have his common. Arg. Brownl. 231. Swain v. Becket.

18. A *releaſe of common in one acre* is a releaſe of all. Brownl. 180. Morſe v. Webb.

Brownl. 180. Wood v. Moreton, S. C.—— Noy. 30 Cole v. Foxman, S. P. and the court held it no extinguiſhment, but apportionable, and no prejudice to the tertenant; and Hobart Ch. J. ſaid, that otherwiſe a grand inconvenience and miſchief would enſue; for by that all the commons in England ſhould be extinct, & ſalus populi eſt ſuprema lex. Et apices juris non ſunt jura.—— Brownl. 17 Hill. 14 Jac. Coles v. Flaxman, S. C.———— 4 Rep. 37. b. S. P. per cur. accordingly in Tirringham's caſe.

19. One who had common by preſcription to an houſe, and 49 acres of land, made a *feoffment* in fee to another, *of* 5 acres, *part of the land*; adjudged, that the common (whether appendant or appurtenant) is apportionable; and tho' one that has common appendant *purchaſes parcel of the land in which*, &c. yet the common ſhall be apportion'd; but in ſuch caſe common appurtenant by ſuch purchaſe ſhall be extinct, or if he takes leaſe of parcel all is ſuſpended. 8 Rep. 78 b. 79 a. Trin. 7 Jac. Wiat Wild's caſe.

Yelv. 189, 190. S. C. the words (cum pertinentiis) will not create a common; for the common before uſed was gain'd by cuſtom, and annex'd to the cuſtomary eſtate, and is loſt with it, the common not being in its own nature incident to the copyhold eſtate, but a collateral intereſt gain'd by uſage; quod nota; per tot. cur.——Brownl. 220. S. C. adjudg'd.—— 2 Brownl. 209. S. C. argued and adjudged.——Bulſt. 2. S. C. adjudged, per tot. cur. accordingly; and Fleming Ch. J. ſaid, that the ſole point in this caſe reſts upon the preſcription; for in this caſe he *ought to ſay in pleading, Talis eſt conſuetudo, but after the purchaſe he cannot ſay ſo*; for the purchaſe extinguiſhes the preſcription, and the common being by preſcription which is gone, the cuſtom is gone alſo; to which Yelverton J. agreed; and Williams J. ſaid, that a copyholder may intitle himſelf by pleading a uſitatum fuit, but when himſelf, by his own act, has determined his eſtate, he has hereby loſt his common; to which Yelverton and Crooke J. agreed.——S. C. cited, 6. Mod. 20. & 1 Salk. 366.———Noy. 136. Darſon v. Hunter S. C. adjudged.———S. C. cited Gilb. Treat of Ten. 210 accordingly; for the common was not appurtenant to the freehold eſtate granted by the lord, and therefore care ought to be taken to add words to continue the common and other profits apprendre to the copyholder after the infranchiſement.

20. A copyholder for life had common in the lord's waſte (as all the copyholders had by cuſtom of that manor). The *lord grants and confirms the ſaid copyhold lands cum pertinentiis* to him and his heirs. Reſolved by all the court that the purchaſer ſhould not have common there, as the copyholder had; for he had his common by reaſon of cuſtom, which annexed the ſame to his cuſtomary eſtate; which being deſtroy'd by his own act, *by making it a freehold, the common is determined*, and cannot continue, *without ſpecial words*; and the general words (cum pertinentiis) are not ſufficient to paſs the common. Cro. J. 253. pl. 8. Mich. 8 Jac. B. R. Marſham v. Hunter.

21. *In-*

21. *Inclosure of part* is an extinguiſhment of common for cauſe of vicinage. Brownl. 174. Trin. 12 Jac. Bacon v. Palmer. So an inclosure of part is an extinguiſhment of his common in the waſte, in which he ought to have common. Noy. 106. Mich. 44 & 45 Eliz. C. B. Bradſhaw v. Bockingham.

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23. Copyholder has common *in alieno ſolo*, the lord *enfeoffs* the copyholder the common is extinguiſhed; but if he has common *in the lord's waſte*, and the lord enfeoffs him of the copyhold *with all commons*, 'tis no extinguiſhment of the common. Brownl. 173. Trin. 19 Jac. Lee v. Edwards. Hob. 190. pl. 235. Trin. 15 Jac. Leets v. Edwards S. C. but no opinion—

S. P. For in the firſt caſe it properly and ſtrictly *belongs to the lord*, but in the laſt caſe it belongs *to the eſtate*. 1. Salk. 366. per Holt. Ch. J. in caſe of Crowther v. Oldfield.

24. S. ſeiſed of the manor of W. claimed common of paſture belonging thereto in all the open places of the Foreſt of Windſor within the bayliwick of F. and made a title by a grant of R. 1. to [19] the Abbot of Waltham Holy Croſs in Eſſex, and ſhewed the *diſſolution of the abbey*, and the *poſſeſſions coming to the crown*, and a *grant of the ſaid manor* to one N. with words of *tot*, *tanta*, *talia*, *libertates*, *privilegia & franches'* &c. *quot* &c. *aliquis abbas* &c. and ſo by meſne conveyances *brought the title down to himſelf*, and pleaded the ſtatute for reviving the liberties in the crown. It was held by Noy that, admitting a good title in the abbot, yet by the diſſolution there was an *unity of poſſeſſion in the crown* which *deſtroy'd the common*, and it ſhall not be revived by the general words of tot, tanta, talia, &c. libertates, &c. becauſe it is neither franchiſe, liberty, or privilege; and ſo it had been adjudged for land in Brayden Foreſt, formerly the poſſeſſions of the abbot of Malmſbury. But if the king had granted, by *ſpecial words*, *tot*, *tanta*, *& talia*, &c. *communias*, &c. *quot*, &c. in ſuch caſe, if there was any *common appendant or appurtenant* to that manor or lands in the abbot's hands, it *ſhould be revived*; *but not* ſo of a *common in groſs*, for then every one that hath any part of the abbot's poſſeſſions, ſhould have as great a common by ſuch words as the abbot himſelf had, and ſo the king's lands would be infinitely ſurcharged, but in caſe of common appendant or appurtenant, there is no ſuch prejudice, for then no man can common with more cattle than is proportionable to his land, and ſo it was adjudged. Jo. 285. 8 Car. Sir Edmund Sawyer's caſe.

25. By Glin, Ch. J. if copyholders have common *in the ſoil of a ſtranger*, it remains notwithſtanding the *infranchiſement of the land*, and ſhall be enjoy'd by all tenants of the land as it was before by copyholders. 2 Sid. 84. Trin. 1658.

26. The *lord* of the manor *infranchiſes a copyhold with all commons thereto belonging* or appertaining, and *afterwards buys in all the other copyholds*, and then diſputes the right of common with the copyholders he had infranchiſed, and at law recovers againſt the plaintiff, becauſe the preſcription of common to the copyhold was deſtroy'd by the infranchiſement; and the grant of the copyhold with all common thereunto belonging and appertaining gives no right of common, becauſe when infranchiſed, no common in point of law

belonged or appertain'd thereunto. Per cur. *decreed* the plaintiff ſhould hold and *enjoy* againſt the defendant *the ſame right of common as belonged to the copyhold*, and coſts againſt the defendant. 2 Vern. 250. pl. 236. Hill. 1691. Styant v. Staker.

27. In a nonſtante the defendants pleaded, that the manor of F. is parcel of the demeſnes of the dutchy of Cornwall, and that the king, &c. was ſeiſed of the manor in fee, as parcel of the ſaid dutchy, and that H. common in which, &c. was parcel of the ſaid manor, and that all the tenants of any tenements held of the ſaid manor lying in the vill of H. have, time out of mind, had common of paſture for all the cattle levant and couchant, &c. at all times of the year, in *Hermitage common*, and that the proſecutor de ſon tort had encloſed it, ſo as they could not enter &c. and had not left them ſufficient common, and iſſue was taken upon this preſcription modo & forma &c. and upon evidence at the bar it appeared, firſt, that all the tenements in Hermitage, unto which the common of paſture was claimed, were heretofore *parcel of the abbey of Sarum*, and that *by the diſſolution* of that abbey the ſame *came to H.* 8. before the birth of Ed. 6. *So that the dutchy of Cornwall was likewiſe, at the ſame time, in the poſſeſſion of H.* 8. *for want of a duke of Cornwall, and hereby an unity of poſſeſſion* both of the tenements to which the common of paſture appertained, and alſo of Hermitage common, [20] (the place where the common of paſture was to be had) was at that time in poſſeſſion of king H. 8. and it likewiſe appeared, that *the tenements in Hermitage were granted to the ſeveral tenants after the unity of poſſeſſion*, and thereupon the counſel of the proſecutor inſiſted, that by this unity the preſcription was deſtroyed, and the common of paſture quite extinct. But after much debate it was unanimouſly reſolved, per Holt Ch. J. and the whole court, that this was not ſuch an unity of poſſeſſion as would deſtroy the preſcription; for though king H. 8. had an eſtate in fee in the lands *a qua*, and alſo in the lands *in qua*, yet he had not as perdurable an eſtate in one as he had in the other; for the quality of the eſtates differed, becauſe in the manor of Fordington, which was parcel of the dutchy of Cornwall, and *in Hermitage common in qua*, &c. which was parcel of that manor, king *H.* 8. *had only a fee determinable on the birth of a duke of Cornwall*, which is a baſe fee; *but in the tenements in Hermitage parcel of the abbey a qua, he had a pure fee ſimple indeterminable jure coronæ*, and therefore an unity of ſuch eſtates works no extinguiſhment; for *where an unity of poſſeſſion doth extinguiſh a preſcriptive right, 'tis requiſite that the party ſhould have an eſtate in the lands a qua, and in the lands in qua, equal in duration, quality, and all other circumſtances of right.* Carth. 240, 241. Paſch. 4. W. and M. B. R. The King v. Hermitage inhabitants & al'.

28. *Releaſe* of common *in* 1 *acre* is an extinguiſhment of the whole common. Per cur. Show. 250. Paſch. 4 W. & M. in caſe of Miles v. Etteridge.

29. Common *ſans nombre in groſs* cannot be extinguiſhed by purchaſe of parcel of the land; per Powell J. lord Raym. Rep. 407. Mich. 10 W. 3.

30. Where

30. Where a *copyholder claims common in the waſte of the manor*, it properly and ſtrictly belongs to his eſtate, and if he infranchiſes his copyhold his common is loſt; *but where* he claims it *out of the manor*, it belongs to the land, and not to the eſtate; and if he infranchiſes the eſtate, yet the common continues; this diverſity was taken by Holt, Ch. J. 1 Salk. 366. pl. 5. Hill. 4 Ann. in caſe of Crouther v. Oldfield.

*As if copyholder of one mannor has common in waſte of another mannor, he muſt preſcribe in the name of his lord, and ſay, that the lord of the mannor, whereof he is copyholder, uſed time out of mind to have common for him and his copyholders, and there infranchiſement of copyhold does not extinguiſh the common, but is a derivative right which the copyholder has; and ſo, if it be taken as appendant to land, infranchiſement will not extinguiſh it. 6. Mod. 20. Mich. 2 Annæ B. R. in S. C.

(F. a) Revived.

1. A Parſon had common *appendant to his parſonage* out of the lands of an abbey, and afterwards the abbot had the parſonage *appropriated* to him and his ſucceſſors. By Windham and Mead J. contra Dyer, the abbot had not as perdurable eſtate in the one as in the other; for the parſonage may be *diſappropriated*, and then the parſon ſhall have the common again. Godb. 4. pl. 5. Hill. 23. Eliz. C. B. Anon.

2. Common appurtenant to a meſſuage was extinguiſhed by unity of poſſeſſion in the lord's hands. A grant by the lord of the *meſſuage with all common appurtenant*, does not paſs the common extinct, but a grant of all commons *uſually occupied with the meſſuage*, would have paſſed ſuch common as the firſt was. Mo. 467. pl. 663. Paſch. 39. Eliz. B. R. Sandeys v. Olliff.

3. Common appurtenant to houſe and land is extinguiſh'd by *purchaſe of the land*; afterwards the purchaſer *grants a leaſe* of the houſe and land, *with all commons, profits, &c.* thereunto appertaining, or *uſed or enjoyed with the ſaid meſſuage*, this grant of the common is good; for tho' 'twas not common in the purchaſer's hands, yet 'tis quaſi common uſed therewith; and tho' 'tis not the ſame common as was uſed before, yet 'tis the like common. Cro. E. 570. Pl. 6. Tr. 39. Eliz. B. R. per 2. J. Bradſhaw v. Eyre. [21]

4. If a copyhold meſſuage, to which common in the demeſnes of the lord belongs *eſcheats*, and the lord *grants it* per nomina &c. *Communiarum quarumcunque dicto meſuagio ſive tenemento &c. ſpectant' ſive in aliquo modo pertinent' vel cum eodem meſuag' dimiſſo uſitat'*. Adjudged, that this enures as a new grant of the ſame common, tho' the ancient common, which was by preſcription, was determined by the unity of poſſeſſion in the lord. Cro. E. 794. pl. 40. Mich. 42 and 43 Eliz. C. B. Worledge v. Kingſwell. 2 And. 168. pl. 91. S. C. and S. P. agreed.

5. A. ſeiſed of a *manor* in which was a *cuſtom, that every tenant for years* of an ancient tenement, and cloſe within the ſaid manor, ſhould have common of turbary &c. in the lord's waſte, becomes ſeiſed likewiſe of an ancient tenement and cloſe which had been parcel of the ſaid manor; and *the lord* being *ſo ſeiſed of the inheritance of the tenement*, and cloſe, *and alſo of the manor*, granted the tenement 2 Brownl. 222. S. C. ſtates it, that the meſſuage and cloſe came into the lord's hands,

and that afterwards he granted it to J. S. in fee, and that J. S. bargained and sold to J. N. with all commons, profits, &c. used, occupied and pertaining to, &c. and after granted the waste to another; and that it was conceived by all, but Williams J. that the lessee for years [by which he must mean J. N. for he said nothing before of any lease for years] should have common, but that they did not give any absolute opinion as to that.

tenement and close to B. for a term, *with all commons appurtenant to the said messuage and close*. It was held by 4 justices, that the common passed. Bulst. 17. 18. Hill. 7 Jac. B. R. Grymes v. Peacock.

(G. a) Suspended.

8 Rep. 79. a. Trin. 7 Jac. S. P. per cur. in Wild's case.—S. P. Arg. Goldsb. 14. in pl. 6.

1. COmmoner *takes a lease of one acre*, part of the land out of which his common is issuing, his whole common is suspended. 9. Rep. 135. a. in a nota of the reporter and cites 11 H. 6. 22. a. b.

2. Where a *commoner disseises the lord of the soil*, his common is suspended for the time, and when the *lord re-enters* he *shall have trespass* for the same trespass, and the commoner has lost his common during this time. Br. Common. pl. 12. cites 16 H. 7. 11.

(H. a) Appendant. Pleadings.

Br. Commoner, pl. 17. cites S. C.

1. ASSISE *of common of pasture in F. appendant to his franktenement in* C. and made *plaint of common in* 200 *acres of land*, 100 *acres of meadow, and* 100 *acres wood*, viz. *in the third part of the land for all the year, and in 2 parts from the time that the grain is cut and carry'd away till it be resown*; and so of the residue, &c. with all manner of beasts. Br. Plaint. pl. 28. cites 11 Ass. 5.

2. In assise the plaint was *of common with all manner of beasts*; per Fisher. *Goats and geese* are not beasts of common; judgment of plaint, & non allocatur; the reason seems to be because it shall be *intended* beasts which are *commonable*. Br. Common. pl. 42. cites 25. Ass. 8.

[22]

3. In action of common appendant, it is a good title, *that I and those whose estates*, &c. *have been seised time out of mind as appendant*. Br. Prescription, pl. 51. cites 31 Ass. 23.

This should have been at (A a).

4. *Assise of common in an acre of land* from Michaelmas to Candlemas, if the land be not sown; and if it be sown before Candlemas, then of common from Mich. till the land be sown, with all manner of beasts; Finch. said, *Assisa non; for he has there, of antient time, a house and* 40 *acres of land, and that which the plaintiff calls an acre of land is only a rood of land joining to his house*; and because his house was too strait for his dwelling and his necessaries to his estate, *he inclosed the rood of land, and upon part built a house necessary to his estate*, viz. 2 granges, and 2 pigeon-houses, and of the remainder made a curtilege, and demanded judgment if assise, and was *compelled to shew how much was built upon, and how much was curtilege*, who said that the moiety to the one and the rest to the other; the plaintiff said that this is an acre, and also that there is a chace

chace and re-chace of beaſts from the vill, and that the houſe was large enough for the franktenement which he had in the ſame vill; and the *iſſue was, whether it was incloſed for neceſſity or not*, and not whether he had ſufficient whereof before for his franktenement there; for this is warranted by the ſtatute, that for neceſſity he may do it of his ſoil. *Weſt.* 2. 46, which ſpeaks of augmentation of court neceſſary, or curtilage; quære if a man may *incloſe land where there is a common way?* it ſeems that he may, leaving paſſage there. Br. Common. pl. 25. cites 32 Aſſ. 5.

5. In *treſpaſs*, if the *defendant juſtifies for common appendant in the ſame place*, it is no plea for the plaintiff that this is *his ſeveral, priſt*, &c. but ought to ſay further *abſque hoc, that he had common there modo & forma*; quod nota; per judicium. Br. Traverſe per, &c. pl. 42. cites 49 E. 3. 19.

6. In *treſpaſs in the county of G.* the *defendant juſtified, becauſe he was villein of the prior of W. and that the ſaid prior and his predeceſſors, time out of mind, have had common in the place*, &c. *appendant to the land in the county of W. for them and their tenants at will and villeins, by which he uſed the common*, &c. and the plaintiff *ſaid that his ſeveral ſoil, priſt*, &c. & non allocatur, without traverſing abſque hoc that the other has common there prout, &c. by which he traverſed accordingly; quod nota. Br. Replication. pl. 11. cites 49 E. 3. 19. Heath's Max. 71. cites S. C.

7. In *replevin*, the defendant avow'd, becauſe in the place where &c. the defendant and certain others, *after the hay is cut and carry'd away, ought to have common there*; *but by cuſtom* there uſed *none of them ought to have common there till the lord has firſt enter'd* into the common *with his beaſts*; and the biſhop of L. is lord of the manor within which the place is, &c. and becauſe the plaintiff had enter'd there to common before that the lord had enter'd with his beaſts, he avow'd the taking; and per tot cur, this cannot be a cuſtom; for if the lord will not enter, it is not reaſonable that the commoner ſhould loſe his common. Br. Cuſtoms, pl. 12. cites 2 H. 4. 24.

8. In *quo jure* it is a good *plea, that the plantiff has nothing in the land to which he claims the common*; quod nota bene. Br. Droit de recto. pl. 45. cites 7 H. 4. 12.

9. In treſpaſs, a man *need not preſcribe* in common appendant, but *ſhall ſay that he is ſeiſed of an acre of land*, &c. *to which he has common appendant there, by which he put in his beaſts*, &c. Per cur. Br. Preſcription, pl. 30. cites 4 H. 6. 13. Br. Common, pl. 11. cites S. C. —*For if he preſcribes*, it ſhall be *intended that he claims it by the preſcription*, and not as appendant; quod nota. Br. Preſcription, pl. 30. cites 4 H. 6. 13.

10. *Entry in nature of aſſiſe*; the *defendant claim'd common by which he uſed the common*; *abſque hoc, that he claimed any thing in the land, unleſs the common*; *& abſque hoc, that he has any other poſſeſſion or eſtate in the land*; and permitted; but the plaintiff imparl'd. Br. Traverſe, per, &c. pl. 66. cites 8 H. 6. 33. [23]

11. If a man brings *aſſiſe de libero tenemento*, and makes his *plaint of common of paſture*, the writ ſhall abate; for the *writ ſhall be of common of paſture*; per Paſton. But Brook ſays quære legem of the writ of common of paſture. Br. Common. pl. 48. cites 11 H. 6. 22.

12. Note,

12. Note, by the king's attorney, where a *thing ſtands with common right*, as in the caſe of *common appendant*, it is ſufficient to ſay that he has common *for ſo many beaſts, without alleging preſcription*; *but* otherwiſe in caſe of *common appurtenant*, which is againſt common right. Lat. 88. cites 18 H. 6. 25.

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13. He who *juſtifies* for common appendant need not *preſcribe in it* alſo. Br. Common. pl. 35. cites 21 H. 6. 10.

Br. Treſpaſs. pl. 30. cites S. C.

14. In *treſpaſs* 'twas admitted a good bar, *that* the plaintiff [defendant] *is ſeiſed of ſuch an acre, and that he and all thoſe whoſe eſtate, &c. have had common* in the place where the treſpaſs is ſuppoſed, &c. time out of mind; per quod he uſed his common, which is the ſame treſpaſs, &c. without ſhewing appendancy or otherwiſe, and yet 'twas ſaid that in *aſſiſe* thereof, or by way of title, 'tis otherwiſe for there he muſt ſhew certainly; note the diverſity. Br. Titles. pl. 2. cites 33 H. 6. 32.

15. Treſpaſs of trees cut, the defendant *preſcribed* there *for him and his tenants at will* in his manor of B. *to take eſtovers* in B. to enter the place where, &c. *to repair ancient hedges within the ſame manor, and to burn in halls, chambers, kitchens* and ovens in the ſame manor, and ſaid that he took the trees at the time, &c. to burn within the ſame manor, &c. Per Fairfax, he ought to *ſhew a certain place where he burnt them*, for this can't be in a new-built place, & non allocatur; for he may burn it in any place within the manor, and *if he burns them otherwiſe than he ought, this may come in iſſue by ſhewing of the other party*; but by all the juſtices, if he juſtifies to mend hedges of the manor, he *ſhall ſhew certain what hedge he amended*; for iſſue may come of it, whether the hedge was ſufficiently repaired or not at the time, &c. Br. Common. pl. 31. (30) cites 7 E. 4. 27.

But in ſome caſe he ought to ſay *that he and thoſe whoſe eſtate, &c. have had common for them and their tenants at will, &c.* Br. Common. pl. 12. cites 9 E. 4. 3.

16. In treſpaſs the defendant juſtified, becauſe he, and all thoſe whoſe eſtate he has in ſuch lands, have had common appendant to the ſaid land in the place where, &c. with all manner of beaſts levant and couchant upon the ſame land, by which, &c. Per Fairfax, this is common appurtenant; for if it be common appendant he ſhall not have common with all manner of beaſts; per Littleton, it is a good plea, *that ſuch a one whoſe eſtate*, &c. *have had common*, &c. *who leaſed to the defendant at will, by which he put in his beaſts*, &c. as well as tenant for years, &c. Br. Common. pl. 12. cites 9 E. 4. 3.

As if I have a *manor* in which have been *tenants at will*, time out of mind, who have *uſed common in right of the lords* of the manor, &c. in this caſe he cannot ſay that he and all thoſe whoſe eſtate he has have had common; for this was not uſed by them but by the tenants at will. Ibid.

As in treſpaſs of a cloſe broken, if the *defendant ſays that A. G. has common there*, and *B. the like, and C. the like, and he*, as their ſervant, and by their command, put in the beaſts, this is double; per cur. But if he ſays that he *put in 2 beaſts for A.* and 3 *for B. and the reſt for C.* this is a good plea, and is not double; per Cur. Br. Double Plee. pl. 59. cites S. C.

17. Where *one juſtifies as ſervant to ſeveral defendants*, this ought to be *ſeverally* likewiſe, viz. *ſo many beaſts for the one*, and *ſo many beaſts for the other*, & *ſic de ſingulis*. Br. Common. pl. 9. cites 15 H. 7. 10.

18. In

18. In *treſpaſs*, the *defendant juſtified as commoner to dig the land, to keep the water out of the common, and out of his own land adjoining*; and by the beſt opinion it is double. Quere. Br. double. pl. 111. cites 13 H. 8. 15.

19. If one has an *aſſiſe* of common and *pending the writ he uſes the common*, the *writ ſhall abate*; but, if the cattle eſcape into the land, it ſhall not abate the writ, altho' they feed there. F. N. B. 180. (M.) Thel. Dig. 188. Lib. 12. Cap. 24. pl. 3. cites 33 Aſſ. 22. S. P.

20. In *aſſiſe* of common, *all the tenants of the land*, out of which the common is, *ought to be named*. F. N. B. 180. (L.)

21. If the common be *apportioned by the purchaſe of part*, and an *aſſiſe* is brought, the *tertenant of the land charged with the reſidue of the common, ſhall only be named*; reſolv'd. 4. Rep. 38 a. Mich. 26 & 27 Eliz. B. R. in Tirringham's caſe.

22. There *needs no preſcription* for common appendant, becauſe ſuch common is of common right, and commences by operation of law in favour of tillage. Per cur. 4 Rep. 37 a. Mich. 26 & 27 Eliz. B. R. in Tirringham's caſe.

23. In replevin, the defendants made conuſance as bailiffs to G. B. damage-feaſant, the plaintiff *replied, and preſcribed, that he and all thoſe whoſe eſtate he hath in* 40 *acres, have had common* for all manner of cattle *in* 6 *acres, whereof the place where, &c. is parcel*; the defendants *rejoin'd, that the plaintiff had common in* 40 *acres, whereof the* 6 *acres are parcel*, and that before the taking, *&c.* the plaintiff had purchaſed two acres parcel of the 40 acres, by which the common was extinct; and upon demurrer it was argued, that the common for the 6 acres ſhall be intended common in 6 acres only; for *common in* 40 *acres cannot be intended the common in* 6 *acres*; and the whole court was clear of opinion, that this rejoinder was not good without a traverſe (viz.) *abſque hoc, that he had common in* 40 *acres, of which the* 6 *acres are parcel*. Le. 43. pl. 56. Mich. 28 and 29. Eliz. C. B. Kimpton v. Bellamie. And. 159. pl. 203. S. C. but S. P. does not appear — Gouldſb 73. pl. 4. S. C. but S. P. does not appear.

24. If the *huſband ſeiſed in right of his wife pleads, that he and all thoſe whoſe eſtate they had*, have uſed to have a common appendant; per cur. that is naught, for the eſtate is in the wife; but he ought to have pleaded, that he and his wife, and all thoſe whoſe eſtates the wife has, or whoſe eſtates they have, &c. Noy. 66, 67. Godbolt v. Mallet.

25. Plaintiff *counted that the defendant put in his beaſts*, &c. The jury *found, that he did not put them in, but that they came in by eſcape*; yet the plaintiff ſhall have judgment; for the feeding of the graſs is the ſubſtance adjudged. 9. Rep. 113. b. cited per cur. as Hill 5. Jac. C. B. Ingland v. Crogate.

26. A. ſeiſed of 2 *yard land to which common was appurtenant, for* 4 *beaſts*, 2 *horſes and* 60 *ſheep, demiſed divers parcels* of the 2 yard-land to J. S. and R. S. *for* 400 *years*, who entered and were poſſeſſed. In replevin A. *preſcribed*, that the place where was part of the common, and that he was and is ſeiſed of 2 yard-land, and that he and all thoſe whoſe eſtates, &c. The avowant traverſed the preſcription, and upon the finding the whole matter as before, it was adjudged for the plaintiff; for the preſcription had been true, tho' A. had

had demiſed all the 2 yard-land, for he is ſeiſed in his demeſne as of fee of the freehold of them, to which, &c. and the inheritance and freehold of the common, after the years ended, is appendant to the lands, and ſo the iſſue found for the defendant; and had the avowant not traverſed the preſcription, but pleaded the leaſe, yet that would not have ſuſpended or diſcharged the common; for in ſuch caſe, each ſhould have common ratably, ſo as the common be not ſurcharged. 13. Rep. 65. Hill. 7 Jac. C. B. Morſe v. Webb.

[25] 27. There is *no difference* when the *preſcription* is *for cattle levant* and *couchant*, and *for a certain number of cattle levant and couchant*; *but* when the preſcription is *for common appurtenant* to land, *without alledging, that it is for cattle levant and couchant*, there a *certain number* of the cattle *ought to be expreſſed*, which are intended by the law to be levant and couchant. 13 Rep. 66. Hill. 7 Jac. C. B. Morſe v. Webb.

28. A man *preſcribes* to have common *in* 100 *acres*, and *ſhews, that he put his cattle in* 3 *acres, without ſaying, that thoſe* 3 *acres are parcel of the* 100, yet good; and Hitcham ſaid, that ſo it was adjudged in this court. Hetl. 137. Paſch. 5 Car. C. B. in Moor's caſe.

29. A man alledged a cuſtom to put in his horſes, &c. and the cuſtom was for horſes and cows, and adjudged good, cited by Richardſon as a Huntingtonſhire caſe. Hetl. 137. Paſch. 5 Car. C. B. in Moor's caſe.

30. In treſpaſs, &c. the defendant pleaded, that A. and his wife were ſeiſed of the manor of C. and of a parcel of land containing 42 acres, and of a meſſuage and 2 yards-land parcel of the ſaid manor in the right of his wife for life, the remainder to J. S. and that they all joined in a *fine of* the ſaid *meſſuage and 2 yard-lands to the defendant and his heirs*, and further, *by the ſaid fine, granted him common for 4 horſes, 5 beaſts, &c. in the ſaid manor and lands*, and that he put in his cattle to uſe the common; it was objected, that the plea was not good, becauſe he doth *not plead, that it was waſte or common*; but Berkley and Crooke held the plea good, and that by the plea, as the fine is, he may claim common in any part of the manor; for there is not any reſtraint to the waſts or commons, but it is granted generally in his manor; and for that point they agreed (cæteris juſticiariis abſentibus) to give judgment for the defendant; but for another part, wherein the leſſee preſcribed to have common it was clearly ill, it was adjudged for the plaintiff. Cro. C. 599. pl. 20. Mich. 16 Car. B. R. Stringer's caſe.

Ibid. 28. the reporter, who was of counſel with the plaintiff, adds a nota, that there was another fault in the plea, becauſe it was not averred, that the cattle were levant

31. Treſpaſs for *breaking his cloſe*, &c. *treading down his graſs, and feeding it with cattle*; the defendant, as to breaking the cloſe, pleads Not guilty; and as to the reſt he *pleads in bar*, that Sir T. B. was ſeiſed of the manor of W. and preſcribes in Sir T. B. *for common* in the place where, &c. *for all his commonable cattle levant and couchant*, &c. *and* ſaith, *that the ſaid Sir T. B. did appoint the defendant to take care of his cattle put into the ſaid cloſe*; *and* further, *that the ſaid Sir T. B. cauſed ſeveral of his commonable cattle to be put therein, whereupon the defendant entered into the ſaid cloſe to ſee that they had no damage, and in entering he trod down the graſs there, which is the ſame reſidue of the treſpaſs*; and upon demurrer to this

plea

plea adjudged to be ill, becauſe the defendant did *not ſhew, that thoſe were his own cattle, or that he put them into this cloſe*, for otherwiſe he cannot be guilty of a treſpaſs; and here the defendant had juſtified the treſpaſs with cattle, and yet he has not confeſſed it or ſaid any thing to that purpoſe; ſo that his plea being ill in part is ill in all, ſuch an entire plea not being dividable; and of that opinion was the whole court, and judgment for the plaintiff. Saund. 27. Mich. 18 Car. 2. Manchester (earl) v. Veal. and couchant upon the manor; but that this was not moved.

32. Commoner brought an action for incloſing and depriving him of his common; and ſets forth the *cuſtom, that for 2 years, when the land uſed to be ſowed, he had common from the time that the corn was reaped, quouſque reſeminaretur, and every third year, when the land uſed to lie fallow, he had common per totum annum.* It happened *the land was not ſowed in ſeven years or more*, the queſtion was, What common the party might claim? (and by Hale) he had right to put in his cattle per totum tempus that it was not ſowed; for when his cattle were in, he was not bound to take them out quouſque reſeminaretur; and if the owner did not ſow it, he might continue his cattle. Freem. Rep. 23. pl. 31. Hill. 1671. Walker v. Miller.

33. It was held, that a man may *juſtify* putting in his cattle *hac vice by a licence*, without ſaying it was by deed; *but if* it be a licence to put in his cattle *for a certain time it muſt be by deed*, for that is tantamount to a grant of common. Freem. Rep. 190. pl. 194. C. B. Smith v. Fetherwell. [26]

34. In caſe brought *by a commoner againſt a ſtranger*, for putting his cattle into the common per quod communiam in tam amplo modo habere non potuit, the defendant *pleads a licence from the lord* to put his cattle there, *but does not aver there is ſufficient common left for the commoners*, and therefore adjudged no good plea; and tho' it was objected, that the plaintiff might reply and ſhew that there was not enough, yet it was agreed that he need not, the declaration as to that being full enough, and it being the very giſt of the action, the defendant ſhould have pleaded it. 2 Mod. 6. Hill. 26 & 27 Car. 2. C. B. Smith v. Feverel. Freem. Rep. 190. pl. 194. Smith v. Fetherwell, S. C. held accordingly. —But in an *Action upon the caſe by the commoner againſt the lord*, the plaintiff muſt particularly *ſhew the ſurcharge*. 2 Mod. 7. per curiam in S. C.

35. A commoner brought an action upon the *caſe for eating up his common*, and *declar'd, that he was ſeiſed of Black-acre to which he had common appendant*, &c. Exception was taken, becauſe he did *not ſhew what* title, or what *eſtate he had to or in Black-acre*; but it was over-ruled, for that it was but a poſſeſſory action, and his ſeiſin of Black-acre *but inducement*. Freem. Rep. 458. pl. 624. Mich. 1677. Anon.

36. Adjudged, that if a man has *common for a certain number* of cattle *belonging to a yard-land*, he need not *ſay levant upon the* yard-land; ſed aliter, if it were for a common *ſans* number. 2 Mod 185. Hill. 28 and 29 Car. 2. B. R. Stevens v. Auſtin.

37. In replevin, the defendant avowed for damage feaſant on his common; and upon a demurrer to his avowry it was adjudged not good, becauſe he did *not ſhew ſome particular damage to himſelf*, or that he could have his common in tam amplo modo quo debuit & conſuevit; 3 Lev. 104. Woolton v. Salter, S. C. Paſch. 35. Car. 2. C. B.

and tho' 2 precedents were cited, the one out of Raſtal's Entries, and the other out of Coke's Entries to the contrary, that the court took no regard to them, they being without argument, and they took the law to be all one in avowry as in actions on the caſe, that commoners cannot diſtrain any more than they can have action on the caſe, without alleging, that he is damaged in the common.

conſuevit; for a commoner cannot juſtify to diſtrain the beaſt of a ſtranger, without ſhewing how he is damnified in his common. 3 Salk. 94. pl. 9. Woolſton v. Slater.

Skinn. 137. pl. 8. Molliton v. Trevillian, S. C. adjudg'd for the defendant.

38. In *replevin* for 6 cows, the defendant *avows for damage feaſant*, plaintiff *replies a ſeiſin of certain lands, and a right to common of paſture for beaſts levant and couchant* on thoſe lands; and thoſe 6 cows being his cattle, and levant and couchant there, he put them in, &c. Defendant *rejoins* with an *abſque hoc, that thoſe were the proper cattle of the plaintiff levant and couchant on thoſe his lands*; demurrer thereto; the court held the traverſe good, and the judgment was for the avowant. 2 Show. 328, 329. pl. 337. Mich. 35 Car. 2. B. R. Manneton v. Trevilian.

And in ſuch an action againſt the lord, *the ſurcharge muſt be particularly ſet forth*, that the copyholder could not enjoy his common; *but* the plaintiff *need not* ſhew the ſurcharge particularly *againſt a ſtranger*. 2 Mod. 6. 7. Hill. 26 & 27 Car. 2. C. B. Smith v. Feverell.——Freem. Rep. 190. pl. 194. S. C. Held that in action for putting in cattle whereby he could not enjoy his common in tam amplo, &c. and the defendant *pleads the licence of the lord*, he ought to aver that there was ſufficient common left.

39. In caſe againſt J. S. for putting his cattle into the common, *ſufficiency of the common*, whether the commoner has ſufficient or not, *is traverſeable*, if pleaded ſo by the defendant; but *caſe, &c. againſt the lord* too will lie, if he overcharge the common, at the ſuit of a commoner; but the lord may put into the common beaſts of warren as well as other beaſts. 1 Lutw. 101. 107. Hill. 6 W. 3. Haſard v. Cantrell.

[27] 40. Common was claim'd thus, viz. *a tempore fractionis campi* (it being a common field) *until* &c. After verdict for the plaintiff, it was moved to be inſenſible and uncertain what common was here claim'd; and though a fractione campi may be an expreſſion in the country, yet the law knows not the meaning of it, and Holt Ch. J. was of that opinion, but Gould J. held it well after verdict, though it had been ill on demurrer; but Holt Ch. J. ſaid, the verdict cannot aid a thing unintelligible; for it has only found the common as the plaintiff has replied; ſed adjornatur. Ld. Raym. Rep. 645. Hill. 13 W. 3. Hockley v. Lamb.

41. In *treſpaſs againſt a commoner*, he may *plead not guilty, and give his right of common in evidence*, cited by Holt Ch. J. to have been ſo held; but he ſaid he cannot think ſo, but he ought to plead ſpecially, and ſhew his title; otherwiſe of the lord of the waſte, he may plead not guilty and give his title in evidence. 2 Ld. Raym. Rep. 1134. Paſch. 4 Annæ, in caſe of Winton Mayor v. Wilks.

42. A man that *claims common* in another man's land *muſt ſet forth a title*; but one that is in poſſeſſion need not ſet out a title. 11 Mod. 53. pl. 29. Paſch. 4 Annæ, B. R. Anon.

10 Mod. 184. Jack on v. Laveright, S. C. it was

43. *Replevin*; the defendant *avowed for damage feaſant in* 100 *acris terræ parcel' communiæ paſturæ* &c. but becauſe it was *not ſet forth that he could not otherwiſe enjoy his common*, judgment was

againſt him; for without a particular damage, a commoner cannot diſtrain the cattle of a ſtranger, nor can he have an action upon the caſe, without ſaying that he could not otherwiſe enjoy his common. And here it was held, that *communia* did include the place in which &c. ſo that if this be the ſenſe of the word in any caſe, it ſhall be here ſo intended after a verdict; the ſame anſwer ſerves as to the word *terra*, and it ſhews that it is taken in the ſenſe of the word, which is not ſo proper and ſtrict as the other, (i. e.) it is not ſo formal, and uncertainties are always help'd by a verdict. Trin. & Mich. 12 Ann. B. R. Jackſon v. Laverack.

urged, that the word communia ſignified not the place, but the right of common-ing, and a right being a thing of an incorporeal nature, was no more capable of being incloſed than a rent, but [in the margin ſays, that] judgment in C. B. was affirmed, becauſe the word communia uſed in the declaration does in common parlance, and in acts of parliament ſignify a common, though in legal proceedings it is generally uſed for an incorporeal right.

(I. a) In Groſs, &c. Pleadings.

1. IN treſpaſs, the defendant *juſtified for common appendant by preſcription*. The plaintiff ſaid, that de ſon tort demeſne, abſque hoc that the defendant had common there, and ſo to iſſue without argument. Br. De ſon tort, &c. pl. 43. cites 22 Aſſ. 42.

2. Aſſiſe of common by the parſon of D. and made his plaint of common in groſs, and *that he and his predeceſſors, parſons, have been ſeiſed of land*, &c. The *defendant ſaid, that never ſeiſed as in groſs, and if* &c. *ſeiſed as appendant at his will*, and it was accepted for a good plea. Br. common, pl. 44. cites 33 Aſſ. 9.

3. Treſpaſs of trampling his graſs; Moile ſaid, that *the defendant is ſeiſed of ſuch a houſe, and he and all thoſe whoſe eſtate he has in the houſe, have had common in the place where* &c. time out of mind, for 20 beaſts, *by which he put in* 12 *beaſts* to uſe the common. Judgment &c. Per Newton, the preſcription is not good; for he *ought to claim as common appendant*, or common *in groſs*, and he does not ſhew that this is common appendant, *nor does he claim* the commoh *as for beaſts levant and couchant upon* the ſaid houſe, *nor that he ought to have common by reaſon of the ſaid houſe*, and he cannot claim as common in groſs, if he does not ſay that ſuch a one, and all his anceſtors have had ſuch common time out of mind in the ſaid ſoil, who has granted to the defendant the common. Br. preſcription, pl. 26. cites 22 H. 6. 42. [28]

4. In treſpaſs for depaſturing his cloſe with ſheep, &c. the defendant *juſtified, for that the prior of D. was ſeiſed in fee of Bl. acre in D. and of the paſturage in the place aforeſaid for all ſheep levant and couchant* in Bl. acre at all times in the year. After judgment for the defendant, it was aſſign'd for error, that the defendant *did not intitle the prior to this common, either by grant or preſcription*, and this being a *profit apprender in alieno ſolo*, none can intitle himſelf by the courſe of the common law, but by one of thoſe means, and this paſturage is only in nature of common. But it was anſwered, and the court inclined, that tho' paſturage claimed for ſheep levant and couchant upon the defendant's land is common appendant, and cannot be ſevered from the ſoil by grant, and then to preſcribe for it

is

is not good; but tho' it be not good at common law, yet the *ſtatute* 31 *H.* 8. *makes it good by pleading, that the prior was ſeiſed thereof in fee at the time of the diſſolution.* Cro. C. 542. pl. 7. Paſch. 15 Car. B. R. Daniel v. the earl of Hertford.

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(K. a) Preſcription. Pleadings.

1. TReſpaſs *of feeding his graſs*; the *defendant ſaid*, that he and his predeceſſors have had and uſed *common in the place* &c. *as appurtenant to a houſe* and 100 acres of land in H. time out of mind. The *plaintiff ſaid, that the place is his ſeveral*, abſque hoc *that the defendant and his predeceſſors ever had common there appurtenant to their franktenement in H. modo & forma*, and becauſe *this traverſe* goes whether he had common there or not, which *is to the right*, as in quo jure, where this action is to try the poſſeſſion, Thorpe drove him to try *the uſage*, by which the plaintiff travers'd the uſage; quod nota. Br. traverſe per &c. pl. 169. cites 22 Aſſ. 63.

2. In aſſiſe of *common of paſture appendant* &c. the *defendant ſaid, that the vill of D. where he claims common, and the vill of C. to which he claims it, do not intercommon, by which the plaintiff preſcrib'd*, and good, and iſſue may be taken in aſſiſe upon the preſcription. Br. preſcription, pl. 90 cites 30 Aſſ. 42.

3. In treſpaſs, commoner *juſtified the taking of beaſts by cuſtom*, becauſe the cuſtom is, *that none ſhall put his beaſts there after the corn cut and carried away till Mich.* and becauſe the plaintiff put his beaſts there he took them, &c. and ſaid, that he was lord of the vill, and *the other ſaid, that the uſage extends as well to the lord as to other men*, and the others contra. Br. cuſtoms, pl. 9. cites 46 E. 3. 23.

4. Where the defendant *juſtifies for common, by preſcription, for all manner of beaſts*, it is no *replication, that he has common there for all beaſts except ſheep and hogs*, but ſhall traverſe alſo, abſque hoc, that he has common with all manner of beaſts modo & forma, &c. Br. traverſe, &c. pl. 148. cites 14 H. 6. 6.

Bendl. 74. pl. 116. Mich. 5 and 6. P. & M. the S. C. held accordingly.

5. If a man has common *in a waſte for* 100 *ſheep, as appurtenant to a houſe and certain land*, and after *purchaſes another houſe and land, to which is common appurtenant for another* 100 *ſheep by preſcription*, he muſt in pleading *make* 2 *ſeveral preſcriptions to the ſaid ſeveral houſes and lands* for the 200 ſheep, and not join them both together, for they are 2 diſtinct commons. D. 264. a. pl. 59. Trin. 4 & 5 P. & M. Baſket v. Mordant.

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6. If *A. ſeiſed of* 20 *acres, to which common is appendant, infeoffs B. of* 10 acres, and *B.* is to preſcribe, he *muſt preſcribe ſpecially*, viz. *to have common in the whole* till ſuch a day, and then ſhew the purchaſe of part, and that from that time he has put his beaſts into the reſidue, *pro rata portione*; per cur. 4 Rep. 37. b. 38. a. Mich. 26 and 27 Eliz. B. R. in Tirringham's caſe.

Goldſb. 123. pl. 30. Pearce v.

7. In caſe, the plaintiff declar'd, that *uſitatum fuit* within the manor, *that every copyholder* within the manor *ſhould have common*, in ſuch

ſuch a waſte of the lord's *for two ſheep for every acre of arable land, and that the defendant (the lord) had digged holes and burrows therein for conies*, and ſo had diſturbed him of his common; it was objected that a preſcription by the copyholder againſt the lord is not allowable; but the court held the preſcription was good, for where the *preſcription* is *againſt the lord* himſelf, there it *is to be laid by way of uſage*; otherwiſe where he preſcribes againſt a ſtranger, there the preſcription ought to be alledged in the lord. Cro. E. 390. pl. 12. Paſch. 37 Eliz. B. R. Pearce v. Bacon.

Barker. S. C. Fenner ſaid, that a copyholder may not preſcribe but in right of his lord, but in this caſe the lord pro tempore being party to the action, he doubted whether this will alter the action; but per Glanvile, tho' the copyholder cannot preſcribe but in right of his lord, yet by way of uſage as this caſe is, it has been adjudged that he may make his title.

8. One *preſcribed* for common; 'twas found that he had common by preſcription *paying a penny*; adjudged that this was an entire preſcription, whereof the payment of the penny is parcel, and ought to have been entirely alledged. Cro. E. 546. pl. 49. Hill. 29 Eliz. C. B. 563. pl. 22. Paſch. 39 Eliz. C. B. Lovelace v. Reignolds.

There is a plain *difference* between this caſe and a caſe adjudged in B. R. where the copyholder preſcribed to have common in the lord's land, and it was traverſed and found that he had common according to his preſcription, and 'twas further found that the copyholders in the ſame manor had *uſed to pay* to the lord *pro eadem communia unam gallinam & quinque ova per annum*, and adjudged that the preſcription was well pleaded; for there were 2 *preſcriptions*, one for the commoner, the other for the lord, and ſo 'twas ſufficient for the commoner to allege the preſcription for the common, and need not meddle with the other, and the finding the preſcription on the lord's part is not material. Cro. E. 563. in the caſe of Lovelace v. Reignolds.

9. A preſcription *for the inhabitants of the vill of Dale* to have common, is a void preſcription. Arg. 2 Bulſt. 87. cites it is adjudged, Trin. 2 Jac. C. B. Tinnery v. Fiſher.

10. In treſpaſs, the defendant *juſtifies for common for all his beaſts levant and couchant in the place &c. by preſcription, and put in his cattle utendo communia.* Exception was taken, that he *did not aver that his cattle were levant and couchant*; ſed non allocatur; for the want of averment is help'd by the ſtatute of Jeofails; and judgment for the defendant. Cro. J. 44. pl. 12. Mich. 2 Jac. B. R. France v. Tringer.

11. *Replication in avowry* preſcribed to have *common appurtenant*, but doth *not ſhew and* aver, *that the cattle were levant and couchant* upon the land &c. and for that it was held to be naught by the court; and cites 15 E. 4. 32. Noy. 145. Jeffry v. Boys.

12. The cuſtom of a manor was, that *every tenant for years of an ancient tenement* and cloſe within the ſaid manor, *ſhould have* common of turbary &c. An ancient tenement and cloſe were ſevered from the manor, and the inheritance of the ſaid tenement &c. and alſo of the manor coming to A. He granted the meſſuage &c. to the defendant, with all commons appurtenant to the ſaid meſſuage &c. In treſpaſs for taking turf the defendant pleaded, and juſtified by an *uſitatum fuit*, that it had been there uſed *time out of mind, that every tenant for years of &c. uſed to have* common of turbary &c. and *that the meſſuage &c. was an ancient meſſuage, and* the ſame *granted unto him with all commons appurtenant* to the ſame &c. It was clearly agreed by all the court, that this preſcription ſo laid

2 Brown. 229. S. C. adjornatur.

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with an *uſitatum* was not good, and judgment was given for the plaintiff. Bulſt. 17. Hill. 7 Jac. B. R. Grymes v. Peacock.

13. If a *copyholder preſcribes* to have common *in the ſoil of J. S.* he ought in this caſe to preſcribe *in the name of the lord. But* if he preſcribes to have common *in the lord's waſte*, then his preſcription is to be with a *uſitatum fuit.* Per Fleming Ch. J. Bulſt. 19. Hill. 7 Jac. in caſe of Grymes v. Peacock.

14. Preſcription *for every houſholder* to have common in alieno ſolo is not good. Bulſt. 183. Paſch. 10 Jac. Ordway v. Orme.

Brownl. 172. Richards v. Young. S.C. but no reſolution.

15. It was inſiſted, that in *pleading* common it *muſt appear, that the place in quo*, &c. *eſt infra manerium*, becauſe the cuſtom of the manor can't extend out of the manor; but he ought to *preſcribe* in the lord of the manor; curia adviſare vult. Hob. 286. pl. 371. Trin. 16 Jac. Roberts v. Young.

2Roll. Rep. 173. Anon. S. P. and ſeems to be S. C. and Bridgman ſaid, that all manner of beaſts, beſides ſheep and yearlings, ſhall be called magna averia.

16. In treſpaſs &c. for chaſing his gelding, the defendant juſtified for damage-feaſant as in his freehold; the plaintiff replied, that he was ſeiſed of a meſſuage and ſuch lands in M. in fee, and ſo preſcribed to have common in the place where &c. *pro* 25 *magnis averiis, every year after May day*, and therefore put in his gelding to uſe his common. It was moved in arreſt of judgment, that his plea was not good, becauſe uncertain what were *magna averia*; but adjudged, that it may well be intended horſes, oxen, kine, and other ſuch commonable beaſts, which are known among the people there by ſuch common phraſe, and iſſue be join'd and found, it is good enough. Cro. J. 580. pl. 10. Trin. 18 Jac. B. R. Standred v. Shoreditch.

S. C. cited by the reporter 2. Lutw. 470.—In treſpaſs, the defendant juſtified for damages feaſant; the plaintiff in his replication *preſcribes for common until*

17. In replevin, the plaintiff preſcribed to have common for a meſſuage and 2 acres of land in a field called W. ubicunque & *poſtquam blada & herbd ibidem creſentia, be cut and carried away, until* the ſaid field, or any part thereof, be reſown, and that ante tempus quo & poſtquam the corn in the ſaid field was cut and carried away, he put in his cattle, &c. and becauſe he ſheweth, that ante tempus, and doth *not ſhew in which year the field was ſown, and the corn carried away, nor* ſhews, *that the field was not reſown*, nor any part thereof, for then it is not within his preſcription, it was adjudged for the defendant. Cro. J. 637. pl. 8. Paſch. 20 Jac. B. R. Jackſon v. Bell.

the field was ſown, and after it was ſown, & poſt blada illa meſſa until it was ſown again; and upon demurrer it was ſaid, that this preſcription was unreaſonable (viz.) to have common in land ſown; but adjudged, that the common was not claimed by this preſcription until after the corn reaped. Vent. 21. Paſch. 21 Car. B. R. Walter v. Channer.

And therefore where appendancy was alledg'd in the declaration to be to the ſcite of the manor and other lands, and the plaintiff did not preſcribe for the other lands, but only in the ſcite, it was adjudg'd for the plaintiff. Palm. 360. S. C.

18. In caſe of *common appendant there needs no preſcription at all*; but the declaration is good without it. Palm. 360. Paſch. 21 Jac. B. R. Carvil v. Holt.

2Roll. Rep. 346. S. C. adjudged.—Palm. 368.

19. In *caſe* the plaintiff declared, that *diu fuit & adhuc ſeiſitus exiſtit* of an houſe &c. and ſo preſcribed, that he, and all thoſe whoſe eſtate he had in the ſaid houſe &c. had uſed to have common in the waſte

waſte of L. and that the defendant &c. made coney-burroughs in the waſte, *quorum quidem præmiſſorum* (not ſaying *prætextu*) he loſt his common. * After judgment for the plaintiff error was aſſigned, that *diu ſeiſitus* was not good, for that may be as well one year as 40; and the word *(pretextu)* being left out, the declaration is uncertain, both as to the time and damages; and therefore the judgment was reverſed. Godb. 347. pl. 442. Trin. 21 Jac. B. R. Lee v. Griſſel. Griſſell v. Lee, S. C. adjudg'd for the defendant.—— Ibid. 319. Greeſley v. Lea S. P. does not appear.——

Jo. 12. pl. 13. Mich. 18 Jac. C. B. S. C. but S. P. does not appear.——Win. 16. Grice v. Lee. Mich. 19 Jac. in C. B. S. C. Judgment niſi.

*[31]

20. Caſe &c. in which the plaintiff declared and preſcribed *for copyholders of* 30 *acres to have common in* 4 *acres, for certain beaſts, from the 1ſt of Auguſt to the feaſt of All Saints*, and that he was a copyholder of 30 acres; and that the defendant on the 1ſt May had incloſed the ſaid 4 acres &c. After verdict; and it was moved in arreſt of judgment, that the plaintiff ought to have preſcribed for cattle *levant and couchant*; ſed non allocatur, becauſe he had preſcribed generally. 2 Roll. Rep. 379. Mich. 21 Jac. B. R. Colſon v. Perry.

21. In caſe for the making of a coney-burrow in damage of his common, the plaintiff *preſcribed to have common omni tempore anni*, and *ſays not quolibet anno*; and after verdict adjudged good. Hutt. 71. Mich. 21 Jac. Bickner v. Wright.

22. Adjudged, that a preſcription *to have common for all his cattle commonable* is not good, becauſe he may in ſuch caſe put in as many beaſts as he will; *but* a preſcription to have common *for his cattle commonable, levant and couchant* &c. is good. Mar. 83. pl. 137. Paſch. 17 Car. B. R. Say's caſe.

23. In *pleading preſcription* for common it muſt be alledged for beaſts *levant and couchant*, or otherwiſe the bar is ill. 2 Lutw. 1359. Hill. 2 & 3 Jac. 2. Clerk v. Johnſton. The want of it is ill on general demurrer, but cured by Verdict. Lev. 196. Mich. 18 Car. 2. B. R. Cheadle v. Miller.——Sid. 313. pl. 29. Cheedley v. Mellor, S. C. adjudged.——And levancy and couchancy is not ſufficient without *property* alſo. 2 Show. 328. pl. 337. Mich. 35 Car. 2. B. R. Manneton v. Trevillian.——But a *ſpecial property* is [it ſeems] ſufficient. See 2 Show. 329. S. C.

24. In caſe the plaintiff *declared upon a cuſtom* of commoning in ſuch a place, the defendant demurred, for that the cuſtom was not well laid; for the plaintiff declares of a cuſtom of commoning, *pro averiis, viz. pro equis, bobus, equabus & pullis*, and the word *(pullis)* is of an uncertain ſignification; for it *may ſignify a calf, a lamb, or any other young beaſt or fowl*, and 23 Car. Segar and Dyer's caſe was cited. The court held the exception good, and ſaid, that is uncertain what is meant by the word (pullis), and ſaid, that if the preſcription had been *pro omnibus averiis*, it had been good, and the viz. ſhould have been void; but here it is only *pro averiis*; therefore nil capiat per billam. Sty. 289. Trin. 1651. B. R. Chapman v. Brook.

25. Plaintiff *preſcrib'd for all the copyholders* of Bl. Acre *in the manor of D. to have common in A.* The defendant demurred, for that the plaintiff ſhould have preſcribed in the lord's name, A. being

ing out of the manor; but the truth being that *A. was anciently parcel and lately ſever'd by the lord*, the court held, that this does not deſtroy the cuſtom, but that the copyholder ought to *preſcribe ſpecially, that talis conſuetudo fuit till ſuch a day, and that after the lord granted A. over*, &c. as in Lutterell's caſe on the charge of a corporation. Keb. 652. pl. 28. Hill. 15 & 16 Car. 2. B. R. Davy v. Watts.

26. In treſpaſs the defendant juſtified damage feaſant, the plaintiff *preſcribed* for common *quibuſlibet duobus annis, that the ground was ſown with corn, inſimul concurrentibus, when it was ſown, and after the mowing of the ſaid corn till it were reſown*, which per Bigland is
[32] a void preſcription, being as well for the time that the ground is ſown as not, ſed non allocatur eſpecially the treſpaſs being *laid in a fallow year*; and judgment pro plaintiff. 2 Keb. 491. pl. 41. Paſch. 21 Car. 2. B. R. Chandler. v. Melland.

27. There is a *difference in preſcribing for common appurtenant and common in groſs ſans number in a natural perſon.* As to common appurtenant a man *ſhews his ſeiſin in fee of land to which* he claims his common, and then ſays *quod ipſe & omnes illi quorum ſtatum ipſe habet*, in the ſame land de temps &c. *habuit communiam paſturæ in the place where*, &c. *pro averiis ſuis levant & couchant* on the land to which, &c. but the preſcription for common in groſs is where one *lays no ſeiſin* of any land, *but ſays, Quod ipſe & omnes anteceſſores ſui quorum heres ipſe eſt de temps dont, &c. have had common in the place where*, &c. *pro omnibus averiis ſuis*, without referring to any land, and without ſaying levant and couchant, becauſe there is no land on which they may be levant and couchant, or to which the common may be appurtenant; per Saunders counſel. Arg. 1 Saund. 345. 346. Mich. 21 Car. 2. in caſe of Mellor v. Spateman.

Vaugh 253. Mich. 20. Car. 2. C.B. in caſe of North v. Coe, where the plea was that the

28. The *cuſtomary tenants* of a manor may *allege a cuſtom pro ſola & ſeparali paſturæ* in &c. quolibet anno per totum annum, &c. *but* if any *tenants of the freehold* at common law will claim any ſuch profit or benefit, they *ought to ſhew their eſtates, and to preſcribe the name of the tenant in fee* by a que eſtate. Arg. 2 Saund. 326. Paſch. 23 Car. 2. in caſe of Hoſkins v. Robins.

freehold and cuſtomary tenants have had and enjoy'd per conſuetudinem manerii ſolam & ſeparalem paſturam. Exception was taken that this plea did not ſet forth the cuſtom of the manor, but implicitly, and that it was a double plea both of the cuſtom of the manor, and of the claim, by reaſon of the cuſtom, which ought to be ſeveral, and the court ſhall judge, and not the jury, whether the claim be according to the cuſtom alledged.

29. Treſpaſs for taking 2 mares in B. the defendant ſaid that the king was ſeiſed of B. and he took them damage feaſant as bailiff to the king. The plaintiff replies he was an *inhabitant* of C. and *that the mayor and burgeſſes of C. had common of eſtovers of turfs for them and for every inhabitant to burn in quibuſlibet meſſuagiis ſuis.* Vaughan ſaid tho' inhabitants cannot preſcribe for common in their own names, they may be capable of the benefit of ſuch a preſcription, and as this preſcription is laid for the mayor and burgeſſes, they may preſcribe for them and for the inhabitants, and that is the direction given in 15 E. 4. 29. by Littleton, judgment was given for the plaintiff. Freem. Rep. 135. Mich. 1673. White v. Coleman.

30. Error

30. Error upon a judgment in C. B. where the plaintiff declared in an action upon the caſe, that he had common in the defendant's lands, & habere debuit, &c. The defendant demurred, becauſe *not ſet out how the plaintiff was intitled* to the common, *whether by preſcription or otherwiſe*; notwithſtanding which judgment in C. B. was for the plaintiff, and now the ſame matter inſiſted on for error here, and the court doubted; adjornatur. Vent. 356. Mich. 33 Car. 2. B. R. Bound v. Brooking. 2 Je. 148. S. C. Judgment affirmed.

31. Preſcription in avowry was *pro communi paſtura* inſtead of *pro communia paſturæ*, and adjudg'd ill. 3 Lev. 104, 105. Mich. 35 Car. 2. C. B. Woolton v. Salter.

32. In treſpaſs &c. the defendant juſtified damage-feaſant; the plaintiff *preſcribed for common for ſheep*; the *defendant traverſed the preſcription*, and the jury *found that the plaintiff had common for ſheep, and alſo for cows*; it was objected that this verdict would not maintain this preſcription, becauſe it was larger than the preſcription pleaded; *but the plaintiff had judgment. 4 Mod. 89. Paſch. 4 W. & M. in B. R. Bridges v. Saer. 12 Mod. 25. Bruges v. Lear. S. C. & per cur. the common for ſheep, and the common for cows are

ſeveral, diſtinct, and different.——Show. 347. Bruges v. Steer, S. C. adjudged for the plaintiff.—4 Mod. 89. S. C. adjudg'd for the plaintiff.——Carth. 219. Bruges v. Searle. S. C. and the court held that it was a general verdict for the plaintiff, and the finding for the cows is ſurpluſage and void; beſides as the action was brought only for taking ſheep, the plaintiff might well abridge his preſcription as to them only, ſince nothing elſe was in diſpute, and finding as to the cows does not falſify, but ſtands well with the preſcription.

*[33]

33. In caſe it was held that a preſcription for an *inhabitant* or *occupier* to have common was not good, whereupon the plaintiff brought a new action, and *declared upon a cuſtom.* The caſe was argued, and the court inclined againſt the cuſtom, ſed adjornatur. Lord Raym. Rep. 405. Mich. 10 W. 3. C. B. Weekly v. Wildman.

34. A man cannot preſcribe *for common appurtenant to a farm*, becauſe it is uncertain what a farm conſiſts of, whether of 10 acres or of 100 acres, but the preſcription ought to be laid to a meſuage and ſo many acres of land; but if there is an *ancient farm, and the ſame lands always occupied with it*, a man may have common of paſture to depaſture his cattle tilling that farm; per Holt, Ch. J. at Wincheſter aſſiſes, 10 W. 3. Lord Raym. Rep. 726. Hockley v. Lamb.

35. Cuſtomory freeholders may preſcribe for common by a que eſtate. 2 Lord Raym. Rep. 1188. Trin. 4 Annæ, in caſe of Follet v. Troake.

[*For more of common in general, ſee* Actions *(N. b.)* Aſſiſe *(D)* Copyhold, Inhabitants *(B)* Levand and Couchant, Nuſance, Profit Apprender, *and other proper titles.*

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Commoner.

(A) Commoner. [His Intereſt in the Common; and] *what* Things he *may do*.

Cro. J. 195. pl. 21. Hadeſden v. Gryſſel, S. C. The Court on the firſt motion were of opinion againſt the plaintiff, becauſe conies are feræ naturæ, but afterwards all the juſtices adjudg'd for the plaintiff; for a commoner has nothing to do with the land but to put in his cattle, and may not meddle with any thing of the lord's there, and as the lord may have great beaſts there, ſo he may have beaſts of warren, and the commoner cannot deſtroy them.——Yelv. 104, 105. Hoddeſden v. Greſil. S. C. adjudg'd; for tho' the owner of the ſoil has no property in the conies, yet ſo long as they are in the land he has poſſeſſion, which is good againſt the commoner, and conies are matter of profit to the owner of the ſoil for houſekeeping.——Brownl. 208. Holdeſden v. Greſil, S. C. but ſeems only a tranſlation of Yelv.——Bridgm. 10. cites S. P. adjudg'd Mich. 5 Jac. and ſeems to intend S. C.——S. C. cited Lutw. 108.——The commoner may have action on the caſe, or an aſſize for putting the conies upon the land, if the owner of the land leaves not ſufficient common* for the commoner's cattle; but he cannot juſtify killing the conies. 2 Le. 201. 203. pl. 254. Mich. 29 Eliz. B. R. Anon.——Godb. 122. pl. 144. Hill. 29 Eliz. B. R. Coney's caſe ſeems to be S. C. and adjudg'd that the commoner cannot kill the conies.——4 Le. 7. pl. 32. Trin. 26 Eliz. Ould v. Conye. S. P. adjudg'd.

[1. IF a *lord* of a common *makes coney-burrows* in the common, *and ſtores them with conies, though he hath no warren*, yet the commoners *cannot juſtify the killing the conies* that they may not encreaſe, to the prejudice of the common. Mich. 5 Jac. B. R. between *Hodſon and Griſſel* adjudged.]

* [34]

2 Bulſt. 115. Carrill v. Pack. S. C. adjudg'd.—Brownl. 227 Carrill v. Baker. S. C. ſays the opinion of the court ſeem'd to incline for the plaintiff, but that for a fault in the pleading diſcover'd by Haughton J. all was diſcontinued.

[2. [*And*] *if* the lord of a common makes *coney-burrows* in the common, and ſtores them with conies, by which the *commoners cannot have ſufficient common, yet* the commoners *cannot juſtify the killing* the conies, *but ought to bring their aſſiſe or action* againſt the lord, for they cannot be their own judges, dubitatur. Trin. 11 Jac. B. R. between * *Carrel* plaintiff, *and Park and Baker* defendants. Mich. 5 Jac. B. R. between † *Hodſon and Griſſel*, per curiam.

† Cro. J. 195. pl. 21. S. C. adjudg'd.——Yelv. 104, 105. S. C. the commoner in caſe of ſurcharge may have action on the caſe.——Brownl 208. S. C. & S. P.

2 Bulſt. 115. Trin. 11 Jac. Carril v. Pack, ſeems to be the caſe intended & S. P. there adjudg'd for the plaintiff.——Brownl. 227. Carrill v. Baker. S. C.——See the notes at plea 2.

[3. *So although the ſheep of the commoners are killed by falling into the ſaid coney-burrows* ſo made by the lord, yet *they cannot juſtify the digging* of the land, *and ſtopping them*, for the cauſe aforeſaid. Trin. 11 Jac. B. R. dubitatur.]

[4. If

[4. If *J. S. hath land adjoining to the land of J. D. in which J. N. hath common of paſture*, and *J. S. makes coney-burrows in his land, and ſtores them with conies, which come into the land of J. D. J. N.* who hath the common of paſture, *cannot* there *kill the conies*; becauſe he hath nothing to do there but take the graſs with the mouth of his cattle. Mich. 43, 44 Eliz. B. R. between * *Bellowe and Loughdon*, adjudged. Mich. 10 Car. B. R. between † *Everſley and Wilkinſon* adjudged. [But] ſuch a commoner brought an action upon the *caſe againſt J. S.* who without any lawful grant or preſcription, had ſtored the land adjoining with conies, by which the conies came into the land where he had common, per quod he loſt his common, *and adjudged that the action does not lie*, and a judgment given in banco reverſed accordingly in this caſe in a writ of error, and the court gave the reaſon, *becauſe the commoner may kill the conies*. Intratur. Hill. 8 Car. B. R. Rot. 302.]

Ow. 114. Pelling v. Langdon. S. C. adjudg'd; for conies are beaſts of warren, and profitable as deer, and are not to be compared to foxes or vermin which may be killed. —Cro. E. 875. pl. 1. S. C. adjudg'd accordingly.——S. C. cited Cro. J. pl. 21.—S. C. cited Yelv. 105.——2 Bulſt. 116. S. C. cited.——Brownl. 208. cites S. C.

† Jo. 356 pl. 5. Hirdley v. Wilkinſon. S. C. adjudg'd for the commoner in C. B. but that judgment was reverſed in B. R.——Cro. C. 387. pl. 20. S. C. ſays the caſe in C. B. paſſed ſub ſilentio, and the judgment there was reverſed in C. B.——See Tit. Actions. (N. b.) pl. 9. S. C. and the notes there.

[5. A commoner may juſtify the *taking of the cattle of a ſtranger damage feaſant* upon the common, *is his own name*, for the intereſt which he has in the common, * 15 H. 7. 2. b. 12, 13. b. per curiam. 14 H. 7. 3. b. Co. 9. *Mary's Caſe*, 112. b. F. N. B. 128. (C.) 10 E. 4. 4. 13 H. 7. 15. b. agreed.]

* Br. juſtification, pl. 15. cites S. C.—Br. common pl. 40. (39) cites 15 H. 7. 13. S. P. but he ſhall not have action of treſpaſs, nor ſhall any other have ſuch action, but the poſſeſſor of the ſoil.—9 Rep. 112. b. reſolved, and the court ſaid it is evident that he may take the beaſts of a ſtranger damage-feaſant, and cites it as ſo held in 24 E. 3. 42. a. 46 E. 3. 23. b. 15 H. 7. 2. a. b. & 12. b.——S. P. admitted by Coke Ch. J. 2 Brownl. 148, 149.——S. P. per cur. Yelv. 104, in caſe of Hoddeſden v. Greſil.——Yelv. 130. S. P.——2 Bulſt. 117. S. P.——S. P. agreed Arg. Bridgm. 10.——Godb. 123. Arg. S. P. cites 15 H. 7.——Adjudg'd that if the cattle of a ſtranger eſcapes into the common, the commoner may diſtrain them damage feaſant as well as when they are put into the common. Godb. 185. pl. 265. Hill. 9 Jac. C. B. Morris's caſe.——9 Rep. 112. a. in Mary's caſe. S. C. reſolv'd accordingly.

[35]

[6. If there be a *cuſtom that a cloſe ought to lie freſh and hained every ſecond year, till Lady-day, after the corn cut and carried away*, and *J. S. hath uſed time out of mind to have common in the ſaid cloſe after Lady-day, till it is ſowed again with corn, for his cattle levant and couchant upon a certain tenement, as appurtenant* thereto, in this caſe, if the *lord of the ſoil of the ſaid cloſe puts in his cattle* in the ſaid cloſe, *againſt the cuſtom, when it ought to lie freſh* and hained by the cuſtom, the ſaid *J. S.* though he but a commoner, yet *may take the cattle of the lord there damage feaſant*, and (*) juſtify it in an action of treſpaſs brought againſt him by the lord of the cloſe where he took the cattle, for the common will be the worſe if the lord may eat the graſs before the common is to be taken by the cuſtom. Mich. 14 Car. between *Trulock and White*, adjudged, this being moved in arreſt of judgment. Intratur. Trin. 14 Car. Rot. 1212. B. R.]

In treſpaſs for taking his cattle brought by the lord, the defendant juſtified by a cuſtom that the lord till *Fol. 406. Lammas-Day had the place where entirely to himſelf, but afterwards it is common to the tenants, plaintiff then can put in 3 horſes only, and becauſe the plaintiff put in more, the defendant ſo as the commoner took them damage feaſant. Fenner, Williams, and Cooke held ſuch taking damage

mage feaſant good; for by the cuſtom the lord is tied up to his ſtint, and the commoners have no other remedy but by diſtraining; and the cuſtom here has made the lord as mere a ſtranger as any other perſon; but the Ch. J. and Yelverton doubted thereof, and thought the defendant ſhould likewiſe have alledged a cuſtom and uſage alſo to diſtrain the beaſts of the lord, and then it had been good. Yelv. 129. Trin. 6 Jac. B. R. Kenrick v. Pargiter.——Cro. Ja. 208. pl. 1. Kenrick v. Pargiter. S. C. the court divided 2 and 2, and Crook does not mention himſelf.——Brownl. 187. S. C. ſeems a tranſlation of Yelverton.——Noy 130. S. C. the cuſtom to ſtint the lord was adjudg'd good; but it ſeem'd that the cuſtom to diſtrain the cattle of the lord ſhould be alledged.——Cro. J. 257. in pl. 15. S. C. cited per cur. as reſolved that one man may preſcribe to have the ſole paſturage in ſuch a place from ſuch a time to ſuch a time, excluſive of the owner of the ſoil.

It was agreed that if the lord of the waſte does ſurcharge the common, the commoner cannot drive his cattle off the common, or diſtrain them damage-feaſant, as he may the cattle of a ſtranger, but the remedy againſt that lord is either an aſſiſe or an action on the caſe. Godb. 182. pl. 258. Mich. 9 Jac. C. B. Anon.

[7. A *commoner in* an action of *treſpaſs cannot juſtify his coming there with an intent to put in his cattle* there, *if he does not put them in.* P. 17 Jac. B. between *Sir Henry Spilman and Hermitage*, adjudged.]

[8. *But* the commoner *may juſtify his coming to ſee if the paſture* in it *to be fit to receive his cattle.* P. 17 Jac. B.]

S. P. by Popham, and judgment accordingly. Cro. E. 820. pl. 14. Paſch. 43 Eliz. B. R. Baſſet v. Maynard.

[9. If I have *common of eſtovers in the woods of J. S.* and *J. S. cites part, or all* of the wood, yet I *cannot take any part of this which is cut*, but ſhall be put to my aſſiſe or caſe, as my eſtate is. P. 17 Jac. B. between *Sir Henry Spilman and Hermitage*, per curiam.]

——S. P. reſolved. 5 Rep. 25. a. Paſch. 43 Eliz. B. R. Sir Tho. Palmer's caſe. S. C.——Mo. 691. pl. 955. S. C. adjudg'd in B. R. and affirmed in the Exchequer-Chamber.——S. C. cited Yelv. 188. per cur.——S. C. cited Brownl 220.——If a man has common of eſtovers in the wood of another in fee, or for life, and the owner of the wood or any other cuts down all the wood, he who ought to have the eſtovers ſhall have aſſiſe, for it is a diſſeiſin of his common, cites F. N. B. 58. 159 and if he has only a term in the eſtovers, he ſhall have action upon his caſe; per cur. 9 Rep. 112 b. Trin. 10 Ja. in Mary's caſe.——An action will lie againſt the lord for cutting down the body of a tree when the tenant ſhould have the loppings. Brownl. 197.

[10. If a common every year in a flood is ſurrounded with water, yet the commoner *cannot make a trench* in the ſoil *to avoid the water*, becauſe he has nothing to do with the ſoil, but only to take the graſs with the mouth of his cattle, * 12 H. 8. 2. 13 H. 8. 15. D. 36 H. 8. 36. b. 39.]

* Br. common, pl. 49. (48) cites S. C. that this point was demurred and not adjudg'd.——2 Bulſt. 116. Arg. cites 13 H. 8. S. P. that the court was divided 2 againſt 2, ſo that a commoner may reform what is amiſs, and to the prejudice of the common, but not to meddle with the ſoil de novo.——Godb. 52. pl. 65, cites 12 & 13 H. 8. that a commoner cannot meddle with the ſoil.——But tho' he cannot meddle with the ſoil, as digging a trench, yet if he amends and repairs a thing abuſed it is no treſpaſs, and therefore if the land be full of mole hills, he may dig them down; Arg. Brownl. 228, cites 13 H. 8. and 42 Aſſ. if the lord makes a hedge the commoner may pull it down; ſo if the lord makes a pond in the land, the commoner may dig and let the water out. And ſo if holes were dug in the common long ago in damage and hurt of the land, the commoner may put the earth, ſo dug out, into the holes again.——He cannot *make a fence or ditch to let out the water*, which ſpoils the common. Arg. Bridgm. 10. Trin. 19 Jac.——*But* in ſuch caſe he *may juſtify, by ſaying that the commoners, time out of mind, have uſed to dig the land to let out the water*, that he may the better take his common with his cattle. Godb. 182. pl. 258. Mich. 9. Jac. C. B. held per tot. Cur. Anon.——Sid. 251. pl. 20. Paſch. 17 Car. 2. is added a quære to this purpoſe, and ſays, it is ſo uſed in the moors in Somerſetſhire. The caſe was, the lord brought treſpaſs againſt a commoner for filling up a trench in the common dug by the lord, and the court held, that the action lies; for a commoner cannot *cut mole-hills nor buſhes* in the common, nor make fiſh-ponds, as has been adjudg'd, though they are acts of improvement. Howard v. Spencer.

*[36]

11. He who is *diſſeiſed of the land to which* common is appendant, *cannot uſe the common before that he has recovered the land* to which &c.

&c. for the common ſhall not be doubly peſter'd. Br. Common, pl. 34. cites 19 H. 6. 33.

12. In treſpaſs, by three juſtices where a *man has 20 loads of wood yearly to be cut in N. 10 to burn, and 10 to repair pales, and to make new* pales, he *may take* for reparation or to make pales, *though his pales need no reparation*; becauſe he may *reſerve them to ſeaſon them*, and then make pales thereof; and *e contra of Houſeboot and Hayboot*; for this ſhall be intended where it wants reparation. Br. Common, pl. 32. cites 10 E. 4. 3.

13. *But* if he *puts* any of them *to another uſe, treſpaſs lies.* Br. Common, pl. 32. cites 10 E. 4. 3.

14. Where I have *common in another's land*, and the *owner makes a hedge* in the land where the common is, I may *break all the hedge.* Br. Common, pl. 9. cites 15 H. 7. 10. *So of common appendant &c. and the tenant of the ſoil* where the common is, *makes a hedge in the land where the common is*, I may *break all the hedge*, and yet he may approve or incloſe a certain parcel well enough. Br. common, pl. 15. cites 21 H. 7.

15. *But if he incloſes all the land in which* the common is, *by making of the hedge in other land which invirons the land in which the common is*, I cannot *break* all the hedge, *but only parcel*, to have a way to the land where the common is; and this is the diverſity; per cur. Br. Common, pl. 9. cites 15 H. 7. 10. Br. common, pl. 15. cites S. C.

16. If all the inhabitants of a town *preſcribe to have common in ſuch a field after harveſt*, and *one particular man, who has freehold land within the ſaid field ſowed, will not within convenient time gather in his corn*, but ſuffer the ſame to continue there on purpoſe to bar the inhabitants of their common, the inhabitants may put in their cattle, and if they eat his corn, he has no remedy. Arg. 2 Le. 202, 203. pl. 254. Mich. 29 Eliz. B. R. cites 21 H. 6.

17. In treſpaſs quare clauſum fregit, & *ſolum fodit*; the defendant *juſtifies*, that he and his anceſtors, and all whoſe eſtate he had in a cottage, have uſed to have *common of turbary, to dig and ſell ad libitum*, as belonging to the houſe, &c. and adjudged that 'tis an ill plea; for ſuch a common as aboveſaid is an intereſt and a Frank-tenement. See 7 Aſſiſe 4. and is repugnant in itſelf; for a common appertaining to a houſe, ought to be ſpent in the houſe, and not ſold abroad; and judgment accordingly. Noy 145. Valentine v. Penny.

18. In treſpaſs by the lord, the defendant juſtified the taking the cattle damage feaſant, ſetting forth a *cuſtom, that the plaintiff, who was lord of the manor, had the ſole right to the place where &c. entirely to himſelf, until Lammas-day, but that afterwards it was common to the tenants, ſo as the plaintiff could put in three horſes, and no more*; *and becauſe after Lammas-day, &c. he put in more, the defendant took them damage feaſant.* This cuſtom was found for the defendant. It was mov'd, that defendant being only a commoner, could not take the cattle, and the place where, &c. is the ſoil of the plaintiff, ſo as his cattle cannot be damage feaſant on his own ſoil. Two juſtices held the taking good, becauſe the lord is to be excluded by cuſtom for all but his ... t, and the commoners have no other remedy to preſerve their right; but two other judges doubted, becauſe the com- Noy 130. S. C. adjudg'd, that the cuſtom is good; but it ſeem'd that he ought to allege the cuſtom alſo to diſtrain the cattle of the owners of the ſame land.—— Yelv. 129.

Kinrick v. Pargiter, S. C. says, that 3 justices, viz. Fenner, Williams, and Crook, held the taking the lord's beasts damage feasant to be good, for the reasons given in Cro. J. and that the custom here has made the lord as mere a stranger as any other person, and no doubt but the commoner may take a stranger's beasts damage feasant; but the Chief Justice and Yelverton doubted, and that they ought to have alledged a custom to distrain the lord's beasts, and then it had been good; Quod Nota——Brownl. 187. S. C. in totidem verbis.——2 Brownl. 60. S. C. says, that judgment was given for the plaintiff by all the justices upon the pleadings, and they moved the parties to replead.

commoners ought not only to *shew the custom, but also the usage, to distrain the lord's cattle damage feasant* when he exceeded his stint. Cro. J. 201. pl. 1. Trin. 6 Jac. B. R. Kenrick v. Pargiter.

Brownl. 220 S. C. but seems only a translation of Yelv. ——Cro. J. 271. pl. 4. S. C. accordingly.

19. If a grant be made to J. S. of common, and after the said grant the *grantor erects a stack of corn there*, the *grantee may put in his cattle*, to use his common, and may use the whole place for his common, and eat the hay. Resolv'd. But for want of shewing the indenture of grant, which is the ground of his title, judgment was given against him. Yelv. 201. Hill. 8 Jac. B. R. Farmer v. Hunt.

Yelv. 187. Dewclas v. Kendall, S. C. adjudg'd accordingly.—Brownl. 219. S. C. but seems only a translation of Yelv.—3 Bulst. 93. S. C. adjudg'd accordingly.

20. Trespass for carrying away 30 load of thorns in a place called the common waste, the defendant justifies for that he was seised of a messuage and 3 acres of land, and that he and all those, &c. have *used to cut down omnes spinas crescentes upon the said place, to spend in their houses, or about the said lands, as pertaining to the said house and lands*; the plaintiff replied that R. S. was seised in fee of the manor of C. whereof, &c. and granted licence to him to take the thorns, whereupon he cut them down, and the defendant afterwards took them. It was held that *the lord may not cut* down any thorns, *nor licence any other* to cut them, for that his prescription excludes the lord; *but* if the defendant had claimed *common of estovers only*, then if the lord had first cut down the thorns, the commoner might not take them, wherefore it was adjudged for the defendant. Cro. J. 256. pl. 15. Mich. 8 Jac. B. R. Dowglas v. Kendal.

Yelv. 185. S. C. and Brownl. seems to be only a translation.

21. A man had *common* for his cattle levant and couchant upon his lands *in a field* called B. *when it was not sowed with corn*, and he put in his cattle when *part of it was sow'd*; the court held that sowing parcel of the field should not hinder him from using his common in the residue, because part of the field might be sowed by Covin, on purpose to hinder the commoner from taking his common. Brownl. 189. Mich. 8 Jac. Truelock v. Rigsby.

22. A commoner cannot generally justify the *cutting and carrying away bushes* from the common, but *by a special prescription* he may justify the same; per tot Cur. Godb. 182. pl. 258. Mich. 9 Jac. C. B. Anon.

Cro. E. 463. (bis) S. C. & S. P. by Popham, that by such grant within my manor of D. I shall have it within my own demesnes only; for if otherwise, the queen should impose a charge upon another person, which the law will not suffer.

23. The *king cannot grant free warran to the prejudice of a commoner*. 2 Jo. 5. Arg. & admitted. Trin. 21 Car. 2. C. B. in case of Timberley v. How. cites 3 Cro. 462. Higham v. Best; and said that the grant cannot enable the grantee to erect an house.

[38] 24. Commoner *may abate hedges* made on his common, for that is not a meddling with the soil, but only a pulling down the erection. 2 Mod. 65. Hill. 27 & 28. Car. 2. C. B. Mason v. Cæsar.

25. The

25. The lord or commoner may *drive the beaſts* of a commoner mix'd with the beaſts *of a ſtranger* to a convenient place to ſever them, and may drive the beaſts of the ſtranger out of the common without any cuſtom. 3 Lev. 40. Hill. 33 Car. 2. C. B. Thomas v. Nichols.

But commoner cannot drive the beaſts of the lord off the common, or diſtrein them

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damage feaſant, as he may the cattle of a ſtranger. But the remedy *againſt the lord* is either an aſſize or an action upon the caſe. Godb. 182. pl. 258. Mich. 9 Jac. C. B Anon.

26. Treſpaſs for *burning turfs* defendant juſtifies that the turfs were on the land where he has common (and ſhews title to it) and for *damage feaſant* he burnt the turfs. Adjudg'd on demurrer that defendant can't burn the turfs for this cauſe. 2 Jo. 193. Paſch. 34 Car. 2. B. R. Bromhall v. Norton.

27. A. has right of common in ſuch a *cloſe*, which *belongs to B. who after the corn taken away ſows peaſe* in it; he cannot by ſuch a trick deprive A. of the benefit of his common. Per cur. 12 Mod. 648. Trin. 6 W. and M. Anon.

28. If a ſtranger who had no right of common put in cattle, any commoner might diſtrain. Freem. Rep. 273. pl. 300. Paſch. 1698. Dixon v. James.

(B) Actions. By and againſt Commoners.

1. THel. Dig. 67. Lib. 8. cap. 5. S. 14 ſays, that in Bracton, 235. there is a writ of *entry of ſur diſſeiſin* of common of paſture, and of other things.

2. The clear opinion of the court was, that a man ſhall not have writ of *entry in nature of aſſiſe* of common of paſture. Thel. Dig. 67. Lib. 8. cap. 5. S. 15. cites 12 E. 2. Dower 161. and that ſo was the opinion of Fitzh. Paſch. 27 H. 8. 12. that no præcipe quod reddat lies of common of paſture; but Shelley held that it lies againſt a pernor &c. As to plaint of common in aſſiſe, ſee in aſſiſe, plaint, & quod permittat in Fitzh.

3. Note that a commoner ſhall not have an action of *treſpaſs for treſpaſs which a ſtranger does in the ſoil*, for he is not ſeiſed of the ſoil. Br. treſpaſs, pl. 233. cites 22 Aſſ. 48.

Br. common pl. 24 cites S. C.—and Bridgm. 19. cites S. C. & 12 H. 8. 2.—Br. common, pl. 40. [30.] S. P. cites 15 H. 7. 13.—Ibid. pl. 36. [35.] cites S. C. & 5 H. 7. 2. & 44 E. 3. 42.——Ibid. pl. 40. [39.] S. P. cites 15 H. 7. 13.

4. He may *avow for damage feaſant*. Ibid. cites 24 E. 3. 42.

5. If I have a common upon another man's land, and the *tertenant ploughs the land*, I ſhall have aſſiſe of common. Per Markham. Br. aſſiſe, pl. 42. cites 2 H. 4. 11.

If the tenant *ploughs the lands in which* I have common of paſture, I may have *action on the caſe in nature of a quod permittat*. Arg. Godb. 324. cites 2 H. 7. and 4 E. 4.

6. Note, by the ſtate W. 2. cap. 25. *Aſſiſe lies* of common and other profits apprendre, but not of a way; and per Scot, for *diſturbing of a way to my common*, aſſiſe lies of the common. Br. common, pl. 33. cites 11 H. 4. 25. 26.

If *lord approve of the waſte* where I have common, *and does*

does not leave me my way, by which I am compell'd to go all round about, I ſhall have *aſſiſe* of the common. Br. Nuſance, pl. 9. cites 11 H. 4. 25.

[39] 7. Note, per tot. Curi except Aſhton, that *præcipe quod reddat* does not lie of common, but *quod permittat*. Br. common, pl. 45, cites 4 E. 4. 1. 2.

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8. Præcipe quod reddat of *common for 2 cows* does not lie; *but* præcipe quod reddat of *paſture for 2 cows* lies well by him; but the other juſtices held it all one, and that præcipe quod reddat does not lie. Ibid.

9. If a man be *diſſeiſed of the common appendant or appurtenant* to his land, and afterwards *makes a feoffment of the land* to which the common is appendant or appurtenant, he ſhall not have aſſiſe of that common, nor other remedy. F. N. B. 180. (F).

The tenant may either have aſſiſe, or an action upon the caſe. Godb. 182. pl. 182. pl. 158. Mich. 8 Jac. C. B. Anon.

10. If the *lord ſurcharges* the common, the tenant ſhall have an aſſiſe of common againſt him. F. N. B. 125. (D).

11. If the *lord makes approvement, and leaves not ſufficient common* to the tenant, the tenant ſhall have aſſiſe, and not a writ of admeaſurement. F. N. B. 125. (E).

12. If the tenant of the freehold *plough and ſow the land*, the commoner may put in his cattle and eat the corn, becauſe the wrong firſt began by the tenant. Arg. Godb. 124. pl. 144. Hill. 29 Eliz.

Mo. 411. pl. 561. S. C.—But if the ſtranger digs and carries it away, *action on the caſe* lies for the commoner, as well for the digging and laying it on the common and ſo ſpoiling the graſs, as for the carrying it away, and every one of theſe injuries increaſes the damage. Godb. 343. Trin. 21 Jac. B. R. Bullen v. Sheene.——2 Roll Rep. 308. S. C.——Palm. 366. Sheene v. Bullen, S. C.

13. If *clay be dug* by a ſtranger, and if *graſs cut*, the commoner can't carry it away nor have treſpaſs. Cro. E. 434. pl. 46. Mich. 37 & 38 Eliz. B. R. Stile v. Butts.

Cro. E. 845. pl. 32. Cantrel v. Curch S. C. 43 Eliz. in Cam. Scacc.——See Tit. Nuſance (H) pl. 30. S. C. in the notes there.

14. He may have action of the *caſe for ſtopping his way to the common*, tho' he might have had an aſſiſe; affirmed in error. Noy 37. Hill. 42 Eliz. B. R. Cautwell v. Church.

15. *Coney-burroughs* erected in time of the father, and *continued*, is a wrong to the heir. Yelv. 143. Mich. 6 Jac. B. R. Greſil v. Hoddeſon.

16. A commoner cannot generally juſtify the *cutting and taking buſhes* off from the common; but by a ſpecial preſcription he may juſtify the ſame. Per tot. cur. Godb. 182. pl. 258. Mich. 9 Jac. C. B.

9 Rep. 113. a. Trin. 10. Jac. S. P. in Mary's caſe, S. C.

17. An action does not lie for a commoner, unleſs it be for a *damage, whereby he loſes his common*. Brownl. 197. in the caſe of Crogate v. Morris.

Hob. 43. Hobart Ch. J. cites 9 Rep. 111. Mary's caſe, S. C.

18. If a ſtranger comes and eats the common, a freeholder may bring an *aſſiſe* of common, becauſe it is a diſſeiſin; for a diſſeiſin of common is the taking away the profits of the common. Brownl. 197. in caſe of Crogate v. Morris.

S. C. that if any man feed in a common wrongfully, every commoner may have an action of the caſe againſt him; and by the ſame reaſon, if the lord of the ſoil plough it up, or make a water of it, every freeholder may have an aſſiſe, and every copyholder an action of the caſe, and yet at this time there was no profit of common at all, and the poſſibility of reſtoring of it leſs than in this caſe; and therefore there can be no reviving the very title which muſt be for the inheritance, or not at all.

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19. Commoner ſhan't have *aſſiſe* or *action ſur case* for every petit feeding thereon by the beaſts of a ſtranger; but the depaſturing ought to be ſuch, *per quod communiam* for his beaſts habere non potuit, ſed *proficuum ſuum inde per totum idem tempus amiſit*; ſo that if the *treſpaſs* be ſo ſmall that he has no loſs, but ſufficient in ample manner remains for him, the commoner ſhan't take them damage feaſant, nor have any action for it, but the tenant of the ſoil, or the lord, may in ſuch caſe have action. 9 Rep. 113, Trin. 10 Jac. Robert Mary's caſe. Brownl. 197. Crogate v. Morris, S.C. —2 Brownl. 146. S.C.— The ancient opinion was that a commoner might diſtrain for damage feaſant, but not maintain *treſpaſs*, for two reaſons, 1ſt, Becauſe of the *multiplicity of actions*, if every commoner might bring action. 2dly, That the commoner had nothing to do with the common, but to take the herbage of it by the mouths of his cattle, and has no other intereſt in the freehold, and can't enter into the common but for this end, and only the lord of the common ſhall have an action, quare clauſum fregit, againſt any one who commits a treſpaſs there and has not common. This ancient opinion has alter'd of late times; the reaſon is, the commoner is *deprived of his intereſt* and profit by another's wrong doing; the cattle which depaſture the common may be removed before a diſtreſs can be taken; perhaps all the profits of the common may be deſtroy'd and not a diſtreſs to be found; a very powerful man may deprive a commoner of all his common, if he be not allowed to bring an action for it. Jenk. 144. pl. 99.

20. If he be utterably diſturbed of his common, he may have an *aſſiſe*, or a *quod permittat*. Bridgm. 10. Arg. Trin. 19 Jac. Where a man has common of paſture for his cattle, and is diſturbed by a ſtranger that he cannot uſe his common, he may have *quod permittat*, and it may be ſued by juſtices in the county or in the common pleas. F. N. B. 123. (F).

21. If any damage or *annoyance* be made *upon the land, whereby he loſes his common*, he may have an *aſſiſe*. Arg. Bridm. 10 Trin. 19 Jac. Br. Treſpaſs, pl. 233 cites 22. Aſſ. 48.

22. Per Doderidge, if *warren be ſurcharged* commoner ſhall have action, and if *common be ſurcharged* the lord of the warren ſhall have action. Palm. 319. Mich. 20 Jac. B. R. in caſe of Grieſly v. Lee and Taylor.

23. In caſe for *ſurcharging the common and treading the graſs*, after verdict exception was taken, that *caſe* lay not but *aſſiſe*; but Roll Ch. J. held, that he might have the one or the other *at his election*, tho' here be a diſturbance of the plaintiff's freehold, notwithſtanding the old books ſay the contrary; judgment for the plaintiff niſi. Sty. 164. Mich. 1649. Ayre v. Pyncomb.

24. In *caſe* by a commoner *for digging pits and ſpreading gravel*, whereby he loſt his common, the defendant *pleaded*, that he is lord of the ſoil, and *that he dug for coals, doing as little damage to the paſture as poſſible, and averr'd that he left ſufficient common*. Plaintiff demurr'd, for that the plea amounted to the general iſſue, and of that opinion was the court. Sid. 106. pl. 17. Hill. 14 and 15 Car. 2. B. R. Geo v. Cother. Keb. 453. 454. pl. 47. Geo v. Carthorn S. C. accordingly; but by agreement a full iſſue was offered to try the right. —Windham J. ſaid, that the lord cannot dig pits in the common, into which perhaps the commoner's beaſts may fall; for the ſtatute intends other manner of improvement, v.z. by inclofure.

25 *Ejectment*

25. *Ejectment* was brought of 10 *acres of land, and common of paſture*, after verdict and judgment, it was mov'd in error brought, that ejectment does not lie of common of paſture, tho' an aſſiſe does; but it was anſwer'd, that tho' an ejectment will not lie for *common* by itſelf, yet when it is *joined with land in ejectment it ſhall be intended appurtenant* to the land; to which the court inclin'd. Adjornatur. Freem. Rep. 447. pl. 608. Hill. 1676. Anon.

26. In an action ſur caſe by commoner for eating his graſs with ſheep, *coſts* were allowed. 2 Mod. 141. Mich. 28 Car. 2. C. B. Stileman v. Patrick.

27. One commoner may have an action of the *caſe againſt another that puts in more beaſts than were levant and couchant*, and the lord may in ſuch caſe diſtrain alſo; and where a commoner is entitled to a common for a certain number of cattle, as for 10 or any other certain number, there if he ſurcharges, another commoner may *diſtrain*; agreed. But this was ſaid to be a caſe not yet reſolv'd, whether one commoner could diſtrain another for a ſurcharge, in the caſe of levancy and couchancy; * and ſo the court took time to conſider fully the next term. Freem. Rep. 273. pl. 300. Paſch. 1698. Dixon v. James.

3 Lutw. 1238. 1240. S. C. it was moved in arreſt of judgment, that the iſſue was immaterial, becauſe one commoner cannot diſtrain the beaſts of any other commoner, tho' he may thoſe of a mere ſtranger that has no pretence of right, and cited ſeveral books, and thereupon rule was made to arreſt judgment, niſi &c. And the matter was afterwards debated by counſel of both ſides, and the rule was not then diſcharg'd, nec adhuc eſt, as the reporter ſays he believes. But the reporter ſays it ſeems to him, admitting that a diſtreſs may be taken for a ſurcharge by a commoner, where the common is for a certain number, that it is reaſonable that it might be done in this caſe; for altho' it is now uncertain as to the number, viz. how many ſhall be levant and couchant upon an eſtate, that muſt be aſcertained by the jury upon a trial; & id certum eſt quod certum reddi poteſt. Freem. Rep. 273. 274. pl. 300. Paſch. 1698. in caſe of Dixon v. James.

* [41]

For more of commoner in general, ſee common, copyhold, and other proper titles.

Fol. 407.

Conditions.

(A) *To what Perſons* it may be reſerved.

Hill. 2 & 3 P. & M. in caſe of Warren v. Lee.

[1. IF *tenant for life, and* the *reverſioner join in a feoffment*, the condition may be *reſerved to the leſſee only*, and by his re-entry he ſhall deveſt but his eſtate. D. 3. Ma. 127. 25.

——If *two make a leaſe* or gift *upon condition, that if the leſſee or donee does not do ſuch an act, that then the one of the donors* or leſſors *ſhall enter*; if the condition be broken, one of them ſhall only enter into one moiety, becauſe he did not depart from more than a moiety, and the words cannot make a condition, but only to him that ſpoke them, and he ſpoke the words for the moiety only as the law ſays, and the other for the other moiety, and his ſpeaking them cannot make his companion to enter or to avoid that eſtate. Pl. C. 133. a. Arg.

2. No entry or re-entry (which is all one) can be given or reſerved to any perſon, but *only to the feoffor*, donor, or leſſor, *or their heirs*. Litt. S. 347.

3. If I enfeoff another of an acre of land on condition that *if my heir pay to the feoffee* &c. 20*s*. *that he and his heir ſhall re-enter*, this is a good condition; and if after my death my heir pays the 20*s*. he ſhall re-enter; for he is privy in blood, and enjoys the land as heir to me. Co. Litt. 214. b.

S. P. and the heir was diſinherited by the feoffment, and this is a particular exception in favour of the heir out of the general rule. Hawk. Co. Litt. 298. a note of the ſerjeant's.

4. A. had *had iſſue two ſons, B. and C.* and made a *gift in tail to B.* the remainder *in fee to C. on condition, that B. ſhall not make any diſcontinuance with warranty to bar the remainder, and if he does that C. and his heirs ſhall re-enter. B. made a feoffment in fee with warranty; A. dies; B. dies without iſſue*; C. may enter; but *had the diſcontinuance been after A.'s death*, C. could not have entered. In this caſe, 1ſt. the entry for breach is given to A. and not to C. 2dly, by the death of A. the condition deſcends to B. and is only ſuſpended, and is revived by the death of B. without iſſue, and deſcends to C. 3dly, the feoffment made in A.'s life cannot give away a condition that is collateral, as it may do a right. 4thly, a waranty cannot bind a title of entry for a condition broken; but had the diſcontinuance been made after A.'s death, it had extinguiſhed the condition. Co. Litt. 379. a. b.

Hawk. Co. Litt. 478, obſerves that B.'s feoffment with warranty in A.'s life-time cannot bar C. of his entry by force of the condition, which depending on the original deed, binds the ſtate of the land into whoſe hands ſoever it comes, and can't be deveſted or barr'd by a warranty; yet *if B. diſſeiſes A. and makes a feoffment with warranty and dies*, he bars C. becauſe A.'s eſtate in the land being deveſted and turn'd to a right, was conſequently capable of being barr'd by a warranty. And by a diſcontinuance by B. after A.'s death, the condition is extinguiſhed; becauſe it was in him as heir to his father at the time of the feoffment, and was as much releaſed by it as if he had expreſly releaſed it by deed.

*[42]

5. A condition *is* only ſuch as may be *performed by the party himſelf*, from whom it moves *or his heirs*, and not where a thing is to be performed by a 3d perſon; per maſter of the rolls. Ch. Prec. 488. Paſch. 1718. In caſe of Marks v. Marks.

(A. 2) Notes as to Conditions.

1. A Condition *annexed to the realty* in the legal underſtanding *is* a quality annexed by him, that has eſtate, intereſt, or right to the ſame, whereby an eſtate &c. may either be defeated, or enlarged, or created upon an uncertain event. Co. Litt. 201. a.

2. Of conditions *in deed* ſome are *affirmative*, ſome are *negative*, and ſome in the affirmative which imply a negative; ſome making the eſtate whereunto they are annexed, *voidable* by entry or claim, or *void* ipſo facto without entry or claim; ſome are *annexed to the rent* reſerved out of the land, and ſome *to collateral acts* &c. ſome are *ſingle*, ſome in the *conjunctive*, and ſome in the *disjunctive*. Co. Litt. 201. a. 201. b.

3. There are 6 *ſeveral kinds of conditions*; 1ſt, a *ſimple condition in deed*. 2dly, of a condition *ſubſequent to the eſtate*. 3dly, a condition *annexed*

annexed to the rent, &c. 4thly, a condition that *defeats the eſtate*. 5thly, a condition that *defeats not* the eſtate *before an entry*. And laſtly, a condition *in the affirmative which implies a negative*, (as behind or unpaid implies a negative) viz. not paid. Co. Litt. 201. b.

4. Conditions are divided into conditions *in deed* and conditions *in law*; condition *in deed* is as if a man infeoffs another in fee by deed indented, reſerving to him and his heirs yearly a certain rent payable at certain days, upon condition that if the rent be behind, &c. the feoffor and his heirs may re-enter. Litt. S. 325.

5. A condition *in law is* that which the law implies without expreſs words in the deed; as if one grants the parkerſhip of his park for life, a condition is implied, that if he does not what belongs to his office to do, the grantor and his heirs may ouſt him; and ſuch condition is as ſtrong as if it was put in writing. Litt. S. 371. & Co. Litt. 232. b. 333. a.

6. Formally condition ought to be the *words of the leſſor*, but when they are *indefinite* and *apt to defeat the eſtate*, they ſhall be taken as condition; per Doderidge, and cites Browning v. Beſton, which he ſays is received for law at this day. Palm. 503. Hill. 3 Car.

7. There are 3 things which *concern the nature* of a condition. 1ſt, *apt words*; 2dly, *the nature of them to reſtrain* the eſtate; 3dly, that they *give title of re-entry*, but the place where they are inſerted
[43] is not material; reſolved. Palm. 503. Hill. 3 Car. B. R. in caſe of Hayward v. Fulcher.

8. Where the condition is *larger than the recital*, the recital ſhall reſtrain it. Per Hale Ch. J. 2 Saund. 414. Paſch. 24 Car. 2. in caſe of Arlington v. Merrick.

(B) When a *perſon* is *not certainly deſigned*, to whom the law ſhall ſay that it ſhall be.

[1. A Man *deviſes to A. upon Condition*, the *remainder to B.* in tail, *ſaving the fee*, and dies; the condition here is, by implication of law, reſerved *to the heir*; for by intendment he ſhall have the condition who is prejudiced by the deviſe, who is the heir. (R. it is to be admitted, that the condition is not deſtroyed by the remainder.) * D. 3 M. 127. 53.

* In caſe of Warren v. Lee, cites F. N. B. in ex gravi querela. [It is F. N. B. 201. (C)

that he in remainder ſhall have advantage of the condition if it be broken; but the ſame ſhall be by way of action, and not by entry for the condition not performed.

(C) Condition *in Deed*. What *Words* make a Condition. What not.

[1. AD *effectum* in grants of the king makes a condition. * 38 H. 6. 35. † Co. 10. Portington 42.

* Grant of the king ad effectum, *that the grantee ſhall give it to A. B.* is a conditional grant. B. Patents, pl. 29. cites 38 H. 6. 34, 35.——21. confirmation, pl. 13. S. P. per omnes juſticiarios, cites S. C.——Quare impedit, king

King H. 6. *granted an advowſon* to W. N. and two others, *ad effectum, that they give it to the nuns of Sion*, of the foundation of the king; and the defendant pleaded, that the *grantees granted it to the abbeſs of Sion*, and *did not ſay that ſhe was of the foundation of the king*; and therefore ill, by all the juſtices; for by them, this word (effectum) is a condition; but it is not declared, whether it be a condition in the caſe of the king only, or in the caſe of a common perſon alſo. Br. Conditions, pl. 96. cites 38 H. 6. 34.——Ad effectum is conditional of itſelf. 4 Le. 70. in pl. 161. Arg. cites 38 H. 6. 34. in caſe of the king.——Such words in a grant of the king make a condition in futuro, and that ſtands with the grant, and allows it perfect and good at the firſt.

† D. 318. b. Marg. pl. 12. cites S. C.——Co. Litt. 204. a. S. P.——See pl. 5. in the notes.

[2. If the king grants an advowſon in fee, and further *conceſſit, that* the grantee *may amortize* this for the ſoul of the progenitors of the king; this *is but a licence*, and not a condition. 43 E. 3. 34. adjudg'd.] Fitz. Condition, pl. 7. cites S. C. ſo that he is not bound to amortize but at his will.

[3. The words *Ea intentione* in the grant of the *king* make a condition. Co. 10. Portington 42.] Co. Litt. 204. a. S. P.——D. 318. b. pl. 12. Marg. cites S. C.——But in the caſe of a common perſon's grant of feoffment, the words Ea Intentione, or Ad Effectum, do not make a condition, though in a laſt will they do. 10 Rep. 42. a. cites it as reſolved Paſch. 18 Eliz. by all the juſtices of C. B.

[4. The words *Ad ſolvendum* in the grant of the king, make a condition. Co. 10 Portington 42.] D. 318. b. pl. 12. Marg. cites S. C.——Co. Litt. 204. a. S. P.—but contra in the caſe of a common perſon, unleſs it be in a laſt will. 10 Rep. 42. a. cites it as reſolved Paſch. 18 Eliz. by all the juſtices.

[44]

[5. *Ea intentione* does not make a condition, but a *confidence and truſt, unleſs* an expreſs *re-entry* be limited. *D. 3, 4. Ma. 138. 30. adjudged. Doctor and Student, 122. † 31 H. 8. S. 152. Contra ‡ 27 H. 8. 15. b.] The Counteſs of Surry's caſe.—Br. Conditions, pl. 191. cites S. C. & S. P. held by ſeveral.——Br. N. C. pl. 152. cites S. C.——Br. Conditions, pl. 7. cites 27 H. 8. 14, 15. that Knightley held the words Ea intentione to make a condition as well as the words ſub Conditione, &c.——If a man makes a feoffment Ea intentione, that the feoffee ſhall not do ſuch an act, theſe are no words of condition in the caſe of a common perſon. Co. Litt. 204. a ſays it was ſo adjudged 18 Eliz. in C. B.——10 Rep. 42. in Mary Portington's caſe, cites S. P. ſo reſolved by all the juſtices, 18 Eliz. C. B.——So a *feoffment* in fee *ad intentionem to perform his will*, this is no condition, but a declaration of the purpoſe and will of the feoffor, by ſeveral; and the heir cannot enter for non-performance. Br. Conditions, pl. 131. cites 31 H. 8.——Quære of theſe words, *Ad Intentionem*, or *Propoſitum*, if theſe make a condition? Brook ſays it ſeems that they do not. Br. Conditions, pl. 96. cites 38 H. 6. 34.

A man made a feoffment in fee ſub conditione, Ea intentione, that his wife ſhould have the land for her life, the remainder to his younger ſon in fee. The feoffee died without making ſuch an eſtate. The heir of the feoffee entered. It was reſolved, that it was not a condition, but an eſtate, which was executed preſently according to the intent. 4 Le. 2. pl. 3. Mich. 23 Eliz. Anon.

‡ Br. Conditions. pl. 7. cites S. C.——S. C. cited Palm. 438.

[6. *Ut adveniat, ad inveniendum*, or *perimplendum*, &c. make not a condition. D. 3, 4. Ma. 138. 3. And this is alſo proved by the writ of ceſſavit de Cantaria.]

[7. Bracton capite de donationibus upon condition hath this verſe.]

[8. Scito quod *(ut)* modus eſt *(ſi)* conditio *(quia)* cauſa. This is cited, D. 3, 4. Ma. 138. 31.] S. C. cited Co. Litt. 204. a.

If the grantee refuses to give his counsel, the annuity is extinct.

9. If an annuity be granted *to a physician pro consilio impendendo*, this is a condition. 2 Le. 126. Arg. cites 41 E. 3. 6. for the grantor has no means to compel the grantee to give his advice.

Br. Extinguishment, pl. 36. cites S. C.

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But Brooke says, that it does not appear there whether it was pro servitio impenso, or impendendo. Ibid.——S. C. cited. Arg. 2 Le. 128.——S. C. cites Arg. 4. Le. 70. that he may enter into the wardship and land.

10. If J. N. has the ward of land and body, and grants it to W. P. his servant, *pro bono servitio*, &c. this was admitted a good condition; and if he departs out of his service the other may enter into the ward. Br. Conditions, pl. 29. cites 45 E. 3. 8.

D. 329. a pl. 13. Mich. 15 & 16 Eliz. Anon. S. C.—— 3 Le. 65. pl. 95. S. C. cited by Dyer.—— Dal. 116. pl. 7. 16. Eliz. S. P. and seems to be S. C.

11. A. and B. were bound to stand to the award of certain persons, who *awarded that A. should pay unto B. 20 s. per ann. during 6 years, towards the education and bringing up of such a one an infant*, and *within the 2 first years* of the said term *the infant died*, so as now there needed not any supply towards his education; yet it was adjudged that the yearly sum ought to be paid for the whole term after; for the words (towards his education) are but to shew the intent and consideration of the payment of that sum, and no words of condition, &c. 2 Le. 154. in pl. 186. 19 Eliz. C. B. Anon.

4 Le. 70, 71. Arg. S. P.

12. In some cases this word *pro* does not make a condition; As if before the Stat. of W. 3. land was given *pro Homagio suo*, there, if the homage be not done, the feoffor could not re-enter, but he ought to distrain. Arg. 2 Le. 128. Mich. 29 Eliz.

Co. Litt. 203. a. says, that sub conditione is the most proper and express condition in deed.

13. Diverse words of themselves make estates upon condition, among which is *sub conditione*; as if A. enfeoffs B. to have to B. and his heirs, upon condition that B. and his heirs pay, &c. to the said A. annually such a rent, &c. the feoffee has estate upon condition. Litt. S. 328.

*[45]

*14. Regularly the word *(pro)* does not import a condition, tho' it has the force of a condition *when the thing granted is executory, and the consideration of the grant is a service, or some such thing, for which there is no remedy; but the stopping the thing granted*, as in the case of an annuity granted pro consilio, or for executing the office of a steward of a court, or the service of a captain or keeper of a fort, here the failure of giving counsel, or performing the service, is a kind of eviction of that which is to be done for the annuity, the grantor having no means either to exact the counsel, or recompence for it, but by stopping the annuity; and in these cases the condition is not precedent, and therefore the performance thereof need not be averr'd when the annuity is demanded. Per Hobart, Ch. J. Hob. 41. Mich. 10 Jac. in the case of Cowper v. Andrews.

Cro. C. 475. pl. 4. Dodson v. Lynne. S. C. and because this concerned *Ecclesiastical Jurisdiction*, the court heard Civilians, and diverse texts in the civil law being shewn, that *modo* and dummodo are express provisors in such licences, and make no condition, unless added, *That if he does otherwise then it shall be void*; but is only an admonition or caution, that shall be punished

15. The clause is a dispensation to hold 2 benefices, *Dummodo* they be not above 12 miles from one another, does not make a condition to make the first void; Agreed among the justices without argument. Jo. 394. pl. 5. Trin. 13. Car. Dodson v. Glyn.

punished by eccleſiaſtical cenſures if he does otherwiſe; and this being always the expoſition on granting ſuch licences, the court reſolv'd, that tho' it be generally a condition in the expoſition of the law, yet to avoid the great inconveniences that would inſue, as to avoidancies of multitudes of benefices, &c. it ſhould not be taken here as a condition.

16. *Leaſe of land paying rent* is no condition; ſo a power *to dig up trees making up the hedge* again is not a condition, but *covenant* lies for not repairing the hedge. 2 Show. 202. pl. 209. Paſch. 34 Car. 2. B. R. Anon.

(D) By what *Words* it may be created. By *Covenant*.

[1. IF a man leaſes land by indenture, and in this there is ſuch a clauſe, *And it is covenanted between the parties*, or *It is agreed between the parties*, That the leſſee ſhall not do ſuch a thing *upon pain of forfeiture* of the eſtate, * this is a good condition; for here the words ſtand indifferently to be the words of the leſſee or leſſor, and ſo ſhall be taken to be the words of the leſſor. H. 32 Eliz. B. R. agreed.]

* Fol. 408.

[2. If a man by indenture leaſes for years, and therein the leſſee covenants and grants with the leſſor, that he nor his aſſigns *will not grant*, aſſign, or ſell the land to any prætor, &c. *upon pain of forfeiture* of the term, this is a condition. Mich. 12 Jac. B. R. and Trin. 14 Jac. B. R. between *Whitchcock and Fox*, adjudged.]

Cro. J. 398. pl. 4. S. C. reſolved without hearing arguments; for being by indenture, they are the words of both parties, and ſufficient to determine the leaſe.—2 Bulſt. 290. Fox v. Whichcocke, S. C. Coke Ch. J. held it clearly a condition.——Roll Rep. 68. pl. 12. S. C. & ibid. 69. agreed on the other ſide to be a condition.——S. P. by Mountague, and the leſſor has election either to enter or to bring action of covenant. Dal. 8. pl. 7. Mich. 7 E. 6. Anon.

3. A *leſſee* for years *covenants*, that *if he, his executors or aſſigns, ſell the term, that then the leſſor may re-enter*; This is no condition; for all conditions ought to be reſerved and made on the part of the leſſor, donor, &c. Dy. 6. a. b. pl. 1. 2. Paſch. 28 H. 8.

4. A. made a leaſe to B. wherein it was *covenanted* between the ſaid parties, *that if it* happen the ſaid *rent* to *be behind, in part or in all, by the ſpace of* 6 *weeks*, that then *it ſhall be lawful for A. to re-enter*. Dyer held, that theſe words made condition, becauſe they are the words of the leſſor, as well as of the leſſee. Weſton was of the ſame opinion, viz. that it is a perfect covenant. Dal. 86. pl. 46. Anno 14 Eliz. Molington v. Filpot.

[46]

5. A *leaſe* is made *of a farm, except the wood*, and the *leſſor covenants, that the leſſee ſhall take all manner of underwoods, provided always, and the leſſee covenants, that he will not cut any manner of timber-trees*; this is no condition, being but a declaration of what wood he was to meddle with. Poph. 117, 119. cites 17 Eliz. Hamington v. Pepul.

6. Proviſo *added in the end of a covenant* extends only to defeat the ſame covenant, unleſs there are the words *Qu d tunc* the grant ſhall be void. But proviſo *put abſolute* in a deed, without dependance upon any particular covenant or exception, is to be conſtrued

But proviſo annexed to an exception is only an explanation.

for condition to all the eſtate. Agreed by all the juſtices. Mo. 106. pl. 249. Mich. 17 and 18 Eliz. in Andrews's caſe.

Mo. 106. Andrews's caſe.

7. In an indenture of leaſe, the *leſſee covenanted to perform all the covenants ſub pœna foriſacturæ*, and by the opinion of the whole court the ſame was a condition. Arg. Le. 246. pl. 331. cites 24 Eliz. Hill v. Lockham.

Cro. E. 202. pl. 23. Arg. cites Hill v. Lockſon S. P. and ſeems to be S. C. that the leſſor enter'd, and it was adjudg'd for him.

8. The lord M. bargained and ſold lands by deed inrolled, *proviſo, and is covenanted, granted and agreed, that it ſhall be lawful for J. S. (who was a ſtranger) to dig in the lands for mines*; it was adjudged in this caſe, that, altho' the word proviſo, abſolute dicto vel poſito, makes a condition, yet when it is coupled with other words ſubſequent, it ſhall be conſtrued in the ſenſe of the ſaid words to which it is coupled. Mo. 174. pl. 308. Mich. 26 & 27 Eliz. Huntington v. Mountjoy.

4 Le. 147. pl. 258. S. C. but ſtates the grant to dig to be to the lord M. his heirs and aſſigns, and that he aſſigned it over. But it was held accordingly, that the word (proviſo) being coupled with other words of covenant and grant, did not create a condition, but ſhould be of the ſame nature as other words of grant.——Godb. 17. pl. 24. S. C. in totidem verbis.

9. The biſhop of R. made a leaſe for years, *leſſee covenanted, that he would not put out or diſturb any of the tenants*, inhabiting in the ſaid manor *out of their tenancies, doing their duties according to the cuſtom* of the manor; and plaintiff ſhewed, that the defendant had put out one A. G. a tenant dwelling there upon a tenement parcel of the ſaid manor, and that the biſhop enter'd for the condition broken, and made a leaſe to the plaintiff. It was argued, that altho' the words found in covenants, and are the words of the leſſee, yet the leaſe being by indenture, they are the words of both, and the intent of them is to defeat the eſtate, which cannot be by covenant but by condition; and Wray and Gawdy were of that opinion clearly. Cro. E. 202. pl. 33. Mich. 32 & 33 Eliz. B. R. Thomas v. Ward.

Le. 245. pl. 331. S. C. held accordingly by Wray and Gawdy, and Fenner did not contradict it.

10. A. leaſes to B. for years, with clauſe of re-entry for non-payment of rent, and in the leaſe were diverſe covenants on the part of the leſſee. Afterwards *leſſor deviſes, that leſſee ſhould hold* the land demiſed *for 31 years*, reckoning the years of the firſt term not expir'd as parcel of the ſaid term of 31 years, *yielding like rent and under ſuch covenants as in the former leaſe*. Per tot. cur. the words can't make a condition; for a condition is a thing odious in law, which ſhan't be created without ſufficient words. 2 Le. 33. pl. 40. Hill. 39 Eliz. C. B. Machell als. Michell v. Dunton.

Goldſb. 74. pl. 1. S. C. all the court held, that the words (under like covenants) do not make a condition, tho' they are in a will, and Periam ſaid, that they are void words.——Godb. 99. pl. 114. Mich. 28 and 29 Eliz. S. C. not reſolv'd.——And 197. pl. 232. Maunchell v. Dodington, S. C. adjudged.

[47] 11. J. S. made a leaſe for years; the *leſſor covenanted that the leſſee ſhould have houſebote, &c. without committing waſte, upon pain of forfeiture* of the leaſe; if it be a covenant or a condition was not reſolved; but Walmſley held it a covenant on the leſſor's part, and conſequently it cannot be a condition. Cro. E. 604. pl. 18. Hill. 40 Eliz. B. R. arch-deacon v. Jennor.

12. It

12. If A. infeoffs B. viz. *proviſo* ſemper *quod prædictus B. ſolvat* ſeu ſolvi faciat præfato A. talem redditum; or *ita quod prædictus B. ſolvat &c.* In thoſe caſes, without ſaying more, B. has only eſtate on condition; ſo that if he does not perform the condition, the feoffor and his heirs may enter. Litt. S. 329.

13. If a man by indenture lets lands for years, *provided always, and 'tis covenanted and agreed* between the ſaid parties, that the leſſee ſhould not alien, and 'twas adjudg'd that this was a condition by force of the proviſo, and a covenant by force of the other words. Co. Litt. 203. b.

Proviſo join'd with words of covenant makes a condition and a covenant

alſo, per Popham. Cro. E. 486. cites Sir Henry Barkeley's caſe.

14. *Leaſe* for 80 years *of the manor of T.* &c. *excepting all woods and underwoods growing or to grow in the wood called T. wood, and* excepting *all timber trees of oak, aſh, and elm, growing on any part of the premiſes, with free ingreſs and regreſs*; the leſſor covenanted that the premiſſes were free from incumbrances, and the *leſſee covenanted* to repair the fences, and alſo *if he diſturbed the leſſor, or his aſſigns, to ſell, cut or carry any of the wood or underwood excepted, that then it ſhould be lawful for the leſſor to re-enter* &c. One queſtion was, whether this was a covenant or a condition, for which upon a diſturbance the leſſor might enter and defeat the eſtate? It was inſiſted, that it was not a condition, becauſe they were the *words only of the leſſee*, and every condition is created by the words of the leſſor; 'tis true, if the words had been, if the leſſee diſturb &c. then the leaſe ſhall be void, this had been a condition, becauſe the plaintiff could have no remedy by action upon a void leaſe; but 'tis otherwiſe where the leſſee covenants it ſhall be lawful for the leſſor to re-enter, becauſe in ſuch caſe he may have a remedy by way of action upon the deed; and Doderidge ſaid that *formally a condition ought to be by the words of the leſſor, but when they are indefinite, and proper to defeat the eſtate, they ſhall be taken as a condition*, according to Browning and Beſton's caſe, which is received for law at this day. Palm. 491, 496, 503. Hill. 3 Car. B. R. Hayward v. Fulcher.

Jo. 166. pl. 1. S. C. reſolved, that it was a condition; for tho' it was placed among covenants, as was reſolved in Cromwell and Andrews's caſe. 2 Rep. [71. b.] and tho' they are the words of the leſſee by way of covenant, yet there being by the indenture, words of reentry, and that the leaſe ſhall be void, it is as ſtrong as if they had been the words of the leſſee himſelf, and tho' this point was not reſolved in the caſe of the Queen v. Lyſter, yet the better opinion is ſo, and the law has been taken ever ſince that it ſhall be a condition. Ibid. 169. S. C. adjudged.

15. Leſſee for years brought *treſpaſs* for breaking his cloſe, and beating down his hedges &c. The defendants *juſtify for that one M. ſeiſed in fee, leaſed to the plaintiff, excepting the trees, with liberty to grub up, cut down, and carry them away, repairing the hedges and filling up the holes*; and that M. granted the trees, and the liberty to the defendants &c. Upon demurrer exception was taken, becauſe the *defendant had not ſhewn that he filled up the holes and repaired the hedges*, and that thoſe words (filling up the holes and repairing the hedges) make a condition, which not being done deſtroys the agreement, and avoids the liberty; ſed non allocatur; for it is not a condition but a covenant, for breach whereof the leſſee has remedy by action. Adjudged quod querens nil capiat, per Billam. 2 Jo. 205, 206. Paſch. 34 Car. 2. B. R. Warren v. Arthur.

(E) Improper Words.

*Br. N. C. pl. 465. cites S. C. that it is not void till an entry; per Bromley Ch. J.——Br. Conditions, pl. 245. at the end of the plea cites S. C.

[1. IF a man leaſes for life, or makes a feoffment upon condition that if the *leſſee does ſuch an act*, the *eſtate ſhall be void*; tho' the eſtate cannot be void before entry, yet this is a good condition, and ſhall give an entry to the leſſor by implication. *2 Marl. Br. S. 465. Co. 3. *Pennant* 65. admitted. Litt. S. 723. M. 37, 38 Eliz. B. R. in † *Goodale and Wiat's caſe*. Agreed by all præter Fenner, who doubted thereof.]

† 5 Rep. 95. b. S. C. admitted to be a condition.——Cro. E. 383, 384. pl. 4. S. C. affirmed in error, that they were good words of condition.——Poph. 99, 100. S. C. & S. P. admitted by two J.——Gouldſb. 176. pl. 111. S. C. but the juſtices differed as to its being a good condition.——Mo. 708. pl. 989. S. C. agreed, that the eſtate could not be void before entry, but whether the words (ſhall be void) are ſufficient warrant for entry they varied in opinion.

[2. *So* it is if the condition be that the *eſtate ſhall ceaſe*. Litt. S. 723. M. 37, 38 Eliz. B. R. per Coke.]

D. 193. pl. 27. Mich. 2. & 3 Eliz. S. C. & S. P. admitted.

[3. If a man makes a feoffment by deed, upon condition that if the feoffee *does not* ſuch an act, then the feoffment, charter, and livery *ſhall be void*; this is a good condition, *tho' no re-entry* be reſerved. D. 9. 10 Eliz. 268. 15. admitted.]

[4. *So* if the condition be that the *feoffment ſhall be void*, this is a good condition, and *ſhall give a re-entry* without an expreſs reſervation. 11 H. 7. 22. *Eriche's caſe*, agreed.]

5 Rep. 95. b. Goodal's caſe, S. C. & S. P. ſeems admitted.——Cro. E. 383. pl. 4. S. C. affirmed in error, that they were good words of condition.——Poph. 99. S. C. but S. P. doubted by Popham and Fenner.——Mo. 708. pl. 989. S. C. agreed, that the eſtate could not be void before entry; but whether the words (ſhall be void) are ſufficient warrant for entry, they differed in opinion.——Gouldſb. 176. pl. 111. S. C. but the juſtices differed as to its being a good condition.

[5. *So* if the condition be *that the deed* of feoffment *& ſciſina* inde habita *erit vacua* & nullius vigoris; this is a good condition; for this is all one as if he had ſaid that the feoffment ſhall be void; for the livery takes effect by the deed. Dubitatur, M. 37, 38 Eliz. B. R. between *Goodale and Wiat*, two againſt two juſtices.]

See (K) pl. 6. S. P.

[6. If a man leaſes for life, or makes a feoffment in fee, upon condition that if the feoffee or leſſee *does ſuch an act*, that then his *eſtate ſhall* be void and ceaſe, *and* the land *ſhall remain over to a ſtranger*; tho' it was intended that the ſtranger ſhould take advantage of the condition, and he cannot by law, yet the leſſor or feoffor may enter by force of this condition. Lit. S. 723.]

This ſeems to be intended of another deed made at the ſame time.——See (S) pl. 2.

[7. If a man makes a feoffment by deed, and the *feoffee grants* by another deed made upon condition, that *if the feoffor does* ſuch an act, the *firſt deed ſhall be of no force*; this is a good condition, and ſhall give a re-entry, tho' none be reſerved. * 30 Aſſ. 11 admitted. 45 Aſſ. 10. admitted.]

* The caſe was, a man made a *ſimple feoffment*, and after, *by deed rebearſing it*, the *feoffee granted to the feoffor, that if the feoffor paid* 10 *l. by ſuch a day, that the deed and feoffment ſhould be void.* Tanke ſaid, that deſeaſance cannot be of effect of lands which paſs by livery, if the *livery* be not *made as well upon the deſeaſance as upon the charter* of feoffment; and the opinion of the court was with him. Br. Conditions, pl. 113. cites 30 Aſſ. 11.——Br. Deſeaſance, pl. 8. cites S. C. and Brooke ſays, that

that therefore at this day it is uſual to covenant, that the aſſurance, after the condition performed, ſhall be to the uſe of the vendor, and that the vendee and his heirs, and all others, ſhall be [ſeiſed] to the vendor and his heirs.

[49]

[8. If a man leaſes for years, and in the indenture there is ſuch clauſe, *et non licebit* to the leſſee *dare*, vendere, vel concedere *ſtatum* & terminum ſuum alicui perſonæ *ſine licentia* of the leſſor *ſub pœna foris-facturæ* termini præd' this is a good condition. D. 66. a. pl. 8. Mich. 3 E. 6. per cur.] S.C. & S.P. cited Godb. 99. in pl. 114.—Co. Litt. 204 a. S. P.—S. C. cited Arg. Le. 246.—S. P. by Gawdy, Godb. 131.—Provided always, and it is covenanted and agreed, and the leſſee covenants not to alien or grant over without licence of the leſſor. The reporter adds a quære, if this be a condition or a covenant only, becauſe it was not agreed among the juſtices. D. 157. pl. 7. Mich. 4 & 5 P. & M. Anon.—This amounts to a leaſe for years defeaſible, and ſo it was adjudg'd in C. B. in Q. Elizabeth's time; and the reaſon of the court was, that a leaſe for years was but a contract which might begin by word, and by word may be diſſolv'd. Co. Litt. 204 a. at the bottom.—Proviſo quod non licebit to the leſſee to alien his term without aſſent of the leſſor, was reſolved to be a condition. Cro. E. 60. pl. 2. Mich. 29 & 30 Eliz. B. R. Knight v. Mory.

[9. *So* if there be ſuch a clauſe in the indenture, and the leſſee *ſhall continually dwell* upon the houſe upon pain of forfeiture of the ſaid term and intereſt. D. 6. [and] 7 E. 6. 79. pl. 46. per cur.] Co. Litt. 204. a. S.P. and cites S.C.

[10. If a man makes a *feoffment rendering rent, and if* the rent be *behind*, that it ſhall be lawful for him and *his heirs to retake* the land, and to make his profit thereof; this is a good condition, and ſhall give a re-entry, tho' it be not expreſly limited. 6. E. 2. Entry congeable 55. Adjudged.] Roll Rep. 330. pl. 37. Arg. cites Fitz. condition, S.C. and 8 E. 3. which was that terra redibit; and Coke Ch. J. ſaid, that there ought to be a reaſonable intendment in that caſe; that the word (return) is not a proper word, yet it is a good condition, and it was to defeat the eſtate.—If the words had been (to retake) only, without ſaying (to retake the land) it had been good; per Coke Ch. J. 3 Bulſt. 155. Mich. 13 Jac.—Co. Litt. 204. a. ad finem S. P. and cites S. C. and ſays, that for the avoiding a leaſe for years, ſuch preciſe words of condition are not ſo ſtrictly required as in a caſe of freehold and inheritance.

11. A. was bound in an obligation to B. and upon oyer of the obligation the endorſement was, that the ſaid B. *vult & concedit, that if the ſaid A. ſhould ſtand to the arbitrement of J. S. then* the obligation ſhould be void. It was moved that the condition is void, becauſe it is, that B. vult & concedit, that if A. ſtands to the arbitrement of J. S. and all this is the deed of A. and not of B. neither is it by words conditional; and per Newton and Paſton, the words vult & concedit are void, but the condition commences here, viz. if the ſaid A. ſhould ſtand to the arbitrement of J. S. And therefore it is ſufficient to make a condition; whereupon the defendant's counſel paſſed over. Br. conditions, pl. 58. cites 21 H. 6. 51. Br. Faits, pl. 32. cites S. C.—Fitzh. Barre, pl. 157. cites S. C. but miſtakes Aſcue for Paſton.—Le. 246. Arg. cites S. C.

12. *Provided it ſhall not be lawful to the leſſee to lop the trees*; per Dyer, 'tis a condition; per Brown 'tis not. Mo. 45. pl. 136. Mich. 5 Eliz.

(E. 2) By Words of Leſſor only.

1. A. Leaſes to B. for years, with clauſe of re-entry for non-payment of rent, and in the leaſe were diverſe covenants on the part of the leſſee; afterwards *leſſor deviſes that leſſee ſhould hold* the land Goldſb. 74. pl. 1. S. C. adjudg'd to be no con-

dition; for the words (under like covenants) do not make a condition, tho' they are in a will.—Ow. 54. S. C. re-

land demiſed *for* 31 *years*, reckoning the years of the firſt term not expired as parcel of the ſaid term of 31 years, *yielding like rent, and* * *under ſuch covenants as in the former leaſe*; per tot. Cur. the words of the will can't make a condition, for a condition is a thing odious in law, which ſhan't be created without ſufficient words. 2 Le. 33. pl. 40. Hill. 29 Eliz. C. B. Machel, alias Michel v. Dunton.

ſolved by all the juſtices accordingly; for covenants and conditions are of ſeveral natures, the one giving action, the other entry; and the intent of the will was, that the leſſee* ſhould not forfeit his term, tho' the covenants were not perform'd, but is only bound to ſuch penalty as he was at firſt, which was to render damages in an action of covenant and judgment accordingly.——And. 279. pl. 214. Manchel. v. Dounton, S. C. held accordingly.——Ibid. 197. pl. 332. Maunchel v. Dodenton, S. C. agreed per Cur. that it does not make condition, but that the words were vain words.—Godb. 99. pl. 114. ſeems to be S. C. but not reſolved, but ſays that Gawdy held it a condition, which was in a manner agreed by all the other juſtices; yet Periam and Rhodes J. ſaid, that the firſt leaſe was not defeaſable for non-performance of the covenants, nor was it the intent of the deviſor that the ſecond ſhould be ſo, notwithſtanding his meaning was that he ſhould do the ſame things.——2 Le. 33. pl. 40. S. C. and the whole court held that the words of the deviſe cannot make a condition; for a condition is a thing odious in law, which ſhall never be created without ſufficient words.——And. 279. pl. 214. Manchell v. Dounton, S. C. & ibid. 197. pl. 232. Maunchel v. Dodington, agreed that it makes no condition.——Poph. 8. S. C. cited by Popham Ch. J. as adjudg'd no condition.——S. C. cited by Popham as adjudg'd accordingly. Cro. E. 288. in pl. 3.

* [50]

2. Covenant by leſſor *that leſſee may cut fireboot, &c. without doing waſte*, and the leſſee does waſte in felling wood; this is a breach of leſſee's agreement, and he is liable to be ſued on his bond for performance of covenants, agreements, &c. for tho' 'tis the covenant of the leſſor, yet 'tis the agreement of the leſſee. Le. 324. pl. 457. Trin. 31 Eliz. C. B. Stevenſon's caſe.

Fol. 409.

(F) Obligation. Condition. What *Words* make a Condition.

See (D)

[1. IF the condition of an obligation be made in this manner, ſcilicet, the condition of this obligation is ſuch, that *if R. H. do not grant over the benefice of D. during his life, then* the ſaid *J. H.* (the obligor) *doth covenant to grant* and aſſign *the ſaid advowſon to the obligee and his aſſigns*, &c. tho' the word *covenant* be put in here, yet this is conditional, becauſe it is expreſſed before in the commencement of the condition, [viz.] the condition of this obligation is ſuch, &c. Tr. 38 Eliz. B. R. between *Wiſden and Haynes.*]

[2. If the condition of an obligation be ſuch, *now therefore if the ſaid obligor pay* 10 *l. to the obligee quarterly, then it is agreed that the obligation ſhall be void*, this is a good condition. Per 8. Ja. B. between *Simpſon and Bernard.* Per. Cur.]

[3. If the condition of an obligation be to ſtand to the award of J. S. *ſo as* the award *be made in writing indented under his hand and ſeal, &c.* this is a condition ſo that the award ſhall not bind, tho' it be made by writing under the hand and ſeal of J. S. if the writing be not indented. P. 11 Car. B. R. between *Holmes and Hoyt* adjudged upon a demurrer. Intratur Hill. 11 Car. Rot. 468.]

4 The condition of an obligation was, *whereas the obligee is bound in certain obligations, the obligor is to deliver them to the obligee before Mich.* Reſolved that this is a condition clearly. Mo. 395. pl. 515. Hill. 37 Eliz. Grammingham v. Ewre

Cro. E. 396. pl. 1. Grenningham v. Ewer, S. C. ——Ibid. 339. S. C.

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(G) Obligation. Condition. What ſhall be ſaid to be *Parcel* of the Condition. [51]

See Tit. faits (G)

[1. IF the condition of an obligation be in ſuch a manner; *whereas Robert Croſs* the father *ſhall and will* before ſuch a day, *ſurrender the moiety* of the ſaid copyhold tenement *unto Robert* the younger, *ſo that Robert* the younger *be thereof ſo ſeiſed, according to the cuſtom of the manor, if they ſo long live*, then the obligation to be void. The laſt words (if they ſo long live) do not make the condition only, but the ſurrender is part of the condition alſo. M. 11 Jac. B. R. between *Marker and Croſs.*]

2 Bulſt. 133. S.C. the objection was to the word (whereas) inſtead of (if) and the court were all clear of opinion, that it was a mere void condition, the ſame being altogether inſenſible, and not compulſory, as the ſame ought to be, and ſo the obligation is ſingle and without condition. ——The words were, *Whereas the obligee is bound in certain obligations, the obligor is to deliver them to the obligee before Mich.* &c. It was reſolv'd, that thoſe words make a condition clearly. Ibid.

[2. If the condition of an obligation be in ſuch manner; the condition of this obligation is ſuch, that *if the above-bounden A. B. do diſcharge the obligee of ſuch a recogniſance*, &c. *and whereas the above-bounden A. B. hath agreed to free and diſcharge the ſaid obligee from 2 ſeveral obligations* &c. Now the *condition* of this obligation *is* ſuch, *that if* the ſaid A. B. *do ſave and keep harmleſs the obligee of and from the ſaid 2 ſeveral obligations*, then this preſent obligation to be void; tho' in this caſe the words prima facie ſeem to *reſtrain* the condition to the laſt part only, ſcilicet, to ſave him harmleſs from the 2 obligations, yet in as much as it *appears that the intent was to extend to the recognizances* by the firſt words, the condition of this obligation is ſuch, and likewiſe by the word (alſo) in the laſt clauſe, ſcilicet (whereas alſo) or otherways the firſt words (the condition of this obligation is ſuch) will be void; the firſt part, as to the diſcharge of the recognizance, ſhall be part of the condition alſo, for the *firſt part is a perfect ſentence to make it a condition*; but theſe words to be added thereto, ſcilicet, *(then the ſaid obligation to be void)* which words *will ſerve well for* (*) *both clauſes*, and the *intervening* recital *(whereas &c.) will not hinder it.* Mich. 1649, between *Ingoldeſby and Steward* adjudged per cur. præter Jermyn. Intratur Cr. 1649. Rot. 1284]

* Fol. 410.

3. A man made obligation, and after the date, and *at the end of it a clauſe was compris'd, that if he pay the moiety of the ſum, that then the obligation ſhall be void*; and the opinion of the court was, that it is a good condition. Br. obligation, pl. 89. cites 30 E. 3. 3. and Fitzh. Bar, 265.

Br. Conditions, pl. 232. cites S. C.

4. Condition of a bond was to ſave lands from all incumbrances, and before the ſealing of the bond there is a *memorandum indorſed, that it ſhould not extend to ſuch a particular incumbrance.* The indorſement

dorſement was held an explanation of the intent of the parties, and that before the ſealing 20 things may be indorſed or ſubſcribed as conditions of the obligation, and they all ſhall ſtand. Mo. 679. pl. 930. Mich. 44 & 45 Eliz. B. R. Broke v. Smith.

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[52] (H) By what *Words* it may be created.

See (K) pl. 2. S. C. and the notes there.

[1. IF a man *leaſes to a woman for* 40 *years* upon condition, that ſi *illa tam diu viveret* & cuſtodiret ſeipſam *a ſole widow, and ſhould inhabit upon the premiſes*, this is not any condition; for the word *(ſi)* makes the intention uncertain whether another thing was intended beſides the ceſſor of the term or the re-entry. Mich. 37, 38 Eliz. B. R. between *Sayer and Hardy*, adjudged.]

This was a point made out of the caſe, Arg. by leaving out the inſenſible words, and that theſe words of themſelves would make a condition without more, but the whole court e contra for the reaſon given by Roll. Roll. Rep. 367. pl. 20. Paſch. 14 Jac. B. R. S. C. [but I do not obſerve S. P. mentioned in any of the other reports of the S. C.]

[2. If a man *leaſes* lands to another, *proviſo if the rent be arrear*, this is not any condition, becauſe the word *(ſi)* makes the intention uncertain; for where the proviſo is *hypothetical*, it ought to be ſhewed what he would have. Paſch. 14 Jac. B. R. between *Moodye and Garnon*. Per Cur.

—To make it a good condition it ought to have the following words, viz. *that then it ſhall be lawful for the ceſſor, &c. to enter*, &c. Litt. 331.—And in ſuch caſe the words *ſi contingat* redditum prædict' aretro fore, &c. that then it ſhall be lawful to the ceſſor, leſſor, &c. to enter, &c. make a good condition. Litt. S. 330.

Proviſo is as apt a word to make an eſtate conditional as ſub conditione, or any other word of condition; but yet when it ſhall make an eſtate or intereſt conditional, 3 things are to be obſerved, 1ſt. That it does not depend upon any other ſentence nor participate of it, but that it ſtands originally of itſelf. 2dly, That it be the word of the bargainor, feoffor, donor, &c. 3dly, That it be compulſory to inforce the bargainee, feoffee, donee, &c. to do an act; reſolved. 2 Rep. 70. b. Hill. 43 Eliz. C. B. Lord Cromwell's caſe ——Mo. 106. pl. 249. Andrews's caſe, S. C. and all the juſtices agreed that proviſo annexed to an exception is only an explanation; and if it be added at the end of a covenant, it extends no further than to defeat the covenant, unleſs it has words quod tunc the grant ſhall be void; but being put abſolutely in a deed, without dependance upon any particular covenant or exception, it is to be conſtrued as a condition to all the eſtate.

Mo. 848. pl. 1151. S. C. Reſolved that it is not any condition.—— Roll Rep. 330. pl. 37. S. C. adjornatur.—— Ibid. 367. pl. 20. S. C. held accordingly.——3 Bulſt. 153. S. C. adjudg'd againſt the plaintiff per tot. Cur.——Cro. J. 390. pl. 3. Wood v. Germons. Hill. 13 Jac. adjornatur.

[3. (So) if a man leaſes land to another, *proviſo if the rent be behind, it ſhall be lawful* for him *to reſtrain, and not being ſufficient the ground, to re-enter into the premiſes, and the ſame to have again in his former eſtate*; this is no good condition; for the words are not, that he ſhall reſtrain the goods upon the tenement, nor is it known what is intended by the word ſufficient, ſcilicet, ſufficient reparation, rent, &c. and the words (the land to re-enter into the premiſes) are *without ſenſe*. Paſch. 14 Jac. B. R. between *Moodye and Garnon* per cur.]

* And. 267. pl. 275. S. C. the court adjudg'd it to be a condition, and the greater

[4. (So) if a man leaſes for years lands by indenture, and *after a covenant on the part of the leſſor* this clauſe is contained, viz. *provided always nevertheleſs, and it is covenanted* and agreed, *by and between the ſaid parties, that* he *the ſaid leſſee*, his executors, *nor aſſigns, ſhall alien* the premiſes, *but to*, &c. this is a *condition and covenant at* the *election* of the leſſor. Hill. 33 Eliz. B. between *Simpſon*

Simpſon and Titterell, adjudged upon a ſpecial verdict; which intratur Paſch. 33 Eliz. Rot. 1609. Co. 2. *Lord Cromwell*, 7. *b.*] part held it a covenant alſo.——

• Cro. E. 242. pl. 6. S. C. adjudg'd that it was a condition, and the entry lawful.——S. C. cited Arg. Cro. E. 385.——S. C. cited Mo. 707. per Cur.——S. C. cited per Cur. 2 Rep. 71. b.——S. C. cited 2 And. 72, 73.——S. C. cited by the name of Tirrel's caſe. Win. 36.——S. C. cited by the name of Bendlow's caſe. Gouldb. 116. in pl. 14.——S. C. cited Lane 109.

† Ld. Cromwell's caſe is 2 Rep. 69. b. to 82. b. Hill. 43 Eliz. C. B.——2 And. 69. pl. 52. Cromwell v. Andrews, S. C. adjudg'd.——Mo. 471. pl. 679. S. C. adjudg'd.

[53]

[5. *(So)* if a man leaſe lands for years rendering rent, and the *leſſee covenants to pay the rent, and not to do waſte*, and the *leſſor binds himſelf* in an obligation, *that the leſſee ſhall enjoy* the lands *for the ſaid rent*, and doing according to the covenants of the ſaid indenture; theſe words (for the rent) make not a condition, becauſe he hath *other remedy* for the rent, ſcilicit, upon the indenture of covenants. Mich. 5 Jac. B. between *Tomkins and Tomkins.*] Writ of entry of 40 *s.* rent out of the monaſtery of S. where variance was between the plaintiff and defendant

for tithes, and the *Plaintiff granted to the defendant the tithes*, and *he granted* the 40*s. rent to the plaintiff* and his ſucceſſors *for the ſaid tithes*; and the defendant ſaid, that the plaintiff had taken 24 loads of tithes; judgment ſi actio; and per Littleton and Brian, the grant of *one thing for another* is no condition. Br. Conditions, pl. 61. cites 9 E. 4. 19.

6. In annuity, per Brian, and the beſt opinion, where *annuity* is granted *till* the plaintiff be *promoted* by the grantor *to a competent benefice*, and the defendant *tenders* a benefice, and the *plaintiff refuſes*, the annuity is determined; for it ſeems to be a *condition in law*. But where it is *granted by R. Prior of S.* and his covent, *till* he be *promoted to a* benefice *by the ſaid R.* and he dies, the *tender of the ſucceſſor is not good*. *Contra* if it had been *by the ſaid Prior without name of baptiſm*. Br. Conditions, pl. 69. cites 14 H. 7. 31 & 15 H. 7. 1.

7. The prior of Saint John's of Jeruſalem in England *leaſed for years* the commandry of Baſill by indenture to Martin Docknye, *proviſo*, that *if the ſaid Prior, or any of his brothers there being commanders would inhabit in it*, that *then the ſaid M. D. and his aſſigns oblige themſelves by the ſaid indenture, upon a year's warning, to remove or give place to the ſaid prior*. And after the *prior died*, and one who was *brother at the time of the demiſe was made prior, and* was *alſo commander*, by which he *gave warning* by a year to M. D. who would not go out, and the prior entered. The queſtion was, Whether the words above were a condition or only a covenant conditional? and per Knightly and Marvin, ſerjeants, it is not a condition to forfeit the leaſe, but is a covenant conditional; viz. that if the leſſee be required then he covenanted to remove, and otherwiſe not. But per Audly Chancellor, Fitzherbert J. and Doniſhall and Chamley, ſerjeants, it is a condition, quod mirum! But per Audly, Knightly, and Marvin, if it be a condition it does not extend to the ſucceſſor, and there is a diverſity between *rent reſerved generally* and a *condition*; for if a man *leaſes* for years or life *rendering rent*, and *does not ſay to him and his heirs or ſucceſſors*, yet the heir or ſucceſſor ſhall have it; for it is *part of the reverſion*; quod nota; *But* if it be *leaſed upon condition*, &c. *that the leſſor may enter*, and does not ſpeak of his heirs nor ſucceſſors, there, by the death of the leſſor, the condition is extinct; note a diverſity. And per Knightly theſe words,

words, *ea intentione quando & tunc* makes a condition as well as theſe words, *ſub conditione, proviſo ſemper & ſi contingat* &c. Br. conditions, pl. 7. cites 27 H. 8. 14, 15.

8. A *leaſe* for years was made to huſband and wife, *provided, that if they had a mind to diſpoſe* of the term, that then *the leſſor ſhould have the firſt offer, he giving as much for it as another would*; the queſtion was, whether this was a condition or a covenant? Shelly held clearly that it was a condition, but Fitzherbert and Baldwin doubted. D. 13. b. pl. 65. Trin. 28 H. 8. Anon.

The meaning is, viz. (to be perform'd or not done) 2 Rep. 71. a. by the Reporter, who obſerves, that this caſe which is commonly cited to prove that proviſo does not make a condition, when it comes among other * covenants does not warrant it; but if it be well obſerved the opinion there is good law, and ſtands well with the principal caſe; viz. Lord Cromwell's caſe.—When *upon the habendum a proviſo is added for a thing to be done* by him to whom the deed is made, *or to reſtrain him* to do any thing, this is a condition. Poph. 118. Hill. 38 Eliz. in caſe of Pembroke (earl) v. Berkley.

9. Note, for law, that *proviſo ſemper put upon the part of the leſſee upon the words habendum*, makes a condition. But *contra* of a proviſo [to be performed] *of the part of the leſſor*. Br. Condition, pl. 195. cites 35 H. 8.

10. *As* it is covenanted in the indenture, *that the leſſee ſhall make the reparations, provided always, that the leſſor ſhall find the great timber*. This is no condition. Ibid.

* [27]

S. P. agreed by the reporter, 2 Rep. 72. a. in lord Cromwell's caſe; for as to the ſcouring the ditch and carrying the mud to ſuch a field, it depends upon the precedent covenant, and without the precedent covenant it cannot ſtand; And the other part of the difference is alſo agreed by him, becauſe by its not depending on any precedent clauſe, but ſtanding by itſelf, this makes it a condition; and ſays, that all this is good law, and well ſtands with the reſolutions of the ſaid juſtices in the principal caſe; and ſo the quære made by Brooke is fully reſolved.

11. *Nor* by ſome it is no condition when it *goes among other conventions upon* [*the part of*] *the leſſee*. Ibid.

12. *As* if it covenanted *after the habendum and* after the *reddendum, that the leſſee ſhall ſcour his ditches*, &c. *provided always that the leſſee ſhall carry the mud of it to ſuch a field*; this is no condition to forfeit the leaſe for not doing of it. *Contra if* ſuch proviſo be put *immediately after the habendum*, which makes the eſtate, *or* after the *reddendum*; quod nota, & quære. Br. Conditions, pl. 195. cites 35 H. 8.

13. *No words* make condition, *unleſs ſuch as reſtrain the thing given*; As upon condition that he ſhall not do ſuch an act; for if they do not reſtrain the thing given, it is rather a limitation than a condition; As if I make a *leaſe for life upon condition, that if the leſſee does waſte I may enter*. This is only a limitation of the time of my entry, which is void, becauſe it is no more than the law ſays, and is no condition becauſe it does not reſtrain the eſtate; *So* if I make *leaſe for life upon condition, that if the leſſee commits waſte, and I recover the place waſted, that I ſhall enter into it*. This is no condition for the reaſon before mentioned; *but* if it had been upon condition, *that if I recover in waſte any part, that I ſhall enter into the whole*, this is a condition for that part in which the waſte was not done, becauſe the condition is reſtrictive, and goes in defeaſance of this part. Per Hinde J. pl. c. 33. a. Paſch. 4 E. 6. in caſe of Colthirſt v. Benjuſhin.

14. A biſhop made a leaſe for years of certain lands reſerving rent, which was confirmed by the dean and chapter, and in the leaſe was a *proviſo, that, in tempore vacationis epiſcopatus, the rent ſhould be paid to the chapter.* It was held that this proviſo was no condition, but a foreprize of ſaving in the ſentence of the reſervation of the rent, and as an agreement or covenant; for it is not annexed to the eſtate, nor to the thing given. D. 221. b. pl. 20. Paſch. 5 Eliz. Ayer v. Orme. Bendl. 129. pl. 191. S.C. the proviſo is not a condition but a limitation, or demonſtration.—Mo. 51. pl. 152. Eire's caſe, S. C. reſolv'd, that this proviſo was well enough placed to make condition, becauſe annexed to the reſervation of the rent, the non-performance whereof may, by the intent of the parties, determine the eſtate of the leaſe, tho' it does not go to the non-payment, but to the manner of payment, viz. payment to the chapter, otherwiſe it is where the proviſo is adjoined to the exception or to the ſpecial covenant; for there it ſhall be intended ſometimes a declaration, ſometimes an explanation, and ſometimes a reſtriction of the particular thing to which it is adjoin'd, and not a condition to the whole eſtate.—Dal. 53. pl. 31. S. C. Walſhe and Weſton held it a condition, but Brown and Dyer e contra; but Dyer ſaid, that he thought proviſo is a good word to make a condition when it is annexed to the principal matter leaſed, and may be either in the affirmative or the negative, when it is annexed to the thing leaſed and to the eſtate, if it abridges the thing leaſed, it is not a condition, as leaſe for years proviſo that he ſhall not meddle with the wood.

15. A. leaſed to B. for life, and that it ſhould be lawful for him to take fuel upon the premiſſes, *proviſo that he does not cut any great trees.* If B. cuts great trees he is puniſhable in waſte, but A. cannot re-enter; for the proviſo is not a condition, but only an expoſition of the intent of the grant in that behalf. 3 Le. 16. pl. 38. Mich. 14 Eliz. C. B. Anon. Leaſe for years proviſo that it ſhall not be lawful to the leſſee to lop the trees. Dyer thought it a condition, but Brown thought it only a reſtraint, if no penalty enſues upon it. Mo. 45. pl. 136. Mich. 5 Eliz. Anon.

16. Arbitrators *award* that A. ſhall have the lands, *yielding and paying* 10l. per ann. in this caſe it is not a condition, for it is not knit to the land by the owner itſelf, but by a *ſtranger*, viz. the arbitrator. 3 Le. 58. pl. 86. Mich. 17 Eliz. B. R. Treſham v. Robins. [55]

17. *Recoverors to an uſe before the ſtatute* 27 *H.* 8. *make a leaſe* for years; the *leſſee covenants that he will pay the rent to ceſty que uſe, his heirs and aſſigns; proviſo, if ceſty que uſe doth not make his heir male his aſſignee, then he ſhall pay the rent to the recoverors, their heirs and aſſigns.* Ceſty que dies, and does not make his heirs male his aſſignee; adjudged, that this proviſo was no condition that went to the eſtate, but only abridged the covenant. Cro. E. 73. pl. 30. Mich. 29 & 30 Eliz. B. R. Scot v. Scot. 2 Le. 128. pl. 170. S.C. ſtates it, that if the leſſee makes his heir male his aſſignee of the term that then he ſhall pay the ſaid rent to the recoverors their heirs and aſſigns, and not to the heirs of ceſty que uſe. It was argued whether this proviſo makes a condition or not, ſed adjornatur.—3 Le. 225. pl. 302. S. C. argued again, ſed adjornatur.—4 Le. 70. pl. 161. S. C. and ſtates it again, that the rent was reſerved payable to the recoverors, and after their death then to ceſty que uſe his heirs and aſſigns, proviſo, that if the leſſee makes his heir male his aſſignee of the term, that then he pay the rent to the recoverors, their heirs and aſſigns, and leſſee did not pay it to the heirs of ceſty que uſe, whereupon was a diſtreſs and a replevin. Argued, whether a condition or not, and is in totidem verbis with a Le. 228. & adjornatur.—4 Le. 39. pl. 106 Scot v. Scot is a D. P.

18. In ſome caſes this word proviſo is not a *condition*, but only an *explanation* of a ſentence precedent. If it be in the *negative*, and makes *reſtraint of the common law*, then 'tis a condition, as leaſe for years, proviſo not to alien or do waſte; and if the proviſo be in the *affirmative*

affirmative, and by that the party be *bound to do what by common right he is not bound to do*, it is a condition. Arg. 3 Le. 225. pl. 302. Paſch. 31 Eliz. in caſe of Scot v. Scot.

In covenant by aſſignee upon an indenture of leaſe, and breach aſſigned by Eviction; the defendant pleaded, that

19. Leſſor covenanted, that the leſſee, paying his rent, ſhall enjoy the land demiſed for the whole term; the leſſee did not pay, and afterwards is ejected by a title paramount. 2 juſtices held the covenant conditional, and that leſſee ſhould not have advantage without performing the condition created by the word (paying). But Periam J. held ſtrongly, that (paying) did not create a condition. 4 Le. 50. pl. 130. Mich. 32 Eliz. C. B. Anon.

it was, that he ſhould enjoy, *paying the rent* &c. Plaintiff demurred, becauſe it appears that there was not rent due after the aſſignment, and before the eviction; and it was agreed, that the word (paying) was not a precedent condition, and thereupon the plaintiff had judgment. Sid. 280. Paſch. 18 Car. 2. B. R. Allen v. Babbington.

Leaſe of land, *paying the rent*, is no condition. 2 Show. 202. pl. 209. Paſch. 34 Car. 2. B. R. anon.——Leſſor covenanted that the leſſee, *paying the rent, and performing the covenant*, ſhould quietly enjoy; in action by leſſee the leſſor pleads, that plaintiff did quietly enjoy till the time when leſſee cut down wood contrary to his covenant, and then he entred and not before. It was argued, that this covenant was not conditional; for the words (paying and performing) ſignify no more than that he ſhall enjoy &c. under the rents and covenants, and it is a clauſe uſually inſerted in the covenant for quiet enjoyment; indeed the word paying in ſome caſes may amount to a condition; but that is where, without ſuch conſtruction, the party could have no remedy. But here are expreſs covenants in the leaſe, and a direct reſervation of the rent, to which the party concerned may have recourſe when he has occaſion. The words (paying and yielding) make no condition, nor was it ever known that for ſuch words the leſſor entered for non-payment of rent; and there is no difference between theſe words and the words (paying and performing.) The court took time to conſider, and afterwards in this term judgment was given for the plaintiff, that the covenant was not conditional. Atkins J. doubted. 2 Mod. 35. Paſch. 27. Car. 2. C. B. Hayes v. Bickerſtaff.——Freem. Rep. 194. pl. 198. S. C. North. Ch. J. ſaid, that this clauſe is now ſo uſual that it is but clauſula clericorum, and that if it ſhould be conſtrued conditionally, then if the leſſee broke a covenant of the value of a penny, it would excuſe the leſſor of the breach of a covenant of 1000 l. value. Curia adviſare vult.——2 Jo. 206. S. C. cited by the Chief J. as adjudged that the word (paying) did not make the covenant conditional, but that it was a reciprocal covenant, for which the party might have action.

Mo. 706 pl. 987. Berkley v. Pembroke (Earl) S. C. adjudg'd accordingly, and in error brought in the exchequer chamber, held that this proviſo, placed as it was, tho' there are words of covenant as well as of

20. The Earl of Pembroke *granted* the lieutenancy of the Foreſt of *F. to B. and the heirs male of his body*, and in the deed of the grant were theſe words, *provided always, and the ſaid B. doth covenant &c. that the ſaid Earl ſhall have the command of the game there; provided alſo, and the ſaid B. doth further covenant not to cut down any wood unleſs for neceſſary browſe &c.* B. cut down 4 oaks. Gawdy and Clench thought this not to be a condition, but Popham and Fenner e contra; for the proviſo here has a perfect concluſion, the words (that he ſhall not cut down trees) referring to the proviſo and to the covenant, and ſo it founds as well to the condition as to the covenant, and it ſhall be as if there were ſeveral ſentences; & adjornatur. But afterwards, upon conference with all the judges of England, the greater part held it to be a condition, and judgment accordingly. Cro. E. 385. pl. 8. Paſch. 37 Eliz. B. R. Pembroke (Earl of) v. Lord Berkley.

condition, makes a condition by the intent of the parties.——2 and 20. pl. 14. S. C ſays, the judges in bank were in ſeveral opinions, and thereupon it being moved to all the other judges and barons, the greater part held it a condition and covenant; becauſe when words contained in a deed go to ſeveral purpoſes and ſenſes, the deed ſhall be taken according to the ſenſe of the words, without conſtruing any word to be vain, or confounding the ſenſe thereof; as if a deed contains dedi, remiſi, &c. It may be a deed of grant, feoffment, releaſe, or confirmation, or all of them; as the caſe requires, which was ſhewn at large, and judgment accordingly.—Poph. 116. S. C. the chief juſtices, and chief baron, and all the other juſtices and barons, præter Gaudy, Clench, Walmſley, and Beaumont, held that it was a condition and alſo a covenant.——Goulſh. 130. pl. 27. S. C. but no judgment

judgment.——5 Rep. 76. a. b. S. C. but S. P. does not appear.——Jenk 266. pl. 73. S. C. that this proviſo is a condition.——Cro. E. 560. pl. 17. Paſch. 39 Eliz. S. C. upon error brought this matter was aſſigned, but the juſtices and barons would not hear any argument, the ſame having been diſputed among them before the judgment given, and by the greater part held to be a condition, and judgment given by their adviſe accordingly. But for other errors and imperfections in the declaration, the firſt judgment was reverſed.——Mo. 706, 708. accordingly.——2 Rep. 71. b. 72. a. cites S. C. reſolved accordingly by all the juſtices of England upon argument before them at Serjeants Inn, but that it was reverſed for default in the count.——A gift in tail is made of a walk in the foreſt, proviſo, and the donee covenanted that he ſhould not fell any trees there, being timber trees; this proviſo is a condition, altho' a covenant is alſo added to this purpoſe; by all the judges of England. Jenk. 266. pl. 73——S. C. cited per cur. by the name of Pembret v. Barkley. Palm. 503.

21. Proviſo always implies *a condition*, if there are *no ſubſequent words* which may peradventure *change it into covenant*, as where there is *another penalty* annexed to it for non-performance, as Dockwray's caſe, 27 H. 8. 14. but 'tis a *rule* in proviſoes, that where the proviſo is, that the leſſee *ſhall or ſhall not perform* a thing, *and no penalty to it*, this is a condition, otherwiſe it is void; but if a penalty is annexed 'tis otherwiſe; per Periam J. to which all the reſt of the juſtices agreed. Cro. E. 242. pl. 6. Trin. 33 Eliz. B. R. Simpſon v. Titterel.

22. A. *bargains and ſells a manor, to which an advowſon was appendant*, to B. in fee, and it was *agreed* between them, *that A. ſhould levy a fine to B. of the ſaid manor with the advowſon*, and it was agreed by the ſaid indenture, *that a recovery ſhould be ſuffered* to the intent aforeſaid, *provided that B ſhould grant the advowſon to A. for life*; *B. dies before any grant* is made by him of the advowſon to A. *and A. made no requeſt to B.* to have the ſaid grant made to him; A. enters into the manor for breach of the condition. Reſolved by all the judges of England, and barons of the Exchequer, 1ſt. That this proviſo makes a condition, and that it was well created by force of the ſtatute of uſes of 27 H. 8. altho' the eſtate veſted after the condition was created and made. And tho' the proviſo be placed in any part of the deed, yet if it be ſubſtantive and independant, and relates only to the eſtate paſſed, it is a condition; if it be qualified it may amount to covenant only; if there be a proviſo and covenant in the deed it may inure to both. Jenk. 252. pl. 43.

2 Rep. 69. b. Hill. 43. Eliz. C. B. Lord Cromwell's caſe —D. 311. pl. 83. Andrews v. Blunt, S. C. & S. P. —And 17. pl. 35. S. C. & S. P. —Ibid. 230. pl. 246. S. C. but S. P. does not appear. —2 And. 69. pl. 52. to fol. 89. S. C. & S. P. adjudged by the major part of the juſtices.——Cro. E. 391. pl. 8. S. C. but S. P. does not appear.——Yelv. 3 & 6. S. C——Nov. 44. S. C. but S. P. does not appear.——Bendl. 201. pl. 239. S. C. in Marg. ſays the opinion of all the juſtices was, that the proviſo, as it is here placed in the indenture, makes condition; for they ſaid that the ſenſe is to be regarded, and not the place where it ſtands in the indenture; for if the ſenſe refers ſo that it tends to a condition, it ſhall be ſo, and in the principal caſe it is moſt aptly ſo.——Sav. 115. pl. 187. S. C. adjornatur.

23. A *proviſo* ſhall be ſometimes taken for a *condition*, and ſometimes for *explanation*, and ſometimes for a *covenant*, and ſometimes for an *exception*, and ſometimes for a *reſervation*; and it is taken for a *condition*; as if a man leaſe land provided, that the leſſee ſhall not alien without the aſſent of the leſſor, *ſub pœna forisfacturæ*, here it is a condition; and if I have two manors both of them named Dale and I leaſe to you my manor of Dale, provided that you ſhall have my manor of Dale, in the occupation of J. S. here this proviſo is an *explanation* what manor you ſhall have; and if a man leaſe a houſe, and the leſſee covenanteth that he will maintain it, provided always that the leſſor is contented to find great timber, here this is a *covenant*; and if I [57]

leaſe to you my meſſuage in Dale, provided that I will have a chamber myſelf, here this is an *exception* of the chamber; and if I make a leaſe rendering rent at ſuch a feaſt as J. S. ſhall name, provided that the feaſt of Saint Michael ſhall be one, here this proviſo is taken for a *reſervation*. Per Popham Ch. J. Gouldſb. 131. pl. 27. Hill. 43 Eliz. in caſe of E. of Pembroke v. Barkley.

24. A power to *dig up the trees making up hedges* is not a condition; but covenant lies for not repairing the hedge. 2 Show. 202. pl. 209. Paſch. 34 Car. 2. anon.

(H. 2) Where the Cauſe or Conſideration of the Grant will make a condition.

If A. covenants to ſerve B. for a year and A. covenants to give him ſo much *for his year's ſervice*; if B. will bring an action for his money, he ought to ſhew, that he has ſerved him; Arg. Bulſt. 167. Trin. 9. Jac. and cites 15 H. 7. 10. b.——The ſervice is a condition precedent for the wages. Arg. Roll. Rep. 122. cites 15 H. 7. [10. b. pl. 17.]——See tit. Apportionment, fol. 8. 9. the caſe of Worth v. Viner.

1. IF A. covenants with B. to be his *ſteward for ſo much wages*, and B. brings an action for his wages, he ought to ſurmiſe and ſet forth, that he has performed his ſervice which intitles him to his action; Arg. Bulſt. 167. cites 18 H. 6. fol. [1. a. pl. 1.] by Forteſcue.

2. If a *corody* is *granted for certain ſervice to be done*, omiſſion of the ſervice determines the corody. Dav. 1. b. cites 20 E. 4. fol. ultimo.

3. If a man *for* 20 *marks*, *whereof* 10 *are paid* in hand, and the other 10 to be paid at Mich. promiſes and agrees to do ſuch an act after Mich. on a certain day, and *the laſt* 10 *marks are not paid* at Mich. or lawfully tendered, the promiſe and contract is void; for the word *pro* makes the contract conditional. D. 76. a. pl. 29. Mich. 6 E. 6. in caſe of Andrew v. Boughey.

Bulſt. 167. Arg. cites S. C.—— Ibid. 168. S. C. citedby Yelverton J.

4. If one covenants *pro maritagio habendo* to make an eſtate &c. and the marriage does not take effect, the covenantor is diſcharged of his covenant. D. 76. a. pl. 29. Mich. 6 E. 6. B. R. in caſe of Andrew v. Boughey.

S. C. cited Arg. Bulſt. 167.—— Dav. Rep. 1. b. S. P. cites 9 E. 4. 19. 15 E. 4. 2. 21 E. 3. 7. 45 E. 3. 8. 6 H. 8. 2. and 6 E. 6. 76.

5. If A. grants to B. a way over his land, and B. *pro chimino ille habendo* grants to A. a rent-charge, the ſtopping the way is a ſtopping the rent-charge. D. 76. a. pl. 30. Mich. 6 E. 6.

6. There is a diverſity between a *gift of lands*, *and* a gift *of annuity*, or ſuch like. For example, if a man *grants an annuity pro una acra terræ*, in this caſe this word *pro* ſhews the cauſe of the grant and therefore amounts to a condition; for if the *acre* be *evicted by an older* title the annuity ſhall ceaſe, for ceſſante cauſa ceſſat effectus. Co. Litt. 204. a.

7. *So* if an annuity be granted *pro decimis* &c. if the grantee be *unjuſtly diſturbed of the tithes* the annuity ceaſes. Co. Litt. 204. a.

8. *So*

8. *So* if an annuity be granted *quod præſtaret conſilium*, this makes the grant conditional. Co. Litt. 204. a.

9. But if A. *pro una acra terræ makes a feoffment or leaſe for life of an acre*, albeit that the acre be evicted, yet A. ſhall not re-enter; for in this caſe there ought to be legal words of condition or qualification; for the cauſe or conſideration ſhall not avoid the eſtate of the feoffee; and the reaſon of this diverſity is, for that *the eſtate of the land is executed*, and the annuity is executory. Co. Litt. 204. a.

10. Sometimes in caſe of lands or tenements, *cauſa* ſhall make a condition; as if a *woman gives lands to a man and his heirs, cauſa matrimonii prælocuti*; in this caſe, if ſhe either marry the man, or the man refuſes to marry her, ſhe ſhall have the lands again to her and to her heirs. *But*, of the other ſide, *if a man gives lands to a woman and her heirs, cauſa matrimonii prælocuti*, though he marry her, or the woman refuſes, he ſhall not have the lands again; for it ſtands not with the modeſty of women in this kind to aſk advice of learned counſel, as a man may and ought; and the rather, for that in the caſe of the woman ſhe may aver the cauſe, (or the reaſon aforeſaid) although it be not contained in the deed, even tho' the feoffment be made without deed. Co. Litt. 204. a.

11. If a man makes a feoffment in fee *ad faciendum*, or *faciendo*, or *ad propoſitum*, that the feoffee ſhall do or not do ſuch an act, none of theſe words make the ſtate in the land conditional; for in the judgment of the law they are no words of condition, and ſo it was reſolved Hill. 18 Eliz. in C. B. in the caſe of a *common perſon*; but in the caſe *of the king* the ſaid or like words do create a condition; and ſo it is in the caſe of a *will of a common perſon*. Co. Litt. 204. a.

12. *Pro* in ſome caſes has the force of a condition *when the thing granted is executory, and the conſideration of a grant is a ſervice* or ſome other like thing, *for which there is no remedy but the ſtopping of the thing granted*; as in the caſe of annuity granted for counſel, or for doing the office of a ſteward of a court, or the ſervice of a captain, or keeper of the fort, as in Ugthred's caſe, 7 Rep. And in thoſe caſes the condition is not precedent, and therefore needs not be averred performed, when the annuity is demanded; and thoſe caſes are within the reaſon of an exchange, where the land given is evicted, for here the failure of counſel or ſervice is a kind of eviction of that that is to be done for the annuity, in as much as he has no means either to exact the counſel or recompence for it, but to ſtop the annuity. And is to be noted, that this has ſo far the force of a condition, that it being denied once, it does avoid the annuity, not for that one payment, but forever. Hob. 41. in pl. 47. Mich. 10 Jac. in the caſe of Cowper v. Andrews.

(I) Condition *by Deviſe*. By what words a condition may be created by deviſe. [59]

1. IF a man deviſes *lands* deviſeable *to his executor to ſell*, and to make diſtribution of the money for his ſoul, and dies; if the executor *does not ſell* it, the heir *may enter*, for this creates a condition. 38 Aſſ. 3. Adjudged, 39 Aſſ. 17. Br. Conditions, pl. 215. cites S. C. —See (C. b) pl. 10. 11. S. C.

Cro. E. 146. pl. 8. Crickmere v. Paterſon, S. C. adjudged, & *Fol. 411. S. P. held accordingly by all the juſtices——Le. 174. pl. 242. Creckmere v. Paterſon, S. C. held accordingly by the whole court.—S. C. cited arg. as adjudged, that the youngeſt ſhould have the moiety by way of limitation. Gouldſb. 134. in pl. 33.——Co. Litt. 236. b. cites S. C.

2. (*So*) [If a man ſeiſed of ſocage lands, *having two daughters deviſes it to one* of the daughters to have and to hold to her and her heirs, *to pay her other ſiſter* a certain ſum of money at a certain day, theſe words make a condition, ſo that the other ſiſter, if the money is not paid, may enter into one moiety for the condition broken, becauſe (*) otherwiſe ſhe ſhall be remedileſs. Mich. 31 & 32 Eliz. B. R. Crickmere's caſe, adjudged.]

Lane 56. Sweet v. Beal, S. C. —Deviſe reddendum & ſolvendum 20 l. yearly makes a condition Cro. E. 454. pl. 22.

3. (*So*) [If a man deviſes lands *to B. for life, paying to C. 6l. rent yearly*, which he wills to be paid at 2 feaſts half yearly, and if it be arrear, then it ſhall be *lawful* to the Lord [*to C.*] *to diſtrain*. It ſeems this word (paying) makes not any condition, in as much as a diſtreſs is limited upon non-payment thereof. P. 8 Jac. Saccario, between *Street and Beale* dubitatur.]

Br. deviſe, pl. 16. cites S. C.

4. In aſſiſe by a clerk it was found, that the anceſtor of the defendant whoſe heir, &c. was ſeiſed of the *land* deviſable in fee, and *deviſed* it by his teſtament *to the clerk*, upon condition that he ſhall have the land *for his life*, and *that he ſhall be chaplain and chaunt for his ſoul* during his life, *and after* his death the land *ſhall remain to the commonalty of D. for ever* to find a chaplain for ever; and that becauſe the plaintiff had *held the land by* 6 *years*, *and was not chaplain*, the *tenant as heir entered upon him*; and it appeared by inſpection, that the *demandant was of ſuch age as that he might have been chaplain immediately after the deviſe*; and per Birton, the entry is lawful clearly. Br. conditions, pl. 111. cites 29 Aſſ. 17.

D. 163. a. pl. 52. Trin. 4. & 5 P. & M. Anon. S. P. and ſeems to be S. C. ſays that the parties agreed, but that the opinion of the juſtices was bent againſt the plaintiff, viz. that the entry of the heir was not lawful. —— Bendl. 287. pl. 287. S. C. accordingly.

5. C. deviſed a manor to his wife for 30 years, *for and to the intent and purpoſe*, that his wife ſhall pay 30 l. yearly during the term to A. and others; and further deviſes, that his wife ſhould be bound to A. and the others to perform the will. This was held to be no condition; for to what purpoſe ſhould his wife be bound if this was a condition? but judgment was not given becauſe the parties agreed. And. 50. pl. 126. Paſch. 17 Eliz. Hubbert v. Spencer.

Ibid. Marg. ſays, that no judgment was given in this caſe of Dier, and that it ſeem'd to ſeveral juſtices, that the heir (who had brought ejectment on a breach of

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6. A. *deviſed Lands* in London *to B. and C. to hold in common upon condition to pay a rent to his wife at the 4 uſual feaſts of the year, and if the rent be behind by* 6 *weeks, being lawfully demanded, that it ſhall be lawful for the wife to diſtrain*; and added, that his full intent was that ſhe ſhould be annually paid the ſaid rent accordingly. The queſtion was, if the entry of the heir be lawful or not? or if the penalty of the expreſs condition be deſtroyed by the penalty of the diſtreſs, and ſo a limitation of the payment of the rent to the feme, and the heir to take no advantage of the breach of the condition? Manwood and Mounſon held, that the heir ſhould not enter for the breach; but Dyer and Harper e contra cearly, and ſo was the opinion of Wray Ch. J. and Saunders Ch. B. in præſentia

Manwood

Manwood ad Menſam, and that both penalties, viz. the condition and re-entry, and the diſtreſs to the feme for non-payment, are good remedies and ſecurities for the firm payment of the rent to the feme according to the intent of her baron; and as to the demand of the rent, they thought ſhe need not make any ſuch demand, but that it is payable by the deviſees at their peril, if they would ſave their land; but that the feme ought to demand it before ſhe makes any diſtreſs. D. 348. a. b. pl. 13. Hill. 18 Eliz. Anon.

the condition) ſhould recover; for that this is a will made upon condition, which was broken. —*Deviſe of Lands for* a certain term *of years, yielding and paying* 20*l. yearly at Michaelmas to J. D.* The 20l. not being paid, the heir entred ſuppoſing that thoſe words made a condition, and his entry was adjudged congeable. Cro. E. 454. pl. 22. Trin 37 Eliz C. B. Fox v. Carlyne.

7. A. ſeiſed of land in fee, by his will in writing, *granted a rent-charge* of 5l. per ann. out of it *to his younger ſon towards his education and bringing up in learning*; and if in pleading the deviſee ought to aver, that he was brought up in learning was the queſtion; and it was holden by Dyer, Manwood and Mounſon, that ſuch averment needs not, for the deviſe is not conditional, and therefore, altho' he be not brought up in learning, yet he ſhall have the rent. 2 Le. 154. pl. 186. 19 Eliz. C. B. anon.

3 Le. 65. p 97. Mich. 19. Eliz. S. C. in totidem verbis.

8. A man deviſed land to his wife, *proviſo my will is, that ſhe ſhall keep it in good repairs*, cited per Cur. to have been adjudged. Le. 174. in pl. 242. Trin. 30 Eliz.

9. A. deviſed lands *to B. paying* 40*l. to C.* it is a good condition; for C. has no other remedy, and a will ought to be expounded according to the intent of the deviſor; per Wray. Le. 174. pl. 242. Trin. 30. Eliz. B. R.

10. A man deviſed a houſe in London to his wife, *provided if ſhe clearly departs out of London, and dwells in the country, that ſhe ſhall have a rent out of the ſame* &c. It was agreed, that this was a good proviſo to determine her eſtate, tho' there be no words that the eſtate ſhall ceaſe &c. Cro. E. 238, pl. 5. Trin. 33 Eliz. B. R. Allen v. Hill.

3 Le. 152. pl. 204. S. C. admitted per Cur. to be a good condition.

(K) Condition or Limitation. What ſhall be ſaid a *Condition*, and what a *Limitation*.

IF a man *deviſes* land to his daughter in tail, with divers remainders over; *proviſo* that his daughter and every one in remainder *ſhould permit* and ſuffer *T.* (who then enjoyed the ſaid land) *to enjoy* the ſaid land *during his life*: this ſhall not be any limitation upon the eſtate of the daughter, though ſhe be heir general, and ſo ſhe herſelf is to have the advantage thereof, if it be a condition as it ſeems becauſe this is the proper word for a condition. Mich. 37 Eliz. B. *Thomas's caſe*. Per Cur. admitted.

See (L a) pl. 1. S. C.

2. If a man *leaſes* to a woman *for* 40 *years*, upon condition *Quod ſi tam diu viveret, & cuſtodiret ſeipſam a ſole widow, & inhabitaret* upon the premiſes; this is not any limitation, becauſe the words upon condition that *if ſhe* make the intention uncertain, and therefore

Cro. E. 414. pl. 5. Hardy v Seyer, S. C. and Gawdy,

Clench, and Popham, held the lease determines not by the death of the lessee. Mich. 37, 38 Eliz. B. between *Sayer and Hardy* adjudged.

words (quod si) not being answered with other words (quod tunc) and thereby to make the intention of the parties full what it was that should be done, to be without sense, and otherwise the intention cannot be judged of; for it might be that she should forfeit a penalty, or part of the term, or of the profits; but that for this uncertainty the lease is absolute, and the words void, and neither make a limitation nor a condition; but Popham held that had the words been that the lease was for 40 years, if she so long lived unmarried, and inhabited therein, it would be a limitation, and the lease would determine by her marriage or death, so that she could not inhabit therein; and so it was affirmed was the truth of the case, but was mistaken drawing the verdict; for the words (sub hac conditione) were not in the lease; but Fenner held the words sub hac conditione full enough of themselves to make a condition of re-entry, and are a condition, and not a limitation, and that this condition is well performed, and the lease is absolute, and therefore adjudged for the plaintiff.——Poph. 99. Sawyer v. Hardy, S. C. Popham Ch. J. held that if the word (Si) had been omitted, it would have been good to determine the lease; but by reason of the uncertainty occasioned by that word, he and Gawdy, and Clench, held it should be taken as a void clause, and they all agreed that had it been Si tam diu sola viveret & inhabitaret in eodem mesuagio, the lease had determined by her marriage or death; and Popham took a difference between the words dwelling there during the term, and dwelling there during his life, and that in the last case it would be good for 40 years——Mo. 400 pl. 525. S. C. adjudged that the term was not determined, but went to the executors; but otherwise it had been if the words of the lease had been Si tam diu vixerit vidua; for there the words make a limitation collateral to the term; but here the breach does not come without marriage or non-habitation by the intent of the words sub conditione quod &c. and so a diversity between a limitation and conditional words.——Ow. 107. Sawer v. Hardy, S. C. adjudged that the term continued.——Gouldsb. 179. pl. 112. S. C. adjudged accordingly; and Popham and Clench held, that if the words (sub conditione quod) had been omitted, it would have been a limitation.

Cro. E. 833. pl. 2. S. C. adjudged; and Gawdy and Fenner held it a limitation; and it is all one as if he had devised

3. If a man having *three sons devises* his lands *to the eldest*, upon condition that he shall *pay* 20 *l. to every of the other two sons, and* that *if he fails* in payment thereof to any of the sons, that *then they may enter*, and have the land, this is a limitation; so that if the eldest does not pay the money, the two sons may enter into the land. Tr. 43 Eliz. B. R. between *Haynsworth and Pretty* adjudged per cur.

that if his eldest son did not pay all legacies, his lands should go to the legatories. And ibid. 919, 920. pl. 14. Hill. 45 Eliz. B. R. resolved accordingly by all the justices, and judgment for the defendant; for it is an immediate devise or limitation to the other two sons, if the eldest does not perform the condition.——Mo. 644. pl. 891. Hamsworth v. Pretty, S. C. resolved that the failure of payment is condition precedent to the devise of the land to the younger sons, and not any condition or limitation to the estate of the eldest son; and also that non-payment to one of them will give the estate to both, tho' payment be made to the other.——Noy 51. Aynsworth v. Batty, S. C. resolved accordingly.——S. C. cited by Vaughan Ch. J. Vaugh. 271.

See Lane, 74 to 79 &c. S. C.—— See Tit. Prerogative (M. c) pl. 7. S. C.

4. If the *king leases* for years, rendering rent, and by the same deed the *lessee convenit & concedit* with the king, his heirs and successors, not only de novo *to repair* the bill leased within one year after, but *also to keep it in repair* during the term; this is a limitation in the King, in as much as it is an executory consideration; so that by the non-performance thereof, the lease shall be void. Pasch. 10 Jac. Saccario, between *Sawyer and East*, for Crosse Mills, adjudged.

Cro. E. 376. pl. 27 Baldwin v. Wiseman. Hill. 37 Eliz. C. B. the S. C. adjudged a condition, and not a

5. If a man hath issue *two sons*, scilicet, R. the eldest, and P. the youngest, *and* also *two daughters*, and *devises* certain lands *to H. in tail when he comes to* 24 *years of age*, upon condition *that he shall pay unto my two daughters* 20*l. a year at their full age, and if* the said *H. dies before* 24 *then* I will that *R.* my son and heir, *shall have* the land to him and his heirs, *he giving and paying* to my said daughters *the said money* in such manner, as H. should have done if he had lived; and if my sons H. and R. (if the said lands come to the said R. by the death

death of H.) do not pay the ſaid money to my ſaid daughters as aforeſaid then I will my ſaid land *ſhall remain to my daughters and their heirs for ever*; and after the deviſor dies. This is a limitation upon the eſtate of H. and not a condition; ſo that if H. does not pay the money to my ſaid 2 daughters after his age of 24 years, and at the full age of the daughters, R. ſhall have it by way of limitation, and cannot enter as for a condition broke, becauſe that (*) otherwiſe, ſcilicit, if this ſhall be a *condition*, it *would defeat the portions* given to the daughters, *and the future deviſe* to them, which is againſt the intent of the deviſor. Mich. 38, 39 Eliz. B. R. between *Wiſeman and Baldwin*; adjudged in a writ of error per totam Cur. and the judgment given to the contrary in Banco reverſed.

limitation by 3 juſtices, but [62] Owene contra——But in writ of error * Fol. 412. brought in B. R. the judgment in C. B. was

reverſed by 3 judges.——Ow. 112, 113. S. C. in B. R. the judgment in C. B. was reverſed by 3 judges (abſente the Ch. J. as it ſeems).——Gouldſh. 152. pl. 90. S. C. and Gawdy, Clench, and Fenner agreed it to be a limitation and no condition, and therefore reverſed the firſt judgment.

6. If a man deviſes lands to another *in* tail, upon condition *that he ſhall not alien*, and that if he dies without iſſue, it ſhall remain over to another in fee; and after the deviſee aliens, yet he in *remainder cannot enter for the condition* broke, *but the heir at the common law*; for this is not any limitation but a condition. Mich. 10 Jac. B. between *Skirne and Dame Bond*, per Coke and Warburton. * See (E) pl. 6. S. P.

7. If a man *deviſes* 20*l.* by his teſtament, *to W. N. to be paid in 4 years*, and he *dies in the firſt year*, yet his executors ſhall have it; for this is no condition, but a limitation of payment. Br. conditions pl. 187. cites 24 H. 8.

8. A man ſeiſed of *land in gavelkind* has iſſue 2 ſons, and by will *deviſed it to the eldeſt ſon in fee, upon condition that he pay to the wife of the deviſor* 100*l. at a certain day.* He did not pay the money at the day. Manwood doubted whether the youngeſt might enter or not upon his brother's moiety as by a limitation implied in the eſtate, if the condition be not performed. D. 316. b. pl. 5. Mich. 14. & 15 Eliz. Anon. A *copyholder in borough Engliſh* ſurrender'd to the uſe of his will, and after *deviſed* to his wife for life, re-

mainder *to his eldeſt ſon* paying 40*s. to each of his brothers and his ſiſter within 2 years after his wife's death.* The court held this a limitation, and not a condition; for if it be a condition it extinguiſhes in the heir, and there would be no remedy for the money; but being a limitation, the law will conſtrue it that on non-payment his eſtate ſhall ceaſe, and then the law will carry it to the heir by the cuſtom, without any limitation over; and judgment accordingly. Cro. E. 204. pl. 39. Mich. 32 & 33 Eliz. B. R. Wellock v. Hammond.——2 Le. 114. pl. 152. S. C. adjudged a limitation——S. C. cited very full, 3 Rep. 20. b. 21. a. as adjudg'd accordingly, and that ſo the doubt in D. 14 Eliz. 317. moved by Manwood is well reſolved——S. C. cited per Cur, Cro. J. 592.——S. C. cited Arg. 2 Brownl. 69.——S. C. cited 10 Rep. 41.——S. C. cited Lat. 9.——S. C. cited Cart. 93.

A *copyholder* in fee *of lands in Borough Engliſh had iſſue three ſons*, B. C. and D. *and ſurrender'd* it to the uſe of his will, by which he *deviſed it to C. in fee, upon condition he ſhould pay to his 4 daughters* 20*l. a piece at their full age, and dies*; B. had iſſue 2 daughters, and dies; C. is admitted and does not pay the ſaid ſum to the daughters at their full age; D in the name of the 2 daughters of B. enters, and they diſaſſent, and after he enters in his own name, and ſurrenders to the uſe of the defendant, who is admitted. It was held by all the juſtices except Williams, that it is a condition; for it ſhall be expounded according to the common law, where it is not neceſſary to expound it otherwiſe. Cro. J. 56. pl. 2. Hill. 2 Jac. B. R. Curtis v. Wolverſton.

9. A man deviſes his houſe and certain land to his father for life, *proviſo that if he will inhabit upon it, then it ſhall remain to the lord*; this was adjudged to be no condition, but a limitation of the re-

mainder, and that the heir of the deviſor cannot enter for the non-performance. Dal. 117. pl. 12. 16. Eliz. Anon.

And 184. pl. 220. Paine v. Samms S.C. but S. P. does not clearly appear. [63] 8 Rep. 34. Paine's caſe. S. C. and Gouldſb. 81. pl. 22. Plain v. Sams, S. C. but S. P. does not appear.

10. The *Mother having* 2 *daughters, E. and F. covenanted to ſtand ſeiſed to the uſe of E. the eldeſt in tail, upon condition that ſhe pay to F.* 300l. *within a year after her deceaſe, or after F. ſhould be* 18, *and if ſhe fail, or die without iſſue before payment, then to the uſe of* F. in tail. The mother died, *E. married and had iſſue, but died ſoon after without iſſue, before the time for payment.* The court held clearly as to the point of dying without iſſue, the ſame is not a condition, but rather a limitation of the eſtate, and they amount to no more than what the law ſaith without them, (viz.) If ſhe die without iſſue, the eſtate tail would be ſpent by that means, and does not ceaſe, or is cut off by any limitation. 1 Le. pl. 233. Mich. 30 & 31 Eliz. C. B. Samms v. Paine.

S. P. Co. Litt. 214. b. —2 Mod. 7. cites the caſe of Williams v. Fry. S. P.

11. Limitation *determines* the eſtate *without entry.* 10 Rep. 40. b. Trin. 11 Jac. in Mary Portington's caſe.

The nature of a condition is to draw back the eſtate to the feoffor, donor, or leſſor; but a limitation carries the eſtate further. Per Walmſley J. Le. 299. pl. 409. Mich. 28 Eliz.

12. Condition *defeats the eſtate, and all remainders* depending upon it, and the party or his heir only ſhall *have benefit of it*; but limitation determines the eſtate, and the remainder continues upon it. Jo. 58. Mich. 22 Jac. B. R. in caſe of Foye and Hynde.

13. *So* that if A. was tenant for life, remainder to B. in fee, on condition that A. being a feme ſole continues a widow; if A. marries, the heir enters, and defeats the eſtate of A. and of B. alſo; but if an eſtate had been granted to A. durante viduatate remainder to B. and after A. had married, the eſtate of A. had determined by the limitation, and the remainder to B. ſhould be granted. Jo. 58, Mich. 22 Jac. B. R. in caſe of Foy v. Hynde.

——Limitation is when the firſt eſtate is deſtroyed, and new eſtate limited by way of remainder, or otherwiſe. Sav. 77. in S. C.

14. If one *deviſe a term to A. paying* to B. ſo much per ann, *and for non-payment, that he may enter* into parcel, this is a limitation not a condition. 2 Sid. 130, 131. 151. Paſch. 1659. B. R. Fynmore v. Crockford.

15. *Deviſe to J. his eldeſt ſon for life,* remainder *to him in tail,* remainder *to R. in tail,* remainder *to W. in tail,* remainder to *M. in tail, provided,* and upon condition, *that J. and his heirs ſhall pay to the* 3 *brothers an annuity of* 20l. *apiece out of the ſaid lands, and that he ſhall marry a wife of* 1000l. *portion, upon default whereof he deviſes all theſe lands to his* 3 *ſons and their ſeveral heirs male for ever,* as before is limited, equally to be divided amongſt them, and that it ſhould be lawful to enter &c. Tho' this deviſe is ſaid to be upon expreſs words of a condition, yet it is but a limitation of the eſtate; for if it were a condition the eſtate were fruſtrate and the heirs at law ſhould have advantage of it. A deviſe to the eldeſt ſon, tho' it be by words of a condition, yet it is a limitation, and upon the limitation it ceaſes without entry or claim, and cites Boraſton's caſe,

3 Rep.

3 Rep. fol. 21. So that by the breach or non-performance the eſtates of J. ceaſes, and it now veſts in R. Cart. 171. Hill. 18 & 19 Car. 2. C. B. per Bridgman Ch. J. in caſe of Rundale v. Eeley & al'.

16. It is the office of a limitation generally to *determine the eſtate without entry* or claim, and that a *ſtranger* at common law may *take advantage* of a limitation. Agreed and admitted by Serjeant Jones, Arg. but he ſaid, that there is a *difference between a limitation dependant upon a collateral ſingle act to be performed unica vice*, and a limitation dependant on payment of rent which ariſes out of the land, which by its creation may have continuance of *ſucceſſive acts*; but that this difference does not extend to the caſe of a dummodo ſolverit redditum, and therefore will require a particular anſwer, That the principal caſe is of a rent iſſuing out of land and to have continuance in ſucceſſive acts, but 'tis not ſo in the limitations in the other caſes; and tho' the books cited all concur, that the eſtate determines without entry or claim, yet no authority has been cited, [64] where, in caſe of a rent, the eſtate ſhall determine without demand of the rent; the reaſon whereof ſeems to be, becauſe there is other remedy for the rent without ſuch rigour, but not in the other caſes. 2 Jo. 32. Hill. 19 Car. 2 in caſe of Tuſtian (alias Tufton) v. Temple.

17. The Earl of N. *deviſed* a houſe and lands to his wife for life, and after her death *to his grandaughter A. K. and the heirs of her body, provided always, and upon conditon, that ſhe marry with conſent of his ſaid wife &c. but otherwiſe he bequeaths it to P.* It was held, that this proviſo made a limitation of the eſtate to let in the remainder man; for tho' the word condition be uſed, yet limiting a remainder over makes it a limitation; and if it were a condition, then none could enter for a breach of it but the heir, which ſeems to be againſt the intent of the teſtament. Vent. 199. Paſch. 24 Car. 2, B. R. Fry's caſe [als'] Fry v. Porter.

Raym. 236, 237. Williams v. Fry. S.C. reſolv'd that it is a limitation and not a condition; for tho' the words are expreſs words of a condition, yet they muſt always be conformable according to the intention of the parties, and cites ſeveral caſes by which it appears, that words of condition in a will ſhall enure as a limitation; and tho' in Mary Portington's caſe, 10 Rep. it is ſaid otherwiſe, yet that is but an accumulative reaſon which was not neceſſary. ——2 Lev. 21. S. C. adjudg'd accordingly.——Mod. 86. Porter v. Fry S. C. but the word (provided) is not mentioned, but only the words (upon condition)——S. C. cited per Cur. 2 Salk. 570. ——Vent. 202, 203. in S. C. Hale Ch. J. ſaid, that this had received as many reſolutions as ever any point did, and cites ſeveral caſes, and ſaid, that nothing but the opinion in Mary Portington's caſe, 10 Rep. 41. was againſt it.——Vent. 322. cites the S. P. in 10 Rep. in M. Portington's caſe, but ſays, that the current of authorities ſince are otherwiſe.

18. Holt Ch. J. ſaid, he ſaw no reaſon why *expreſs words of condition* might not be *conſtrued as a limitation in deed* as well in a will, tho' the law had not been carried ſo far. 2 Salk. 570, Trin. 3 Annæ, B. R. in caſe of Page v. Heyward.

(L) *Upon what Conveyance* it may be annexed.

Fitzh. condition, pl. 14 cites S. C. and 17 Aſſ. pl. 2.

[1. *A Releaſe* of all his right may be upon condition. 17 E. 3. 2. b.

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——Co. Litt. 274. b. S. P. where it is made by a diſſeiſee.——See Tit. releaſe (W).

A *releaſe* may be made upon condition, per Penroſe and Perle, which was affirmed per Cur. in the argument of the caſe. Br. releaſes, pl. 39. cites 43 Aſſ. 12.

A man cannot *releaſe a right or choſe in action upon condition, and reſerve the thing by the condition*; for all is gone by the releaſe, and the condition is void; Quære inde &c. by the opinion of Fineux. Br. releaſes, pl. 32. cites 21 H. 7. 24.——Br. conditions, pl. 84. cites S. C. & S. P. by Fineux Ch. J.

A *releaſe* cannot be on condition, nor for a time. Kelw. 88. a. pl. 2. and 89. a. pl. 8. Hill. 22 H. 7.

In debt defendant *pleads* one of the common *letters of licence under the hand and ſeal of the plaintiff*, whereby he gives the defendant liberty *for three months, and covenants, that if he ſhould ſue or moleſt him in that time, the defendant ſhould be acquitted of the debt; and that he did ſue him, &c.* Plaintiff demurs. The quære was, if this ſhould amount to a releaſe? and held by the court, that it being under ſeal, and the plaintiffs own agreement, it was not barely a covenant, but a releaſe upon condition, and accordingly judgment for the defendant. 2 Show. 446. pl. 411. Mich. 1 Jac. 2. B. R. Macbeth v. Cobb ——S. C. cited, and S. P. ſeems to be admitted. Arg. Show. 331. Mich. 3 W. & M.

See (N) pl. 3.——* The original Word is (Faire) which ſignifies either to make or do, which Mr Danvers tranſlates to make; but ſeems (to do) beſt anſwers the meaning here.

[2. If a *copyholder ſurrenders* to the Lord to * do his will, upon condition to pay 15l. this is a good condition. Mich. 2 Jac. B. *Garden's caſe*, per Cur.]

[65]

* Br. ſurrender pl 41. cites 7. E. 4. 26. [but this in the large edition ſeems miſprinted, and that it ſhould be 7 E. 4. 6. as in Roll, and ſo are the other editions.]——Br. conditions, pl. 156. (155) cites S. C. that it was upon condition rendring rent, and for default of payment a re-entry; but Brooke ſays that it ſeems it ought to be by deed indented——Br. Dower, pl. 74. cites S. C. that ſurrender may well be upon condition.

[3. *A leſſee may ſurrender* upon condition. * 14 E. 4. 6. adjudged. Co. 4. *Andrew Corbet*. 28. b. † 44 Aſſ. 3.

A ſurrender may be upon condition, and therefore Brooke ſays it ſeems to him that a releaſe may. Br. conditions, pl. 103. cites 7 E. 4. 29. and 43 Aſſ. 12.——Note, by the juſtices and ſerjeants, that a man may ‡ *ſurrender a term* upon condition *without deed*; *contra of an eſtate for life*; for this ought to be by deed. B. R. conditions, pl. 149. cites 7 E. 4. 29. ‡ Br. releaſes, pl. 34. cites S. C. and Brooke ſays, *the ſame law* ſeems to be of a *releaſe*——*Releaſe* may be made upon condition, per Penroſe and Perle, quod affirmatur per Cur. in the argument of the caſe. Br. releaſes, pl. 39. cites 43 Aſſ. 12 & 41. † Br. ſurrender, pl. 37. cites S. C.——Fitzh. Aſſiſe, pl. 355. cites S. C.

Fitzh. aſſiſe, pl. 355. cites 44 Aſſ. pl. 3. S. P.——Br. ſurrender, pl. 37. cites S. C. & S. P.——Br. Tender, pl. 40. cites S. C & S. P.

[4. A *confirmation* may be upon condition. Co. 5. *Ford*, 81. b.]

* In the caſe of Warren v. Lee.——Perk. S. 563. cites 29 Aſſ. 17. S. P.——Br. deviſe, pl. 16. cites S. C.——Br. conditions, pl. 111. cite s S. C.

[5. A *deviſe of lands* deviſeable was good *at common law* upon condition. * D. 3 Ma. 127. 52.

[6. A deviſe *of an uſe at common law* was good upon condition. D. 3 Ma. 127. 52.]

[7. A.

[7. A deviſe *within* 32 & 34 *H.* 8. may be upon condition, becauſe the ſtatute gives liberty to deviſe at pleaſure. D. 2, 3. Ma. 127. 52.]

[8. A man cannot *releaſe a perſonal thing*, as an obligation *upon a condition ſubſequent*, but the condition will be void, becauſe a perſonal thing being once ſuſpended is perpetually extinguiſhed. Hill. 9 Car. B. R. between *Barkly and Parks*, per Cur. agreed.]

[9. *But* a man may releaſe a perſonal thing as an obligation or ſuch like, *upon a condition precedent*, for there the action is not ſuſpended till the condition performed. P. 10 Car. B. R. between *Barkley and Parkes*, adjudged upon a demurrer, where the releaſe was of an obligation with a proviſo, that he who releaſed might enjoy 120l. due by J. S. at a day then after to come, which was a condition precedent, as the court then adjudged it.]

10. Land was *given in tail, ſo that the donee may alien in profit of his iſſue*; and per Wilby this is a good condition; Brook ſays quære if he may alien. Br. Taile & Dones &c. pl. 7. cites 46 E. 3, 4.

11. *Contra* of a gift or *grant of land*, franktenement, *or chattel, where the ſame thing paſſed*; but by the releaſe the choſe en action, or right, is extinguiſhed, and can't be reſerved by releaſe. Quære inde. Br. conditions, pl. 84. cites 21 H. 7, 24. Per Fineux Ch. J.

12. In dower the defendant pleaded, that he dedit & *conceſſit* to her *a rent in recompence of her dower, which ſhe accepted of.* The demandant *replied that it was upon condition, that if the rent ſhould not be paid within a month*, the rent ſhould ceaſe, and the *deed ſhould be void.* It was held to be no bar of dower, and judgment for the demandant, and the plaintiff was reſtored to her dower without having made any demand of the rent. Cro. E. 451. pl. 19. Mich. 37 & 38 Eliz. C. B. Wentworth v. Wentworth.

13. A. made a *feoffment* to the uſe of himſelf for life, remainder *to his wife for life, remainder to his own right heirs, provided if* his ſon interrupt his wife, it ſhould be *to the uſe of the wife and her heirs.* A. made a leaſe for years to begin after his deceaſe, and died; the ſon diſturbs the wife. Reſolved per 2 juſtices that no uſe would [66] ariſe to give the wife the fee. Arg. Cro. E. 765. cites it as Hill. 42 Eliz. Leigh v. Burton.

But Godfrey Arg. ſaid he conceived the reaſon to be becauſe the uſe limited to the right heirs was *the antient reverſion, and no new eſtate*, and that condition cannot be annexed thereto. Ibid. ——Mo. 742. pl. 1022 Mich. 41 & 42 Eliz. Barton's caſe——S. C. reſolved by Popham and Anderſon Ch. J. that the future uſe was checked by the leaſe, and that it ſhould ariſe by reaſon of this diſturbance.

14. If a *condition* be *releaſed upon conditian*, the releaſe is good, and the condition void. Co. Litt. 274. b.

(M) *Upon what act* it may be created.

[1. THE tenant cannot *attorn* to the grant of a ſeignory upon condition, becauſe this is but a conſent, and no intereſt paſſes from him. Vide 15 E. 3. Aſſiſe 95.

Attornment to a grantee upon condition, the

condi-

condition is void; becauſe the grantee is once ſettled. But this is to be underſtood of a *condition ſubſequent*, and not of a condition precedent, for in this caſe the condition precedent is good. Co. Litt. 274. b.———2 Rep 68. a. S. P.—for there is no attornment till the condition is performed. ———5 Rep. 81 a. b. Paſch. 37 Eliz. C. B. in Ford's caſe. S. P.———The learning of attornments is now of very little uſe ſince the ſtat. 4 Ann. cap. 16 S. 9, 10. and 11 Geo. 2d cap. 19. S. 8.

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2. If a man *deviſes a term to J. S.* and the *executors aſſent that J. S. and J. N. ſhall have the term, or that J. S. ſhall have it upon condition*; in this caſe J. S. ſhall have the term ſolely and abſolutely; for after the aſſent of the executors, he is in by the deviſe; per Cur. 4 Rep. 28. b. Trin. 33 Eliz. B. R.

3. A *reſignation by a parſon* cannot be upon condition, becauſe it *is a judicial act* to which a condition cannot be annexed, no more than an ordinary can admit upon condition, or a judgment be confeſſed upon condition, which are judicial acts; Arg. And afterwards upon arguments given in writing by the civilians, judgment was entred accordingly for the plaintiff. Ow. 12, 13. 34 Eliz. C. B. Gayton's caſe.

Cro. J. 614. pl. 4 Paſch. 18 Jac. B. R. 4. Executor cannot *deliver a legacy* conditionally. per Fenner, to which Popham agreed. Cro. E. 462. pl. 8. Hill. 38 Eliz. B. R. the S. P. admitted per Cur.———In ſuch caſe the condition is void. Arg. Roll rep. 140.———S. P. admitted Cro. E. 462. pl. 8. by Fenner and agreed by Popham.

Such aſſignment is void, and ſhe is in paramount. Arg. Cro. E. 451, 452. in pl. 19. 5. The heir cannot *aſſign dower* upon condition. Per Fenner J. to which Popham agreed. Cro. E. 462. pl. 8. Hill. 38 Eliz. B. R.———Cro. J. 614. pl. 4. Paſch. 18 Jac. B. R. the S. P. admitted per Cur.

Cro. E. 461. pl. 8. Hill. 38 Eliz. B. R. Haddon v. Arrowſmith. S. C. & S. P. by Fenner, that a lord cannot limit a condition in his licence; becauſe he gives nothing, but only diſpenſes with the forfeiture and all the eſtate paſſes from the copyholder, and conſequently cannot annex a condition; to which Popham agreed.———Ow. 72, 73. S. C. & S. P. held accordingly by Popham and Fenner; but Clench e contra.——Noy. 171. Hart v. Arrowſmith, S. C. 6. A *licence to a copyholder* to make a *leaſe for years* cannot be made to be void by a *condition ſubſequent* to the execution thereof, to undo that which was once well executed; But there may be a condition *precedent* united to it, becauſe in ſuch a caſe it is no licence until the condition performed. Agreed per tot. Cur. Poph. 106. Hill. 38 Eliz. in caſe of Hall v. Arrowſmith.

[67] But one cannot be naturalized upon condition, becauſe it is againſt the abſoluteneſs, purity, and indebility [indelibility] of natural allegiance, Co Litt. 129. a. 7. Letters patents of *denization* made to an alien may be either upon condition precedent or ſubſequent, and ſo the king may make a charter of *pardon* to a man of his life upon condition. Co. Litt. 274. b.

8. An *expreſs manumiſſion of a villein* cannot be upon condition, becauſe once free in that caſe and always free. Co. Litt. 274. b.

9. If a *parſon charges the glebe with a rent with conſent of the ordinary, this* is not good without the aſſent of the patron that has the fee ſimple to make the charge perpetual; but ſeeing this *aſſent of*

the patron is in reſpect of his intereſt, his aſſent *may be upon condition.* Co. Litt. 300. b.

10. An *aſſignment of dower* cannot be upon condition, nor an *aſſent to a legacy*; an *admittance of a copyholder* cannot be upon condition. In theſe caſes the condition is void.

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(N) *To what things* Conditions may be annexed. [And How. pl. 1.]

[1. *F Eoffment of two acres* upon condition, and for breach that he may *re-enter* but *in one*, this is good. D. 3. Ma. 127. 55.]

[2. A *tenth* may be granted by the clergy to the king upon condition. 21 E. 4. 46.]

[3. If a copyholder *ſurrenders* to the lord * to do his will, upon condition that he ſhall pay to him 10l. this is a good condition.] Fol. 413.

* See (L) pl. 2. and the note there.

[4. A *contract* may be upon condition. 44 E. 3. 28.] *As* in debt *for a houſe ſold* to the defendant for 10l. who *ſaid that it was ſold for 10l. and that the plaintiff ſhould pull it down and carry it to him*, and that then he would pay the 10l. and ſaid that he was at all times ready to pay in caſe the other would pull it down and carry it; by which the other ſaid, that the bargain was ſimple, and the other e contra. Br. conditions, pl. 28. cites 44 E. 3. 27, 28.

5. *Matter of record* may go upon condition ſometimes. Br. Conditions, pl. 236. *As charter of pardon* is granted ſometimes upon condition, *Ita quod ſtet rectus in curia* &c. and *conuſance of plea* is granted *ita quod celeris ſtet inde juſtitia* alioquin redeat, &c. Br. conditions, pl. 236.

And conſultation was granted *upon prohibition, upon condition that it ſhould not be prejudicial to the preſentation of the king.* Ibid.——Br. conſultation, pl. 10. cites 43 E. 3. S. P.——Br. ſpoliation, pl. 5. S. P. cites 43 Aſſ. 35.

(O) *How* to be *created* [*and pleaded.*]

[1. *A* Condition of an obligation is good, if it be *wrote upon the back.* 41 E. 3. C. 10. b. Juſtice Charlton ſaid, he did not know but a man might make an obligation *in a letter* if he puts his hand and ſeal to it. Vern. 114. Mich. 1682. in the caſe of Moore v. Hart.——S. P. notwithſtanding that it be not the deed of the obligee; but contra, if the condition be tack'd to the obligation, per Thorpe and Kirton, quod non negatur. Br. conditions, pl. 19. cites 41 E. 3. 16. [ſo is the large edition, but the ſmaller editions, are 41 E. 3. 10]——Fitzh. Barre, pl. 196. [but miſprinted 186.] cites S. C. & S. P. admitted.——Br. Faits, pl. 7 cites S. C. & S. P. by Thorpe and Kirton.—See tit. faits. (G) per totum.——See tit. indorſement;

[2. A condition *to perform a matter in fact, without writing*, is good. 11 H. 6. 25. b.] [68]

[3. *As* in an indenture a man may bind himſelf upon condition, *to perform all the covenants* between them made *for the permutation of a benefice* of which there is no writing. 11 H. 6. 25. b.]

[4. *So* if the obligation be indorſed upon condition *to ſtand to the award of J. S.* this is good. 11 H. 6. 25. b.]

5. A

S. P. Br. monſtrance &c. pl. 32. cites 7. H 4. 26.—Tho' a man *can't* in any action

[5. A man may *aver a leaſe for years* to be upon condition and *plead the condition without ſhewing the deed* thereof, becauſe it is *but a chattel.* 7 H. 4. 11. Hill. 15 Car. B. R. between *Potter and Oldreeme*, adjudged upon a demurrer, but not moved to the court. Intratur Mich. 15 Car. Rot. 375.

plead a condition concerning a freehold, without ſhewing writing of this; *yet he may be aided by the verdict at large* in aſſiſe of novel diſſeiſin, or in any other action where the juſtices will take the verdict of 12 jurors at large. As if a *man ſeiſed in fee leaſes* to another *for life without deed rendring* rent, *and for defaults of payment a re-entry &c* by force whereof the leſſee is ſeiſed as of freehold, and after *the rent is behind*, by which the *leſſor entreth*, and *leſſee arraigns an aſſiſe* of novel diſſeiſin, *leſſor pleads that he did no wrong or diſſeiſin*, and upon this the aſſiſe is taken; in this caſe the recognitors of the aſſiſe may give their verdict at large, as to ſay, that the defendant was ſeiſed of the land in his demeſne as of fee, and ſo ſeiſed let the ſame land to the plaintiff for life, rendering ſuch a yearly rent payable at ſuch a feaſt, &c. upon ſuch condition, that if the rent were behind at any ſuch feaſt at which it ought to be paid, then it ſhould be lawful for the leſſor to enter &c by force of which leaſe the plaintiff was ſeiſed in his demeſne as of freehold, and that afterwards the rent was behind at ſuch a feaſt &c. by which the leſſor entered into the land upon the poſſeſſion of the leſſee and prayed the diſcretion of the juſtices if this be a diſſeiſin or not; therefore becauſe it appears, that this was no diſſeiſin to the plaintiff, inſomuch as the entry of the leſſor was gongeable, the juſtices ought to give judgment that the plaintiff ſhall not take any thing by his writ. And ſo in ſuch caſe the leſſor ſhall be aided, and yet no writing was ever made of the condition; for as well as the jurors may have conuſance of the leaſe, they alſo may have conuſance of the condition which was declared and rehearſed upon the leaſe. Litt. S. 366.——And ſo 'tis of a feoffment in fee, or gift in tail upon a condition, altho' no writing were ever made of it. Litt. S. 367.

See tit. faits &c. (M. a) per totum.

[6. (*So*) a man may plead, that a *leaſe for years of land*, or a grant of a ward, was *made by guardian* in chivalry *upon condition* &c. without ſhewing any writing of the condition, becauſe it is *but a chattel real.* Litt. S. 365.]

* It ſhould be S. 365.

[7. *So* it is of *chattels perſonal and contracts* perſonal. Litt. S. * 165.]

[8. If a condition have *falſe Latin* in it, yet if any ſenſe may be intended in it by the words within the condition, it ſhall be good. 20 H. 6. 32.]

(P) *How* it may be *created.*

Br. verdict, pl. 64. cites S. C. and S. P. admitted.——Fitzh. Verdict, pl. 42. cites S. C. & S. P. admitted.

[1. IF a man grants a *rent for life*, a condition cannot be annexed to this unleſs it be *by deed.* 33 Aſſ. 2. Curia.]

Fitzh. aſſiſe, pl. 311. cites S. C.

[69]

[2. If a man *agrees* with me *to make a feoffment* to me *upon condition*, and after makes a charter of *feoffment without any condition*, *and* after makes *livery ſecundum formam chartæ* without any condition, this is abſolute without any condition, for the livery is not made according to the agreement, but according to the charter. 34 Aſſ. 1. Dubitatur.

(Q) Condition in *deed.* How.

Br. conditions, pl. 167. cites 22 E 4.

[1. A Corody granted for life *ſecundum quod prius per J. H. & alios uſitat' fuit*; and *avers the uſe* to have been, *that every one that hath it ſhall attend upon the maſter four times in the year*, otherwiſe

otherwiſe ſhall forfeit it; this is a good condition which refers to other matters, though not ſhewed in certain that they were done. 20 E. 4. 12. 18. b. 17 S. P. admitted.

[2. If an annuity be granted *pro conſilio, & auxilio habendis*, and does *not mention in what matter* it ſhall be, yet it may be *averr'd* he was a phyſician, or a man of the law, and it was granted for his counſel and aid therein. 41 E. 3. 6.] Tho' the deed does not make mention what *counſel* or aid he

ſhall give, yet when he avers that the plaintiff is a phyſician, *it ſhall be intended to be in ſuch a thing in which the plaintiff has moſt ſkill*, by which the plaintiff ſaid, that the annuity was granted to reſign ſuch a benefice; quære if he may aver other cauſe than is expreſſed in the deed of a thing which cannot paſs but by deed; and it was agreed that the demand of conſilio & auxilio is not double; quod nota; but the principal caſe was not adjudged. Br. annuity, pl. 7. cites 41 E. 3. 6. 19.—Fitzh. annuity, pl. 19. cites S. C.

[3. *So* if the *grantee* be *learned in two ſciences*, yet he may *aver* the grant was for one in certain. 41 E. 3. 6. b.] Fol. 414.

(R) How it may be created. In what Caſes *without Deed*. And in what not.

[1. A Condition cannot be reſerved without deed *indented*. D. 2. 3. Ma. 127. 52.] See (O) pl. 5. 6. 7. (P) pl. 1.—A

condition may be without deed by livery. D. 127. a. pl. 52.——If a man makes a deed of feoffment to another, and in the deed there is no condition &c. and when the feoffor will make livery of ſeiſin unto him by force of the ſame deed, he makes livery of ſeiſin unto him upon certain condition; in this caſe nothing of the tenements paſſes by the deed, for that the condition is not compriſed within the deed, and the feoffment is in like force as if no ſuch deed had been made. Litt. S. 359—In this caſe the feoffor, upon the delivery of ſeiſin, muſt expreſs the eſtate as to him and his heirs, or to the heirs of his body &c. Co. Litt. 222. 6.

2. It was in a manner agreed, that a condition may be *implied*, tho' it be not preciſely expreſſed in the deed, as in the caſe of a parker, that at all times after the grant he ſhall preſerve the game. Br. conditions, pl. 168. cites 22 E. 4. 28.

3. If a man *leaſes land* upon condition, or *grants a ward* upon condition, this may be pleaded without deed; *but* eſtate upon condition of *franktenement* cannot be pleaded without deed in a real action, nor perſonal, without ſhewing deed; per Vaviſor; quod tota Curia conceſſit. Br. conditions, pl. 249. cites 11 H. 7. 21.

4. If an *agreement* be made between 2, *that the one ſhall infeoff the other upon condition, in ſurety of the payment of certain money*, and after the *livery is made* to him and his heirs *generally*, the eſtate is holden by ſome to be upon condition, inaſmuch as the *intent of the parties* was not changed at any time, but continued at the time of the livery. Co. Litt. 222. b. [70]

(S) *At what time* it may be *created.*

[1. IF a *diſſeiſee releaſes to his diſſeiſor* all his right, and at a day *after* the *diſſeiſor* by indenture *grants* that *if he pays ſo much* at a day certain, the *releaſe ſhall be void*; this is a void condition as to *revive the right* to the diſſeiſee. Br. conditions 115. * 43 Aſſ. 12. per Cur. † 44 per Cur. contra ‡ 17 Aſſ. 2. contra 31. Aſſ. 2. adjudged; but quære. dubitatur, 32 Aſſ. 11.]

* Br. defeaſance, pl. 11. cites S. C. becauſe the right was extinguiſhed before by the ſimple releaſe.——Br. releaſe, pl. 39. cites S. C. agreed per tot. cur. † Br. conditions, pl. 122. cites S. C.——Fitzh. conditions, pl. 18 cites S. C. ‡ Br. conditions, pl. 103. cites S. C.——Fitzh. conditions, pl. 14 cites S. C.——Co. Litt. 236. at the bottom, S. P.

If the condition had been in the ſame deed, or both deeds had been deliver'd together with condition to revoke the releaſe, it was not denied but that it had been good. Br. conditions, pl. 115. cites 31 Aſſ. 32. * Br. conditions, pl. 122. cites S. C. and thereby Penroſe and Perle held a releaſe may be upon condition well enough, if it be contained in the ſame or another deed delivered at the ſame time with the releaſe; quod affirmatur per Curiam, and not denied.——Fitzh. conditions, pl. 18. cites S. C.——Br. conditions, pl. 103. cites 17 Aſſ. 2. S. P. accordingly.——Br. releaſe, pl. 39. cites 43 Aſſ. 12. S. P. by Treſilian and Wiche, quod Curia non negavit.—Br. defeaſance, pl. 11. cites S. C. & S. P.—Co. Litt. 236. b. S. P. accordingly; for it is a maxim in law, quæ incontinenti fiunt ineſſe videntur.——2 Rep. 71. a. S. P. per Cur. and cites 17 Aſſ. 2. & 43 Aſſ.

[2. But ſuch a condition may well be created *at the ſame time* that the releaſe was made, tho' it be by another deed. Br. conditions 115. 32 Aſſ. 11. * 43 Aſſ. 44.]

3. In aſſiſe, the tenant pleaded in bar, that *the anceſtor of the tenant enfeoffed the anceſtor of the plaintiff without deed*, and *delivered the ſeiſin upon certain conditions contained in certain indentures made between the parties*, and for the condition broken, he as heir entred; and it appears there that if the livery had been made ſimply, and after the indentures had been made upon the condition, the indenture had come too late. Br. conditions, pl. 110. cites 28 Aſſ. 1.

4. In aſſiſe a man made *ſimple feoffment*, and after *by deed rehearſing it* the *feoffee granted to the feoffor, that if the feoffor pays* 10*l.* *by ſuch a day, that the deed and feoffment ſhall be void.* Per Tanks, defeaſance cannot be of effect of lands which paſs by livery, if the *livery* be not *made as well upon the defeaſance as upon the charter* of feoffment, and the opinion of the court was with him. Br. conditions, pl. 113. cites 30 Aſſ. 11.

*[71]

* The right was extinguiſhed by the releaſe before the defeaſance made. Br. defeaſance, pl. 11. cites 43 Aſſ. 12. —[And ſo this ſhould be inſtead of 43 Aſſ. (1).——Br. condition, pl. 122. S. P. cites 43 Aſſ. 44——Br. defeaſance, pl. 9. *cites 31 Aſſ. 36.——*But* if the indenture of *defeaſance and releaſe had been delivered uno inſtanti*, it would have been good, and have avoided the releaſe. Br. defeaſance, pl. 11. cites 43 Aſſ. 44. And the difference there taken is, that a defeaſance made afterwards may be good as to things ‡ *executory*, but

5. In aſſiſe the *tenant pleaded releaſe* of the plaintiff of all his right made to him, then tenant of the land, and ſhewed the deed; the *plaintiff ſaid that the tenant, by the deed which he ſhewed, granted that if he paid* 8*l.* *to the defendant by ſuch a day, the releaſe ſhould be void, and at the day he tender'd, and the other refuſed*; and the opinion of the court was clear, that ſuch *defeaſance made after the releaſe* cannot give power to the plaintiff to re-enter, becauſe by the releaſe the * right was in the tenant ſimply, and cannot be deveſted by the defeaſance. Br. conditions, pl. 120. cites 43 Aſſ. 1.

but not as to what are *executed*; as in case of a release of right it is extinguished immediately, and executed; but where a simple feoffment is made with warranty, and after feoffee grants that he will not vouch, this is a thing executory in futuro. So of a lease without impeachment of waste, and after lessee grants by another deed, that if he be impleaded he will not plead this deed, this is good. Ibid.——And ibid. pl. 9. Brooke says, that some are of opinion that such release of right shall not be avoided, unless the condition or defeasance had been *expressed in the deed, or been delivered on condition contained in another indenture uno instanti.*

† See S. P. 2 Saund. 48, where the reporter takes the same diversity, contrary to the opinion of Twisden, and cited Cro. E. 755.

6. In debt, where *recognizance or obligation* is *made simplicitur*, it *can't be upon condition after*; for condition can't be added to it after, but this ought to be by defeasance; for recognizance is a judgement, and judgement which is simple can't be conditional after; and it is contrary to the nature of a judgement to be conditional, by the best opinion, and in a manner for law. Br. Conditions, pl. 89. cites 36 H. 6. 3.

7. Rents, annuities, conditions, warranties, and such like, that are *inheritances executory*, may be *defeated by defeasance made*, either at that time, or *at any time after*; and so the law is of statutes, recognizances, obligations, and other things executory. — Co. Litt. 237. a.

(T) Condition precedent. What shall be said a Condition precedent, and what subsequent.— [*And Pleading.*]

[1. IF I grant, that *if you will go to such a place* about my business *you shall have* 10*l.* this is a condition precedent. 3 H. 6. 7. b.]

[2. If I retain a man for 40*s.* *to go with me to Rome*; this is a condition precedent; for the duty commences by going to Rome. 3 H. 6. 33. b.] Br. Count, pl. 5. cites S. C.—— Poph. 161.

Arg. cites S. C. & S. P. and therefore he ought to shew that he went to Rome.——Bulstr. 168. Arg. cites S. C.——3 H. 6. 7. b. S. P.

[3. So if a man retains another *to be his counsel for* 2 *years next ensuing*, *taking every year* 20*l.* This is a condition precedent.— 3 H. 6. 33. b.] Br. Count. pl. 5. cites S. C.—— S. C. cited Arg. Bulst. 168.

[4. If A. by his *will* obligatory acknowledges, *that he debet to B.* 20*s. and* for payment thereof at a day *binds himself in* 40*s. by the same bill*, in an action of debt upon this bill for the 40s. he ought to aver, that A. did not pay the 20s. otherwise it is not good. Mich. 14 Car. B. R. between *Danes and Brett*, adjudged upon a demurrer.] Cro. C. 515. pl. 14. Bayns v. Brighton, S. C. per tot. cur. accordingly; for this is not an obligation with a condition.

[5. If by *charter-party G. and* 3 *others covenant with P. and C. to let to freight a* certain *ship*, of which they are owners, *to the said P. pro.* Bulst. 167. Clarke v. Gurnei Trin. 9 Jac.

P. pro uſu & ex parte of one B. for a voyage, modo & forma ſequente. *G. and the 3 others covenant* and grant *with B. that the ſhip ſhall go from Lynn and take ſuch freight, and thence to Yarmouth*, and thence to Cinchego, and thence return to the Thames; and *C. covenants with G. and the other 3*, that B. [*P.*] *ſhall cauſe lading to be put in* the ſhip at Yarmouth, Cinchego, &c. *within ſo many days, and* covenants *that* the ſaid B. [*P.*] *ſhall pay to the ſaid G.* and the other 3, *pro tota transfretatione* 147*l.* at ſuch a day; C. and the other three may have *an action of* covenant againſt C. for non-payment of the ſaid 147*l. without averment of the performance of the covenants of their parts*, for this is not a condition precedent, but covenants diſtinct of the other part. Mich. 7 Jac. B. between *Gurnell and others againſt Clarke* adjudged.]

B. C. in writ of error in B. R. and Yelverton and Williams J. and Fleming Ch. J. held the judgment erroneous, becauſe the declaration did not allege performance of what was to be done on the plaintiff's part; but the court not being full, the reverſal was not pronounced, but adjourned to another time.——In this caſe it does not appear whether the money was to be paid before the voyage or after; but in writ of error in B. R. the judgment was held erroneous, as appears Bulſt. 167. per Holt Ch. J. Lutw. 251. Hill. 8 W. 3.——S. P. by Holt Ch. J. and ſays, that Roll reports the judgment in the Common Pleas, 7 Jac. but it ſeems had not ſeen the reverſal thereof, which was 9 Jac. 2 years after, as it is in Bulſt. where it is judged that *pro tota transfretatione* is a condition precedent, and that its being in mutual covenants makes no alteration. 12 Mod. 463. Paſch. 13 W. 3. in caſe of Thorpe v. Thorpe——Lord Raym. Rep. 665. Holt. Ch. J. cites S. C. and ſays that as it is put in Roll, without ſetting forth at what time the day of payment was to happen, whether before or after &c. it can be of no great authority, and that it was reverſed for this very reaſon, becauſe pro tota transfretatione made a condition precedent, and cites Bulſt. 167.—S. C. cited accordingly by Holt Ch. J. Lutw. 251. in the caſe of Thorp v. Thorp.

The caſe of Thorp v. Thorp was an action brought in which the plaintiff declared, that the defendant had and held of him by way of mortgage 2 cloſes of copyhold land, and that there was a *diſcourſe* between them *concerning* the *plaintiff's releaſing his equity of redemption* therein to the defendant, *and* concerning *divers ſums of money due* from the plaintiff to the defendant upon the ſaid mortgage, upon which the plaintiff did *agree* with the defendant *that he would releaſe* to him *the ſaid equity of redemption, in conſideration of which* the *defendant did agree with the plaintiff to pay him 7 pounds above all that was due*; and that, in conſideration that the plaintiff promiſed the defendant to perform all of his ſide, the defendant promiſed the plaintiff to perform of his ſide, and avers that he did perform all on his the plaintiff's ſide, but that the defendant paid 1l. 7s. of the ſaid 7l. and no more, &c. To this the *defendant pleads* in bar, that long after the promiſe, viz. 29 July 1694, the plaintiff did, by indenture made between him and the defendant, *releaſe to the defendant all manner of actions, ſuits, debts, duties, ſum and ſums of money, and all demands* whatſoever, which ever he had, or he, his heirs, executors, or aſſigns ever ſhould have, for or by reaſon of any thing, matter, or demand whatſoever. Upon oyer of this deed of *releaſe, it did recite the ſaid mortgage, and releaſed all proviſoes therein and all his eſtate, right, title and intereſt in the ſaid cloſe, both in law and equity*, and *then follows the foregoing clauſe*; and upon this the plaintiff demurs, and judgment for the plaintiff in C. B. and affirmed in B. R. 12 Mod. 455 to near 467. Paſch. 13 W. 3. Thorp v. Thorp. ——Lutw. 245. 249. S. C. and judgment affirmed.—Ld Raym. Rep. 662. S. C. and judgment affirmed.——S. C. cited 8 Mod. 293.

†S. C. cited Arg. Bulſt. * Fol. 415. 268.—12 Mod. 461.

[6. If A. by indenture *covenant with C. to ſerve him with* 3 *eſquires* in the war, and *C. covenants for this to pay* to A. 42 marks, here (*) each hath an equal remedy, and therefore in debt for the 42 marks, the plaintiff *may count generally or ſpecially.* † 48 E. 3. 3. b. Co. 7. Ugtred. 10. b.

Holt Ch. J cites 48 E. 3. 2. 3. as cited in Ugtred's caſe, where the diverſity is taken, when there are mutual remedies, and when not. It is thus put in that book; Sir R. P. covenants with Sir R. T. to ſerve him with 3 'ſquires in the wars of France; Sir R. T. covenants, in conſideration of thoſe ſervices, to pay him ſo much money; and there it is ſaid, action will lie for the money without any ſervices performed. But the caſe in 48 Ed. 3. is, that Sir P. covenants with R. T. to ſerve him with 3 'Squires in the wars of France, and R. T. covenanted with him to pay him ſo much money for the ſervice; and it was further agreed, that 20 marks of the money ſhould be paid in England at a day certain, before they went for France, and the reſt by quarterly payments, which might likewiſe incur before the ſervice, and upon action brought by Sir R. P. it was objected, that the ſervice was not performed; but there was no room for that objection, the money, by the agreement, being made payable

payable at a day certain, before the ſervice was to have been performed.——S. C. cited by Holt Ch. J. Ld. Raym. Rep. 665.——S. C. cited and denied by Holt, Ch. J. 1 Salk. 171. pl. 1.

Ugtred's caſe has afforded a ground for a variety of opinions upon this queſtion.—Per Holt, Ch. J. 12 Mod. 462.—S. P. by Holt. Lutw. 251.——Ld. Raym. Rep. 665. S. P.

There is no pl. 7. in Roll.

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[8. If by articles of agreement made between A. on the behalf of B. and C. by which A. covenants that B. *for the conſideration after in the deed expreſſed, ſhall convey certain lands to C.* in fee, and after *C. covenants on his part* pro conſiderationibus prædictis *to pay to B.* 160*l.* &c. In this caſe, though B. does not aſſure the land to C. yet C. is bound to pay the money; for the aſſurance of the land is not a condition precedent, but theſe are diſtinct and mutual covenants. Mich. 15 Car. B. R. between *Caton and Dixon*, adjudged upon a demurrer. Intratur Car. Rot. 137.] [73]

S. C. cited by Holt Ch. J. 12 Mod. 463. who ſays that this caſe does not come up to the caſe of Thorp v. Thorp, becauſe here is an expreſs *covenant*, that *(for the conſideration hereafter expreſſed) B. would convey* to C. *and C. (upon conſideration aforeſaid) covenants to pay* the money; that muſt be underſtood, that for as much as A. hath covenanted that B. ſhould aſſure lands for conſideration hereafter mentioned, that is, that B. hath covenanted to pay ſo much money, for it is pro conſiderationc prædicta; and the queſtion is, what is meant by the words (pro conſiderationc prædicta)? 'tis *not ſaid for conſideration of conveyance* of the land, *but pro conſideratione prædicta*, which muſt be underſtood in conſideration *of the agreement that B. ſhould convey* &c. for the one covenants for conſideration hereafter mentioned, which muſt be covenant for payment of the money, and the other covenants for conſideration aforeſaid, which muſt be that A. covenanted that B. ſhould convey.——Lutw. 251. S. C. cited by Holt Ch. J. accordingly.—Ld Raym. Rep. 665, 666. S. C. cited by Holt Ch. J. accordingly.

[9. If *A. releaſes* to B. *an obligation*, in which B. is bound to him with a *proviſo that he*, ſcilicet A. *might have and enjoy* 120*l. due by J. S. to B. at Lady-Day next enſuing*, this is a condition precedent, and not ſubſequent, becauſe the 120l. was not due at the time of the releaſe, but at a day to come; and if it ſhould be ſubſequent, the condition would then be void, the releaſe being of a perſonal thing. P. 10 Car. B. R. between *Barkely and Parker* adjudged upon a demurrer, per Curiam. Intratur P. 9 Car. Rot. 262.]

[10. If an *award* be made by arbitrators between A. and B. that *A. ſhall pay* 10*l. to B. and* that *in conſideratione inde B. ſhall be bound* in an obligation *to A. to releaſe* all his right in certain land; in this caſe B. is obliged to be bound in the obligation though A. hath not paid him the 10l. though that is firſt to be done by the intent of the arbitrators, for there is a *mutual remedy* of each part, if the award is not performed, for the conſideration was the only motive of the arbitrators to make the award, and it is not a condition precedent; between **Vivian and Shipping*, per Jones and Barkley againſt Croke, this being moved in arreſt of judgment; But Hill. 11 Car. B. R. between † *Hayes and Hayes*, the ſame caſe in effect was adjudged upon a demurrer, that is not any condition precedent; but that B. is bound to perform his part, though A. does not perform his Part. Intratur Hill. 10 Car. Rot. 1045. Contra M. 10 Car. B. R.]

* S. C. cited by Holt Ch. J. 12. Mod. 463. 464. and obſerves that Roll himſelf ſays the court were divided; and ſays that Cro. C. 384. gives a quite contrary report of the caſe, and ſays that Jones and Berkley held it a condition precedent, contra Croke, and therefore Holt ſays that he rather believes Croke, who was one of the judges, and tells you himſelf he was of a contrary opinion.——S. P. by Holt, Lutw. 252. accordingly.——S. P. by Holt accordingly. Ld. Raym. Rep. 666.

† As to the caſe of Hayes v. Hayes Holt Ch. J. ſays 12 Mod. 464. and Lutw. 252. and Ld. Raym. Rep. 666. that the S. C. is reported Cro. C. 384. but that there is no ſuch point in it.

[11. If a man by his laſt will *deviſes* any thing, &c. and after he deviſes *all the reſidue of his eſtates*, &c. to his executor *after his debts paid*, and funeral expences diſcharged, this is a good condition precedent; ſo that the executor cannot have it before they are paid and diſcharged. Hill. 10 Car. B. R. between *Wilkinſon and Merdam*, per Curiam, upon a ſpecial verdict adjudged; But in a writ of error, as I have heard, this was a doubt between the judges, and they inclined to reverſe it. Hill. 7 Car. B. R. between *Briſcoe and Baker* adjudged upon a ſpecial verdict, where the deviſe of land was to a woman, his debts and legacies firſt paid, and his funeral expences diſcharged.]

[74]

[12. If A. tenant for life, and R. in reverſion in fee, covenant, and to levy a fine, and that it ſhall be *to the uſe of A.* and his Heirs, *if R. does not pay* 10*s. to A.* the 10th of September after; *and if he does pay, then to the Uſe of A. for Life, and after to the Uſe of R. in Fee.* In this caſe this word (if) &c. is a condition ſubſequent, and not precedent, ſo that A. hath an eſtate in fee till R. pays the 10s. becauſe there is a day limited for payment of the 10s. and the ſubſequent words explain the intent to be a ſubſequent condition, ſcilicit, and if he pays it, then it ſhall be to A. for life, and after to the uſe of R. in fee, which ſhews the intent to be, that A. ſhall have an eſtate in fee till the 10s. paid. Tr. 13 Car. B. R. in a writ of error, upon a judgment in Banco, between *Spring and Cæſar*, (*) the laſt Maſter of the Rolls, per totam Curiam adjudged, and the judgment given in Banco affirmed, where it was adjudged accordingly. Intratur Mich. 11 Car.]

Jo. 389. pl. 10. S. C. adjudged accordingly, and judgment in C. B. affirmed—— Will. 103 to 109. and part thereof, and 115 to near the end of 120.

* Fol 416.

Mich. & Hill. 22 Jac. C. B. the arguments of the ſerjeants in the caſe of Cooper v. Edgar. S. C. cited 3 Lev. 132. and judgment accordingly, Trin. 35 Car. 2. C. B. in the caſe of Edwards v. Hammond. —— S. C. cited 2 Show. 398. pl. 370. and held accordingly, Mich. 36 Car. 2. B. R. in caſe of Stocker v. Edwards; but ſeems to be S. C. with that in 3 Lev. [See Tit. remainder (L) pl. 13. S. C.]——(F. a) pl. 1. S. C. but not S. P.

S. C. at Tit. Arbitrement (K) pl. 17. but S. P. does not appear.

[12. [bis] If the condition of an obligation be to ſtand to the *award of J. S. Ita quod fiat de & ſuper premiſſes by writing under the hand and ſeal of the arbitrators, and publiſhed and ready to be delivered to the parties before ſuch a day*; all this is a condition precedent; for if it be not in writing under the hand and ſeal of the arbitrators, and publiſhed before the day, and alſo though it be made and publiſhed, yet if it be not ready to be delivered to the parties before the day, it is not a good award. Mich. 16 Car. B. R. between *Burbridge and Raymond*, adjudged in a writ of error, and the judgment given in Banco reverſed, becauſe he did not aver that it was made under the ſeal of the arbitrators, and publiſhed before the day. Intratur Tr. 15 Car. Rot. 1657.]

[13. Mich. 15 Car. B. R. between *Capps and Pennye*, per Curiam, where he averred, that it was *ready to be delivered* to the parties before the day, for it might be that he made it but kept it ſecret; and for this cauſe judgment was arreſted after a verdict for the Plaintiff.]

See Tit. Arbitrement (D.) pl. 22. and the notes there.

[14. Tr. 1649. between *Conduit and Damper* adjudged, where the condition being *to ſtand to the award* of J. S. *Ita quod arbitrium by deed indented under the hand and ſeal of the ſaid J. S. be ready*

ready to be delivered to each of the parties before ſuch a day, &c. and the plaintiff in an action upon the obligation for non-performance of the award *pleads* in his replication, *that J. S. ſuch a day*, which was before the day aforeſaid, before which it ought to be made by the condition, *accepto ſuper ſe onere arbitri prædicti per quoddam ſcriptum indentatum, quod idem querens ſub manu & ſigillo prædict' J. S. ſignatum, & utrique partium prædictarum deliberari paratum hic in Curia profert, cujus datum eſt eiſdem Die & anno arbitratus fuit*, &c. this is not good; becauſe as this is alledged, it does not appear that the award was made under the hand and ſeal of the arbitrator, and ready to be delivered to the parties before the day, as it ought to appear, or otherwiſe it is not good; for the word (ſo) disjoins the ſentence that it is to be intended, that when it was ſhewn in court, it was under the hand and ſeal of the arbitrator, and ready then to be delivered to the parties. Adjudged it is not good. Intratur Hill. 24 Car. Rot. 636. And the record of *Burbridge's Caſe* before-mentioned was ſhewed to the court, which was all one with this, and judgment there given accordingly as here.] [75]

[15. If *A. leaſes* by indenture *a meſſuage to B.* in December, 22 Car. for 12 years, *and covenants* with B. *to repair* it with all neceſſary reparations before *Midſummer following*, and *B. covenants* of his part, *quod ab & poſt tale tempus quale A. repararet & emendaret præd meſuagium* quod tunc *predictus B. ſufficienter repararet* prædictum meſuagium *ad omnia tempora durante dicto termino*; in an action of covenant by A. againſt B. for not repairing the meſſuage after Midſummer, according to the covenant of B. *and declares, that altho' he hath performed all the covenants of his part* to be performed *(without any particular averment that he hath repaired before Midſummer* according to the covenant, with all neceſſary reparations) *yet the defendant hath not repaired it after the ſaid feaſt* &c. this is a good declaration; for the covenant of A. to repair it before Midſummer is not a condition precedent, but only the time divided, and mutual between A. and B. ſcilicet, that A. ſhall repair it before Midſummer, and B. after, during the term, for which each of them may have their remedy by an action againſt the other, for the ultimate time limited for A. to repair is Midſummer, and the covenant of B. refers to the ſaid extreme time limited to A. and not to the fact, ſcilicet the reparation; for the (*) words are poſt tale tempus &c. Paſch. 1649. between *Bragg and Nightingal.* Intratur Tr. 24 Car. B. R. Rotulo 601. adjudged upon a demurrer per Curiam.]

Sty. 140, 141. S. C. Roll Ch. J. held it a reciprocal covenant, but Bacon J. e contra, & adjornatur. ——Leſſee covenanted quod ab & poſt reparationem &c. by the leſſor &c. he would keep the ſame in repair, and leave them ſo at the end of the term. In covenant the plaintiff alledged, that a dove-houſe, parcel of the premiſſes at the time of the demiſe was in good and ſufficient repair, and that the defendant voluntarily, during the term, ſuffered it to ſtand uncovered for a year, whereby it became very ruinous and fell down. The whole court (abſente Lea) held, that though it was in good repair at the time, yet that is not ſufficient, nor ſhall the covenant be conſtrued to extend to ſuch of the buildings only as then wanted repairs; for if any were in good reparation in the beginning, and happen afterwards to decay, the plaintiff muſt firſt repair it before the defendant is bound to do it. Cro J. 645. pl. 7. Mich. 20 Jac. B. R. Slater v. Stone.——And though one of the out-houſes which the covenant extended to, was in good repair, and the leſſee pulled the ſame down, this is not within the covenant, unleſs the leſſor had repaired it firſt; but his true remedy would be by action of waſte. 2 Roll Rep. 248. S. C.——S. C. cited by Chamberlaine J. 2 Roll Rep. 348.

* Fol. 417.

16. The word *paying* makes ſubſequent condition. Arg. Mo. 363. cites 38 E. 3. 11. and 12. deviſe of land to K, ſo that he may pay my

debts, viz. 10l. to A. and 12l. to B. the payment ought to be upon requeſt and ſubſequent and cites 5 E. 6. Br. Eſtates 78.

17. Condition *to reſign a living by ſuch a time for a certain penſion* to be conveyed to the parſon, makes the conveying the penſion a condition precedent. Arg. 10. Mod. 223. cites 14 H. 4. 19.

The plaintiff's teſtator *deviſed a term to J. W. and if* A. *his wife ſuffered the deviſee to enjoy it 3 years, that ſhe ſhall have all his goods as executrix; but if ſhe diſturbs him, then he makes G. J. his ſon executor*, and dies; A. as executrix brings an action of debt within the 3 years; adjudged, that ſhe was executrix till ſhe diſturbed, and that the plea of the defendant that ſhe had made a diſturbance was not good without particularly alleging how ſhe diſturbed. Cro. E. 219. pl. 7. Hill 33 Eliz. B. R. Jennings v. Gower——Tho' in grants eſtates ſhall not be till the condition precedent be performed, yet it is otherwiſe in a will; for a will ſhall be guided by the intent of the party, and in the principal caſe it ſhall not be conſtrued as a condition precedent, but as a condition to abridge her power to be executrix if ſhe does not perform it; per juſticiarios. Ibid.——Le. 229. pl. 311. S. C. adjudged accordingly by all the juſtices, tho', according to both the reports, Anderſon at the firſt was of a contrary opinion.——S. C. cited by the name of Jennings v. Cawman. Win. 115.

18. Note per Cur. that where a man *makes 2 executors, and that if they refuſe that then ſuch and ſuch &c.* there the 2 laſt are not executors but in default of the 2 firſt; for theſe words imply a condition. Br. Conditions, pl. 10. cites 3 H. 6. 6.

[76]

*This is miſprinted and ſhould be 3 H. 6. 33. b. pl. 26.

19. A condition precedent is traverſable; per Cur. Noy 75. Hill. 1 Car. B. R. cites 3 H. *9. 33. 48 E 3. 34. 9 E 4. 3. b.

20. There is a diverſity where the condition is *precedent* and where *ſubſequent*; for when it is *precedent* it *is not in the grantee till the condition* be performed; *but* when the condition is *ſubſequent* the thing *is in the grantee till the condition be broken.* Br. condition pl. 67. cites 14 H. 7. 17. per Brudnel.

21. *As* where I grant to you, that *if you will marry my daughter* that *you ſhall have ſuch a leaſe*, or ſuch land for 20 years, now you ſhall not have the land or leaſe before you have married my daughter; *but if I leaſe* to you my land *for 20 years upon condition that you pay to me 10l. by ſuch a day*, now the leaſe is in the grantee till the condition be broken. Ibid.

Br. covenant S. 22. cites S. C.—— A man *hired another for a year*; it was agreed on all ſides, that the perſon thus hired could have no action for his wages till the year was expired; but if the maſter had covenanted to pay it on a certain day within the year, in ſuch caſe an action would lie before the year was ended. 8 Mod. 41. Paſch. 7 Geo. 1. cited per Cur. as a caſe in the time of the Ld. Ch. J. Holt.—See Tit. apportionment (A).

22. If A. *covenants with B. to ſerve him for a year, and B. covenants with A. to pay him* 10*l.* there. A. ſhall maintain an action for the 10l. before any ſervice; but if B. had covenanted *to pay* 10*l.* *for the ſaid ſervice*, there A. could not maintain an action for the money before the ſervice performed. And there is great reaſon for this diverſity; for when one promiſes, agrees, or covenants *to do one thing for another*, there is no reaſon he ſhould be obliged to do it till that thing for which he promiſed to do it be done; and the word (For) *is a condition precedent* in ſuch caſes. Per Holt Ch. J. 12 Mod. 460. cites 15 H. 7. 10. pl. 17.

Win. 116. Arg. cites it as agreed in the caſe of Jennings v. Cowman, that the

23. Lands were leaſed to A. and M. his wife for life, remainder to B. their ſon for his life, *ſi ipſe (B) inhabitare vellet*, & reſidens eſſet infra prædictam grangiam & firmam &c. This is not a precedent but only a ſubſequent condition. Pl. C. 23. a. Paſch. 4 E. 6. Colthirſt v. Bejuſhin.

words

words, ſi ipſe inhabitaret are a ſubſequent condition, as in the caſe of Colthirſt, becauſe it is a thing of continuance which may be infringed and broken every year.

24. When an intereſt or eſtate ſhould be reduced to a certainty upon condition precedent, and the leſſor or *granter*, and the leſſee or *grantee die before the contingent happens*, the leaſe or grant is void; *as if a leaſe be made for ſo many years as my executors ſhall name*, this is void, for it ought to be reduced to a certainty in the life of the parties; And note, a good *diverſity between* a covenant or other *agreement* which is perfect and *certain*, and *tho'* if it be *to take effect in poſſeſſion, upon a future matter precedent, and* a covenant and agreement, *uncertain* which is *to be reduced to a certainty by future matter ex poſt facto*; for in one caſe the intereſt or eſtate of the lands is bound immediately, and in the other not. 1 Rep. 155. b. in the rector of Chedington's caſe, cites Pl. C. 273. b. [Paſch. 6. Eliz.] Say and Fuller, and ſays that in the one caſe the intereſt and eſtate in the land is bound, but not in the other.

25. When a man is to have one thing for the cauſe of another he *muſt allege the thing for which* he is to have it; Arg. cites many caſes. 3 Le. 39. pl. 63. Arg. Mich. 15 Eliz. 1 Salk. 112. Trin. 2 Ann. S. P. but *time fix'd for payment* will vary the conſtruction. Before Holt, Ch. J. at Guildhall, Callonel v. Briggs.

26. A. leaſed for life upon condition, that *if the leſſor died without iſſue*, then *the leſſee to have fee*; the leſſor is attainted of treaſon by 1 H. 7. *and all his lands* forfeited to the crown ſaving the right of * ſtrangers, and then *dies without iſſue*, and afterwards an office is found; and adjudged, that the leſſee had the fee. Plow. Com. 481. Mich. 17 and 18 Eliz. Nicholls v. Nicholls. Tho' the *Reverſion* is *removed out of the* perſon of the *leſſor*, and out of his blood, *by his grant eſcheat or other cauſe*; yet this ſhall not hurt the leſſee *when the condition is performed*; for *the fee ſhall veſt* in him, and be *diſcharged* of all rents, recognizances, conveyances, or other incumbrances made by the leſſor after the condition firſt made, or coming under the leſſor, or under the condition, or under felony or treaſon, or other thing done by him, and all ſhall be bound whether they be ſtrangers or privies in blood; by the juſtices. Plow. 486. 8. Mich. 17 and 18 Eliz. Nichols v. Nichols.

* [77]

27. A. levied a *fine to B. and his heirs* upon condition, that *if he pay* 10 *l. to A's ſon when he comes to* the age of 18 *years*, then *to the uſe of B.* and *if not* then *to A. and his heirs.* The ſon died before the day, and the opinion was, that B. ſhould have it; cited per Finch ſerjeant, Arg. Winch. 119. to have been adjudged 18 Eliz. in C. B.

28. A. makes leaſe for years to B. proviſo *quod non licebit to B. to alien* his term without aſſent of A.—B. deviſed the term to his ſon, *the leſſor aſſenting to it*; as this caſe is, 'tis no breach of the condition, for nothing paſſed till A's aſſent be obtained, for 'twas a condition precedent; and though the deviſee entered by the conſent of the executor, and had not A's licence, yet 'tis not material. Cro. E. 60. pl. 2. Mich. 29 and 30 Eliz. B. R. Knight v. Mory.

29. The *lord* of a manor *covenanted* with his copyholder, *to infranchiſe* his copyhold, and *the copyholder, in conſideration of the ſame performed, covenanted to pay* 100 *l.* The whole court held, that he is not obliged to pay the money before the aſſurance made; *but* if the words had been *in conſideration of the ſaid covenant to be performed* 2 Le. 211. pl. 261. Trin. 29 Eliz. C. B. Brodeus's Caſe, S. C. in the ſame words.

formed, he muſt pay the money preſently, and take his remedy over by covenant. 3 Le. 219. pl. 290. Mich. 30 Eliz. B. R. Brocas's caſe.

30. Tho' the *law is ſtrict* againſt eſtates at common law which are to ariſe upon conditions precedent that never are performed, yet 'tis *not ſo in limitations of uſes* where the intent is to guide the eſtate, no more than 'tis in deviſes. Arg. Mo. 519. cites it adjudged, 31 Eliz. in lord Paget's caſe.

Le. 229. pl. 311. Pa ch. 31 Eliz. C. B. the S. C. & S. P.

31. Tho' in *grants* eſtates ſhan't be till the condition precedent be performed, yet 'tis otherwiſe in a *will*, for the will ſhall be guided by the intent of the party. Cro. E. 219. pl. 7. Hill. 33, Eliz. B. R. in caſe of Jennings v. Gower.

7 Rep. 9. b. Trin. 33 Eliz. C. B. Ughtred's caſe.

32. A. grants an *annuity* to B. for life, *for maintaining a caſtle*; In annuity brought upon this grant, the plaintiff need not ſhew in his declaration that he has maintained the caſtle; for it is a condition ſubſequent, (as where an annuity is granted pro conſilio impendendo) and the eſtate is veſted. Jenk. 260. pl. 59.

7 Rep. 10. b. S. P. per Cur. accordingly, for it is by the performance of the conſideration that the duty commences,

33. But where a man *retains a ſervant by the year, for a ſalary*, in debt for this ſalary the plaintiff ſhould declare, that he has done his ſervice, or tendered; for this is an action which ought to aver a conſideration; but not where the covenants are reciprocal, the one to ſerve the other to pay, for they have mutual remedies. If the condition be precedent, the performance of it ought to be ſhewed in the declaration. Jenk. 260. pl. 59.

and ſo it is in nature of an act precedent, and ſays that ſo was the opinion of the court in 3 H. 6. 336. ——S. P. accordingly by Hobart Ch. J. Hob. 41. & 106.—Poph. 198. Arg. S. P. cites 15 H. 7. by Fineux.——See Tit. Apportionment (A) per tot.

34. A. deviſed a houſe to B. and if B. die before C. then I will that *C. ſhall have it upon ſuch compoſition as ſhall be thought fit by my executors, allowing* to my executors ſuch reaſonable rates *as ſhall be thought meet by my overſeers*. A. died. B. died. Agreed that the eſtate to C. is precedent and the condition ſubſequent, and that the overſeers might make agreement with C. at any time, Cro. E. 795. pl. 42. Mich. 42 & 43 Eliz. C. B. Woodcock v. Woodcock.

[78] 35. Deviſe to A. for life, *if B. within 2 years* after deviſor's death *do bind himſelf in* 100 *l.* to pay 5 *l.* per ann. to A. during his life, and if B. binds himſelf then he deviſed it to B.—*A. dies within 2 months*, no bond given by B. Agreed, that the remainder to B. on this condition precedent is good, becauſe the condition is diſcharged by the act of God. Mo. 758, pl. 1049. Trin. 2. Jac. Foſter v. Brown.

36. If a condition precedent be *impoſſible*, no eſtate or intereſt ſhall grow thereupon. Co. Litt. 206. a. b.

37. If the condition be to *increaſe an eſtate*, i. e. to have the fee *upon payment of money to the leſſor or his heirs* at a certain day, and before the day the *leſſor is attainted* of treaſon or felony, and alſo before the day is *executed*. Now is the condition *become impoſſible by the act and offence of the leſſor*; yet the leſſee ſhan't have fee, becauſe a *precedent condition* to encreaſe an eſtate muſt be performed,

formed, and if it become impoſſible, no eſtate ſhall ariſe. Co. Litt. 218. a.

38. A. makes a *leaſe* to B. *if C. lives for* 21 *years*, and *C. is dead at the time*; this leaſe is void, for the condition is precedent. Jenk. 305. pl. 79.

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39. A *poſitive agreement* was, *that one ſhall deliver a cow* to the other, *and that the other ſhall give him ſo much* money; the action lies for either ſide without performance of his promiſe. 12 Mod. 460. cited by Holt, Ch. J. as Hob. 88. [pl. 117. Hill. 12 Jac. Nichols v. Rainbred] and agrees the caſe to be good law.

But if by the agreement *A. were to deliver B. a cow, and that for it B. were to deliver him a horſe*, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before A. can bring his action; and upon this diverſity the books are reconcileable. Per Holt Ch. J. 12 Mod. 460. Paſch. 13 W. 7.

40. The executor of A. brought an action of the caſe againſt *B.* declaring, that *in conſideration that A. in his life-time did promiſe to aſſure certain lands to B. before Michaelmas next, B. promiſed to pay him ſo much* money for the land; ſo that the aſſurance was to be made before Mich. and the money was to be paid for the land, and conſequently after Mich. For A. had time till Mich. to make the aſſurance; and becauſe the aſſurance was to have been made firſt, and the money by the agreement to be paid for the land, though there were mutual promiſes, yet it was adjudged the action would not lie for the money, without making the aſſurance firſt; cited by Holt Ch. J. in delivering the opinion of that court, 12 Mod. 462. as Jo. 318. [pl. 27. Mich. 5. Car. B. R. *Ruſſel v. Ward*] and ſays, that this caſe as it is there reported is intricate, and requires conſideration to make this conſtruction upon it; but upon examination it is a full authority in point.

S. C. cited by Holt Ch. J. in delivering the opinion of the court, Lutw. 251. — Ld. Raym. Rep. 665. S. C. cited by Holt Ch. J.

41. *The huſband deviſed his lands to his wife for life, and made her executrix, and deviſed further, that if it ſhould fully appear that his goods and chattles were not ſufficient to pay his debts, &c. that then ſhe ſhould ſell all his lands, or ſo much thereof, which together with his goods, &c. would ſatisfy his debts, &c.* Adjudged this is a precedent condition to the ſale of the lands, and therefore the amount of the debts, &c. and the value of the goods ought to be ſet forth, and aver that they were not ſufficient to ſatisfy the debts, that thereby the court may judge whether the condition is performed or not. Jo. 527. pl. 9 Car. B. R. Dike v. Ricks.

Cro. C. 335. pl. 21. S. C. adjudged accordingly.

*[79]

42. The *plaintiff covenanted to raiſe ſoldiers, and bring them to ſuch a port*, and the *defendant covenanted to find ſhipping and victuals for them to tranſport them*; plaintiff brought his action for not providing ſhipping, &c. at the time appointed; the defendant pleaded that the plaintiff had not raiſed the ſoldiers at that time; Roll Ch. J. and Aſk held, that theſe words were mutual and diſtinct covenants, but Jerman and * Nicholas J. held it a precedent condition, but afterwards Nicholas chang'd his opinion, and ſo judgment for the plaintiff, Niſi. Sty. 186, 187. Hill. 1649. Ware v. Chappel.

S. C. cited 2 Mod. 34. by Ellis J. and ſaid he thought it a very hard caſe, that the plaintiff who never raiſed any ſoldiers may bring his action upon this promiſe againſt the defendant for not tranſporting them. — S. C. cited by Holt Ch. J. Lutw. 253. and ſaid, that he did not think as Ellis J. did, that this was a hard caſe, but a plain caſe. — S. C. cited per Holt Ch. J. 12 Mod. 465. in the caſe of Thorp v. Thorp, and ſays, that this differs from that caſe;

for in this caſe 2 diſtinct acts are to be done, the one is to be ready with ſoldiers, and the other with ſhips, and the performance of the one does not depend on the other, nor is the doing of the one the reward for doing of the other; but they are diſtinct acts, and each is to do his part; and this is not a hard caſe, for they are mutual acts not depending the one upon the other.——S. C. cited per Holt, Ld. Raym. Rep. 666, 667. accordingly.

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43. A. in conſideration that B. ſhould forbear to proteſt a bill of exchange drawn upon A. promiſed *he would pay the money when he came next to London*; iſſue joined and verdict for the plaintiff. It was moved in arreſt of judgment, that here is no conſideration ſet forth to ground the promiſe upon; for B. does not ſhew that A. came to London, but ſhews, that *A. died at Plymouth and came not to London*; per Roll. Ch. J. the coming to London is alleged to no purpoſe, for the payment of the money was a *duty*, and the monies to be paid were received beyond ſea, and ſo is a duty and made a good conſideration; judgment affirmed. Sty. 416. Hill. 1654. Pinchard v. Fowke.

44. A leaſe was made paying ſo much; *(paying)* does not make precedent condition. Sid. 280. pl. 8. Paſch. 18 Car. 2. B. R. Allen v. Babington.

S. C. cited Arg. Mod. 307.

45. A. ſeiſed of lands in fee in 1643, conveyed them to *truſtees*, and their heirs upon truſt, that *if B. his eldeſt ſon within* 6 *months after A's death, ſecured* 500 *l.* to the truſtees for the benefit of B's children, then the *truſtees (after ſuch ſecurity firſt given) to convey to B.* and his heirs, and *till the* 6 *months the truſtees to ſtand ſeiſed to the uſe of B's eldeſt ſon*, and *for default* of ſuch ſecurity, the truſtees, *at the requeſt of B's eldeſt ſon, to convey to him.* Afterwards, in 1656, B. being in poſſeſſion, and taken to be abſolute owner of the lands, mortgaged the land for 2000 l. Afterwards B. died without having given any ſecurity; the court decreed, that the mortgagee ſhould hold the land for ſecurity of the 2000 l. and intereſt againſt the truſtees and the eldeſt ſon of B. and all claiming under them, but charged with the 500 l. and upon a bill of review Lord Keeper Bridgman ſaid, he ſaw no cauſe to reverſe the decree; but looked on the condition precedent to be *in nature of a penalty*, and would regard the *intent of the truſt*, which was to ſecure 500 l. to the younger children, which according to the way the truſtees and B.'s eldeſt ſon went, could not be; and ſo diſmiſſed the bill of review. Chan. Caſes 89. Trin. 19 Car. 2. Elſton, Wallis & al' v. Crimes & Scot.

Lev. 274. Mich. 21 Car. 2. B. R. the S. C. adjudg'd and affirm'd in Cam. Scacc. ——Saund. 319, 320. S. C. adjudg'd, and judgment affirm'd — Raym. 183.

46. An agreement in writing between the parties that *A. ſhould pay* 500 *l.* to B. *for all his lands*, in witneſs &c. This agreement was mutually executed, and afterwards B. brought debt for the 500 l. without averring conveyance or tender. Adjudg'd, that after the day for the conveyance was paſt the action lay for the money, becauſe it was a *mutual agreement* on which either party has a mutual remedy; but it is otherwiſe where the prepoſition *pro* makes it a condition precedent, and the court held it would have been otherwiſe in the laſt caſe if it had been the deed of one of the parties. 8 Mod. 42. cited per Cur. as the caſe of Pordage v. Cole.

S. C. adjudg'd.——Sid. 423. S. C. adjudg'd.——2 Keb. 547, 543. pl. 5. B. R. adjudg'd per tot. Cur.—— S. C. cited by Holt Ch. J. in delivering the opinion of the court. Lutw. 251. And Ld. Raym. Rep. 665.

27. Plaintiff

47. Plaintiff *covenants not to uſe the trade of* a taylor with any cuſtomers in a ſchedule mentioned, and defendant covenants *in conſideration of performance thereof to pay* 100*l*. *per annum quarterly*, this is in nature of a *negative covenant*, viz. not to uſe &c. and, therefore if the words in conſideration &c. ſhall amount to a condition precedent, the plaintiff ſhall never have the 100*l*. per annum during his life, becauſe ſuch negative covenant cannot be ſaid to be performed while there is a poſſibility of breaking it, which may be done at any time during his life, and death only can make it impoſſible, ſo that theſe are *mutual covenants*. 2 Saund. 155. Trin. 22 Car. 2. Hunlock v. Blacklow. adjudg'd

Mod. 64. pl. 8. S. C. adjudg'd niſi. —Sid. 464. pl. 10. S. C. the court held them to be mutual covenants, and judgment for the plaintiff.—2 Keb. 674. pl. 48. S. C. accordingly.

48. In covenant &c. the plaintiff declared upon articles of agreement, by which the defendant covenanted to pay the plaintiff ſo much money, *he making to him a ſufficient eſtate* in ſuch lands before Michaelmas, &c. and though he (the plaintiff) ſemper a tempore confectionis ſcripti paratus fuit ad performand' uſque ad diem exhibitionis billæ all the agreement on his part, the defendant had not paid the money. It was held, that the words (he making a good and ſufficient eſtate) are a condition precedent, and therefore the plaintiff ſhould have averr'd the performance of it particularly, and not by ſuch general words as, that he had performed all on his part. Vent. 147. Trin. 23 Car. 2. B. R. Large v. Cheſhire.

2 Keb. 801. pl. 45. S. C. adjudged accordingly.—S. C. cited Lutw. 251. and Ld. Raym. Rep. 665. by Holt. Ch. J.

49. *Plaintiff agreed to aſſign a term* of 80 years *to the defendant, who proinde ſhould pay* 250*l*. and then lays mutual promiſes; and upon a demurrer it was objected, that this was a condition precedent, and therefore the plaintiff ought to have averred a performance; for the plaintiff was to aſſign, and the defendant proinde, viz. pro aſſignatione, is to pay the money; but the court præter Atkins J. who doubted, held it not a condition precedent, but a *mutual promiſe*; for it is as reaſonable the plaintiff ſhould have his money before the aſſignment made, as 'tis that the defendant ſhould have the aſſignment before he paid his money; and judgment for the plaintiff. 2 Mod. 33. Paſch. 27 Car. 2 C. B. Smith v. Shelberry.

S. C. cited Ld. Raym. Rep. 666. by Holt. Ch. J. who ſays that they went upon the authority of Ughtred's caſe.—Lutw. 252. S. C. cited by Holt accordingly.—1 Salk. 172. pl. 1. C. S. cited by Holt and denied.—Freem. Rep. 195. pl. 199. S. C. held that (Proinde) made no condition precedent, but only ſpecified the conſideration.

50. *Defendant covenanted to be accountable to the plaintiff for all arrears of rent, tithes*, &c. and aſſigns a breach, that he hath not accounted, &c. tho' requeſted to do it. The *defendant confeſſes the covenant to be accountable; but that in the ſame indenture, agreatum fuit & ulterius proviſum, that the plaintiff ſhould allow and diſcount all moneys for parſons-dinners*, &c. which the plaintiff refuſed to do; and upon demurrer to this plea, it was inſiſted that ulterius proviſum eſt makes a condition precedent; ſed per Curiam, theſe are mutual covenants, upon which each party hath a diſtinct remedy, for the proviſum & agreatum eſt doth not amount to a condition, but is a covenant; and in this caſe the defendant is bound to account upon requeſt, and judgment for the plaintiff. 2 Mod. 73. Paſch. 28 Car. 2. C. B. Samways v. Eldſly.

51. *Deviſe*

51. *Deviſe* of lands to A. and B. for payment of debts, and after in truſt for the uſe and benefit of C. and his heirs male; but declared his will to be that C. ſhould have *no benefit* of this deviſe, *unleſs his father ſhould ſettle* ſuch lands upon C. and in default thereof, deviſed the ſaid lands to A. and B. Per Lord Chancellor, This is a condition ſubſequent. Vern. 79, 83. pl. 73. Mich. 1682. Popham v. Bampfield.

[81] 52. In covenant upon *charter-party*, the plaintiff declared upon an agreement, *that his ſhip ſhould be ready on the 12th of Auguſt to ſail to* N. *beyond ſea, and there would load it with figgs, and other merchandize of the defendant's, and bring them back to Topſham*, &c. and that the *defendant covenanted to pay 3 l. 15 s. for every ton ſo brought*, and aſſigns the breach in non payment of 112 *l.* 10 *s.* due for the freight of 30 ton; the defendant pleads that the ſhip was not ready to ſail on the ſaid 12th of Auguſt, whereby he loſt the profit of his merchandize, and traverſed that the ſhip was ready, &c. and upon demurrer per Curiam the plea is ill, for theſe are mutual covenants, and each party hath remedy for non-performance, and judgment for the plaintiff. 2 Jo. 216. Trin. 34 Car. 2. B. R. Shower v. Cudmore.

53. Copyholder of *lands of borough Engliſh*, ſurrender'd to the uſe of himſelf for life, and after of A. his eldeſt ſon, and his heirs, *if he lives to* 21; *but on condition that if A. dies before* 21, *then* to the ſurrenderor and his heirs, and dies. This is an *eſtate to A. preſently to be defeated by condition ſubſequent*, viz. if A. dies before 21. 3 Lev. 132. Trin. 35 Car. 2. C. B. Edwards v. Hammond.

54. B. the *plaintiff leaſed a mill* to W. the defendant, *and covenanted to find coggs*, rounds, braſſes, and timber, &c. for the mill, during the term, and *W. covenanted to keep them in repair*; W. pleaded performance; B. replied that W. ſuffered the mill to be in decay, and ſhew'd in what; W. rejoined, that he *demanded timber of the plaintiff to repair the ſame, but he refuſed to deliver any*; and upon demurrer to this rejoinder the court was divided, whether theſe were conditional or mutual covenants. Lutw. 394. Hill. 2 & 3 Jac. 2. Browne v. Walker.

3 Lev. 211. Trin. 1 Jac. 2. C. B. the S. C —— Carth. 292. Mich. 5 W. & M. in B. R. the S. C. but the point of condition precedent does not appear in either.

55. A. ſeiſed in fee ſettles lands to the uſe of himſelf for life, &c. remainder *to B. and the heirs male of his body*, remainder *to C. in tail male*, remainder to A. and his heirs, with power of revocation of the eſtate of B. only, and to limit new uſes, and after by deed the next day, reciting that he had limited an eſtate to B. and his heirs male, he *revokes* the ſame, *and limits it to B. and his heirs male, provided that he pays* 1500 *l. to his executors, and if he fail thereof, it ſhall be lawful for A. and B. &c. to enter and raiſe the ſame out of the rents, iſſues, and profits.* A. dies. B. dies without iſſue. W. R. claimed the eſtate as heir to B. inſiſting that the limitation was of an eſtate in fee, but adjudged it was only eſtate tail, as the firſt eſtate was. But in arguing this caſe, it was urged, that this proviſo was a condition precedent, and ſo B. never ſeiſed in fee (ſuppoſing the limitation to have been in fee) becauſe no performance of the condition found by the verdict. But this was rejected; and it was held clearly that this *was a chattle intereſt in the truſtees to raiſe* 1500 *l. if B. did not pay it*, and that ſuch an intereſt

intereſt may be limited by way of uſe, as in caſe of a rent, and that upon payment the grantee may enter and receive the profits; that this is not a condition, as if it was upon a *conveyance at common law*, but an *eſtate which ſhall ariſe to A. and B. upon ſuch a contingent*. Skin. 324. Mich. 4 W. & M. in B. R. Gillimore v. Harris.

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56. In debt the caſe was, that the plaintiff, *in conſideration of* 1100*l. to be paid to him*, &c. by the defendant, *covenanted to aſſign*, &c. *to the defendant, on the* 30*th January next*, 10 *ſhares* in the corporation of linen manufacture; *and the defendant covenanted*, &c. *that he would then accept them, and at the ſame time pay the plaintiff the ſaid* 1100*l.* &c. under the penalty of 2200 *l.* It was inſiſted for the defendant, that the aſſignment ought to precede the payment of the money, becauſe the covenant to pay it was in nature of a condition, or defeaſance, to ſave the forfeiture of the 2200 *l.* and therefore ſhall be conſtrued moſt favourably for the obligor, and cited D. 17. a. by [82] the rule of which caſe, and alſo by the reſolution of the court thereupon, the payment of the money in the principal caſe ought to refer to the acceptance of the aſſignment, and not to the day in which the aſſignment was mentioned to be made; and if ſo, it was impoſſible that the defendant ſhould accept of the aſſignment before it was made; ſo that the true meaning was, that the plaintiff ſhould aſſign the ſhares on the ſaid 30th day of January, and that the defendant ſhould accept it, and that upon ſuch acceptance the money ſhould be paid; and of this opinion were all the court, whereupon the plaintiff pray'd leave to diſcontinue, and had it. Lutw. 490. 492. Paſch. 5 W. & M. Elwick v. Cudworth.

57. Deviſe to the firſt ſon of A. *if he takes my name, if not to B.* A. dies without iſſue. B. ſhall take; for the refuſal of A's ſon is not a condition precedent, but a precedent eſtate attended with theſe limitations. Per Treby Ch. J. and judgment accordingly. 1 Salk. 230. pl. 8. Trin. 9 W. 3. C. B. Scattergood v. Edge.

Per Cowper C. it is a condition ſubſequent to defeat the eſtate, and not precedent. 2 Vern. 661. Trin. 1700. Trafford & Ux' v. Sir Ralph Aſhton.——It was objected that tho' this deviſe was void as to the iſſue of A. yet it could not be good to the ſon of B. becauſe it depended on a condition precedent, viz. If iſſue of A. ſhould refuſe to aſſume the name, or die without iſſue, which are impoſſible, A. dying without iſſue, cites Plowd. 272. 2 Inſt. 218. tho' the condition there became impoſſible by the act of the party himſelf, and this notion was agreed to by the court. But here it was adjudged not to be a precedent condition, but part of a limitation of a deviſe of a particular eſtate which is void; but if it were collateral by itſelf, it would be a precedent condition; cites 19 H. 6. pl. 34, 39. Fol. 16. Deviſe to a monk, remainder to B. B. ſhall take immediately, becauſe deviſe to a monk is void, but had it been that after death of the monk it ſhould remain, B. ſhould not take till after death of the monk. Per Powel J. 12 Mod. 285. Paſch. 11 W. 3. Arg. in caſe of Scattergood v. Edge.

58. Where the *one promiſe* is the conſideration *of the other*, and where the performance and not the promiſe is, *is to be gathered from the words and nature of the agreement*, and depends intirely thereupon; for if in caſe there were a poſitive promiſe that one ſhould releaſe his equity of redemption, and on the other ſide that the other would pay 7*l.* then the one might bring his action without any averment of performance; but where the agreement is, that the plaintiff ſhould releaſe his equity of redemption, in conſideration whereof the defendant was to pay him 7*l.* ſo that the *releaſe*

eaſe is the conſideration, and therefore being *executory*, it is a condition precedent, which muſt be averred. 12 Mod. 455. 460. Paſch. 13 W. 3. by Holt Ch. J. in delivering the opinion of the court in caſe of Thorp v. Thorp.

59. If there be a *day ſet for* the *payment* of money, *or doing the thing* which one promiſes, agrees, or covenants to do *for* another thing, and that day *happens to incur before* the time, *the thing* for which the promiſe, agreement, or covenant is made *is to be performed by the tenor of the agreement* there, tho' the words be, that the party ſhall pay the money, or do the thing for ſuch a thing, or in conſideration of ſuch a thing. After the day is paſt the other ſhall have an action for the money, or other thing, tho' the thing for which the promiſe, agreement, or covenant was made be not performed; for it would be repugnant there to make it a condition precedent; and therefore they are in that caſe left to mutual remedies, on which, by the expreſs words of the agreement, they have depended. Per Holt Ch. J. 12 Mod. 461. Paſch. 13 W. 3. in caſe of Thorp v. Thorp.

60. M. agrees *to give A. ſo much for the uſe of a coach and horſes for a year*, and *A. agreed* further with M. *to keep the coach in repair*; it was averred the coach and horſes were delivered to M. but nothing of the repair; and Holt Ch. J. held upon this evidence that *repairing* was not a condition precedent, and therefore need
[83] not be averred. Per Holt Ch. J. at Guildhall, judgment pro querente. 12 Mod. 503. Paſch. 13 W. 3. Atkinſon v. Morrice.

61. *But* if the agreement had been that A. had agreed *to give M. a coach and horſes for a year, and to repair the coach, and* that *for that M. promiſed ſo much money*, then the repairing had been a condition precedent neceſſary to be averred. Per Holt Ch. J. 12 Mod. 503. Paſch. 13 W. 3. in S. C.

62. Condition that A. ſhall do, and *for the doing B. ſhall pay* is condition precedent, but *time fixed for payment* will vary the conſtruction; per Holt Ch. J. 1 Salk. 171. Paſch. 13 W. 3. B. R. Thorp v. Thorp.

Ibid. 590. Trevor Ch. J. ſaid, he agreed with Powell J. in part, viz. that if part of the award be void, yet if it be a condition precedent, it muſt be perform'd before the other performs of his ſide; but my brother's diverſity of expreſs words of reference I think will not hold, that is, that where the words be expreſs that upon performance of that part which is void, the other ſhall do ſuch a thing, there the void thing, ſays he, is a condition precedent, and muſt be done; but where ſeveral things are ordered, and ſome of them void, and that ſuper performationem præm' ſuch a thing ſhall be done; there, he ſays, it is enough to do that which is well awarded, to be intitled to the thing to be done on the other ſide. I ſay, that every illegal part of an award is the ſame thing to many purpoſes as if it were not in; but yet if it appear that the arbitrators deſigned that ſuch illegal part ſhould be part of the conſideration in reſpect of which the other

63. Where an *award* conſiſts *of divers things*, and one of them is void, and it be expreſly ſaid, *that upon performance of* that *void thing, the other party ſhall do* ſuch a thing, there the doing of the void thing is a condition precedent, and muſt be averred before action againſt the other for not doing his part; *but where* there be ſeveral things in an award, and *ſome are good* and others not, and 'tis further ſaid, *that upon performance præmiſſorum* the other ſhall releaſe for the purpoſe, there it ſuffices to make *averment of performance of what is well awarded* without more; per Powell J. 12. Mod. 588. Mich. 13 W. 3. in C. B. Lee v. Elkins.

other was to perform, it muſt be done, or elſe here is not that advantage for the other ſide which was deſigned for it; and he has a wrong done him by being forced to pay for a conſideration which he has not.

64. Altho' *ita quod* is held in Littleton, to make a conſideration ſubſequent, yet that is *in caſe of eſtates executed*, but it is *otherwiſe* in caſe of *things executory*. As if A. ſhall *covenant to convey* his lands *to B. ita quod* 10 *l. be paid to A. before Mich.* the payment of the money is a condition precedent to the conveyance of the lands, and he is not obliged to perform his agreement unleſs the 10l. be paid at the time appointed; per Holt Ch. J. in delivering the opinion of the court. 2 Ld. Raym. Rep. 766. Paſch. 1. Ann. in caſe of Feltham v. Cudworth. 3 Salk. 59. S. C. & S. P. by Holt. Ch. J. according-ly, and ſays that Littleton is ſo to be underſtood.——7 Mod. 11. S. C. & S. P. per Cur. for where ita quod is annexed to an agreement for a thing not executed it qualified the matter before, and is the ſame thing as if it were put firſt.

65. Condition *deſcribing the qualification of the perſon that is to take* is in its nature a condition precedent; per lord K. Cowper. 2 Vern. 573. pl. 518. Hill. 1706. Creagh & Ux' v. Wilſon & al'.

66. An infant feme marries one Ingram having lands of inheritance; articles are entred into, whereby the infant *feme was during the coverture to ſettle and convey over* theſe *lands, and then ſhe was to have a rent-charge of* 450 *l. per ann.* for her jointure, *whereas before ſhe had but* 250 *l. per annum.* Ingram dies; ſhe marries one Wood. W. and his wife brings a bill for to have the 450l. per ann. &c. but decreed per Harcourt lord keeper, that here was a condition precedent to her having her jointure augmented which was to have been done during the coverture; and a court of equity will not relieve in ſuch a caſe where omiſſion of it was but a meer neglect in the party. In my lady *Bertie's caſe*, where a portion was given to a lady, in caſe ſhe married my lord Guilford, my lord refuſed upon a tender, and the lady married to another by the conſent and direction of the Court of Chancery; yet in this caſe my lord Somers refuſed to aſſiſt the lady, but the fortune went over; [84] but upon an appeal in the Houſe of Lords this matter was in a manner compromiſed by the lords, and the lord keeper here diſmiſſed the plaintiff's bill; for if he ſhould relieve her ſhe would have both the land and the 450l. per ann. Mich. 9 Annæ Wood v. Ingram.

67. The condition of a bond was, *whereas D. was indebted to T. in a bond of* 3000 *l. conditioned for payment of* 1500 *l. and had recovered judgment. G. upon conſideration that T. the plaintiff would forbear ſuing out execution* upon D. *promiſed to pay the money to T. upon requeſt, T. aſſigning over to him the judgment* he had againſt D. The defendant pleads in bar, that the plaintiff had not aſſigned. Plaintiff replies, that he was ready to aſſign. Upon the firſt argument on demurrer, Parker Ch. J. and Powis were of opinion for the plaintiff, and that the ſingle queſtion was, who was to do the firſt act? and that the obligor was to do it; for though he is not bound to part with his money unleſs the judgment be aſſigned to him eodem inſtanti, yet he muſt offer to him on condition the obligee will aſſign it. But Eyre J. e contra; for he held it a condition precedent; and alſo that if the judgment was aſſigned firſt, the bond might After conſideration, Parker Ch. J. deliver'd the opinion of the court for the plaintiff, and ſaid, the queſtion at the bar had been, who was to do the firſt act, whether the plaintiff ought firſt to have aſſigned the

Judgment, or the defendant to have first paid the money, and that the main objection

might be put in ſuit for the money; but if the bond was paid firſt, there lay no remedy at law for the judgment; et adjornatur. 10 Mod. 153. Paſch. 12 Ann. B. R. Afterwards the caſe was argued again. ibid. 189. Mich. 12 Ann. & ibid. 222. Paſch. 13 Ann. and afterwards in the next term judgment was given for the plaintiff. Turner v. Goodwin.

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againſt the plaintiff's aſſigning firſt was, that the plaintiff would then have been obliged to have found out the defendant, and have tender'd an aſſignment the day the money was payable by the condition, as in 3 Cro. 143. Noy 18. Hob. 69. 77. and ſo it would have been in the power of the defendant to have render'd his own bond ineffectual by keeping out of the way; and that on the other ſide it had been objected, that if the defendant ought firſt to have paid the money, he would have been without remedy at law for the judgment; but that the court were of opinion, that the words *(he aſſigning &c.)* did not amount to a condition precedent, for the words themſelves do not import it, and there were no other words or reaſon to make ſuch a conſtruction neceſſary. In all the caſes cited at the bar of conditions precedent, there is ſome word of priority, or one of the acts is to be at a prior time, or ſomething that makes it neceſſary that one ſhould precede the other, except the caſe of *Large and Cheſhire*, 1 Vent. 147. 2 Keb. 801. which is of no authority; for no judgment is enter'd in that caſe, nor any rule for judgment to be found, and that in this caſe the acts of the parties ought not to have preceded, but accompanied one another; the defendant ought to have tender'd the money, but not abſolutely, but ſub modo he ſhould have counted it out, and told the plaintiff here is your money, aſſign me the judgment, and then upon the plaintiff's delivering the aſſignment, the money would have been his, but not before, tho' he alſo had counted it, and ſo the aſſignment of the judgment ought to have been a circumſtance of the payment, and that this conſtruction of the condition obviated all the objections of both ſides, and that ſuch a ſpecial tender was not a new thing; for upon a ſingle bill the obligor ought to tender the money upon the terms of having an acquittance, and ſuch a tender with an adhuc parat' is a good plea, cites Fitzh. Abr. Tit. Verdict 13. So 2 H. 7. 8. 9. Debt was brought againſt the executrix of the clerk of the Hanaper, upon a patent by the king to the plaintiff, for a ſum of money, and a liberate to the clerk to pay it, he receiving letters of acquittance; and the better opinion there is, that the plaintiff was not obliged to offer an acquittance, but that the clerk ought to have tender'd the money, and demanded an acquittance; ſo in this caſe the defendant, to ſave his obligation, ought to have found out the plaintiff, and tender'd the money upon the day upon the terms of having an aſſignment of the judgment, and ought to have pleaded ſuch ſpecial tender with a refuſal and an adhuc parat' as in the common caſe of a general tender, and ſince he had not done ſo, his plea was ill. Judgment for the plaintiff. MS. Rep. Trin. 13 Ann. B. R. Turner v. Goodwin.

Gilb. Equ. Rep. 43. S. C. in totidem verbis.

68. A. on the marriage of B. his ſon with M. an heireſs, conveys land to truſtees to the uſe of B. and their iſſue, *that if M. when ſhe comes of age ſhall not join to charge her eſtate with* 2000 *l.* then the indentures to be abſolutely void to all intents and purpoſes; per Lord Harcourt this is a condition ſubſequent. Ch. Prec. 387. pl. 266. Paſch. 1714. Hunt v. Hunt.

*[85]

Comyns's Rep. 513. 522. pl. 214. Paſch. 9 Geo. 2. in C. B. the S. C. in an action of debt, Ld. Ch. J. Reeve thought it a condition ſubſequent; but the other judges doubting, it was adjourned; and afterwards in Eaſter term, 12 Geo. 2. Willes Ch. J. and the whole court, inclined to think it a condition precedent; but held, that ſuppoſing it to be a condition ſubſequent, yet not being performed, the plaintiff was not intitled to the arrear of the annuity, and therefore the verdict was ſet aſide, and the plaintiff to pay

69. A. gave a *legacy of* 6000 *l. to L. the only child of M.* and died, *leaving M. his heir at law, but deviſed all his real eſtate to B. The legacy to L. was made payable at her age of* 21 *or marriage,* which ſhould * firſt happen, and to be in lieu and ſatisfaction of all which ſhe might claim out of his real or perſonal eſtate, and *upon condition ſhe ſhould releaſe all right and title* thereunto unto his executors and truſtees. It was inſiſted, that L. had no right during her mother's life, that L. might marry while an infant, and ſo her legacy become due, and ſhe not capable of releaſing, or might intermarry with an infant, and ſo neither ſhe nor her huſband capable of releaſing, and yet the legacy due; wherefore ſuppoſing it to be a condition, it could be no more than a condition ſubſequent, quod curia conceſſit. Wms's Rep. 783. 785. Hill. 1721. [Trin. 1722] in Canc. Acherley v. Wheeler and Vernon.

the

the costs of a nonsuit.——Forteſcue's Rep. 189. 194. S. C. adjudg'd, and Ld. Ch. J. Willes, who delivered the opinion of the court, ſaid, that his brothers were of opinion that it is a condition precedent, but his lordſhip ſaid, that the ſame words will make it a condition ſubſequent as well as precedent, and cites ſeveral caſes.

70. In all *executory agreements* where the plaintiff declares pro conſideratione, there the word *(pro)* makes it a condition precedent, (that is) the thing ſhall be done or tendered to be done before the defendant ſhall be obliged to pay, and neither of the parties can have an action of covenant without *averring the performance*. 8 Mod. 42. Paſch. 7 Geo. 1. in caſe of Lock v. Wright.

71. A. *in conſideration of* 500 *l. which he is to have with his wife in money and goods*, and of the marriage, made a ſettlement, and *gave her a power to diſpoſe of* 200 *l. by will*, which ſhe did about 15 years after. On a bill in chancery by the legatees, A. inſiſted, that this was a condition precedent, and that he never received more than 300 *l.* as a marriage portion with his wife; but the Maſter of the Rolls held otherwiſe, and that the quantum of the portion *ſeemed rather a computation*, and was ſatisfied therewith, and decreed the 200 *l.* to be raiſed. 2 Wms's Rep. (618.) Trin. 1731. North v. Anſell.

[*For more of* Conditions precedent *ſee* Tit. Deviſe, Remainder (W) per tot. Stocks, per tot. *and other proper titles.*]

(T. 2) What ſhall be ſaid a Condition precedent, and what ſubſequent, as to Marriages and Marriage Portions. And in what Caſes forfeited.

See Tit. Marriage (K).

1. A *Leaſe for years* to Sir Edward Waldgrave and lady, on truſt to *raiſe* 900 *l.* for a feme ſole, *in caſe ſhe did not marry contrary to good liking of Sir Edward and lady*; *if ſhe did, then* to go *to ſuch perſons as Sir Edward* and lady, or ſurvivor *ſhould nominate, and for want of nomination to Sir Edward* and lady, or ſurvivor of them; *ſhe marries without their conſent, they die without any nomination*; bill was preferred by Sandall, who had a general deed of gift by lady W. who ſurviv'd, of all her goods and chattels, againſt F. Copledite, who had adminiſtration to the feme and lady W. to have the benefit of this leaſe; which was decreed for Copledite. Comyn's Rep. 739. 740. * Paſch. 13 Geo. 2. in caſe of Harvy v. Aſton. cites Chan. Caſes 58. [Mich. 16 Car. 2.] Fleming v. Waldgrave.

But ibid. 740. his lordſhip ſays the caſe is obſcurely reported, but here was no nomination, for the gift of all her goods and chattels could not amount to make Sandall nominee of this 900*l.* Here appears no diſlike of marriage; for tho' no conſent, it does not appear they diſliked it, and the making no nomination is an argument they did not, and ſo the condition not broken; and this might be the reaſon that the book ſaith, it was not in the power of the truſtees to diſpoſe of the leaſe otherwiſe; tho' the book gives no reaſon for ſuch ſaying, but in the caſe of *Treagh v. Wilſon*. 2 Vern. 573. it is ſaid, there may be a difference between marrying without conſent, and marrying againſt conſent, according to the caſe of Fleming v. Waldgrave.

*[86]

2. The daughter of lord Kelmurry, and the ſon of lord K. preſer a bill to have the benefit of a *ſettlement* made by lord K. and his

But ib. 741, 742. his lordſh. ſays,

his ſon, whereby *truſtees were to raiſe* 1500 *l. a-piece for portions of* 2 *daughters*, the plaintiffs and the ſiſters, *payable at their marriage with conſent of truſtees* or major part of them, *and maintenance in mean time*; and if truſtees had raiſed the portions before they married, they were to improve them to the beſt advantage, that they might receive the increaſe for maintenance till marriage; and *if they married without conſent, the portion of her ſo marrying ſhould remain over to another.* The truſtees received the rents ever ſince the death of lord K. and raiſed the portions; and the plaintiffs *being in years, and intending not to marry*, would lay out their portions in purchaſe of annuities for their larger maintenance. Queſtion was, Whether plaintiffs ought to have portions at their own diſpoſal, before they married with conſent? *And it being admitted, if either died before marriage, her portion ſhould go to her executor or adminiſtrator*, and they *offering ſecurity to indemnify truſtees from claim by defendants*, who were infants, children of Charles lord K. *to whom the portions after marriage without conſent were limited* by the ſettlement, *the court decreed it* on giving ſuch ſecurity. Comyns's Rep. 740, 741. Ld. Ch. B. Comyns cites Fin. Rep. 62. [Hill. 25. Car. 2.] Needham v. Vernon.

It is evident this decree was not conformable to the uſual courſe of proceedings in equity; ſo if one may gueſs upon ſo ſhort and obſcure a report of the caſe, it ſeems to be a decree by conſent. The brother Robert, who probably was the eldeſt ſon of lord K. and party to the ſettlement and to the bill, and to whom the benefit of the portions, if not paid, would reſult, conſents his 2 ſiſters ſhould have their portions to lay out in the purchaſe of annuities for their better ſupport, and ſo admits they would go to their executor or adminiſtrator if they died unmarried; or perhaps it might be apprehended by the parties, that a ſum of money given to a daughter to be paid at marriage, like a ſum demiſed to an infant to be paid at his age of 21 years, was an intereſt veſted that would go to an executor or adminiſtrator, though the deviſee died before the time of payment, and upon ſuch admiſſion the portions were decreed. But there was ſtill a difficulty for the defendants to whom the money was limitted over, in caſe the daughters married without the conſent of truſtees; but the plaintiffs being in years, and declaring they intended never to marry; and being leſs likely ſo to do, when their fortunes were turned to annuities, and offering any ſecurity to indemnify truſtees againſt the infants claim, on ſuch ſecurity which the truſtees were willing to accept, the court decreed the portions to them. However it is manifeſt, that this queſtion, whether the condition annexed to the payment of the portions, that the daughters ſhould not marry without conſent of truſtees, is good, or not, was not the thing under the conſideration of the court; for they decreed the portions though the daughters never married; whereas it is agreed on all ſides in the preſent caſe, that marriage is neceſſary before the portions are payable, whether the mother's conſent is neceſſary or not. But it is moſt evident the court look'd upon the condition as good, or there had been no need of ſecurity to indemnify the truſtees. (What need of ſuch ſecurity if the condition was void?)

3. A ſettlement was made by W. by deed and will, reciting a marriage intended between A. and B. the daughter of W. and then comes a clauſe, that *if B. ſhould live to* 16 *years of age, and ſhould refuſe to marry A. then A. ſhould have* 20,000 *l. out of the perſonal eſtate*; And afterwards comes another clauſe, that *if it happen that the ſaid intended marriage be not had till after B's age of* 16 *years*, then the real and perſonal eſtate is ſettled on A. & B. for their lives, &c. The marriage was had before B. was 16 years old, but ſhe lived to 16 and died before 17 without iſſue. 'Twas urged, that A. and B. marrying before 16, the perſonal eſtate was not veſted ſo as to intitle the adminiſtrator of B. and that the grantor's intent was to reſtrain B. from *marrying before* 16; But lord Jeffries took it, that a marriage between A. and B. was the chief intent * and of the 20,000 *l.* penalty for refuſal, and that the latter clauſe was only to bring back that 20,000 *l.* into the perſonal eſtate to be ſettled to the ſame uſes with the reſt, in caſe the marriage

2 Freem. Rep. 186. pl. 263. S. C. ſays the father made a ſettlement of his eſtate (reciting the intended marriage &c.) and limits it to the uſe of himſelf for life, remainder to the uſe of J. S. and the defendant, and their heirs

riage ſhould be after 16, and decreed an account. Vern. 338. pl. 332. Mich. 1685. Duke of Southampton v. Crammer & al'. to the intent that in caſe the plaintiff ſhould be married to his ſaid daughter after the age of 16, and that they ſhould have iſſue-male between them, that then the ſaid truſtees and their heirs ſhould ſtand ſeiſed of the premiſſes in truſt for the plaintiff during his life, and after his deceaſe in truſt for his ſaid daughter for her life, and after in truſt for ſuch iſſue in tail, &c. The ſaid plaintiff was married to the ſaid daughter before her age of 14, but ſhe lived till ſhe was above the age of 16, and then died without iſſue; and the plaintiff preferred his bill to have this truſt executed to him for his life, and the only queſtion was, Whether he was intitled to this eſtate for life? And it was held, that altho' ſhe was married before the age of 16, yet in as much as ſhe lived till after the age of 16, ſhe might properly enough be ſaid to be married after the age of 16; and ſo it was held in *Lord Saliſbury's caſe*, and affirmed in the Houſe of Lords. They all held, that although there was no iſſue of that marriage, yet the plaintiff was intitled for his life; for that ſhould be taken reddendo ſingula ſingulis, and the having of iſſue ſhould be no condition precedent to his truſt for life, but ſhould refer to that limitation of the truſt to the iſſue; For that a truſt ſhould be expounded by the ſame rules as a will, or as articles of agreement, which need not that preciſe form of words as a limitation of an eſtate at law; as an agreement to convey an eſtate to J. S. for ever will carry the fee ſimple. And Trevor ſaid, that if it were the limitation of an uſe at law, it would be ſufficient to create an eſtate for life, the intent of the party ſo plainly appearing as it does in this caſe. This cauſe being afterwards heard in the Houſe of Lords, the decree was reverſed.——Show. Parl. caſe 183. Wood, alias, Cranmere v. the Duke of Southampton, S. C. ſays the Court of Chancery decreed the profits to J. S. for life; but againſt this decree 'twas argued, that where a condition *copulative*, conſiſting of ſeveral branches, as this does, is made precedent to any uſe or truſt, the entire condition muſt be perform'd or elſe the uſe or truſt can never ariſe or take place, and that the performance of one part only is not ſufficient; and the decree was reverſed accordingly.——S. C. cited by Lord Ch. Baron Comyns in his Lordſhip's (as I ſuppoſe it is) delivery of his opinion, in the caſe of Harvey v. Aſton, Paſch. 13 Geo. 2. Comyns's Rep. 732.

4. A. by marriage ſettlement provided 2000 *l. a-piece*, and after, *by will, directs the making up their portions* 3000 *l. a-piece*, and charges his real and perſonal eſtate, *provided they marry with conſent* of their mother; per Lord Wright and Maſter of the Rolls, 'tis a condition ſubſequent. Ch. Prec. 226. pl. 186. Trin. 1703. *Aſhton* v. Aſhton. 2 Vern. 458. pl. 415. Mich. 1703. S. C.

5. A. by will leaves his grand-daughter 200 *l. provided ſhe continued with his executors until* 21, *but if taken from them by her father, who was a papiſt, before* 21, or *if ſhe married againſt the conſent of* his executors then he gave her but 10 *l.* and made B. and C. executors. She was placed by the executors with D. a clergyman, and before ſhe was 21 D. and one of the executors conſented that ſhe ſhould make a viſit to her father, when the *father, unknown to the executors, married her to a papiſt.* Decreed at the rolls for payment of the 200 l. to the daughter; but on appeal Ld. Cowper decreed her only the 10 l. He held that the continuance with D. by direction of the executors was well, and that this was a marriage againſt their conſent, they not having opportunity to declare their diſlike before marriage, and declaring it upon notice after; and that the condition deſcribing the qualifications of the perſon who was to take, was in its nature a *condition precedent*. 2 Vern. 572. pl. 518. Hill. 1706. Creagh and Ux' v. Wilſon. S. C. cited by the Maſter of the Rolls, and ſaid it was a very good cond tion, and that if the teſtator's intent be defeated in that reſpect, the legacy ſhall not be paid. Sel. Chan. Caſes in Ld. Talbot's time, 216. in the caſe of Hervey v Aſhton ——

S. C. cited Comyns's Rep. 755, by the Lord Ch. B.

6. J. S. having 4 daughters, A. B. C. and D. in 1705. *deviſed* &c. ſeveral parcels of his eſtate ſeverally to his 4 daughters, & inter al' deviſed *to truſtees* his *lands in E. and F. in truſt for A. until her marriage or death, and in caſe ſhe marries with the conſent of her truſtees, then for her and her heirs*; but in caſe ſhe ſhould marry without But where the party cannot be compenſated in damages, it is againſt conſcience to relieve

and in Fry and Porter's case the condition could not be compensated in damages, being a marriage without consent. Precedent conditions must be literally performed, and a Court of Equity will never vest an estate when by means of a condition precedent it will not vest at law; but as conditions subsequent are to devest an estate, there it is otherwise where there can be a compensation made in damages, as above, but in any other case, even in case of condition subsequent it is otherwise. Ibid.

without their consent, then to her other sisters equally between them &c. In 1708, *A. marries W. R. with the consent* and approbation *of her father, who settles upon this marriage part of those lands devised to her, and also 7 l. * per ann. fee farm* rent. *In* 1709 *J. S. dies without altering his will.* Objected that this was a condition precedent, and till performance the estate could not vest, and equity will not aid in this case; but Cowper C. decreed that *by the marriage with the consent of the father, the condition was dispensed with*, and the devise become absolute; for conditions of this kind, whether precedent or subsequent, were in nature of penalties and forfeitures, and if the substantial part and intent be performed, equity will supply small defects and circumstances, and favour the devisee. Here is no forfeiture, and it was never the intent of the testator that the estate should be taken from the first devisee, when it can't go to the devisee over, and be let to descend to the heir at law. MS Rep. Mich. 3 Geo. Canc. Clark and Ux' v. Lucy and al'.

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7. A legacy was *devised to A. to be paid at* the age of 21 *or marriage, which shall first happen, so as such marriage be with consent of B.* and *if not, then he devised the same to his other daughters.* A. marries without consent, and dies before 21, leaving issue. Lord Chancellor said that this is not to be considered under the notion of a forfeiture; that it is merely a legacy given, and 2 days of payment appointed with a devise over; and the person dies before the legacy grew due, and so decreed that A. dying before marriage with consent, or 21, an account should be taken of her part, and that that, and the improvements of it, be paid to the surviving sisters. Sel. Cases in Canc. in Ld. King's time. 26. Trin. 11 Geo. Piggot v. Morris.

8. A. devised a *legacy* of 1000 l. to his daughter, *on condition that she marry a man who bore the name and arms of Barlow, and if she marry one that should not* bear such name and arms, *then he devised the* 1000 *l. to J. S.* The daughter *married one Bateman, but about 3 weeks before the marriage he called himself Barlow.* On a bill brought by J. S. for the 1000 l. as forfeited to him, the Master of the Rolls was of opinion that the condition was complied with by the taking the name of Barlow, and tho' it was insisted by the plaintiff's counsel, that the defendant, when he had received the legacy, would probably resume the name of Bateman, and therefore pray'd that he might be decreed to retain the name of Barlow ever after, yet his Honour refused to make any such decree. 3 Wms's Rep. 65. pl. 16. Trin. 1730. Barlow v. Bateman.

9. A. by will *devised all his lands to C. and his heirs in trust to pay debts, and then* in trust *for B. his grand-daughter, and the heirs of her body*, remainder *to C. and his heirs, upon condition that he marry B.* and gave C. his personal estate in trust for B. until she attain 21, and made C. executor, and died. *B. refused to marry C.* and *married*

tied J. R. and afterwards at her age of 21, *B. and J. R. made a bargain and ſale to W. R.* to make him tenant to the præcipe in order to ſuffer a common recovery, in which B. and J. R. were vouch'd, and the uſes were declared to the iſſue of the marriage, remainder to her own right heirs. One queſtion was, whether the condition annexed to the defendant's remainder be a condition precedent or ſubſequent? and as to this, Lord Chancellor ſaid he was inclined to think it is a condition ſubſequent. There are no * technical words to diſtinguiſh conditions precedent and ſubſequent; but the ſame words may indifferently make either, according to the intent of the perſon who creates it. In this caſe the precedent limitation was an eſtate tail in poſſeſſion; and therefore why ſhall we not ſay, that as to this remainder likewiſe it was the teſtator's intent to have it veſt immediately in the defendant? The limitation is immediate, altho' the condition upon which it depends is ſubſequent. Caſes in Chanc. in Ld Talbot's time, 166. Hill. 9 Geo. 2. Sir John Robinſon v. Comyns.

* See (T) pl. 69.

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10. A. by *ſettlement* after marriage created a *term of* 1000 *years in truſt by mortgage or ſale to raiſe* 2000 *l. for each of the daughters portions, provided they marry with their mother's conſent, and if either die before marriage with ſuch conſent, her portion to ceaſe, and the premiſes to be diſcharged; and if raiſed, then to be paid to the perſon to whom the premiſes ſhould belong*; and afterwards by will created *another truſt-term to augment their fortunes* 2000l. a-piece more, but *ſubject to the like condition* as in the ſettlement, and gave the reſidue over and above the 2000l. a piece to his wife; and by a codicil created another truſt-term, for the better raiſing of his daughter's portions. A. died, leaving 2 daughters, J. and K.— J. after age of 21, married R. S. and K. before 21 married W. R. and both without the mother's conſent. They and their huſbands brought a bill for their portions. The Maſter of the Rolls took notice of the clauſe, declaring that if either die before marriage with ſuch conſent, her portion ſhould ceaſe, which was inſiſted upon by the counſel to be ſufficient diſpoſition of it; but he ſaid that ſurely this was not a good diſpoſition within the meaning of thoſe caſes, that allow a limitation over to be good; for *this is not to take place upon marriage without conſent, but upon dying before marriage with ſuch conſent, and is no more than providing for daughters dying unmarried; he taking it all along, that if they married they would do it with conſent*; that here does not appear to be any perſon in the teſtator's view, to whom theſe fortunes ſhould go over, as in other caſes where thoſe limitations over are allow'd; that tho' theſe portions are charged upon land, yet there being *no diſtinction between conditions annexed to money charged upon land, and ſuch as are to ariſe out of the perſonal eſtate*, and portions by will being due by the eccleſiaſtical law, notwithſtanding ſuch condition as this annexed to them, portions by ſettlement (tho' under the like conditions) are likewiſe due by the law and rules of this court, and therefore thought the plaintiffs, the daughters, well intitled to their portions; and ſo order'd the huſband of the one to make propoſals before the Maſter as to ſettling his wife's fortune, and that the fortune of the other

On appeal from this decree made by the Maſter of the Rolls, it was held, that A's daughters were not intitled to their portions by this ſettlement, unleſs on their marriage with their mother's conſent. And Ld. Ch. B. Comyns, who was called in to aſſiſt the court in his argument, ſaid, that the reaſons on which he grounded his opinion, are, 1ſt. That it is the right and liberty of the ſubject, who makes a voluntary diſpoſition of his own property, to diſpoſe of it in what manner, and upon what

terms and conditions he pleases; this he believed will be universally allowed. 2dly, That it is a fixed and settled maxim of law, that if an estate in land, or interest out of the land, is limited to commence upon a condition precedent, nothing can vest or take effect till the condition performed. And this is so strong and so settled a point, that it holds although the previous act was at first impossible, or after becomes impossible by the act of God, or other accident, the estate can never vest. Comyns's Rep. 744. in his lordship's argument. And his lordship said, that a third reason which influenced him to this opinion, is, that it is most agreeable to the rules of equity, to direct the execution of the trust according to the intent of him who placed the trust in him; it is said a trust is construed favourably; and it is true, it is construed with as much advantage as may be to make good and answer the intent and design of the party; but it is construed strictly with regard to the execution of the trust; and therefore it would be a strange thing, when the trust directs the trustees to pay the money at the time of the daughter's marriage with her mother's consent, that the court should direct them to pay the money before that time. 4thly, But that it is an argument of no small weight in his opinion, that the restraint in the present case is not only lawful, but prudent and reasonable, and no consequence more likely to ensue from it, than the hindrance of an inconsiderate or imprudent marriage. Comyns's Rep. 748. The Lords Ch. J. Sir W. Lee, and Sir J. Willes, who assisted the Ld. Chan. Hardwicke upon this appeal, being of the same opinion, his lordship was pleased to concur; and thereupon the decree of his honour, the Master of the Rolls, was reversed. Comyns's Rep. 757.

should be paid to her, her husband being dead. Sel. Chan. cases in Lord Talbot's time, 212. Mich. 10 Geo. 2. Harvey v. Ashton.

P. by Ld. Ch. Baron Comyns, in his Reports, 32. Pasch. 3 Geo. 2.

11. When a condition *copulative*, consisting of *several branches*, is made *precedent to any use* or trust, the intire condition must be * performed, or else the use or trust can never rise or take place. Show. Parl. Cases. 85.

In case of Harvey v. Aston, says it is a known rule, and that the case of Sir Cæsar Wood, alias Creamer, v. duke of Southampton, Parl. Cases 83, is an authority express in this point; Sir H. Wood, on [in consideration of a] marriage of [to be had between] his daughter with the duke, made a settlement on trust to raise maintenance for his daughter till [12 years of age, and then of 550l. a year till] marriage, or age of 17, and *if his daughter after her age of 16 should marry and have issue male by the duke then* for settlement *on the issue male, and for a better provision for the duke and his wife*, on trust for the duke and his wife *for their lives*, and *after to their first and other sons in tail male*. She married [the said duke] before the age of 16, and after that age died without issue; the question was, whether the duke should not have the estate for his life? and at first decreed for him, but that decree was reversed in the House of Lords; for it was said the words were plain and certain, that there must not only be a marriage, but issue male; and it would be violence to break the condition into 2 parts, which is but one according to the plain and natural sense of it.—The same determination was made afterwards in this court between Sir Cæsar Wood and W. Webb. Parl. Cases 87. and affirmed in the House of Lords. Ibid.

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12. A *personal legacy* in case of *limitation over*, given on a condition not to marry without consent, shall be lost if the condition be broken; per Ld Ch B. Comyns, says it is admitted. Comyns's Rep. 755. Pasch. 13 Geo. 2.

(T. 3) Breach relieved. In what Cases of Conditions precedent or subsequent.

1. *TRUST* created, by which the wife was to have an *estate for life*, on condition that she settle her own lands within 18 months after the husband's decease, on her and her husband's children, else to be void. She signified to one of the trustees within the time, her willingness to do her part, but doubted the title to the estate for life, and in a bill by her brought in this court, declared her willingness to make such settlement, but not *unless her estate for life was confirmed*, which was decreed in the manner proposed, and the

the truſtees to be indemnified. Fin. R. 67. Hill. 25 Car. 2. Wallop v. Shaftſbury and Vernon.

2. A. on marriage of B. his daughter with C. entred into *articles* with C. to pay down 1500 *l.* and 2500 *l. more within* 6 *months after C. ſhould ſettle on B.* 800 *l.* per ann. Afterwards by another *indenture* between A. B. and C. in conſideration of the ſaid marriage to be had, and of 4000 *l.* mentioned to be paid, or ſecur'd to be paid to C. C. ſettled lands of 446*l.* per ann. and A. paid C. 1500*l.* and at the ſame time *A. gave the ſecurity to pay the* 2500 *l.* and at the ſame time C. by *other articles, covenanted within* 3 *years to purchaſe and ſettle* 354 *l.* per ann. to make up the 800 *l.* per ann. and in the ſame articles *A. covenanted to pay* C. or his aſſigns 2500 *l.* within 6 months next after ſuch purchaſe and ſettlement made, and *intereſt* for the ſame half yearly in the mean time, and *if C. died before ſuch purchaſe*, &c. then A. within 6 months after C's death, to *pay to B. her executors, &c. the* 2500 *l.* and for default of payment of intereſt, &c. to ſuch perſons as the ſame ſhall become due to, the truſtees were to enter and ſell the lands charg'd. *B. died within a month*, and *no purchaſe made*; per Cur. here is no pretence that the articles were contrary to the *intention of the parties*, and ſo this covenant is in nature of a condition * precedent, and can't be diſcharged in equity; and here is *a deed of truſt*, a *jointure-deed*, and *articles*, all *of the ſame date*, and ſhall be intended to be executed at the ſame time, and are all as one entire agreement, therefore the recital in the jointure-deed, that it was *in conſideration of marriage, and of* 4000 *l. paid or ſecured, as the portion* can't be underſtood as any poſitive agreement, but muſt be expounded by the articles to which it does in a manner refer in ſome caſes, and upon ſpecial circumſtances a court of equity has *expounded deeds otherwiſe than the letter thereof* ſeems to import, yet this ought never to be done ſo as to make a deed, but only to avoid ſome extremity. Fin. R. 98. Hill. 25 Car. 2. Cheek v. Ld. Liſle and Harvey.

Freem. Rep. 302. pl 367. S. C. but Curia adviſare vult —Ibid. 303. pl. 372. S. C. held accordingly by the lord keeper and Rainſford J. and ſo the bill was diſmiſſed —S. C. cited accordingly. Vern. 69. —2 Keb. 794. pl. 20. Hill. 23 Car. 2. B. R. the S. C. but S. P. does not appear. —S. C. & S. P. cited by lord chancellor 2 Freem. Rep. 36.

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3. Bill to have a *legacy* of 1000 l. which was money ſecured by a bond to be paid to the teſtator within 7 years after his marriage, and after a jointure of 600 l. ſhould be ſettled on his wife. The defendant pleads, *that the money was to be paid upon condition, and that the party died before the condition was performed.* But the plea was over-ruled. Mich. 26 Car. 2. Fin. R. 178. Glaſcock v. Brownwell.

4. Deviſe to A. in tail male, and *for default of ſuch iſſue, to B. and his heirs, on condition to pay* to C. D. and E. 500 l. to be divided equally, and *if B. ſhall refuſe to pay, then the lands to go to C. D. and E.* &c. A. died without iſſue; defendants inſiſted that this was a condition precedent, but the plaintiff was reliev'd on payment of the 500l. and intereſt ſince A.'s death. Fin. R. 403. Hill. 31 Car. 2. Pitcairne v. Brace, Wheeler, & al'.

5. F. on his marriage of M. daughter to Sir G. S. by marriage articles was to ſettle 2000 l. a year, viz. 1200 l. a year, of which he was then ſeiſed, and to purchaſe and ſettle 800 l. per ann. more; but 'twas expreſly agreed in the articles that *before Sir G. S. ſhould make the ſettlement agreed to be made by him*, which was 1000 *l. per ann. now*, and 3000 *l. per ann. at his death*, the plaintiff the *huſband*

2 Freem. Rep. 35. 38. S. C. ſays it was proved, that Sir G. S. in his Pretence ſaid, that

tho' F. had not as yet purchaſed the 800l. a year, it ſhould be no prejudice to him, but he ſhould take his own time for doing it; and a great many expreſſions of this kind from Sir G. S. were proved, and were inſiſted upon by plaintiff's counſel to be in nature of diſpenſations with the performance of that part of the agreement; but lord chancellor, aſſiſted by North Ch. J. and Montague Ch. B. delivered their opinions againſt the plaintiff;

ſhould purchaſe and ſettle 800l. *per ann.* part of the intended 2000l. *on the ſaid M. for life, &c.* The marriage was had; Sir G. S. died before any ſettlement of the 800l. per ann. but the 1200l. per ann. was ſettled, as agreed, ſoon after. The *wife died without iſſue*; F. brought his bill for the 3000l. per ann. Lord Chancellor ſaid, it appeared that there was no deſign, ſurprize, or *unwary wording* the articles, and that the plaintiff was to do the precedent act; that this article was *penn'd in a different manner from the other articles*, becauſe the other things therein mentioned had a *time prefixed* for doing them; but there was *no determinate* or fix'd *time for ſettling this* 3000 *l. per ann.* for that was to be *after the purchaſe and ſettlement* of 800l. per ann. and 'twas *uncertain* when that would be, and it does not appear that the parties came to a *new agreement*, or *diſpenſed* with the performance of the articles on the part of the plaintiff, but 'twas a condition precedent which can't be diſpenſed with in equity. If the articles had been ſo penn'd that each party had depended on the *mutual covenants* of each other, there might be ſome colour to relieve the plaintiff, becauſe in ſuch caſe the father might have recover'd damages at law, without averring the performance on his part, but otherwiſe where a covenant is penn'd by way of condition precedent ſo as no action lies at common law, without averring performance. 'Tis true, if the plaintiff had ſuch a *legal advantage* by the penning this covenant, perhaps this court would not have reſtrain'd him. *Had the wife been living, or left iſſue*, there might have been ſome ground for relief, becauſe the *equity of the contract had been ſtill ſubſiſting*, but as it is, the whole reaſon of the contract is diſſolved, and the plaintiff ſuffers not any loſs, but only the diſappointment of his reaſonable hopes and expectancy. The bill was diſmiſſed.* Fin. R. 445. Paſch. 32 Car. 2. Lord Feverſham v. Watſon and Sands.

becauſe what was to be done was in nature of a condition precedent, and ought to have been wholly done before defendant was obliged to do what was to be done on his part.——Skin. 287. S. C. cited per Hutchins commiſſioner, as follows, viz. That upon the marriage of a daughter of Sir Geo. Sands, the late E. of Feverſham was to have by agreement 3000l. per ann. when the preſent lord Feverſham ſettled 2000l. per ann. for a jointure; the eſtate in poſſeſſion of the lord Feverſham was nothing but Holdenby, which is about 800l. per ann. but he had penſions in Ireland to commence in futuro, which being ſold would amount to what would purchaſe 2000l. per ann. The marriage took effect, and afterwards the *L.d. Feverſham was upon treaty to ſell his penſions, in order to the purchaſing and ſettling* the 2000l. per ann. the then lord Feverſham hearing of it told him, that theſe penſions, not being in poſſeſſion, they would not ſell for ſo much as when they came into poſſeſſion, and ſo *adviſed him not to part with them yet*; and he accordingly forebore, and then his wife dies; and the then lord Feverſham dies; and the preſent lord Feverſham prefers his bill againſt Mr. Watſon who married the other ſiſter, and was the daughter and heir of Sir Geo. Sands; And it was decreed in B. R. and afterwards affirmed in the Houſe of Lords, that the lord Feverſham ſhould have an execution of the firſt agreement, and that this *was a diſpenſation* in Sir Geo. Sands of the agreement for the preſent, which ſhould not prejudice the lord Feverſham.

*[92]

Conditions ſubſequent, that are to defeat an eſtate are not favoured in law.

6. Conditions *ſubſequent need not be literally performed, where they are to deveſt an eſtate*, but equity can only *relieve* againſt conditions ſubſequent, where there can be a *compenſation in damages*. Per Fin. C. Vern. R. 83. Mich. 1682. Popham v. Bampfield.

And if the condition *becomes impoſſible by the act of God*, the eſtate ſhall not be defeated or forfeited, and a court of equity may relieve, to prevent the deveſting of an eſtate, but not to give an eſtate that never veſted. Per Holt Ch. J. 2 Vern. 339. Hill. 1697. in caſe of Cary v. Bertie.—— S. P. by Holt Ch. J. 12 Mod. 183. in caſe of Berty v. Falkland. S. C. in Canc.

7. A, de-

7. A. deviſed lands to B. and C. in truſt for J. S. *on condition that the father of J. S. ſhould ſettle on J. S. 2 thirds of the eſtate ſettled by the grandfather on the father*; the eſtate ſettled by the grandfather was 6000 l. per ann. The father deviſed all his eſtate to J. S. but ſubject to debts and legacies, but in effect made no ſettlement otherwiſe (for tho' he made one, yet 'twas with power of revocation, and he actually did revoke it.) North K. decreed that if on reference to a maſter, it ſhould appear that after debts &c. paid 2 thirds remained, that 'twas a good performance, and on rehearing ſaid, the difference was whether this caſe lay in *compenſation* or not, for where a recompence can be made, this court will relieve againſt ſuch a condition, and declared if a compenſation was made *by the will*, he would relieve againſt the breach of the condition; but if a ſufficient compenſation was not made, he would then conſider farther of it. Vern. 79. pl. 73. Mich. 1682. & 167. pl. 159. Paſch. 1683. Popham v. Bampfield.

12 Mod. 184. S. C. cited per Holt Ch. J. as the caſe of Popham v. Rogers, and reports it thus, viz. a *deviſe to Sir F. Popham, on condition he ſhould let 2 thirds thereof deſcend to his heir.* He did not do ſo, but *permitted other lands to the value* of 2 thirds to deſcend, and this was held in equity to be a ſufficient performance of the will. Becauſe *the teſtator's deſign was ſatisfied thereby*, it being to make Sir F. P. a good huſband to provide for his poſterity.

8. Deviſe, that *if his daughters ſhould releaſe* to his heir their right to certain lands, *he gave them* 2000 *l. a-piece on condition they ſhould releaſe* &c. The land to be releaſed was not worth 500 l. One of the daughters died before any releaſe given; ſerjeant Maynard urg'd, that there was a difference between a *condition in the giving* a portion, and a *portion given upon* condition; for that in the former caſe the portion never ariſes unleſs the condition is performed; the ſurviving daughters brought a bill, which was diſmiſſed by lord C. Nottingham; but on a review and a demurrer North K. inclined to over-rule the demurrer, and ſaid that in all caſes where the matter lies in *compenſation*, be the condition precedent or ſubſequent, there ought to be relief; and by agreement the ſigning and inrolling the decree was ſet aſide, and the cauſe to be heard *de integro*. Vern. 222. pl. 221. Hill. 1683. Hayward v. Angell. [93]

9. One having 3 daughters, *deviſes land to his eldeſt, upon condition that ſhe, within 6 months after his death, pay certain ſums to her 2 other ſiſters, and if ſhe failed, then he deviſed the land to his ſecond daughter on the like condition* &c. The court may enlarge the time for payment, tho' the premiſſes are deviſed; and *in all caſes that lie in compenſation, the court may diſpenſe with the time*, tho' *even in caſe of a condition precedent.* 2 Vern. 222. pl. 202. Paſch. 1691. Woodman v. Blake.

10. If an eſtate is to veſt on the intermarriage of A. and B. and the condition becomes *impoſſible by the act of God*, as in caſe A. had died within 3 years limited for the marriage, or ſoon after the death of the teſtator, Holt Ch. J. thought the eſtate would never ariſe, and that there would be no relief in that caſe. 2 Vern. 340. Hill. 1697. in caſe of Cary v. Bertie.

11. Where a condition is precedent to the veſting of an eſtate, chancery cannot *relieve* in caſe of *non-performance*; otherwiſe in caſe 2 Vern. 339. S. C. & S. P. 12 Mod.

183. S. C. & S. P. by Holt Ch. J. —2 Vern. 83. Popham v. Bamfield, S. P. as to the veſting per Finch C. who ſays it was ſo ruled in lord Feverſham's caſe here, tho' the lords afterwards reverſed that decree.

caſe of a *forfeiture* for which a valuation can be made and compenſation given. 1 Salk. 231. pl. 10. Hill. 9 W. 3. in Canc. Bertie v. Falkland.

12. A ſeiſed in fee having three daughters, *deviſed to truſtees to convey to the eldeſt, if ſhe ſhall pay* 6000 *l. to her 2 ſiſters in* 6 *months*, and if ſhe ſhall not, then gives the *like pre-emption for the ſame time to the 2d*, and if ſhe ſhall not to the 3d; the money muſt be paid punctually at the time, and equity will not enlarge it. MS. Tab. February 7th 1705, Maſton v. Willoughby.

13. I give and bequeath to E. V. 100 l. *to be paid* him *within* 6 *months after he ſhall have ſerved his apprenticeſhip; he ran away from his apprenticeſhip and died*; the queſtion was, whether the legacy was to be paid to his repreſentative? decreed, that the *ſerving apprenticeſhip is* not the condition annexed to the legacy, but *only an appointment when it ſhall be paid*, and the rather, for if E. V. had died before expiration of his apprenticeſhip, his repreſentative would have been intitled to the legacy. MS. Tab. July 26. 1712. Sidney v. Vaughan.

14. In a marriage ſettlement, a power was lodged in truſtees to *raiſe* 3000 *l. for a daughter, to be paid her at the age of* 21, *or day of marriage, which ſhould firſt happen, when C. and his wife ſhould die without iſſue male*, and in the mean time an 100 l. per ann. to be paid her for her maintenance; reſolved, per lord Ch. Cowper, upon the authority of the duke of Southampton's caſe, that the words, when C. and his wife ſhould die without iſſue male, amounted to a condition precedent; and that the time of raiſing the portion did not commence when one of them ſhould be dead without iſſue male, and the other be tenant in tail after poſſibility of iſſue extinct, but *when both of them ſhould be dead without iſſue male*, 10. Mod. 314. Paſch. 1 Geo. 1. Champney v. Champney.

15. Equity will not relieve againſt the breach of a condition precedent *where the damages* accrued *are contingent*, and cannot be eſtimated. MS. Tab. 1723. Sweet v. Anderſon.

[94] (U) What ſhall be ſaid a Condition *againſt Law*, [*And Pleadings.*]

See Tit. Simony (F)

[1. IF the condition of an obligation in which A. is bound to B. is, that whereas A. in a ſhort time is to be preſented, inſtituted, and inducted, to the church of D. if A. after his admiſſion, inſtitution, and induction to it at all times upon requeſt of B. his executors or adminiſtrators, *reſigns the ſaid rectory and church to the ordinary* or guardian of the ſpiritualities for the time being, *by which B. his heirs or aſſigns*, patrons of the ſaid church, *may preſent de novo to the ſaid church*, diſcharged of all the charges and incumbrances made or ſuffered by A. this is a good condition of itſelf *without averment that it was for a ſimoniacal purpoſe*. Mich. 14 Car.

between

between *Carey and Yeo* adjudged upon a demurrer. Intratur Hill. 13 Car. Rot. 445. And another action between the ſame parties, adjudged the ſame term, upon the like condition. Intratur Hill. 13 Car. Rot. 438. 432.]

[2. *So* if the condition of ſuch obligation be, *that he, after inſtitution and induction into the ſaid church, ſhall at all times after ordinarily be reſident*, and ſerving the cure of the ſaid benefice, *without abſence by* 80 *days* in any one year during the time he ſhall be parſon of the ſaid church; this is a good condition without any averment taken to be for any *ſimoniacal* purpoſe. Mich. 14 Car. B. R. between *Carey and Yeo*, adjudged upon demurrer. Intratur Hill. 13 Car. Rot. 444.] See Tit. Simony (F) pl. 2. Babington v. Wood and the notes there.

[3. If the ſheriff of a county makes B. his *under-ſheriff*, and takes a *covenant* from his under-ſheriff, *that he will not ſerve executions without his ſpecial warrant*, this is a void covenant, becauſe it is againſt law and juſtice, in as much as when he is made under-ſheriff, he is liable by the law to execute all proceſs, as well as the ſheriff is. Hobart's Reports 18. Tr. 12 Jac. B. R. between *Norton and Syms*, per curiam.] Mo. 856. pl. 1175. S. C. accordingly. But ſee Tit. under-ſheriff (A) pl. 5, 6. and the notes there.

4. If W. be bound in a *bond, that if he recovers againſt P. certain lands at the coſts of J. N. that then he ſhall infeoff the ſaid J. N.* the bond is void, and the plaintiff ſhall not recover; per Belk. Contrary it ſeems of a condition *impoſſible*. Br. Obligation, pl. 11. cites 42 E. 3. 6.

5. A man was *bound* to another *that he ſhould not uſe his art in D. ſuch a vill, by a certain time*. Hull ſaid, if the plaintiff had been preſent he ſhould go to priſon; the cauſe ſeems to be, becauſe the bond is againſt law. Br. Obligation, pl. 85. cites 2 H. 5. 5. and Fitzh. impriſonment 14.

6. Bond *to ſave harmleſs againſt all men*, or againſt all the world, is void. Arg. Godb. 212. cites 8 E. 4. 13. 2 H. 4. 9. 7 H. 7.

7. The under-marſhal took a *bond* of one in execution, and of a ſtranger, *to indemnify from eſcapes, and* then he *let the priſoner at large*. The court agreed, that the condition was againſt law, and the obligation void by the ſtat. 23 H. 6. cap. 10, though the marſhal is not named therein. Cro. E. 66. pl. 12. Mich. 29 & 30 Eliz. B. R. Bracebridge v. Vaughan.

8. A *bond was conditioned*, that *if the obligor ſhall from henceforth, during the natural lives of him and the ſaid A. account of, uſe, and maintain the ſaid Alice as his lawful wife*, to all conſtructions and purpoſes, &c. then this obligation to be void, or elſe to ſtand in full force. The defendant *pleaded*, that *before the ſaid A. was eſpouſed to him, ſhe was married to one Hawle, who is ſtill living, and therefore the defendant could not uſe and maintain her as his lawful wife*; and upon demurrer the whole court held the juſtification good, becauſe the condition was againſt the law of God, and ſo the obligation void; and that he is not eſtopp'd by calling her his wife in the obligation to plead this ſpecial matter. Mo. 477. pl. 683. Mich. 39 & 40 Eliz. Prat v. Phanner. [95]

9. Condition was, that the obligor *ſhould be always ready to give evidence, and teſtify the truth in any of the queen's courts, in all things*

things which ſhould be demanded of him on the part of the obligee, upon reaſonable requeſt, and his charges borne; and that he *ſhould not hurt or endanger, or moleſt the obligee in his lands or goods by reaſon of any thing whatſoever.* Upon a demurrer the court held the condition good, and not againſt law; for, as to the firſt part, if he had not been obliged thereto, he is compellable by the law; and the laſt part ſhall be intended, that he ſhall not *hurt*, &c. *tortiouſly*, but is not to reſtrain him from purſuing the obligee for felony, or upon any other juſt cauſe. Wherefore it was adjudged for the plaintiff without argument. Cro. E. 705. Mich. 41 & 42 Eliz. B. R. Dobſon v. Crew.

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But *Warden of the Fleet* or of the palace of *Weſtminſter* may take bond for diet, &c. Het. 146. Harris v. Lea.

10. Bond *to ſheriff to be a true priſoner*, or to pay for his *eating and drinking*, the condition is wholly void. 10 Rep. 100. b. Mich. 10 Jac. in Beawſage's caſe.

11. If a *ſheriff* takes a bond for a point *againſt the* 23 *H.* 6. *and alſo for a due debt*, the whole bond is void. Hob. 14. pl. 25. Trin. 12 Jac. in caſe of Norton v. Symmes.

12. Bond *to ſheriff for fees before he had done his office* is void for that very reaſon. Adjudged. Lat. 20. Paſch. 2 Car. Empſon's caſe.

Jo. 341 pl. 1. Todderidge v. Mackalley. S. C. adjudged accordingly, and ſo a judgment given in the court of the Tower of London was reverſed.

13. Condition to *pay money, if obligee will procure him to be rector of a church*, is unlawful. Cro. C. 361. Paſch. 11 Car. B. R. Mackallar v. Todderick.

The defendant ſeeks to put a bond in ſuit againſt the plaintiff, having married her, that promiſed not to marry without the conſent of friends; ordered not to proceed. Toth. 88. cites 32 Eliz. Pearey v. Bardolf.

14. A gift or deviſe on condition *not to marry*; yet the donee ſhall have the full benefit of the gift, &c. as if no ſuch condition was annexed thereto. But had it been *not to marry any of ſuch a town*, it would be good. Arg. 2. Show. 352. Paſch. 36 Car. 2. B. R.

Comb. 122. S. C. and the court was clearly of opinion that it tended to a monopoly, and gave judgment for the defendant.

15. A bond was conditioned *not to buy ſheep's feet of any but A. or B. and not* to buy *above ſuch a quantity*. This is plainly reſtrictive of trade and void. Show. 2. Paſch. 1 W. & M. Thompſon v. Harvey.

Comb. 122. S. C. & S. P. by Holt Ch. J.——S. P. per Powel J. 11 Mod. 93. in caſe of Hacket v. Tilly.

16. There is a difference between bonds *void by ſtatute*, and thoſe which are void *by common law*, becauſe of the unlawfulneſs of the condition; as a bond *not to proſecute a felon*, and in the latter caſe an *averment* that the bond was given upon an unlawful condition may be good, if it be *conſiſtent with the condition.* Show. 2. Paſch. 1 W. & M. Thompſon v. Harvey.

17. *Bond to inforce marriage* order'd to be deliver'd up, for that marriage ought to be free. 2 Vern. 102. pl. 97. Trin. 1689. Key v. Bradſhaw.

18. In

18. In debt on bond by adminiſtratrix of a ſheriff, it did *not appear either in the writ or declaration that he was ſheriff*; for the words *nuper vicecomes, &c. were omitted*; the defendant *pleaded the ſtatute that the bond was taken colore officii*, &c. The plaintiff in her *replication ſet forth a latitat* brought againſt W. R. *and the return, and the arreſt by her inteſtate adtunc vic. &c. and the bond given for appearance*, &c. Upon demurrer it was reſolved that the writ and declaration were ill, becauſe the plaintiff's inteſtate was not therein named nuper vicecom. &c. 1 Lutw. 619. Mich. 13 W. 3. C. B. Prince v. Compton.

19. A bond conditioned *to commit maintenance* is void. Arg. 11. Mod. 93. Mich. 5 Ann. B. R.

20. A bond *to ſave B. harmleſs from an unlawful act already done* is not void, but is an undertaking to bring him off; per Holt Ch. J. 11 Mod. 93. Mich. 5 Annæ B. R. in caſe of Haſket v. Tilly.

It is a good condition *to ſave* me *harmleſs from all the ill things I have done*, for that is no encouragement for me to do any more ill actions; *but* you are *not* to ſave me harmleſs *from all the ill actions which I ſhall do*, for that is an encouragement to me to do ill things, which is againſt the law; per Holt Ch. J. Holt's Rep. 203. in caſe of Hacket v. Tilly.

21. Bonds *reſtraining* a man as to the *exerciſe of his trade* have been held void: but *a promiſe* upon conſideration has been held good. See Tit. Actions (T) pl. 6. & Tit. Trade (F).

But where the bond or covenant, or promiſe, is *entered into upon a fair*, juſt, and reaſonable conſideration, and with no ill intention, it is good, and the difference is between thoſe ſo enter'd into and ſuch as are upon *no conſideration, or a vicious one*, whether it be by bond, covenant, or promiſe, the former will be good, but the latter void; and tho' ſuch bonds, containing no reaſon or conſideration, is void prima facie, yet where the condition *aſſigns a juſt and fair reaſon*, the bond is good until that reaſon can be falſified; and therefore a bond reſtraining trade * *all over England* is void, becauſe ſome place may be found not to the prejudice of the obligee. 10 Mod. 130. adjudged, Michell v. Reynolds.——*As* an *apprentice taken without money* may be bound to pay a reaſonable ſum of money *in caſe ſhe inſtruct others, or ſet up within half a mile of her miſtreſs.* Wood's Inſt. 51. cites anno 1727 in parliament, Cheeſman v. Nainby.——MS. Tab. S. C. the bond was not to exerciſe the trade within half a mile of the plaintiff, and held good, the conſideration being recited on the bond.

* But *within ſuch a diſtance of his maſter* is a good agreement. Ibid. 138.

(X) *What* condition ſhall be ſaid *againſt Law*; and what ſhall be void. And e contra.

See (U) S.P.

[1. CONdition of an obligation *to releaſe and ſet over an office for the war in Calais to whomſoever he pleaſes*; the obligation is void; but there the principle caſe is to whom it ſhall pleaſe the lieutenant; and it ſeems this is good; but Br. intends the obligee. 15 E. 4. 15.]

Br. Pleadings, pl. 31. cites 15 E. 4. 14. S. C. & S. P. admitted.—— Br. Lieu. pl. 32. cites S. C. & S. P. admitted.

[2. Condition *to renounce an adminiſtration* is good. 15 E. 4. 30.]

Br. Conditions, pl. 65. cites S. C.

[3. Condition *to do a thing which will be maintenance is void*, as to ſave J. harmleſs from ſuch an appeal of robbery that B. hath againſt him; this is againſt law. 18 E. 4. 28.]

Cart. 229. 230. Mich. 23 Car. 2. S. P. admitted per Cur. in caſe of Pearſon v. Humes.

[4 The

* Br. Conditions, pl. 22. cites S. C. † Br. Condition, pl. 24. cites S. C. & S. P. admitted good.—— Fitzh. Barre, pl. 90. cites S. C. accordingly.

[4. The condition of an obligation was, that *if the obligee in an action in the name of C. recovers againſt R. at the coſts of the obligee, C. ſhould infeoff him of the land; and if* he does *not* infeoff him, then the *obligor ſhall be bound* by the obligation *in* 20 *l.* This is a condition againſt the law; for it is *maintenance* * 42 E. 3. 6. b. Quære but after † 23. the condition is admitted good; for the defendant had other matter to help him.]

* Fol. 418. See (N) pl. 2. S. C.

[5. *A tenth granted* by the clergy to the king, *proviſo that no parſon* (*) *that is indicted* in the court of the king *ſhall pay any fine*; and if he doth that he ſhall be diſcharged of the tenth; and a good proviſo. 21 E. 4. 46.]

[6. Leaſe for life upon condition that *if the leſſee marries without licence*, he ſhall re-enter, is a good condition. 43 E. 3. 6.]

7. When a condition is *void by the maxims of the law*, 'tis as fully void to every intent as if it were made void by ſtatute. Doct. and Stud. L. 1. Cap. 24.

8. Bond for appearance on *attachment out of Chancery* is void, becauſe the defendant was not bailable on the attachment. 3 Le. 208. pl. 269. Mich. 33 Eliz. C. B. Bland v. Riccards.

Pl. C. 133. a. Arg. in caſe of Browning v. Beeſton.

9. Bond by a baron with *condition to infeoff his wife*. The *condition is void* and againſt law, becauſe it is contrary to a maxim in law, and yet the *bond is good*. Co. Litt. 206. b.

Mar. 192. Arg. S. P. of a covenant cites 7 E. 3. 65. [b. pl. 67. per Parn.]

10. Obligation by huſbandman *not to ſow his land*, is againſt the common law. Per Curiam. 11 Rep. 53. b. Mich. 12 Jac.

11. The baron enter'd into a bond conditioned *not to ſell his wife's apparel*, and in debt brought thereupon it was objected that this was againſt law, becauſe it is contrary to the liberty of the baron; but Coke Ch. J. held it clearly good. Roll. Rep. 334. pl. 43. Hill. 13 Jac. B. R. Smith v. Watſon.

Co. Litt. 206. b. S. P.

12. If a *baron binds himſelf to a ſtranger to pay* 20 *l. a year to his wife*, this is good without doubt; per Coke Ch. J. Roll. Rep. 334. pl. 43. Hill. 13 Jac. B. R. in caſe of Smith v. Watſon.

13. If in caſe upon 23 H. 6. 13. or the ſtatute of uſury, the condition of the bond ſhould *recite* ſome matter that makes the bond good, yet if in truth the *contract* were *uſurious*, or the condition not within the ſtatute, and that *be pleaded*, it will *avoid* the bond, and the eſtoppel too. Hard. 465. in pl. 3. Trin. 19 Car. 2. in Scacc.

Lev. 209. Norfolk v. Elliot, S. C. and though the ſerjeant at arms of the Houſe of Commons is not within the Stat. 23

14. The *Houſe of Commons* had *voted one Wogan guilty of high treaſon*, and the plaintiff being a *ſerjeant at arms attending upon the houſe, was order'd to take him into cuſtody*, who being taken into cuſtody by virtue of that warrant, the defendant entred into this *bond* to the plaintiff, *conditioned for the ſaid Wogan's appearance*, who did not appear; and hereupon debt being brought, the chief queſtion upon a demurrer was, whether this was a void bond or not? And per Curiam it is void by the common law, for it was entred into for caſe

eaſe and favour of the priſoner; and it is no more than a bond to a ſheriff to anſwer for an eſcape. And here Wogan was taken into cuſtody for treaſon, for which he could not be bailed; otherwiſe if it were for an offence bailable. Hard. 464, 465. pl. 3. Trin. 19 Car. 2. Norfolk's caſe.

H. 6. yet if he takes a bond for *enlargement of one in cuſtody for treaſon*, and this appears upon the record, it is void by the common law. † Lev. 109 Paſch. 19 Car. * 2 in Scace. Norfolk v. Elliot.——Raym. 62. Norfolk v. Aylmer, S. C. adjornatur.——Keb. 391. pl. 103. S. C. adjornatur.

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* [98]

15. A bond condition'd *to perform a bye-law* has been ruled naught, per Hale Ch. J. obiter. Raym. 227. Mich. 25 Car. 2. B. R.

16. Bond to the *marſhal* to be a *true priſoner* is good; but not to receive or take any thing of advantage or profit to himſelf; and that if he did, the bond was void at common law. 2 Salk. 438. Mich. 9 W. 3. B. R. Anon.

17. A. having a wife who lived ſeparate from him, afterwards courted and married another woman, who knew nothing of the former wife's being alive; but it being diſcovered to the ſecond wife that the former was alive, A. in order to prevail with the ſecond wife to ſtay with him, ſome years afterwards gave a *bond* to a truſtee of the ſecond wife to leave her 1000 l. at his death, and dies, not leaving aſſets to pay his ſimple contract debts; if this bond had been given immediately on the diſcovery, and they had parted thereupon, it had been good; but being given in truſt *for the ſecond wife, after ſuch time as ſhe knew the firſt wife was living*, and *to induce her to continue with A.* this was worſe than a voluntary bond. 3 Wms's Rep. 339. pl. 88. Mich. 1734. Lady Cox's caſe.

If ſuch bond had been given to the ſecond wife as a recompence for the injury done her, and thereupon had left A. it had been a good bond. 3 Wms's Rep. 340. in S. C.

18. Bonds and contracts to *procure marriage* are void. See Tit. Marriage (I) per Totum of Brocage bonds for procuring marriages.

(Y) The Effect of a Condition againſt Law.

[1. IF a *feoffment* be of land upon condition *to kill* J. S. this condition is againſt law and void, but the feoffment *is good*, and not made void by it. Co. Litt. 206. b.]

But in caſe of an *obligation* with ſuch a condition the obligation is void as well as the condition. Br. Obligation, pl. 45. cites 2 E. 4. 2.

[2. If the condition be to do a thing againſt law, the *obligation is void.* 2 H. 4. 9. Co. Litt. 206. b.]

Br. Dette, pl. 51. cites S. C.——Br. Conditions, pl. 34. cites S. C.——Fitzh. Obligation, pl. 13. cites S. C.——Br. Obligation, pl. 20. cites S. C. the obligation and condition are both void.——Br. Condition, pl. 127. cites 4 H. 7. 3. S. P. by Brian, Ch. J.

[3. *As* if it be to *kill or rob* J. S. 2 H. 4. 9. Co. Litt. 206. b.]

Br. Conditions, pl. 34. cites S. C.——Br. Dette, pl. 51. cites S. C.——Fitzh. Obligation, pl. 13. cites S. C. and 2 E. 4. and 8 E. 4.——Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. where Markham ſays, that in ſuch caſe the condition is void, but the obligation ſingle. But Brooke ſays, Quære inde; for he ſays it ſeems that both are void.

[4. So

Br. Conditions, pl. 34. cites S. C. [4. *So* if it be *to save harmless a sheriff if he embezzles a writ* that he hath against him. 2. H. 4. 9.]

——Br. Dette, pl. 51. cites S. C.——Fitzh. Obligation, pl. 13. cites S. C.

Br. Conditions, pl. 34. cites S. C. —Br. Dette, pl. 51. cites S. C.——Fitzh. Obligation, pl. 13. cites S. C.——S. C. cited Hob. 14. [5. *So* if the condition be to save harmless a sheriff *for the delivery of cattle taken in Withernam to one of the parties*, for the sheriff ought to keep them till &c. 2 H. 4. 9. Com. * Diverman, 64. b.]

* This is misprinted, and should be Dive v. Man, alias Manningham, where it is cited by Moyle J.

Bond for deliverance of goods taken in Withernam is void. Lev. 209. Pasch. 19 Car. 2. per Cur. cites 2 H. 4. 9.

[99]

The law distinguishes between a condition against law for the doing of any act that is *malum in se*, and a condition that concerns not any thing that is malum in se, but is therefore *against law, because* it is *repugnant to the state, or* against some *maxim* or rule in law; when therefore it is said, that if the condition of the bond be against law, that the bond itself is void, the common opinion is to be understood, of condition against law for the doing of some act that is malum in se; and yet therein also the law distinguishes; as if a man be *bound* upon condition that he *shall kill J. S.* the bond is void; but if a man make a *feoffment* upon condition that he shall kill J. S. the estate is absolute, and the condition void. Co. Litt. 206. b.—S. P. by Holt Ch. J. Comb. 246. Pasch. 6 W. & M. in B. R. in case of Carpenter v. Beer. [6. If the condition be for *doing a thing* that is *malum in se*, this is void, and makes the *obligation void.* Co. Litt. 206. b.]

Hob. 14. S. C. & S. P. resolved, for a statute is a strict law; but the common law divides according to common reason, and having made that void which is against law, lets the rest stand, as is 14 H. 8. fol. * 15.——Godb. 272. pl. 303. S. C. adjornatur; but Coke Ch. J. seem'd clear of opinion that the bond was void, and said he conceived it had been adjudged before in B. R. in the same Norton's case v. Chamberlain.——Brownl. 64. S. C. and S. P.——Med. 35. pl. 85. Twisden J. said he had heard lord Hobart say, that the statute is like a tyrant in such cases, where he comes he makes all void; but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest. 7. When *some covenants* in an indenture are *void by the common law, and others good, an obligation made for performance of all the covenants stands in force for such as are good, but not for the other*; *but* if any of the covenants are void *by statute-law* the obligation shall be void; for all the other covenants, according to Colshill's case, and Twine's case, in 3 Rep. of Coke. Mo. 856, 857. pl. 1175. Mich. 11 Jac. resolved, in case of Norton v. Syms.

* This seems misprinted, for 25. 27. Br. Faits, pl. 37. cites S. C.

Cites * Co. Litt. 206.—† Palm. 172. Hob. 12. Norton v. Simms.—‡ Fitzh. Tit. Obligation, 13. Br. Tit. Obligation, [conditions] 34 D 118.—10 Mod. 134. S. C. & P. cites ‖ Co. Litt. 206. 216. Perk. 139. Cart. 220. 2 Keb. 140. 153.——¶ Pal. 172. Fitzh. 13.——*Br. Condition 34. 2 H. 4. 9. Hob. 12.——† Perk. 778. 1 Rep. 22. a. Hob. 12. 3 Cro. 705. 8. All the instances of conditions against law, in a legal sense, are reducible under one of these heads; 1st, Either * *to do malum in se, or* malum *prohibitum.* 2dly, *To* † *omit the doing* of something that is *a duty.* 3dly, *To* ‡*encourage such crimes and omissions.* And such conditions as these the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes, and therefore, as in 1st inst. 206. a ‖ feoffment shall be absolute for an unlawful condition, but a bond void; and, consequently, where a *way* may be *found out to perform the condition without* ¶ *a breach of the law* it shall be good; per Parker Ch. J. in delivering the opinion of the court. Wms's Rep. 189, 190. Hill. 1711. in case of Mitchell v. Reynolds.

‖ S. P. 10 Mod. 134. for in the one caſe, leſt the man ſhould have any temptation to do the act the law ſecures to him the poſſeſſion of the land without performing the condition, and in the other frees him from the penalty of the bond; ſo that the law has the ſame end in view either way, viz. the prevention of the fact.

9. Where *part* of the condition of a bond is *lawful and the reſt againſt law*, it is good for what is lawful, and void for the reſt; otherwiſe if the condition be entire. MS. Tab. December 4th. 1721. Yale v. the King.

For more of Conditions againſt Law, *ſee* Tit. Action (T), Officer and Offices (O. 3), Sheriff (T), Simony, Trade, Uſury, *and other proper titles.*

(Y. 2) Againſt Law &c. Void. And Pleadings. [100]

1. M. Brought debt upon a *bond* which was *indorſed* upon condition *to pay a leſs ſum*; the defendant *pleaded the* ſtatute of 13 *Eliz. that all covenants, contracts and bonds, made for the enjoying of leaſes made of ſpiritual livings, by parſons &c. were void*; and *averred* that that bond was made for enjoying of ſuch a leaſe; but becauſe the *condition expreſſed* in the bond *was for payment of money*, the juſtices held it clear for law that the bond was good, and out of the ſtatute; and ſo it was adjudged. Godb. 29. pl. 38. 27 Eliz. C. B. Macrowe's caſe.

2. Where the condition of an obligation ſhall be ſaid againſt the law, and therefore the obligation void, the ſame ought to be intended where the condition is expreſsly againſt the law in expreſs words, and *in terminis terminantibus*, and *not for matter out of the condition*; agreed per tot. Cur. Le. 73. pl. 99. Mich. 29 & 30 Eliz. Brook v. King.

3. As in debt on a bond the defendant pleaded, that the bond was indorſed with ſuch condition, viz. That *if the the ſaid defendant* King *ſhall procure one J. S. to make reaſonable recompenſe to the plaintiff for certain beaſts which he wrongfully took from the plaintiff, that then* &c. and he *ſaid in facto, that the ſaid J. S. had ſtolen the ſaid beaſts from the plaintiff, and thereof he was indicted*, &c. and ſo the condition being againſt the law, the obligation was void, upon which the plaintiff did demur in law. Le. 73. pl. 99. Mich. 29 & 30 Eliz. Brook v. King.

4. Bond conditioned not to give evidence againſt a felon is void; but the defendant *muſt plead the ſpecial matter*. Le. 203. pl. 281. Hill. 31 Eliz. C. B. Jone's caſe. S. C. cited 2 Vent. 109. in caſe of Maſon v. Watkins,

which was an action of debt upon a bond of 20l. the defendant demanded *oyer* of the condition, which was, that the obligee ſhould not himſelf bring any evidence at the aſſizes to prove the 2 cows now in queſtion, between one Owen Maſon the younger, and the ſaid Watkins, to be the cows of the ſaid Watkins, or of Robert Gillo; and that the ſaid Gillo ſhall ſet in a bill of *ignoramus*, that then the bond ſhould be void. The defendant pleaded *quod ipſe de debito prædict' virtute ſcripti obligat' prædict' onerari non debet*; becauſe that one of the ſaid cows was the cow of the ſaid Watkins, and the other of the ſaid Gillo; and that before the bond, Owen Maſon, jun. in the ſaid condition mentioned, being the plaintiff's ſon, ſtole the ſaid 2 cows and was impriſoned thereupon; and the defendant Watkins was bound by recognizance to proſecute him at the aſſizes for the ſaid felony; and there the ſaid Maſon, junior,

junior, was indicted and convicted, and the defendant did give evidence that one of the cows was his, *prout bene licuit*, and that the defendant did not give any evidence by himself, or any one else, to prove the 2 cows to be the cows of the defendant, or the cows of the said Gillo, *& hoc paratus eſt verificare, &c. unde petit judicium, &c.* To this the plaintiff demurred, and upon the firſt opening judgment was given for the defendant; for the condition is againſt law, viz. to ſhift off evidence of felony, and that makes the bond void, and the court recommended it to ſerjeant Pawlet, who was a judge in *Wales* where the plaintiff lived, to ſee to have him proſecuted for taking ſuch a bond.

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Eyre Ch. J. aſk'd why ſhould not this matter which avoids this

5. In debt on bond, defendant pleaded, that 'twas given for *compounding felony*, but this being a *matter debors* judgment was given for the plaintiff. Gibb. 73. Trin. 2 & 3 Geo. 2. C. B. Andrews v. Eaton.

bond by the *common law* be as well *pleadable* as a matter which by *ſtatute law* is declared to make a deviſe void which is allowed to be pleaded in bar, tho' nothing of it appear in the condition? Ibid 75. but judgment was given as above.——The ſtatutes of *ſimony*, *uſury*, and *ſheriff's bonds give averments* in ſuch caſes, but no ſtatute gives averment in caſe of *maintenance*. Jenk. 208. pl. 9.——So a plea, that the bond was for *maintenance* as upon buying of debts due to obligee. Jenk. 208. pl. 9. 37. H. 6. 13.

[101] See Tit. Perpetuity.

(Z) What Condition ſhall be ſaid repugnant. *Repugnant to the Eſtate.*

Fitzh. Condition, pl. 12. cites S. C. & S. P. by Wilby, and

[1. *A Gift in tail*, or in fee, upon condition that the *feme ſhall not be endowed, or* that the *baron* ſhall not be *tenant by the curteſy*, is repugnant. *Co. 10. 38. b. 22 E. 3. 19. b.]

agreed by Shard.——But if land be given by A. to baron and his heirs, rendering a roſe for his life, and afterwards his heirs to render certain rent, and that if the rent be arrear that A. may enter; if, after the baron's death the rent be arrear, the feme ſhall not have her dower; per Tot. Cur. Fitzh. Condition, pl. 12. cites S. C. but ſays that afterwards, Trin. 34 E. 3. it was awarded that ſhe recover, but that execution ceaſe till the age of the heir; and per Tot. Cur. if the heir was of full age, and the feme had been endow'd, yet if afterwards the heir dies, and his heir be within age, the rent of the feme ſhall ceaſe for the time, and cites 5 E. 3. accordingly.——6 Rep. 41. a Mich. 3 Jac. in Mildmay's caſe, S. P.——2 Brownl. 67. S. P.——Co. Litt. 224. a S. P.——D. 343. b. pl. 58. S. P.——Jenk. 243. in pl. 26. S. P. * 10 Rep. 38. b. 39. a S. P.

* Co. Litt. 223. b. ſays that ſuch condition is good; for the ſtatute

[2. *So* upon condition that he ſhall *not make a* * *leaſe within* 32 *H.* 8. or *levy a fine within* 4 *H.* 7. or that he ſhall *not ſuffer a* † *common recovery*, *or* that he ſhall not *make any concluſion to ſuffer a recovery*, is repugnant. Co. 10. 38 b.]

g ves him power to make ſuch leaſes which may be reſtrain'd by condition; for this power is not incident to his eſtate, but given him collaterally by the act, according to the rule of quillibet poteſt renunciare juri pro ſe introducto.——Jenk. 243. pl. in 26. ſays it is repugnant.

A deviſe to A. and the heirs male of his body, proviſo, that if he does attempt to alien, then immediately his eſtate ſhall ceaſe, and B. ſhall enter. The court held the condition void; for a man cannot be reſtrained from an attempt to alien; for non conſtat what ſhall be judged an attempt, and how can it be tried: And when the expreſs words are ſo, there ſhall not be made another ſort of condition than the will imports; and ſo a judgment was affirm d. Vent. 321, 322. Mich. 29 Car. 2. B. R. Pierce v. Win.——Pollexf. 435. S. C. argued.——3 Keb. 787. pl. 41. S. C. adjornatur.

† 10 Rep. 39, a. S. P.——6 Rep. 41. a. in Mildmay's caſe. S. P. reſolv'd.——Co. Litt. 224. a. S. P.

Co. Litt. 224. a. S. P. 6 Rep. 41. a. S. P.

[3. *So* upon condition that he *ſhall be puniſhed in waſte*, or *that tenant after poſſibility ſhall*, or that a *collateral warranty ſhall not bind*, is void. Co. 10. 39.]

The reaſon that when he makes ſuch aliena-

[4. *But* a condition that he ſhall *not alien in fee, in tail, or for life of another*, is good. Co. 10. 39. Mich. 3 Jac. B. R. *Mildmay's caſe*, reſolved. * 33 Aſſ. 18 Curia.]

tion

tion, he acts contrary to the intent of the donor, for which the ſtatute of Weſtm. 2. Cap. 1. was made, whereby eſtates tail are ordain'd. 10 Rep. 39. a. in Portington's caſe. Trin. 9 Jac. cites Litt. S. 362. But ſays that common recovery is not contrary to the ſaid act, nor to the intent of the donor within the purview thereof; but Littleton's meaning is, that tenant in tail may be reſtrained from making a diſcontinuance in fee, or in tail, or for another's life.

* Br. Conditions, pl. 116. cites 33 Aſſ. 11. S. P. — Fitzh. Condition, pl. 16. cites S. C. [There is no pl. 18.]

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[5. *So to reſtrain a fine by the common law.* Co. 10. 42.] Br. Conditions, pl. 239. cites 10 H. 7. 11. S. P. becauſe it is contrary to the eſtate.

[6. A gift in tail, upon condition that the *donee may alien for the profit of the iſſue*, is a good condition. 46 E. 3. 4. b.] Co. Litt. 224. b. S. P.

[7. A condition upon a *feoffment in fee*, that his *daughters ſhall [not] inherit*, is not good. Da. 1. 34. b.] It is againſt the nature of a fee ſimple to exclude the heir female upon failure of heir male, and therefore ſuch proviſo on ſuch feoffment is void. Dav. 34. b.

[102]

[8. It is a good condition of a ſtatute, that he alienera null terre * a vendre, nor do other thing que luy poit turner in vileny, without his counſel. 46 E. 3. 32. b.] * The words (a vendre) ſeem to mean that he ſhould not ſell any. — The caſe was, viz. in debt, the defendant pleaded a defeaſance, that if he did not alien any land, nor do any other thing which might turn him into villeny, without his counſel, then the obligation ſhould be void, and ſaid that he had performed all the covenants. The plaintiff replied that he alien'd certain lands to J. S. and alſo entred into a ſtatute merchant to W. R. and ſo the covenants broken, and pray'd his debt. The defendant rejoin'd that he had given to his heir apparent certain land without taking any thing, and demanded judgment, and that as to the ſtatute this cannot turn him into villany, and demanded judgment, &c. Mich. 46 E. 3. 32. b. 33. a. pl. 42.

[9. [So] if a man *leaſes a mill* for years, upon condition *that he ſhall not leaſe it to any except* to one of the villeins of the leſſor, or to a miller. 38 E. 3. 33. b. admitted.]

[10. If A. being ſeiſed in fee of land, *leaſes* it *to B. for* 99 *years, if he ſo long lives*, the remainder *to C. for* 99 *years, if* he ſo long lives; and after *A. demiſes it to C. and D. for* 99 *years, if* 3 *others* or any of them *ſo long live, to begin after* the determination of *the firſt eſtate*, upon *condition that if C. and D. both* (*) *die* either *before the beginning* of the term; *or* before the *end of the term*, that then *it ſhall be lawful to the leſſor to re-enter*; this is a good condition, for this is not repugnant to the eſtate, nor to the limitation; but this is a *collateral contingent thing*, that ſhall give cauſe of re-entry. Hill. 15 Car. B. R. between *Potter* and *Oldreeve*, per Cur. adjudged upon demurrer. Intratur Mich. 15 Car. Rot. 375.] * Fol. 419.

11. If a man aliens in fee upon condition, that *if the feoffee or his heirs make any aſſignee*, that the feoffor or his heirs may enter, this is a void condition; for it is repugnant to the eſtate; Per Grene. Br. Conditions, pl. 116. cites 33 Aſſ. 11.

12. A. makes a *feoffment* of land to B. *with warranty, proviſo that the warranty ſhall be void*, this is a void proviſo; *but if* the proviſo *leaves any benefit* of this warranty *to the feoffee, as* if it be that he *ſhall not vouch the feoffor*, it is a good proviſo, becauſe he leaves him a right to rebut him. Jenk. 96. pl. 86. As in a deed, a. *buendum*, which is *repugnant to the premiſſes* is void for both being in one inſtrument, where the latter clauſe is repugnant to the former, the latter is void. Jenk. 96. pl. 86.

13. A *leſſee* may be reſtrain'd by condition not to alien, but not if the leaſe be *to him and his aſſigns*; per Hobart Ch. J. Arg. Hob. 170. cites 21 H. 6. 33.

14. If *land be given in tail*, the *remainder over to the right heirs of the tenant in tail upon condition that if he or his alien in fee, the donor or his heirs may enter.* This was held a good condition by all the juſtices, notwithſtanding the fee ſimple in the reverſion; and a *diverſity was taken between a fee ſimple in poſſeſſion and fee ſimple depending upon another eſtate.* Mich. 11 H. 7. 6. b. pl. 25. ſays, that it was ſo held by all the juſtices in C. B. Trin. 8 H. 7.

Whatſoever is prohibited by the intent of any act of Parliament may be prohibited by condition. Co. Litt. 224. a.

15. A man may make a condition *of any thing* which is *prohibited by the law.* Br. Conditions, pl. 239. cites 10 H. 7. 11. per Opinionem Curiæ.

16. *As* to make a *feoffment*, proviſo *that the feoffee ſhall not do felony.* Br. Conditions, pl. 339. cites 19 H. 7. 11.

* This is good to reſtrain alienations during his minority, but not after his full age. Co. Litt. 224. a.

17. * *Or ſhall not alien within age*, nor to † *Mortmain.* Ibid. ‡

† Co. Litt. 223. b. S. P. becauſe ſuch alienation is prohibited by law; and regularly whatſoever is prohibited by law, may be prohibited by condition, be it malum prohibitum, or malum in ſe.

‡ [103]

18. *And* a man may *infeoff another and his feme* upon condition *that they ſhall not infeoff any by deed*; for this is diſcontinuance. Br. conditions, pl. 339. cites 10 H. 7, 11.

19. *And* where land is *given in tail*, the *remainder in fee* upon condition, that *if the donee or his heirs alien in fee that the donor or his heirs may enter.* Ibid. Brooke ſays, it ſeems that the remainder in fee was to the ſame tenant in tail. Ibid.

*Br. Eſtates, pl. 31. cites S. C. that it was adjudg'd franktenement in the grantee.—Quære if the other caſes are not miſcited.

20. If land be given *to A. and his heirs ſo long as J. S. has heirs of his body*, the *donee* has fee and *may alien it, notwithſtanding there be a condition that he ſhall not* alien. 2 And. 138. Arg. cites 13 H. 7. 11 H. 7. 21 H. 6. 37. and ſays the law ſeems to be plain in it; and cites * 11 Aſſ. 8. where the S. C. is put and held as before, and that there if the land be given to one and his heirs ſo long as J. S. and his heirs ſhall enjoy the manor of D. thoſe words (ſo long) are entirely void and idle, and do not abridge the eſtate.

Br. Prerogative, pl. 38. cites 21 H. 7. 7. S. P. & S. C.——

21. If the *king grants* land *in fee upon condition that the grantee ſhall not alien* to any, it is a good condition; for it ſhall be taken moſt beneficial for the king, and moſt ſtrong againſt the grantee. Br. Conditions, pl. 82. cites 21 H. 7. 8.

Br. Prerogative, pl. 102. cites S. C. ——— 5 Rep. 56. a. S. C. cited in Knight's caſe.——And ſo it is in the King's caſe at this day, becauſe he may reſerve a tenure to himſelf. Co. Litt. 223. a.——A man before the ſtatute of quia emptores terrarum might have made a feoffment in fee, and added further, that if he or his heirs did alien without licence, that he ſhould pay a fine, then this had been good. Co. Litt. 223. a.——And ſo it is ſaid, that then the lord might have reſtrained the alienation of his tenant by condition, becauſe the lord had a poſſibility of reverter. Co. Litt. 223. a.

Br. Prerogative, pl. 102. cites S. C. ——Ibid.

22. *But* if a *common perſon* makes a feoffment upon condition that the feoffee ſhall not alien, it is a void condition. Br. Conditions, pl. 82. cites 21 H. 7. 8.

pl. 38.

pl. 38. cites S. C.——S. P. But gift in tail upon condition that the tenant ſhall not alien to any is good, by reaſon of the reverſion in the donor; per Fairfax and Huſſey. Br. Conditions, pl. 135. cites 8 H. 7. 10.

23. A *leaſe for years* was made *to A. and his aſſigns, provided that he ſhould not aſſign the term.* The proviſo was void. But if the grant had not been to him and his aſſigns the proviſo had been good; Per Hobart Ch. J. Mo. 881. in caſe of Stewkley v. Butler, cites D. 9 Eliz. 264. and 21 H. 6. 33. Hob. 170. S. P. per Hobart, in S. C.

24. A condition annex'd to an eſtate tail, that the donee ſhall not marry, is void; for without marriage he cannot have an heir of his body; but it is otherwiſe of a fee paſs'd upon ſuch condition, for the collateral heir may inherit. Jenk. 243. in pl. 26. S. P. as to the not marrying, by Dyer, accordingly quod Manwood and Wray conceſſerunt. D. 343. b. pl. 58. Trin. 17. Eliz.

25. Leaſe of lands to A. for 20 years, proviſo *not to occupy* the ſame *the two firſt years*, is void and contrary, and repugnant to the eſtate. Arg. quod fuit conceſſum, per Curiam. Le. 132. pl. 176. Trin. 27. Eliz. in Scacc. obiter.

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26. A. ſeiſed of lands, deviſed the ſame to his eldeſt ſon, and the heirs male of his body, the remainder to his ſecond ſon, and the heirs male of his body, and ſo to the third ſon, the remainder to his daughter in tail general, with remainder over, proviſo, that if any of the deviſees, or their iſſue, ſhall go about to alien, diſcontinue, and incumber the premiſſes, that then, and from the time that they ſhall ſo go about to alien, diſcontinue, &c. their eſtate ſhall ceaſe as if they were naturally dead; and from thenceforth it ſhall be lawful for him in the next remainder to enter, and hold for the life of him who ſhall ſo alien, &c. and preſently after his death the land ſhall go to his iſſue, &c. The deviſor dieth, the eldeſt ſon, and all the other but the ſecond ſon, levy a fine; the ſecond ſon claims the ſaid land by the deviſe. It was reſolved in this caſe, by all the juſtices, that the proviſo of ceaſing of the eſtates upon an attempt to alien, or upon an alienation, was repugnant, and that the remainder limited to the ſecond ſon upon ſuch attempt was void in law; and the ſame was agreed by all the juſtices in England on a conference with them; and judgment accordingly againſt the ſecond ſon who brought the action. Mo. 364. pl. 495. Hill. 33 Eliz. Germin. v. Aſcott. And. 186. pl. 222. S. C. adjornatur. ——2 And. 7. pl 6. S. C. adjudg'd accordingly. ——4 Le. 83. pl. 176. Jermine v. Arſcot, S. C. ſays, that judgment was given againſt the plaintiff; for by the will here is a good limitation, and an eſtate to ceaſe upon an act, and upon another contingent to be revived is good enough.——1 Rep. 85. a. b. S. C. cited by Anderſon Ch. J.——S. C. cited Mo. 471. pl. 678. Mich. 39 & 40 Eliz. in Tarrant's caſe, like point, but no judgment.——S. C. cited Mo. 544. in pl. 751. and Mo. 633.

27. C. ſeiſed of lands, *covenanted for natural affection to ſtand ſeiſed to the uſe of himſelf for life*, and after *to the uſe of R. and the heirs male of his body*, the remainder *to A. and the heirs male of his body*; *provided if R. or any heir male of his body, ſhall intend or go about any act to cut off the eſtate tail, then it ſhall be lawful for him that is next to enter.* C. died. R. ſuffered a common recovery. A. enter'd. Reſolved the proviſo was repugnant to the eſtate tail, and that the ceſſer of the eſtate tail, as if the party had been dead, was impoſſible, and the going about it is ſuch a ſecret thing that an 2 And. 134. pl. 82. S. C. adjudged. ——1 Rep. 83. b. S. C. adjudged per tot. Cur.——S. C. cited Mo. 633.

iſſue cannot be upon it. Mo. 601. pl. 831. Hill. 41 Eliz. Corbet v. Corbet.

6 Rep. 40. a. Mich. 3 Jac. B. R. the S. C. adjudged according to the opinion of Anderſon and Kingſmill.

28. Sir W. M. the father, in conſideration of love and affection, *covenanted to ſtand ſeiſed* of lands *to the uſe of himſelf* for life, without impeachment of waſte, the remainder *to A. his ſon, and the heirs male of his body*, the remainder *to H. and the heirs male of his body. Provided if any of the ſaid parties ſhall go about, reſolve, determine, or deviſe to do any act, or ſhall conſent to any act whereby the eſtates of them in remainder ſhall be aliened, diſcontinued, barred*, &c. *then his remainder ſhall ceaſe as if he were naturally dead*, and not otherwiſe. Sir W. died, A. entered and ſuffered a common recovery. Kingſmill and Anderſon held that the proviſo was repugnant and not iſſuable, but Walmſley and Warburton e contra. Mo. 632. pl. 868. Paſch. 43 Eliz. C. B. Mildmay v. Mildmay.

*Godb. 299. S. P. by Hobart Ch. J. Arg —— S. P. Arg. Cro. E. 107.

29. Feoffment on condition that *feoffee* * *ſhan't take the profits* of the land. The condition is repugnant, and againſt law, and the eſtate is abſolute. But a *bond* with ſuch condition is good. Co. 206. b.

pl. 1. cites 6 R. 2. Quid Juris clamat. 20. ——— A leaſe was made to A. B. and C. by tenant in tail, proviſo that *if C. ſhall demand, &c. any profits of the lands, &c. or enter into the ſame during the life of A. or B* (his father and mother) *that then the eſtate limited to C. by the ſaid indenture ſhould ceaſe, and be utterly void.* Per Cur. this condition and proviſo is utterly *void*; for 'tis contrary to the eſtate limited before. 2 Le. 132. pl. 176. Trin. 27 Eliz. in Scacc. Moore v. Savill.

An elder brother voluntarily *gave land to his 2d*

30. If *feoffee in fee* is *bound in a bond that he nor his heirs ſhall alien*, this is good; for he may alien notwithſtanding if he will *forfeit his bond* which he himſelf hath made. Co. Litt. 206. b.

brother and the heirs of his body, with *remainder to a younger brother in tail*, and *made each of them* * *to enter into a ſtatute with the other that he would not alien*, &c. but becauſe thoſe ſtatutes were in ſubſtance to make a perpetuity, which the ſtatute of England cannot allow, therefore *the ſtatutes by decree* of chancery with the advice of Ld. Ch. J. Coke *were cancelled*. Cited by the lord Chancellor. Mo. 810. in caſe of Tatton v. Molineux, as 6 Jac. Poole's caſe. ——— S. C. cited 2 Vern. 251. pl. 237. per Cur. Hill. 1691. in caſe of Jervis v. Bruton, where the caſe was, that *A. ſettled lands on B. in tail, remainder to his own right heirs*, and *takes a bond of B. not to do waſte. B. levied a fine, and afterwards committed waſte*, and the bond being put in ſuit, it was decreed to be deliver'd up to be cancelled, and ſaid it was an idle bond.

A. ſettled land on B. his ſon in tail, B. gives A. *bond not to dock* the intail; decreed the bond good. Had not B. agreed to give the bond, A. might have made him only tenant for life; and tho' the alienation is not made by B. but by his iſſue, yet the bill for relief againſt the bond was diſmiſſed with coſts. 2 Vern. 233. Trin. 1691. Freeman v. Freeman. ——— Chan. Prec. 28. pl. 31. S. C. thus, a man enters into bond that his ſon, who was tenant in tail, ſhall not alien, and dies; the ſon ſuffers a common recovery, and thereupon the bond being put in ſuit, the bill was brought for relief, but was diſmiſſed with coſts. ——— Tenant in tail after 32 *H. 8.* gives *bond* or recognizance *not to leaſe for 21 years, or 3 lives.* If he make ſuch leaſe the leaſe is good, but the bond, &c. forfeited. Jenk. 120. pl. 41.

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31. If a man be ſeiſed of a ſeigniory *rent*, *advowſon*, *common*, or any other inheritance that lies in grant, and by his deed grants the ſame to a man and his heirs, upon condition that *he ſhan't alien*, this condition is void. Co. Litt. 223. a.

As to a particular perſon it is good Arg. 3 Le. 282.

32. If a feoffment in fee be made upon condition that the *feoffee ſhall not infeoff J. S. or any of his heirs or iſſues &c.* this is good; for he does not reſtrain the feoffee of all his power, and in this caſe if the feoffee *infeoff J. N.* of intent and purpoſe, *that he ſhall infeoff J. S.* ſome hold that this is a breach of the condition; for quando

aliquod prohibetur fieri, ex directo, prohibetur & per obliquum. Co. Litt. 223. b.

33. If a feoffment be made upon condition that the *feoffee ſhall not alien in mortmain*, this is good, becauſe ſuch alienation is prohibited by law, and regularly whatſoever is prohibited by law may be prohibited by condition, be it malum prohibitum or malum in ſe. Co. Lit. 223. b.

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34. If a man make a *feoffment to a baron and feme* upon condition that they *ſhall not alien*. To ſome intent, this is good, and to ſome intent it is void; for to reſtrain an alienation *by feoffment*, or by deed, it is good, becauſe ſuch alienation is tortious and voidable; but to reſtrain their alienation *by fine* is repugnant and void, becauſe it is lawful and unavoidable. Co. Litt. 224. a.

35. It is ſaid that if a man *infeoff an infant* in fee upon condition that he ſhall not alien, this is good to reſtrain alienations during his minority, but not after his full age. Co. Litt. 224. a.

36. If a man makes a *gift in tail* to *A.* the *remainder to him and to his heirs*, upon *condition that he ſhall not alien*, as to the eſtate tail, the condition is good, for ſuch alienation is prohibited by the ſtatute W. 2. Cap. 1. But as to the fee ſimple, ſome ſay it is repugnant and void, and therefore ſome are of opinion that this is a good condition, and ſhall defeat the alienation for the eſtate tail only, and leave the fee ſimple in the alienee; for that the condition did in law extend only to the remainder, Co. Litt. 224. a.

But by ſpecial limitation, it may extend to any one of them, and not to the other. Co. Litt. 230. b.

37. Tenant in tail *in the ſame deed, in which he creates the intail, covenants not to dock the intail, or ſuffer a recovery.* Chancery will not decree a ſpecifick execution; for the covenantees knew he had a power to bar, and therefore accept of a covenant by which to have damages. Per Cowper C. 2 Vern. 635. pl. 563. Hill. 1708. Collins v. Plummer.

(A. a) Repugnant *to the Grant.* [106]

[1. *A* * *Tenth granted* by the clergy, *proviſo* that *no parſon* that is *indicted in the court of the king ſhall pay any fine*, and *if he does he ſhall be diſcharged of the tenth* is a good proviſo. So if exchequer be made, proviſo the collectors ſhall not account in the ſuch grant before the barons, but before ſpecial auditors aſſigned by the king, this is a good proviſo. 21 E. 4. 46.]

* In Roll. it is a (fifteenth) but in the year-book it is a (tenth.)

[2. If a man makes a *feoffment in fee, provided* that *the feoffor ſhall have the profits*, this condition is void, becauſe it is repugnant to the grant. 17 H. 6. 43. b.]

It ſeems that this ſhould be 7 H. 6. 43. b. [pl. 21. per June]

—Perk. S. 731. S. P.——A feme made a leaſe of mills in Kent, with an exception, that ſhe ſhould have the profits for her life, and it was greatly debated, whether this exception was good or not, becauſe the profits of the mills are all the benefit, and in effect the mills themſelves, and at laſt the exception was adjudg'd good in law, and that the feme ſhould have the profits; cited by Manwood as a caſe which happened in Kent. Pl. C. 524. b.——See 3 Le. 111. S. P. in a queſtion put by Manwood Ch. B.

[3. If a man for himſelf and his heirs *warrants lands* to another and his heirs *againſt all men*, *proviſo* tamen, *that the warranty ſhall be*

Note, by all the juſtices in the Ex-

chequer Chamber, except June, If a man makes a

be void, this proviſo is altogether repugnant to the grant, and therefore the grant is good and the proviſo void. Contra 7 H. 6. 43. b.

feoffment with warranty, provided always that he ſhall not vouch him nor his heirs, and that if he does, that the warranty ſhall be void, this is a good proviſo; as in caſe of grant of an annuity, provided always that the grant ſhall not extend to charge his perſon, but his lands and tenements, &c. Br. Conditions, pl. 51. cites 7 H. 6. 44. S. C.——*But* if it was, provided, &c. *that he ſhall not vouch nor rebut*, this is void; for this cuts off all the force of the warranty; Contra ſupra; note a diverſity, Ibid.——Br. Garranties, pl. 30. cites 7 H. 6. 43. S. C.

Br. Garranties, pl. 30. cites S. C. ſays it was held good by all the Juſtices, præter June.

[4. *So* it ſeems in the caſe aforeſaid, if the proviſo had been, *that he to whom the warranty was made, nor his heirs, ſhould not have in value by force of the warranty*, that the proviſo is not good; yet he may *rebut*, if the proviſo be good, and ſo the warranty not wholly defeated; but it ſeems it is not a good proviſo, becauſe then the words (againſt all men) would be wholly defeated; for the other words will give a rebutter without them. Contra 7 H. 6. 43. b. by all the juſtices præter June and Hank.]

5. If the condition be that the feoffee *ſhall not do waſte*, it is not good, for no right or intereſt remains in the feoffor. Br. Condition, pl. 57. cites 21 H. 6. 33. Per Yelverton.

6. *But leaſe for years*, upon condition not to grant over, the ſame is good, becauſe the *reverſion remains in the leſſor*. Ibid.

S. P. per Montague Ch. J. but he ſaid that ſuch a *covenant is good*. Cro. J. 596. in caſe of Broad v. Jolliffe.——When a man is enfeoffed, he has power to alien to any perſon by the law, for if ſuch a condition ſhould be good, then is would ouſt him of all the power which the law gives him, which would be againſt reaſon, and therefore ſuch a condition is void. Litt. S. 360.

7. If a feoffment be made upon this condition, that the *feoffee ſhall not alien the land to any*, this condition is not good. But contra that he ſhall not alien to W. S. Br. Condition, pl. 135. cites 8 H. 7. 10.

But a condition that he ſhall *not ſuffer a common recovery* is void as repugnant to the grant. Jenk. 243. pl. 26.——*But a* condition annexed *to any particular eſtate*, as for years, life, or in tail, that he ſhall *not commit felony, treaſon*, or any treaſonable act is good. Jenk. 243. pl. 26.——*And* that the tenant in tail ſhall not *diſcontinue the eſtate tail*. Jenk. 243. pl. 26.——Br. Condition, pl. 57. cites 21 H. 6. 33.——*And* that he ſhall *not levy a fine* of it *ſur conuſans de droit come ceo*, is a good condition; for it reſtrains the diſcontinuance of a reverſion, which is a wrong. Jenk. 243. pl. 26.

8. A gift in tail, upon condition that the tenant *ſhall not alien to any*, is good by reaſon of the reverſion in the donor. Br. Condition, pl. 135 cites 8 H. 7. 10. Per Fairfax and Huſſey.

*9. So if condition be, *that he nor his heirs ſhall not alien in fee*, nor *in tail*, nor *for term of another's life*, but only for their own lives &c. ſuch condition is good; for ſuch alienation and diſcontinuance of the intail, is contrary to the intent of the donor, for which the ſtatute of Weſtm. 2. Cap. 1. was made. Litt. S. 362.

*[107]

10. Two feoffees granted *cuſtodiam parci* of A. to W. N. *capiendo feodo quod J. S. nuper parcarius cepit proviſo quod* ſcriptum *non extendat ad onerandum one of the grantors*, and this proviſo was held void; for this reſtrains all the effect of the grant againſt him. Br. conditions, pl. 238. cites 10 H. 7. 8.

11. Leaſe for 2 years, proviſo that he ſhall not occupy it for one year, is repugnant and void. Cro. E. 107. pl. 1. Arg. cites 21 H. 7.

12. Lands

12. Lands were given in tail, upon condition *if the donee or his heirs diſcontinue the land, the donor ſhall re-enter*; the *donee hath iſſue 2 daughters, and dies*; the *daughters have iſſue 2 ſons, and die*; one of the ſons diſcontinues the land to another [to the other] and it was held by the court to be a breach of the condition. Cro. E. 35. pl. 2. Mich. 26 & 27 Eliz. Croker v. Trevithin. Le. 292. pl. 400. Anon. S. C. but is that one of the daughters levied a fine ſur conuſance de droit come ceo, &c. to her ſiſter. Adjudged per tot. Cur. to be a forfeiture.

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13. A gift in *tail* is made *of a walk in a foreſt*, proviſo and the donee covenanted that he *ſhould not fell any trees* there, being timber trees. This proviſo is a condition, altho' a covenant is alſo added to this purpoſe: by all the judges of England. Note, this was a walk in a foreſt, *but* in a gift in *tail of land out of the foreſt*, provided that he ſhall not fell any timber trees growing upon the ſaid land, the proviſo is void; for the law gives him power to commit waſte if he will, as well as the tenant in fee. Jenk. 266. pl. 73.

14. A man *before the ſtatute of quia emptores* terrarum, might have made a *feoffment*, and added farther, that if he or his heirs did *alien without licence*, that he *ſhould pay a fine*, then this had been good, and ſo 'tis ſaid, that then the lord might have reſtrained the alienation of his tenant by condition, becauſe the lord had a poſſibility of reverter. Co. Litt. 223. a.

15. If A. be ſeiſed of Blackacre in fee, and B. *infeoffes him of Whiteacre*, upon condition that A. *ſhan't alien Blackacre*, the condition is good, for the condition is *annexed to other land*, and ouſts not the feoffee of his power to alien the land whereof the feoffment is made, and ſo no repugnancy to the ſtate paſſed by the feoffment, and ſo 'tis of gifts or ſales of *chattles* real or perſonal. Co. Litt. 223. a.

16. If a man be poſſeſſed of a *leaſe for years*, or of a *horſe*, or of any other *chattle real or perſonal*, and give or ſell his whole intereſt or property therein, upon condition that the *vendee ſhan't alien* the ſame, the condition is void, becauſe his whole intereſt and property is out of him, ſo as he has no poſſibility of a reverter, and 'tis againſt trade and traffick, and bargaining and contracting between man and man, and likewiſe it ſhould ouſt him of all power given to him. Co. Litt. 223. a.

17. If a man make a *gift in* tail, upon condition that he *ſhall make a leaſe for his own life*, albeit the ſtate be lawful, yet the condition is good, becauſe the reverſion is in the donor; as if a man make a leaſe for life or years upon condition that they ſhan't grant over their eſtate, or let the land to others, this is good, and yet the [108] grant or leaſe ſhould be lawful. Co. Litt. 223. b.

18. If one grant a *rent-charge* with a *proviſo*, *that neither the ſaid grant, nor any thing therein contained, ſhall charge his perſon* with a writ of annuity, by ſuch proviſo the land only is charged; and tho' there be 2 negatives in ſuch proviſo, yet they ſhall not make an affirmative againſt the manifeſt intent of the party. Hawk. Co. Litt. 219. Litt. S 280. Co. Litt. 146. a.

Co. Litt. 146. a.

19. *But* a proviſo *that would take away the whole effect of the grant*, as if one grant a *rent out of land in which he has nothing*, provided that it ſhall not charge his perſon, is void. Hawk. Co. Litt. 219.

Co. Litt. 146. a. b.—Poph. 87. S. P. per Curiam.—6 Rep. 41. b. S. P. per Cur.—2 Danv. 24. pl. 7. cites this caſe and ſays, that he ſuppoſes it was put in the book as at common law, for the executors of ſuch tenant for life may at this day diſtrain by 32 H. 8. cap. 37.

20. *So* is a proviſo that is *repugnant to the expreſs words of the grant*; As where one grants a rent-charge out of land, provided that it ſhall not charge the land, and where a proviſo is good at firſt, and afterwards it happens that the grantee, or his executors, can have no other remedy but that which was reſtrained, they ſhall have it notwithſtanding ſuch reſtraint; as if A. grant a rent to B. for life, with a proviſo that it ſhall not charge his perſon, yet B's executors ſhall have an action of debt for the arrears during B's life. Hawk. Co. Litt. 219, 220.

Leaſe for 2 years, proviſo, that leſſee ſhall not take the profits is repugnant and void. Arg. Cro. E. 307. pl. 1. cites 6 R. 2. Quid Juris clemat, 20.

21. If land is given *to A. and B. provided that B. ſhall not take any of the profits*, this proviſo is void and repugnant; per Yelverton J. Obiter. Bulſt. 42. Mich. 8. Jac.

22. A *condition annexed* to an eſtate given *is a divided clauſe from the grant, and therefore cannot fruſtrate the grant precedent*, neither in any thing expreſſed, nor in any thing implied, which is of its nature incident and inſeparable from the thing granted; per Hobart Ch. J. Hob. 170. pl. 125. Hill. 12 Jac. in caſe of Stukely v. Butler.

(B. a) Condition repugnant. [*By reaſon of the Intent.*]

[1. IF the condition be, that *if the obligee* ſhall *pay* to J. S. 10 *l.* ſuch a day, *then the obligation, being* 100 *l. ſhall be void*, otherwiſe not: though this *was not the intent* of the parties, yet the condition is good; for if the obligee does not pay 10 *l.* the obligation is forfeited. 39 H. 6. 9. b.]

Br. Conditions, pl 98. cites S. C.—Br. Obligations, pl. 42. cites S. C.—S. C. cited Arg. Saund. 66.—2 Mod. 285.

[2. *So* if the condition be, that *if* the obligor *does not pay* to the obligee ſuch a day 10 *l. then the obligation, being* 100 *l. ſhall be void*, this is a good condition; and the obligor, in an action upon the obligation may ſay, that he did not pay the 10 *l.* and ſo avoid the obligation; For though the *intent* was *not* ſo, yet becauſe the words were ſo, he ought to adjudge *according to the words*. 39 H. 6. 10. cited to be adjudged.]

Hill. 29 & 30 Car. 2. C. B. the Ch. J. ſaid he doubted whether that caſe was law.—Freem. Rep. 247. pl. 261. Hill. 1677. Wells v Wright, the condition was held abſurd, and judgment for the plaintiff.—See Tit. Obligation (M) pl. 4. (N) pl. 1.—S. C. cited Arg. 11. Mod. * 193. but was denied by Holt Ch. J. to be law.—Ibid. 199. pl. 16. Mich. 7 Ann. B. R. in caſe of Wells v. Ferguſon, S. P. adjudg'd to be repugnant, and denied this caſe to be law.—2 Salk. 463. pl. 3. Wells v. Treguſon, S. C. adjudg'd accordingly.

3. A. made a *leaſe* to B. on condition, *that if A. grants the reverſion then B. ſhall have fee.* If *A. grants the reverſion by fine* B. ſhall not have fee; for the condition is repugnant and void; per Anderſon Ch. J. 1 Rep. 84. b. Paſch. 42 Eliz. C. B. cites 6 R. 2. Quid juris clamat 20. Pleſington's caſe. S. C. cited D. 209. a. pl. 21. and ſays, that the leaſe was of a term for years, and likewiſe was,

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that if A. died within the term B. ſhould have franktenement, and livery of ſeiſin was made accordingly, and the condition was held repugnant.——S. C. cited Pl. C. 26. a. that it was held, that inaſmuch as the condition preceded the franktenement, that the franktenement is not out of the leſſor immediately.—S. C. cited Pl. C. 487. 2.—Co. Litt. 378. b. (r) S. P. as of a leaſe for life, and ſays, that when the fine transfers the fee to the conuſee, it would be abſurd and repugnant to reaſon, that the ſame fine ſhould work an eſtate in the leſſee; for one alienation cannot veſt an eſtate of one and the ſame land in two ſeveral perſons at one time.——Perk. S. 729. S. C. and S. P. but ibid. S. 730. ſays, if the leſſor had granted the reverſion to a ſtranger by deed, the leſſee in ſuch caſe ſhould have fee by the condition, becauſe the reverſion is not in the grantee before attornment, and yet the feoffor has granted the ſame, and againſt this grant he cannot plead ne granta pas by the deed.——2 Brownl. 227. Arg. cites Pleſington's caſe as held that he ſhall not have fee, becauſe at the time he had only a right to a term, and not a term in poſſeſſion.——If a man makes a leaſe for years upon condition, that if the leſſor ouſts him within the term he ſhall have fee; in this caſe, by the performance of the condition he ſhall have fee, becauſe it is the act and tort of the leſſor himſelf, whereof himſelf ſhall not take advantage; and alſo, that eodem inſtante that the leſſor ouſts him, eodem inſtante the leſſee has fee, and the title of the leſſee is by force of the condition, which is paramount the ouſter; per Coke Ch. J. 8 Rep. 76. a. and ſays, that with this accords 6 R. 2. Quid juris clamat 20. And that poſſeſſion at an inſtant is ſufficient to ſupport the increaſe of the fee appears 12 E. 2. Tit. Voucher 265.——S. C. cited Co. Litt. 217. a.

4. Condition of a bond that *the obligee ſhall not ſue the obligation*, is repugnant, but a defeaſance by other deed to ſuch effect is good. Mo. 811. pl. 1097. cites 21 H. 7. the caſe of Puſeto.

5. A bond was conditioned, that *if J. B. the obligor ſhall die without iſſue, then if he, by his laſt will, or otherwiſe in writing, ſhall convey ſuch lands to W. B. the obligee, then the obligation to be void.* It was objected that this condition was repugnant and impoſſible, viz. that if he die without iſſue, then by his laſt will or otherwiſe he would convey &c. and that he cannot convey when he is dead; and of this opinion was Doderidge; but by the other 3 judges, the condition being made in benefit of the obligor [obligee] ſhall be conſtrued according to the intention of the parties, which was, that J. ſhould make a conveyance in his life by will, or otherwiſe, of lands ſo as they ſhould remain to W. and his heirs, in default of heirs of the body of J. Jo. 180. pl. 7. Trin. 4 Car. B. R. Eaton v. Butter. Palm. 552. S. C. Doderidge J. held the obligation ſingle, and the condition repugnant and impoſſible at the commencement, and yet he ſaid that the intent appeared, but that they are tied up to the words;

and that tho' the intent is to be purſued, yet that is when the words lead us to the intent. But the other 3 held e contra, and gave judgment to the plaintiff accordingly.

6. A bond was condition'd *to pay 7 l. by 2 s. per week, and if he fail of payment* at any of the days, *the bond to be void, or otherwiſe to remain in full force.* The defendant pleaded that he did not pay at one of the days. The court held that the condition ſhall be taken *diſtributively* reddendo ſingula ſingulis, that if he pays the 7 l the obligation ſhall be void, but if he fails to pay the 2 s. a week at any of the days, it ſhall be in full force; for the obligation *ſhall not be ineffectual if by any means it can be made good.* Lev. 77. Mich. 14 Car. 2. B. R. Vernon v. Alſop. Raym. 68. S. C. adjudged for the plaintiff, becauſe the condition is ſenſeleſs, and then the obligation is in force and ſingle — Sid. 105. pl. 14. S. C. adjudged after adviſement ſeveral terms that the obligation was ſingle, and the condition repugnant and void.——S. C. cited 2 Mod. 285. and S. P. adjudged accordingly. Hill. 29 & 30 Car. 2. Wells v. Wright.

7. The

7. If a man pleads defeasance *in debt upon an obligation of a thing to be done beyond sea*, which cannot be tried here, *or in two counties*, as in London and Wiltshire, *where the one cannot join with* [112] *the other*, so that trial cannot be had, this is void, and the obligation is single. Br. Defeasance, pl. 13. cites 22 E. 4. 2.

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(E. a) Condition impossible. The *Effect* of a Condition impossible at the making thereof.

Br. Conditions, pl. 155. cites S. C. And in such case the estate is

[1. IF the condition of an obligation of feoffment be impossible at the making thereof, this *is* a *void* condition; *but the obligation* or feoffment *is not void*, but single. 14 E. 4. 3. Co. Litt. 206. because the *condition is subsequent*.]

absolute; as if the condition be to go to Rome from Westminster in 3 hours. Co. Litt. 206. b.—— S. P. per Markham. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76.——S. P. *But* if the condition be to do any thing *against law, as to kill a man*, and the like, there the one and the other are void. But if the condition be *possible at the time of the making*, as to infeoff J. S. and this becomes impossible after by the act of God, or of J. S. or if J. S. dies or enters into religion by the day, there the obligation is saved by the condition. Br. Obligation, pl. 45. cites 2 E. 4. 2.

If a *condition precedent* be impossible, the estate, interest, or agreement, cannot arise; but a condition *subsequent* is of

[2. *But* if the *condition precedent be* impossible at the making thereof, there all is void, because nothing passes before the condition is performed. Co. Litt. 20. b. [206. a.]

[3. *As* if a man *leases for life* upon condition, that *if he goes from* the church of *St. Peter's in Westminster*, *to* the church of *St. Peter's in Rome*, *within three hours*, to have a fee, which is impossible, yet because it is precedent no fee can accrue. Co. Litt. 206. b.]

another consideration; per Holt Ch. J. in delivering the opinion of the court. 2 Ld. Raym. Rep. 766. Pasch. 1 Ann. in case of Feltham v. Cudworth.

4. Where a man is bound to do one thing or another, and *the one is possible*, and *the other impossible*, he ought to perform that which is possible. Br. Conditions, pl. 47. cites 21 E. 3. 29.

5. It is agreed that where a man binds himself by covenant to a thing impossible the covenant is *void*; *but* if it be *to do a thing within the power of man*, then e contra. Br. Covenant, pl. 4. cites 40 E. 3. 5.

Fitzh. Obligation, pl. 17. cites Mich. 17 H. 6. S. C.

6. A. is bound to B. in an obligation conditioned *to stand to the arbitrement of C. so that it be made before* 15 *Mich. and that the* obligor shall have notice of it 14 days before 15 Mich. to attend the said arbitrement; and the 15 Mich. is 14 days before the date of the said obligation, and so the notice is impossible to be performed, this obligation is good, and the condition void; adjudged in the Exchequer Chamber. Jenk. 116 pl. 31.

7. *Obligation* with condition impossible is as well void as where the condition is against law; per Markham and Danby Ch. J. Br. conditions, pl. 150. cites 8 E. 4. 12, 13.

8. There is *no diverfity* where the thing *or condition is impossible at the commencement*, and when it is possible at the commencement, *and made impossible after*; for an impossible condition shall be said void,

void, and the grant good. And where the condition was poſſible, and became impoſſible after, there it is ſingle alſo; As where an annuity is granted by R. Prior of S. till the plaintiff be promoted by R. this is a condition; but if R. dies before promotion, now the grant is ſingle, for the tender of the ſucceſſor is not good; Contra if it had been granted by name of Prior without name of baptiſm. Br. Conditions, pl. 69. cites 14 H. 7. 31. and 15. H. 7. 1.

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9. Where a deed has covenants, *partly poſſible, and partly impoſſible*, it is good for the poſſible ones, and void for the others. Br. Faits, pl. 37. cites 14 H. 8. 25. per, Pollard.

But in the caſe of a *joint covenant* all is void; per Brudenell. Ibid.

10. A bond was conditioned *for ſuſtaining* and maintaining *an houſe, &c. in ſufficient repairs*, and ſo to leave it at the end of the term; *at the time of the entry into the bond, the timber of part thereof was ſo rotten, that it was impoſſible to ſuſtain* and maintain it in repairs, yet the obligation is good, though the condition was impoſſible; adjudg'd. Sav. 96. pl. 177. Trin. 31 Eliz. Wood v. Avery.

2 Le. 189. pl. 237. Mich. 32 Eliz. B. R. the S. C. the defendant pleaded, that the kitchen was ſo ruinous at the

time of the demiſe, that he could not maintain or repair it, and therefore he took it down, and re-built it again, in ſo ſhort a time as he could poſſibly, in the ſame place, ſo large, and ſo ſufficient in breadth, length, and height, as the other kitchen was; and that the ſaid kitchen, all times after the re-edifying of it, he had ſuſtained and maintained, and well repaired, and demanded judgment, &c. Upon which plea the plaintiff did demur in law; and by the court, the plea were a good plea if it were in an action of waſte, but here, where he has by his own act tied himſelf to an inconvenience, he ought at his peril to provide for it; and here it was ſaid, that if the condition be impoſſible the bond is ſingle; contrary where a man is charged by an act in law.

11. A condition *altogether* impoſſible is *void*. Cro. E. 780. pl. 14. Mich. 42 & 43 Eliz. B. R. in caſe of Wigly v. Blackwall.

As, if I am bound to infeoff (before Eaſter) him that comes firſt to Paul's on Michaelmas day next it is void, becauſe it is impoſſible. Per Popham, Goldſb. 188. pl. 132. Hill. 43 Eliz.

12. Condition *to pay money at a day paſt* makes the obligation ſingle. Brownl. 104. Mich. 6 Jac. Green v. Eaden.

Yelv. 138. S. C. in totidem verbis.

13. In debt upon bond, condition'd *to pay the money on the 31ſt day of September*, whereas there are not ſo many days in the month; the defendant pleaded ſolvit ad diem, and found for the plaintiff; it was moved in arreſt of judgment, that the condition was impoſſible; ſed per Curiam, the condition being impoſſible, *the money is due preſently*. Jo. 140. pl. 6. Trin. 2 Car. B. R. Jiggon v. Purchaſe.

Lat. 152. Gibbon v. Purchaſe. S.C. accordingly.—— Noy 85. Giggham v. Purchaſe, S. C. held that it is

payable preſently, and judgment for the plaintiff.——Cro. C. 78. pl. 9. Trin. 3 Car. in Cam. Scacc. Purcaſe v Jegon, S. C. and judgment affirmed.——Het. 175. Trin. 7 Car. S. P. in caſe of Goſſee v. Brown.

14. If a man is bound to do *a collateral act*, and that matter becomes impoſſible afterwards, it is void; but not ſo where the condition is parcel of the duty contained in the obligation. Arg. 2 Show. 143. pl. 119. Mich 32 Car. 2.

Palm. 516. Wood v. Bates, S. P.

15. A bond

The report adds (perhaps) at the end.

15. A bond to the ſheriff *to appear at a day certain, where there is no ſuch day*, is a condition impoſſible at the time of making the bond; and therefore *the obligation is ſingle*; and judgment for the plaintiff. But note, the defendant did not plead the ſtatute 23 H. 6. for had he pleaded obligation without condition or conſideration impoſſible, which is all one, it had been void by the ſtatute. 3 Lev. 74, 75. Mich. 34 Car. 2. C. B. Graham v. Crawſhaw.

16. If one binds himſelf in a bond *to go to a place not in being*, or to do other impoſſible thing, the obligation is ſingle; and here the caſe was, one laid a wager *that he would walk in ſuch a time to High-Park* Corner, and the *place being Hyde-Park* Corner, *and no ſuch place as High-Park* Corner, he loſt his wager. Per Cur. 12 Mod. 418. Mich. 12 W. 3. Wall v. Grovet.

17. *Sci. Fa.* againſt the bail, *reciting a recognizance taken in the reign of the late king William, wherein the condition was, that the defendant ſhould render himſelf to the priſon of the Marſhalſea Dominæ* [114] *Reginæ nunc.* It was argued that the condition is impoſſible, and conſequently the recognizance ſingle. Per Holt Ch. J. *where the condition is under-written or indorſed, there that is only void*, and the obligation ſingle; *but where the condition is part of the lien itſelf; and incorporated with it*, there, if the condition is impoſſible, *the obligation is void*; and the court inclining that it was ill, the plaintiff for his own expedition, pray'd that his writ might be abated 1 Salk. 172. pl. 4. Trin. 2 Ann. B. R. Pullerton v. Agnew.

(F. a) What Perſons may perform it.

(T) pl. 12. S. C. but not S. P. (D. d) pl. 1. S. C. but that is upon the point of notice to the heir.—Jo. 389. pl. 10. S. C. accordingly. ——Win. 103. to 110. and 115.

[1. IF A. and B. levy a fine *to the uſe of A. in fee, if B. does not pay* 10*s. at Michaelmas after*, and that *if he doth* then pay the 10s. that *then it ſhall be to the uſe of A. per life, and* after *to B. in fee*, and after B. dies before Michaelmas; it ſeems the *heir* of B. may pay the 10s. for this is not more perſonal, being the payment of money, than in the caſe of Litt. upon a mortgage, Tr. 13. Car. B. R. between *Spring* and Sir *Julius Cæſar*, Maſter of the Rolls, in a writ of error upon a judgment in a quare impedit. The court divided on this point, ſcilicet, Croke and Jones inclined that it was not perſonal, but the heir might perform it; but Brampſton & Berkely e contra.]

to near the end of fol. 120. Mich. & Hill. 22. Jac. Cowper v. Edgar, S. C. argued by the ſerjeants, but no judgment.——Payment of a *ſmall trifling* ſum may be conſidered rather as a *ceremony* than a valuable conſideration, per Parker C. and he ſaid, that he took this to be the ground upon which the 2 judges went, who in the caſe of Spring v. Cæſar held the payment of 10*l.* to be a perſonal act; for when the ſum comes to be conſiderable, as 500*l.* &c. the payment of it is never eſteemed a perſonal act. 10 Mod. 424. in caſe of Marks v. Marks.——And he ſaid, that this appears throughout 7 Rep. in Engleſield's caſe.——Chan. Prec. 486. S. C. but S. P. does not appear.

2. *Feoffment in fee upon condition to be void if the feoffor pays ſo much to the feoffee, and the feoffee dies before payment*, his *heirs cannot pay it*, becauſe the time of payment is paſt; for the condition being general, if the feoffor pays, &c it is as much as to ſay, If the feoffor during his life pays, &c. Litt. S. 337.

3. *But*

3. *But when a day* of payment *is limited, and the feoffor dies before the day*, his heir may tender the money, becauſe the time of payment was not paſt by the death of the feoffor. Litt. S. 337.

4. And it ſeems, that *ſo may his executors*, becauſe they repreſent the perſon of their teſtator. Litt. S. 337. And ſo may his adminiſtrators, and

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if there be neither executor nor adminiſtrator, the *ordinary* may do the ſame. Co. Litt. 209. a.

5. If a man *mortgages his land* to W. *upon condition that if the mortgagor & J. S. pay* 20 *ſhillings at ſuch a day* to the mortgagee, that *then he ſhall re-enter*. The *mortgagor dies before the day. J. S. pays the money* to the mortgagee. This is a good performance of the condition, and yet the letter of the condition is not performed. *But if the mortgagor had been alive at the day*, and he would not pay the money, but refuſed to pay the ſame, and J. S. alone had tendred the money, the mortgagee might have refuſed it. Co. Litt. 219. b.

6. *But* in the former caſe, albeit the mortgagor be dead, yet *the act of God ſhall not diſable J. S. to pay* the money, for thereby the mortgagee receives no prejudice; and *ſo* it is in that caſe, *if J. S.* [115] *had died before the day*, the mortgagor might have paid it. Co. Lit. 219. b.

7. If A. *infeoffs D. his ſecond ſon upon condition*, that *if he pay* 500 *l. to D.* then *E. his 3d ſon ſhould have fee*. This is a condition, the right of performing which, deſcends to the heir of A. and he may take advantage of it; for the limitation of the fee over to E. is void by a particular maxim of the common law, which will not allow a fee to be limited upon a fee, or by that other maxim by which *a ſtranger cannot take advantage of a condition*; per Parker C. 10 Mod. 423. Mich. 5 Geo. in Canc. in caſe of Marks v. Marks.

8. If a *leaſe* is made *to* 2, with *condition to have fee*, and the *one dies*, the ſurvivor may perform the condition and have the fee; but if the ſame jointenants have made partition the condition is deſtroyed, becauſe the eſtate in fee ought to increaſe to them jointly and not in ſeveralty; per Coke Ch. J. 8 Rep. 75. b. 76. a. Trin. 7 Jac. in lord Stafford's caſe. 2 Brownl. 251. S. P. per Coke Ch. J. ſays it is agreed by 12 Aſſ. 5. becauſe the privity remains, and the eſtate alſo in ſubſtance.

9. *Deviſe* of lands *to his daughter and her heirs, at her age of* 18, *and that his wife ſhall take the profits in the mean time, provided ſhe keeps the daughter at ſchool*, &c. *The widow marries again and dies, the daughter not being* 18. Adjudg'd that this was a plain term given to the wife for her own uſe, which accrues to the huſband, and the keeping and educating the daughter is not of ſuch a particular privity but that it may be performed effectually by another. Hob. 285. pl. 370. Trin. 17 Jac. Balder v. Blackborne. Hutt. 36. Blackburn's caſe, S. C. accordingly, and that here was no default in the wife, for it is the act of God, and therefore judgment for the plaintiff.——Brownl. 79. S. C. adjudged for the plaintiff.

10. Deviſe of lands to his wife for life, and after her death to D. his 3d ſon and his heirs, *provided, that if C. the ſecond ſon do within* Tho' it be only ſaid, that if C.

ſhall pay, and not C. and his heirs, yet this is only a plain miſtake in the will,

within 3 months after my wife's death pay to D. his executors, &c. 500 *l.* then the lands to come *to C. and his heirs.* C. died, living the wife. The *heir of C.* may pay the money, and ſhall have the eſtate conveyed to him. Paſch. 1718. Ch. Prec. 486. Markes v. Markes.

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which is a conveyance that the law ſuppoſes to be made when a man is *inops conſilii*, and therefore favoured greatly; per Parker C. 10 Mod. 422. S. C.

Fol. 421.

(G. a) To whom it may be performed.

Cro. E. 383. pl. 4. S. C. & S. P. admitted, but the payment to the heir being covenous, was no performance.—— Mo. 708. pl. 989. S. C. & S. P. admitted.—— Gouldſb.

[1. IF a man makes a *feoffment* in fee *upon condition* that if he *pays* 100 *l. to the heirs, executors, or adminiſtrators of the feoffee*, within a year after his death, that then it ſhall be lawful for him to re-enter, and after the *feoffee makes a feoffment* to J. S. *and dies*, and the feoffor pays the money to the heir of the feoffee, this is a good performance of the condition; for the heir is within the expreſs words of the condition. Mich. 37, 38 Eliz. B. R. between *Goodale and Wiat* reſolv'd Co. 5. 96. Same caſe.]

[2. *And* in this caſe if the money had been paid *to the aſſignee*, it had been no performance of the condition, becauſe the aſſignee is not named. Co. 5. Goodale 97.]

376. pl. 111. S. C. Fenner thought that no payment ought to be made to the heir *; but Gawdy and Clench e contra.——Poph. 59, 100. S. C. all agreed that notwithſtanding the feoffment made over by the father, the money might have been paid to the heir to perform the condition, if it had been truly paid and without covin; but by Popham and Clench, if a feoffment to be made to one, upon condition of payment of money to the feoffee, his heirs or aſſigns, and the feoffee makes a feoffment over, and dies, the money ought to be paid to the feoffee, who is the aſſignee, and not to the heir, for there (heir) is not named but in reſpect of the inheritance which might be in him, but here he is named as a mere ſtranger to it.

A. gives to B. ſolvend' to ſuch perſon as he ſhall appoint; if B. appoints one, payment to him is payment to B; but if B. appoint none, it ſhall be paid to him. 6 Mod. 228.

Where the feoffor has any reverſion remaining in him, the payment muſt be to himſelf; but where he departs with his intire fee, as feoffment in fee, gift in tail, or leaſe for life, remainder over in fee there, leſſee for life, or donee in tail, is aſſignee. 5 Rep. 97. a. Goodale's caſe.

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3. Feoffment on condition to pay to the feoffee, *his executors*, or aſſigns, within three years, and then feoffor his heirs, &c. to re-enter. The feoffee has 2 ſons, *infants*, whom he makes executors, and dies before the day. J. S. is made *adminiſtrator during minority*; 'tis moſt ſure for A. to pay the money to the executors, for the adminiſtrator during minority is but as bailiff or receiver to the executors, and payment to one of them is good. 3 Le. 103. pl. 151. Paſch. 26 Eliz. C. B. Anon.

4. If a man makes a feoffment in fee, by way of *mortgage*, upon condition *to be void upon payment of the money by the feoffor at a day*, if the *feoffee dies before the day*, the money ſhall be paid to the executors, and not to the heirs of the feoffee; becauſe it ſhall be intended the eſtate was made by reaſon of the loan of the money, or ſome other duty. Litt. S. 339.

S. P. for in this caſe de ipſatio unius perſonæ

5. *But* if the condition be, that *if the feoffor pays, &c. to the feoffee, or his heirs*, if he dies before the day the payment ought to be made to his heir, and not to his executors. Litt. S. 339.

ſonæ

ſonus eſt excluſio alterius, & expreſſum facit ceſſare tacitum. And the law ſhall never ſeek out a perſon, when the parties themſelves have appointed one. Co. Litt. 210. a.

6. Condition of an obligation entred into by M. was *to pay* 10 *l.* per ann. after his death *to the executors* of the obligee, *for the uſe of M's children.* The obligee dies without making any executor. The court ſeem'd of opinion that the money ſhall be *paid to his adminiſtrators.* Sed Adjornatur. Het. 115, 116. Trin. 4 Car. C. B. Manningham's caſe. Litt. Rep. 156. Manington's caſe. S. C. in totidem verbis.

(H. a) [*To whom to be performed.*] Aſſigns. [Executors.]

[1. IF the condition be *to leaſe* certain lands for three lives *to the obligee or his aſſigns*, and after the obligee demands a leaſe to be made to 3 *ſtrangers* for their 3 lives, he ought to make it to them accordingly, or otherwiſe the condition is broke, for here by the word aſſigns is *intended aſſigns by nomination*; for he cannot have other aſſigns, in as much as the eſtate is not aſſignable before he hath it. Paſch. 14 Jac. B. between *Albon and Wodgwood*, per Curiam.] Roll. Rep. 37. pl. 28. S. C. & S. P. per Curiam accordingly. ——3 Bulſt. 168. S. C. & S. P. by Coke Ch. J. accordingly; but ſaid it had been otherwiſe clearly, if it had been to be made to him, (and) to his aſſigns; but that here he has an election to whom he will make this leaſe; as if you are to make a leaſe to me or to three which I ſhall name.——Bridg. 39, 40. S. C. & S. P. Arg. but nothing ſaid to it by the court.

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[2. If a man be bound in 20 *l.* upon condition *to pay* 10 *l. to ſuch perſons as the obligee ſhall name by his laſt will*, and after the obligee *names no perſon* by his will, the obligor is not bound to pay it to his executors, becauſe the condition hath reference to his nomination. Mich. 10 Jac. B. per Curiam, & Tr. 12 Jac. B. between *Peaſe & Mead*, per Curiam.] Hob. 9. pl. 19. S. C. per Curiam clearly; for though where any thing teſtamentary is covenanted to be done unto a man or his aſſigns, that is to be done to the executors where there is no actual aſſignee, as in Chapman and Dalton's caſe, and in † 27 H. 8. for the delivering of rentals to a man and his aſſigns; the reaſon is becauſe the word (aſſignee) is indifferent both to the aſſignee in deed and in law; And there when the executor takes it he has it to the uſe of the teſtator; But here the words muſt needs be underſtood of an aſſignee in deed, who ſhall take it to his own uſe, for the word (paying) carries property with it.——Mo. 855. pl. 1172. S. C. adjudged, that the executor is not aſſignee; for there ought to be an expreſs aſſignee, and therefore the condition becomes impoſſible by the omiſſion in not naming the obligee, and ſo the obligation diſcharged.——Godb. 192. pl. 274. Mead's caſe, S. C. held accordingly per tot. Cur. and Coke took a diverſity, that if I am bound to pay 10 *l.* to the aſſignee of the obligee, and his * aſſignee makes an executor and dies, the executor ſhall not have the 10 *l.* But if I am bound to pay 10 *l.* to the obligee or his aſſignees, there the executor ſhall have it; becauſe it was a duty in the obligee himſelf; and judgment accordingly.

† Pl. C. 288. a cites S. C.

* [It ſeems the words (his aſſignee) are miſprinted and ſhould be only (he)] ——See Tit. Executor (X) pl. 2. Peaſe v. Stileman, S. C.

3. If A. infeoff B. *to infeoff C. and D.* and *D. dies*; yet B. ought to infeoff C. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. So if D. refuſes and C. not. *Ibid.*

4. Note per Forteſcue, Aſcough, Newton and Paſton, that if a man *infeoffs* another upon condition *to infeoff the baron and feme in tail*, the *remainder to W. in fee*, and he offers to the *baron and feme*, and they *refuſe*, he has not performed the condition, unleſs he

offers to him in remainder. Br. Conditions, pl. 211. cites 19 H. 6. 76.

S. C. cited 5 Rep. 96. b. 97. a. as resolved, Mich. 23 & 24 Eliz. in the court of wards.—Mo. 243. pl. 382. Mich. 29 Eliz. cites the case of Randal v. Barker in the Court of Wards 14 Eliz. in which case Barker covenanted, that if Randal pay 400 *l.* to him or his assigns before such a day, he would stand seised to his use in fee; and before the day he infeoffed one W. of the land, and at the day the money was tender'd to W. and adjudged, that it was due to W. he being assignee of the land, and not to B. who was the covenantor; where Coke, who cited the case, said, that such payments, tho' they are collateral, yet with words of assigns they shall go to the assignee and not to the covenantor.

5. R. being seised of certain lands, covenanted with B. that *if he pay unto him, his heirs and assigns*, 500 *l. then he and his heirs would stand seised to the use of the said B. and his heirs*; *R. devised the land to his wife during the minority of his son, the remainder to his son in fee*, and died, having *made his wife executrix.* B. at the day and place tendred the money generally, *the wife* having but an estate for years in the land *took the money.* It was holden, that the same was not a sufficient tender, for the wife is not assignee, for she has only an interest for years, and here the son is to bear the loss; for by a lawful tender the inheritance shall be divested out of him, and therefore the *tender ought to be made to the son and not to the wife.* Le. 252. pl. 339. Trin. 33 Eliz. B. R. cites it as the case of Randal v. Brown.

6. *So if R. had made estate for life or years*, &c. for no one shall be assignee in this case; *but when* the covenantor *departs with his whole estate*, as if he makes a feoffment in fee, gift in tail, or lease for life, with the remainder over in fee, in such case the lessee for life, or donee in tail, is the assignee; but so long as the covenantor has reversion remaining in him, the payment ought to be made to him. Resolved by the whole Court of Wards, cited 5 Rep. 97. a. as Randal's case.

7. *So* it was said, if R. had made assignment of his *entire estate in part*, that so long as any part remained with R. the tender ought to be made to him or his heirs. Ibid.

*[118] Co. Litt. 210. a. S. P. —See Tit. Mortgage (O) pl. 2. the case of Randal v. Brown.

8. Land was mortgaged, and a promise [proviso] that *if the mortgagor at such a time and place should pay* the money *to the mortgagee, his* * *heirs, or assigns, the mortgage should be void.* The *mortgagee died*, and the *money was paid to his executor*; and it was adjudged to be no performance of the condition; for the executor was not named, and the money ought to be paid to the heir who should have the land, if the money were unpaid, and not the executor. Brownl. 64. Mich. 6 Jac. Alston v. Walker.

9. Condition was *to make the obligee a lease for life by such a day, or pay him* 100 *l. Obligee died before the day*; and adjudged, that his executor shall have the 100 *l.* per Treby Ch. J. and the ground of Laughter's case was denied to be universal. 1 Salk. 170. pl. 2. Mich. 9 W. 3. C. B. Anon.

(I. a) *What persons* shall be *bound* by a Condition.

* Br. Baron and feme, pl. 78. cites 22 E. 3. 11.

[1. IF an estate be made to a *feme covert*, she shall be bound by the condition, because this does not charge her person, but the land. * 45 E. 3. 22. D. 28 H. 8. 13. & 6. 5.]

[b. 12. a. pl. 7.] S. C. as to payment of the rent reserved on a lease for years to her and her baron, but contrary of other collateral covenants.

† This is misprinted, and should be pl. 65.——It was agreed, that if lands are given to a feme sole upon condition, and she takes baron, who breaks the condition, the feme shall be bound. Mo. 92. pl. 229. Trin. 9 Eliz.

[2. If an estate be made to an *infant* upon an express condition, the infant shall be bound to perform it.] And if the condition be broke during his minority, the land is lost for ever; resolv'd. 8 Rep. 44. b. Hill. 45 Eliz. in Whittingham's case.—— S. C. cited Arg. Hard. 11.

[3. *So* if an *estate* be *made* to another *in fee upon condition*, his *heir*, after his death, though he be *within age*, shall be bound by the condition. Tr. 13 Jac. B. R. between *Slade and Thompson*, adjudged and agreed.] Cro. J. 374. pl. 5. S. C. & S. P. seems to be admitted.—— Roll. Rep. 136. pl. 18. S. C. & S. P. admitted.——Ibid. 198. pl. 1. S. C. & S. P. admitted by judgment. ——3 Bulst. 58. S. C. & S. P. admitted.

In assise it was found, that A. *infeoffed* B. in fee upon condition, *that if A. or his heirs pay C.* 100*l. at such a day, that they may re-enter. A. died, his heir within age.* The *day incurr'd during the non-age*, and the *heir did not tender at the day*; and after they came to the *feoffee*, who *at their request deferred the day of payment*, at which day he *refused*, [to accept the money then tendered] and the heir entered, and because the heir was within age at the day of payment, and that the feoffee defer'd the day of payment, therefore the entry lawful by award; but Brooke says, quod nota, for mirum! for it seems to be contra legem. Br. Conditions, pl. 114. cites 31 Ass. 17.——S. C. cited 3 Bulst. 59. Arg.

4. If an office of *parkership* be *granted or descends to an infant or feme court*, if the *conditions in law annexed to this office*, which require skill and confidence be not observed and fulfilled, the office is lost for ever, because as Littleton says, it is as strong as an express condition; *but* if a *lease for life* be made *to a feme covert, or an infant*, and they by charter of feoffment alien in fee, the breach of this condition in law, that is without skill, &c. is no absolute forfeiture of their estate. So of a *condition in law given by statute*, which gives an entry only; *as if an infant* or feme covert with her husband *aliens* by charter of feoffment *in mortmain*, this is no bar to the infant, or feme covert. But if a recovery be had against an infant or feme covert in an action of waste, they are bound and barr'd for ever. Co. Litt. 233. b.

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5. Whether *the king* shall be bound by a condition see a long argument. Hardr. 10 Mich. 1655. in the Exchequer, Newman v. Phillips.

(I. a. 2) Who bound. By Agreement to the Estate.

1. *THREE infeoffed* by deed, and there were several *covenants in the deed* on the part of the feoffees, *two only sealed the deed*, yet because the 3d entred and agreed to the estate conveyed by the deed, he was bound in writ of covenant by the sealing of his companions. Arg. 2 Roll. R. 63. cites 38 E. 3. 8. Br. Estranger al Fait, pl. 23. cites 50 E. 3. 22.—3 Bulst. 163. S. P.

2. Lease *to A for his life*, the *remainder in fee* to B. upon condition &c. and if A. seals the indenture, and dies, and B. enters into the land by force of his remainder, he is tied to perform all the Br. Estranger al Fait, pl. [illegible]. cites 50 E. 3.

22. and this Sect. of Litt. and cites also 38 E. 3. 8. that if a man makes

conditions, as the tenant for life ought to have done in his life-time, and yet he in the remainder never ſealed any part of the indenture; in as much as he entred and agreed to have the lands by force of the indenture, he is bound to perform the conditions within the ſame, if he will have the land. Litt. S. 374.

a feoffment by deed-poll upon condition, and feoffee pleads the deed and ſhews it the feoffor, upon this ſhewing ſhall take advantage of the condition, and plead it; ſo if the feoffor can get the deed, without its being pleaded by the feoffee, the feoffor may plead it, and yet it belongs to the feoffee.——3 Bulſt. 163. S. P. Arg. cites Litt. & 59 [50] E. 3. 22.

3. If A. by deed indented between him and B. lets lands to B. for life, the remainder to C. in fee, reſerving a rent; tenant for life dies, he in the *remainder enters* into the lands, he ſhall be bound to pay the rent. Co. Litt. 231. a.

4. An indenture of leaſe is ingroſſed between A. of the one part, and D. and R. of the other part, which purports a demiſe for years by A. to D. and R.—A. ſeals and delivers the indenture to D. and D. ſeals the counterpart to A. but R. did not ſeal and deliver it; and by the ſame indenture it was mentioned that *D. and R. did grant to be bound* to the plaintiff in 20l. in caſe that *certain conditions* comprized in the indenture were not performed; and for this 20l. A. brought an action againſt D. only, and ſhewed the indenture; the defendant pleaded that 'tis proved by the indenture, that the demiſe was made to D. and R. which R. is in full life, and not named in the writ; judgment of the writ; the plaintiff reply'd, that R. did never ſeal &c. and ſo his writ good againſt D. ſole. The plainttff's counſel took a *diverſity* between a *rent reſerved*, which is parcel of the leaſe, and the *land charged* therewith, and a *ſum in groſs*, as here the 20l. is; for as to the rent they agreed that by the agreement of R. to the leaſe, he was bound to pay it, but for the 20l. that is a *ſum in groſs, and collateral to the leaſe*, and not annexed to the land, and grows due only by the deed, and therefore R. ſaid he was not chargeable therewith, for that he had not ſealed and deliver'd the deed, but in as much as he agreed to the leaſe, which was made by indenture, he was chargeable by the indenture for the ſame ſum in groſs, and for that R. was not named in the writ, it was adjudged that the writ did abate. Co. Litt. 231. a.

[120] (K. a) *Who* may *perform* it.

[1. IF 2 *are infeoff'd to re-infeoff*, if *one refuſes to re-infeoff*. the other cannot perform the condition by a feoffment of the whole: Contra 49 E. 3. 16. b.]

[2. If the condition of an *obligation* be *to pay a leſs ſum*; if my *ſervant by my command*, tenders it to the obligee, this is ſufficient. 2 H. 6. 3. b.]

3. Debt upon obligation with condition *that if the feoffees* of J. C. or J. C. *by ſuch a day grant* 40 *s. per ann. to the obligee*, that the obligation ſhall be void, and *ſaid that A. and B. his feoffees granted*

granted &c. The *plaintiff said that A. B. and C. were his feoffees, and C. did not grant.* And by all the juſtices the condition is not performed; for there is no diverſity between theſe words, *his feoffees*, and *all his feoffees*; quod nota. Br. conditions, pl. 56. cites 21 H. 6. 10.

4. If *annuity* be granted by J. abbot of D. *till the grantee be promoted to a competent benefice by the ſame abbot*, tender of the benefice *by his ſucceſſor*, is not good. *Contra if it had been by (the) abbot of D.* and (J.) had been omitted. Br. conditions, pl. 214. cites 15 H. 7. 1.

5. If I covenant *that my eldeſt ſon ſhall marry your daughter by ſuch a day*, and *he dies before the day*, the 2d ſon who now is eldeſt cannot perform the condition. Per Audley Chancellor. Br. conditions, pl. 7. cites 27 H. 8. 14, 15.

6. If a man *infeoffs* 2 *upon condition that they infeoff W. N. before Michaelmas*, and *one dies*, and the other alone makes the feoffment, this is good. Br. jointenants, pl. 62. cites Paſch. 33 H. 8.

7. M. ſeiſed in fee made a *feoffment upon condition, that if he or his heirs pay* 100 *l. ſuch a day to re-enter*; *M. died, his ſon and heir within age*; the *mother* of the infant, *without the privity of the infant, and who was not guardian in ſocage, in the name of the infant, tender'd the money at the day*; it was adjudged an inſufficient tender; otherwiſe if the jury had found the infant under 14, and that ſhe had been his guardian in ſocage, or if he had been found upwards of 14, and that he aſſented to the tender, it would be ſufficient. Mo. 222. pl. 361. Hill. 28 Eliz. Watkins v. Aſhwell. Le. 34. pl. 43. S. C. reſolved per tot. Cur. accordingly, becauſe the *jury found him at the time of the tender within age generally*, and not particularly of 6 or 10 years, &c.——Ow. 137. S. C. & S. P. agreed accordingly.——Cro. E. 232. pl. 7. is a ſhort note of S. C.——2 Le. 213. in pl. 268. S. C. cited.——Win. 118. cites S. C. that if an heir is bound to perform a condition, then a ſtranger may not perform it, but any who had an intereſt may, as guardian in ſocage or chivalry, &c.——Co. Litt. 206. b. S. P.—If a ſtranger of his own head, who has not any intereſt, &c. will tender the money to the feoffee at the day appointed, the feoffee is not bound to receive it. Litt. S. 334.——But if the mortgagee accepts it of the ſtranger, this is a good ſatisfaction, and the mortgagor or his heir agreeing thereto, may re-enter into the land; but the mortgagor may diſagree thereunto if he will. Co. Litt. 206. b. 207. a.

8. A *ſtranger* cannot *tender the money* to be paid *on a mortgage*; for it ought to be one who has intereſt in the land. Ow. 34. Trin. 31 Eliz. Winter v. Loveday. 2 Le. 213. pl. 268. B. R. S. C. held accordingly. In this caſe the mortgagee covenanted that W. upon re-payment of the money at Michaelmas, in ſuch a church-porch, ſhould have back all his evidences. At the day of payment C. a ſtranger ſent to L. to know if he would receive the money which W. ow'd him, at his houſe, who conſented; whereupon C. came there, and the money was told and deliver'd in bags to L. but ſome diſpute ariſing between W. and L. about ſome writings, C. ſaid that if they would not agree betwixt themſelves, they ſhould not have his money; whereupon W. requeſted C. that he might have the money to carry to his ſaid church-porch, which C. agreed to, and L. came thither to receive it, but W. would not pay it; by all which it appeared that it was not W's money, and for that reaſon the court held that it was not a ſufficient tender.

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9. If a man mortgage land to W. upon condition that *if the mortgagor and J. S. pay* 20 *s.* at ſuch a day to the mortgagee, that then he ſhall re-enter. The *mortgagor dies* before the day. *J. S. pays* the money to the mortgagee; this is a good performance of the condition, and yet the letter of the condition is not performed. But if the *mortgagor had been alive* at the day of payment, and he would

not pay the money, but refuſed to pay the ſame, *and J. S. alone had tendered* the money, the *mortgagee might have refuſed* it; So that tho' the mortgagor be dead, yet the act of God ſhall not diſable J. S. to pay the money, for thereby the mortgagee receives no prejudice. Co Litt. 119. b.

So if J. S. had died before the day, the mortgagor might have paid it. Co. Litt. 119. b.

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10. If the *heir is an idcot*, of what age ſoever, any man may make the tender for him in reſpect of his abſolute diſability, and the law in this caſe is grounded upon charity, and ſo in the like caſes. Co. Litt. 206. b.

5 Rep. 96. S.P. accordingly, and cites S. C. & notes a diverſity that the money ſhall not be paid to the aſſignee of the land without naming him in the condition, becauſe the payment goes in defeaſance of the inheritance; but it may be paid by the aſſignee in preſervation of his inheritance.——S. C. cited 4 Le. 176. by Manwood Ch. B.——S. C. cited by Manwood Ch. B. Mo. 336. in pl. 455.——And if if feoffee die his *executors* ſhall pay the money or his *heir*; ſo payment limited by the feoffor, *at a day certain*, his heirs or executors ſhall pay.——S. C. cited by Jones J. Lat. 28.

11. If *feoffee on condition to pay* 100 *l. to the feoffor on ſuch a day*, or otherwiſe the feoffment to be void, *makes a feoffment over to J. S. before the day*, in this caſe either J. S. may tender the money at the day, becauſe he has an intereſt in the condition, or the firſt feoffee may tender it for the ſafeguard of the eſtate of the 2d feoffee, becauſe the firſt feoffee was privy to the condition. Litt. S. 336.

12. Deviſe to A. and his heirs for ever, on condition that *A. pay B.* 100 *l.* within 6 months after his age of 21 years, and for default of payment he gives the ſaid lands to B. and her heirs, and if A. happen to die without iſſue, B.'s 100 l. being firſt paid, then *the remainder* of his eſtate *to be divided among my ſons and daughters*; A. dies without iſſue before 21 years, it ſeems the brothers and ſiſters paying the 100 l. before the time that A. would have been 21 had he lived, was a good performance. Raym. 425. Hill. 32 & 33 Car. 2 B. R. Wilſon v. Dyſon.

(L. a) *To whom* it may be performed.

Debt upon bond, conditioned *to deliver* 40 *pair of ſhoes*

[1. IF the condition of an obligation be *to pay* 10 l. &c. it is a good performance if he pays it to his *deputy*. 42 E. 3. 13. b.]

within a month, at Holborn-bridge, to H. K. a common carrier, for the uſe of the obligee, the defendant pleaded, that in all that ſpace of a month H. K. did not come to London, but that on ſuch a day, at Holborn-bridge, *he deliver'd* 40 *pair of ſhoes to A. G. the carriers porter*; the court (abſente North Ch. J.) held the plea good, and that ſuch conſtruction was to be made as was agreeable to the intent of the parties, and that the delivery to the ſervant was a delivery to the maſter. 2 Mod. 309. Trin. 30 Car. 2. C. B. Staples v. Alden.

2. Debt upon obligation with *defeaſance* by indenture, that *if C. at the coſts of the plaintiff recovered* 2 *acres* of land *againſt J. and after enfeoffed the plaintiff*, that then &c. and he *ſaid, that C. by commandment of the plaintiff enfeoffed W.* and held a good plea, quod mirum! becauſe contra T. * 12 H. 4. 23. of *things dehors* it ſhall be performed ſtrictly; but payment to the plaintiff, and payment to a ſtranger is all one. Br. conditions, pl. 24. cites 42 E. 3. 23.

*Br. Conditions, pl. 41. cites S. C. accordingly.

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3. If

3. If I *infeoff* J. S. upon condition, *that he ſhall infeoff ſuch as I ſhall name before Eaſter*, and I *name W. and after I name N.* the feoffee may infeoff which he pleaſes; per Littleton. Br. conditions, pl. 154. cites 14 E. 4. 2.

4. Debt upon *obligation of* 20 *l.* upon condition *to pay* 10 *l.* the defendant *ſaid, that ſhe paid* 5 *l. to the plaintiff's bailiff by his command, which came to the uſe of the plaintiff*; this is a double plea, by which he relinquiſhed the coming to the uſe, and then a good plea. Br. conditions, pl. 181. cites 22 E. 4. 25.

5. A. makes feoffment on condition, that *if A. pay* certain money *to feoffee*, before ſuch a day, *or to his executors or aſſigns*, that then he may enter. Before the day *feoffee makes feoffor his executor*, and by the ſame teſtament *gives all his goods and chattles to his wife*, and dies; this was thought no releaſe by 3 juſtices againſt 1; and Dyer thought that payment might be made to the wife; Weſton thought, that if there ſhould be any payment it ſhould be to the heir who is not aſſignee. Mo. 58, 59. pl. 166. Paſch. 6 Eliz. Anon.

6. Debt upon obligation, conditioned *to pay* money *to the obligee and others the pariſhioners of D.* at ſuch a feaſt. *Payment to the obligee and 2 other of the pariſhioners* of the pariſh is good; Dyer and Walſh held that it is not requiſite the payment be made to all the pariſhioners. Mo. 68. pl. 183. Trin. 6 Eliz. Anon.

7. In debt the condition was *to pay* 100 *l. to C. and his wife*, and by all the court, if he pleads *payment to C. alone*, it *ſufficeth*, for payment to him alone ſufficeth without naming the wife. Goldſb. 73. pl. 16. (20.) Mich. 29 and 30 Eliz. Mary v. Johnſton.

8. A. was bound *to B. to the uſe of C. to deliver a cheſt* to C. who refuſed to receive it upon the tender at the day; the obligation was ſaved. Cro. E. 755. per Glanvill, cites it as the caſe of Carne v. Savery.

9. A. was *bound to B. to the uſe of C.* A tender to C. is good. Cro. E. 754. pl. 18. Paſch. 42 Eliz. C. B. Hughs v. Phillips. Yelv. 38. Paſch. 1 Jac. S. C. & S. P. admitted by judgment, and judgment affirm'd.——Cro. J. 13. pl. 17. Phillips v. Hugre, S. C. and S. P. admitted by judgment, and judgment affirmed in B. R.

10. If I bind myſelf *to pay money to 2 actually, I cannot pay it but to one*; becauſe I cannot pay one and the ſame ſum to 2 ſeveral perſons at one and the ſame time; per Glin. Ch. J. 2 Sid. 41. Hill. 1657. in caſe of Abbot v. Biſhop.

(L, a. 2) Performed. How. And to whom: Cy-pres. After Death, &c. of any.

1. IN aſſiſe the caſe was, that a man *infeoff'd* 2 upon condition *that they re-infeoff him and his feme in tail*, the *remainder to the right heirs of the baron*. The *feme took another baron*; the *feoffees infeoff'd the ſecond baron and the feme for the life of the feme*, the *remainder to the right heirs of the firſt baron*, by which, becauſe

the eſtate was not made to the feme in tail, according to the condition, and alſo the ſecond baron was infeoffed, which is contrary to the condition, the heir of the firſt baron enter'd, and the feme [123] ouſted him, and he arraigned aſſiſe; and by advice of all the juſtices, it was awarded that the condition was well performed; quod nota; and as to the eſtate for life, Littleton agrees to it in his Chapter of eſtates. But Brook ſays *miror!* that the 2d baron had eſtate; for this is *contrary to the condition.* Br. Conditions, pl. 33. cites 2 H. 4. 5.

S. P. And the eſtate ſhall be to the iſſues in tail, according to the firſt limitation of the tail, for

2. *But* if the condition had been *that J. S. ſhall make a gift to R. G. and his feme, and to the heirs of their two bodies begotten,* and *the one dies without iſſue,* [*before any eſtate made*] he ſhall make eſtate to the other for life without impeachment of waſte; for he ſhall make it as near the condition as he can. Br. conditions, pl. 70. cites 15 H. 7. 2.

though he cannot perform the condition according to the words, yet it ſhall be performed according to the intent. Pl. C. 291. a. cited Trin. 7 Eliz. in the caſe of Chapman v. Dalton.——S. P. and ought to be as near to the intent of the condition as it may be. Litt. S. 352.——This eſtate to the wife for life ought to be made without impeachment of waſte, and yet if the wife accepts of any eſtate for life without this clauſe, without impeachment of waſte, it is good, becauſe the eſtate for life is the ſubſtance of the grant, and the privilege to be without impeachment of waſte is collateral, and only for the benefit of the wife, and the omiſſion of it only for the benefit of the heir. Co. Litt. 219. b.——The omiſſion of the privilege being without impeachment of waſte ſhall not give the heir of the feoffor, for whoſe benefit it was omitted, a re-entry which would defeat the eſtate of the wife. Hawk. Co. Litt. 304.——Alſo if the wife marries before requeſt made, and then they make requeſt, and the eſtate is made to the huſband and wife, during the life of the wife, this is a good performance of the condition, albeit the eſtate be made to the huſband and wife, where Littleton ſays it is to be made to the wife, but it is all one in ſubſtance, ſeeing that the limitation is during the life of the wife. Co. Litt. 219. b. 220. a.

3. Here is to be obſerved a *diverſity when the feoffee dies,* for then the condition is broken, *and when the feoffor* dies, for then the eſtate is to be made as near the condition as it may be. Co. Litt. 219. b.

4. And if the *huſband and wife have iſſue and die* before the gift in tail made to them &c. then the feoffee ought *to make an eſtate to the iſſue* and to the heirs of the body of his father and his mother begotten, and for default of ſuch iſſue &c. the remainder to the right heirs of the huſband &c. and the ſame law is in other like caſes; *and if ſuch a feoffee will not make ſuch eſtate* when he is reaſonably required by them which ought to have the eſtate by force of the condition &c. then may the feoffor or his heirs enter. Litt. S. 353.

The reaſon why the habendum is to the heirs of the ſurvivor, and not to the heirs of

5. If a feoffment be made upon condition that the feoffee *ſhall re-infeoff ſeveral men,* and their heirs, and they all *die before any eſtate made,* then ought the feoffee *to make eſtate to the heir of him which ſurvives,* to have and to hold *to him and to the heirs of the ſurvivor.* Litt. S. 354.

the heir, is becauſe if the habendum were made to the heirs of the heir, then ſome perſons by poſſibility ſhould be inheritable to the land, which ſhould not have inherited if the eſtate had been made to the ſurvivor and his heirs, and conſequently the condition be broken; for if it were to the heirs of the heir, then the blood of the mother &c. might by poſſibility inherit, which never ſhall, if the limitation be to the heirs of the ſurvivor, &c. Co. Litt. 220. b.

(M. a) *To whom* the Condition ſhall be ſaid to *extend* to be bound by it.

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[1. IF a man *deviſes* lands *to H. his ſon, and the heirs of his body*, the *remainder to T. and the heirs male of his body*, upon condition *that he or they, or any of them ſhall not alien*, diſcontinue, &c. this condition ſhall *extend only to reſtrain T.* and the heirs male of his body, and not H. and his heirs. Co. 5. *Lord Cheney*. 68. reſolved.] Mo. 727. pl. 1014. S. C. & S. P. but nothing ſaid by the court.

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[2. If a man *leaſes* lands for years, upon condition that the *leſſee nor his aſſigns ſhall not alien* the term *to any but* to *one of his brothers*, and after the leſſee aliens to one of his brothers; this aſſignee is not within the condition, but he may alien to whom he pleaſes. Mich. 12 Jac. B. R. Tr. 14 Jac. B. R. between *Whitchcock and Fox*, per Coke.] Cro. J. 398. pl. 4. S. C. and all the court were of that opinion. ——Roll. Rep. 68. pl. 12. Hitchcock v. Fox.

S. C. adjornatur.——Ibid. 389. pl. 4. Trin. 14 Jac. B. R. S. C. and Coke Ch. J. thought that the aſſignment to one of the brothers purſuant to the condition has diſcharged all the condition, and the eſtate is then abſolute without any condition.——2 Bulſt. 296. Fox v. Whitchcocke. S. C. & S. P. per Coke Ch. J. and judgment for the plaintiff accordingly.

3. Conditional deviſe in fee by baron to his wife, who takes other baron, and the *ſecond baron breaks* the condition, yet it is no forfeiture. See Mo. 92. pl. 229. Trin. 10 Eliz. Anon.

4. A. deviſes land *to his mother for life*, and after her death *to B. his brother in fee, proviſo* that if his wife (being enſeint) be delivered of a ſon, that then it *ſhall remain* to ſuch ſon in fee, and dies. A ſon is born; and it was held that this proviſo does *not deſtroy the mother's eſtate*, but the eſtate of B. only. D. 127. pl. 53. Marg. cites 33 Eliz. C. B.

5. Lands were leaſed on condition, that leſſee, his executor or aſſigns ſhould not alien without leave of the leſſor. If *execution of ſuch leaſe* be made by reaſon of judgment, or recognizance, one juſtice held, he that has it may aſſign it over; but, per another juſtice, the execution itſelf is a forfeiture, which the reporter thinks hard. And. 124. Trin. 25 Eliz. in the caſe of Moor v. Ferrand. Le 7. pl. 6. S. C. Mead. & Periam J. held that this is not an alienation againſt the condition.

6. A leaſe for years is made upon condition, that *leſſee, his executors or aſſigns, ſhall not alien* without aſſent of the leſſor. The leſſee dies inteſtate; the ordinary grants *adminiſtration to J. S. who aſſigns* the term without licence; adjudged, that the condition is broken, for he is an aſſignee in law. Cro. E. 26. pl. 4. Paſch. 26 Eliz. C. B. More's caſe. Le. 3. pl. 6. Moor v. Farrand S.C. but no judgment, and Periam J. held, that the adminiſtrator is not

within the penalty of the condition, becauſe he is not in merely by the party, but by the ordinary.—And. 123. pl. 172. S. C. 3 of the judges held, that the adminiſtrator was aſſignee, and ſo the condition broke within the words and the intent; but the other judge held e contra.——Dal 83. pl. 29. 14 Eliz. S. P. and it ſeemed that the condition was not broken, becauſe an adminiſtrator is not aſſignee, but ſervant to the ordinary, but comes in en le poſt. Dyer ſaid, that he is aſſignee in law, but not in fact; and he thought the words would extend to an aſſignee in law, becauſe they ſhall be taken ſtrictly, and ſo he apprehended that the condition was broken.——Leſſee covenanted not to lop, or top any trees, and afterwards died inteſtate; his adminiſtrator lopped the trees. The court held, that this was a breach of the covenant, for he is aſſignee as well as executor; and though at common law he was not, yet now by the ſtatute he is made to all purpoſes as executor; And Weſton ſaid, that adminiſtrator in this caſe is charged in this caſe as well as an executor would be, becauſe they have the term

term to the uſe of the teſtator [or inteſtate]. Mo. 44, 45. pl. 136. Mich. 5 Eliz. Anon.———Dal. 46, 47. pl. 4. S. C. in totidem verbis.

2 Le. 38. pl. 51. S. C. and the opinion of the court was, that here is a limitation, and not a condition, and the entry of the eldeſt held unlawful, and the youngeſt ſon

7. A. *deviſed part of his land to B. his eldeſt ſon in tail, and another part to C. his youngeſt ſon in tail, provided that if any of his children alien or demiſe any of the lands to them deviſed before they come to the age of* 30 *years, then the other ſhall enter.* A. died. *B. demiſed* his part before his age of 30 years, and C. entred, and afterwards demiſed the ſame for years *before his age of* 30 *years*, whereupon B. reentred on the leſſee. The queſtion was, whether by the entry of C. the land is abſolutely diſcharged of that firſt limitation, ſo as B. the eldeſt ſon cannot enter upon C. the youngeſt for this alienation by him? Quære. Mo. 271. pl. 424. Hill. 30 Eliz. C. B. Spittle v. Davis.

after his entry ſhall hold the eſtate diſcharged of the proviſo, or * any limitation therein contained. —Ow. 8. Spittle's caſe, S. C. held accordingly per tot. Cur. and judgment accordingly.———Ibid. 55. S. C. in totidem verbis.

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2 Le. 48. pl. 62. S. C. in totidem verbis, and judgment was enter'd accordingly.

8. The *huſband gave lands to his wife during the minority of his ſon, upon condition that ſhe ſhould do no waſte.* The *huſband died*, and the *widow married again*, and died, and this *2d huſband committed waſte.* It was held by the whole court to be no breach of the condition. 2 Le. 35. pl. 46. Hill. 33 Eliz. C. B. Cobb v. Prior.

———Lat. 20. cites S. C. and that it was therein adjudged, that a condition to avoid an eſtate ſhall be taken ſtrictly.

9. *A.* being *ſeiſed of a manor and lands* in fee, *made a feoffment to D.* &c. *to the uſe of himſelf in tail male, remainder to E. in tail, provided that E. or any in whom the inheritance in tail of all the premiſſes ſhall happen to be, ſhall pay to the daughter of A.* 200 *l. P. being in poſſeſſion of part of the lands never attorn'd.* Popham and Anderſon Ch. J. agreed that the remainder-man in tail is not bound by this condition, for that was, that he who ſhould have the inheritance in tail of all the premiſſes ſhould pay &c. whereas *that which was in the poſſeſſion of P. did not paſs for want of attornment*, becauſe a condition is to be taken ſtrictly. Poph. 102. Hill. 38 Eliz. Slaning's caſe.

Noy 56. S. C. but reports the covenant to be made by the leſſee of A. to his aſſignee of the leaſe.

10. A. in tail, the reverſion in fee to the queen, lets the land for 21 years by indenture, and covenanted *that the leſſee ſhould enjoy* it *againſt all perſons without interruption of any beſides the queen, her heirs and ſucceſſors, being kings or queens of England.* The *queen granted the reverſion to W.* and then A. died without iſſue. W. enter'd and ouſted the leſſee, who brought covenant, and adjudged that it did lie, for none are excepted but the queen, her heirs and ſucceſſors, and not her patentees. Cro. E. 517. pl. 43. Mich. 38 & 39 Eliz. B. R. Woodroffe v. Greenwood.

2 Roll. Rep. 286. S. C. the court inclin'd that it was a breach of the covenant, and

11. A. made leaſe for 21 years to B. and covenanted *that the leſſee ſhould enjoy it during the term, without the let or diſturbance of him, his heirs, or aſſigns, or any other perſon, by or thro' his means, title, or procurement*, and in covenant the *plaintiff ſet forth, that before the ſaid leaſe was made to him, Ld P. granted the lands to A. and to M. the defendant his wife, and to the heirs of A. and averr'd that*

it

it was by fine levied by the means and procurement of A. and that A. was dead, and M. turned him out of poſſeſſion; it was *objected, that the wife derived no title from her huſband, the covenantor, but from the Lord P. and that this covenant extends only to titles derived under A. and after his eſtate created*; but adjudged that in regard there was an averment, that tho' the wife claims by a title derived from Ld. P. the conuſor, yet ſhe is in and claims by means of A. her baron, the leſſor, and it was by his procurement that the fine was levied, and if that had not been levied, ſhe would have had no eſtate, and conſequently is within the covenant, tho' ſhe claims by title derived from another. Cro. J. 657. pl. 7. Hill. 20 Jac. B. R. Butler v. Swinnerton.

eſpecially by reaſon of the averment; ſed adjornatur. —— Pal n. 339. S. C. reſolv'd by Ley Ch. J. Doderidge and Haughton (abſente Chamberlain) that the condition was broken; for the words (by his means and procurement) have a large extent; and judgment accordingly.

12. A. *leaſes* land to *to J. S. upon condition, that if he paid him 3 l. per ann. for 5 years* next enſuing, *then the leaſe to be void*; and afterwards *gives a bond with condition to perform all covenants &c. and conditions* in the ſaid indenture of leaſe. Debt being brought upon the bond, the defendant *pleaded conditions performed.* The *plaintiff aſſigns a breach, that he had not paid the 3 l. per ann.* according to the condition in the leaſe. The *defendant demurs*, and the queſtion was, whether or no the condition of the bond was broken by not paying the 3 l. and it was argued for the defendant that it was not, becauſe the defendant had not covenanted to pay 3 l. but had it at his election, either to pay the money, or elſe let the land [or, that the leaſe ſhould ſtand good] but Hale ſeemed to incline that the bond was forfeited; for if the word conditions ſhould not relate to that clauſe of paying the 3 l. it would be void; and he ſaid, ſuppoſe the condition of the bond had been only to perform all conditions in the leaſe, certainly it muſt have related to that; and now, when it is for performance of all covenants and conditions, it will be as effectual; for ne word covenants ſhall relate to the covenants in the leaſe, and conditions to this condition. Sed adjornatur. Freem. Rep. 386. pl. 498. Hill. 1674. Anon. [126]

(N. a) *To what* Things it ſhall be ſaid to *extend.*

[1. IF a *man that hath certain walks* within a foreſt of inheritance, *gives one* walk called B. *to J. S. in tail*, and dies, and his *heir* recites the ſaid grant, and *confirms it, and by the ſame deed grants another walk* called S. in the ſame foreſt *to him and his heirs, proviſo*, that the ſaid *J. S. ſhall not cut any trees in aliqua parte premiſſorum in indentura prædict' ſpecificatorum*; the condition ſhall extend to the walk called B. ſo that if he cuts any of the trees in this walk, the grantor may enter for the condition broke, into the walk called S. for the word *premiſſes* comprehends as well that which is confirmed, as that which is granted. Tr. 41 Eliz. B. R. between *Evans and Labram* adjudged.] Cro. E. 781. pl. 19. the earl of Pembroke v. Symſ. Mich. 42 & 43 Eliz. B. R. ſeems to be S. C. and S. P. reſolv'd per tot. Cur. accordingly; for the word (premiſſa) extends

extends in this ſenſe to (præmentionata) and to avoid his entire grant, and adjudged for the plaintiff. ——S. C. cited 11 Rep. 51. a.——S. C. cited by Hobart Ch. J. Hob. 276.——S. C. cited by Coke Ch. J. Roll. Rep. 103.

Hob. 269. pl. 355. that S. C. ſays judgment was given for the plaintiff, contrary to the opinion of Hutton, who thought the condition was to be under-ſtood only by the words, of damage directly growing by the releaſe, and not by

[2. If *A.* be *in execution at the ſuit of B.* and *B. upon good conſideration affirms to J. S.* that *he will not diſcharge A. without his conſent*, and after *A. and B. agree that B. ſhall* make a *releaſe* to him of *the execution*, and deliver him, *and that A. ſhall enter into an obligation* with condition *to ſave harmleſs B. from all ſuits &c. that may ariſe upon the releaſe* of the ſaid A. being in execution at the enſealing thereof, at the ſuit of the ſaid B. in ſuch a ſum, from all perſons which may any way trouble the ſaid B. *touching or concerning the ſaid releaſe*, that then &c. and after all this is done accordingly, and J. S. brings an action upon the caſe againſt B. upon his promiſe, and recovers, A. ought to ſave him harmleſs, otherwiſe the condition is broke, for this ariſes by reaſon of the ſaid releaſe, and ſo within the words, though the promiſe made to J. S. was the cauſe of the action of J. S. Paſch. 17 Jac. B. between *Wylden and Wilkinſon* adjudged.]

any collateral act dehors as this promiſe is; but the reaſon that moved the judges was, that this condition carried a forcible and apparent intent of ſaving harmleſs of ſome damage, which might ariſe, not upon the releaſe alone, but upon ſome external and collateral thing beſides the releaſe, and yet by the means and occaſion of the releaſe; for the words are (to ſave harmleſs, &c. from all perſons that might trouble him concerning the ſaid releaſe).

[127] 3. The condition of an obligation was, that the obligor *ſhould make appropriation of the church of Dale ſuch a day to ſuch a houſe, at his coſts and charges diſcharged of incumbrances*; there, altho' *there was a penſion* granted thereout to another, it was holden that the obligee was not bounden to diſcharge it of that penſion. Arg. 3. Le. 44. pl. 64. in caſe of Mountfield v. Cateſby, cites 3 H. 7. 4.

4. If a man leaſes his land for 20 years, upon condition that *the leſſee ſhall rake the ditches*, and *does not ſay how often*, there if he rakes them *once* he is excuſed for ever. Br. conditions, pl. 6. cites 27 H. 8. 6.

5. If a man makes a *feoffment* of his lands *with warranty*, and *covenants, that it is diſcharged of all rents*, there it ſhall *not extend to rent-ſervices*, which are incident to the lands of common right. Arg. 3 Le. 44 pl. 64. Mich. 15 Eliz. C. B. in caſe of Mountford v. Cateſby.

6. It was ſaid, that if one makes a *leaſe* for years, *rendering for the firſt 2 years 10 l. and afterwards 30 l. every year, with condition, if the rent of 30 l. or any payment of it be behind, that the leſſor enter*, the leſſor *enters for not payment of the 10 l.* that his entry is lawful, for the 10l. was parcel of the rent, for it was but one rent. 4. Le. 8. pl. 34. Hill. 27 Eliz. Holland v. Hopkins.

3 Le. 115. pl. 165. S. P. accordingly, in S. C. in tidem verbis.

7. If lands are given *to A. for life on condition, remainder to B. in manner aforeſaid*; theſe words (in manner aforeſaid) ſhall refer to the eſtate for life limited to A. and not to the condition, nor to any other collateral matter; per Fenner. 2 Le. 69. pl. 92. Trin. 27 Eliz. in caſe of Brian v. Cawſon.

8. If

8. If *aliqua lis, vel controverſia oriatur inpoſterum*, by reaſon of any clauſe, article or other agreement in the ſaid indenture contained, that then before any ſuit &c. the *parties ſhould chooſe four indifferent perſons* for the ending thereof &c. This extends not to the ſubmitting the breach of every covenant &c. but only where diſputes ariſe upon the conſtruction of any covenant &c. Le. 37. Trin. 28 Eliz. B. R. Parmort v. Griffins.

9. A. being *tenant in tail* of certain lands, *exchanged* the ſame *with B.—B. entred, and being ſeiſed in fee of other lands, deviſed ſeveral parcels thereof to others, and amongſt the reſt a particular eſtate to his heir, proviſo, that he doth not re-enter nor claim any other of his lands in the deſtruction of his will*, and if he do, that then the eſtate in the lands deviſed to him to ceaſe. A. dies; his *iſſue enters into the lands in tail, and waives the lands taken in exchange*, and before any other entry, *the heir of B. enters upon the land given in exchange*; and the opinion of the whole court was, that it was no breach of the condition, becauſe that was not the land of the deviſor at the time of the deviſe, therefore it was out of the condition. Godb. 99, 100. pl. 115. Mich. 28 and 29 Eliz. C. B. Barber v. Toppesfield.

10. Where the proviſo *is parcel of one ſentence, which contains a covenant*, or abridgeth the covenant, there it ſhall not amount to a condition but to an *exception*; as grant of a rent-charge proviſo that he ſhall not charge the perſon; ſo a leaſe without impeachment of waſte, proviſo that the leſſee ſhall not do voluntary waſte, the ſame abridges the liberty. Arg. 2 Le. 128. Mich. 29 Eliz. B. R. Scott v. Scott.

11. A leaſe is made of lands for years proviſo, that *leſſee ſhall not put his cattle on the land from Michaelmas to St. Andrew's tide*; per Dyer conditions are *ſtricti juris*, and conceived that the conditions ſhould be reſtrained to the firſt year, and ſhould extend no farther. Per Manwood, if I am bound that I will not go to London between Eaſter and Michaelmas, it ſhall not extend only to the firſt years after the date of the obligation, but for my whole life. 4 Le. 100. pl. 205. in time of Q. Eliz. [128]

12. The condition of an obligation was, that *if the obligor paid ſo much, then the obligation to be void*, or *otherwiſe it ſhould be lawful for the obligee quietly to enjoy* ſuch lands. The defendant pleaded, that the plaintiff had quietly enjoyed. The plaintiff demurred, intending that the condition depended only on the payment or non-payment, and that what concerned the land was idle. The court ſaid, that conditions ought to be taken according to the intent of the parties, if it can appear what that is; but as the words (then to be void) are placed here, it can refer only to what precede and not to the land, which follows; and it was ſaid, that the rule of grammar holds in our law, viz. that the words in the beginning or end of a thing refer to all, but that thoſe in the middle refer only to the middle; but they ſaid, that the intent of the parties doubtleſs was, that the obligee ſhould have either the money or the land, and therefore the court would adviſe, and recommended an agreement. Sid. 312. pl. 26. Mich. 18 Car. 2. B. R. Ferrers v. Newton.

2 Keb. 103. pl. 35. S. C. the court held the condition good enough and disjunctive, and (that it might be lawful to ter) implies, that the party would deliver up poſſeſſion, & adjornatur, —Ibid. 117. pl. 63. S. C. adjornatur, becauſe the court

court would not adjudge it for the plaintiff.——Ibid. 131. pl. 89. the court agreed, that judgment ought to be for the plaintiff, the words after the condition being inſenſible, and the parties not agreeing.

Lev. 272. Stokes v. Stokes S.C. but ſtates it only as of an action brought by B. alone, to whom the bond was given in truſt for others, and adjudged that his releaſe to the obligor of all demands on his own account, did not releaſe the bond.——S. C. cited Lev. 100, 101 ——2 Keb. 530. pl. 37. S.C. adjudged for the plaintiff.

13. *A. and B. brought debt upon a bond*, the defendant *pleaded the releaſe of B.* but *upon oyer it was of all actions &c. which he had &c. againſt the defendant upon his own account*; the plaintiffs *replied, that this bond was not taken upon his own account*; upon which iſſue was taken and found for the plaintiffs; it was moved in arreſt, that this was a frivolous iſſue, for the releaſe of one obligee diſcharged the bond; but the court ſeriatim delivered their opinions for the plaintiffs; for B. who gave the releaſe, might take the bond (and ſo the truth was that the bond was made to him and A.) as a ſecurity for a debt with which he was intruſted for another. Vent. 35. Trin. 21 Car. 2. B. R. Noke's caſe.

Sty. 18. Paſch. 23 Car. B. R. Stoughton v. Day, S.C. ruled accordingly, that the plaintiff Nil capiat per billam niſi. ——All.

14. In the condition of a *bond* it was recited, that a *ſheriff* had conſtituted defendant *bailiff of a hundred* in his county, if therefore the defendant *ſhall duly execute all warrants* to him directed, that then &c. It was adjudg'd, that the words *(all warrants)* ſhall be intended only all warrants directed to defendant as bailiff of the ſaid hundred, and not other warrants; per Twiſden J. 2 Saund. 414. Paſch. 24 Car. 2. in the caſe of Lord Arlington v. Merrick, as the caſe of Horton v. Day.

10. Paſch. 22 Car. B R. the S. C. reſolved, that though the words of the condition were generally to make returns of all warrants directed to him, yet it was to be underſtood of ſuch only as were to be executed within the hundred of which he was made bailiff.

2 Vent. 126. Dowſe v. Cale S. C. adjudged for the plaintiff, but Rooke-by J. doubted, it ſeeming to him to be all as one covenant, and ſo all the ſubſequent matter concerning leaving [129] the houſes well repaired, ſhould be reſtrained and underſtood of thoſe agreed to be built.

15. A. *leaſed three houſes to B.* for 41 years, rendring rent, and *B. covenanted to pull them down, and in the ſame place to build three new ſubſtantial houſes, and during* the ſaid term *well and ſufficiently to repair the ſame, and to yield up the ſame ſufficiently repaired at the end of the term.* B. inſtead of building three houſes only, built five, and permitted one of them at the end of the term to fall down. A. aſſigned a breach in not repairing one houſe built on the premiſſes; the defendant pleaded, that he pulled down three houſes, and built three more on the ground where they ſtood according to his covenant, which were kept in repair during the term, and left in repair at the end thereof, and concluded to the country. The whole court held that he by this covenant muſt keep and leave all the five houſes well repaired; for though in the firſt covenant he was bound to repair all the houſes agreed to be built (which were three) yet by the laſt covenant he is bound to repair dicti premiſſa ac domos ſuperinde erect' (not agreed fore erect' ſuperinde erect' but indefinitely) which extends to all the houſes which ſhall be built on the premiſſes within the term. Lev. 264. Trin. 1 W. & M. in C. B. Douſe v. Earl.

16. One *deviſes to his ſon by his ſecond wife in tail male, remainder to his eldeſt ſon by his firſt wife, provided that if the land ſhould come to his eldeſt ſon, then he or his heirs ſhould pay* 1000 *l.* to the teſtator's daughters, within four months after the eſtate ſhould come to them, and

and in default of payment the truſtees to enter and raiſe the money. The ſon by the firſt wife dies, leaving a ſon. The *ſon by the ſecond wife ſuffers a recovery of a moiety of the lands, and dies without iſſue*, ſo that the *moiety only of the premiſſes comes to the ſon of the ſon by the firſt wife.* Though no part of the premiſſes ever came to the eldeſt ſon, yet *the moiety* of the lands ſhall be *liable to the payment of the whole* 1000*l.* without any apportionment. 2 Vern. 359. pl. 324. Mich. 1698. Hooley v. Booth & al.

(O. a) When a Thing is limited to be done, *by whom collateral Things* which conduce to the Performance thereof *ſhall be done.* By whom they ſhall be done.

[1. WHERE a man is bound to do a thing, he ought to *do all* that *which depends thereupon* in the performance of the thing. 11 H. 4. 25. b.]

[2. *(As)* if the condition be *to levy a fine to the obligee*, and it is *not determined at whoſe coſts* it ſhall be done, it ſhall be at the coſts of him that ought to levy the fine, for this depends upon the other. 11 H. 4. 15. b. Cur.] Br. Coſts, pl. 9. cites S. C.

[3. *(And)* upon ſuch a condition, the *obligor ought to ſue* out a *writ of covenant in the name of the obligee*, and the obligee is not bound to do it. 11 H. 4. 25. b.] Br. Coſts, pl. 9. cites S. C.—— S. P. by Hutton J. Litt. Rep. 14 Hill. 2 Car. C. B.

[4. If the condition be *to levy a fine upon warning*, a *warning by the ſheriff upon a writ of covenant is not ſufficient*, (for perhaps he cannot know by this, whether it be to levy a fine or other action) *but it ought to be* upon warning *by the obligee* himſelf. 11 H. 4. 18.] Br. Conditions, pl. 39. cites S. C. ——Roll. infra (Y. c) pl. 2. cites 29 E. 3. 44. b. contra.

5. Debt on *bond* to pay money, *if A ſhall be then living, and ſhall before the 20th of May, by due form and courſe of law, perfect, levy, and acknowledge a fine* and a recovery before his majeſty's juſtices of C. B. of and in certain houſes and tenements, with the appurtenances, which the ſaid B. lately had and purchaſed of A. Defendant pleads that A. is living, and did not levy &c. and the queſtion on demurrer was, *if B. or A. ſhould levy* the fine? and held that B. ſhould levy it. Brownl. 76. Hill. 10 Jac. Manceſter v. Draper. S.C. reported by Roll at Parols (E) pl. 9. that the words (that he ſhall levy a fine and ſuffer a recovery) refer to the next antecedent, viz. A. though the words (if A. be then living) come in in a parentheſis.

6. If a man covenants *to convey lands*, it ought to be done *at the charge of him that covenants* to do it, except the contrary be agreed. Sic dictum fuit. Sty. 280. Trin. 1651. [130]

(P. a) Con-

Fol. 423. (P. a) Condition *for Assurance.* How it shall be performed.

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S. P. by Popham accordingly, quod curia concessit. Cro. E. 370. pl. 11. in case of Thornborough v. Mompesson, S. C.

[1. IF a man covenants *to make such* assurance of the manor of D. *as the counsel of the other shall devise*, and the *counsel devises that he shall be obliged in a certain obligation, that the other shall occupy* the manor *peaceably* &c. he is not bound to perform it, for this is no assurance within the intent of the covenant. Hill. 37 Eliz. B. R. per Curiam.]

——Lutw. 679. Arg. cites S. C.——Assumpsit in consideration of a sum of money paid to the defendant, he promised *to assure copyhold lands to the plaintiff in such manner as D. should advise*, who *advised that the defendant should make a surrender at the next court* &c. *and* should *enter into a bond of* 40 *l. to the plaintiff, for the enjoying the land against all persons*, which he had not done; adjudged per tot. Cur. that the breach in not entring into the bond was ill, because it was out of the assumpsit, and therefore the defendant is not bound to perform it. Cro. J. 115. pl. 1. Pasch. 4 Jac. B. R. Staynroide v. Locock.——Noy 124. Stanred v. Laycock, S. C. says, that the obligation is not part of the assurance, and was out of the reference to D. [but the report seems not very clear.]

S. P. by Popham, Cro. E. 370, 371. in case of Thornborough v. Mompenson

[2. [But] if a man be obliged *to do such acts* for the assurance of the manor of B. as the counsel of the other shall devise, and the counsel *devises* that he shall make an *obligation or statute that the other shall enjoy it*, he ought to perform it, otherwise he hath broke his covenant. Hill. 37 Eliz. B. R. per Popham.]

——Condition of a bond, that if the defendant do before Michaelmas *make, acknowledge, and suffer all and every such act and things, whatsoever they be, for the good assuring*, and the sure making of the manor of D. to J. S. and his heirs, that then &c. Here if the *plaintiff requests a fine, a feoffment, a recovery, a bargain and sale*, he ought to do all; for he is to make all and every act whatsoever for the assurance of the manor of D. *but* he is *not bound to make any obligation or recognizance for the enjoying of* the manor, for this is but a * collateral security, and not any assurance, and if the plaintiff request the defendant to convey the manor in generality, the defendant at his peril ought to do this by any kind of assurance, and if upon this request the defendant make a feoffment of the manor, yet if after this the plaintiff requests a fine, the defendant must acknowledge a fine also, and so *upon every several request he ought to make several assurances.* Yelv. 44, 45. Hill. 1 Jac. B. R. Pudsey v. Newsam.——Mo. 682. pl. 938. S. C. adjudg'd that general request is sufficient, and the obligor at his peril must do what is sufficient for the assurance.——Brownl. 84. S. C. but seems only a translation of Yelv.

* S. P. As to the not being compellable to give any collateral security, agreed per tot. Cur. Brownl. 93. Pasch. 5 Jac. in case of Stamford v. Cooke.——Cro. J. 115. pl. 1. Pasch. 4 Jac. B. R. Staynrode v. Locock, S. P. by the opinion of the whole court.

Cro. E. 370. pl. 11. Hill. 37 Eliz. B. R. Thornborough v. Mompenson seems to be S. C. It was moved,

[3. If a man covenants to make such assurance *as the counsel of the covenantee shall devise of an annuity of* 30 *l. and of* 200 *l.* in money, and the counsel *devises that he make an obligation* in which he shall oblige himself, his heirs, executors, and administrators, *to pay* to the other *the annuity, and also the* 200 *l. at certain days*, he is not bound to perform it; for this obligation is not any assurance of the annuity, dubitatur. Hill. 37 Eliz. B. R.]

that this was not within the covenant, because the devise was, that he should bind him and his heirs, whereas there is no word in the covenant that the heir should be bound; but the court gave not any answer thereto, and it was ended by arbitrement.

[131] [4. If A. covenants to make such assurance *for the payment of* 100 *l. to B. as his counsel* shall devise, and his counsel *devises* that A. shall

A. ſhall make *an obligation of* 1000 *l.* for the payment of 100 l. he ought to perform it. Hill. 37 Eliz. B. R. per Popham.]

[5. *But if* the covenant in this caſe had been *to make ſuch reaſonable aſſurance as the counſel of the covenantee ſhould deviſe*, it had been otherwiſe; for it is not reaſonable to make an obligation of 1000l. for the payment of 100l. Hill. 37 Eliz. B. R. per Popham. Godb. 445. 446. in pl. 513. cites 27 Eliz. S.P. by Popham.

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[6. If A. covenants with B. to make *ſuch reaſonable aſſurance* to B. in fee *of ſuch lands*, *reſerving* to A. and his heirs 20s. *rent* per ann. *as the counſel of B. ſhall adviſe*, and after *B. tenders to A. a deed-poll, by which A. infeoffs B.* of the land *in fee*, *reſerving the ſaid rent* to A. in fee; this is not ſuch reaſonable aſſurance to bind A. to ſeal; for this is a *rent-ſeck*, and the deed appertains to the feoffee, and then A. without the deed cannot have any remedy for the rent. Mich. 11 Car. B. R. between *Guppage and Aſcue*, per Curiam.]

[7. *But if* A. by indenture *grants* and ſells lands *without livery or inrollment* to B. in fee, *reſerving* 20s. *rent to him and his heirs, and covenants to paſs any further reaſonable aſſurance as the counſel of B. ſhall adviſe*, and after the counſel *adviſes a feoffment by deed-poll, reſerving the ſaid rent in fee*; this is a good aſſurance within the covenant, ſo that A. is bound to ſeal it; for there the reſervation does not depend only upon the deed-poll, but upon the indenture which directs the uſe of the feoffment, by which A. may recover the ſaid rent-ſeck without ſhewing the feoffment. Mich. 11 Car. B. R. between *Guppage and Aſcue*, per Curiam, upon a demurrer, but ordered the parties to make a new feoffment by indenture, rendring the rent. Hill. 10 Car. Rot. 1337. But after the parties could not agree, and ſo this judgment was given againſt the plaintiff, ſcilicet, againſt their opinion before, becauſe the deed tendered was a deed-poll, the which ſhould be after the execution thereof in the poſſeſſion of the plaintiff; and (*) then the defendant could not without the deed have his rent, not being able to prove the feoffment.] * Fol. 424.

[8. If the condition of an *obligation* be *to make the obligee or his aſſigns as good a leaſe as counſel could adviſe*, and after the *obligee* comes to the obligor, and *appoints him to make a leaſe to J. S.* he ought to make it accordingly, though *no counſel adviſed it*, but the obligee himſelf; for by the words it is not neceſſary to have the adviſe of counſel, but only that the leaſe ſhould be as good *as counſel could adviſe*. Paſch. 14 Jac. B. R. between *Allen and Wedgewood*, per Coke, but Dodderidge e contra.] Bridgm. 39. S. C. but nothing ſaid by the court as to this point.—3 Bulſt. 168. S. C. & ibid 170. S. P. by Coke Ch. J.——

Roll. Rep. 373. pl. 28 S. C. and Coke Ch. J. thought, that if the words had been, that he ſhould make as good a leaſe as *counſel ſhould deviſe*, he ought to have brought a leaſe drawn by advice of counſel; but that it ſeems otherwiſe here, becauſe the word is not deviſe, but adviſe.——— Mo. 595. pl. 811. ſame diverſity by Popham. Paſch. 35 Eliz. Stafford's caſe.———In ſuch caſe Ld. Anderſon ſaid, that if obligee deviſes the aſſurance himſelf, and makes it, the obligor is not bound to perform it; for he is only to make the aſſurance that the obligee's counſel ſhall adviſe, and not that which himſelf ſhall deviſe, and that it is a good plea that conſilium non dedit adv ſamentum. Cro. E. 9. pl. 1. Mich. 24 & 25 Eliz. C. B. in Bennett's caſe.

[9. If the condition be to *aſſure* certain *lands to ſuch perſons as the obligee ſhall name*, and after he *aſſures it to the obligee himſelf*; this is a good

a good performance of the condition, tho' it be not alledged that the obligee named himſelf, for this *acceptance is a nomination* of himſelf. Mich. 13 Ja. B. between *Howſego and Wild*, per Curiam.]

[132] [10. If the condition be to make ſuch aſſurance in the law of certain lands to the obligee, *as by the counſel* of the obligee *upon requeſt made ſhall be adviſed*, and after J. S. was of counſel with the obligee, and gave his *advice to the obligee, that the obligor ſhould make a certain aſſurance, and the obligee gave notice* to the obligor of of the ſaid advice, *and required him to perform it*, he ought to perform it, or otherwiſe the condition is broke; for it is more convenient that the counſellor ſhould give the advice to the obligee than to the obligor, for the obligor does not know whether he be of his counſel in this matter, for he may be of his counſel in one thing and not in another. Co. 5. * *Higgenbottom's caſe.* 19. b. adjudged. See † 11 h. 7. 21.]

* Cro. E. 298. pl. 9. Paſch. 35. Eliz. Staford v. Bottorne S. C. adjudged for the plaintiff. —Mo. 595. pl. 811. Staford's caſe. S. C. adjudg'd for the plaintiff. —† Br. Conditions, pl. 247. cites S. C. that the deviſe ought to be notified to him who is to make the eſtate.—5 Rep. 20. a. cites S. C. as held by all the juſtices. 11 H. 7. 21. that the counſel ought to be given to him who is to make the eſtate, and not to him with whom he is counſel; but that upon conſideration of the book, and of the reſidue of the caſe after 11 H. 7. 23. b. it appears plainly otherwiſe, and ſo it was reſolved in Higginbottom's caſe.—But if the party himſelf notifies other advice to him, who was to make the eſtate, than the counſel gave, if the covenantor knows of it he may refuſe, if he does not know of it, and the counſel notified it according to his covenant and agreement, and he performs it, he is excuſed; and if it be not according to his covenant he may refuſe it, and ſo no miſchief to the party. 5 Rep. 20. Paſch. 35 Eliz. B. R. in Higginbottom's caſe.

* And. 53. pl. 132. S.C. but I do not obſerve S.P. there.— S.C. & S.P. cited and held that the obligation was forfeited; for when he knew the laſt inſtant of the time, he ought to have had his counſel there ready with him. 4 Le 63. in pl. 156.—Bendl. 228. pl. 260. S. C. and the pleadings.

[11. If the condition be to make ſuch aſſurance, &c. to the obligee *as the obligee ſhall deviſe*, and after the *obligee deviſes an indenture, &c. and tenders it* to him, and *he requires time to ſhew it to his counſel* to be adviſed thereupon, which is denied to him, yet if he does not ſeal it preſently the condition is broke, becauſe the *condition is peremptory*, ſcilicet, to be performed preſently. D. 16 Eliz. 338. S. 39. between * *Wooton and Cooke*; Co. 2. † *Manſers.* 3 adjudged.]

† 4 Le. 62. pl. 156. Hill. 26 Eliz. C. B and S. C. the aſſurance was condition'd to be made the 1ſt of Jan. and on 31ſt of Dec. before ſun-ſet the obligee came to the obligor with a deed ready to be ſeal'd, and required the obligor to ſeal it, who ſaid he would ſhew it to his counſel, and then he would ſeal it; the court held the obligation forfeited.—Mo. 182. pl. 326. S. C. ſtates the condition to be, that the defendant and his ſon ſhould make ſuch aſſurance, and that the ſon (who was a ſtranger) refuſed it on account of illiteracy, and therefore required to ſhew it to his counſel. The juſtices doubted; but at another day Anderſon ſaid his opinion was, that the plea was not good.—See (I. b) pl. 4. S. C.—See (L. b) pl. 3. S. C.—4 Le. 190. pl. 298. cites S. C.—Mo. 143. pl. 284. Mich. 25 & 26 Eliz. Androſe v. Eden, S. P. exactly, held accordingly.—And. 122. pl. 171. S. C. & S. P. exactly.—S. C. cited Mo. 183. as agreed lately on the point of time being limited.

Roll. Rep. 71. pl. 13. Mich. 12 Car. B. R. by Doderidge Obiter, quod fuit conceſſum; per Coke.

[12. If a man *aſſumes to be obliged in an obligation to J. S. and an obligation is tendered, in which he, his heirs and executors are bound*, he ought to ſeal it, becauſe this is the *common courſe* to make obligations in ſuch manner, though the heir or executor was not named in the promiſe.' Mich. 12 Jac. B. R. per Coke and Dooderidge.]

—Cro. E. 371. pl. 11. Hill. 37 Eliz. B. R. the S. P. moved, but the court gave no anſwer thereto, and it was ended by arbitrement.

[13. If

[13. If a man be bound *to make a conveyance* of certain lands, if *a warranty or covenant* be put in the deed, he is not bound to seal it. Mich. 12. Jac. B. R. per Coke.] S.P. by Coke Ch. J. Roll. Rep. 71. in pl. 13.—— Le. 29. in pl. 34. Pasch. 27 Eliz. says it has been adjudged, that if B. be bound to A. in an obligation to assure to him the manor of D. &c. if A. tender to B. an indenture of bargain and sale, in which are many covenants, B. is not bound upon the peril of his bond to seal and deliver it.

[133]

[14. If a man *assumes to become bound with J. S. and J. D. to B. in a certain sum*, and B. tenders an obligation in which they should be *obliged jointly and severally*, he is not bound to seal this, for by the assumpsit a *joint obligation is intended*. Mich. 12 Jac. B. R. between *Malcot and Deane* adjudged.] Roll. Rep. 71. pl. 13. S.C. adjudged.—— 2 Bulst. 287. S. C. adjudged.

[15. *So* if a man assumes to become bound with J. S. and J. D. to B. *per hujusmodi scriptum and payable at such a time as two strangers should agree between them*, and the *strangers agree, that the obligation should be joint and several*, yet he is not bound to seal it; for by the promise, a joint obligation is intended, and the word *hujusmodi* gives no power to alter that which the law made joint, but only refers to the sum and time. Mich. 12 Jac. B. R. between *Malcot and Deane* adjudged. It seems that this exposition is most strict.] Roll. Rep. 71. pl. 13. S.C. adjudged; for the general words (Hujusmodi scriptum) shall not be referred to that which was certain before, but to that only which was uncertain, and that was the sum and the time.—But ibid. the reporter makes a doubt of this reason, and says, that (hujusmodi) imports rather the manner of the obligation, as whether it should be joint and several, than the sum or the time.—— 2 Bulst. 287. S. C. adjudg'd, but the (per hujusmodi scriptum) does not appear there.

[16. If a man covenant for further assurance to *levy a fine of all his land in D.* and at the time of the covenant he is *seised only of two* (*) in D. and *after two other houses descend to him*, and the covenantee *tenders him a fine of four houses* to be levied by him, he is not bound to levy it; for this will comprehend the other two houses, of which he is not bound to levy a fine; and though the use of these two houses which are not within the covenant shall be to the consusor, yet he is not bound to levy a fine of them; for perhaps he is tenant in tail of them, and this will dock the intail. Mich. 12 Jac. B. R. between *Wilson and Welch*, adjudged.] 2 Bulst. 317. S. C. adjudg'd.—— Roll. Rep. 103. pl. 42. S. C. adjournatur.—— Ibid. 127. pl. 1. S. C. adjudg'd per tot. Cur.——A. sold to B. 3 yard land, and covenanted for further assurance. A. tender'd a note of a fine. Two messuages, &c. were comprised more than were sold, or intended to be assured, and exception was taken, that the fine being tendred of more than he ought to levy, he is not bound to levy any fine at all; but the whole court to the contrary; for though the fine be levied of more than it ought to be it is not material; for of the residue it is the use of the consusor himself. Cro. J. 251. pl. 4. Mich. 8 Jac. B. R. Bouldney v. Curtis,—— Bulst. 90. S. C. the court held it good, and that it was done according to the usual form.—— Mo. 810. pl. 1066. S. C. but S. P. does not appear.—2 Bulst. 318, 319. Arg. cites S. C. as of a fine tendered of a house and 20 acres of land, and that defendant refused, and said, that he was seised of the house and 10 acres, and also of other 10 acres, which he did not sell, and that these 10 acres also were contained in the note of the fine, the which he never intended to pass, and therefore refused to acknowledge the fine; but resolved that the plea was not good.—— S. C. cited Roll. Rep. 117. as of a bargain and sale of all his lands in D. and a covenant for further assurance to levy a fine of them, and the fine tendered contained a house and a certain number of acres; and defendant pleaded, that at the time of the bargain he was seised of a house and 4 acres, which he sold, and this fine contained those [and more] being so many in number, but adjudged no good bar.——If the covenant is to levy a fine of 10 acres, and the fine contains more, it is not good; but otherwise where it is to levy a fine of all his lands in D. Coke and Doderidge said, the case of Bouldney v. Curtis, differed from this of Wilson v. Welch, for it is hard to put the certainty of acres; because by the measure of one man it may be more than by the measure of another, whereas here 4 houses may be well known from 5.

* Fol. 425.

[17. If the condition of an obligation be, that *if he makes* a good, perfect and *abſolute aſſurance in fee* to the obligee *of certain copyhold lands*, then &c. if *he after ſurrenders it upon condition of payment of money*, and the ſurrender is preſented accordingly, this is not any performance of the condition, becauſe the aſſurance ought to be abſolute without a condition. Paſch. 8 Jac. B. between *Riſbonne and Gary* per Curiam.]

[18. So if a covenant be with a purchaſor *to make further aſſurance*, if he make an *aſſurance upon condition*, this is not any performance of the covenant. Paſch. 8. Jac. B. per Curiam.]

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[19. If *A. in conſideration that B.* at the requeſt of A. *would ſurrender a copyhold* tenement, parcel of the manor of D. to A. in due form of law, according to the cuſtom of the manor, to the uſe of A. and his heirs, *aſſumes to B. to pay him* 20 *l.* in an action upon the caſe by B. againſt A. for the 20l. if he avers the performance of the conſideration, that he after, at the requeſt of A. *ſurrendered by a ſtraw to* one J. S. *(a cuſtomary tenant* of the ſaid manor) the ſaid tenement into the hands of the lord of the ſaid manor, according to the cuſtom of the ſaid manor, to the uſe of A. and his heirs, and yet the defendant A. had not paid the 20l. This is not a good performance of the conſideration which is a condition precedent, for he is bound to make an effectual ſurrender to the uſe of A. and his heirs at his own coſts, and he hath made a ſurrender here into the hands of a tenant of the manor, which *is a good beginning of a ſurrender, yet it is not a compleat ſurrender till it is preſented in court*, and he hath taken upon him to make a perfect ſurrender, and therefore he ought *to procure the tenant to preſent it at the court* according to the cuſtom, *and* to procure *a court to perfect it*, which does not appear to be done. T. 1651. between *Shan and Beilby*, adjudged. per Curiam this being moved in arreſt of judgment quod querens nil capiat per Billam. Intratur Hill. 1650. Rot. 1605. For if a man be bound to make a *feoffment* to me upon requeſt, if I requeſt him to make a deed of feoffment with a letter of attorney to B. to make livery to me, and he does it accordingly, this is a good beginning; yet if *livery is not made*, this is a forfeiture of the condition.]

Sty. 256. Shann v. Shann, 8 C. Roll Ch. J. held the ſurrender ineffectual, and orderedjudgment to ſtay till plaintiff move—— Ibid. 280. Shann v. Bilby, judgment niſi, &c.

Cro. E. 476. in pl. 4. Arg. cites S. P. as adjudg'd in Andrews's caſe.—— 20. If a man *bargains and ſells* 100 *acres of wood*, this ſhall be *meaſured according to the uſage of the country*, viz. according to 20 feet to the rod, and not according to the ſtatute. For conſuetudo loci eſt obſervanda. 6 Rep. 67. a. per Cur. cites 47 E. 3. 18. a.

But if one ſells land, and *is obliged [or covenants] that it contains* 100 *acres*, this ſhall be according to the law, and not according to the cuſtom of the country; per Gawdy J. Cro. E. 267. pl. 2. Hill. 34 Eliz. B. R.——Popham ſaid, that it had been reſolved by all the juſtices, that if one be obliged *to aſſure* 20 *acres of land*, the acres ſhall be accounted according to the eſtimation of the country where the land lies, not according to the meaſure limited in the ſtatute. Cro. E. 665. pl. 15. Paſch. 42 Eliz. C. B. Some v. Taylor.——See Tit. weights and meaſures, pl. 5. Morgan v. Tadcaſtle, and pl. 14. Barkſdale v. Morgan.

Fitzh. Dette. pl. 81. cites S. C.—— Perk. S. 775. [but it

21. If a man be obliged *to make to another a* ſure, *ſufficient and lawful eſtate*, in certain land, *by the advice of J. D.* here if *he makes an eſtate according to the advice of J. D.* be it ſufficient or not, lawful

lawful or not lawful, yet he is excuſed of the obligation. 5 Rep. 23. b. cites 7 E. 4. 13. b. should be 766.] S. P. and cites S. C.

22. Debt; a man was *bound* in 1000l. *to make ſuch eſtate by a day which the counſel of the plaintiff ſhould adviſe*, and he *ſaid that the counſel did not give advice*, and a good plea; and *ſo had he pleaded that no advice was given*, and becauſe he pleaded in the negative, he need not ſhew the names of the plaintiff's counſellors; but if the plaintiff replies, that the counſel did give advice, he ſhall ſhew their names. Br. pleadings, pl. 78. cites 6 H. 7. 4.

23. In an action of covenant brought, one of the covenants in the indenture was, that the defendant ought to make and ſuffer for the aſſurance of the plaintiff, all things that ſhould be deviſed by the counſel of the plaintiff, if he were required, and the defendant taking *proteſtation*, for *plea* ſaid that he was not required; to which the plaintiff replied, that J. S. was of his counſel, who deviſed a *releaſe*, which he required the defendant to ſeal, but he *refuſed* to do the ſame; to which the defendant *rejoined que ne refuſa pas*, and by all the court holden a departure, and that the defendant ought to have pleaded at firſt *non requiſitus fuit*; and the plaintiff in his replication needed not to have ſpoken of any refuſal, in as much as the defendant had pleaded in the negative quod non fuit requiſitus. Heath's Max. 48, 49. cites 28 H. 8. D. 31. [b. pl. 217.] [135]

24. A man by deed indented, *bargained and ſold land* unto another *in fee, and covenanted* by the ſame deed *to make to him a good and ſufficient eſtate* in the ſaid land *before Chriſtmas* next; and afterwards, *before Chriſtmas, the bargainor acknowledged the deed, and the ſame is inrolled*; it was the opinion of all the juſtices of C. B. that by that act the covenant aforeſaid was not performed, for the bargainor in performance of the ſame ought to have levied a fine, made a feoffment, or done other ſuch acts. 3 Le. 1. 2. pl. 2. 6 E. 6. in C. B. Anon. And. 27. pl. 61 Anon. but S. C. held accordingly.—— Bendl. 36. pl. 62. Anon. S. C. held accordingly.

25. *A. was bound* in a bond *to B. for performance of covenants*; afterwards *B. gave bond to A. conditioned to releaſe A.'s bond* to B. *as the counſel of A. ſhould adviſe*. A.'s counſel *adviſed that B. ſeal a releaſe of all demands to A. and to one W.* who was *a ſtranger to the covenant*, and averr'd that there was no other matter between them, but ſaid nothing of W. The court held clearly that the requeſt was unreaſonable, and that B. was not bound to ſeal the deed. D. 218. a. pl. 3. Mich 4 & 5 Eliz. Forteſcue v. Strode.

26. The condition of a bond was, that whereas the obligee had an eſtate for life, &c. by a leaſe made by A. B. if the obligor and his heirs do at all times *ratify, confirm, and allow the ſaid leaſe, and ſuffer the obligee to enjoy the premiſſes*, &c. that then, &c. In an action of debt brought on this bond, the defendant pleaded, that at all times after the making the bond, he has ratified, confirmed, and allow'd the ſaid leaſe, &c. The better opinion was, that the plea was ill, for he ought to have pleaded a confirmation in deed in writing, and ſo the party confeſſed the action, and wav'd the demurrer. D. 229. b. pl. 51. Trin. 6 Eliz. Anon.

27. An indenture of covenant between A. and B. in which A. *covenanted*, in conſideration of a marriage to be between his ſon and A. covenanted with B. to make

an assurance of a jointure to the same before Mich at the charges of B. Adjudg'd that *B. need not tender the charges,*

the sister of B. *that he, at the costs of his son, by his sufficient deed, would before Mich. assure land to his son, and B. did covenant if A. performed it, that then he would make a general release to him. A. before the day did not perform the covenant, because his son did not tender the costs and charges, yet if the conveyance be not made, B. is not bound to make a release.* D. 371. a. pl. 1 Mich. 22 & 23 Eliz. Rolt. v. Neale.

because it is uncertain what manner of assurance he will make; but otherwise if it had been certain, as by fine, &c. Per Cur. D. 371. Marg. pl. 1. cites Mich. 38 and 39 Eliz. C. B. Anon.—Ibid. says it was also resolv'd Pasch. 35 Eliz. in St. Albon's term.

If B. reports falsely to A. the advice of his counsel, yet if *A. performs it* according to B's report it is sufficient,

28. A. covenanted with B. *to make such assurance as B.'s counsel should advise.* B. must give notice of the assurance, and must shew it him, and permit him to read it, and go to his own counsel to *consider*, and A. is to have *convenient time* after the assurance shewn to him to perfect it. Cro. E. 9. Mich. 24 & 25 Eliz. C. B. Bennet's case.

and B. cannot vary from it, but has dispended with A. for any other. Cro. E. 299. pl. 9. Pasch. 35 Eliz. C. B. in case of Stafford v. Bottorne.

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29. The condition of an obligation was, *to perform covenants* in a pair of indentures, and *the covenant wherein the breach was assigned was, that if R. W.* brother of the plaintiff *should say, Make assurance of such a manor to the defendant as the counsel learned of the said defendant should advise, then if the defendant pays unto the plaintiff 50 l. the obligation to be void*; The *defendant, by advice of counsel, demanded a release with warranty*, &c. And by Periam and Windham, the same is not any assurance, but a means to recover in value; Anderson contrary, that it was a collateral warranty, &c. 2 Le. 130. pl. 172. Pasch. 27 Eliz. C. B. Wye v. Throgmorton.

Ow. 65. Mich. 36 & 37 Eliz. B R. Bagnall v. Porter, S. C. Coke was clear of opinion, that the bargainee ought to have sealed the acquittance and release, for unless the deed mentions the payment, the bargainee and his heirs may claim the land for default of payment; to which Gawdy agreed, and cited 19 E 4. but Popham doubted; but at last the matter was referred to arbitration.——D. 128. Marg. pl. 3. Mich. 36 Eliz. C. B. Reynell v. Proctor, S. P. and seems to be S. C. and reported according to Ow. 65.

30. J. S. the bargainee covenanted, *on payment of 100 l. at a certain day and place, to stand seised of the land to the use of A. the bargainor, and his heirs, and also to make such assurance for security of the land as should be devised by the counsel of A.* and entered into *recognizance to perform* the covenants. *A. paid the money before the day, and at another place*, and *after the day tender'd a deed to be sealed by J. S. containing the receipt of the money, and also a release of all his right in the land*, which J. S. refused to seal; The court doubted if by the refusal the recognizance was forfeited, because the acquittance for the money is not assurance of the land, and so not bound to seal the deed, comprehending this matter as not being pertinent to the assurance of the land; but the court held that the acceptance of the money at another place, and before the day, was sufficient to excuse the recognizance, as well as the covenant on which the recognizance depended. Mo. 366. pl. 502. Hill. 33 Eliz. Anon.

31. Debt

31. Debt upon obligation, the condition was *to make ſuch aſſurance as by the counſel of the plaintiff ſhould be deviſed*; the *plaintiff himſelf cauſeth ſuch an aſſurance to be drawn*, and put wax to it, and required the defendant to execute it, and he refuſed; It was the opinion of the whole court that it was no breach of the condition. Cro. E. 297. pl. 8. Paſch. 35 Eliz. C. B. More v. Roſewell.

5 Rep. 19. b. Roſewell's caſe, S. C. held accordingly, and that with this agrees 6 H. 7. and 11 H. 7. 21.

for if the party himſelf may deviſe it, then it will be no plea to ſay that conſilium non dedit adviſamentum.——S. P. adjudg'd contra Cro. E. 465, 466. (bis) pl. 20. Paſch. 38 Eliz B. R. Clifton v. Gibbon; for to have advice of counſel is only for the ſtrengthening of his aſſurance, and if the plaintiff at his own peril will inquire of it himſelf, the defendant ought to do it as he requires.

32. K. on 22 *Jan.* 38 *Eliz. promiſed to make ſuch aſſurance to B. of all his lands in Y.* as S. ſhould appoint. S. the ſame day appointed that K. ſhould make a bargain and ſale of all his lands in Y. *On the 14th Sept.* 39 *Eliz. K. tender'd to B. a bargain and ſale of all his lands in Y.* and whether B. was bound to execute it was the doubt. Gawdy and Fenner held that he was not bound, becauſe he might have other lands in Y. 14 Sept. 39 Eliz. which he had not at the time of the agreement, but Popham e contra, & adjornatur. Cro. E. 660. pl. 8. Paſch. 41 Eliz. B. R. Keeble v. Brown.

S. P. Cro. E. 682. pl. 12. Trin. 41 Eliz. B. R. in caſe of Waſhington v. Murden, and held by Popham and Clinch, that it ſhall not be intended that he had

more land, and that the aſſurance is well tendered, and that the defendant ought to ſeal it, unleſs he can ſhew that he had more lands afterwards purchaſed. But Gawdy held, that it ſhall be intended that he had no more land, but he doubted whether he was bound to ſeal it, becauſe it is variant from the covenant.

33. It was holden by Popham and Fenner, that if one be bound *to make ſuch aſſurance of all his land, as another will deviſe and require, if it be to be done at the coſts of the deviſor*, he may deviſe one aſſurance of one part, and another of another part of the land; but if it be at the coſts of him who is to make the aſſurance, the other can deviſe but a joint aſſurance for the whole land, unleſs it be neceſſary. Mo. 570. pl. 780. Trin. 41 Eliz. B. R. Waſhington v. Burgon.

34. If a man be bound *to make a feoffment in fee* to the obligee, and he *makes a leaſe and releaſe to* him and to his heirs, the condition is well performed, becauſe this in law amounts to a feoffment. Co. Litt. 207. a. [137]

35. Condition was, that huſband and wife being leſſees for life of land, ſhould *levy a fine to a ſtranger at the coſts of the ſtranger, and alſo that they ſhould levy a fine of other lands*, which they alſo held for their lives, *to a ſtranger, and at their charge.* Obligor pleads that huſband and wife offer'd to levy the fine, if the ſtranger, to whom the fine was to be, would bear the charges; obligee demurs; it was held that the levying the 2d fine has no reference to the 1ſt, becauſe they are *two diſtinct ſentences*, and the words (and alſo) make them ſo, and judgment pro Quer'. Brownl. 94. Paſch. 4 Jac. Hollingworth v. Huntley.

36. A man covenanted *to make further aſſurance upon requeſt, be it by fine*, &c. The *plaintiff delivered to him a note of a fine, and required the defendant to acknowledge the ſame before the juſtices of aſſize*, and he did not acknowledge it; the defendant demurred, becauſe

Bulſt. 90. S. C. & S. P. held per Cur. clearly, and they ſaid that fines

are uſually levied without any writ of covenant pending, as fines levied before the juſtices of aſſiſe.

cauſe *no writ of covenant was firſt brought or depending*; but adjudged that the covenant was broken, becauſe the acknowledgement of the note for a fine is an act preparatory for levying a fine, upon which a writ of covenant may afterwards be ſued out, and ſo it is an act for further aſſurance, though writ of covenant be not pending. Mo. 810. pl. 1096. Hill. 6 Jac. B. R. Boldney v. Curtis.

37. Debt on *bond* for performance of covenants in a deed in which 'twas covenanted, that vendor ſhould make further aſſurance *at the coſts and charges in the law of the purchaſor*. Breach alledged, that a *note of* a *fine* was deviſed and ingroſſed in parliament, and delivered to vendor to *acknowledge* the fine *at the aſſiſes*, which he refuſed to do and demurred to the breach, becauſe he did not offer *coſts* to the vendor, and the court held it to be idle. Brownl. 70. Paſch. 11 Jac. Preſton v. Dawſon.

Cro. J. 572. S. C. ſays it was held that the breach was not well aſſigned, but they would adviſe thereof, and afterwards being moved again, they all held their former opinion, That this aſſuranee with theſe covenants was not within the promiſe, and ſo the breach ill aſſigned, and adjudged it for the defendant. Coles v. Kinder.—See pl. 49.

38. The plaintiff offered to make *ſuch aſſurance* of certain land *as the plaintiff ſhould deviſe*, and the plaintiff deviſed aſſurance with *covenant for the enjoying* of it, and 'twas reſolved by Doderidge and Haughton J. (Mountague Ch. J. being abſent) without any ſcruple, that this was no aſſurance, for the covenant is collateral, and cannot be called an aſſurance; but Haughton J. ſaid, that aſſurance with *ſpecial warranty* may be under the name of aſſurance, though it is collateral. 2 Roll. R. 191. Trin. 18 Jac. B. R. Coales v. Kirmer.

2 Roll. Rep. 333. S. C. and Lee Ch. J. ſaid, that where the land is certain he need not ſhew his evidence to the counſel, nor of what eſtate he is to be ſeiſed, and he thought it would be the ſame where the land is not named, but that it is ſufficient to give notice of the land, and not to ſhew his eſtate in evidence; and Doderidge J. agreed to the firſt, viz. where the land is named, but not to the ſecond; and Haughton J. ſaid nothing.——But if a man is bound to make ſuch aſſurance of land as J. S. ſhall adviſe, he is *not bound to ſhew his evidence, but* he ought to ſhew the party where the land is and where it lies, and the *obligee muſt ſeek out the eſtate at his peril*; and then J. S. may adviſe conditionally, viz. if he has a fee ſuch an aſſurance, and if a tail ſuch an aſſurance, and if a remainder over then to deviſe a recovery; per Ley Ch. J. Godb. 339. in S. C.

39. L. covenants with G. *to make a jointure to his wife within one year* after marriage, of lands in England of the clear yearly value of 500l. ſo as A. and B. (two counſellors at law) ſhould deviſe and adviſe, L. muſt give notice to A. and B. what lands he intends to ſettle, and of what eſtate therein he is ſeiſed. The whole court held the plea not good. Godb. 338. pl. 433. Trin. 21. Jac. Gorge v. Lane.

[138] 40. *But* if the covenant be *to make a jointure* &c. *as the counſel of the covenantee ſhall deviſe*, he muſt give notice to the covenantee what lands he is determined to ſettle, and he muſt inform his counſel, per Doderidge. Godb. 339. Trin. 21 Jac. in caſe of Gorge v. Lane.

Another exception was, that there was not any writ of cove-

41. A. covenanted, *that he and his aſſigns, and all other perſons having right to the land, ſhould at all times within ſeven years, at the requeſt and coſts of B. the obligee, make, acknowledge, &c. all and every act* &c. *be it by fine or fines* &c. *or otherwiſe whatſoever, which*

which by his counſel ſhould be adviſed or required, and *ſhewed the advice and requeſt of a fine* by ſuch a counſel *and a ded. poteſt. to J. S. & W. R. to take the conuſance, but that the obligor being requeſted &c. refuſed.* Exception was taken, that he did not ſhew that the writ was delivered to the commiſſioners, and that it appeared by the fine pleaded that it was with warranty, and that if I covenant to levy a fine I may refuſe to levy it with warranty; by Jones J. the covenant is not to levy a fine, but to do ſuch acts as ſhall be required; and by him and Doderidge there is a difference between a covenant *cognoſcere finem*, and *levare finem*; and for the reaſons given by Jones and Doderidge the court was againſt the defendant. Lat. 186. Trin. 2 Car. Tindal's caſe.

nant pending; but by Doderidge the Ded. Poteſtatum may be ſued before the writ of covenant. Ibid. —It ought to have been pleaded, that a writ of covenant was ſhewn, and that the tender of the note of the fine is not ſufficient; but *the breach* of that covenant *ought to be laid after the Ded. Poteſt ſued by the plaintiff.* Agreed by Crooke and Yelverton only in court, and upon their advice the action was diſcontinued without coſts. Het. 105. Trin. 4 Car. C. B. Newton v. Sutton.

42. A. covenanted *to convey land to J. S. in fee*; in action brought for non-performance the defendant *pleaded, that J. S. did not ſhew what manner of conveyance he would have* &c. and upon demurrer it was adjudged for the plaintiff. Lat. 126. Paſch. 2 Car. Lucas v. Warren.

43. In debt upon an obligation to perform covenants in an indenture, there was a covenant that the defendant ought to *do ſuch an act, thing or things, as the plaintiff or his counſel learned ſhould deviſe*, for the better aſſurance of certain lands by himſelf to the plaintiff, and ſaid that a *counſellor adviſed* him to have *a fine*, and upon the declaration there was a demurrer; and upon the opening the caſe, Crooke and Yelverton being only preſent, agreed that it *ought to have been pleaded, that a writ of covenant was ſhewn*, and the tender of the note of the fine is not ſufficient, but the breach of the covenant ought to be laid after the dedimus poteſtatem ſued by the plaintiff; and upon their advice the action was diſcontinued without coſts. Het. 105. Trin. 4 Car. C. B. Newton v. Sutton.

44. If a man be bound to another *to make ſuch aſſurance* of lands *as the obligee ſhall deviſe*, it is not ſufficient for him to *deviſe a fine, and to take out a dedimus* &c. upon it, *and require his conuſance in that*, for this is but a ſpecial way of taking the conuſance; but if there were a *proviſo, that he ſhould not go above 5 miles from his houſe*, then if his houſe be above five miles from Weſtminſter, he is bound to make his conuſance upon the dedimus, and that he ſaid has been the difference; per Roll Ch. J. and ſo he ſaid it had been ruled. All. 69. Trin. 24. Car. B. R.

45. A. promiſes B. that within ſuch a time after marriage of his ſon to the daughter of B. A. and his ſon ſhould be bound *per ſcriptum ſuum debita juris forma fiend'*; the breach is laid that they did not give ſecurity *per ſcriptum ſuum obligatorium*, and adjudged good in B. R. and affirmed in error. Sti. 143. Mich. 24 Car. Tracy v. Poole.

46. Aſſumption *in conſideration* the plaintiff hath promiſed to pay the *defendant* 700 *l.* for the reverſion of a manor, the defendant promiſed

promiſed to ſeal two inſtruments for the aſſurance of it with warranty &c. according to *draughts between them before agreed*; &
[139] licet the defendant tendered him, 1ſt March, two inſtruments in writing *ſecundum tractationes præd'*, and the 3d March requeſted him to ſeal them, yet he hath not ſealed them, nor conveyed the reverſion of the manor; after verdict for the plaintiff upon non aſſumpſit it was *moved* in arreſt of judgment, 1ſt, *That he ought to ſhew the inſtruments* to the court that they may judge of them. 2dly, He does not ſhew, *that he tendred him wax, pen, ink* &c. as he ought. 3dly, The *requeſt* is not well made being *at another time, not when the tender was*. But judgment was given by all the court for the plaintiff; for, to the 1ſt, the inſtruments were agreed before, and therefore need not ſhew them to the court; to the 2d, There need not be any tender, for the defendant hath taken upon him to make it; to the third, The requeſt after the tender is the better, for ſo he hath time to read and conſider them; and Windham J. ſaid, where conveyances are before agreed, and to be ſealed according to ſuch agreement, ſo that there is no need of counſel, the defendant is to do it at his peril; and where one is to grant a reverſion he hath time to do it any time during his life, if it tamdiu continue a reverſion, if he be not haſtned by requeſt; here is a requeſt, and the conveyances being agreed, there needs no tender. Lev. 44. Mich. 13 Car. 2. C. B. Webb v. Bettel.

47. *But* if one be to ſeal a conveyance generally, there the counſel of the purchaſor is intended to draw them, and then the purchaſor muſt tender them; per Windham J. quære, for non fuit negatum ab aliquo. Lev. 44. Mich. 13 Car. 2. C. B. Webb v. Bettel.

Or I muſt ſhew him, whether I will do it in court or by dedimus.

48. If I am bound *to levy a fine* I may do it either *in court or by commiſſion*, but I muſt go *and know of the perſon* to whom I am bound *how he will have it*, and he muſt direct me. Mod. 62. pl. 4. Trin. 22 Car. 2. B. R. in caſe of Turner v. Benny.

Vent. 148. per Cur. obiter, Trin. 23 Car. 2. B. R.

Twiſden J. ſaid the law is alter'd ſince Cole & Kinder's caſe, as to covenants in a conveyance, if they are *reaſonable*, but not that he is ſeiſed of an abſolute eſtate in fee ſimple. Raym. 191. S. C.—Sid. 467. pl. 3. S. C. Twiſden J. inclined according to late books, that reaſonable covenants might be inſerted, and therefore he would adviſe; and judgment was given on another point.——See pl. 38.

49. An action of *covenant* for further aſſurance, the covenant being to make ſuch conveyance &c. as counſel ſhould adviſe; they alledge for breach that they *tendered ſuch a conveyance as was adviſed by counſel*, viz. a *leaſe and releaſe*, and ſet it forth *with all the uſual covenants*; Levins moved, that defendant is not obliged to ſeal any conveyance with covenants nor with a warranty; beſides, that which they have tendered has a *warranty not only againſt the covenantor, but one W.* Twiſden ſaid, he knew it hath been held, that if a man be bound to make ſuch reaſonable aſſurance, as counſel ſhall adviſe, *uſual covenants* may be put in; for the covenant ſhall be ſo underſtood, but there muſt be no warranty in it, though ſome have held, that there may be a warranty againſt himſelf, but I queſtion whether that will hold; but Weſton on the other ſide ſaid, that the objection as to the warranty was fatal, and he would not make any defence. Mod. 67. pl. 15. Mich. 22 Car. 2. B. R. Laſſells v. Catterton.

50. A co-

50. A. covenanted *to convey all his lands in B.* and a *conveyance tendred was of all his lands in the lordſhip of B.* and exception was taken thereto; but Twiſden J. ſaid he thought they ſhould intend them to be both one. Mod. 67. pl. 15. Mich. 22 Car. 2. B. R. Laſſels v. Catterton. Raym. 190. 191. S. C. and the counſel for the plaintiff acknowledged, that

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it cannot be good, and thereupon judgment was ſtayed.——Sid. 467. pl. 3. S. C, and becauſe *it appeared by the record, that the conveyance tendered compriſed more land than he had covenanted to convey*; judgment for that reaſon was given for the defendant.

51. Where A. is bound to convey land to B. *but the kind of conveyance is not ſpecified, and the ſame is to be done by a day certain,* and no conveyance is made till the laſt hour of the laſt day, and then A. ſealed and deliver'd a deed of feoffment, and was ready on the land to deliver ſeiſin to B. but not having given *notice to B. that he would execute this charter of feoffment by livery,* and B. not being there to take, this was not a performance of the condition; for the charter of feoffment might have been executed *by inrollment.* Vent. 147. Trin. 23 Car. 2. B. R. Large v. Cheſhire. [140]

52. *But* Hale Ch. J. ſaid the *time when* was not neceſſary in this caſe to be in the *notice,* becauſe the charter was ſealed and delivered *upon the extream day* limited by the agreement, and ſo the defendant *knew it muſt be on that day*; and ſo for the *place,* becauſe it is a local thing, and muſt be done upon the land. Vent. 147. Trin. 23 Car. 2. B. R. in caſe of Large v. Cheſhire.

53. Debt upon an obligation, upon condition that the defendant ſhall *well and ſufficiently execute, to the ſatisfaction of the plaintiff's counſel, a releaſe within 7 days.* The defendant pleads that the plaintiff did not tender any releaſe; the plaintiff demurs. Hale Ch. J. ſaid that if advice had been neceſſary, then the plaintiff muſt have done the firſt act, but now it is at the peril of the defendant, that the releaſe be to the ſatisfaction of the plaintiff's counſel; and judgment was given for the plaintiff. Raym. 232. Mich. 25 Car. 2. B. R. Baker v. Bulſtrode. Vent. 255. S. C. reſolved accordingly.—2 Lev. 95. S. C. adjudg'd.—Mod. 104. pl. 12. S. C. it was objected that the condition was not (to make) but only (to ſeal and execute, &c.) But per Cur. the word (execute) or the word (ſeal) comprehends the making.——3 Keb. 277. pl. 12. Baker v. Betesford S. C. adjudg'd accordingly.

54. A. covenanted *to make ſuch aſſignment* to B. *according to an agreement* made between them, as counſel ſhould direct and adviſe. It was objected that the plaintiff's counſel ſhould give the advice, becauſe he was the perſon intereſted. But it was anſwer'd that the defendant likewiſe had an intereſt, for it is an advantage to him to make an aſſignment, ſo that his covenant might be ſaved; that 'tis true it had been otherwiſe if the covenant had been to make ſuch a conveyance as counſel ſhould adviſe; for then the covenantee may chuſe whether he will have a feoffment, releaſe, or confirmation, and then his counſel ſhould adviſe what ſort of conveyance is proper; but here it is to make an aſſignment, and alſo ſuch as the parties had agreed upon. Sed adjornatur. 3 Mod. 191. Paſch. 4 Jac. 2. B. R. Heyward v. Suppie.

55. An action of covenant was brought upon an indenture of *feoffment* made by the defendant's wife before marriage *of lands* lying

lying *in Ilton in the pariſh of Marſham*, whereby defendant's wife covenanted to make ſuch further reaſonable acts *for aſſuring the premiſſes*, as by the plaintiff or his counſel ſhould be adviſed, deviſed or required, and aſſigns a breach that plaintiff tender'd a note of a *fine* to defendants before 2 commiſſioners appointed for that purpoſe *of lands in the pariſh of Marſham*, and in their preſence did requeſt defendants to acknowledge the fine, and then avers that it was a reaſonable act for the further aſſuring the premiſſes, and that defendants refuſed to acknowledge it. To this the defendants plead, that they had always been ready and willing to acknowledge &c. but that defendant (the baron) was *ſeiſed* in fee in right of his wife *of other lands in the pariſh of Marſham, no part whereof was contained in the deed*, and becauſe thoſe lands not contained in the deed were contained in the note of the fine, therefore they refuſed to acknowledge it. To this plea defendant demurred; and for the plaintiff it was inſiſted, that tho' there are more acres contained in the note of the fine than in the deed, yet by the covenant for further
[141] aſſurance, defendants were bound to acknowledge it; that it is uſual to put in more than the number of acres mentioned in the deed, becauſe as the preciſe quantity cannot be known, if the party did not put in enough he would loſe ſo much, and it can be no prejudice to defendants, for no more would paſs than was contained in the deed, and unleſs they levy the fine, the feme will have her dower of it, tho' the plaintiff has actually paid a conſideration for it; for the defendants it was ſaid, that if the fine propoſed would be of any prejudice to defendants, it is a ſufficient excuſe for their refuſing to acknowledge it. Now the deed mentions lands lying in Ilton, in the pariſh of Marſham, whereas the note of the fine tender'd is of lands in the pariſh of Marſham; and it is ſet forth in the plea, and likewiſe admitted by the demurrer, that defendants have other lands in the pariſh of Marſham, which would have been comprehended in this fine, which prima facie would enure to the uſe of the conuſee, at leaſt it would alter the nature of the wife's eſtate; for if ſhe was ſeiſed in tail, that would be thereby cut off, and the huſband might declare the uſes, as he thought fit, and ſhe might loſe her dower. The court were of opinion for the defendants; for tho' a man is not obliged in a fine to ſet out the parcels exactly agreeable to the deed, and it is uſual to put in rather more, leſt in caſe of a miſtake he may loſe part of the land, yet here the covenant is to levy a fine of *lands in a vill*, but the note tender'd is of *lands in the pariſh generally*; now as defendants have other lands in the pariſh, and as plaintiffs might have tender'd one not ſo extenſive (for a fine may be levied of lands lying in a vill) it ſeems a good excuſe, and judgment for defendants, unleſs cauſe before the end of the term. Paſch. 12 Geo. 2. C. B. Danby v. Gregg & Ux'.

(P. a. 2) As Counſel or Vendee &c. ſhall adviſe &c. Pleadings.

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1. IF a man be bound to make ſure, ſufficient, and lawful eſtate, *as ſhall be deviſed by J. N.* there it ſuffices to make it as J. N. deviſes, be it ſufficient and ſure or not. Br. Conditions, pl. 147. cites 7 E. 4. 13. Fitzh. Dette, pl. 8:. cites S. C.—— 5 Rep. 23. b. cites S.C.

2. A man was bound in 100 l. *to make ſuch eſtate by ſuch a day, as the counſel of the obligee ſhall deviſe*, and in debt upon the obligation the defendant *pleaded* quod *conſilium non dedit adviſamentum*, and *need not name the counſellors*, becauſe D. pleaded in the *negative*; but if the *plaintiff replies*, quod *conſilium dedit adviſamentum*, he ſhall ſay their names; for he pleads in the affirmative. Br. Conditions, pl. 133. cites 6 H. 7. 4.

3. *And* it is a good plea, that *no counſel was given.* Ibid.

4. Where a man is bound *to make ſuch eſtate as the counſel of J. N. will deviſe*, and he *has* 4 *of his counſel*, but he *required the advice of* 2 of them *only*, who give their advice, the other may ſay, quod *conſilium non dedit adviſamentum*; for theſe 2 were all his counſel in this matter; per Townſend and Vaviſor. Br. Conditions, pl. 248. cites 11 H. 7. 23. See the year book that Brian is contra, and would diſtinguiſh between this and nullum conſilium dedit adviſamentum.——Br. Conditions, pl. 133. cites 6 H. 7. 4. per Brian, S. P.

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5. *But* per Brian, if it ſhall be *by the advice of the juſtices of C. B.* there the adviſe ſhall be by all; note a diverſity. Br. Conditions, pl. 248. cites 11 H. 7. 23. Br. Conditions, pl. 133. cites 6 H. 7. 4. S. P. per Brian.

6. Note per Cur. where a man was bound *to make ſuch eſtate as ſhould be deviſed by the counſel of the other party*, and ſaid he made eſtate for life of 10 *l.* Land, as was deviſed by the counſel of the plaintiff; and by the court it is no plea; for he *ſhall ſhew what eſtate the counſel deviſed, and that he has made it accordingly, and* ſhall ſhew *where the land lies*; Quod Nota; for otherwiſe the iſſue is not perfect. Br. Conditions, pl. 1. cites 26 H. 8. 1, 2.

7. Bond was conditioned *to make ſuch aſſurance as D. ſhould deviſe. D. deviſed two things* to be done. Exception was taken that the *plaintiff alleged a requeſt of one of them only*; ſed non allocatur; for the plaintiff may allege breach in the one though the other be performed, and it is in his election which he will demand; and judgment accordingly. Cro. J. 194. pl. 20. Mich. 5 Jac. B. R. Staineroide v. Locock.

(Q. a) *How*, and in what manner it ſhall be *performed*; and in what not. *In reſpect of the Words.*

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[Where the Subſtance is performed.]

2 Bulſt. 18. Mich. 10. Jac. S. C. & thereby Williams J. the difference will be where the caſe ariſing upon the aſſumpſit is in the *affirmative*, and where in the *negative*, where the ſame is in the affirmative, there it ought to be averred in facto, that the land did deſcend; but otherwiſe it will be, where it is in the negative; for there it is good and ſufficient to ſay, as here in this caſe, quod non permiſit that he did not ſuffer the land to deſcend; and herein the whole court agreed, that a good iſſue may be taken upon this plea of non permiſit, that he did not ſuffer the land to deſcend; and ſo by the opinion of the whole court, the action here is well brought, and by the rule of the court judgment was given for the plaintiff.

[1. D. 8. 9 Eliz. 255. 4. The condition of an obligation was, That he ſhould *ſuffer his leſſee for* years to *enjoy* the land *during the term*, and that *without trouble of him or any other perſon. A ſtranger enters by an elder title*; per Cur. the condition is not broke, becauſe this word *(ſuffer)* is a paſſive, and all the reſt is to be referred thereto, but *if any procurement*, or occaſion of diſturbance be by the leſſor, his executors or aſſigns, then he hath forfeited his obligation. 2 E. 4. 2. b. per Litt. and agreed per Aſhf. I am obliged that I ſhall *demiſe to my ſon after my deceaſe*, land to the value of 20 *l.* my *ſon is outlaw'd of felony in my life*-time, and after I die, I have not forfeited my obligation; (*) and this caſe was agreed per Cur. to Jac. my Reports *Gray and Gray*, where the principal point was in an action upon the caſe; the plaintiff declared, *in conſideration* that *his teſtator vellet permittere his land to deſcend* to his ſon, the defendant *aſſumed to pay him* 20 *l.* and he *alleges that he did permit it to deſcend, not averring that it had deſcended*, yet good per Cur. See ſuch caſe of a covenant. D. 7 Eliz. 240. 43.]

* Fol. 426.

S. P. For where the defendant in debt by executors demands oyer of the teſtament, the entry upon the continuance is quod querens profert literas teſtamentarias; Br. Conditions, pl. 158. cites 17 E. 4. 3. per Littleton & Brian. ——So upon obligation *to deliver deed of feoffment*, it ſuffices that he deliver *quandam chartam*, &c. this is one and the ſame ſubſtance.

[2. If the *condition* be *performed in ſubſtance* it is good, although it differs in words; as where it is *to deliver the teſtament* of the teſtator, if he pleads that he hath *delivered literas teſtamentarias*, yet it is good. * 7 E. 4. 3.]

[* Roll ſeems miſprinted 7. inſtead of 17.]

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Br. Conditions, pl. 158. cites S. C. & S. P. by Brian.

[3. *So* if the condition is *to deliver letters patents*, and he loſes them, and *delivers an exemplification*. 17 E. 4. 3.]

Br. Conditions, pl. 158. cites S. C. & S. P. by Brian, of a leaſe and releaſe, [not ſaying what leaſe] quod Littleton negavit; but Brooke ſays it ſeems by other books that the law is with Brian, if it be a leaſe for years and releaſe. ——Co. Litt. 267. a. S. P. and ſays it is well performed, becauſe this amounts in law to a feoffment.

[4. *So* if a condition be *to make a feoffment*; a *leaſe for years and releaſe* is a good performance; Quære. 17 E. 4. 3.]

[5. If the condition be *to grant the reverſion* of tenant for life or years, and he *enters* upon the leſſee, *and makes a feoffment*, and the leſſee

leſſee re-enters, the condition is performed, for the effect is performed. 21 E. 4. 39. b. an opinion contra, and they ſaid it was all one with the principal caſe there, which was afterwards ruled per Cur. as is here; and ſo this is a good authority that it is performed.]

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[6. If the condition be *to give licence* to the *obligee to carry trees* that he hath bought of him, or other things, if *he gives* him *licence*, yet although a *ſtranger who hath right* thereto *diſturbs him*, the condition is performed; for it extends but to the perſon of the obligor by the words. 18 E. 4. 20. b.]

Br. Conditions, pl. 163. cites 18 E. 4. 18. & 20 S. C. & S. P.—

Br. Licence, pl. 13. cites S. C.

[7. *But* otherwiſe it had been, if the words had been, *that he ſhould have licence* &c. for this extends to all ſtrangers. 18 E. 4. 20. b.]

Br. Conditions, pl. 163. cites S. C.—

Br. Licence, pl. 13. cites S. C.

[8. If a man covenants *to give licence* to J. &c. *and he and ſtrangers are bound*, the condition being to perform, or cauſe the covenants to be performed, the ſtrangers *ought to procure the licence*, otherwiſe it is broke, although he gives licence. 18 E. 4. 18. b.]

The caſe was, that A. covenanted by indenture with B. and afterwards A. and two ſtrangers became bound to B. to perform, or cauſe to be performed, the covenants in the ſaid indenture. In debt brought againſt the obligors, they pleaded that they had performed the covenants, &c. But exception being taken to the plea, becauſe two of the defendants were ſtrangers to the covenants, they then ſhewed that the defendant A. licenſed B. the plaintiff to carry, &c. But Littleton and Choke ſaid, that they ought to ſay that they requeſted a licence of the defendant, and that he, at their requeſt, licenſed the plaintiff as above; for if he of his own will, without any requeſt by them, did licence him, it is no performance of the condition in them two, &c. Br. Conditions, pl. 163. cites S. C. but not as in Roll.

[9. A condition ought to be performed *in ſubſtance*; *as if* the condition be *to withdraw ſuch a ſuit*, a diſcontinuance thereof is not a performance, becauſe it differs in ſubſtance; for *a retraxit* is a bar in another action, and *not a diſcontinuance*. 20 E. 4. 8. dub.]

10. In debt it was covenanted *that A. recover certain land, and infeoff thereof B. and ſhall inroll the deed, and then B. ſhall pay to him* 40 *marks, and if he fails, that A. ſhall pay to B.* 40 *l.* B. brought debt, and A. pleaded that he had infeoffed him of the land, and after releaſed to him, judgment ſi actio. And becauſe he did not deny but that he did not recover the land, nor inrol the deed, judgment; per Knivet, this is no matter when you have *accepted a feoffment and releaſe*, by which anſwer; quod nota; *quære* of his opinion. Br. Conditions, pl. 76. cites 39 E. 3. 5.

11. If the defendant be *bound to make recognizance of* 20 *l. by a day* and he *pays the* 20 *l. at the day*, and *does not make the recognizance*, it ſuffices; per Culpeper, which the court denied. Br. Conditions, pl. 41. cites 12 H. 4. 23.

12. *And* per Hank, if a man be bound *to infeoff* another *of the manor of D.* and *he infeoffs him of the manor of S.* which is *of greater value*, the condition is not performed. Ibid. [144]

13. Debt upon obligation, the condition was that *if J. F. & omnes alii ſi qui fuerint feoffati dicti J. F. ad ſuum uſum de* Manerio de B. *releaſe totum jus ſuum T. F. filio dicti J. F. and deliver the releaſe to the plaintiff to the uſe of the ſaid T. F. citra tale feſtum*, quod tunc &c. and he *ſaid that at the time confectionis* obligationis, there *were not any feoffees, but J. F. was ſole ſeiſed, which J. F. has releaſed before the day, and delivered it to the plaintiff to the uſe of the ſaid T. F.* judgment; and *did not anſwer if there were any feoffees in time paſſed*, but in the preſent time; and by the beſt opinion, this word *(fuerint)* in this caſe ſhall be *taken for the preſent time*, and ſo the plea good; but per Priſot and divers others, it ſhall be taken for the *preter tenſe*, therefore quære, becauſe it is not adjudged. He may have feoffees who were diſſeiſed before, who ought to releaſe. Br. Conditions, pl. 17. cites 35 H. 6. 11. 15.

14. *But* it was agreed that *dedi & conceſſi* in deed of feoffment is taken for the preſent tenſe. Ibid.

15. *And* it was agreed that if a man *gives all his pikes in ſuch a pond, or all his goods ſi quæ fuerint*, this ſhall be taken for the preſent tenſe, and for ſuch pikes or goods as he then had; but the caſes are not alike, per Priſot and others. Ibid.

16. If a man be bound *to ſuffer J. N. to recover in formedon brought*; there if J. N. be *nonſuited*, and *brings other formedon*, the obligor is not bound to ſuffer it there; for formedon brought is the formedon which was *pending at the time* of the obligation made. Br. Conditions, pl. 223. cites 21 E. 4. 52, 53.

17. In debt, P. B. was bound *to make eſtate of 40 l. land per ann. to a certain perſon, to the intent that if R. ſon of the ſaid P. B. died, living P. the father*, that *then the feoffee infeoff the feme of the ſaid R.* and after *P. died*, and *R. and his feme ſurvived*; and per Danvers, Brian, and Fineux, the condition is well performed, becauſe the intent is obſerved, viz. that the feme of R. ſhould be infeoff'd if R. died in the life of P. his father, and now R. did not die in the life of P. but ſurvived him, and therefore the bond is ſaved; quære inde; for contra Rede and Vaviſor. Br. Conditions, pl. 136. cites 9 H. 7. 17.

D, 14. b. pl. 72 & 18. pl. 104 S. C. adjudged for the defendant accordingly.

18. Debt upon bond conditioned, that *if J. M. ſhould die before Chriſtmas* 1532, *without iſſue male of her body by R. B. begotten, he then living, then the bond to be void*; the defendant *pleaded* in bar, *that* after the ſaid bond, and *before the ſaid feaſt, J. M. did die without iſſue male of her body then living*; the plaintiff *replied that J. M. had iſſue H. and that before Chriſtmas* &c. *ſhe died, the ſaid H. then living, who likewiſe died before Chriſtmas*; and upon a demurrer it was adjudged that the plea in bar was good, and the replication ill, the queſtion being, whether the words (then living) ſhould relate to the death of J. or to Chriſtmas? And. 1. pl. 1. Paſch. 26 & 27 H. 8. Bold v. Molineux.

19. If a man leaſes land upon *condition that the leſſee ſhall rake the ditches*, and *does not ſay how often*, there if he rakes them once he has performed his condition and covenant; quod nota. Br. Expoſition, pl. 2. cites 27 H. 8. 6. per Fitzh.

20. Con-

20. Condition *to pay 15 l. at Michaelmas, and 15 l. at Lady-day, and ſo from thenceforth yearly during the life of R. H. or until the defendant ſhall lawfully advance one L. H. to ſome benefice*, &c. The biſhop preferred L. H. before Michaelmas next after the making of the bond, yet held, that the two firſt payments ought to be made notwithſtanding. 2 And. 65. pl. 47. Mich. 2 and 3 P. & M. counteſs of Warwick v. the biſhop of Coventry. Cro. E. 549. pl. 23. 39 Eliz. C. B. the S.C. but is ſtated to pay 15 l. at Mich. 15 l. at Lady-day; and defendant pleaded, that L. H. was preſented to a benefice before the firſt feaſt of St. Mich. and adjudged no plea, for the 15 l. is to be paid notwithſtanding; becauſe the limitation (until he be advanced) goes only to the ſubſequent payments.——Noy 64, 65. S. C. adjudged accordingly; for the two firſt feaſts are abſolute.

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21. *Except* conſtrued to ſignify *ſaving* in a condition. Mo. 113, 114. pl. 254. Paſch. 20. Eliz.

22. L. bargains and ſells a manor, and covenants *to acquit, or otherwiſe ſave it harmleſs from all former bargains, ſales, incumbrances* &c. made by any perſon, *except the eſtate of M. and ſuch eſtates as ſhe has made which will determine by her death. M. after grants part of the manor for three lives by copy of court-roll*; M. dies. The court held, that this grant by copy made after the bargain and ſale cannot be called a former incumbrance; and though it does not determine by the death of M. according to the intent of the exception, it is not within the intent of the words (former grants) and the exception is added only to qualify the covenant, and therefore ſhall not be expounded ſo as to extend it further than the words; but a grant by copy is an incumbrance. Sav. 74. pl. 154. Mich. 26 & 27 Eliz. Lovel v. Luttrel.

23. *Feoffment* to the uſe of B. in tail, *provided*, that if the ſaid B. do *go about to avoid any eſtate or demiſe by copy made, or to be made of the premiſſes*, or any part thereof, that then his eſtate ſhall ceaſe. B. entered and levied a fine ſur conuſance de droit come ceo &c. of the land; per cur. 'tis no offence againſt the proviſo, for the words *(made or to be made)* do not extend to eſtates made or limited by the ſaid feoffment, but only to eſtates before made and to be made afterwards. Le. 207. pl. 288. Mich. 32 & 33 Eliz. C. B. Bradſtock's caſe.

24. A. *enfeoffs* B. upon condition, that B. ſhall *make an eſtate in frank-marriage to C.* with M. daughter of A.; in this caſe B. cannot make an eſtate in frank-marriage, becauſe the eſtate muſt move from the feoffee, and the daughter is not of his blood, but yet he muſt make an eſtate to them for their lives, for this is *as near* the condition as he can; *ſo* 'tis if the condition be to make to A. (which is a meer *layman*) an *eſtate in frank-marriage*, yet muſt he make an eſtate to him for his life. Co. Litt. 219. b.

25. A diverſity is to be underſtood between conditions that are *to create* or to *deſtroy* an eſtate, for a condition that is to create an eſtate is to be performed by conſtruction of law *as near* the condition as may be, and according to the intent and meaning of the condition, though the letter and words of the condition cannot be performed; but otherwiſe 'tis of a condition that deſtroys an eſtate, for that is to be taken ſtrictly, unleſs it be in ſome certain caſes. Co. Litt. 219. b. 8 Rep. 90. b. 91. a. Arg. Same diverſity taken and admitted by the court.

26. Debt on *bond* with condition *to give and grant to A. his heirs* and aſſigns. Defendant pleads he has been ready to give and grant, adjudged ill; for he muſt plead that he did it, otherwiſe had it been, if the words had been, *as counſel ſhould deviſe*. Brownl. 75. Trin. 11 Jac. Chapman v. Peſcod.

Once diſcharged are gone for ever, per Coke Ch. J.

27. Conditions are *ſtricti juris*. Litt. R. 128, 129. per Vernon J. Mich. 4. Car.—Eſpecially when they are to defeat eſtates. Arg. Roll. R. 70. Mich. 12 Jac. in caſe of Whitchcock v. Fox.

2 Buls. 292. S. C.——Where *general* conditions *tend to the benefit of the party* they ſhall be conſtrued generally; as a condition not to alien, but to his wife for her life, and for the reſidue of the term to one of his children. This condition ſhall be extended to any after-wife as well as to the preſent, becauſe for his benefit; but where it is *to the prejudice* of the party it ſhall be conſtrued ſtrictly. Arg. 2 Buls. 290. cites 39 H. 6. 9.

[146] 28. Leaſe by baron and feme and another feme; leſſee covenants by the ſame indenture *to find ſufficient man's and horſe meat to the baron and feme, and to the other feme, or to their ſervants*, at their coming to London, at his houſe at Southwark; baron and feme die. The other feme takes huſband. Per Cur. he is not bound to find ſuſtenance for the huſband, but only for the wife or for her ſervants, and not for both at one and the ſame time, becauſe the *covenant* was in the *diſjunctive*; but it was *doubted* if he ſhall find them victuals for one meal only at their coming, or for all the time of their ſtaying there. Het. 53. Mich. 3 Car. C. B. Grange & Ux. v. Dixon.

29. In debt upon bond the defendant prayer oyer of the condition, which was 59 *l. upon the birth of his firſt child by his wife, or any other woman, and averred that he had no child by his wife*; the plaintiff *replied, that he had a child by another woman*. Upon demurrer the court held, that it muſt be intended of a child by another wife, and not otherwiſe; and judgment for the defendant. Comb. 37. Mich. 2 Jac. 2. B. R. Creſwell v. Trott.

30. A condition *to pay money when able* is to pay it preſently; for the law ſuppoſes every man ought to pay what he is able to pay. Cumb. 445. Anon. at the ſittings before Holt Ch. J. 21 June 1697.

31. Condition is to be conſtrued *from the intent of the parties*. 1 Salk. 171. pl. 3. per Holt Ch. J. Paſch. 13 W. 3. B. R.

32. In debt upon obligation the defendant, upon oyer of the obligation and condition, which was *for payment of ſuch a ſum on or before ſuch a day, pleaded payment at a day before the day mentioned in the condition*. The plaintiff *traverſed the payment, and concluded to the country*, to which the defendant demurred. It was ſaid for defendant, that the traverſe was immaterial, for if iſſue had been joined upon it, and found for the plaintiff, it would not have determined the right of the cauſe, and the caſe of Holmes and Brokett, Cro. J. 434. was cited; but per tot. Cur. the traverſe is good, becauſe the payment pleaded is according to the condition, which gives the defendant a power to defeat the obligation by payment on any day before the day expreſſed, and judgment was pro Quer. MS. Rep. Trin. 12 Annæ, C. B. Furneſs v. Killum.

(R. a) How

(R. a) How it ſhall be performed. The Intent ought to be performed.

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[1. IF a *ſheriff arreſts a man* upon a latitat, at the ſuit of J. S. iſſuing out of B. R. and *lets him to bail*, and takes an obligation for his appearance, of which the *condition* is, *that if he appears in B. R. ſuch a day the next term*, that then the obligation ſhall be void; and the *obligor appears at a day* in the ſame term, *before the day mentioned* in the condition, *at the ſuit of another man*, which is an appearance in law for all ſuits which ſhall be commenced againſt him the ſame term, yet becauſe this is an appearance by a *fiction* in law, and not an actual appearance at the day, the condition is broke; for, perhaps, if he had actually appeared, ſpecial bail would have been required. Paſch. 15 Jac. B. R. *Sir Richard Buller's caſe*, per Curiam.]

Note, that it was enacted by parliament, *that if J. N. does not come before the juſtices of B. R. within one quarter of a year*, that *he ſhall be condemn'd in 40 l.* and *be appear'd before the king himſelf*, and therefore was condemn'd; for he ought to have appear'd *before the juſtices* * *ſitting in court*, and not before them out of the court, nor before the king himſelf; Quod nota quia conditio ſtricta. Br. Conditions, pl. 208. cites 8 H. 4. 6.

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[2. If *A. and B. ſubmit* themſelves *to* the *award* of J. S. of all actions &c. and *A. hath an action depending againſt B. of which there is a continuation de termino Paſchæ uſque ad terminum Trinitatis*, and the *ſubmiſſion and award are* (*) *made between Paſch. and* [*Octab.*] *Trinitatis*, and the award is, *that he ſhall retract his ſaid ſuit*, and after A. at Trinity term does not further purſue his action, but *ſuffers it to be diſcontinued*, that is a good performance of the award; for the intent of the arbitrator was not that he ſhould make a legal retraxit, but that he ſhould not proſecute the ſuit further. 21 Ed. 4. 38. adjudged.]

Br. Conditions, pl. 173. cites * Fol. 427. S. C. and ſays that ſo A. alledged a diſcontinuance for a retraxit, and that the plea was adjudg'd not good; for non ſuit nor diſcontinuance is not a retraxit; becauſe upon a retraxit the party ſhall be barr'd, whereas in the other caſe he may commence his ſuit de novo, and afterwards the judgment was affirmed.——Cro. J. 525. pl. 12. Hill. 16 Jac. B. R. Gray v. Gray. It was agreed that the award being that he ſhould not proſecute in ſuch an action in the ſame term that the entry of continuance from term to term is not any breach.

[3. If the condition of an obligation be *to ſtand to the award of J. S.* who *awards that he ſhall pay* 20 *l. to the obligee*, and he *pays it to the wife* of the obligee, and ſhe accepts it, yet this is not any performance without alledging more. Hill. 32 Eliz. B. R. between *Froud and Batte* adjudged.]

Le. 320. pl. 450. S. C. adjudged, for the plaintiff.

[4. If a *leſſor covenants* with his leſſee for years, *that it ſhall be lawful for the leſſee peaceably &c. to enjoy* the land; and after the *leſſor enters tortiouſly* upon the leſſee, *and ouſts him*, yet this is a breach of the covenant; for the intent was, that he ſhould enjoy it without the interruption of the leſſor. H. 39. B. R. *Core's caſe* adjudged.]

Cro. P. 544. pl. 15. Core's caſe. adjudg'd for the plaintiff without argument. ——See (U.) pl. 22. S. C.

Cro. E. 628. pl. 57. Mich. 38 & 39 Eliz. C. B. Marſh. v. Curtis S. C. and 3 judges agreed clearly that the condition was broken,

[5. If a man *leaſes a houſe and land*, upon condition that the leſſee *ſhall not parcel out the land, nor any part thereof, from the houſe*, and after the *leſſee leaſes the houſe and part of the land to A. and* after leaſes the *reſidue of the land to C.* this is a breach of the condition; for by the word *(parcelling)* is intended a diviſion or ſeparation of the land from the houſe, and if the firſt grant be not a forfeiture, the ſecond is. Hill. 41 Eliz. B. R. between *Curtis and Marſh* adjudged in a writ of error.]

and that it is all one where the houſe is divided from the land, and where the land is divided from the houſe, and it is a breach both within the intent and the words; but Owen abſente adjornatur, and afterwards it was adjudg'd for the plaintiff.————2 And. 42. pl. 38. S. C. in C. B. held accordingly.——Ib'd. 90. pl. 54. S. C. & S. P. held accordingly. Mo. 425. pl. 594. S. C. in C. B. and S. P. held by all the juſtices accordingly.

Cro. E. 833. pl. 8. Lane v. Hodges, S. C. the bargainor infeoff'd the bargainee of all his lands in U. and afterwards by indenture bargains and ſells to the obligee all his lands in U. and covenants to

[6 If a man makes a *feoffment* in fee to B. *of all his land, and after bargains and ſells the ſame lands to him* for further aſſurance, and after the feoffor *covenants* with the feoffee *to make ſuch further aſſurance of all ſuch lands that he hath bargained and ſold* to him, as the counſel of the feoffee ſhall deviſe, and binds him to perform the covenants; and after the counſel *deviſes, that he ſhall ſuffer a common recovery*, he is bound to perform it; for though he covenanted to make an aſſurance of all lands that he had bargained and ſold, and he hath not bargained and ſold any land, for the *bargain and ſale was void, being made after the feoffment*, and ſo on bargain omnino in ſtrict expoſition of law; yet it is a bargain * and ſale in appellation to which the covenant ſhall have reference. P. 43 Eliz. B. R. between *Hodges and Lane* adjudged.]

make further aſſurance of all his lands. The breach aſſigned was in not making further aſſurance of thoſe lands, but by the feoffment prior he had not any lands there at the time of the bargain and ſale, and conſequently the breach is not well aſſigned, and ſo held all the court. But if one infeoffs another of his lands [generally] and afterwards bargains and ſells them by name, and covenants to make further aſſurance, he muſt make aſſurance accordingly, wherefore they were of opinion to reverſe the judgment, but the matter was referred to compromiſe.

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[7. If a *leſſee of an houſe covenants not to leaſe the ſhop, yard, or other thing belonging to the houſe, to one who ſells coals*, nor that he himſelf will ſell coals there, and after he *leaſes all the houſe to one who ſells coals*, he hath broke the condition. M. 8 Jac. B. R. between *Chinſley and Bonner* plaintiff. *and Langly* defendant, adjudged, for he hath broke the intent.]

8. If a leaſe be made on condition that *if the leſſee be diſpoſed to ſell the term, the leſſor ſhall have the firſt offer* or advancement, *he giving therefore as much as another* will give. If the leſſee, being diſpoſed to ſell the term, a ſtranger offers him 100 *l.* for it, *he need not tell the leſſor how much is offer'd, but aſk him generally if he will give ſo much for it as another will*, and if he ſays No, he need ſay no more to him, but *if he ſays Yes, then he ought to ſhew certainly what the other will give more*, &c. Per Shelley, D. 13. b. 14. a. pl. 65. 68. Trin. 28 H. 8. Anon.

9. *And if* the leſſor, when *he* is aſk'd the queſtion, *anſwers that he will take time to conſider of it*, the *leſſee is not obliged to wait* ſo long; for it may be another will give him 100 *l.* immediately, and it is not

not reaſonable to defer the ſale, but the leſſor muſt ſay Yes or No preſently, and ſo the condition is then determined, &c. Per Shelley and Fitzherbert. *D.* 14. a. pl. 68. Trin. 28 H. 8. Anon.

10. In every condition *a reaſonable intention ſhall be conſtrued, though the words ſound to a contrary meaning*; as if I grant to B. an *annuity till B. has purchaſed* 5 *s. rent*, and *B. purchaſes* 5 *s. rent joint'y with J. S.* this is no performance; for my intent was, that B. ſhould purchaſe to his own profit and advancement only. D. 15. pl. 79. Trin. 28 H. 8. S. C. cited per Cur. Raym. 464. Paſch. 34. Car. 2. B. R.

11. A condition was to *purchaſe* 5 *s. rent* to J. S. and his heirs; *A. has* 5 *s. rent iſſuing out of J. S.'s lands.* A releaſe of all his right in the land is performance of the intent of the condition. D. 15. pl. 80. Trin. 21 H. 8. S. P. Br. Mortmaine, pl. 31. cites 21 E. 3. 18.

12. An obligation was conditioned *to deliver the plaintiff an obligation, in which he was bound to the defendant before ſuch a day.* The *defendant ſues the plaintiff upon that obligation, and recovers, and afterwards and before the day he delivers the obligation to him.* Wray and the other juſtices held this to be no performance, for the intent was that he ſhould have the obligation for his diſcharge, which is not by the delivery of it at the day, for it is transferred in rem judicatam; and notwithſtanding the delivery of the bond, yet he may have benefit of the judgment. Cro. E. 7. pl. 3. Trin. 24 Eliz. B. R. Treat's caſe. The defendant covenanted *to cauſe a ſtatute to be cancelled upon payment of* 10*l. before ſuch a day.* Afterwards before the day, he took out execution, but at the day appointed he tender'd the ſtatute to be cancelled. Reſolved that this was a breach, for after execution he cannot deliver up the ſtatute to be cancell'd in the ſame plight as it was at the time of the covenant; for as Twiſden J. ſaid, this would be to keep the kernel and deliver the ſhell. Sid. 48. pl. 7. Mich. 13 Car. 2. Robinſon v. Aunts.——Raym 25. Robinſon v. Amps. S. C. adjudg'd for the plaintiff, niſi, &c.——Keb. 1. 3. pl. 198. S. C. adjornatur.——Ibid. 118. pl. 24. and judgment niſi.——Gouldſb. 177. in pl. 111. S. P. cited Arg. to have been adjudged accordingly.

13. If a man covenants *that his ſon, then within age, & infra annos nubiles before ſuch a day ſhall marry the daughter of J. S.* and *he does marry her* accordingly, and *after at the age of conſent he diſagrees* to the marriage, yet is the covenant performed; for it is a marriage, and ſuch a one as the covenantee would have, untill the diſagreement. Ow. 25. 29 Eliz. Fenner's caſe. Le. 52. pl. 67. Leigh v. Hanmer. S. P. and ſeems to be S. C.

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14. If A. is bound to B. *that J. S.* (who in truth is *an infant*) *ſhall levy a fine* before ſuch a day, *which is done* accordingly, and *afterwards the ſame is reverſed by error*, yet the condition is performed notwithſtanding. Arg. Le. 54. at the end of pl. 67. Paſch. 29 Eliz. C. B.

15. A bond was condition'd *to plead an iſſuable plea in* 7 *days.* An *iſſuable plea was pleaded and drawn in paper, but not entred of record*, and therefore the court (abſente Anderſon) held the obligation forfeited. Gouldſb. 50. pl. 11. Paſch. 29 Eliz. Drury's caſe.

16. A. makes a *feoffment* in fee to B. upon condition, that *if A. within a year after the death of B. ſhall pay* 100 *l. to the heirs or executors of B. that A. may re-enter*; *B. makes a feoffment* of this land *to C.* and *B. makes his teſtament, and* makes *his wife and his heir his executors*, and dies; A. within a year after the death of B. by agreement with the heir of B. at a time and place limited for the payment If B. in the principal caſe, had not made this feoffment, the ſaid colourable pay-

ment had been sufficient to defeat the estate; for the heir of P. might prejudice him, and one executor another; for they represent one person; but an executor cannot prejudice a 3d person. Ibid. 262. S. C.——5 Rep. 95. b. S. C. and S. P. adjudg'd.——Cro. E. 383. pl. 4. Goodale v. Wyat. S. C. adjudg'd and affirm'd in error.——Yelv. 208. pl. 289. S. C. adjudg'd and affirm'd in err.——Poph. 99. pl. 2. S. C.——Gouldsb. 176. pl. 111. S. C. adjudg'd.——Co. Litt. 309. b. S. C. & S. P.——S. C. cited by Hobart Ch. J. Godb. 299.

payment, *pays the* 100*l.* to him; *and by* the said *agreement*, *A. is immediately to have back* 30*l. of this* 100*l.* and all is done accordingly; the entry of A. upon C. is not congeable; so adjudged and affirmed in error; for this *colourable payment* is not a payment of the 100*l.* but of 70*l.* only; and the law will not allow such fictions and colours to the prejudice of a 3d person. Jenk. 261. pl. 61. 39 Eliz. Goodale's case.

17. The defendant *leased lands to the plaintiff* for 6 years, *and covenanted that he should enjoy it during the term quietly and without interruption, and discharged from tithes and other duties, and if the tithes were demanded and recovered against him during the term, he should retain in his hands so much of the rent as the tithes amount to*, and shewed that 42 Eliz. the parson sued him for tithes there growing 29 Eliz. All the court held that the *suit*, *though after the determination of the term*, *was a breach of the covenant*, for he did not enjoy it discharged within the intent of the covenant; but because it was *not alleged that the suit was lawful*, *or that the tithes were due*, for he was not bound to discharge him but from illegal suits, and so the breach was not well assigned, it was adjudged for the defendant. Cro. E. 916. pl. 7. Hill. 45 Eliz. B. R. Lanning v. Lovering.

Cro. E. 27. pl. 9 Pasch. 26 Eliz. C. B. Eaton v. Wood. S. P. adjudg'd.

18. Debt on a bond conditioned, *that the wife should make a will* &c. The defendant pleaded that his wife did not make a will; the jury found that *she made a will*, and that she was a feme covert at the time of making it; adjudg'd that though it is not properly a will, she being a feme covert, yet it *is a will within the intent of condition*, and good. Cro. C. 219, pl. 5. Trin. 7 Car. B. R. Marriot v. Kinsman.

19. Condition by the husband, that if his wife *die without issue within two years*, to repay 500 l. of her portion. The wife *has issue*, *and she and her children die within two years*, the baron shall not repay; for the having issue was performance of the condition. Sid. 102. pl. 8. Windham J. cited it as the case of Bret v. Pildredge.

20. A. was bound *to pay* at Mich. in Gray's-Inn Hall, to B. 50*l.* *(not saying* 50*l. in money.)* A. at Mich. when the gentlemen were at supper, came and *tendered* 50*l. weight of stone*; but adjudged no tender; cited by Twisden as a case which he remembered. Sid. 151. in pl. 19. Trin. 15 Car. 2. B. R.

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2 Jo. 191. 192. Goodhand v. Griffith, S. C. and per tot. Cur. the breach was well assign'd;

21. Defendant covenanted, *that the plaintiff should have the 7th part of all grains made in the defendant's brewhouse for* 7 *years*, and the plaintiff assigns a *breach*, *that the defendant did put divers quantities of hops into the malt*, *by reason whereof the grains were spoiled*; adjudged for the plaintiff; because in all contracts the intention of the parties is to be considered, and it was the intent of the parties here, that the plaintiff should have the grains for the use of his

cattle, which they will not eat when the hops are put into them. Raym. 464. Paſch. 34 Car. 2. B. R. Griffith v. Goodhand.

for the intent of the covenant was that the grains ſhould be delivered without corrupt mixture which might render them unſerviceable, and by ſuch fraudulent mixture he had diſabled himſelf to perform the intent of the agreement, and thereby broken his covenant, and judgment per tot. Cur. for the plaintiff. The chief J. before whom the cauſe was tried, affirmed that it appear'd upon the evidence that the defendant had made the mixture with a deſign to diſſolve the agreement, that price of grains being much enhanced by the drought of the ſeaſon.———Skinn. 39. Anon. S. C. held a breach of covenant.

22. Debt upon bond conditioned, *that the huſband ſhould leave his wife 80 l. at his death, ſo that ſhe might peaceably enjoy it to her own uſe.* The huſband died. The defendant who was adminiſtrator to the huſband pleaded, that he made his wife executrix, and left goods and chattels to the value of 100 l. and deviſed, that ſhe ſhould pay herſelf. This plea was adjudged ill, becauſe he might owe debts of a higher nature, as on judgments, or ſtatutes, ſo that ſhe could not pay herſelf, and perhaps his eſtate was ſo litigious, that it is better for her to renounce the executorſhip, (as ſhe had actually done) and ſue the adminiſtrator. 3 Lev. 218. Trin. 1 Jac. 2. C. B. Thomaſon v. Wood.

3 Salk. 65. pl. 9. Thompſon v. Wood, S. C.

(R. a. 2) Where it muſt be effectual.

1. IF A. is bound *to acknowledge a ſtatute*, and he doth acknowledge the ſame, but *keeps it in his own hands*, this is no performance; per Fenner J. Goldſby. 156. cites 20 E. 3. Accompt.

2. Note, it was held, that where a man is bound in recognizance *to keep the peace and to appear* Menſe Paſchæ, and he appears, but his appearance is not of record, he has not performed the condition. Br. Conditions, pl. 94. cites 38 H. 6. 17.

3. *So* if a man be bound in an obligation, upon arreſt by the ſheriff, *to appear ſuch a day before the juſtices of Banco*; there if he appears, and his appearance is not entred of record, he has forfeited his obligation, quod nota. Ibid.

S. P. by Rhodes, J. Goldſb. 50. pl. 11.

4. If a man be bound *to demiſe or relinquiſh to his ſon 10 l. land per annum*, and the *ſon is outlawed of felony in the life of the father*, and the *father dies ſeiſed of the 10 l. land*; the bond is not forfeited, for this ſhall deſcend, though the lord may take *the eſcheat.* Br. Conditions, pl. 140. cites 2 E. 4. 2. per Aſhton and Littleton.

5. In debt, where a man is bound *to appear at a certain day upon writ*, he ought to appear, and to have *ſpecial entry of his appearance, though the writ be not returned*; and it is a good *plea that the bailiff to whom* he is bound *kept him in perſon* till the day of his appearance was paſſed. Br. Conditions, pl. 75. cites 9. E. 4. 23.

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6. Where a man is bound *to appear in bank upon capias ſuch a day*, he ought to appear at the day, and have his appearance recorded, though the ſheriff does not return the writ; and yet he has not day in court. Br. Conditions, pl. 162. cites 18 E. 4. 17.

S. P. and it is no plea for the defendant, that it does not appear of record that any ſuch writ was returned. Br. Dette. pl. 167. cites S. C.

7. Condition of a bond was, that the obligor *shall licence* the obligee for 7 years to carry wood &c. If the obligor *gives licence, and afterwards revokes it*, or disturbs the obligee, the obligation is forfeited. 8 Rep. 83. a. cites 21 E. 4. 55. a per Choke and 18 E. 4. 18. b. & 20. a.

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S. P. by Holt. Ch. J. Comb. 396. Mich. 8 W. 3. B. R. in case of Smith v. Taylor.

8. A. gave bond to B. *to deliver up another bond before Michaelmas, wherein B. was bound*; afterwards *A. sued B. on the bond, and had judgment and execution before Michaelmas, and afterwards at Michaelmas A. delivered the bond.* Adjudged no performance, for it ought to be delivered in such plight as it was at the making the second bond. Mo. 709. in pl. 989. cites Mich. 21 & 22 Eliz. B. R. Brown v. Randal.

3 Le. 151. pl. 201. S. C. in totidem verbis.—Goldsb 45. pl. 27. S. C. but no judgment, but the defendant had leave to amend his plea.

9. Debt by B. against S. upon bond, conditioned, that S. the obligor *should procure the next avoidance of the archdeaconry of* &c. *so as B. the obligee might present. S. did procure a grant* of the next avoidance, *but before it happened, the present archdeacon was made a bishop*, so that now the queen had a right to present; resolved, that the condition was not performed, and judgment for the plaintiff. 4 Leon. 61. pl. 155. Hill. 29 Eliz. C. B. Bingham v. Squire.

S. P. by Hobart Ch. J. Hob. 167. —Brownl. 31. S. P. by Hobart Ch. J.

10. If A. is *bound to present* B. and he *presents him by simony*, yet the bond is forfeited; per Hobart. Noy 25. in case of Winchcomb v. Pulleston.

11. King H. 8. granted lands to A. and his heirs, *provided that he and they, perpetuis futuris temporibus invenirent & sustinerent duos capellanos in ecclesiæ parochiali de W. ad orandum pro animabus* H. 8. his heirs and successors, & ad celebranda divina servitia, & curam animarum parochianorum; *A. conveyed the lands to B.* and his heirs upon the same conditions, *who appointed two chaplains, one of whom was never resident there and did not perform his duty.* Adjudged by all the barons, that this was a breach of the condition. See Litt. Rep. 94 to 97, and 105 to 112, &c. the arguments of the counsel, and 129 to 139 the arguments of the barons: Trin. & Mich. 4 Car. in the exchequer. The King v. Brockham.

12. An award *to enter into a bond* to another, it is not enough for the party to bring a bond written, and to say, *I will seal and deliver to you this bond*; but he must *bring the writing with a seal* clapped upon it, and say, *I deliver you this as my act and deed*; and if he omits the doing of any one thing that is essentially necessary to the executing the deed, he has not performed the award; per Holt, Ch. J. 12 Mod. 533. Trin. 13 W. 3. in case of Lancashire v. Killingworth.

(S. a) What ſhall be ſaid a Performance, and what a Forfeiture.

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[1. IF the condition of a feoffment be *to infeoff J. S.* if *he infeoffs J. S. and two others*, this is no good performance, but the condition is broke. 21 Aſſ. 28.] Br. Conditions, pl. 107. cites S. C. and ſays that therefore the feoffor enter'd for condition broken, and J. S. ouſted him, whereupon the feoffor brought aſſiſe and recover'd. And Brooke ſays, Et ſic vide, that he ought not to infeoff more than contain'd in the condition.——Br. Conditions, pl. 90. cites 36 H. 6. 8. S. P. by Billing.——An annuity is granted until the grantee purchaſes 5s. of rent, and he purchaſes 5s. rent jointly with another, this is no performance of the condition; but if a condition is that if I purchaſe a rent of 5s. *Habend' & Percipiend'* to me and my heirs, and a ſtranger having a rent of 5s. iſſuing out of my land, releaſes this to me and my heirs; the condition is performed. Dy. 15. pl. 72, 80. Trin. 28 H. 8.

[2. If the condition be, that whereas B. hath bound himſelf apprentice to the obligee [obligor] for ſeven years, if the obligor *retain, keep, and employ the ſaid apprentice in his own houſe and ſervice, in the art of ſurgery, during the term*, the obligation ſhall be void; and after the obligee [obligor] *ſends the apprentice* in a voyage *to the Eaſt Indies*, in the company of others expert ſurgeons, *the better to learn the ſaid art*, this is a breach of the condition; tho' by the condition he is not reſtrained from ſending his apprentice into other places about his cures, yet he ought (*) always to be of his houſhold, going and returning, and in his ſervice, and not put over to any other; for the putting an apprentice to another, is a great truſt for his diet, health, and ſafety; and generally a man cannot compel his apprentice to go out of the realm, if it be not expreſsly agreed, or the nature of the apprenticeſhip imports it, as if he be bound apprentice to a merchant-adventurer, or ſailor. Hobart's Reports 181. between *Coventre and Woodhall* adjudged.] Hob. 134. pl. 180. Hill. 13 Jac. S. C. —Brownl. 67. Coventry v. Windal S. C. adjudged. ——See (U. b) pl. 1, 2, 3. S. C. by the name of Coventry v. Boſwell. *Fol. 428.

[3. If a man ſeiſed in fee of lands, leaſes it for years, and the *leſſee covenants to render the poſſeſſion to the leſſor, his heirs, and aſſigns, at the end of the term upon requeſt*; and after the *leſſor aſſigns over the reverſion to two*, and *one of them*, at the end of the term, comes to the leſſee, and *demands the deliverance of the poſſeſſion*, though the other never demanded the poſſeſſion, yet by this demand, by one only, he is bound to render the poſſeſſion, otherwiſe he hath forfeited his covenant; for the demand of one *joint-tenant* is ſufficient for both. Paſch. 16 Jac. B. R. between *Linghen and Payn* adjudged.] Cro. J. 475. pl. 8. Hingen v. Payn, S. C. adjudged for the plaintiff.——Bridgm. 128. S. C. adjudg'd per tot Cur. for the plaintiff. ——Godb. 272. pl. 381. Ingin v. Payn, S. C. adjudged.

4. If A. be bound *to infeoff me*, it is *no plea that he has infeoffed J. S. by my command*, for I have no action to recover it from him; *but* if he be bound *to pay me* 10 *l. payment to J. S. by my command is a good plea*, becauſe I may have debt or accompt againſt him; per Wangford, to which Billing agreed. Br. Conditions, pl. 90. cites 36 H. 6. 8.

5. Annuity

5. Annuity granted *quamdiu* the grantee ſhould be friendly and obliging to the grantor, there if the grantee *labours to put the grantor out of ſervice*, this is forfeiture of the annuity. Br. Conditions, pl. 148. cites 7 E. 4. 16.

6. Condition of a recognizance taken before the mayor of London was, *to deliver quiet poſſeſſion* at the end of a term to the mayor [153] to the uſe of J. S. &c. The key was delivered to the mayor, the houſe empty and the doors locked; but within an hour after a perſon claiming right to the houſe, and whom the obligor was ſuppoſed to favour, entred the houſe at a ſhop door by a key he had kept a long time; whether this was a performance dubitatur. See D. 219. pl. 9. Mich. 3 & 4 Eliz. Parry v. Smith.

Le. 298. pl. 409. S. C. adjudged, that the condition was broken for where the deviſor had allowed the deviſee to diſcontinue for life to make a jointure to

7. A. ſeiſed of lands in fee his iſſue two ſons, and deviſed to his youngeſt ſon certain lands in tail, remainder to his firſt ſon on condition *not to alien or diſcontinue*, but for jointure to his wife or wives, and only for life or lives of ſuch wife or wives. Deviſee *levies a fine* to a ſtranger, and by deed declares the uſe to himſelf and his wife and to the heirs male of his own body, remainder to the heirs of his father, and avers that this fine was for jointure of his wife; adjudged that the levying the fine is a breach of the condition. Mo. 212. pl. 353. Mich. 27 & 28 Eliz. Rudhall v. Milward.

his wife; now he has exceeded his allowance, for he himſelf might have made a jointure to his wife indefeiſable by fine upon a grant upon a render for life, &c. But this fine with the proclamations is a bar to the former entail which was created by the deviſe, and has created a new entail, and the former tail was barred by the fine againſt the intent of the deviſor; alſo by this fine he has created a new remainder, ſo as his iſſue, inheritable to this new entail, might alien and be unpuniſhed, which was againſt the meaning of the deviſor.

Obligation was conditioned, that *if J. S. makes an*

8. If a covenant be *to make an eſtate to A.* and *it is made to B. to the uſe of A.* Periam J. ſaid he doubted if it was good or not. Godb. 95. in pl. 106. Mich. 28 & 29 Eliz. C. B.

obligation to the plaintiff before Michaelmas, that then, &c. the defendant *pleaded that J. S. made the obligation, and ſealed and delivered it to another as his deed to the uſe of the plaintiff*; and it was adjudged, that it was no performance of the condition, for the meaning was, that it ſhould be a good deed to the plaintiff, and perhaps the other will not deliver it to the plaintiff. Cro. E. 143. pl. 9. Trin. 31 Eliz. C. B. Peaſe v. Draiton.

9. Debt on *bond* with condition *to give and grant to A. his heirs* and aſſigns, defendant pleads he has been ready to give and grant; adjudged ill, for he muſt plead that he did it; otherwiſe had it been if the words had been *as counſel ſhould adviſe*. Brownl. 75. Trin. 11. Jac. Chapman v. Peſcod.

10. A man makes a *feoffment of lands in five counties, with a condition of re-aſſurance. A re-aſſurance is made of lands in four counties*; it is a breach of the condition but only for the lands in one county, and a good performance for the other; reſolved by Hobart Ch. J. Coke Ch. J. and Lord C. Egerton. Mo. 823. pl. 112. 14 Jac. in Canc. the King v. Howard.

11. Condition that a *conveyance* ſhall be to A. B. and C. to the uſe of D. and the heirs male of his body, the remainder *to the heirs male of E.* The limiting the remainder to E. and the heirs male

of

of his body is no performance, for they agree not to the words of the condition. Het. 177. Trin. 7 Car. C. B. Stone v. Tilderſley.

12. Debt ſur obligation, the condition whereof was, *to leave and bequeath unto the obligee, the third part of the eſtate* &c. the obligor joins him with two others as executors; the obligee dies inteſtate. The adminiſtrator of the obligee brings an action on that bond; the queſtion was, whether that were a performance of the condition. 2 Show. 69. pl. 54. Trin. 31 Car. 2. B. R. Impe v. Pitt. 2 Jo. 133, 134 Impey v. Pitt. S. C. it was inſiſted, that an expreſs deviſe is neceſſary to anſwer to the condition, and legacies may be given by the will; and if not the defendant ought to ſhew it. The court inclined for the plaintiff; ſed adviſare vult.

13. Two men and their wives join in a grant of their wives lands being parceners, *and covenant, that they and their wives have good right to convey the lands and to make further aſſurance; it was aſſigned for breach that one of the women was under age* and died, and that the right of the lands deſcended to her ſon an infant, and ſo the eſtate of a moiety diveſted out of the plaintiff. This was held a breach and judgment for the plaintiff, niſi. 2 Jo. 195. Paſch. 34 Car. 2. B. R. Naſh v. Aſton. [154] Skinn. 42. pl. 3. S. C. and S. P. agreed per Cur.

(T, a) What ſhall be ſaid a Performance.

1. IF a man leaſes for life, upon condition that the *leſſee ſhall not do any waſte*, and after the leſſee ſuffers the houſe to fall for want of covering and reparation, which is not any act of doing, but a *permiſſion*, yet it ſeems that the condition is broke, for the words are, any waſte, and ſuch waſte is within ſtatute of Glouceſter, which ſpeaks of doing of waſte; and it ſeems that the permiſſion *of the houſe to fall* may properly be ſaid a doing of waſte, which is a collateral thing, which is but as much as if he had ſaid, if he had diſinherited him, D. 11 Eliz. 281. 21. but quære.] Where a leaſe is made upon condition that if waſte be done he may re-enter, there if the houſe falls by tempeſt, he cannot re-enter, but if it be uncover'd by tempeſt, and ſtands, there if the tenant has ſufficient time to repair it, and does not, the leſſor may re-enter, but not immediately upon the tempeſt, for it is no waſte till the tenant ſuffers it ſo that the timber be rotted; per Hull; and then it is waſte. Br. Conditions, pl. 40. cites 12 H. 4, 5. ——— If he ſuffers it to continue unrepaired, ſo that at laſt the houſe is caſt down by a tempeſt, it is waſte. Mo. 62. pl. 173. Trin. 6 Eliz. Anon. ——— See Tit. waſte, pl. 44. and the notes there.

[2. [*So*] if a man leaſes land, upon condition that the leſſee ſhall not do waſte, and after *a ſtranger does waſte*, yet this is not any forfeiture, becauſe a condition ſhall be taken ſtrictly. Paſch. 44 Eliz. B. R. between *Baſpoole and Longe*, by three juſtices.] If a man leaſes land for years, upon condition that the leſſee ſhall not cut trees; if the leſſee makes leaſe for 2 years, and the 2d leſſee cuts the trees, this is no breach of the condition. Mo. 49. pl. 149. Paſch. 5 Eliz. Anon.

[3. If a man makes a feoffment in fee, reſerving rent, upon condition that if the *rent be behind, and no diſtreſs* to be found upon the premiſſes, to re-enter. If the rent be behind, and *no diſtreſs but*

but a cupboard in a house lock'd, so that the feoffor cannot come at it, this is a forfeiture; for when *the place* is *not open to the distress*, it *is all one as* if there had been no *distress* there. Mich. 21, 32 Eliz. B. R. per *Wray*, upon a special verdict.]

4. If a man is to carry a load of timber to a wharf to be *laid down where the owner shall appoint*, if the carrier gives notice when he will carry it, and requires the owner to appoint a place, which he does not, the carrier may unload the timber in any convenient place at the wharf, and return. 2 Lev. 196. Trin. 29 Car. 2. B. R. Virtue v. Bird.

5. Where *upon payment* and receipt of money a man is *to do* so or so, it was held that *a tender* is as much as an actual payment. Per Holt, Ch. J. 6 Mod. 33. Mich. 2 Ann. B. R. in case of Squire v. Grevel cites Sti. [481] London v. Craven, and said that the authorities have been so ever since.

6. *Devise* of lands to trustees, *to the use of plaintiff and his heirs male, in case plaintiff's father settle 2 thirds of the estate which was*
[155] *settled on plaintiff's father on his marriage*; and in default thereof, or in case of plaintiff's death without issue, trustees to hold the lands to their own use. Plaintiff's father by will *devises all his lands, being* 6000 *l. per ann. charged with* 30,000 *l. debts, to his son the plaintiff for life, remainder to his first &c. son in tail male.* This is a good performance of the condition. Vern. 79. pl. 73. Mich. 1682. Popham v. Bampfield & al'.

(U. a) Condition broke. What act shall be said a Forfeiture. [*Doing his Endeavours, or putting in another's Power to perfect it &c.* pl. 1, 2, (2), 3, 4.] * [*Quiet Enjoyment*, pl. 6. &c.]

* See (U. a) 2.

Cro. J. 74, 75, pl. 4. Hotton, v. Horton, S. C. the condition was, that he should not alien to any besides his children.

[1. IF there be lessee for years, upon condition *not to devise it* to any body, *but only to his sons* or daughters, and he *devises it to a stranger*, and dies, and his *executor never consents* to the devise, yet this is a forfeiture, because he hath done all that was in his power to pass it by the will; and this puts it in the power of an executor to execute it. Trin. 3 Jac. B. R. between *Burton and Horton*, by three against one.]

Lessee devised part of the term to H. his son after the death of his wife, and made two strangers executors and died. Three justices held, that it was not any breach of the condition, but Williams J. e contra; for they said that this was not a devise to the wife by implication, for if so it would make a forfeiture of the estate; and this devise to the son, after the death of the feme, is only a demonstration when his estate shall commence, and the executors may well have it in the interim, and a difference was taken between a devise to the heir after the death of the wife, and this devise to the son after the death of the wife, as to her taking an estate by implication, and cited 13. H. 7. But they held, that if the devise be allowed to be to the feme by implication, although the executor never assented thereto, yet it is a breach of the condition; for he thereby made an alienation; and the non-consenting of a stranger shall not take away the advantage which the lessor had by this act. So it was resolved in the lord Borough' case in this point.

[2. *So* if ſuch leſſee *deviſes* the term *to his executor for payment of his debts*, (as it ſeems it is to be intended to make the deviſe void) though this deviſe is void, becauſe the law had veſted it in him for the (*) ſame cauſe, yet in as much as he hath *done his endeavour to paſs it by the deviſe*, this is a forfeiture. Trin. 3 Jac. B. R. in *Burton and Horton's caſe*, held by three.] * Fol. 429.

[(2). [*So*] if leſſee for years, upon condition *not to alien without the aſſent* of the leſſor, makes his executor, and deviſes it to him, and *the executor enters generally*, the teſtator not being indebted to any body, this is a forfeiture of the condition. P. 43 El. B. R. between * *Dumpere and Simms* agreed per Curiam.] * Cro. E. 815, 816. pl. 5. S. C. but S. P. is only mentioned obiter whether the executor by entering generally ſhall be in as legatory, becauſe then clearly by the deviſe the condition is broken; and Gawdy J. ſaid, that he ſhall, but the other juſtices ſaid nothing to that point. ——— 8 Rep. 119 b. S. C. but not S. P. ——See deviſe (D. a) pl. 3. lord Windſor's caſe. ——S. P. adjudged a forfeiture and breach of the condition, becauſe the general entry ſhall be intended as deviſed; cited Arg. Mo. 352. pl. 470. and Fenner J. ſaid it was true, and ſo adjudged to his knowledge 20 Eliz. Ld. Boroughs v. Ld. Windſor.

[3. If there be a *grantee of a reverſion*, upon condition *not to grant it over to J. S.* and he *grants* the reverſion to J. S. by his deed, though the *leſſee never attorns*, yet this is a forfeiture, becauſe he hath done his endeavour to grant it, and put it in the power of a ſtranger to perfect it. Tr. 3 Jac. B. R. in *Burton and Hortin's caſe*, per three.]

[4. If leſſee for years covenants *not to aſſign it, by which it may come to J. S.* and obliges himſelf to perform covenants, and after he *aſſigns it to J. D.* this breaks the condition, in as much as by the means it may come to J. S. Tr. 13 Ja. B. between *Cumin and Richardſon*, per Curiam.] [156]

[5. If the condition of an obligation be, that he ſhall *not be* aiding and *aſſiſting to E. in any action to be proſecuted againſt L. the* obligor [*obligee*] and after the *obligor joins in a writ of error with E. and another againſt L. upon a judgment* in treſpaſs againſt them three, which is *apparently erroneous*; this is not any breach of the condition, for this is not properly an action, but a ſuit to diſcharge himſelf of a tortious judgment, in which they ought all to join. H. 17 Ja. B. between *Lambe and Tomſon*, dubitatur.] Heb. 303. pl 383. S.C. the apparent ſenſe of the condition is, that he ſhould not maintain &c. in any his proper ſuits againſt the plaintiff; and adjudg'd to be no breach. ——Hutt. 40. S. C. adjudg'd accordingly; and if he would have reſtrained him from joining in a writ of error, it ought to have been precitely contain'd in the condition, and ſhall not be taken by a large expoſition to make a forfeiture of an obligation, by a general and ambiguous ſenſe.

[6. If a man leaſes for years, and covenants with the leſſee, that he ſhall *enjoy it without any lawful interruption by the leſſor, or any claiming under him, and* alſo covenants that the land *ſhall remain and continue to the leſſee and his aſſigns, of the clear yearly value of 20 s. over all reprizes during the term*, and after the *leſſor enters* upon the leſſee, and ouſts him *tortiouſly, and takes the profits for ſeveral years*, ſo that it does not continue to the leſſee of any value, for [becauſe] the leſſor took profits, he hath broke his covenant; for though the leſſee may have an action for the interruption upon another covenant, yet by the ſpecial words he hath covenanted, that the land Jo. 360. pl. 2. S. C. adjudged accordingly; but if a ſtranger without title had entered it had been otherwiſe.

ſhall

ſhall continue to the leſſee of ſuch a value, and ſo the *leſſee may have his action upon one covenant or the other*; and it ſhall not be intended, that the covenant was made to the intent to warrant the land to be of this value generally, and not to the leſſee, when it is expreſly covenanted, that it ſhall continue to the leſſee of this value. Trin. 11 Car. B. R. between *Cave and Brookſby*, adjudged upon demurrer per totam Curiam, except Brampſton, who doubted thereof; but there the firſt covenant did not appear in the pleading, for this was not pleaded; but the court, ut ſupra, delivered their opinion as if it had been pleaded. Intratur. P. 11 Car. Rot. 265.]

It was agreed according to the books of 20 H. 7. 12. and 46. E. 3. 5. that if the leſſor ejects his leſſee, he may have action of covenant.

7. If A. leaſes lands to B. for years by indenture, and covenants that B. ſhall *enjoy* the land *peaceably and quietly* to his own uſe, according to the intent of the indenture; *without any lawful impediment*, ſuit, diſturbance, ejection, contradiction, moleſtation, charge, incumbrance, or denial of the ſaid A. and after *A. enters upon B. and diſturbs him in the taking of the profits, without any lawful title, but as a treſpaſſor*, this is not any breach of the covenant, becauſe it is expreſly limited that he ſhall enjoy it without any lawful diſturbance; and ſo a *diſturbance by tort is out of the covenant*. Mich. 11 Car. B. R. between *Davie and Sacheverel*, per Curiam, adjudged upon a demurrer, in an action of debt upon an obligation, (*) the condition thereof was for the performance of the covenants of an indenture. Intratur, 11 Car. B. R. Rot. 437.]

* Fol. 430.

Yelv. 226. Doughty v. Fawne. S. C. ſays the court after great debate, was againſt the plaintiff upon the matter of pleading.——Brownl. 117. S. C. but is only a tranſlation of Yelv.——2 Bulſt. 19. S. C. adjudged againſt the plaintiff on the point of pleading.

[8. If the condition of an obligation be *to ſave the obligee harmleſs of and concerning the will of J. S. and of all legacies given by the ſame will*, and after *he is ſued in chancery as adminiſtrator, and* there *conſtrained to pay a legacy due by the ſame will*; this is a * breach of the condition, though the ſuit and decree be in a court of equity. M. 10. Ja. B. R. between *Dowtie and Fawne*. per Curiam.]

*[157]

[9. If the parſon aſſumes to the pariſhioners, in conſideration &c. that he ſhall *be diſcharged of the tithes of the lands*, and after *ſues him in the eccleſiaſtical court for his tithes*; this ſuit, tho' he does not there compel him to pay the tithes, is a breach of the aſſumpſit. M. 10 Ja. B. R. between *Brown and Kinman*.]

[10. If *leſſee* for years *aſſigns* it *to J. S. and after aſſigns* it *to J. D.* and *covenants with J. D. that he is poſſeſſed* of the term, *and that J. D. ſhall enjoy* it, and ſhall be ſaved harmleſs of all incumbrances done by him; the *firſt aſſignment is not any breach* of the covenant *before entry* made *by J. S.* nor any diſturbance of the poſſeſſion of J. D. M. 8 Ja. B. between *Lamme and Sir Lewis Treſham* per Curiam.]

Hob. 35. in pl. 39. S. C. cited.—— Cro. E. 344. pl. 15. Corus's caſe, adjudged for the plaintiff

[11. If the leſſor covenants with his leſſee for years, that it *ſhall be lawful for the leſſee peaceably &c. to enjoy* the land, and after the *leſſor enters tortiouſly* upon the leſſee, *and ouſts him*; this is a breach of the covenant, for the intent was, that he ſhould enjoy it without the interruption of the leſſor. H. 39 Eliz. B. R. *Core's caſe* adjudged. *So* it would have been, *tho'* the word *(peaceably)* had

had not been within the covenant. Hob. 49. 20 H. 7. 12. 6 E. 3. 4.] without argument. ——See (R. a) pl. 4. S. C.

[12. [*So*] if the leſſor covenants with his leſſee, that he *ſhall* have and *enjoy* the land *quietly and peacably without eviction and interruption of any perſon*, and after a *ſtranger enters by tort*, yet this is a breach of the condition, becauſe the covenant is, that he ſhall not be interrupted in his poſſeſſion. D. 16. El. 328. 8. [Mountford v. Cateſby.] 3 Le. 45. pl. 96. S. C. but S. P. does not appear.—— S. C. cited Hob. 35. and ſeems to be approved.

——S. C. cited Godb. 48.——S. C. cited by Vaughan Ch. J. Vaugh. 120. and ſays this caſe is not expreſsly denied in Eſſex and Tiſdale's caſe, Hob. 35.——S. C. cited 2 Vent. 62. and ſaid, that it ſeems to go upon the words of abſque interruptione alicujus, and cited Cro. J. 425. [pl. 10. Paſch. 15. Jac. B. R. Brooking v. Cham.], where the promiſe was to enjoy without the interruption of any perſon, and yet held that a title ought to be ſet forth.—When a man covenants, that his leſſee ſhall enjoy his term againſt all men, he does neither expreſsly covenant for his enjoyment againſt tortious acts, nor does the law ſo interpret his covenant; ſo where the leſſor covenanted that leſſee ſhould enjoy againſt his aſſigns, he does not covenant expreſsly againſt the tortious acts, nor ought the law to interpret, that he does any more than in the other caſe; per Vaughan Ch. J. Vaugh. 123. Paſch. 21 Car. 2. C. B. in caſe of Hayes v. Bickerſtaff.

[13. *So* if the covenant be, that the leſſor *ſhall ſave harmleſs the leſſee, concerning the premiſſes* and profits thereof to be received, *againſt J. S.* parſon of D. If *J. S. after ejects the leſſee without title*, the covenant is broke. Hobart's reports 49. cites H. 30 El. *Foſter's caſe* adjudged.] Cro. E. 212, 213. pl. 4. Foſter v. Mapes, S. C. in B. R. for when the covenant is to ſave them

harmleſs againſt a perſon certain, he ought to defend him againſt the entry of that perſon, be it by droit or tort, for he is damnified if he be diſturbed, though by wrong, as 2 E. 4. 18. But if the covenant had been to ſave him harmleſs againſt all perſons, there it ſhall be taken for a lawful entry or eviction; and the words (to ſave harmleſs) amounts to more than a warranty, for that is for lawful titles; But here is to be intended, that J. S. had good title, for it is alleged that he is parſon, and this is of the rectory, and that he entred and let it, by which it ſhall be intended he had intereſt, and it was adjudged for the plaintiff.——Ow. 100. S. C. adjudged for the plaintiff.——Le. 324. pl. 458. S. C. adjudg'd for the plaintiff.——Hob. 35. in pl. 39 cites S. C. as adjudged that the covenant was broke for two reaſons; one was becauſe it was to ſave harmleſs for the receipt of the profits, * and the other becauſe it was againſt a perſon certain; both which did import that they ſhould receive no harm by that perſon touching the profit.——S. C. cited Vaugh. 127, 128. by Vaughan Ch. J.

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[14. [*So*] if the leſſor covenants with his leſſee, *that he ſhould have, occupy, and enjoy* the land demiſed, and after a *ſtranger enters by tort, and ejects him*, this is not any breach of the covenant, for the *law will not conſtrue this covenant to extend to tortious acts, without an expreſs covenant.* Hobart's reports, *Tiſdel and Sir William Eſſex*, 48. adjudged.] Hob. 34, 35. pl. 39. S. C. adjudged.—— Mo. 861. pl. 1183. Hill. 12 Jac. S. C. reſolved that he ought to ſhew a title

in the ſtranger, otherwiſe it is where it is alleged in leſſor himſelf; and another diverſity was taken between a covenant implied, as in the words of the demiſe, &c. and a covenant expreſs, as that he ſhall ſave harmleſs, and that leſſee ſhall enjoy the lands, &c. for in the firſt caſe the covenant is not broken by the entry of a ſtranger, unleſs the entry be by title, which amounts to an eviction of the term. But upon a covenant expreſs, the leſſor is bound to defend the land againſt the entry of any man, and judgment for the defendant.——Brownl. 23. S. C. adjudged for the defendant, becauſe the breach was naught.——3 Bulſt. 204. S. C. ſays it was laid that he did enter, and conatus fuit to take the poſſeſſion, and they diſturbed him and put him out. Coke Ch. J. ſaid, that this covenant ſhall be againſt all men; and ſo without further debate the court held, that here was a clear breach of covenant, and judgment was entred for the plaintiff.——Roll. Rep. 397. pl. 23. S. C. according to 3 Bulſt. and judgment accordingly for the plaintiff.—Vaugh. 120. S. C. cited by Vaughan Ch. J. ſaid it was adjudged, that the interrupt on muſt be legal or an action of covenant will not lye, becauſe there is remedy againſt the interruptor.—But if he be bound to warrant the land, &c. the bond is not forfeited

forfeited unleſs the obligee be impleaded, and then the obligor muſt be ready to warrant. Co. Litt. 384. a.

Mo. 859. pl. 1179. S. C. in C. B. adjudg'd againſt the plaintiff, becauſe it was a ſuit of equity, and not at common law. ——Brownl.

[15. [*So*] if the leſſor covenants with his leſſee for years, that he *quietly and peaceably ſhall enjoy* the land, *without the impediment and diſturbance of the leſſor* &c. and after the leſſor *exhibited a bill in chancery* againſt the leſſee, *ſuppoſing this leaſe was made in truſt for certain purpoſes*, but there it is decreed againſt the leſſor; this is not any breach of the covenant, becauſe the *chancery hath nothing to do to meddle with the poſſeſſion*, but only with the perſon, and this ſuit ſtands with the covenant, ſcilicet, the truſt. Tr. 12 Jac. between *Selby and Shute* adjudged.]

23. S C. adjudged for the defendant.——Raym. 371. S. C. cited by Raymond J. Arg. and ſays that by the record itſelf in Winch's Entries, 116. it appears that judgment was given for the plaintiff; and Winch was one of the judges that gave the judgment, for this was 11 Jac. and he was made judge 9 Jac. and ſo he ſhould know better than any of thoſe who report the caſe, none of which then attended the court of C. B. but Brownlow; and this judgment is entred not in His, but in Waller's office.

a Brownl. 277. Mich. 7 Jac. C. B. Miller v. Francis, S. C. adjudged.—

16. If a man *deviſes* lands *upon condition, that if he does not permit the executors of F. to take* the goods that then were in the houſe, the eſtate ſhould be void &c. *A denial by parol* is not any breach of the proviſo; but it ought to be an act done, as the *ſhutting the door againſt the executors, or laying his hands upon them* to reſiſt them, or ſuch like acts, ſo that by reaſon of any ſuch act he did not (*) permit them to take or carry the ſame goods according to the proviſo. Co. 8. *Francis* 91. reſolved.]

* Fol. 431.

Lutw. 813. Trin. 11 W. 3. C. B. all the court were of opinion, that the principal caſe of Francis is good law, but it was cited there on the point of notice.

[17. If *A. and B. are executors of C.* who was a freeman of London, and *A.* upon the marriage of E. the daughter of E. *covenants with F.* who is to marry with E. *that it ſhould be lawful for the aforeſaid F. from time to time after the marriage aforeſaid, to ſee and inquire into all ſuch accounts as ſhould concern the eſtate of C. the teſtator*, by which he may ſee what money became due to be paid to E. In this caſe, if *B. the other executor hath* any *accounts* [159] *which concern the ſaid eſtate* of the teſtator, and *F. requires A. and B. to ſee* and ſearch *the ſaid accounts, and B. refuſes* to permit him to do it, but A. ſays he does not deny to do it, yet A. hath broke the covenant, for by this covenant he hath undertaken for B. and all other ſtrangers, who have any ſuch accounts, that they will permit F. to ſee and ſearch for the cauſe aforeſaid, by force of the words of the covenant, *that it ſhould be lawful for the aforeſaid F.* Hill. 8 Car. B. R. between *Robarts and Williamſ* adjudged per Curiam, upon demurrer. Intratur Mich. 8 Car. Rot. 492.]

18. *Feoffment to his ſon and heir apparent* is no alienation within the condition. Arg. 2. Le. 82. in pl. 110. cites 46 E. 3.

19. If a *parſon makes a leaſe* for years, *and then reſigns*, it is a breach of covenant. Hob. 35. pl. 39. in caſe of Tiſdale v. Eſſex cites 12 H. 4. 3.

20. Debt againſt executors upon obligation with condition that *if the teſtator of the defendants did his endeavour to collect* 10 *l. rent for*

for the plaintiff of his manor of D. and to render account of it next Whitſontide, and of this make gree to the plaintiff, that then &c. and *ſaid that the teſtator did his endeavour to collect the rent, and* that the teſtator *died ſuch a day before Whitſontide* &c. *and the plaintiff ſaid that he did not do his endeavour*; and ſo ſee that this ſuffices for all, for if he cannot receive it, he cannot render account thereof, nor pay the arrears. Br. Conditions, pl. 92. cites 38 H. 6. 2. 3.

21. Condition of a leaſe was, that if he alien to any perſon during his life, the leſſor may enter; leſſee *deviſes* it to another, this does not take effect in his life, but has an inception in his life. Per Dod. Roll. R. 214. cites D. 45. b. 31 H. 8. [pl. 3. Parry v. Harbert, and it ſeem'd to Brook and Hales, maſter of the rolls, that it was a forfeiture.]

And tho' he deviſed it *to his executors*, who accepted it only as executors, and not as deviſees, yet it was held a breach, becauſe he did what he could to have deviſed the land. 3 Le. 67. pl. 100. Hill. 29 Eliz. C. B. Anon.——4 Le. 5. pl. 20. Parry v. Herbert. S. C. in totidem verbis.

22. *Condition that he, his executors, or aſſigns, ſhall not* alien *without conſent of leſſor*. B. died inteſtate, his *adminiſtrator* alien'd without leave; per Periam J. the adminiſtrator is not within the penalty, for he is not in merely by the party, but by the ordinary; and per Mead and Periam J. if a leaſe for years upon ſuch a condition be *extended upon a recognizance*, 'tis not an alienation againſt the condition; but if feme leſſee for years on ſuch condition *takes huſband, and dies*, the huſband is within the danger of the condition, for he is aſſignee. If the king grant to a ſubject bona & catalla felonum, and leſſee for years on ſuch a condition is *outlaw'd*, upon which the patentee enters; now per Periam J. the *patentee* is not bound by the condition, but Mead J. contra, for the condition ſhall go with the land. Le. 3. pl. 6. Mich. 25 & 26 Eliz. C. B. Moor v. Farrand.

Cro. E. 26. Sir Wm. More's caſe adjudg'd that the condition was broke, for the adminiſtrator is an aſſignee in law. S. C. ——And. 123. pl. 172. Smalpiece v. Evans. S. C. held accordingly by 3 juſtices, but the other e contra.

23. Donee on condition *not to alien* has iſſue 2 daughters; one *levies a fine* ſur conuſance &c. Come ceo *to the other*. Adjudged a forfeiture. Le 292. pl. 400. Mich. 26 & 27 Eliz. B. R. Anon.

Cro. E. 35. pl. 2. Croker v. Trewithin. S. C. the daughters had iſſue a ſons and die, and one of the ſons diſcontinues the land; and held a breach of the condition.

24. Leaſe for 60 *years, and ſo from* 60 *to* 60 *without rent*, amounts to an alienation. 2 Le. 82. pl. 110. Mich. 29 Eliz. B. R. Large's caſe.

3 Le. 182. pl. 233. S. C.—— The word alination, in conditional eſtates among ſubjects extends not to a leaſe *for 21 years or a life*; for the term granted is ordinary and reaſonable as ſome think. Jenk. 275. pl. 97.

25. A. was bound not to alien ſuch *a manor*. Alienation of *one acre* parcel of it, is a breach. Arg. 2 Le. 83. pl. 110. Mich. 29 Eliz. in Large's caſe.

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26. *Entring into a ſtatute to the value of the land* may be conſtrued alienation within the intent of a will. Per tot. Cur. 2 Le. 83. pl. 110. Mich. 29 Eliz. B. R. in Large's caſe.

3 Le. 183. S. C.

Cro. E. 331. pl. 8. Berry v. Taunton, S. C. ſtates the condition to be, that if he, his executors or aſſignees, demiſe the lands more than from year to year, then the leaſe to be void; and he deviſed it to his ſon who entered by aſſent of the executor, and all the juſtices held it a breach; for a condition ſhall not be taken ſo ſtrictly, that it ſhall be according to the preciſe words, and if the meaning be broken, it is a breach of the condition, and judgment accordingly.——Gouldſb. 184. pl. 142. Cole v. Taunton, S. C. held a breach.——Ow. 14, 15. Taunton's caſe, S. C. reſolved, that rigore juris this is a breach, yet it was ſaid that it was very hard, according to equity, that the eſtate ſhould be loſt; for he intended by his will to prefer his youngeſt ſon to whom he deviſed it, and not to break the condition, and did not think that it was any breach of it, and for this cauſe ſome doubt was made of the caſe; but afterwards judgment was given as aforeſaid.——Poph. 106. S. C. adjudg'd per tot. Cur.——S. P. by Rhodes J. Gouldſb. 49. in pl. 10.——S. C. cited D. 45. b. Marg. pl. 3.

27. A leaſe was made for years, upon condition *not to deviſe* [*demiſe*] *the land, or aſſign over his term*, and *by his will he deviſed it*; Gawdy, Fenner and Clench held clearly, that the condition was broken; for by this deviſe the term is diſpoſed by his gift, which is an alienation, and is as ſtrong as any other alienation. But Popham delivered no opinion. Cro. E. 330. pl. 6. Trin. 36 Eliz. B. R. Barry v. Stanton.

D. 152. a. pl. 7. Mich. 4 & 5 P. & M. Anon. S. P. and 3 juſtices held, that the reſtraint was not determined by the leaſe being granted by the leſſee's executors to one of his ſons, and ſo he could not grant it over without licence; but Stamford and Catlin held that he might, for that the reſtraint was determin'd.——S. C. cited 4 Rep. 120. B. by the reporter, who ſeems to approve of the opinion of Stamford and Catlin as law.

28. Debt upon obligation for performance of covenants, one was, *that the leſſee, his executors or aſſigns, nor any other who ſhall have the eſtate, or intereſt in the term, or any part thereof, ſhall not alien* their eſtate *without licence of the leſſor, but only to his wife or children; the leſſee deviſeth it to his wife, and makes her executrix, who enters as legatee, and takes huſband, and they alien the eſtate.* It was the opinion of 3 juſtices the covenant was broken, for the wife is reſtrained from aliening by expreſs words, for it extends to the leſſee and his aſſigns, and ſhe is aſſignee. But Walmſley doubted, becauſe ſhe is not within the words, for ſhe cannot alien to herſelf. Cro. E. 757. pl. 24. Paſch. 42 Eliz. C. B. Thornhill v. King.

29. Leſſee for years upon condition that *if he demiſed the premiſſes*, or any part thereof, *for more than one year*, then the *leſſor, &c. might enter*; he did not leaſe it, but *he deviſed it to his ſon*; this was held a breach of the condition. Gouldſb. 184. pl. 142. Hill. 43 Eliz. and ſays that the caſe of 31 H. 8. 45. rules the law in this caſe; for a deviſe is taken for a breach of the condition, and cites 27 H. 8. 10. but the reporter adds a quære if he might not have ſuffer'd it to come to his ſon as executor.

S. P. held accordingly by Daniel and Walmſley, but Warburton e contra. Cro. J. 61, 62. pl. 7. S. C.

30. *Deviſe to A. in tail provided not to alien otherwiſe* than to leaſe for the term of any number of years as may be determinable upon the death of three or fewer perſons, &c. and in caſe of alienation the remainder over to B. A. made a *leaſe for 1000 years* to J. S. who never entred; Per omnes J. præter Warburton J. this is no alienation within the proviſo on which an eſtate may ariſe to B. becauſe A. who made this leaſe was but tenant in tail, and then the leaſe is determinable on his death, and ſo the iſſue is not prejudiced; and it was not the intent of the deviſor to reſtrain A. to make a leaſe which ſhould determine by his death, becauſe it could not prejudice the iſſue, which was what the deviſor was taking care of; beſides,

beſides, if he had annexed an expreſs condition, that the tenant in tail ſhould not make an eſtate during his own life, it would be a void condition; but Warburton J. e contra. Mo. 772. pl. 1067. Trin. 2 Jac. C. B. Lovice v. Goddard.

31. A. makes leaſe for years to B. *Leſſee gives bond not to alien* the ſaid term, *and in the leaſe is a condition not to aſſign the leaſe without conſent of leſſor*; the leſſor gives him licence by deed, and upon this the leſſee *aliens*; the *bond is forfeited.* Jenk. 120. pl. 41.

32. A manor was granted on condition not to alien any part by which it ſhould not immediately revert; a *grant of a copyhold* was not within it; per Coke Ch. J. Roll. R. 203. in pl. 4. Trin. 13 Jac. B. R. cites D. 17. El.

33. *Jointenants* upon condition not to alien, and one *releaſes* to the other, 'tis no breach of the condition; per Hitcham Serjeant. Win. 3. Paſch. 19 Jac. in caſe of Waſe and Pretty. S. C. cited by Raymond J. Raym. 413. as ſaid by Wiuch J. and Hitcham, that it makes no degree for releſſee is in by leſſor, and cited Co. Litt. 184.

34. *Committing treaſon* is no breach of a condition not to alien; per Jones J. Jo. 20. Hill. 20 Jac. cites 7 El. D. 243. Lord Arundel's caſe. But per Hobart Ch. J. Arg. Forfeiture for felony or treaſon is an alienatiation as well as feoffment. Jo. 80. Paſch. 2 Car. in Cam. Scacc.

35. Condition that if A. obſerve, fulfil and *accompliſh the laſt will of B.* and ſhall content and *pay all bequeſts and legacies according to the intent* and true meaning of the ſaid laſt will. *B. was ſeiſed of lands in capite, and deviſed them by his laſt will to C. in fee*, and gives diverſe legacies, and makes D. his executor, and dies. *A. (who was heir at law) enters into the third part of the land.* Per three juſtices this was no forfeiture, but per two juſtices it was a forfeiture; but they made a general certificate to chancery, that by the opinion of the major part it was no forfeiture, and ſo it was decreed. Jo. 265. Trin. 8 Car. Egerton v. Egerton.

36. It was ſaid, that if *leſſee* for years *covenants with the leſſor not to aſſign over his term without the leſſor's conſent in writing*, and afterwards without ſuch conſent *deviſes the term* to J. S. this is not a breach of the covenant; for a deviſe is not a leaſe. Sty. 483. Trin. 1655. in caſe of Fox v. Swann.

37. Bond conditioned to perform covenants, whereof one was *to repay money, if the defendant or others ſhould ſue or trouble, charge or vex the plaintiff as adminiſtrator*; adjudged, that *a ſuit in equity is* a ſuit *within the condition*, and that whether the ſuit be for the ſame money or not, ſo it be againſt him as adminiſtrator. 2 Keb. 288. pl. 63. Mich. 19 Car. 2 B. R. Aſhton v. Martyn.

38. Debt on bond *to pay ſuch coſts as ſhould be ſtated* by two arbitrators by them choſen. Defendant pleads, that none were ſtated. Plaintiff replies, that *defendant brought not in his bill.* Defendant demurred; for though if the defendant were the cauſe that no award was made, it was as much a forfeiture of his bond as not to perform it would be; yet here there was a precedent act of the

plaintiff's neceſſary viz. to chuſe an arbitrator, which he ought to have ſhewn before any fault could be aſſigned in the defendant in not bringing in of his bill, and to this the court did incline; ſed adjornatur. Vent. 71. Paſch. 22 Car. B. R. Baldway v. Ouſton.

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[162] (U. a. 2) For quiet Enjoyment. See (U. a) pl. 6. &c.

The warranty extends only to acts done or to be done by the defendant. Mo. 58. pl. 164. S. C. ——Dal. 58. pl. 8. S. C. adjudg'd accordingly.

1. *FEME recovers in dower againſt leſſee.* Afterwards *leſſee leaſes over, and covenants habend' &c. pacifice gaudend' &c. and that he had done no act to impeach &c. but that the aſſignee might quietly have* &c. the premiſſes &c. without any diſturbance &c. of him, or *of any other perſon*, and gave bond for performance. Reſolved the words (but that) depend on the precedent matter, and have relation to the words (that the leſſee had not done any act) and are not abſolute words, and judgment for defendant. D. 240. pl. 44. Trin. 7 Eliz. Broughton v. Conway.

——Tenant pur autur vie leaſed for 21 years, and covenanted, that he had not done any act but that the leſſee may enjoy it during the term. Ceſty que vie died within the 21 years. Adudg'd that covenant does not lie; for the word (but) refers the ſubſequent words to the precedent words. D. 240. Marg. pl. 43. cites 40 Eliz. B. R. Peel v. Jervies.

2. A *parſon leaſed his rectory* for 3 years, and *covenanted that leſſee ſhall* have and *enjoy it during the ſaid term without expulſion, or any thing done or to be done by the leſſor*, and gave bond to perform the ſaid covenant; afterwards, *for not reading of the articles, he was deprived ipſo facto by the ſtatute of* 13 *Eliz.* The *patron preſented another, who* being inducted *ouſted the leſſee.* It was the opinion of all the juſtices, that this matter is not any cauſe of action, for the leſſee was not ouſted by any act done by the leſſor, but rather for *nonfeaſance*, and ſo out of the compaſs of the covenant; as if a man be bound that he ſhall not do any waſte, permiſſive waſte is not within the danger of it. 4 Le. 38, 39. pl. 104. Paſch. 19 Eliz. C. B. Anon.

3. Condition that B. ſhall *enjoy a leaſe* of Bl. Acre *immediately after his death*, the land being ſown; the *executors of A. take the corn.* It was held that it is no forfeiture, becauſe by law the corn belongs to them. 4. Le. 1. pl. 1. Hill. 20 Eliz. Launton's caſe.

S. C. cited by Raymond J. Raym. 371, 372. ſays, that the leſſee could not be diſturbed by that ſuit againſt the leſſor, and he took it, that ſuch a ſuit is not a breach of covenant againſt incumbrances, becauſe a decree is no incumbrance upon the land, but a moleſtation to the perſon; and the law takes notice of ſuits in chancery, for a forbearance to ſue in chancery is a good conſideration to ground an aſſumpſit, and of this opinion were the other 3 judges.

4. The leſſor covenanted, *that the leſſee ſhould enjoy without any lawful eviction.* Afterwards, upon a ſuit in chancery by a ſtranger againſt the leſſor for the land demiſed, the chancellor made a *decree againſt the leſſor, and that the ſtranger ſhould have the land*; Lord Dyer held, that the decree was *not any eviction*; for although in conſcience it be right, that the ſaid ſtranger have the poſſeſſion, yet that is not by reaſon of any right in the ſtranger, paramount the title of the leſſor. 3 Le. 71. pl. 109. Hill. 20 Eliz. C. B. Anon.

——The caſe was, viz. in aſſumpſit, &c. the plaintiff declared of a diſcourſe

court between him and defendant concerning a *portion of tithes in B.* and concerning a verdict againſt one H. T. for 18 *l.* obtained by the plaintiff for the tithes of B. Mead, and that the defendant, in conſideration the plaintiff would, at his requeſt, acquit the ſaid H. T. from the ſaid 18 *l.* &c. and all arrears of tithes, &c. did *promiſe to allow the tithe hay of B. to be the right of the plaintiff, as belonging to the ſaid portion of tithes*, and that the plaintiff from thenceforth ſhould quietly receive the ſame without interruption, and aſſigned a breach, that the defendant did not permit him to receive the tithes of B. without any interruption, but in ſuch a term did *proſecute two ſuits in the Exchequer* againſt him, ad damnum, &c. The plaintiff had a verdict and judgment, and upon a writ of error brought, the queſtion was, Whether a ſuit in the Court of Equity is ſuch a breach of this agreement, as the common law can take notice of it? All the judges held that it was; for the law takes notice of ſuch ſuits. Raym. 370. Trin. 32 Car. 2. B. R. Hunt v. Danvers.

5. *B. granted the next avoidance to T. and gave bond to T. that* [163] *he ſhould enjoy the ſaid preſentment without any diſturbance or claim of the ſaid B.—S. releaſed to B. his intereſts in the ſaid advowſon.* The *church became void. B. offered to join with T. in preſenting* to the avoidance. It was held, that the obligation was forfeited, although that B. had a puiſne title to it after the obligation was entered into. 4 Le. 18. pl. 62. Mich. 26 Eliz. C. B. Bluet's caſe.

6. Condition to permit the plaintiff *quietly to take, reap, and carry away corn.* Coming on the land with ſtaves, and forbidding him to reap was adjudg'd a breach. And. 137. pl. 188. Mich. 26 & 27 Eliz. Burr v. Higgs. Godb. 22. pl. 30. Anon. S. P. held accordingly, and ſeems to be S. C —

S C. cited by Raymond J. Arg. Raym. 371. Trin. 32 Car. 2. B. R.

7. B. ſold lands to P. and covenanted that B. and his heirs ſhould quietly enjoy the lands without any interruption; afterwards ſome *controverſies ariſing concerning the title, they ſubmitted to the award of Sir W. C.* who *awarded that P. and his heirs ſhould quietly enjoy* the lands *in tam amplo modo, as the ſame were conveyed to him*, and the truth was, that *at the time of the* executing the ſaid *conveyance, the vendor ſtood bound to M. in a recognizance of* 600 *l. who after* the conveyance *ſued out an elegit, and took the moiety of the lands in execution*; and in an action of debt brought by the plaintiff, for non-performance of this award, it was argued that the lands paſſed with the charge, and when B. covenanted that P. ſhould quietly enjoy, that covenant is a collateral ſecurity, and the award that he ſhould enjoy in tam amplo modo as the lands were convey'd to him, give him no new title, for they are not words of aſſurance, for the aſſurance conſiſts in the legal words of paſſing an eſtate, viz. Dedi, conceſſi, &c. and in the limitation of the eſtate, and not in the words of the covenant. And it does not appear that there was any interruption of the vendee, becauſe the *execution by elegit was illegal*; for it appears that M. ſued it by elegit *4 years after the judgment in the ſci. fa. whereas he ſhould have brought a new ſci. fa.* and the ſheriff ſhould return, that the coguiſor, after the recognizance had infeoffed the vendee, and upon that return the cogniſee ſhould have a ſci. fa. againſt the feoffee. And the court was clear of opinion againſt the plaintiff. 1 Leon. 20. pl. 34. Paſch. 27 Eliz. B. R. Allington v. Bates.

8. Debt on a bond, conditioned *to ſuffer the plaintiff's tenants to enjoy ſuch a common*; the defendant *pleaded conditions performed*, the plaintiff *replied that he did not ſuffer A. B. his tenant to enjoy* &c. *abſque hoc, that he had performed the condition*; the court held this

traverſe ill; for 'tis no more than he had pleaded before (viz.) that he did not ſuffer the tenants to enjoy. Goldſb. 62. pl. 21. Trin. 29 Eliz. Gawen v. White.

And. 162. pl. 267. Hannington v. Rudiard, S. C. adjudged that the land was not diſcharged of the leaſe by the taking of the feoffment, and that it was the intent, that

9. *K. leaſed lands to H. for years. H. by will deviſed the uſe and occupation of the ſaid land to his wife ſo long as ſhe continues a widow, and if ſhe died or married that his ſon ſhall have it; H. dies. K. by feoffment conveys the land to his wife, and covenants, that* from thence *it ſhall be clearly exonerated de omnibus prioribus barganniis, titulis juribis, & aliis oneribus quibuſcunque.* The *wife marries* and the *ſon enters*, This is a breach, and the whole court agreed, that the land at the time of the feoffment was not diſcharged of all former rights, titles and charges, and therefore judgment was given for the plaintiff. Le. 92. pl. 120. Mich. 29 & 30 Eliz. Hamington v. Rider.

ſhe ſhould hold the land diſcharged, which now upon the matter ſhe does not; but by the marriage the land becomes charged with the leaſe.—Ow. 6. Haverington's caſe, S. C. and adjudged, that no act which the wife can do in purchaſing the inheritance by which * the term is extinct, ſhall bar the poſſibility which the ſon had to come upon her marriage; and that this poſſibility of the ſon to have the reſidue of the term, which at the time of the feoffment was but dormant ſhall be accounted a former charge and before the covenant, becauſe of the will which was before the covenant, and ſhall awake and have relation before the marriage.——Gouldſb. 59. pl. 17. S. C. adjornatur.——Ibid. 65. pl. 7. S. C. and the whole court agreed, that it was an incumberance and not diſcharged, and therefore gave judgment for the plaintiff.——Mo. 249. pl. 393. Mich. 29 Eliz. Anon. but ſeems to be S. C. only ſtates it, that the wife after her purchaſe ſold it again, and that ſhe then covenanted that the land was diſcharged of all former incumbrances, and gave bond for performance of covenants, and died, and the ſon claimed the term; and it was adjudged in debt on the bond, that the poſſibility in the ſon was a forfeiture of the wife's bond, becauſe it was an incumbrance.——10 Rep. 52. a. b. S. C. cited by the Ch. J. as adjudged.——S. C. cited 2 Sid. 167.

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10. Debt upon obligation by F. againſt G. the condition was, that if the obligee may enjoy certain tithes demiſed to him by the defendant during his term, againſt all perſons, *paying yearly the rent* of 3l. that then &c. to which the defendant *ſaid, that the plaintiff did not pay the ſaid rent* &c. Beaumont Serjeant moved that the plea is not good, but he ought to ſay that the plaintiff enjoy'd the tithes until ſuch a feaſt, at which time ſuch rent was due, which rent he did not pay, for which &c. Quod curia conceſſit. 4 Le. 94. pl. 193. Mich. 33 Eliz. C. B. Foles v. Griffin.

S. C. cited Freem. Rep. 42. in pl. 48. Trin. 1672. and ſays, that by the words (the indenture ſhall be void) there would be nothing for the plaintiff to ground his action upon.

11. In debt on *bond* conditioned *to perform covenants* in a leaſe, whereof one was, *that leſſee ſhould enjoy ſuch lands let to him quietly and without interruption*, and ſhews that the *defendant*, 20 *March*, 30 *Eliz. had diſturbed him*; the defendant ſaid that in the indenture was a *proviſo, that if he pay* 10*l.* 31 *March*, 30 *Eliz. then the indenture and all therein contain'd ſhould be void*, and *ſaid he paid the* 10*l. at the day*, It was adjudged for the plaintiff; for by the covenant broken before the condition performed the obligation was forfeited, and it is not material that the covenants become void before the action brought. Cro. E. 244. pl. 2. Mich. 33 and 34 Eliz. B. R. Hill v. Pilkington.

——A *perſon made a leaſe* for years, in which were divers covenants, and afterwards *he became non-reſident*, whereby the indenture became void, yet he might maintain an action of covenant for a covenant broken before his non-reſidency. Cro. E. 245. cites Bylowe's caſe.

12. But

12. *But* Wray said, *if the proviſo had been that upon the payment of the* 10*l. as well the obligation as the indenture ſhould be void*, it had peradventure been otherwiſe; for then the bond was void before the action brought. Cro. E. 244. pl. 2. Mich. 33 & 34 Eliz. B. R. Hill v. Pilkington.

13. A. made a leaſe to B. of land for years, and the *leſſee gave bond to pay M. N.* 20 l. for 17 years, if M. N. ſhould ſo long live, and *if he ſhall or may occupy or enjoy* the ſame, and then the *leſſee ſurrender'd the leaſe*, and refuſed to make any further payment of the annuity. A. being dead, his executor brought debt on the bond, and judgment was for the plaintiff; for this payment is a thing collateral. Ow. 104. Trin. 35 Eliz. Ford v. Holborrow. Cro. E. 313. pl. 4. S. C. adjudged; for it is collateral, and B. might have enjoy'd it during the time.——Mo. 597. pl. 815. S. C. adjudged accordingly.——Poph. 19. Forth v. Holborough, S. C. adjudged for the plaintiff; but if any had *defeated the ſaid term by a lawful entry, by a title paramount*, the obligation had not been forfeited for any default of payment after ſuch entry; per Popham.——But Popham ſaid, that if the condition had been, that if B. or his aſſignees, or thoſe which ſhould occupy the lands, ſhould pay the 20 l. and after B. had ſurrendered to A. and A. did not pay, the obligation had been forfeited; for in ſuch caſe A. was the party who was to pay it, and he ſhould not take the advantage of the non-payment. Cro. E. 313. in S. C.

14. Debt upon obligation to perform covenants of a leaſe, whereby the defendant had *leaſed* to the plaintiff *a houſe by the words demiſe and grant, and covenanted that the leſſee ſhould enjoy it without eviction, by him or any by his procurement.* The *leſſee aſſigned over his term.* S. a *ſtranger entred upon the aſſignee, and leaſed it to D.* The *aſſignee re-entred*,* whereupon D. brought ejectment againſt the aſſignee, and recover'd by verdict. Popham inclined that this covenant in law, upon the words demiſe and grant, is taken away by the expreſs covenant, but the other juſtices deliver'd no opinion as to that; but they all held the breach ill, for *not averring that S. entred upon good title*, for otherwiſe there is no cauſe of action; and tho' it be pleaded that D. recover'd by verdict, yet that is not material, for it may be upon falſe verdict and without title, and reſolved that judgment be entred accordingly; but the plaintiff had leave to diſcontinue. Cro. E. 674. pl. 2. Trin. 41 Eliz. B. R. Nokes v. James. 4 Rep. 80. b. Nokes's caſe. S. C. and reſolv'd that the aſſignee ſhall have covenant on the covenant in law, by the words demiſe, grant, &c. and that by the breach of this covenant in law the obligation was forfeited, it being to perform all co-

venants, grants, &c. which extend as well to covenants in law as to covenants in deed; And further, that the ſaid expreſs covenant qualifies the generality of the covenant in law, and reſtrains it by the mutual conſent of both parties that it ſhall not extend further than the expreſs covenant, and that it was lately ſo adjudged in the ſame court in Hamond's caſe.——S. C. cited by Vaughan Ch. J. Vaugh. 136——S. C. cited Arg. 5 Mod. 371.——S C. cited per Cur. Lev. 57.

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15. Leſſor covenanted *that leſſee for years might, or ſhould, peaceably, quietly and lawfully enjoy the premiſſes, without interruption of him or any other* perſon. In debt on bond for performance of covenants the plaintiff for breach aſſigned the *entry of a ſtranger who had no right*, and the opinion of Coke and the court was clearly for the plaintiff. D. 328. a. Marg. pl. 8. cites Trin. 4 Jac. C. B.

16. Debt was brought upon an obligation *to perform the covenants* contained in an indenture; the covenant was *for quiet enjoying without let, trouble, interruption*, &c. The plaintiff aſſigned his breach, that he *forbad his tenant to pay his rent*; This was held by the court to be no breach, unleſs there were ſome other act, and the defendant *pleaded, that after the time the plaintiff ſaid that he forbad*

the tenant to pay the rent to the plaintiff. Brownl. 81. Trin. 9 Jac. Witchcot and Lindſey v. Nine.

17. If *leſſee* for years rendering rent, with *condition of re-entry for non-payment of the rent, leaſes part for a leſs term under a leſs rent*, and *covenants that his leſſee ſhall enjoy without impeachment* of him, or of any other *occaſioned by his impediment*, means, procurement, or conſent, and after *he neglects to pay his rent*, upon which the *firſt leſſor enters*, &c. This is a breach, adjudg'd per tot. Cur. clearly. 1 Bulſt. 182, 183. Paſch. 10 Jac. Stephenſon v. Powel.

* Cro. J. 315. pl. 17. Mich. 10. Jac. B. R. Kirby v. Fanſaker, S. C. accordingly. The reporter adds a note, that this exception was taken in B. R. after the verdict before judgment, and diſallowed becauſe the verdict had made it good.

18. Debt upon an obligation, condition'd that where the plaintiff had a leaſe for years from his leſſor of certain land, *that the leſſee ſhould enjoy his land during the leaſe without eviction*; the *breach was alleged* in the replication *in a recovery of this land by A. by verdict, and upon a good title*; The *iſſue was, that the recovery was by covin*, and it is found for the plaintiff; he had judgment, which was reverſed in the Exchequer-Chamber; for A. might recover this land by verdict without covin, under a title derived from the plaintiff himſelf* [after the obligation made] therefore the *plaintiff ought to ſhew that A. had an elder title to* [*before*] *the* ſaid leaſe made to the plaintiff. Jenk. 340. pl. 95.

——In *covenant* by aſſignee of aſſignee of lands exchanged the *breach aſſigned was that a ſtranger, habens jus & titulum, did enter*, &c. After verdict it was now moved, that the plaintiff had not ſhewed a ſufficient breach; for he ſets forth the entry of a ſtranger habens, jus & titulum, but *doth not ſhew what title, and it may be he had a title under the plaintiff himſelf, after the exchange made*; and to prove this, the caſe of Kirby and Hanſaker was cited in point, and of that opinion was all the court. 3 Mod. 135. Trin. 3 Jac. 2. B. R. Moſſe v. Archer.

19. Covenant; *P. the huſband of the defendant* was *poſſeſſed of a leaſe* of a farm called N. for ſuch a term, and *covenanted that the*
[166] *plaintiff and his wife ſhould enjoy it during the term, without the interruption of P. or his wife*, and alleges the breach that ſuch a day *P. entred and ouſted him.* It was reſolved in this caſe, that although the covenant is, that the plaintiff and his wife ſhall enjoy it, and the *expulſion* is *of the plaintiff only*, yet it *is good enough*, and a breach of the covenant, becauſe the huſband hath the ſole profits and poſſeſſion. Cro. J. 383. pl. 11. Mich. 13 Jac. B. R. Penning v. Platt.

a Roll. Rep. 62, 63. S. C. & S. P. accordingly, by Montague Ch. J. and Haughton, but Doderidge e contra.

20. If one be bound *that he ſhall not continue ſuch a ſuit*, if *he continues it by attorney* it is a breach of the condition; *but if the attorney enters the continuance without his privity*, it is no breach; per Doderidge and Haughton J. Cro. J. 525. Hill. 16 Jac. B. R. in caſe of Gray v. Gray.

21. A. granted to H. the preſentation to the church of D. and gave bond, *that if from time to time he ſhall make good the ſaid grant from all incumbrances made or to be made by him and his heirs, then*, &c. The grantor died, the church is voided, *and the heir of the grantor preſented*, and whether this was a breach of the condition was the queſtion? and Hobart Ch. J. and Winch being only preſent, thought this tortious preſentation to be no breach of the condition, but this

extends only to lawful diſturbances by the heir; and by the pleading here it appears, that though the heir preſented, yet he had no right to preſent, becauſe his father had granted that before, and then the preſentation of the heir is as of a mere ſtranger. And thoſe general words will not extend to a tortious diſturbance by the heir; but Hobart ſaid, that the words ſhall have ſuch a conſtruction as if it had been ſaid, that he ſhall enjoy the ſame from any act or acts made by him or his heirs, and in this caſe there ought to be a lawful eviction to make a breach of the condition; but *otherwiſe if the condition had been, that he ſhall peaceably enjoy from any act or acts made by him, or his heirs*, in that caſe a tortious diſturbance would have been a breach of the condition, but it was adjourned till another time. Win. 25. Mich. 19 Jac. C. B. Hunt. v. Allen

22. Condition of a bond recited, that *copyhold lands were to be ſurrendered to the uſe of H. and G. and their heirs, by A. S. at her full age*; *and that G. ſhould pay to H.* 33 *l. ſuch a day, and if he did not, then the ſurrender ſhould be to the uſe of H. and his heirs*; if therefore A. S at her full age, ſhould ſurrender to the uſe of H. and his heirs, and that H. and his heirs may enjoy the ſame, then the bond to be void; the defendant *pleaded that G. did not pay the* 33 *l. and that A. S. came to age ſuch a day, and after in full court did ſurrender.* The plaintiff *replied, that after the ſurrender G. entred and expelled him.* Reſolved that the replication was not good, becauſe he did *not ſhew that the expulſion was by title*, for otherwiſe the bond does not extend to it. Cro. C. 5. pl. 1. Paſch. 1 Car. C. B. Hamond v. Dod.

23. Debt on bond conditioned, that *whereas the defendant was about to marry ſuch a widow, who was poſſeſſed of ſeveral goods of her firſt huſband, and his children, that he would not meddle with them, but that ſhe and her children ſhould enjoy them without diſturbance*, &c. *from him*, &c. The defendant pleaded performance generally. Plaintiff aſſigned a breach, that the firſt huſband was poſſeſſed of ſuch ſheep and goods, and that the wife had them before her ſecond marriage, but that afterwards the defendant took and detained them. After verdict it was moved, that the plaintiff did *not ſhew that the huſband did any act, or made diſturbance*, and ſo the breach not well aſſigned, and of that opinion were Hide and Jones; but Whitlock and Crook e contra; for by the allegation and the verdict for the plaintiff the court will intend it an unjuſt taking and detaining, contrary to the agreement; and Hide being afterwards of the ſame opinion, judgment was given (abſente Jones) for the [167
plaintiff. Cro. C. 204. pl. 9. Mich. 6 Car. B. R. Crowle v. Dawſon.

24. In conſideration of 130 *l.* paid, the *defendant 7 Martii Anno 9 Car.* 1643, *ſold* the plaintiff *all the furzes growing on ſuch lands, to be taken before Mich.* 1635, and *promiſed that he ſhould quietly carry them away without diſturbance*; and though he had *ſuffered him to carry away* 50 *loads, he diſturbed him from taking* 1000 *load growing on the ſame land*; after judgment for the plaintiff it was aſſign'd for error, that the plaintiff did *not ſet forth any certain time of the diſturbance, whether it was before Michaelmas* 1635; but reſolved

ſolved per tot. Cur. that this being after verdict is no error, for it ſhall be intended to be before that time, otherwiſe no damages would be given; beſides 'tis not material to ſet forth the time of the diſturbance, becauſe 'tis collateral to the promiſe; and ſo the judgment was affirm'd. Cro. C. 497. pl. 1. Paſch. 14 Car. B. R. Hall v. Marſhall.

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25. Where a man *covenants that he has power to grant, and that the grantee ſhall quietly enjoy from any claiming under him*, thoſe are two diſtinct covenants, and the firſt is general, and not qualified by the ſecond; per Hale Ch. J. to which Wyld agreed; for one goes to the title, and the other to the poſſeſſion. 1 Mod. 101. pl. 6. Mich. 25 Car. 2 B. R. in caſe of Norman v. Forſter.

2 Mod. 213. Major v. Grigg. S. C. and this being after a verdict, and the plaintiff ſetting forth in his declaration that the diſturber recover'd per

26. Aſſumpſit in conſideration the plaintiff promiſed to pay the defendant ſo much yearly for 5 years, for ſuch a thing, he promiſed *to ſave him harmleſs concerning the poſſeſſion* of it, *but that ſuch a one had evicted him*, and the defendant had not ſaved him harmleſs. *After verdict* for the plaintiff *it was moved that it is not ſhewn that he was evicted by title*, and all ſuch covenants extend only againſt lawful tithes and eviction; but per Cur. this agreement was only quoad the poſſeſſion, and judgment for the plaintiff. 2 Lev. 194. Paſch. 29 Car. 2. B. R. Gregory v. Major.

Judicium Curiæ, the court were all of opinion that judgment ſhould be given for the plaintiff.

3 Lev. 325. Buckley v. Williams. Hill. 3. W. & M. in C. B. the S. C. ſays the objection was not allow'd, becauſe the title of K. could not be ſuppoſed to be under the plaintiff here, the declaration being that K. had title by a demiſe made to him before the articles made to the plaintiff, and be the title derived from whom it will, yet it being before the articles made with the plaintiff, the covenant is broke according to the caſe of Proctor v. Newton, Trin. 23. Car. 2. B. R. Rot. 856. where, upon a breach aſſign'd, as here, judgment was given for the plaintiff, the roll of which was brought into court, and upon view thereof, after divers motions, judgment was given for the plaintiff; Levins a counſel for the plaintiff.

27. Covenant, &c. upon *articles of agreement*, wherein the *defendant covenanted in behalf of M. (a ſtranger) that the plaintiff ſhould quietly enjoy for a year a tenement called the Saltmarſh, except one cloſe, parcel of the premiſſes, to one E. K.* The breach aſſigned was, that *K. brought treſpaſs againſt the plaintiff, and recovered damages and coſts*, &c. The defendant pleaded, that he did not break this covenant; After a verdict for the plaintiff, it was inſiſted that it did *not appear that K. ſued upon a title*, and it was reſolved by Powel and Ventris (abſente the Ch. Juſtice and Rokeby doubting) that the declaration was ill for that reaſon; for the articles amounted to a leaſe, tho' by a ſtranger, becauſe he acted in behalf of the owner of the land, and it ſhall be taken that he had authority to demiſe, and it appears he intended it a demiſe, for the part excepted is mentioned to be a dimiſſione prædicta; But if it were a collateral covenant by a ſtranger, it would be hard to extend it to a tortious entry. This is no covenant expreſs againſt K. he being only mentioned for the part excepted and to have been tenant of the premiſſes, and ſo the principle judgment was ſtay'd. Vent. 61. Trin. 1 W. and M. in C. B. Raſhleigh v. Williams.

[168] 28. Condition *that A. or his heirs, or aſſigns, ſhall re-convey to B. ſuch land in fee. A. deviſes to C. (an infant) in tail*, remainder *to D.* the

D. the condition is broken; contra if the land had *deſcended to C. being an infant*, becauſe this had been an act in law. Ld. Raym. Rep. 112. Mich. 8 W. 3. Hulbert v. Watts & Ux'.

29. In covenant for quiet enjoyment, the *plaintiff aſſigned a breach that the leſſor entered upon him, and ouſted him* out of the premiſes. The defendant *pleads, that he entred to diſtrain for rent in arrear, abſque hoc that he ouſted him de præmiſſis.* Plaintiff demurr'd, becauſe if he had ouſted him of any part, he had good cauſe of action, and therefore ſhould have traverſed that he ouſted him of the premiſes, or of any part thereof. But per Cur. the plea is well enough; for *if the plaintiff will join iſſue on the matter of the traverſe, and prove the ouſter of any part, the iſſue will be for him*, and they took a *diverſity between pleading the general iſſue* as in debt, for there you muſt plead non debet nec aliquam inde parcellam, *and pleading a ſpecial iſſue* as this is. 2 Salk. 629. pl. 5. Paſch. 3 Ann. B. R. White v. Bodinam. 6 Mod. 150. S. C. in totidem verbis.

30. In the *aſſigning a breach* of condition for quiet enjoyment *a particular act muſt be ſhewn* by which the plaintiff is interrupted, otherwiſe it is ill. Comyns's Rep. 228. pl. 126. Mich. 2 Geo. 1. C. B. Anon.

(X. a) Condition to perform Covenants. [To what it ſhall extend.]

[1. IF a man *leaſes* a manor by indenture, *except certain parcel of* land, and in the indenture there are ſeveral covenants to be performed of the part of the leſſee, and after the *leſſee for further ſecurity binds himſelf in an obligation to perform all the covenants, articles, and agreements contained within a pair of indentures, and names the ſaid indentures*, and after the *leſſee enters the land excepted*, yet this is not any breach of the condition, for this *land excepted* is not leaſed, and ſo as if it had not been named, and therefore it cannot be intended an agreement to be performed on the part of the leſſee within the intent of the indenture. Paſch. 41 Eliz. B. R. between *dame Ruſſel and Gulwell* adjudged.] Mo. 553. pl. 474. S. C. adjudg'd no breach. But by Popham it is otherwiſe where a way, or common, or eſtover, or profit aprender is ſav'd or excepted out of the thing demiſed.

———Cro. E. 657. pl. 1. S. C. held accordingly by Popham and Fenner, but Gawdy e contra; and Popham upon its being moved at another time ſaid, that he had conferr'd with the other juſtices, and the greater part of them agreed, that this exception is not within the intent of the condition, and the bond not forfeited by this diſturbance; wherefore it was adjudged for the defendant. And Popham and Fenner held, that an *exception of a thing de-hors, which leſſor had not before, as a way, common*, &c. that is an agreement of the leſſee's that he ſhall have the profit, and in ſuch caſe a diſturbance will forfeit the obligation, for there the leſſor has an intereſt in the thing excepted.———S. C. cited 11 Rep. 50. b. 51. a. as adjudged that the word *(præmiſſa)* ſhould not extend to the thing excepted, but is all one in effect as *(prædemiſſa.)*——S. C. cited accordingly by Coke Ch. J. Roll. Rep. 102.——S. C. cited Hob. 276.——S. C. cited Show. 388. in caſe of Buſh v. Coles.———1 Salk 196. pl. 1. cites S. C. and the caſe there was, viz. By indenture H. *leaſed a houſe excepting two rooms, and free paſſage to them.* The *leſſee aſſigns*, and the *aſſignee diſturbs the leſſor in the paſſage thereto*, and for this diſturbance the leſſor brought covenant; et per Cur. the action lies. The *diverſity* is this; if the diſturbance had been in the chamber, it is plain then no action of covenant would have lain, becauſe it was excepted, and ſo not demiſed; aliter where the leſſee agrees to let the leſſor have a thing out of the demiſed premiſſes, as a way, common, or other profits apprender; in ſuch caſe covenant lies for the diſturbance. Cites 3 Cro. 657. and Mo. 553. And this covenant goes with the tenure, and binds the aſſignee. Judgment pro quer'.——Show. 388. Buſh v. Coles, S. C. adjudged for the

the plaintiff.——Carth. 232. S. C. resolved per tot. Cur. that this exception amounted to a reservation, it being a thing *newly created*, and not in esse before, viz a way or passage. Now *upon a reservation an action of covenant will lie, as where rent is reserved covenant will lie upon the words of reservation, without any express words of covenant, and the plaintiff had judgment.

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[2. If a man leases for years, *rendring rent*, payable *at Michaelmas, and* at *the Annunciation*, upon condition, that *if he does not pay it upon the said feasts, or within* 14 *days after*, that it shall be lawful for him *to re-enter*; and the *lessee binds himself* upon condition *to perform the covenants* and agreements of this lease; and then the *lessee does not pay* the rent *at the feasts, but* [*pays it*] after, and *within the* 14 *days*, yet the condition is forfeited; for the *condition* in the lease *is not part of the reservation*. Mich. 13 Jac. B. between *Middleton and Ratcliffe*, per Curiam.]

3. A. by *deed-poll reciting, that whereas he was possessed of certain lands for a certain term by good and lawful conveyance, assigns the same* to *J. S. with divers covenants, articles and agreements to be performed on the part of A.* The question was, if the words (whereas he was &c.) be an article or agreement within the meaning of the condition of a *bond given to perform* &c. Gawdy held that it was, and Clench said that against this recital he cannot say that he has not any thing in the term. And at length it was clearly resolved, that if A. had not such interest by a good and lawful conveyance, the obligation is forfeited. 1 Le. pl. 164. 122. Trin. 30 Eliz. B. R. Severn v. Clerk.

Yelv. 206. Bristowe v. Knipe, S.C. adjudged, that the word (payments) in the condition of the obligation shall have relation only to such payments comprised in the deed as are compulsary to the defendant, and not otherwise; and

4. In debt on bond to perform covenants, payments &c. the defendant said, that he for 110 l. had *enfeoffed the plaintiff, with a proviso that if the defendant paid such sums at such a day the feoffment to be void, and that he might re-enter*, with *covenants to save harmless* from incumbrances, *and make further assurances*; and that he had performed all covenants &c. on his part. The plaintiff assigned a *breach, that he did not pay such sums at such a day according to the proviso*; resolved, that in as much as there is not any covenant to pay that sum, it is a proviso in advantage of the feoffor, that if he paid the money he should have his land again, and it is in his *election to pay the money or lose the land*; and so the consideration of the bond does not extend thereunto, but only to perform other covenants, as to save harmless &c. It was resolved against the plaintiff. Cro. J. 281. pl. 1. Trin. 9 Jac. B. R. Briscoe v. King.

the neglect of the payment assigned for breach being in its own nature voluntary, either to be paid by the defendant or not, to which the condition of the obligation cannot by any reasonable construction extend, judgment was given against the plaintiff; quod nota. Yelverton was of counsel with the plaintiff.——Brownl. 113. S. C. in totidem verbis ——Bulst. 156. Briscoe v. Knight. S. C. held accordingly per tot. Cur. and judgment against the plaintiff.——S. C. cited 2 Lev. 126 Mich. 26 Car. 2. B. R. where the case was, that in a *bond* for performance of all covenants and conditions in an indenture of mortgage was a *proviso, that if the mortgagor paid the money at the day the mortgage should be void*. Breach was assigned for non-payment at the day. It was moved that this was no forfeiture of the bond, but of the estate only, and that this condition was for the mortgagor's benefit to have his estate again on payment of the money, but not to compel him to pay it; And of this opinion was Hale, but Twisden contra, and he cited one Westbrook's case. Hill 22 Car. 1. B. R. to be so adjudged, and at another day brought the record of the case into court, whereupon Hale mutata opinione, gave judgment for the plaintiff. 2 Lev. 216. Mich. 26 Car. 2. B. R. Tomlins v. Chandler. ——3 Keb. 387. pl. 79 Tooms v. Chandler, S. C. the defendant pleaded performance; the plaintiff assigned breach in non-payment; the defendant rejoined, that by the non-payment he was to lose his land,

land, and the court held this a departure, and the money is due by the bond, though the land is to be forfeited, and judgment for the plaintiff.——Ibid. 394. pl. 90. S. C. Twisden J. cited Hill. 22 Car. 1. of a leaſe to be void on non payment, and adjudged for the defendant, becauſe the land was to be loſt by the non-payment, Weſtbrook v. Print, and conceived judgment ought to be for the defendant, which the court agreed.——Ibid 454. pl. 23. Paſch. 27 Car. 2. B. R. the S. C. adjudged for the defendant niſi; And per Cur. if it were a condition in the deed ſpecially recited in the bond, though thereby the mortgage is forfeited, the bond is ſo too upon non-performance; but being generally to perform all covenants, conditions, &c. according to Briſcoe's caſe and Bt. Conditions 195. it binds only to ſuch as are compulſary, and not to ſuch as are at the party's election to do or not.——Ibid. 460. pl. 35. S. C. adjudged for the defendant unleſs the plaintiff diſcontinue.

5. In debt upon an *obligation* with condition *to perform covenants in an indenture of leaſe*, the defendant *pleads, that after and before the original purchaſed, the indenture was by the aſſent of the plaintiff, and the defendant cancelled* and avoided, and ſo demands judgment if action, and ſeems by Coke clearly, that the plea is not good *without averment that no covenant was broken before the cancelling* of the indenture. 2 Brownl. 167. Paſch. 10 Jac. C. B. Anon. [170]

6. If an obligation be *for performance of covenants in a grant which is void*, the covenant and obligation are both void; and judgment accordingly. Lev. 45. Mich. 13 Car. 2. B. R. Caponhurſt v. Caponhurſt. Raym. 27. S.C. adjudged for the defendant.

7. Condition of a *bond* was *for performance of covenants in a leaſe of a dwelling-houſe to an alien artificer.* The court held the bond void, for when a bond is to perform covenants, if the leaſe becomes void by any means, as by releaſe, ſurrender, &c the bond is void alſo; and it would be abſurd, that when the ſtatute 32 H. 8. cap. 16. makes the leaſe void, and ſo deſtroys the contract, that yet the bond to inforce payment of the rent ſhould remain good; and judgment for the defendant. Sid. 308, 309. pl. 19. Mich. 18 Car. 2. B. R. Jevons v. Hardridge. Saund. 6. S. C. but I do not obſerve S. P. there —— 2 Keb 116. pl. 62. S. C. adjudged for the defendant.

8. The defendant *in conſideration of* 400 *l. lent him by the plaintiff, granted his lands to him for* 99 *years, if G. ſo long live, provided if he pay* 60 *l. per annum quarterly during the life of G. or* 400 *l. within two years after his death, then the indenture to be void with a clauſe of re-entry for nonpayment*, and gave a *bond for performance* of covenants, payments &c. In debt on this bond the breach aſſigned was, that 30 *l.* for half a year was not paid at ſuch a time during the life of G. Upon demurrer the court inclined, that this action would not lie on this bond in which there was a *proviſo, but no expreſs covenant to pay* the money, and therefore no breach can be aſſigned. 2 Mod. 36, 37. Paſch. 27 Car. 2. C. B. Suffield v. Baſkervill.

(Y. a) [Where] the Condition is to *ſave harmleſs*, &c.

[1. IN an action of *debt* brought *by A. againſt B.* in which *C. and D. are bail* for B. if the *plaintiff hath judgment* againſt B. and the bail, and after *C.* one of the bail, *gives ſecurity to A. for all the money due to him*; and *in conſideration thereof, A. promiſes C. that he may take execution againſt D.* the other bail, *and that he will not releaſe* Hob. 269. 270. pl. 355. S. C. adjudg'd for plaintiff, contra to the opinion of

Hutton; because this condition carried a forcible and apparent intent of saving harmless of some damage which might arise, not upon the release alone, but upon some external and collateral thing besides the release, and yet by means and occasion of the release; for the words are, to save harmless, &c. from all persons * that might trouble him concerning the said release; and no other person could molest or trouble him for the release of his own debt only, wherein no man could have to do but by means de-hors.

release him without the assent of C. upon which *C. procures D. to be taken* in execution, and after *A. releases him* out of execution, and thereupon *D. is bound to A.* in an obligation, of which the condition is *to save A. harmless of all actions* and damages which may arise upon the release of D. out of execution, then being in execution at the suit of A. from all persons that may trouble him concerning the said release, and after *C. brings an action against A. for the breach of his promise*, (*) and *recovers his damages*. This is a breach of the condition, for the *condition is* not to be intended by the words of the damages only, which directly arise upon the release, but *to any collateral act dehors*, as to the said promise. Hobart's Reports, case 353. between *Wilden and Wilkinson.*]

* Fol. 432.

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Br. Conditions, pl. 221. cites S. C. for it is in a manner impossible.

2. If a man be bound *to keep me without damage against all men*, the condition is void, and e contra if it was against a man certain. Br. Conditions, pl. 150. cites 8 E. 4. 12, 13.

3. In covenant, the defendant had *leased to the plaintiff the manor of D. for* 20 *years, and granted* by the indenture *that he would acquit him of all charges issuing out of the said manor* during the term, and after by parliament *the tenth part of the value of the land was granted to the king*, and *not the tenth part of the issues of the land*; for then per omnes the lessor shall discharge the lessee; and by all except Brian the land is charged by reason that he may distrain in the land for the tenth part of the value, and may distrain for his debt, contra of a common person; but Brian e contra, and that the land is not charged, and there is a great *diversity* between those words, *issues of the land*, and *value of the land*; for by the issues of the land, if a man be bound to render them he shall pay the same issues; contra where he is bound to pay only the value. Br. Covenant, pl. 30. cites 17 E. 4. 6.

4. *A. and B. were bound to J. S. in* 15*l.* and *J. N. was bound to the said A. and B.* upon condition to *acquit them* against the said J. S. and after *J. S. released to A. and B. the said* 15*l. by the labour of the said J. N.* this is a good performance of the condition; per Townsend and Catesby, & non negatur. Br. Conditions, pl. 237. cites 1 H. 7. 30.

5. The defendant sold lands, and covenanted *to save the vendee harmless upon request.* It was said Arg. that if *the land was afterwards extended, before any request made*, that this was no breach of the covenant, because it was by the negligence of the plaintiff himself. Mo. 189. pl. 338. Trin. 27 Eliz. B. R. Anon.

6. A. made a *lease* to B. for life, and covenanted for himself and his heirs that he would save the lessee harmless *from any claiming, by, from, or under him*; A. died, and his *wife recover'd in dower*, and the lessee thereupon brought covenant against the heir, and adjudg'd

adjudg'd for B. becauſe the wife claim'd under her huſband, who was the covenantor; but *if ſhe had been the mother of A. the leſſor*, it had been otherwiſe, becauſe her claim would not be from or under A. Godb. 333. pl. 425. Trin. 21 Jac. B. R. Anon.

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(Z. a) *How* the Condition ought *to be performed*, when it is *to keep* him *without Damage*.

[1. IF it be to ſave him harmleſs *from J. S.* if *J. S. after ſays* to him, that *if he goes to his houſe he will beat him*, by which menace he dares not go to his houſe about his buſineſs, the obligation is forfeited. 18 E. 4. 28.]

Br. Conditions, pl. 165. cites S. C. but it is not exactly S. P.

——S. C. cited 5 Rep. 24. a. as held by Brian and Littleton.——S. C. cited Arg. 3 Bulſt. 234. and Doderidge J. ſaid, that the matter is well debated in that caſe.——S. C. cited 2 Bulſt. 94 and 105. (115.) ——S. C. cited Cro. J. 340. in pl. 5.——The caſe in Br. Conditions, pl. 165. is, viz. In debt a man is bound to ſave N. harmleſs *from an obligation in which he is bound to W. S.* and after *W. S. brought debt* againſt N. by which *N. brought debt againſt his obligor*, becauſe he is not ſaved harmleſs, and the *defendant pleaded* quod *non damnificatus eſt*; and the plaintiff ſaid, that W. S. brought the action againſt him, by reaſon whereof he durſt not go about his buſineſs, by which he was damnified; and per * Choke J. he is not damnified; for if *capias* be *awarded, and he be not arreſted*, he is not damnified. Contra. per Brian and Littleton, and that the obligation is forfeited for the not ſaving him from the ſuit, may be at a loſs by the terror. Quære. Br. Conditions, pl. 165. cites 18 E. 4. 27.

* [172]

[2. If the condition of an obligation be *to perform an award*, which is, *that the obligee ſtaret acquietatus de qualibet materia contained in a bill in chancery that the obligor hath depending againſt him, and that the ſaid ſuit ſhall ceaſe*, and after the *obligor exhibits a new bill* in chancery againſt the obligee *for the ſame matter, and* in the end of the bill *prays proceſs, but never takes out* proceſs there upon againſt him; this is not any ſuch moleſtation that it ſhall be a forfeiture of the condition, for he is *not at any damage* thereby. Paſch. 12 Ja. B. R. between *Freeman and Sheene*, per Curiam.]

Cro. J. 339. pl. 5. S. C. held accordingly, and judgment for the defendant.——2 Bulſt. 93. 94. S. C. adjudg'd per tot. Cur.——Roll. Rep. 7. pl. 9. S. C. adjudg'd againſt the plaintiff.——Brownl. 122. Feeman v. Shield, S. C. and judgment per tot Cur. for the defendant.

[3. If the condition be *to diſcharge* another *againſt J. S. of an obligation in which he is bound*, he *ought to diſcharge him* of the obligation *by releaſe*, or otherwiſe, and it is not ſufficient to ſave him harmleſs. 22 E. 4. 40. b.]

[4. [*But*] if the condition be to diſcharge and ſave harmleſs *the ſureties from the penalty of an obligation*; if the obligation be forfeited, yet this condition as to the ſureties is not broke, for they may be diſcharged and ſaved harmleſs from the penalty of the obligation notwithſtanding. D. 4. 5. Ma. 161. 44. (but it ſeems the reſolution there is contra.)]

[5. If *A. and B. are bound* in an obligation *to perform certain covenants* contained in an indenture, of which *one is to pay certain money*, and *C. covenants with* A. and B. *to ſave them harmleſs from all things contained in the ſaid indenture*, and after the *money is not paid* according to the ſaid indenture, by which the obligation is forfeited;

forfeited; yet it ſeems that C. is not bound to ſave them harmleſs from the *obligation*, for this *is a thing collateral* to the indenture. Mich. 5 Jac. B. between *Scot and Pope* plaintiffs, and *Griffin* defendant]

Br. Conditions, pl. 34. cites S. C. for the other is not bound

[6. If the condition be to ſave harmleſs *from ſuch a thing*; this does *not extend to actions, in which he might have a lawful defence without the obligor.* 2 H. 4. 9.]

to ſave him harmleſs againſt all the world. *As* in debt upon an obligation the caſe was, that *A. diſtrained* there againſt *B.* and *B. ſued replevin* in the county, and *C. bailiff of the ſheriff returned* quod *non potuit habere viſum averiorum*, by which *Withernam was awarded* of theſe oxs of A. by which *C. as bailiff took four beaſts of A. in Withernam, and delivered them to the ſaid A. again, and took obligation of A.* in which he was bound to him *to ſave him without damage* for thoſe four beaſts, and *B. brought detinue* againſt *C.* the bailiff, by which he *brought debt againſt A.* the firſt defendant upon the obligation, and the opinion of the court was, that in as much as action of detinue of beaſts does not lie againſt the bailiff who took them in Withernam, therefore the bailiff himſelf might have barred the plaintiff in the action of detinue, therefore the action does not lie, and alſo this condition is againſt law that he ſhould take any obligation to diſcharge him for re-deliverance of the Withernam again to the defendant; for he ought to have retained it till the firſt diſtreſs was re-delivered if the replevin be in C. B. or to the plaintiff if it be in B. R. and not to re-deliver it to the defendant. Br. Conditions, pl. 34. cites 2 H. 4. 9.——Br. Obligation, pl. 20. cites S. C. and S. P. that he is bound to ſave him againſt him only that can hurt him.——Br. Dette, pl. 51. cites S. C. and S. P. accordingly.——Fitzh. Obligation, pl. 13. cites S. C.

Cro. E. 369. pl. 8. Bothwight v Harvey S.C. adjudged—Ow. 19. Bartwright's caſe, alias, Bartwright v. Harris, S. C. adjudg'd for the plaintiff——Cro. F. 264. pl. 3.

[7. If *A. and B. are bound in* 60 *l. to C.* and *A. binds himſelf in another obligation to B.* upon condition *to acquit, diſcharge, and ſave harmleſs the ſaid B.* from the ſaid obligation, and after *C. ſues B.* upon the obligation of 60 l. *and hath judgment* againſt him upon nil dicit, *and* after, *before execution* ſued, *A. delivers to B. the* 60 l. **for which* &c. yet his obligation is forfeited, for he hath not acquitted B. as he ought, for he is damnified by the ſuit and judgment, by which his *lands, goods, and body, are ſubjected to any execution.* Hill. 37 Eliz. B. R. between *Bopwright and Harvey* adjudged.]

Mich. 33 and 34 Eliz. B. R. Buſh v. Ridgely, S. P. adjudged accordingly.

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Fol. 433.

[8. If a man enters into an obligation with another for his debt, of which the condition is to pay the money at a day, and the *principal aſſumes to diſcharge and ſave* him harmleſs from the ſaid obligation, and after *does not pay the money at the day*, by which the obligation is forfeited, and the *ſurety to avoid the ſuit pays the money*; he may have an action upon the caſe againſt the principal, for the *aſſumpſit* is broke. Hill. 14 Jac. B. R. *Cranmer and Gomerſal* adjudged; and the court ſaid it was a ſtronger caſe, by reaſon of the word (*diſcharge*,) the exception being in arreſt.]

Jo. 197. pl. 10. S. C. B. leaſed for a year the barn to A. who put hay in it, and after granted the barn and hay to C. and covenanted to warrant it;

[9. If A. *leſſee* of a term rendring rent, *aſſigns* it *to B.* and *B. covenants to ſave A. without damage from all rents* payable to the leſſor, and after *B. leaſes parcel* of the land *to A.* and after the *hay of A. is* there *diſtrain'd for rent* arrear; yet the covenant is not broke, becauſe the diſtreſs of the hay was unlawful, and a treſpaſs, and the ſufferance of the rent to be arrear, without actual damage, is no breach of the covenant. Mich. 4 Car. B. R. between *Cooper and Pollard* adjudged upon demurrer, which intratur Tr. 4 Car. Rot. 457.]

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The original leſſor diſtrained the hay for rent, whereupon A. brought covenant, but adjudged that it does not lie, becauſe hay in a barn cannot be diſtrained for rent, and the covenant extends only to lawful and not to tortious incumbrances. Another point was moved, viz. Whether action lies, admitting the diſtreſs to be lawful? Jones J. thought it did not; becauſe the covenant extends only to a thing in eſſe at the time of the covenant made, and not to damage happening to the plaintiff by a ſubſequent act of his own, viz. his taking the leaſe for years of the barn; but Crooke e contra. And judgment was given upon the firſt point.

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(Z. a. 2) To ſave harmleſs. At what Time the Suit may be.

1. A. Was bound as ſurety with B. for payment of 20 l. at Mich. and had a counter-bond from B. to ſave him harmleſs. B. *paid not the money at the day.* A. brought *action on the counter-bond.* The court agreed that by the non-payment at the day, which has put A. the plaintiff in danger of being arreſted, is a damnification to him, and conſequently a preſent breach of the condition, and forfeiture of the counter-bond; and judgment for the plaintiff. 3 Bulſt. 233. Mich. 14 Jac. Abbot v. Johnſon.

2. If one give a *warrant of attorney* to confeſs a judgment *for ſaving bail* harmleſs, tho' the debt be not paid, he cannot ſue *execution* before damnification. Per Cur. 6 Mod. 77. Mich. 2 Ann. B. R. Anon.

3. If *one pretending title to land* gives ſecurity to the *tenants* to ſave them harmleſs on paying him the rent, and after another recovers in *ejectment* againſt them, they have not yet a remedy on the ſecurity till recovery of the meſne profits, which is from the time of the action brought, and without an actual entry there can be no recovery of the profits. Per. Cur. 6 Mod. 222. Mich. 3 Ann. B. R. Anon.

(Z. a. 3) To ſave harmleſs. To what ſuch Condition extends. [174]

1. DEBT upon obligation, the condition was that if the defendant *kept the plaintiff without damage againſt J. B. of* 10 *l. in which the plaintiff is bound to the defendant by* obligation; and per Collowe, Choke and Brian, the condition is void; for *J. B. has nothing to do with the debt by obligation which is between the plaintiff and defendant*, and ſo the condition impoſſible, and ſo void, and then the obligation is ſingle. Br. Conditions, pl. 175. cites 21 E. 4. * 54.

* This is miſprinted, and ſhould be 53. b. pl. 22.

2. Debt upon obligation indorſed, with condition *that the defendant ſhall diſcharge the plaintiff of all eſcapes of all felons in the priſon of D.* and *ſaid that there were only 2 there* at the time, &c. viz. J. N. and W. S. and that the plaintiff was not damnified, &c. and the other ſaid that he was damnified, &c. Quære, for peradventure he ſhall be *charged of all felons delivered there after.* Br. Conditions, pl. 87. cites 21 H. 7. 30.

3. Debt upon an obligation, the condition was, that if the defendant *warrant and defend* an oxgange of land to the plaintiff *againſt J. S. and all others*, that then, &c. It was reſolved per tot. Cur. that the word (defend) ſhall be taken, and ſhall not imply any other ſenſe but a defence *againſt lawful titles*, and not againſt treſpaſſors. And per Periam J. it would be the ſame if it had been defend, without the word warrant. Mo. 175. pl. 309. Mich. 26 & 27 Eliz. Grocook v. White.

4. The condition of a bond was to ſave the obligee harmleſs *concerning his buying certain goods at ſuch a price.* This extends not to the price, but to the title. Allen 95. Mich. 24 Car. B. R. Smalman v. Hutchinſon.

5. Counter-ſecurity given againſt a debt of 4000 *l.* ſhall extend to be ſecurity againſt an *after debt* of 2000 *l.* for which the ſame perſon is ſurety. Ch. Caſes, 97. Hill. 19 & 20 Car. 2. Seint-John v. Holford.

Comb. 320. Paſch. 7 W. 3. B. R. Walton v. Spark. S. C. adjudg'd for the plaintiff.

6. Obligation with condition to ſave the *pariſh of S.* harmleſs *from J. G. his wife and children.* Joſeph, the *ſon of J. G.* born at the time of the obligation entred into, *had a wife and children*, whom he could not maintain, and the pariſh, by order of the juſtices, was to allow 2s. per week to Joſeph for the maintenance of him and his family; in an action brought upon this bond, the *condition was held* to be *broken*, for *tho' it did not extend to grand-children* of J. G. becoming chargeable, yet their father Joſeph, who is by nature bound to maintain them, being unable to do it, he is in that reſpect impotent, and become chargeable to the pariſh, and he is within the expreſs words of the condition, and held in this caſe that all the children of J. G. though born after the obligation entred into, would be within the expreſs words of the condition. Skin. 556. Mich. 6 W. 3. B. R. Waltham v. Sparkes.

7. Debt upon bond condition'd to ſave the plaintiff harmleſs *againſt all eſcapes* which he had *already ſuffered as warden of the fleet*; the court took a diverſity between a bond to ſave him harmleſs againſt all future eſcapes; for that would be void, and a bond to ſave harmleſs againſt paſt eſcapes; for though it was unlawful to ſuffer them, yet one may contract to indemnify one againſt a penalty already incurred againſt law. 6 Mod. 225. Mich. 3 Ann. B. R. Fox v. Tilly.

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(Z. a. 4) To ſave Harmleſs. Pleadings.

1. DEBT upon an obligation to keep the plaintiff without damage, the defendant *ſaid that he had performed*, judgment ſi actio; and the *plaintiff ſaid that he did not keep him without damage*, priſt, & non allocatur *without ſhewing how he is indamaged*; and ſo he did; quod nota. Br. Conditions, pl. 36. cites 7 H. 4. 11.

2. In audita querela, where a man is bound in a ſtatute upon *defeaſance*, that *if he acquits or ſaves indemnified the conuſor of* 10 *l. annuity per ann.* or an annual rent *which he has granted to J. N.* that the

the ſtatute ſhall be void; and the conuſor *ſaid that he had annually paid the ſaid annuity, and ſo* acquitted him, & admittitur pro bono, as if the payment had been by acquittance, and ſo ſee that he is not bound to obtain a releaſe to extinguiſh the annuity, &c. For the words were, to acquit and ſave harmleſs, and *payment is ſaving harmleſs.* Br. Conditions, pl. 80. cites 37 H. 6. 18.

3. Debt upon obligation indorſed, that if the defendant acquitted and ſaved the plaintiff without damage *from an obligation of* 10 *l. againſt J. N. to whom the plaintiff was bound in* 10 *l.* that then, &c. and *ſaid that ſuch a day and year J. N. redelivered the obligation of* 10 *l. to the plaintiff at the requeſt of the defendant in lieu of acquittance.* Per Priſot, you ought to ſay that the plaintiff was not indamaged againſt J. N. before the delivery of the obligation; for it may be that it was ſued by the obligee, by which Laicon ſaid ut ſupra *abſque hoc, that he was indamaged* by the ſaid obligation *before the delivery of it*; and good. Br. Conditions, pl. 93. cites 38. H. 6. 13.

4. *But* if he had *ſaid that he had ſaved him without damages*, and did *not ſhew how*, this had been good; but here he ſhall ſhew how, viz. by delivery of the obligation; quod nota. Ibid.

5. *And* it is ſaid 38 H. 8. that * *non damnificatus eſt* is a good plea; for this in the negative, and therefore good *without ſhewing how.* But where he pleads that he has kept him without damage in the affirmative, he ſhall ſhew how; note a diverſity. Ibid.

S. P. and per Keble, there is a *diverſity* where a man pleads in the affirmative, and where in the negative; for *in the affirmative he ought to plead certain*; as where a man is bound to keep J. N. without damage, if he pleads in the affirmative, he ought to plead certain how he has kept him without damage, as by releaſe, payment, &c. in certain. Br. Conditions, pl. 129. cites 4 H. 7. 12. and 5 H. 3, 8.—*But* where a man is bound *to ſtand to the arbitrement*, nullum fecit arbitrium ſuffices in the negative; but if he pleads in the affirmative, that he has performed the award he ſhall ſhew what the award was in certain. Ibid.

* S. P. ‡ But where a man is bound *to diſcharge W.* it is no plea that he has diſcharged him, but *ſhall ſhew how*, becauſe the plea is in the affirmative. Br. Conditions, pl. 133. cites 6 H. 7. 4.—S. P. Ibid. pl. 198. cites M. 37. H. 8. ‡ S. P. Ibid. pl 240. cites 10 H. 7. 12.

6. Debt upon obligation, upon condition that *if the defendant warrants and defends ſuch land to the plantiff for life*, whereof he has infeoffed him, that then, &c. and *ſaid that he has warranted and defended*; per Danby this cannot be without impleading the plaintiff, by which he bids him ſay, *that he was never impleaded, and if he had been*, &c. *you would have warranted him*, which Littleton agreed. And after Danby and Needham ſaid, that if he had been ouſted by a ſtranger without being impleaded, the obligation had been forfeited, ratione hujus verbi (defendet;) quod nota. Br. Conditions, pl. 141. cites 2 E. 4. 15.

7. In debt, a man is bound to ſave N. harmleſs *from an obligation in which he is bound to W. S.* and after *W. S. brought debt* againſt N. by which *N. brought debt againſt his obligor*, becauſe he is not ſaved harmleſs; and the *defendant pleaded* quod *non damnificatus eſt*, [176] and it is admitted a good plea, and the *plaintiff ſhall ſhew by replication how he is damnified*; quod nota. Br. Conditions, pl. 165. cites 18 E. 4. 27.

8. Debt upon obligation, with condition that the defendant ſhall keep the plaintiff without damage *from all ſuits which J. S. has againſt him*, and the *defendant ſaid* quod querens *non eſt damnificatus* by the ſaid ſuits; per Brian and Choke J. the defendant ought to ſhew that he has ſaved the plaintiff without damage, or has been nonſuited, &c. or has diſcontinued them, &c. in the generalty, and the plaintiff ſhall ſhew certain in what action he is grieved; quod non negatur; quod nota. Br. Conditions, pl. 178. cites 21 E. 4. 75.

9. If A. be bound to B. *to diſcharge and ſave him harmleſs*, if A. *pleads that he has diſcharged him*, he *ſhall ſhew certainly how*; *but if he* was *bound only to ſave him harmleſs*, then the plea is good generally, per Cateſby; quod non negatur, & hoc videtur dicere non damnificatus eſt. Br. Conditions, pl. 185. cites 22 E. 4. 43.

10. Condition was, that the obligee ſhould peaceably enjoy, &c. and the defendant *pleaded, that* the *plaintiff did peaceably continue his poſſeſſion until* ſuch a day, at which time *the lord diſtrained for rent*; and a good plea. Heath's Max. 47. cites 28 H. 8. D. 30.

11. But where the condition was, to grant warrant and ſave harmleſs againſt lord and king, and to have and peaceably enjoy, the defendant pleaded, *quod & habuit & pacifice gaviſus fuit*; where ſaid by divers, that the plea is ill, and but argumentative, that is, he hath peaceably enjoyed the land; ergo, he hath warranted the land, and ſaved the plaintiff harmleſs, for he might be impleaded in a *præcipe* and the other not warranted, and yet hold it peaceably, or might be diſtrained for iſſues loſt, &c. and therefore ought to have pleaded expreſsly *quod non fuit damnificatus per regem nec per aliquem alium*; or that the plaintiff was impleaded, and he did warrant, &c. *Quære inde*, for Baldwin e contra. Heath's Max. 47. cites 30 H. 8. D. 43.

12. The condition of an obligation was, to warrant, defend, or ſave harmleſs, as well the perſon of the obligee as the premiſſes againſt one C. where the defendant alleged in his *bar* a former leaſe, by reaſon whereof *neque le obligee, nec les premiſſes poſſint nec potuerunt eſſe damnificat' per prædictum C.* The defendant replied the ſpecial matter in law, without concluding *et iſſint damnificatus*; it was holden the defendant's bar was ill, and that he ought to have pleaded *non fuit damnificat'*, or the ſpecial matter, and conclude *iſſint non damnificatus*; and the plaintiff's replication, for want of a proper concluſion, is ill alſo. Heath's Max. 47, 48. cites 2 El. D. 184.

13. And in the like caſe, the defendant pleaded *quod quer' non damnificat' fuit per* A. and the plaintiff in his replication ſhew'd a ſpecial damage, and concluded *et iſſint damnificat'*, and the defendant by his rejoinder pleaded, *nul tiel record*; *quod nota*. Heath's Max. 48. cites El. D. 186.

14. Debt upon bond *to ſave the plaintiff harmleſs*, &c. The defendant *pleaded* in bar *that he had ſaved him harmleſs* generally. The plea was held ill; for he ſhould have pleaded non damnificatus, becauſe he may ſave the plaintiff harmleſs *in ſome things, and yet he may be damnified in ſome other things, in which the defendant was*

was bound to ſave him harmleſs; and judgment niſi. Style 16. Paſch. 23 Car. B. R. Wroth v. Elſey.

15. Bond to ſave harmleſs from bonds, or to ſatisfy all damages within a month, defendant *pleaded* he had paid him ſuch a ſum for all his charges within a month, adjudg'd that defendant ought to *ſhew how* the plaintiff was moleſted, and that he had ſatisfied ſo much, or that he was not moleſted. Cro. E. 393. pl. 18. Paſch. 37 Eliz. C. B. Hutchinſon v. Lewſon.

16. Debt on bond to ſave harmleſs *from payment of rent due to a ſtranger at ſuch a feaſt*; 'tis no *plea* to ſay that no rent was due, but ought to plead *non fuit damnificatus*. Savil 90. in pl. 167. Hill. 30 Eliz. [177]

17. Debt upon a bond, the condition was to ſecure him harmleſs *againſt J. S. in an action for* 53 *l. for which he was bail for him.* The defendant *pleads he had paid to J. S.* 20 *l. in ſatisfaction of the* 53 *l. and ſo he kept him harmleſs*; but for that the plaintiff might be damnified before the payment, to which he does not anſwer, the plea was held ill, and the plaintiff had judgment; cites 38 H. 6. 13. Cro. E. 156. pl. 40. Mich. 31 & 32 Eliz. B. R. Davies v. Thomas.

18. In debt on bond condition'd that *whereas the plaintiff was bound in* 200 *l. for the defendant for payment of* 100 *l. to A. B. if therefore the defendant ſhall ſave and keep harmleſs the plaintiff from all ſuits, quarrels and demands touching* &c. *the ſaid bond* &c. that then &c. The plaintiff declared that *at the day he went to the place, and finding no body there to pay the money, he paid it himſelf* &c. The defendant *pleaded non fuit damnificatus.* The plaintiff replied, and ſhew'd the ſpecial matter. Adjudg'd for the plaintiff; for the payment of the 100l. is damage, and had he not paid it greater damage would enſue; and it is *not neceſſary that the plaintiff be arreſted or ſued* &c. 5 Rep. 24. a. Mich. 42 & 43 Eliz. B. R. Broughton's caſe, alias Broughton v. Pretty. S. C. cited Cro. J. 340. in pl. 5. S. C. cited 2 Bulſt. 115.

19. Debt upon bond for performance of covenants brought by the high-ſheriff againſt the under-ſheriff; one covenant was, *that the under-ſheriff ſhall keep all priſoners committed to him until they be delivered by law, and alſo to ſave the plaintiff harmleſs of all eſcapes made by them.* The defendant *pleaded performance of all covenants.* The court held the plea ill, becauſe one part is in the affirmative, and the other in the negative, and therefore he ought to have pleaded non fuit damnificatus. Goldſb. 157. pl. 88. Hill. 43 Eliz. Payton's caſe.

20. Obligation with condition, reciting that whereas A. the plaintiff, at the requeſt of the above-bounden B. the defendant, ſtands bound together with the ſaid B. unto one J. S. in an obligation for payment of 10 l. on the 15th May (which May was before the date of the ſaid obligation whereof the action is brought) if the ſaid B. do ſave and keep harmleſs the ſaid A. of and from the ſaid obligation, that then &c. *B. pleaded payment ſecundum formam & effectum conditionis* prædictæ. Upon demurrer the plaintiff had judgment; for B. ſhould have pleaded *non damnificatus.* Gouldſb. 159. pl. 90. Hill. 43 Eliz. Allen v. Abraham.

Yelv. 25. S. C. but S. P. does not appear ——Noy 47. S. C. but S. P. does not appear.

21. Caſe &c. for that *in conſideration the plaintiff would diſcharge the defendant, then under an arreſt, the defendant promiſed to pay ſo much* &c. and *alleged quod exoneravit eum from the ſaid arreſt*, but did not ſhew how, but upon this being aſſigned for error, the court held it well enough; for it need not be pleaded, as a diſcharge from a bond or rent muſt, becauſe they cannot be diſcharged but by deed, and it ought to be an abſolute diſcharge; but diſcharge of an arreſt may be by compoſition for a time, either with the party or the ſheriff &c. and ſo need not be ſhewn, and ſo judgment was reverſed. Cro. E. 913. pl. 2. Hill. 45 Eliz. B. R. King v. Hobbs.

Yelv. 30. S. C. and the covenant was, that he ſhould enjoy it without lawful diſturbance of any, and becauſe the plaintiff did not ſhew

22. Covenant for that the teſtator ſold to the plaintiff 20 ton of copperas, and agreed with the plaintiff that *if he failed of payment of ſuch a ſum at ſuch a day, that then he might quietly have and enjoy* the ſaid 20 ton of copperas, and ſhewed that the money was not paid at the day, and that he could not have nor enjoy the ſaid 20 ton of copperas; but becauſe it was that he could not have and enjoy, and did *not ſhew how and by whom he was diſturbed*, it was held inſufficient, and adjudged for the defendant. Cro. E. 914. pl. 4. Hill. 45 Eliz. B. R. Chantflower v. Prieſtley.

that he was legitimo modo diſturbed, according to the very words of the covenant, it was * held ill; for tho' the plaintiff in covenant need not ſhew ſpecially the title by which he is diſturbed, becauſe by preſumption he may not know it, yet in aſſigning the breach he ought to purſue the words of the covenant. ——— Noy 50. Chandflower v. Waterhouſe and Preſbye, S. C. adjudged againſt the plaintiff. ——Vaugh. 124. S. C. cited by Vaughan Ch. J. as reſolved by the whole court.

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23. Debt upon bond, conditioned *to ſave harmleſs from all obligations which he had entred into for him.* Defendant *pleaded* quod *exoneravit & indempnem conſervavit from all the obligations.* Exception was taken, becauſe he did *not ſhew from what obligations*; ſed non allocatur; becauſe there might be many, and ſo to avoid prolixity; but becauſe he did *not plead quo modo he diſcharged him.* It was held to be ill; et adjornatur. Cro. E. 916. pl. 6. Hill. 45 Eliz. B. R. Braban v. Bacon.

24. Debt on a bond (reciting a ſale of an advowſon to the plaintiff) conditioned *to acquit, diſcharge, and ſave the plaintiff harmleſs from all bargains, incumbrances, ſtatutes, charges* &c. The defendant *pleaded, that he ſaved harmleſs the plaintiff and the advowſon from &c. as in the condition.* Adjudged an ill plea, becauſe he did *not ſhew how* he diſcharged him, for he ought to ſhew it particularly. Cro. J. 165. pl. 1. Trin. 5 Jac. B. R. Allington v. Yearkner.

Yelv. 207. S. C. held accordingly, per tot. Cur. ——3Bulſt. 155. S. C. adjudg'd accordingly for the plaintiff.

25. Aſſumpſit *in conſideration the plaintiff*, at the requeſt of the defendant, *was bound with him in a recognizance for his appearance at the next aſſizes*, he the ſaid *defendant promiſed to ſave him harmleſs* &c. The defendant *pleaded, that he brought a certiorari directed to the juſtices of gaol-delivery, and* 10 *March* &c. *the writ was delivered to them, who allowed it*, but adjudged no good plea; for he *ought to have appeared, and to have had his appearance recorded*, otherwiſe his promiſe is broke; beſides, he did *not allege that he had delivered the writ at the next aſſizes*, and then the purchaſing is not material; beſides, *no place is alledged where he delivered the writ*,

writ, and that is iſſuable, and *where the aſſizes were holden for the county of Suffolk is not ſhewn*, and therefore adjudg'd for the plaintiff. Cro. J. 281. pl. 2. Trin. 9 Jac. B. R. Roſſe v. Pye.

26. In debt on a counter-bond the defendant *pleaded non damnificatus*; the plaintiff *replied, that the money was not paid, and that a capias was taken out againſt him for the ſame*, and ſo he was damnified. Adjudged to be a clear breach, and judgment for the plaintiff. 2 Bulſt. 115. Trin. 11 Jac. B. R. Reeve v. Harris.

27. In debt on bond conditioned to ſave the plaintiff harmleſs *for being his bail*, the defendant *pleaded quod libere & abſolute exoneravit a præfato ballio.* Adjudged that he ought to *ſhew how*, and for want thereof the plea was held not good, and judgment for the plaintiff. 2 Bulſt. 270. Mich. 12 Jac. B. R. Codner v. Dalber.

Cro. J. 363. pl. 24. Codner v. Dalby, S. C. adjudg'd accordingly for the plaintiff;

for always when one pleads a diſcharge, and that he ſaved the plaintiff harmleſs, he ought to *ſhew how*, that the court may adjudge thereof; but he may plead generally *non damnificatus* without ſhewing how, becauſe he pleads in the negative, and the other ought to ſhew damnification. Cro. 363. pl. 24. Mich. 12 Jac. B. R. Codner v. Dalby. ——— S. P. Jenk. 110. for a *jury cannot judge of ſuch uncertain general pleas*; the general iſſue of non damnificatus being waiv'd, ſuch general plea, and the iſſue taken upon it perplex the jury.

28. In covenant brought *to diſcharge the plaintiff of a ſingle bill, in which he was bound for the debt of the defendant*; he *alleges for breach non-payment, and a ſuit, and recovery at law for the money which remained in force.* The defendant *pleaded that he paid the money at the day, and thereof gave the plaintiff notice before the purchaſing his writ.* The plaintiff demurs; the court held the plea naught, and judgment for the plaintiff. Brownl. 24. Hill. 13 Jac. Rident v. Took.

29. The defendant leaſed to the plaintiff an houſe for 2 years, in conſideration whereof the plaintiff promiſed to pay for the leaſe 26 l. and the defendant thereupon promiſed to diſcharge and *ſave him harmleſs of all charges and incumbrances.* The breach was aſſigned *that one M. E. diſtrained his beaſts in the ſaid cloſe for 20 l. for which the ſaid cloſe at the time of the diſtreſs was lawfully charged*, and was liable to and impounded &c. till he was forced to pay the ſaid money. But becauſe he did not ſhew that there was any charge before due, nor by whom granted, and it might be chargedby the plaintiff himſelf after the leaſe made, and ſo is in no expreſs charge upon this promiſe, it was held to be ill per tot. Cur. and adjudg'd for the defendant. Cro. J. 444. pl. 21. Mich. 15 Jac. B. R. Leigh v. Gotyer.

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30. The defendant, 1 Car. promiſed the plaintiff that he *ſhould enjoy ſuch lands in poſſeſſion, and* that he *would ſave him harmleſs concerning any action and ſuit againſt him for them*, and *ſhewed he was ouſted of the poſſeſſion by M.* 1 July, 3 Car. *and that a good recovery was had againſt him in an ejectione firmæ 2 Car.* and *damages and coſts to 7 l. by reaſon whereof he feared to be arreſted*, and that he gave defendant notice thereof, and requeſted him &c. The court was of opinion becauſe the defendant failed in part of the breach of the aſſumpſit, viz. in not ſaving harmleſs, but ſuffered the judgment to remain in force, by reaſon whereof the plaintiff was in danger of being arreſted, that therefore the plea was ill, and judg-

Jo. 329. pl. 2. S. C adjudged for the plaintiff.

ment was for the plaintiff. Cro. C. 349, 350. pl. 13. Hill. 9 Car. B. R. Peck v. Ambler.

31. Debt upon bond, reciting whereas the *plaintiff and one H. were bound in another bond to perform covenants in an indenture; now if the said H. should perform the said covenants, and also if the defendant should save the plaintiff harmless of that bond, then &c.* The defendant, upon oyer of the condition, *pleaded, that H. had performed the covenants, and saved the plaintiff harmless of that bond.* Upon a general demurrer this plea was adjudged ill, because he did *not set forth the covenants* in the indenture, and *some of them might be in the negative*, and also because he did *not set forth how* he had saved the plaintiff harmless. All. 72 Hill. 23 Car. Ellis v. Box.

32. Covenant, for that the defendant, the *lessor, covenanted to save the lessee harmless against all suits, evictions, and expulsions.* The defendant *pleaded that J. S. ousted him by an habere facias possessionem*; upon demurrer this plea was ruled to be ill, because he had pleaded an expulsion by an execution *without shewing any judgment*, whereas he *should have set forth the ejectment and the proceedings* to the judgment, *and* he ought to have shewn *that J. S. had a legal title before the lease in ejectment made*, and perhaps the recovery might be by a lease made by the plaintiff himself. Lev. 83. Mich. 14 Car. 2 B. R. Nicholas v. Pullin.

33. In debt on bond, conditioned *to save a parish harmless* from the charge of a bastard child, the defendant *pleaded non damnificatus*; the plaintiff *replied that the parish laid out 3s. for keeping the child.* The defendant *rejoin'd that he tender'd the money*, and the plaintiff paid it de injuria sua propria. Twisden J. said that the rejoinder is a departure, and that they should have pleaded thus, viz. that *non fuit damnificatus till such a time, and then you offer'd to take care of the child, and tender'd* &c. Judgment for the plaintiff nisi &c. Mod. 43. pl. 97. Hill. 21 & 22 Car. 2. B. R. Richards v. Hodges.

Sid 444. pl. 1. S. C. adjudg'd accordingly. —2 Saund. 83. S. C. adjudg'd accordingly. —2 Keb. 612. pl. 53. S. C. the court inclined that it was a departure; sed adjornatur.—Ibid. 619. pl. 7. S. C. adjudg'd for the plaintiff.

34. W. promised B. the plaintiff *to save him harmless concerning goods bought by him of W.* Breach alledged was, that *J. S. brought an action of trover for the said goods, and declared that he was possessed of those goods before W. sold them to B. ut de bonis suis propriis &c. and recovered them.* After verdict exception was taken, because it
[180] was *not alleged that B. gave W. the defendant notice of this suit*; sed non allocatur; for notice is not alleged in any of the precedents. And per Windham, where a thing lies particularly and solely in the notice of the party that is to take advantage, there he shall allege notice, but here he may have notice from the party, or may have notice from him that recovered the goods. Freem. Rep. 130. pl. 152. Mich. 1673. C. B. Bloxam v. Warner.

35. A second objection was, that it was *not alleged that the recovery was by an eigne title*, the court said that did appear in the record, and so it was well enough; for *it is alleged, that J. S. who recovered them lays a property in himself the 12th of April before the sale, and so it must necessarily be eigne to the plaintiff's title*, and so judgment

judgment was given for the plaintiff. Freem. Rep. 131. pl. 152. Mich. 1673. C. B. Bloxam v. Warner.

36. In debt upon a bond conditioned to ſave the obligee harmleſs *from another bond*, the defendant *pleaded non damnificatus*. The plaintiff *replies, that the money was not paid at the day, and he devenit onerabilis, and could not attend his buſineſs for fear of an arreſt.* The defendant *rejoins, that he tendered the money at the day, abſque hoc that the plaintiff devenit onerabilis*, to which it was demurred, and judgment was given for the plaintiff; for the money not being paid at the day, the counter-bond is forfeited, and the traverſe in this caſe is naught. Vent. 261. Trin. 26 Car. 2. B. R. Anon.

37. In covenant &c. to ſave the plaintiff harmleſs as to the occupation of certain cloſes &c. the breach aſſigned was, that the defendant non indempnem conſervavit ipſum de & concernente occupationem quorundam clauſorum, for that T. S. commenced a ſuit againſt him &c. concernente occupationem clauſorum prædict', but did *not ſet forth that T. S. had any title*, ſed per Curiam, this being *after verdict*; and the plaintiff ſetting forth in his declaration, that T. S. recovered, the court were all of opinion that judgment ſhould be given for the plaintiff. 2 Mod. 213. Paſch. 29. Car. 2. B. R. Major v. Grigg.

Lev. 194. Gregory v. Major S. C. the court ſaid, that this agreement was only as to the poſſeſſion, and not as to the title, and gave judgment for the plaintiff.——3 Keb. 744. pl. 12. Gregory v. Mayo, S. C. adjudged for the plaintiff niſi.——Ibid. 755. pl. 34. S. C. & S. P. held accordingly by Wild and Jones.

38. Bond was conditioned *to ſave harmleſs T. S. and the mortgaged premiſſes, and to pay the intereſt for the principal ſum*; the defendant *pleads, that T. S. non fuit damnificatus, for that he (the defendant) had paid the principal and intereſt due at ſuch a day.* Upon a demurrer this plea was adjudged ill, becauſe *non damnificatus goes to the perſon of T. S. and not to the premiſſes.* 2 Mod. 305. Paſch. 30 Car. 2. C. B. Shaxton v. Shaxton.

39. Debt upon bond conditioned *to ſave the plaintiff harmleſs from a bond in which he was bound for the defendant, being a collector of the rents of the new-river-water company, that he ſhould pay the money collected within* 20 *days after he ſhould be required*; the defendant *pleaded non damnificatus*; the plaintiff *replied, that the defendant had received* 1300 *l.* and that he *had not paid it according to the condition, whereupon he was threatened to be arreſted, and ſo was compelled to agree with the company and pay them* 250 *l.* And upon demurrer to this replication it was objected, that the breach was not well aſſigned, becauſe it did *not appear that the defendant had received the* 1300 *l. twenty days before the action* brought. The whole court held the exception good, and judgment for the defendant; but afterwards the plaintiff had leave to amend his replication. Lutw. 470. Hill. 3 & 4 Jac. 2. Ball v. Richards.

40. Debt upon bond, conditioned *to acquit, diſcharge, and ſave harmleſs the pariſh from a baſtard child*, the defendant *pleaded non damnificatus* generally; and upon demurrer it was objected, that the defendant ought to *ſhew how* he acquitted and diſcharged the pariſh, and not anſwer the damnification only; but it was anſwered, that had the plea been that he had kept harmleſs and diſcharged the

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pariſh

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pariſh it had not been good, without ſhewing how, &c. becauſe it is in the affirmative, but here it was *in the negative*, (viz.) that the pariſh was not damnified, and they ſhould have ſhewn a breach; for though in ſtrictneſs this plea does not anſwer the condition of the bond, yet it does not appear upon the whole record that the plaintiff was damnified, and conſequently he has no cauſe of action; and the court gave judgment for the defendant. 3 Mod. 252. Mich. 4 Jac. 2. B. R. Mather v. Mills.

Carth. 374. S. C. adjudged accordingly. If one be *bound* to ſave harmleſs *againſt a particular thing*, the defendant ought to ſhew *how* he has done it; *but if* it be to ſave him harmleſs *generally* a *non damnificatus* generally will do; and *if* it be to ſave harmleſs *in ſeveral particulars againſt all perſons* it is general; per Holt Ch. J. 12 Mod. 406. Trin. 12 W. 3. Anon.

41. In debt upon a bond, conditioned to free and keep the plaintiff harmleſs of, and *from, all coſts and damages which may ariſe by reaſon of ſuch a law-ſuit* &c. The defendant pleaded *non damnificatus* generally, and upon demurrer the court held the plea good, becauſe the condition was to ſave him harmleſs from ſome thing which was *uncertain at the time of the making thereof*, (viz.) from the coſts and charges of the ſuit, that no coſts might be recovered againſt him; *but* if it had been to ſave him harmleſs *from a particular and certain thing*, there ſuch a negative plea generally would not have done without ſhewing how he had indemnified the other. 5 Mod. 243. Mich. 8 W. 3. Harris v. Pett.

* The caſe of Acton v. Hill. Mich. 33 & 34 Eliz. B. R. pl. 24. per Gawdy, that if the diſcharge is to a particular thing, he muſt ſhew how, &c but otherwiſe when it is to a multiplicity of things; for then a general pleading is good, and cites 5 E. 4. 8.

42. Bond to ſave harmleſs *againſt ſeveral particular things, and after in general*; here to a general declaration *non damnificatus* is a good plea, and then the plaintiff ſhould *ſhew a breach*, though perhaps it is better to anſwer to the particular things, and then to ſay *quoad* the reſt *non damnificatus*; per Holt Ch. J. 11 Mod. 78. pl. 11. Paſch. 5. Annæ B. R. Anon. cites * Cro. E. 253. that the plaintiff ſhould have aſſigned a *particular breach* before he had demurred.

(Z. a. 5) To ſave harmleſs. Equity.

So 'tis a breach of condition at law. 3 Bulſt. 234. Abbots v. Johnſton.

1. THO' the ſurety is not troubled or moleſted for the debt, yet at any time after the *money becomes payable* on the original bond, the court of chancery will decree the principal to diſcharge the debt. Vern. R. 190. Mich. 1683. in caſe of E. Ranelagh v. Hays.

2 Chan. Caſes 146. S. C. decreed, but ſays it was much oppoſed by Mr. Keek, and in a nota ſays it was not charged in the bill

2. The plaintiff *aſſigned ſeveral ſhares of the exciſe* in Ireland to the defendant, who thereupon *covenanted to ſave him harmleſs, and to ſtand in his place touching the payments to the king*, &c. the *plaintiff being ſued by the king, brought his bill to have the agreement performed in ſpecie*; it was inſiſted, that the plaintiff might recover damages at law, and that this was no ſpecifick covenant, but only a general and perſonal covenant for indemnity, and it ſounds only in damages which cannot be aſcertained in chancery; but lord North decreed that the defendant * ſhould perform his covenants, and directed it to a maſter, and that as often as any breach ſhould happen

happen he ſhould report the ſame ſpecially, that the court, if occaſion ſhould be, might direct a trial in a *quantum damnificat'*. Vern. 189. pl. 190. Mich. 35 Car. 2. lord Ranelaugh v. Hayes.

here, or proved that the rent was behind, but only that he was ſued, &c. and objected, that for every petty breach this would ſubject the defendant to commitment.

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3. A diverſity was taken, viz. where the counter-bond or covenant is given to ſave harmleſs from a penal bond *before the condition broken*, there if the penal ſum be not paid at the day, and ſo the condition not preſerved, the party by this is liable to the penalty and ſo *damnified*, and the counter-bond forfeited; but if the counter-bond be *given after* the condition broken, or to ſave harmleſs from a *ſingle bond* or bill without a penalty, there the counter-bond cannot be ſued without a ſpecial damnification; per Holt Ch. J. 1 Salk. 197. pl. 2. Mich. 5. W. and M. in B. R. Griffith v. Harriſon.

4 Mod. 249. S. C. but ſame diverſity does not appear.—— Skin. 397. pl. 31. S. C. but S. P. does not appear.

(A. b) Conditions. [*What a Breach.*] In reſpect of the Words.

[1. IF the condition be, that *if he recovers* 20 *acres* of land, the *obligee ſhall have a moiety*; if *he recovers but* 10 acres, he is not bound to pay any part. 21 Ed. 4. 52. b.]

[2. If the condition be, *to make before Eaſter* next *a ſufficient eſtate in fee of the manor of B. diſcharged of all former bargains and incumbrances, except a leaſe for years*, upon which the ancient rent is reſerved; if a *leaſe* for years be *made meſne between the date of the covenant, and the delivery of the deed*, this is not any breach. D. 3, 4. Ma. 139. 34. the ancient rent being reſerved.]

This ſeems to have been a caſe in Cam. Scace. or at one of the ſerjeant's inns, and was held by Brooke Ch. Baron, Saunders, Whiddon, and Dyer, that it was not a breach; but Morgan and Bendlows e contra; and was the caſe of the earl of Huntington v. Ld. Clinton.

3. If the condition of the feoffment be, *that the feoffee ſhall give other lands in recompence* thereof, and the *feoffee infeoffs him of other lands of a defeaſable title*, which are after *evicted*; yet the condition is performed; for * *once a recompence, and perpetually*. D. 3, 4. Ma. 139.]

* D. 139 a. pl. 32. Hill. 3 & 4 P. & M.

[4. If the condition be, that *if* the *conuſee* of a ſtatute *holds ſuch lands in peace without damage* or loſs *for want of warranty*, then, &c. if the *conuſee* be *impleaded*, and *vouches the conuſor, who renders* it, by which the land is loſt, and the *conuſor hath nothing to render in value*, the condition is broke; for to render in value is of common right upon a warranty, and the judgment to recover in value is not ſufficient, for he is indamaged without the value. 46 Ed. 3. 28. b. ſuch caſe.]

Br. Conditions, pl. 227. cites S. C. & S. P. by Finchden and Percye.

[5. If the condition be *to acquit another*, though he acknowledges the acquittance, yet if he do not *acquit him in deed*, the condition is broke. 46 Ed. 3. 28. b.]

[6. If the condition be *to ſtand to an award de partitione faciend'*, and they *award a partition, and that he ſhall levy a fine to make it certain*; he ought to levy a fine, becauſe this depends upon the partition, and *inforces* it. 11 H. 4. 25. b.]

†This ſeems to be miſprinted; for I do not find any ſuch point there.

*[7. If the condition be *not to alien the land*, and he *gives* the land *to his heir apparent*, without taking of any thing for it, the condition is broke. † 46 Ed. 3. 33.]

‡This ſeems to be prif printed; for I do not obſerve any ſuch point there.

[8. If the condition be *not to do any thing which ſhall turn him in villeny*; if he *acknowledges a ſtatute*, whether the condition is broke? Dubitatur ‡ 46 Ed. 3. 32. b. (Quære, the intent of the word villeny.)]

Fol. 433.

[9. If the condition be *not to make any debate* or diſturbance *about the adminiſtration of the goods of B.* againſt the obligee; if he *adminiſters the goods*, and cauſes himſelf to be ſummoned for them, the condition is broke. 47 Ed. 3. 23. b.]

[10. If the condition be *to ſuffer an aſſiſe to paſs*, which the obligee hath againſt another; though he *gives* 20 *s. to a juror to paſs againſt him, yet* if *the aſſiſe paſs for him*, the condition is not broke. 10 H. 6. 19.]

* Orig. is (male engine.)

[11. But *otherways* it had been if the condition had been to ſuffer the aſſiſe *to paſs without impediment* * or had endeavours. 10 H. 6. 19.]

Br. Conditions, pl. 35. cites S. C. and the covenant was, that the leſſor might

[12. If the condition be, that the *leſſor may come to the houſe leaſed at a certain time, and that the leſſee do not ouſt him* during the term; if the leſſor comes, and the *leſſee ſhuts and locks the doors*, yet this is no ouſter, for he might have entred notwithſtanding. 3 H. 4. 8. b. adjudged.]

be in the houſe 4 days in the year, and that the faſtening the doors and windows is no breach; and Brooke ſays, that the law ſeems to be the ſame of ſuch a condition.——Br. Dette, pl. 56. cites S. C.——Fitzh. Dette, pl. 109. cites S. C. adjudg'd by all the juſtices.

[13. If a man leaſes for years, and covenants, that the leſſee ſhall *enjoy the land peaceably, without the trouble or moleſtation of any*, and there was a *rent-ſeck* at the ſame time iſſuing out of the land, which was *due to the queen, and* after the *queen* by her prerogative *diſtrain'd in the land*; yet this is not any breach of the covenant, for the land is not charged or incumbered with the rent-ſeck, ſcilicet, as to the poſſeſſion; and then when the queen diſtrains for it *by her prerogative*, this is *of common right*, and *none is bound to diſcharge things of common right*. Mich. 43, 44 Eliz. B. R. between *Herle and Howe*, per Curiam.]

[14. *So* a fortiori if the rent had been *iſſuing out of other land*. Ibid. per Popham.]

S. C. cited D. 6. b. Marg. pl. 5.

15. *Leaſe to baron and feme for years*, with a proviſo that *if the poſſeſſion comes into the hands of any other than the baron and feme, and of their iſſue, that* then upon the tender of 100l. by the leſſor, he may re-enter. Baron dies; feme takes another baron; leſſor tenders

tenders the 100l. Whether the marriage is a breach, dubitabant. Mo. 21. pl. 71. Hill. 2 Eliz. Anon.

16. A. by indenture *leaſed an houſe to B.* for 40 years, and *B.* by the ſame indenture, *covenants that he will ſufficiently repair it during the term, and that A. his heirs and aſſigns may enter every year to ſee if the repairs are done; and if it is repaired, upon view of the leſſor, according to the agreement, then the leſſee ſhall hold for 40 years more after the firſt term ended* &c. It was agreed by all but Raſtal, that though the *leſſor does not view* &c. yet if it is kept in repair the leſſee ſhall hold the other 40 years, the reparations being in facto performed, becauſe the view is a thing voluntary in the leſſor, and for his benefit, and the not doing thereof ſhall not prejudice the leſſee; and judgment for the plaintiff by the other 3 juſtices. Mo. [184] 27. pl. 88. Trin. 3 Eliz. Skern's caſe.

17. If a man be bound *to make a feoffment* of this land there, altho' *he charges the land*, yet he ſhall not forfeit his bond; *but if* it were *to make a feoffment of his land diſcharged* &c. it is otherwiſe; *but* yet he ſhall *not* be bound to diſcharge it *of ſuch things with which it is charged by the law.* Arg. 3. Le. 44. pl. 64. Mich. 15 Eliz. C. B. in caſe of Mountford v. Cateſby.

18. The Biſhop of Rocheſter made a *leaſe of a manor for years, wherein were divers copyholders, proviſo that the leſſee ſhall not moleſt, vex, or put out any copyholder paying his duties and ſervices ſuch pœna forisfacturæ*; the breach was aſſigned that the *demandant entred upon a copyholder, in a cow-houſe, parcel of the premiſſes, and beat him*, et ſic moleſtavit; it was the opinion of the court, that the condition was not broken, for that the moleſtation ought to be intended ſuch as ſhould be an expulſion, or moleſtation concerning his copyhold-tenement; and adjudged accordingly. Cro. E. 42. pl. 16. Mich. 37 & 38 Eliz. B. R. Penn v. Glover.

Mo. 402. pl. 533. S. C. ſtated only as by way of covenant, and without any proviſo, adjudg'd no breach; and the court likewiſe inclined that it was no condition.

19. A. leaſed lands for years, rendring 50s. rent at the 4 feaſts, viz. Mich. &c. *Proviſo if the rent be behind by the ſpace of a year after the day of payment, it being lawfully demanded, and no diſtreſs to be found there per totum tempus prædictum, to re-enter*; it was found that the rent was behind for a year, and that there was a demand, but there was not any diſtreſs the laſt day of the year upon the premiſſes, and that the leſſor entred. Adjudged that the condition was not broken if there was a diſtreſs at any time of the year, and a condition ſhall be taken favourably for the leſſee. Cro. E. 764. pl. 2. Trin. 42 Eliz. B. R. Grig v. Moyſes.

20. The condition of a bond to ſave the obligee *harmleſs concerning his buying of certain goods at ſuch a price*, extends not to the price but the title, as was clearly agreed upon evidence between them. All. 95. Mich. 24 Car. B. R. Smalman v. Hutchinſon.

21. *Leaſe* for 9 years, was *dated 1 June, 16 Car. 2.* in which there was a *covenant to ſave the plaintiff harmleſs from all evictions during the term*, and in covenant the *breach aſſigned was an eviction 26th of June following*; the defendant *pleaded that this leaſe was primo deliberatum the 1ſt of June 17 Car. 2. which was after the breach aſſigned, and that the plaintiff was not ejected after the delivery of the deed.* Upon demurrer the court held that thoſe words during

2 Keb. 291. pl. 73. S. C. adjudg'd for the plaintiff. —— Ibid. 377. pl. 38. S. C. adjudg'd accordingly.

(during the term) ſhall be conſtrued during the term in computation of time, and not only from the time of the delivery of the deed when it commenced in intereſt, and judgment for the plaintiff. Sid. 374. pl. 14. Trin. 20 Car. 2. B. R. Lewis v. Hilliard.

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(B. b) How to be performed when it is Pro Conſilio impendendo [&c.]

* Br. Annuity, pl. 7. cites S. C. and 41 E. 3. 19.—— [1. IF an annuity be granted *to a man of the law*, pro conſilio impendendo, the grantee is *not bound to travel*, nor do any thing, but counſel where he may be found. * 41 Ed. 3. 6. † 8 H. 6. 24. ‡ 21 Ed. 3. 7. b. adjudged.]

Fitzh. Annuity, pl. 19. cites S. C. & S. P.——Br. Extinguiſhment, pl. 35. cites S. C. † Br. Annuity, pl. 18. cites S. C. ‡ Br. Conditions, pl. 45. cites S. C. & S. P. adjudg'd.——Br. Annuity, pl. 38. cites S. C.

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Br. Annuity, pl. 7. cites S. C. and 41 E. 3. 19.——Fitzh. Annuity, pl. 19. cites 41 E. 3. 19. S. P. [2. Alſo the *grantor ought to diſcloſe his caſe* to the grantee, otherwiſe he is excuſed of his counſel. 41 Ed. 3. 6. b.]

[3. If the *grantee* cannot counſel him, yet if he *does as much as he can*, he is excuſed. 41 Ed. 3. 6. b.]

Br. Annuity, pl. 7. cites S. C. and 41 E. 3. 19. that the phyſician ought to go to the patient.—— Fitzh. Annuity, pl. 19. cites 41 E. 3. 19. and ſeems to admit that the phyſician ought to go to the patient. [4. *So* if any annuity be granted pro conſilio & auxilio *to a phyſician*, the grantee is not bound to travel for him, but to give his advice and help where he may be found; *alſo he ought to certify him what malady it is.* 41 Ed. 3. 6. b. 20. (R. *Quære* this; for a malady is ſecret, which cannot be known but by the phyſician, and a *ſick man cannot travel* to the phyſician, but perhaps if he *ſends his urine* to him, he may know his diſeaſe; but he may be helped much by inſpection and feeling his pulſe; ideo Quære.)]

Nor is he bound to go to him; for the grantor may notify his caſe to him, and he may give his counſel, where he is, without going to him; though otherwiſe it is in caſe of a phyſician; for the patient cannot go to him. Br Annuity, pl. 7. cites 41 E. 3. 6. 19.—— Fitzh. Annuity, pl. 19. cites S. C.——See (S. c) pl. 20. [5. *So* if an annuity be granted *to a man of the law, pro* conſilio & ſervitio ſuo impendendo, he is *not bound to go with him*, nor to counſel him in other place than where he is found. 8 H. 6. 24.]

[6. *So* he is not bound to go with him, *though the other will bear his charges.* 8 H. 6. 24.]

Cro. J. 482. pl. 16. S. C. adjudg'd niſi.—— Poph. 135, 136. S. C. and held no plea; for ſetting his hand to ever bill may be inconvenient to him. [7. If an annuity be granted pro conſilio impenſo & impendendo to a counſellor, he is not bound by this *to put his hand to a bill in the ſtar-chamber.* Paſch. 16 Jac. B. R. between *Mingey and Hammond* adjudged per Curiam.]

[8. *But*

[8. *But when* annuity is granted pro conſilio impendendo, and the * grantee *in the ſame deed binds himſelf* by ſuch words, *pro qua quidem conceſſione*, that *he will go with him to any place within the country*; there he ought to go with him, becauſe he hath *ſpecially bound* himſelf ſo to do. * 8 H. 6. 24. 32. Ed. 3. Annuity, 30 Curia.]

* Fol. 435. Br. Conditions, pl. 52. cites S. C. and 9 E. 4. S. P. that this is a condition, and for non-feaſance the annuity is extinct, per Strange.—Br. Annuity, pl. 18. cites S. C. & S. P. by Strange. But Brooke ſays, quære inde, for it is a grant, and not a condition.

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[9. If the *grantee* of ſuch annuity *refuſes* to give his counſel upon demand, the *annuity is determined.* * Da. 12. 1. b. ‡ 8 H. 6. 24. 16 Ed. 3. Annuity 22. 5 Ed. 2. Annuity 44.]

* Dav. 1. b. S. P. and 12. ſeems to be miſprinted.——Co. Litt. 244. a. S. P.—Becauſe he has no remedy for the counſel, nor any eſtate thereln, Arg. Roll. Rep. 122. Hill. 12 Jac. B. R. ‡ Br. Annuity, pl. 18. cites S. C. & S. P.——3r. Extinguiſhments, pl. 53. cites S. P.——In the quarto edition, and the ſmaller folio edition, it is pl. 36. and ſo in thoſe two editions are two pleas mark'd (36) and thoſe laſt mentioned editions cite 41 E. 3. 6.——Co. Litt. 204. a. S. P.——So if annuity be granted, quod præſtaret conſilium, this makes the grant conditional. Ibid.

[10. If the grantee of an annuity *pro conſilio impenſo & impendendo* refuſes after to give counſel; this *does not determine the annuity*, becauſe this was granted as well for the ſervices paſt as thoſe to come. Temp. Ed. 1. adjudged.]

Br. Conditions, pl. 45. cites 21 E. 3. 7. that this is a forfeiture, and ſhall not extinguiſh the annuity.

[11. If a dean and chapter grants to another the *office of chief cook*, with 5 l. for the exerciſe thereof, *provided that he exerciſes the office in the great kitchen of the church*; and after the dean *requires him to exerciſe it in his own kitchen*, and he *refuſes*, yet the annuity is not determined. Hill. 37 Eliz. B. between *Saliſbury, dean of Norwich, and Chapman*, adjudged.] [186]

I. In replevin E. avowed for a rent-charge granted to him by a ſtranger, who was ſeiſed of a manor whereof the land where is parcel &c. pro conſilio impendendo. It was *pleaded in bar, that E. the defendant was attainted of treaſon, and committed to the tower, and that the grantor had occaſion for to have his counſel, and could not have acceſs to him* &c. and upon demurrer all the court held that the avowant ſhall have return; for by the attainder the rent was not forfeited, becauſe it was incident to the cauſe for which it was given, nor can be granted over, and tho' E. is in priſon, yet he may give counſel as well as before, and no default is aſſigned in him. D. 1. b. 2. a. Mich. 6 H. 8. Oliver v. Empſon.

Pl. C. 382. a. S. C. cited accordingly.

II. If annuity be granted to a counſellor or phyſician for their lives, pro conſilio ſuo impendendo to the grantor, and the *grantor dies*, this *does not determine the annuity*, but the grantee ſhall hold it for his life, and yet it was granted and was executory for the counſel, but by the *act of God* the grantee is diſcharged of giving counſel; for no counſel can be given to the grantor when he is dead; per omnes barones. Pl. C. 456. b. Trin. 15 Eliz. in Sir Tho. Wroth's caſe.

III. An annuity was granted *to an attorney* pro conſilio impenſo & impendendo, and afterwards *there being a difference between the grantor*

grantor and a ſtranger, the attorney gave counſel to the adverſary, but not to the grantor, he not requiring any of him in that matter. The court held that his annuity was not determined hereby. Dyer 369. b. pl. 53. Paſch. 22 Eliz. Plomer's caſe.

But if a tenant in common grants annuity to hold courts,

IV. Annuity granted *pro exercitio officii ſeneſchalli*; refuſal to hold a court is a forfeiture. D. 377. a. pl. 28. Trin. 23 Eliz. Anon.

and he ſummons it without his companion, and the grantee refuſes, this is no forfeiture, becauſe it is a void ſummons. D. 377. a. pl. 28. Marg. cites 27 Eliz. Hurleſton's caſe.

V. If *A. pro conſilio impenſo &c. makes a feoffment or leaſe for life*, albeit *he denies counſel*, yet *A. ſhall not re-enter*; for in this caſe there ought to be legal words of condition or qualification; for the cauſe or conſideration ſhall not avoid the eſtate of the feoffee, and the reaſon of this diverſity is for that *the eſtate of the land is executed*, and the *annuity is executory*. Co. Litt. 204. a.

[(B. b. 2) Till he be promoted to a Benefice.]

[12. If an *annuity* be *granted till the grantee be promoted* and preferred *to a benefice of* 30 *l. a year* by the grantor, and after the grantor preſents him, but the grantee is *found inſufficient*, the annuity ſhall ceaſe. Paſch. 1 Jac. B. dubitatur.]

[13. [*So*] if an annuity be granted till the grantee be promoted to a benefice by the grantor, if he *profers a benefice* to him *which is litigious*, yet the annuity is determined, for perhaps he has a good title thereto, though it be litigious. 17 E. 3. 11. dubitatur.]

[14. *But if* the church be *full of another at the time* of the preſentation, the annuity is not determined, though he accepts the preſentation, for the preſentation and acceptance is void. 26 E. 3. 69. b.] [187]

[15. If an annuity of 20 l. per annum be granted *till he be promoted to a benefice*, the benefice *ought to be of the value of* 100 *marks a year*. 16 E. 2. Annuity, 47. Iſſue thereupon.]

[16. If an annuity be granted to another till be be promoted *to a competent benefice*; if the grantor after *tenders* to him *the preſentation to a vicaridge*, which is *worth* 100 *marks per annum*, which he refuſes, the annuity is determined. 3 Hen. 6. Annuity, adjudged, 31 E. 3. Annuity 28.]

[17. The benefice *ought to be of as much yearly value as the annuity* is, otherwiſe it is not determined. 3 E. 3. Annuity, 40. Temp. Ed. 1. Annuity 50.]

[18. The *value* of the benefice *ſhall be reckoned according to the demerit of the party* to be promoted. 31 Ed. 3. Annuity 28.]

[19. If the *grantor preſents* the grantee *to* an ewe-benet (that is, *the cuſtody of the holy-water,*) this does not determine the annuity, for he is *removeable at the will of the pariſhioners*. 3 E. 3. Annuity 40 adjudged.]

[20. If an annuity be granted *till promoted* &c. *by the grantor or his heirs*, it is a good performance of the condition that he *was promoted by the mother of the grantor at the requeſt of the grantor*, in diſcharge of the annuity. 33 E. 1. Annuity 51. adjudged.]

[21. If an annuity be granted *to an infant till* he be *promoted* to a benefice; if the *grantor tenders* him a benefice, *though he cannot take it* for the nonability of his perſon, yet the annuity is determined. 3 Ed. 3. Annuity 40.]

Annuity was granted to A. till he was promoted to a competent benefice, and

In action brought the defendant *pleaded, that the plaintiff had taken wife, and ſo cannot receive a benefice*; and adjudg'd a good plea. Br. Annuity, pl. 16. cites 7 H. 4. 16.

In annuity upon a grant, till the grantee was promoted to a competent benefice, *and he refuſed*. The *plaintiff ſaid, that it was a benefice with cure*, and that none may take by the law of Holy Church before the age of 24, *and he was only* 22 *at the time of preſentation*; and the other ſaid that he was 24, and ſo to iſſue. Brooke ſays it ſeems to be ill pleading, for he ſhall not anſwer the refuſal; for *if he refuſes where the ordinary was ready to have ſuffered him to have this preſentment*, he has extinguiſhed the annuity, as it ſeems. Br. Conditions, pl. 54. cites 19 H. 6. 54.

[22. If the grantor *reſigns a prebend* to the grantee, and the *biſhop at the requeſt of the grantor tenders the prebend* to the grantee; if he *refuſes* it the annuity is determined. 16 E. 2. Annuity 47.]

[23. If the annuity be granted *quouſque de beneficio ſibi proviſerit quod duxerit acceptand'*, the grantee is *not bound to accept any benefice of any action*, but at his pleaſure, becauſe of the ſaid words; and by this refuſal the annuity ſhall not be determined. Temp. E. 1. Annuity 50. adjudged.]

[24. If an annuity of 40*s.* [40*l.*] *a year* be granted *till promoted to a benefice*, a *vicaridge of* the value of 5*l. per annum is not ſufficient* within this condition. 19 E. 2. Annuity 49.] Fol. 436.

[25. *But* it *ought to be of* the value of 10 *marks per annum at the leaſt*, and this is ſufficient. 19 E. 2. Annuity 49. Iſſue thereupon.]

26. Annuity of 10 marks was granted *till the grantee was advanced to a competent benefice*, and *they were at iſſue upon the value of the benefice tender'd and refuſed*, viz. that it *is not worth* 10*l.* &c. and the others e contra where the *annuity was of* 10 *marks*. And it was ſaid that if he had accepted the benefice, that it had extinguiſh'd the annuity, of whatſoever value the benefice had been; Brooke ſays the reaſon ſeems to be in as much as the acceptance proves that the grantee took it for competent. Br. Annuity, pl. 30. cites 10 Aſſ. 4.

27. If an *annuity* be granted by J. Abbot of D. *till the grantee be promoted to a competent benefice by the ſame abbot*, *tender* of the benefice *by his ſucceſſor* is not good. *Contra if it had been by the abbot of D.* and J. had been left out. Br. Conditions, pl. 214. cites 15 H. 7. 1. [188]

(B. b. 3) Pro Conſilio impenſo & impendendo. Pleadings.

1. IN debt, the plaintiff counted how he was *retained* of counſel with the defendant *for* 20 *years for* 20*l. per ann.* and that ſo much was arrear, &c. and per Cur. the count is not good, for he *ought* S. P. per Priſot. Br. Count, pl. 47. cites 17 H. 6. 8.

ought to count that he counſell'd him, or was ready to counſel in caſe the other had demanded it. Br. Count. pl. 5. cites 3 H. 6. 33.

Br. Count, pl. 57. cites S. C.—Br. Dette, pl. 131. cites S. C.—Br. Abbe, pl. 11. cites S. C.

2. In *annuity againſt a prior upon a grant of his predeceſſor* of 40*s.* per ann *pro conſilio impenſo & impendendo*, he *counted how he had counſelled the predeceſſor and his covent after the grant, ſuch a day, year, and place*, as he ought, as it ſeems; for otherwiſe he cannot charge the ſucceſſor upon a grant of the predeceſſor without covent-ſeal, unleſs it were for ſomething which ſhould come to the uſe of the houſe, *nor count of counſel before the grant, by reaſon of this word impenſo*, and yet well; per Danby and Davers, but he need not count in what matter he counſelled him. But ſays quære if he ſhall ſhew ſuch matter upon grant made by another man. Br. Annuity, 27. cites 38 H. 6. 22.

3. Debt upon arrears of annuity by J. B. againſt the abbot of C. upon demand of 40 *l.* and *counted that K. late abbot*, &c. *by deed*, &c. *granted* to him 40 *s. of annuity out of the monaſtry aforeſaid pro conſilio* to the ſame abbot and convent *impenſo & impendendo, and* that *at the time of making the deed he was and yet is learned in the law, and* that he *had given his counſel to the* ſaid late abbot and covent *at S. in his practiſing the buſineſs of the houſe ad proficuum of the ſaid houſe*; *and* that *K. abbot died, and J. now defendant was elected and made abbot*, &c. *and for ſo much arrear in the life of the ſaid abbot he brought this action*; and held good per Cur. though he ſaid that he counſelled the predeceſſor in managing the buſineſs of the houſe ad proficuum dictæ domus, and did not ſay in what buſineſs; for if the defendant denies it the other ſhall ſhew it in his replication, and ſhall ſhew there in what, &c. Br. Annuity, pl. 28. cites 39 H. 6. 22.

S. P. Br. Abbe, pl. 12. cites S. C.

4. *And* in ſuch action againſt ſucceſſor *upon deed of the predeceſſor without covent-ſeal* he *ought to count that he counſelled the predeceſſor to the uſe of the houſe*; for otherwiſe the ſucceſſor is not chargeable. Ibid.

Ibid.

5. *Contra where the action is againſt the ſame abbot who granted*; for deed or contract of the abbot alone of a thing which comes to the uſe of the houſe ſhall bind the ſucceſſor, and if he who granted does not demand counſel, yet the action lies againſt him becauſe he did not refuſe; but contra againſt his ſucceſſor, for if no counſel was given to the uſe of the houſe, the ſucceſſor ſhall not be charged; quod nota per Cur. Ibid.

Br. Dette, pl. 114. cites 9 E. 4. 48. 53 S. C.

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6. Debt againſt executors of arrears of annuity, and counted that the teſtator, by the deed which he ſhewed forth, had *granted* to him 40 *s. per ann.* of annuity pro conſilio ſuo impenſo & impendendo, &c. payable, &c. *and if the rent was arrear, that he may diſtrain in the manor of B.* and ſhewed that he was of counſel, &c. and counſell'd him ſuch a day and place, and that 10 *l.* was arrear. And it was agreed that the plaintiff need not ſhew in what thing he counſell'd him, but this ſhall come of the [part of] the defendant if he finds default in it; per Choke, he *need not ſhew that he counſell'd him*, but *it ſuffices that he was always ready* to have counſell'd him if he had required it; for he is not bound to offer counſel without requeſt; for he cannot know whether he needs counſel, nor

nor in what till it be ſhewn to him. Br. Annuity, pl. 23. cites 9 E. 4. 53.

7. *And* it was granted that the plaintiff *need not ſhew in what county the manor is*, for *if he has levied by diſtreſs, this ſhall come of the other part to ſhew*; by which the *defendant* [ſaid] *that the plaintiff had levied it upon diſtreſs in the manor charged*, and no plea, for he *ſhall anſwer to the debet*, becauſe the manor is in the ſame county, by which he *ſaid that levied by diſtreſs in the manor*, and ſo nil debet &c. And he ſhall have this plea which is matter in fact without an acquittance, though it be found upon ſpeciality, as in debt upon obligation, *and where* 'tis *executory*, as annuity or rent upon a leaſe for years, by which he had the plea, but ſhall not ſay nothing owing to him againſt ſpecialty. Br. Annuity, pl. 23. cites 9 E. 4. 53. and cites the like judgment, Mich. 6 E. 3.

8. An annuity was granted for life pro conſilio impenſo &c. and in a writ of annuity brought for the arrears, the defendant *pleaded, that before any arrearages incurred, he required the plaintiff to do him ſervice, and he refuſed* &c. The plaintiff *replied, that before any refuſal, the defendant on ſuch a day and place diſcharged him from his ſervice* &c. The court held that the defendant's plea was not good, becauſe he *ought to have ſhewed for what manner of ſervice the plaintiff was retained to do*, and the annuity granted, *and* then ſhew ſpecially *what ſervice the plaintiff required of him, and what he refuſed*. Le. 209. pl. 292. Mich. 32 & 33 Eliz. C. B. Bagſhaw v. Earl of Shrewſbury.

Annuity was brought againſt the ſucceſſors of the *biſhop* of Ely, who *granted* to the plaintiff *the ſtewardſhip of all courts*, &c. *for life with a fee of 40s.* percipiend' annuatim de manerio de D. and the plaintiff *ſhewed that he kept the courts*, but did not ſet forth any ingroſſing of the rolls, *and that after the biſhop diſcharged and forbade him* to keep any more courts, tho' he was ready to do it, and that for divers years after the biſhop paid not the annuity. If the biſhop dies it ſeems he ought to tender his ſervice to every ſucceſſor, and it is iſſuable that ſuch ſucceſſor non exoneravit. D. 156. b. 157. a. pl. 26. Mich. 5 Mariæ. Lucas v. the biſhop of Ely. Cites Trin. 20 H. 8. Lucas v. the prior of Huntingdon.

9. In action brought by a counſel for an annuity granted him pro conſilio impendendo, he muſt *aver that he was always ready to give him his counſel*. Jo. 294. 8 Car. in Itinere Windſor, cited by Mr. Attorney as reſolved in Mingay's caſe.

(C. b) At what *Time* it is to be performed, where *no Time is limited*. Preſently; within *convenient Time*.

[1. *WHEN the act* by the condition of an obligation *to be done* to the obligee, *is* of its own nature *tranſitory*, (as payment of money, delivery of charters, and the like) and no time limited, it ought to be performed in convenient time. Co. 6. *Bothie* 31. Co. Lit. 208. (a. b.)]

The caſe was, viz. debt upon bond conditioned *to deliver up a bond to the plaintiff*, *wherein he and the defendant were bound to T. for payment of 5 l. and alſo that the defendant ſhould acknowledge ſatisfaction of a judgment had on that bond, and alſo ſhould deliver true notes of all bills of charges which concern the ſame*, &c. The defendant *pleaded, that there were no bills of charges for*

for or concerning the ſame, but ſaid nothing to the reſidue, pretending that he need not, *becauſe they are collateral acts, and no time limited for performing them.* But adjudged that he ought to have performed the reſidue of the condition in convenient time, without any requeſt; and this *diverſity* was taken and agreed that, Where, by the condition of a bond *any thing is required to be done to the obligee, which in its own nature is tranſitory,* as payment of money, &c. and no time is limited when it ſhould be paid, there, though a place of payment is expreſſed, the thing muſt be done in convenient time: and *ſo* it ſhall be *where a place was appointed*; and *ſo* likewiſe *where the act is local of its own nature* without expreſſing a place, when the obligor may perform it without the obligee, as the acknowledging ſatisfaction in this caſe. *But if the concurrence of the obligee is neceſſary,* he has time during life, if not haſtened by requeſt; As where it is to infeoff the obligee, but if it be to infeoff a ſtranger, there he ought to do it in convenient time, becauſe he has undertaken to do it; but if it be that a ſtranger ſhall infeoff the obligee, there he ought to haſten it by requeſt, becauſe the obligee is party. 6 Rep. 30. b. Mich. 3 Jac. C. B. Bothie's caſe, alias, Bothie v. Smith.——In ſome caſe a man ſhall have time during his life, as where no benefit ſhall be to any of the parties, as if the condition were to go to Rome; per Wray. Le. 125. pl. 170. in caſe of Cater v. Boothe, S. C.

* Br. Conditions, pl. 166. cites S. C. he ought to ſeek the obligee and pay it preſently; per Brian & Curiam.——Br. Obligation, pl. 55. cites S. C. accordingly by all the juſtices.

[2. If the condition of an obligation be *to pay a leſs ſum,* and no day of payment limited, he ought to pay it preſently, ſcilicet, within a convenient time. * 20 E. 4. 1. b. 18 † 44 E. 3. 9. ‡ 21 E. 4. 39. b. ‖ 14. H. 8. 23. Contra ¶ 10 H. 7. 15. Contra + 9 E. 4. 22. b.]

† If a man be bound to another in a bond, and *no day of payment* is limited, the ſum is due and *payable immediately.* Br. Obligation, pl. 12. cites 44 E. 3. 9.——S. P. per Perſy, quod nullus negavit. Br. Obligation, pl. 28. cites 38 E. 3. 12.——S. P. But he is not bound to pay it without requeſt. Br. Obligations, pl. 34.——S. P. Ibid. pl. 55. cites 20 E. 4. 1. and the obligor *ought to ſeek the obligee and tender it and pay it immediately,* and in pleading *he ſhall ſay, that he has been all time ready to pay, and yet is.* ‡ Br. Conditions, pl. 173. cites S. C.

‖ Br. Conditions, pl. 61. cites 14 H. 8. 17. per Brudenel, that he ought to pay it as ſoon as he can go to him to do it. [This caſe begins at fol. 17. and reaches to almoſt the end of fol. 23.]

¶ If the condition be to pay 10 l. and limits no day, the obligor has liberty during his life to perform it; But if it be a ſingle obligation, and no day of payment expreſſed, it is payable immediately, and ſo is the diverſity; per Fineux quod nota. 10 H. 7. 15. a. pl. 11.——But Mo. 472. it was agreed per Cur. obiter, that if one be *bound to pay money on covenant or ſingle obligation,* he ought to pay it in convenient time without requeſt; but if upon an obligation with condition, he has time during his life.——Debt upon *obligation of 100 l. conditioned for the payment of 50 l.* and no day limited for the payment of the leſſer ſum; Reſolved it was *payable preſently, upon requeſt.* Cro. E. 798. pl. 48. Mich. 42 & 43 Eliz. B. R. Noſe v. Bacon.

+ Br. Conditions, pl. 74. cites S. C. that he is not bound to pay without requeſt; per Choke, to which Brian and Littleton agreed.

[3. If the condition be *to make a retraxit of a ſuit,* he ought to make it within convenient time. 20 E. 4. 8. b.]

Br. Conditions, pl. 182. cites S. C.

[4. If the condition be *to perform the award of J. S. who awards* the obligor *to pay* 10 *l.* without limiting any time, he ought to pay it in convenient time. 22 E. 4. 25.]

For though the acknowledging the ſatisfaction is local, yet

[5. *So* if the condition be *to acknowledge ſatisfaction in ſuch court,* he ought to do it within a convenient time. Co. Lit. 208. b. Co. 6. *Bothie* 30. b. adjudged.]

becauſe he may do it in the abſence of the obligee, he muſt do it in convenient time. 6 Rep. 30. b. 31. a. Mich. 3 Jac. C. B. in S. C.

[6. So if the condition be *to deliver* to the plaintiff *an obligation of 20 l. in which the plaintiff and B. ſtood bound* to the defendant; though no time be limited for doing thereof, yet he ought to do it in convenient time. Co. 6. *Bothie* 30 b. adjudged.]

[7. If *A. demiſes to B. and C.* certain tithes *for* 99 *years, if A. ſo long lives,* and after *B. aſſigns* over by indenture his moiety *to D.*

and

and B. alſo *delivers to D. an obligation, in which D.* then *ſtood bound to B. in* 400 *l.* for the payment of 200l. to B. at a time then paſt. *And thereupon, in conſideration that B.* at the inſtance and requeſt of D. *would deliver to D. the counter-part* of the ſaid indenture of aſſignment, ſealed with the ſeal of D. *D. aſſumed, that if he ſhould ſell* to any perſon *his intereſt in the ſaid moiety ſo to him aſſigned by B.* [191] then *D. would pay to B.* 200 *l. in ſatisfaction of the ſaid obligation*; *and* that *if he ſold* the ſaid intereſt in the ſaid moiety to him aſſigned *for more than* 200 *l. then he would pay to B. one moiety of ſuch money* as he ſhould ſell it for *more than* 200 *l. and* that *if he did not ſell* the ſaid intereſt in the ſaid moiety ſo aſſigned, *then he would re-deliver to B. the ſaid counter-part* of the indenture of aſſignment, *and the ſaid obligation ſafe and not cancelled*; and thereupon B. delivers to D. the ſaid counter-part and obligation. This *promiſe* being *made* 20 *July* 18 *Car.* and *B. brought an action thereupon, Hill.* 20 *Car.* and averred in his declaration, that D. had not ſold his ſaid intereſt in the ſaid moiety, and yet had not re-delivered the ſaid counter-part and obligation according to his promiſe, licet ad hoc faciend' poſtea, 20. Sept. 20 Car. at ſuch place &c. he was requeſted (*). The action lies upon this declaration, for D. ſhall not have all his life to ſell it, but he ought to do it in a convenient time; for otherwiſe he may ſtay till the old age of A. upon whoſe life the eſtate is to determine, and then it will be but of ſmall value, which was not the intent of the parties; but the intent was to ſell it for the beſt value, or to re-deliver the counter-part and obligation. P. 23. Car. B. R. between *Williamſon and Henly*, adjudged upon a demurrer. Intratur Tr. 21 Car. Rot. 362. For though he does not take upon him to ſell it, but only to pay ſo much if he ſells it, and if he does not ſell it to re-deliver &c. yet *upon the whole contract it appears, that this amounted to a taking upon him to ſell or re-deliver* &c. which ought to be within a convenient time, or otherwiſe it will be of no effect to B.]

* Fol. 437.

[8. If the condition of an obligation be *to pay a certain ſum to a ſtranger*, without limiting any time, this ought to be done in convenient time. Mich. 14. Jac. B. R. the *biſhop of Rocheſter* adjudged in arreſt of judgment.]

[9. If a *deviſe* be made to another, upon condition *to pay his debts*; if he does not pay them within a convenient time, the condition is broke. Contra 38 E. 3. 11. 6.]

[10. If a man *deviſes* lands deviſable *to his executor to ſell*, and to diſtribute the money *for the payment of his debts*, he ought to ſell it as ſoon after the death of the deviſor as he can, otherwiſe the condition is broke. 38 Aſſ. 3.]

Br Conditions, pl. 215. cites S. C. but there it is ſaid to be

to diſtribute for the ſoul of the teſtator, and becauſe they took the profits to their own uſe the heir entred upon them, and adjudged well.——Br. Entry congeable, pl. 124. cites S. C. and that the entry of the heir was adjudged good.——Fitzh. Entre congeable, pl. 46. cites S. C. accordingly.

[11. *For if* after the death of the teſtator *a man tenders* to him *a certain ſum* for the lands, *and he refuſe* it, *becauſe* it is *not to the value* of the lands, *and after retains* the lands in his hands, to the intent *to ſell it dearer* to another, *and* in the mean time *takes the profits*

Br. Conditions, pl. 215. cites S. C.—— Br. Entre congeable,

pl. 124. cites S. C. —Fitzh. Entry conge. pl. 46. cites S. C.

profits to his own use, and not for the ſoul of the teſtator; the condition is broke. 38 Aſſ. 3. adjudged.]

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[12. [But] if a *feoffment* be made upon condition, *that he ſhall ſell it as ſoon as he can*, and as profitably as he can, and the money taken for the ſame lands ſhall be diſtributed for his ſoul. If the *feoffee continue the poſſeſſion a year and a half, becauſe he finds not a chapman* to buy it, *and takes the profits* of the land, *but never claims any eſtate but under the condition* aforeſaid, *and is always of good* [192] *will to ſell* the lands if he could find a chapman, the condition is not broke; for there is no default in him. 26 Aſſ. 39. dubitatur.]

[13. If *A. in conſideration of* 50 *l.* given to him by B. *aſſumes to procure the wardſhip of the body and lands of C. to be granted* by the king (to whom it belongs) to B. during the minority of C. who was then of the age of 13 years, he ought to procure it in a convenient time without any requeſt; becauſe otherwiſe the benefit of the profits of the land will be loſt in the mean time. P. 8 Car. B. R. between *Vine and Hetherington*, adjudged upon demurrer; per Curiam. Intratur Tr. 7. Car. Rot. 27.]

14. If one *covenants to aſſure land to another and his heirs*, he ought to do it in convenient time; by Anderſon Ch. J. Arg. 2. And. 73, 74. cites 16 Eliz.

15. If *A. covenants to aſſure land to J. S. during A.'s life*, A ſhall not have time during his life for the aſſuring of it; for then the covenant would be to no purpoſe; per Anderſon Ch. J. Arg. 2. And. 74. cites 16 Eliz.

16. *So* if A. covenants *to grant an annuity to J. S. during his life, or to aſſign his leaſe for term of years or life* &c. *or to marry ſuch a woman*, all theſe ought to be done in convenient time; for in all theſe caſes the covenants are of no effect of liberty during life ſhall be left to him, who by the intent of the deeds ought to perform the things before; per Anderſon Ch. J. Arg. who ſaid the reaſons are apparent, and therefore not particularly mention'd here. 2 And. 74. cites 16 Eliz.

17. A bond was conditioned to *permit the obligee, or his aſſigns, not only to threſh his corn in the obligor's barns, but alſo to carry it away from time to time at all convenient times* hereafter, *or to pay* 8 *l. on requeſt*; that then &c. The corn lay in the barn 2 years, and was much devour'd by mice and rats; the obligor threſh'd the reſidue, and the obligee brought his action. Anderſon took a *difference between* the words *(at convenient time)* and *(within convenient time)* that if he will come in the night, or on the ſabbath-day, this is not a convenient time, but tho' he comes a long time after, yet it may be (at) time convenient, and the words are not (within time convenient) and Windham ſaid that if it had been (within) time convenient, there would have been a difference. Goldſb. 76, 77. pl. 8. Hill. 30 Eliz. The Earl of Kent's caſe.

18. The teſtator deviſed an houſe to his wife and his heirs, upon condition that ſhe by advice of counſel in convenient time, *ſhould aſſure*

aſſure the ſame *for maintenance of a free-ſchool* &c. She *did not make aſſurance in* 8 *years after the death of the teſtator*; adjudg'd that the condition was broken. 1 Rep. 25. b. Mich. 34 & 35 Eliz. in the Exchequer, in the caſe of the queen v. Porter (alias) Porter's caſe.

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19. Feoffment on condition that *if the feoffee does not pay* &c. *that it ſhall be lawful for the feoffor to re-enter.* The money ought to be paid to the feoffor in time convenient; for it is not reaſonable that the feoffee ſhall have the benefit of the land, and not pay the money; per Anderſon Ch. J. 2 And. 73. Mich. 39 & 40 Eliz. Obiter. Litt. S. 337. & Co. Litt. 208. a.

20. *But* if condition be that *if the feoffor pays* &c. that *he may re-enter*, the feoffor has *time* to pay it *during his life*, becauſe the other has the profit of the land, and has no loſs by non-payment. Per Anderſon Ch. J. 2 And. 73. Mich. 39 & 40 Eliz. Obiter.

21. If one be infeoff'd, on condition *to make a grant of a collateral thing, as eſtovers, common*, &c. he ought to do it upon requeſt, and at his peril *before the time incurred in which the grantee is to take any benefit of the grant* as before the time of taking the common or eſtovers. Agreed by all the juſtices. Mo. 472. pl. 679. Mich. 39 & 40 Eliz. in caſe of Lord Cromwell v. Andrews. [193]

(D. b) At what Time it ſhall be *performed* where no Time is limited. *Not before Requeſt.*

[1. IF *land be granted to the king* upon condition *to grant to any* (*) *ſtranger*, it ſeems he is not bound to do it before requeſt. D. 3, 4. Ma. 139. 32.] * Fol. 438.

[2. If the condition of an obligation be *to pay a certain ſum to a ſtranger*, without limiting any time, it ought to be paid within a convenient time *without any requeſt*. Mich. 14 Jac. B. R. the *biſhop of Rocheſter* adjudged, this exception being moved in arreſt of judgment.]

[3. If the condition of an obligation be *to pay* a certain ſum *to the obligee*, without limiting any time, he is not bound to pay it before requeſt.]

[4. If the condition of a feoffment be *to infeoff a ſtranger upon requeſt*, he is not bound to enfeoff him before requeſt. 19 H. 6. 34. b.] Fitzh. Entre Congeable, pl. 2. cites S. C.

[5. *So* it is if it be *to infeoff the feoffor upon requeſt*. 19. H. 6. 34. b.]

[6. *So* if the condition of a feoffment *be, that he ſhall re-infeoff the feoffor*, he is not bound to do it before requeſt. 38 Aſſ. 7. * 44 Aſſ. 26. † 43 E. 3. 9.] * Br. Conditions, pl. 217. cites S. C.——Br. Tender pl. 33. cites S. C. † Br. Conditions, pl. 26. cites 44 E. 3. 8. S. P. [and Roll ſeems miſtaken (43) for 44].——S. P. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. by Portington.——Mo. 472. S. P. agreed per Cur. obiter.——In ſuch caſe he has time during his life, unleſs requeſt be made in the mean time; but if requeſt be made he ought to infeoff upon requeſt; if the feoffee dies the condition is broken, but not if the feoffor dies, becauſe he may infeoff his heir. Mo. 472.

[7. *So* where the condition extends to the *feoffee or his heirs to re-infeoff* the feoffor, the heir after the death of the feoffee is not bound to do it before requeſt. 38. Aſſ. 7.]

* Br. Conditions, pl. 26. cites S. C. & S. P.—— Fitzh. Entry congeable, pl. 33. cites S. C.

[8. If a feoffment be upon condition *to give it to a ſtranger in tail*, the *remainder to the right heirs of the feoffor*, the feoffee is not bound to do it before requeſt, becauſe the feoffor is to have an eſtate by the condition. 44 Aſſ. 26, * 44. E. 3. 9. b. Curia.]

[9. If W. *in conſideration that T. will marry M. his couſin before the return of W. from London to Norwich, aſſumes* and promiſes *after his return* from London to Norwich aforeſaid *to pay to T.* 10 *l. and to find ſufficient ſecurity for the payment of* 40 *l. more at the death of W.* and after T. marries with M. and W. returns from London to Norwich, he ought to pay the 10 l. and find the ſecurity for the 40 l. within a convenient time after his return, at his peril; and there needs no requeſt to be made by T. for he hath taken upon him to do it at his peril. Mich. 31, 32 El. B. between *Peter and Carter* adjudged M. 31, 32. El. B. R.]

[194] (E. b) At what Time it ought to be *performed* where *no Time* is *limited*. During the Lives of the Parties.

* Br. Conditions, pl. 105. cites S. C. † S. P. agreed by all the juſtices. Mo. 206. pl. 249. Mich. 17 & 18 Eliz. Andrews's caſe, S. C.——

[1. IF a man makes a *feoffment* upon condition *to re-infeoff* him, if he does not re-infeoff him during the life of the feoffor, the condition is broke, if he had convenient time to re-infeoff him before his death. * 18 Aſſ. 18. adjudged, *lord Clifford's caſe. Regularly*, if the feoffee or grantee be upon condition to re-infeoff or re-grant any eſtate to the feoffor or grantor, without limiting any time, the feoffee or *grantee hath time* to do it *during his life, if* he be *not haſtened by requeſt*. Co. 2. † *Lord Cromwell*, 78. b. 79.]

Co. Litt. 208. b. S. P.

[2. *But* in the ſaid rule, *if* the caſe be, that *it appears* by the thing to be performed, or by any accident, *that the feoffor cannot have all the benefit intended him* by the condition, the condition is broke without any requeſt and during the life of the feoffee or grantee. Co. 2. *lord Cromwell*, 79.]

And. 17. pl. 35. Andrews * Fol. 439. v. Eliurt, S. P. adjudg'd accordingly; and upon

[3. *As* if *A. conveys a manor to which an advowſon is appendant* to J. S. in fee, *upon condition that J. S. ſhall re-grant the advowſon to* (*) *A. for his life, and if it happens not to be void in his life, then one turn to his executors*; though in this caſe J. S. has all his life to re-grant it, if he be not haſtened by requeſt, and the church does not become void in the mean time, † yet if the *church becomes void during his life, before any requeſt*, the condition is broke, becauſe the feoffor cannot have all the effect which was intended him by the re-grant,

re-grant, which was to have all the preſentations during his life. Co. 2. *lord Cromwell*, 78. b. 79. reſolved.] the ſame grant.—— Mo. 105. pl. 249.

S. C. adjudg'd.——D. 311. a. b. pl. 83, 84. S. C. adjudg'd.——Jenk. 252. pl. 43. S. C. reſolved.——Co. Litt. 222. b. cites S. C. reſolved.

† Per Coke Ch. J. 3 Bulſt. 169. in ſuch caſe he ought to grant it preſently; for it is now a fruit fallen, and otherwiſe it would be prejudicial to the party.

[4. [*So*] If A. *infeoffs* B. the firſt of May, upon condition that he *ſhall grant* to A. an *annuity* or rent *during his life, payable yearly, at Mich. and the Annunciation*; in this caſe the feoffee has not time to do it during his life, but he ought to do it before the firſt of the ſaid feaſts, or otherwiſe A. ſhall not have all the advantage of the rent intended him by the condition. Co. 2. *lord Cromwell*, 79. Vide 8 H. 4. Vide 14 E. 3. Det. 138.] S. P. agreed by all the juſtices. Mo. 472. pl. 679. in S. C.—— Co. Litt. 208. b. at the bottom, S. P.—— Goldſb. 117. in pl. 14. Arg. S. P.

5. In ſome caſes, albeit the condition be *collateral*, and is to be performed to the obligee and no time limited, yet in reſpect of the nature of the thing, the obligor ſhall not have time during his life to perform it; as if the condition of an obligation be *to grant an annuity* or yearly rent to the obligee during his life, *payable yearly at the feaſt of Eaſter*. This annuity, or yearly rent, muſt be granted before Eaſter, or elſe the obligee ſhall not have it at that feaſt during his life. Et ſic de ſimilibus, and ſo it was reſolved in Andrews's caſe. Co. Litt. 208. b. Roll. Rep. 374. in. pl. 26. Arg. cites 14 E. 3. Debt. 138. S. P.

6. Where a man may do a thing at any time during his life, if not haſten'd by requeſt, yet if *any thing happens in the mean time* before the performance, *ſo that it cannot be performed according to the intent of the condition*, the condition is broken. Arg. Roll. R. 374. cites * 3 Rep. Cromwell's caſe. [195] * 2 Rep. 79. a. S. P. per Cur. cites 14 E. 3. Debt 138. ——Co. Litt. 208. b. S. P. and cites S. C.

7. Where a man is bound *to infeoff a ſtranger*, and no time is limited, he has all his life to do it. *Quære* inde. Br. Conditions, pl. 136. cites 9 H. 7. 17. S. P. 6 Rep. 31. a. but agreed e contra, and though the concurrence of the obligor and feoffee is requiſite, yet he ought to do it in convenient time, for in ſuch caſe the obligor has taken upon him to do it to the ſtranger, and may perform it without the concurrence of the obligee. But when the obligee himſelf is party, and the act cannot be done without his concurrence, there it is reaſonable that the obligor ſhall have time during his life, if the obligee does not haſten it by his requeſt, becauſe in ſuch caſe the obligor does not take upon himſelf for the obligee, who is a party to the deed, as he does in the other caſe for the ſtranger.

8. *Feoffment on condition that if feoffor pays* &c. that *he ſhall reenter*. The feoffor has time during his life to pay it; becauſe the feoffee has the profit of the land, and has no loſs by the non-payment; per Anderſon Ch. J. Arg. 2. And. 73. Mich. 39 & 40 Eliz.

9. When *the act of its own nature is local, and to be performed to the obligee, and* to the performance thereof *the concurrence of the obligor and obligee is requiſite*, there the obligor ſhall have time during his life, unleſs haſten'd by requeſt. 6 Rep. 31. a. agreed Mich. 3 Jac. C. B. in Bothy's caſe (alias) Bothy v. Smith. As if one be *bound* in a bond *to infeoff J. S.* of land, without limiting any time,

time, there because the *estate must pass by livery* of seisin, and so both parties must concur, and the *one cannot do it without the other, and it cannot be done but upon the land*, the obligor has time during his life, unless hasten'd by request to the obligor; for it is not reasonable that the obligee may request it on the land when he will, for that would be to compel the obligor to continue always upon the land, which would be inconvenient. Ibid.

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10. A. covenants *to assure a manor to B. within 2 years, and to bind himself in a bond to pay* 100 l. to C. adjudg'd that the bond shall be made within the 2 years, but if the contract to make the bond had been *in another sentence*, then he should have time during his life. D. 347. Marg. pl. 10. cites Mich. 3 Jac. C. B. Brachenbury v. Brachenbury.

6 Rep. 31. a. b. Mich. 3 Jac. in Bothy's case. S. P. accordingly, such act in no manner concerning the obligor, obligee, or any other person.——S. P. by Wray accordingly; or in such case no benefit accrues to any of the parties. Le. 225. in pl 270. Trin. 30 Eliz. B. R.

11. When the obligor, feoffor, or feoffee is to do a sole act or labour, as *to go to Rome, Jerusalem, &c.* in such and the like cases, the obligor, feoffor, or feoffee has time during his life, and cannot be hasten'd by request. And so it is if a stranger to the obligation or feoffment were to do such an act, he has time to do it any time during his life. Co. Litt. 208. b. 209. a.

12. If a feoffment be made upon such condition, *that the feoffee shall give the land to the feoffor and his wife* to have and to hold &c. to them and the heirs of their two bodies &c. albeit the feme be a stranger, yet the feoffee is not bound to make it within convenient time, because the feoffor, who is privy to the condition, is to take jointly with her. Litt. S. 352. and Co. Litt. 219. a. b.

13. If the condition be *to infeoff the feoffor and a stranger*, the feoffee has time during his life, unless he be hasten'd by request; otherwise 'tis where the condition is to infeoff a stranger or strangers only. Co. Litt. 219. b.

[196] 14. If a man make a *feoffment* in fee upon condition *that the feoffee shall make a gift in tail to the feoffor*, the *remainder to a stranger in fee*, there the feoffee has time during his life, because the feoffor, who is party, and privy to the condition, is to take the first estate; *but* if the condition of a feoffment were *to make a gift in tail to a stranger, the remainder to the feoffor in fee*, there the feoffee ought to do it in convenient time; for that the stranger is not privy to the condition, and he ought to have the profits presently. Co. Litt. 219. b.

15. Where one is *to grant a reversion*, he has time during his life to do it if it continues so long a reversion, unless he be hasten'd by request; per Windham J. Lev. 44. Mich. 13 Car. 2. B. R.

(F. b) At *what Time* the Condition shall be *performed* when no Time is limited. *To the Obligor. Feoffor.*

Br. Conditions, pl. 67. cites 24 H.

[1. IF the condition be *to be performed to the party himself only*, who is to take advantage of the breach of the condition, the

the feoffee is not bound to do it before requested. D. 3, 4. Ma. 139. 32.] 8. 17. per Brooke.—S. P. as to re-infeoffing

the feoffor and his heirs, he has time during his life, if request be not made in the mean time; but if request be made he ought to infeoff upon request, and if the feoffee dies before, the condition is broke, but not if the feoffor dies, because he may infeoff his heir. Mo. 472. pl. 679. Mich. 39 & 40 Eliz. agreed.

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(G. b) [At what Time it must be *performed*.] *To a Stranger.*

[1. *FEOFFEE* upon condition *to infeoff a stranger* ought to do it presently, * 44 E. 3. 9. D. 3. 4. Ma. 139. 32. † 44. Ass. 26.] * Br. Conditions, pl. 26. cites 44. E. 3. 8. S. C. & S. P.

for the stranger cannot make request, nor can he take notice thereof.——Fitzh. Entre congable, pl. 33. S. C.

† Br. Conditions, pl. 217. cites S. C. that he ought to tender it to a stranger without request.—If it be to infeoff a stranger before such a day there needs no request, but the feoffee ought to offer the feoffment to the stranger, otherwise the feoffor may re-enter.——So where it is to infeoff a stranger [generally] he ought to do it immediately, for the stranger cannot have notice; otherwise of the feoffor. Br. Conditions, pl. 74. cites 9 E. 4. 22. per Choke.——It ought to be performed in a convenient time, where notice may be given, having regard to the distance of the time * [Place]. Br. Conditions, pl. 67. cites 14 H. 8. 17. by Brooke. [* But it is at 14 H. 4. fol. 21. a. S. C. and there it is not distance of the (time) but of the (place).——Mo. 472. it was agreed by all the justices obiter, that if one be infeoffed to infeoff a stranger and his heirs, he has time during his life if request be not made; but if request be made he ought to infeoff upon request, but if the feoffee dies, the condition is broke.——There is a *diversity between a condition of an obligation and a condition upon a feoffment*, where the act that is local is to be done to a stranger, and where to the obligee or feoffor himself; as if one makes a feoffment in fee, upon condition that the feoffee shall infeoff a stranger, and no time limited, the feoffee shall not have during his life to make the feoffment, for then he should take the profits in the mean time to his own use which the stranger ought to have, and therefore he ought to make the feoffment as soon as conveniently he may, and so it is of the condition of an obligation. But if the condition be, that the feoffee shall re-infeoff the feoffor, there the feoffee has time during his life for the privity of the condition between them, unless he be hastened by request. Co. Litt. 208. b.

(H. b) [At what Time to be *perform'd* to] Stranger and Obligor. [197]

[1. IF the condition be *to infeoff a stranger in tail*, remainder *to the right heirs of the feoffor*, he is not bound to do it before request. * 44 E. 3. 9. b.] *Fitzh. Entre congeable, pl. 33. cites S. C.

——The feoffee ought to do it in convenient time; for that the stranger is not privy to the condition, and he ought to have the profits presently. Co. Litt. 219. b.

[2. If *land* be *granted to the king*, upon *condition that he, his heirs and successors, shall give other lands in consideration thereof*; the king is not bound to do it in his life, but any of his successors may, for the word (*his*) extends to every of them. D. 3. 4. Ma. 139. 32.]

3. *Baron* seised of lands *infeoffed J. S. on condition to infeoff him and his wife for life*, the *remainder over to a stranger* in fee; Hutton

ton and Crooke thought a requeſt ought to be made by the baron, becauſe the particular eſtate on which the remainder depends ought to be made to the huſband, who is party to the condition, and he may take or refuſe it, and the feme is at his will; but *if the baron dies* then he muſt make the feoffment to the wife without requeſt, becauſe ſhe is a ſtranger to the condition by act in law; and ſo *where ſhe dies*, the eſtate muſt be made *to him in remainder*, without any requeſt. Het. 56. Mich. 1 Car. C. B. Wilkinſon's caſe.

4. *But* if the condition be *to infeoff the feoffor and a ſtranger*, the feoffee muſt tender the feoffment to the ſtranger, for he had no notice of the condition, and he ought to be party to all the eſtate; and by the livery made to him, the feoffor ſhall take well enough; per Yelverton. Het. 56. Mich. 1 Car. C. B. Wilkinſon's caſe.

(I. b) At what *Time* it ought to be performed where *no Time is limited*. *Upon Requeſt.*

* Br. Conditions, pl. 26. cites S. C. but that was to infeoff the ſon of the feoffor and his wife, remainder to the right heirs of the feoffor.——Fitzh. Entre congeable, pl. 33. cites S. C. but I do not obſerve exactly S. P.——Though the feme be a ſtranger yet the feoffee is not bound to make it within convenient time, becauſe the feoffor, who is privy to the condition, is to take jointly with her. Co. Litt. 219. a. b.

[1. IF a *feoffment* be upon condition *to re-infeoff the feoffor and his wife*, he ought to do it upon requeſt. 21 E. 3. 11. b. 44 Aſſ. 26. * 44 E. 3. 9. admitted.]

[2. If the condition of an obligation be *to pay a certain ſum* without limiting any time, it ought to be paid upon requeſt. 38 E. 3. 12.]

[198]

Br. Conditions, pl. 43. cites S. C. and if the debts are not paid on demand, the heir may enter; by Percy, quod non negatur.

[3. If a man *deviſes* lands upon condition *to pay his debts*, he ought to pay them upon requeſt, otherwiſe the condition is broke. 38 E. 3. 11. b.]

Fol. 440.

* 2 Rep. 3. a. Paſch. 26. Eliz. C. B. Manſer's caſe, (alias) Painter v. Manſer, S. C. adjudged, and has the words mentioned in the crotchets.—— Mo. 182.

[4. If the condition of an obligation be, that *whereas A.* the obligor *hath conveyed lands to B.* the obligee, *if A. the obligor* * [*and C. his ſon*] *ſhall do all acts and deviſes for the better aſſurance of theſe lands to B.* which ſhall be *deviſed by B. or his counſel*, then the obligation ſhall be void; and after *B. deviſes and tenders a releaſe* to be ſealed by A. and C. his ſon, and *A. preſently ſeals it*, but [*C.*] *becauſe he was not letter'd*, nor could read it, *prays B. to deliver it to him, to ſhew to ſome man learned in the law*, who might inform him whether it was according to the condition, and if it was according to the condition he would ſeal it, which B. refuſes, upon which C. refuſes to ſeal it. This was a breach of the condition, becauſe he *did but require the writing to be read to him*, and he was bound to take conuſance of the law, whether it was according to the condition, and ſhall not have reaſonable time to ſhew the writ-

ing to his counſel learned in the law, to be inſtructed by them. Co. 2. *Manſer* 3. per Curiam reſolved.] pl. 326. Maunxell's caſe S. C. accordingly, but no judgment, for the juſtices doubted; and at another day Anderſon ſaid, that his opinion was, that the plea was not good.——4 Le. 62. pl. 156. S. C. but ſtates it only as to the obligor himſelf refuſing and nothing is mentioned relating to C. the ſon; and the court held the obligation forfeited. ——S. C. cited according to 2 Rep. & Mo. and that the ſame was adjudged. 3 Bulſt. 30.——S. C. cited Jo. 314.——S. C. cited Godb. 445. pl. 513.——S. P. But if any perſon be preſent that can read the deed to him, *if the deed be required to be read, or if the deed be in French, Latin, &c.* which the party does not underſtand; here *if the party require one to read or expound* the deed to him, *and no one is there preſent who can do it, he may refuſe* to deliver the deed; ſo though a man can read, yet if the deed be written in Latin or any other language which the party doth not underſtand, if the party doth demand that the writing be expounded or read in ſuch language as he may underſtand it, and no one is preſent who can do it, the party may refuſe to deliver it. 2 Rep. 3. a. b. Manſer's caſe.

[5. If *A. covenants* with B. to make ſuch conveyance of certain lands *to B. as by him ſhall be deviſed, at the coſts and charges of B.* and after *B. deviſes*, and tenders *a writing containing a bargain and ſale to* [*B*] and A. requires time to have it to his counſel, to be adviſed thereupon, and B. refuſes it, upon which A. does not ſeal, he hath broke his covenant, for the covenant was peremptory, ſcilicet, to be performed preſently, at his peril. D. 16 El. 338. 39. between *Wootton and Coke.*] See (P. a) pl. 11. S. C. and the notes there. ——S. C. Jo. 314, 315.—— S. C. cited, Arg. Godb. 445. in pl. 513.

6. Where a man is bound *to pay money*, or *make a feoffment*, or *renounce an office* &c. and no day is limited when he ſhall do it, there, upon a requeſt, he is bound to perform it *in as ſhort a time as he can.* But where day is limited, and he refuſes before the day, this is no matter if he *performs it at the day.* Br. Conditions, pl. 65. cites 15 E. 4. 30.

7. Debt upon bond of 200 l. condition'd *to pay within 2 days after the date* of the bond, but *no ſum mentioned in the condition.* The plaintiff declared on a bond to pay ſo much cum inde requiſitus fuerit. After verdict it was moved that the declaration was not good, becauſe of the variance from the condition, there being no certain ſum mentioned in the condition; but adjudged, there being no ſum mention'd in the condition, the bond muſt be ſingle, without any condition, and then the money is to be paid upon requeſt. 2 Bulſt. 156. Mich. 11 Jac. Dorrington v. Waller.

(K. b) At what Time it may be performed where a *Day* is *limited*. *Before the Day.* [199]

[* IF the condition be *to ſtand to the award of J. S.* and he *awards him to pay* 10 *l. ſuch a day*; it is a good performance if he *pays it* to the obligee *before the day*, and the other accepts it; for the payment before contains payment at the day. Hill. 14 Jac. at Serjeant's Inn, between *Berrey and Perrin*, in a writ of error, where the award was to pay at or before ſuch a day, and the breach aſſigned for nonpayment at the day, without mentioning the nonpayment before, and yet the judgment affirmed per Curiam, becauſe payment before is payment at the day. Mich. 21 Car. B. R. between Bridgm. 91. Perrin v. Barry, S. C. and all agreed, that the aſſignment of the breach was good.—— 3 Bulſt. 62. S. C. and the pleading

held good, and judgment for the plaintiff. between *Ireland and Sutton* adjudged accordingly upon demurrer, intratur. Tr. 21 Car.]

——Ibid. 169. 70. (though misprinted 67, 68.) S. C. in error in the Exchequer Chamber, and this assigned for error, but over ruled and judgment affirmed. Mo. 849. pl. 1154, S. C. but S. P. does not appear.——Cro. J. 399. pl. 8. S. C. but S. P. does not appear.——Roll. Rep. 223. pl. 29. S. C. but S. P. does not appear; & adjornatur.——Ibid. 375. pl. 31. S. C. but S. P. does not appear. ——If issue be taken upon solvit ad diem, payment before the day maintains the issue. Arg. 2 Vent. 222. Mich. 2. W. & M. in C. B. in case of Watnough v. Holgate.——3 Lev. 293. S. C. and upon demurrer judgment was given for the defendant; for though he did not pay it at the day, he might have paid it before the day, and the payment before the day is good payment at the day, where payment at the day is pleaded; yet in pleading the parties ought to pursue the words of the condition. ——See Tit. Actions (Z. 12) pl. 32. and the notes there, Harmond v. Owden (alias) Hammond v. Oaden.

Mo. 366, 367. pl. 502. Mich. 36 & 37 Eliz. S. P. held accordingly.

[2. If the condition of an obligation be *to pay so much to a stranger such a day*; if he pays it before the day, this is a good performance, because payment before contains payment at the day. 9 H. 7. 20. 10 H. 7. 10. b.]

* Br. Conditions pl. 136. cites 9 H. 7. 17. S. C.——The case of

[3. *So* if the condition of an obligation be, *that a stranger shall infeoff a stranger such a day*; if he infeoffs him before the day, this is a good performance, because it contains a feoffment at the day. *9 H. 7. 18. 20. 10 H. 7. 14. b.]

9 H. 7. 19, 20. is as here of an obligation that a stranger shall infeoff a stranger; but 10 H. 7. 14. is of a feoffment conditioned to be made by the obligor to a stranger; and so is Br. Conditions, pl. 242. where he cites S. C.

Br. Conditions, pl. 136. cites 9 H. 7. 17. S. P. accordingly; for

[4. *So* if the condition be, that a stranger shall infeoff a stranger *after the death of J. S.* If he infeoffs him during the life of J. S. this is a good performance, because it continues a feoffment after his death. 9 H. 7. 17. 20.]

the effect is performed, but says quære, and that the case was not adjudged.

Godb. 10. pl. 14. Mich. 24. Eliz. C. B. Anon. S. P. held accordingly;

[5. If the defeasance of an obligation be, *to pay a less sum* than is contained in the obligation *at a day certain*; if he pays it before the day, and the *obligee accepts it*, that is a good discharge of the obligation. 30 E. 3. 22. b. 23. admitted by the issue.]

but in such case it should be pleaded specially.——So where a copyhold was surrendered on condition for the payment of a certain sum on the first July, and the payment was made before the day, viz. on the 16th June, and the same was accepted, it was agreed by all the court that this was a good* performance of the condition. Cro. J. 284. pl. 27. Mich. 8. Car. B. R. Burgaine v. Spurling. Co. Litt. 212. b. in principio. S. P.——See Tit. Payment (I.)

*[200]

Godb. 445. pl. 513. cites Hill. 37. Eliz. Perpoint v. Thimblebye, S. C. but not exactly S. P.

* Fol. 441.

[6. If a condition be *to make an assurance within a month after the date of the obligation*, he is not bound by any request to make it at any certain time, but he may perform it at any time, (*) within the month. Hill. 37 El. B. between *Pexpoint and Thimblebye*, per Curiam.]

[7. If a condition be *to make further assurance within a month upon request of the obligee*; if the *obligee requests him within the month*, and he refuses, though he be ready after within the month, yet the obligation

obligation is forfeited, in as much as the time of the month is limited to the requeſt. Hill. 37 El. B. in *Pexpoint and Thimblebye's* caſe; per Curiam.]

[8. If the condition of an obligation be, if the obligor do at all times hereafter, *within the ſpace of one month, when* he ſhall be *required, make ſuch further act and acts*, aſſurance and aſſurances, *as the obligee ſhall by his counſel demand, for the recovery of one annuity of* 30 *l. due from J. S.* then the obligation to be void. In this caſe, if the obligee does not demand any further aſſurance within the month after the making the obligation, yet the obligor is bound to make further aſſurance within a *month after requeſt made after the month paſt, after making the obligation*, becauſe the firſt words, (ſcilicet, *at all times hereafter*) are without limitation, and the other words, *(within one month when he ſhall be required)* refer to the requeſt, ſcilicet, he ſhall have a month for the making thereof after requeſt, for the moſt benign conſtruction ſhall be made to make this agreement effectual; for this is not like a common aſſurance, by which it is covenanted to make further aſſurance within 7 years, becauſe the uſe in ſuch caſe has interpreted it, that he ſhall not be troubled beyond 7 years. Hill. 1650. between *Wentworth and Wentworth* adjudged upon a demurrer. Intratur Trin. 1650.] Sty. 242. S. C. adjudged per tot. Cur. accordingly, niſi, &c.—S. P. cited by Windham J. to have been ſo reſolved in the time of Roll Ch. J. [which ſeems to intend this caſe.] Raym. 65. Mich. 14 Car. 2 B. R. in caſe of Lawſon v. Witherington, which caſe was thus, viz.

In debt on an obligation conditioned *to pay* 100 *l. on the* 10th *of January, upon* 3 *month's warning*, the defendant pleaded, that the plaintiff had [not] given three months warning. Windham J. ſaid, that though the condition had been to pay on 10th Jan. after the date of the obligation, upon three months warning by the obligee, the money would not be loſt though the obligee ſhould omit the warning; Et adjornatur.——Lev. 85. S. C. the court at firſt thought that the warning ought to be given by the plaintiff; for otherwiſe, if the defendant would never give warning, the money would never be paid; Et adjornatur. But afterwards, it being moved again, the court held it ſhould be taken that the obligor is to pay the money upon 10th January next enſuing, giving the plaintiff three months warning thereof; for the words ſhall be taken moſt ſtrongly againſt the obligor, and judgment for the plaintiff niſi, &c.——Keb. 415. pl. 122. S. C. adjudged for the plaintiff, and ibid. cites the principal caſe of Wentworth v. Wentworth.

9. Condition to pay 10 l. *within an hour after obligee has infeoffed him of a mill.* Payment of 5 *l. before and* 5 *l. after* is no performance, for it is no duty till &c. and the 5 l. paid before cannot be intended the ſame ſum; otherwiſe when day is limited, for there it is a duty. D. 222. pl. 22. Marg. cites Trin. 9 Eliz. Anon.

10. In *debt upon bond* the defendant *pleaded payment according to the condition*, and it was *found that the payment was made and accepted before the day.* Per tot. Cur. payment before the day was a ſufficient diſcharge of the bond; but it being pleaded *generally* that he paid, according to the condition, they held that the jury muſt find againſt the defendant, for the ſpecial matter would not prove the iſſue. Godb. 10. pl. 14. Mich. 24 Eliz. C. B. Anon.

11. 20,000 l. was bequeath'd to a daughter, *provided if ſhe marry before* 16, *or without the conſent of A. and B.* then ſhe ſhould loſe 10,000 l. and that the 10,000 l. ſhould go to his other children. *She married before* 16, *but with the conſent of A. and B.* Lord K. North thought that both parts muſt be obſerved. 2 Vent. 365. Paſch. 36 Car. 2. in Canc. Lord Saliſbury's caſe. [201] 2 Vern. 223. pl. 203. Paſch. 1691. Lord Saliſbury v. Bennet. S. C. ſays the teſtator

tator in his life-time treated, after his making this will, with the plaintiff (the husband) for a marriage with his daughter, but before an agreement testator died. It was insisted that here was no devise over and that testator's treaty for a marriage of her to the plaintiff, if there had been any condition precedent, or forfeiture, (as it stood on the will) had been an after dispensation of it. And the court decreed the whole 20,000 *l.* to the plaintiff.——Skinn. 285. Hill. 2 W. & M. in Canc. S. C. and that there being no express devise over, but only that in such case the 10,000 *l.* was directed to go to the bulk of the testator's personal estate, and which was order'd to be laid out in lands, the whole portion was decreed her.——Nelf. Chan. Rep. 170. Mich. 1691. S. C. decreed accordingly; and says that on an appeal to the House of Peers this decree was confirmed.——2 Freem. Rep. 118. pl. 235. Bennet v. Ld. Salisbury. S. C. affirmed in the House of Lords.——2 Freem. Rep. 187. in case of the duke of Southampton v. Cranmer, says that the case of lord Salisbury was affirmed in the House of Lords.

2 Freem. Rep. 186. pl. 263. S. C. held accordingly. ——This decree of lord Jefferies was reversed in the House of Lords.

12. A clause in a deed was, that *if M. his daughter should live to attain* 16, *and should refuse to marry A. then the said A. should have* 20,000 *l. out of his personal estate. M. married A. before her age of* 16, *but lived to* 16, *and before* 17 *died.* Lord C. Jefferies thought that this does not in any sort imply that they might not marry before that time, and decreed accordingly. Vern. 338. pl. 332. Mich. 1685. The duke of Southampton v. Cranmer.

Show. Parl. Cases 83. Wood, alias Cranmer v. the duke of Southampton.——[But it seems to have been upon another point, and ibid. 87. it is said that as to the objection of the marriage before 16 it was not much insisted upon on the other side, and in reason cannot be, because her continuing married till after 16 does fully satisfy the intent of the deed as to this matter.

(L. b) At what Time it shall be made [performed] where Time is limited.

Upon Request.

Cro. C. 299, 300. pl. 1. Symms v. Smith, S. C. & S. P. resolved per tot. Cur. and they all held, that there is not

[1. IF A. covenants with B. *to make a surrender* of land, or to convey land to B. *upon request*; if a writing purporting a surrender or conveyance, be tendered to him, with request to seal it, A. ought to seal it *presently*, and shall not have any *time to be advised by his counsel*, whether it be according to the covenant. Pasch. 9 Car. B. R. between *Somes and Smith*, per Curiam resolved.]

any difference where it is to be done upon request, or upon reasonable request.——Jo. 314. pl. 1. S. C. adjudged accordingly for the plaintiff, absente the Ch. J. But Berkley thought that reasonable request implied, that A. should have reasonable time to be informed he not knowing the contents of the deed tendered; but Jones and Crook e contra.——Godb. 445. pl. 513. S. C.

Godb. 445. pl. 513. Arg. cites Perpoynt v. Thimbleby, S. C. that where a man covenanted to make assurance, it was adjudged that he shall have reasonable time to do it;

[2. If a man covenants *to make further assurance at all* time and *times, at the charges of the covenantee*, and the counsel advises, that he shall levy a *fine*, yet he is not bound to do it presently, but he shall have convenient time to do it, though the words be, that he shall do it at all times; for the words ought to have a reasonable construction. Hill. 37 El. B. between *Pexpoint and Thimbleby*, per Curiam.]

[3. If

[3. If A. being a copyholder for life, covenants with B. *to surrender* to B. in reverſion the ſaid *copyhold* tenement *juper rationabilem requiſitionem ei fiendam* by B. and after *B. tenders to A. a writing purporting a letter of attorney of ſurrender of the ſaid tenement to B.* and A. requeſts, that before ſhe ſeals it, ſhe, by her counſel circa ſcriptum illud infra rationabile tempus tunc proximo ſequens adviſaretur, the which B. refuſes, and therefore A. refuſes to ſeal it; admitting that A. was bound to ſeal the letter of attorney, and to ſurrender by ſuch letter of attorney, then ſhe hath broke her covenant; for ſhe ought to take conuſance of the law at her peril, whether the letter of attorney was according to the covenant, and ſhe *ſhall have no time to be adviſed thereupon*; but the *reaſonable time* mentioned in the covenant *is intended* (*) reaſonable time in the making thereof, ſcilicet, ſhe ſhall have time *to read it before ſhe ſeals it*, and therefore it ought to be ſealed preſently, without time to adviſe upon requeſt, according to the words of the covenant. Paſch. 9 Car. B. R. between † *Sims and Dame Smith*, per Curiam, reſolved upon demurrer. Intratur Hill. 6 Car. Rot. But judgment was given againſt the plaintiff for another matter. Co. 2. *Manſer* 3. D. 16 El. 338. 39.]

* Cro. Car. 299, 300. pl. 1. S. C. accordingly per tot. Cur. but adjudged for the defendant, becauſe the requeſt as alleged was only an implied requeſt to make a ſurrender, * Fol. 442. whereas it ought to have been an expreſs requeſt.——Godb 445. pl. 513. S. C. & S. P. ſed adjornatur.——Jo. 314. pl. 1. and the court held the requeſt not good.——See (A. d) pl. 37. S. C.

(L. b. 2) Limited to be done on Requeſt. At what Time the Requeſt muſt be made.

1. CONdition to do an act *at the end of 7 years on requeſt*, requeſt muſt be made the laſt day; and per Cur. 'tis not to be done *poſt finem* but *ad finem*, and the end of a thing is always part of that of which it is the end, and ſo the requeſt ſhould be made ſome convenient time in that day, that the other might have a reaſonable time to do it in. Adjudg'd per tot. Cur. and ſo revers'd a judgment in the Marſhal's court. 2 Salk. 585. Mich. 3 Ann. B. R. Fitz-Hugh v. Dennington. 3 Salk. 309, pl. 7. S. C. held accordingly.—— 6 Mod. 227. Fitzhugh v. Bremington. S. C. accordingly, and judgment below reverſed nifi.

——2 Lord Raym. Rep. 1094. S. C. and the judgment in the Marſhal's Court revers'd. And Holt Ch. J. and Powel J. held that there being a time appointed for the doing the act, the requeſt to do it muſt be at that time. And the Chief J. ſaid that the end of 7 years was the laſt day of the 7 years; for there is no fraction of a day, and after 12 at night is after the 7 years; for the day after is not the end of the 7 years, but poſt expirationem. For the beginning and end of a thing is part of the thing. And he ſaid alſo that when a time is appointed when a thing ſhall be done upon requeſt, it muſt be done immediately upon the requeſt (which differs this caſe from thoſe cited by the counſel for the defendant in error) as if a condition of a bond be to make a feoffment at ſuch a time upon requeſt, there the obligor muſt do it immediately upon the requeſt. But as to this, Powel ſaid that if it appeared to them, that the thing was of ſuch a nature as that it could not be performed at the time limited for the thing to be done upon requeſt, there the obligor ſhould have a convenient time after to do the thing in, otherwiſe if it can be done then it muſt. Powys and Gould J. held that at the end of 7 years might be underſtood a reaſonable time after, ſufficient to do the thing in.

(M. b) *Perform'd.* At what *Time* it ſhall be. *Where Time is limited.*

[1. IF the condition be to do a thing within a certain time, he may perform it the *laſt day* of the time appointed. 8 H. 4. 14.]

[2. *So* if the parliament makes a *conſtitution, that if J. S. comes not in B. R. within a quarter of a year after proclamation made, he ſhall be convicted of a treſpaſs* &c. he need not come before the laſt day of the quarter. 8 H. 4. 13.]

Brownl. 74. Prieſt v. Coe, S. C. adjudged.— D. 226. a. Marg. pl. 36. cites Pye v. Coe, S. C. adjudged.

[3. If an *obligation* be *made the 17th day of November, Anno* 12 *Jac.* and the condition is *to pay* 5*l. the 21ſt of November following*, and 5l. the 20th of December next after, the firſt 5l. ought to be paid the 21ſt day of November 12 Jac. for it *refers to the day, and not to the month.* It was adjudg'd in B. Mich. 13 Jac. B. between Price and Coa.]

—See Tit. Parols (E) pl. 3.—A bond was dated in March condition'd for payment ſuper viceſſimum octavum diem martii prox' ſequentem. It was mov'd, that (ſequentem) refers to the day which ſhall be underſtood of the ſame month; but if it had been (ſequentis) then it had referred to March, and ſo it had been payable the next year. But the court was of opinion, that it ſhould be underſtood of the current month. Mod. 112. pl. 8. Paſch. 26 Car. 2. B. R. Anon.

[4. If the condition be *to pay* 10*s. when A. comes to his houſe, and* 10*s. at the Feaſt of St. Michael, and* then *at the Feaſt of St. Andrew then next enſuing* 10*s.* theſe laſt ſums ought to be paid at ſuch next feaſts or times, and not at the next feaſts after A. comes to his houſe.]

Br. Conditions pl. 174. cites S. C.

[5. If the condition be to pay ſo much *on this ſide ſuch a feaſt*, it ought to be paid in the vigil of the feaſt at the leaſt, and not on the feaſt-day. 21 E. 4. 52.]

Br. Conditions, pl. 174 cites S. C. but Brooke ſays, quære of infra; for becauſe it was per & infra feſtum, &c. the defendant pleaded that he was ready all the vigil, and all the day of the feaſt.

[6. The *ſame* law where it is to be paid *infra feſtum.* 21 E. 4. 52.]

Br. Conditions, pl. 174. cites S. C.

[7. The *ſame* law where it is to be paid *ante feſtum.* 21 E. 4. 52.]

Br. Conditions, pl. 174. cites S. C.

[8. *But* where the condition is to be performed *in feſto*, it ought to be done on the feaſt-day, and not before nor after. 21 E. 4. 52.]

Sty. 20. S. C. but S. P. does not clearly appear.

[9. If the condition of an obligation upon an adventure to Newfoundland be *to pay* ſo much *within* 40 *days next after the ſhip ſhall make her firſt return* and arrival in this voyage *from Newfoundland into* the port of *Dartmouth, or* into *any harbour, creek, or port of England, where ſhe ſhall firſt unlade her goods &c.* and after the ſhip does not return to Dartmouth, but to Plymouth in Devonſhire where ſhe unloades her goods; in this caſe the obligor is bound to pay the money within forty days after the arrival of the ſhip, and *ſhall not have forty days after the unlading* the goods, for *this is not for freight, but for an adventure*; and the unlading of the goods

is mentioned only to describe the haven where the arrival shall be, scilicet, the port of discharge, and not put to make a limitation of the payment of the money, to have forty days for the payment thereof after the discharge; but perhaps there will be some doubt if the discharge be not within the forty days. Trin. 23. Car. B. R. [204] between *Leere and Goldicke* adjudged for the plaintiff, this being moved in arrest of judgment, where it was assigned for breach, that he did not pay the money within forty days after the arrival of the ship, and avers, that the ship was unladed of the goods, but no time alleged of the unlading; (*) and per Curiam, *if it was not unladed within forty days, it ought to come of the other part to shew it.* Intratur, Hill. 22. Car. Rot. 912.] * Fol. 443.

10. *Payment after the day of payment* is not good, tho' the obligee accepts it. Br. Tender, pl. 5. cites 46 E. 3. 29.

11. If a man infeoffs another, upon condition *to re-infeoff him within* 40 *days*, there if the *feoffor does not make any request within the* 40 *days*, the feoffee shall retain the land for ever. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. Per Newton.

12. *Payment after the day* shall not save the penalty. Br. Tender, pl. 11. cites 22 H. 6. 57.

13. *Nor where a re-entry is reserved* in default of payment, and he pays after the day, yet the lessor may re-enter; per Paston, contra Portington. Ibid.

14. *But* all the justices agreed that *in obligation of* 20 *l. to pay* 10 *l. at a day*, and he does not pay at the day, but *pays after*, yet this shall not save the penalty. Ibid.

15. If defeasance is made after the sale of land, by which indenture the *vendee leases the same land to the vendor for* 10 *years rendring a rent, and grants that if the vendor shall pay* 300 l. *within the said term* of 10 years, that *he may re-enter*; and there if he surrenders and *tenders* the 300 l. within the said 10 years, he shall recover his land. *Contra* if the grant had been *if he pays* 300 l. *within the term aforesaid, without* those words 10 *years, and the lease, surrender and tender of the money* is not good in this case; per Whorwood, in his readings in Quadragesima. Br. Defeasance, pl. 18. cites 35 H. 6.

16. If in an obligation the *solvendum is made to the obligor*, whereby the solvendum is void, the money is demandable immediately, and so if it be made payable *crastino de dosms-day*. Br. Obligation, pl. 58. cites 21 E. 4. 36.

17. If a *feoffment* in fee be made *on condition to be void upon payment of money at a day*, albeit convenient time before sun-set be the last time given to the feoffor to tender, yet if he *tenders it to the person* of the mortgagee *at any time of the day of payment*, and he refuses it, the condition is saved for that time. Co. Litt. 207. b.

18. A. covenants at 2 *years end to procure a deputation &c. for* 7 *years* for J. S. In this case A. must procure it *immediately after the* 2 *years* are expired, that J. S. may not *lose the profits* thereof afterwards. Cro. J. 297, 298. Hill. 9 Jac. in Cam. Scacc. Barwick v. Gibson.

2 Salk. 443. pl. 12. 1 Salk. 139. S. C. adjudged for the plaintiff.

20. Condition in consideration of a marriage had with the daughter of the obligor, *to pay* to W. L. the husband, his executors, &c. 300 l. *within* 2 *months after the death of the obligor*, if the said daughter, or any issue of hers by her said husband be living at the death of the obligor. W. L. died intestate, then the wife died leaving a daughter, then the mother the obligor died; in debt upon this bond, defendant pleaded that *there was no executor, and that administration of W. L.'s goods &c. was not granted till* 12 *months after the obligor's death*; and upon demurrer adjudg'd for the plaintiff, because the money being a duty, the defendant should have pleaded uncore prist. Raym. 416. Mich. 32 Car. 2. B. R. Lee v. Garret.

*[205] But there might have been a difference between this case and the case of a common mortgage, as to redemption,

21. Devise of lands *to his wife for life*, and after her death *to D. his 3d son, and his heirs provided that if C. the 2d son, should within* 3 *months after his wife's death pay to D. his executors &c.* 500 *l.* then the lands should come to C. and his heirs. The testator died; the * wife died. Ld. C. Parker thought that C. had an *equity of redemption* that remained open to him in a court of equity, as well after the time limited as before. 10 Mod. 419. 424. Mich. 5 Geo. 1. Marles v. Marks.

after the legal estate absolutely vested in the mortgagee, had C. been to come here for relief against the heir at law; but here C. comes for relief against a 3d *person*, who had the estate vested in him for no other purpose but to make the estate redeemable. Per Lord C. Parker. 10 Mod. 424. Mich. 5 Geo. 1. in case of Marks v. Marks.

(M. b. 2) Performance. At what Time, *after Refusal.* Good in what Cases. And Pleadings.

1. A Man *seised of a manor with advowson appendant infeoff'd three*, upon condition that *they, or any of them, who survive, or their heirs, within* 40 *days next after* 10 *years next* ensuing the date of the deed, *re-infeoff J. and E. his feme in tail*, the *remainder to R. A. in fee*, and *they made a deed accordingly, with letter of attorney* to W. P. to deliver seisin, and deliver it in the county of E. such a day, within the 40 days, and commanded him to make the feoffment accordingly, *which attorney* such a day and year at the manor *offer'd to the baron*, to make estate within the 40 days, according to the deed and condition, *and the baron refus'd, and also the attorney was upon the manor all the* 40 *days ready to have made livery*, and for the non-performance of such condition the feoffor re-enter'd; and per Newton, if the *baron and feme die within the* 40 *days*, there the feoffees ought to make the estate to R. to whom the remainder is limited, *and if all should die* within the 40 days, the feoffor may re-enter; for the feoffor shall not lose the land where the condition is not performed, and no default in the feoffor. And so it seems, that *where time is limited*, if a man refuses at one time, he *may agree at another day within the time*, and all well; quære. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76.

2. Debt upon obligation with condition, that *if the defendant renounced all his interest that he had in the administration of the goods of J. S. before the official of the bishop of N. secundum legem*, that

then &c. And *said, that he had refused and renounced according to the condition.* Pigot said, that this is no plea *without shewing when*; for if he renounced, *pending the writ*, it shall not save the penalty, quod tota Curia concessit; by which he shew'd that he renounced such a day *before the writ purchased*, which was held a good plea. Pigot replied, that after the making of the obligation, and before this day, which he supposes the renouncing, the plaintiff at R. in the county of N. prayed the defendant to renounce according to the condition, and the *defendant refused*. And per tot. Cur. where a man is bound *to pay money, or make a feoffment, or renounce an office*, or the like, and no day is limited when he shall do it, there upon a request he is bound to perform it *in as short a time as he can*; but where day is limited to pay &c. and he refuses before the day, it is not material if he *performs it at the day*; quod nota diversity; by which he said, that he performed the condition, absque hoc, that he refused at the time supposed by the plaintiff. Pigot said, that this is no plea; for though he did not refuse at the time of the request made, yet he is bound to perform the condition immediately after the request, in as short a time as he can, and therefore no plea. Quære, because the court arose and went away. Br. Conditions, pl. 65. cites 15 E. 4. 30. [206]

3. Where *no day* is limited, there the *first refusal determines the condition for ever. Contra where day* is limited, and the condition is performed by the day; and disagreement *to a stranger* is not material; contra to the party. Br. Conditions, pl. 67. cites 14 H. 8. 17.

4. *Grant* was made by lessee of a term, *on condition lessor should assent by such a day.* The lessor refused to assent at one time, yet he may give it at another, so as it be before the day. *But if no time was limited*, then one express denial or refusal would be peremptory, so as the refusal was expressed to the party to whom the assent was to be given; otherwise if it were but in common talk to or among strangers. Went. Off. Ex. 226. cites it as held 14 H. 8. 23.

(N. b) [*Performed.*] How. [*As to Time and Place.*]

[1. IF the condition be to be performed at a *day certain*, it is *not necessary* for the obligor *to be there all the day.* Contra 21 E. 4. 52.] Br. Conditions, pl. 174. cites S. C. & S. P. by Choke, that he ought to say, that he was there all the day, and that the plaintiff nor any other was ready to receive it, and that he is yet ready; quod omnes justiciarii concesserunt.

[2. If the condition be *to stand to the award of B. to be made such a day*; if he does not make the award at the day, but at a day after, he is not bound to perform it. 49 E. 3. 9.] See (F. d) pl. 2. S. C.

[3. If the condition be *to make an obligation* to the obligee *by the advice of J. S. of* 40 *l. immediately*, yet he shall have *reasonable time* to do it by the advice of J. S. 18 E. 4. 21.] Debt upon obligation, that the defendant *shall make*

make obligation to the plaintiff by advice of W. N. of 40 l. immediately; and per Brian, Choke, and others, he may *say, that the first bond was made such a day and hour, and that he such a day and hour after made obligation of 40 l. by advice of W. N.* and shall not speak of this word immediately, and good; for it cannot be done immediately; for he ought to have space to have the advice of W. N. and after to write and seal it. Br. Conditions, pl. 164. cites 18 E. 4. 21.

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Br. Conditions, pl. 65. cites S. C. See (F. c) pl. 2. S. C.

[4. Where by condition a thing is *to be performed upon demand*, yet he shall have *reasonable time* to perform it *after* demand. 15 E. 4. 30.]

[5. If A. recites by his deed, that whereas he is indebted to B. in 100 *l.* he *covenants with B. that* the said 100 l. *shall be paid* and delivered *to B. or his assigns at Rotterdam* in Holland per C. *absque aliqua secta legis super primam requisitionem* quæ de eodem faceretur. In this case the *demand may be made in any other place* præter Rotterdam, for though the payment is to be made at Rotterdam, yet the demand may be made in any place, and if the demand be made in England, or at Dort, which is 10 miles from Rotterdam, or in England, [it is good] for he ought to have *reasonable time* to pay it after the demand, having respect to the distance of the place; but if the demand should be limited to Rotterdam perhaps he would never come there, and so the covenant would be of no effect. Mich. 1650. between *Halsted and Vauleyden*, adjudged upon a special verdict.]

[207] 6. If a man is *bound to pay* 10 *l. before Christmas*, and he *pays it after Christmas*, and the *obligee accepts it*, yet the obligation is forfeited. Br. Conditions, pl. 212. cites 14 H. 8. 13.

Cro. E. 549. pl. 24. Edmunds v. Marks, S. C. adjudg'd for the plaintiff.

7. Debt upon an obligation *to be such a day at the King's Head in B.* and there *to chuse two arbitrators*, to join with two others, to be chose by the obligee, *to arbitrate all matters betwixt them.* The defendant said, that he was there at the last instant to make the choice. Adjudged no plea; for he ought to have been there in such time that they might have chosen arbitrators, and have finished matters the same day. Mo. 545. pl. 725. Mich. 39 & 40 Eliz. Marsh v. Edmonds.

(O: b) At what *Place* where *none* is *limited.*

[1. IF the condition be, *that a stranger shall shew* certain *evidences* of such an annuity *to the counsel of the obligee upon request*; when the request is made, the stranger *ought to seek the counsel* where they are. 19 E. 4. 1. 6.]

2. If A. is bound *to pay B. 20 l. on B's first coming to such a place*, this place shall be *taken for the place where the payment shall be made*; per Popham. Poph. 11. Arg.

(P. b.) [In what Cases it must be *performed.*] To the Person.

As an obligation of 20 l. for the payment of 10 l. Litt. S. 340.

[1. IF the condition be *to pay* a small sum, and *no place* is *limited*, he ought to *seek the obligee.* 21 E. 4. 6. b.]

——Br. Conditions, pl. 166. cites 20 E. 4. 1. Per Brian & Cur. S. P.

[2. If

[2. If the condition be *to do a thing upon requeſt*, and the *plaintiff aſſigns for breach that the defendant could not be found* to make a requeſt to him, *and therefore he made a proclamation at the church* where he was born, *and* another proclamation *in ſeveral markets in the ſame county, by then giving notice of his requeſt*; yet this was not any requeſt, in as much as it ought to be made to his perſon. Mich. 8 Car. B. R. between *Gruit and Pinnel*; adjudged upon demurrer.]

[3. If a man leaſes, rendring rent, and the *leſſee binds himſelf in* 20 *l. to perform the covenants*, this does not alter the place of payment of the rent; for it *may be tender'd upon the land*, without ſeeking the obligee. 21 E. 4. 6. 20 E. 4. 18 b.

Fitzh. Debr. pl. 97. cites S. C. but not exactly S. P.

Debt upon indenture of leaſe, rendring rent, in which the defendant bound himſelf by indenture *to pay* 40*s. toties quoties the rent be arrear*; and the *defendant pleaded payment in another place*; and per Littleton, Rigot, and Brian, the payment ſuffices upon the land; and the ſame law of a requeſt there, and of a tender there; the reaſon ſeems to be, in as much as it is *all by one and the ſame indenture, and* therefore the *penalty is of the nature of the rent. Contra* it ſeems *if he was bound by obligation.* Br. Conditions, pl. 169. cites 21 E. 4. 18.——Br. Tender, pl. 23. cites S. C. & S. P. accordingly; but Brooke ſays it ſeems e contra of a collateral obligation.

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Fol. 444.

[4. [*So*] if the leſſee *binds himſelf to pay a greater ſum*, if he does not pay the ſum reſerved at the day, yet he is not bound to make tender in another place than upon the land. 21 E. 4. 6. b.]

Fitzh. Debt, pl 97. cites S. P. but not exactly S. C.

5. Note, that the *obligor or mortgagor* is bound *to ſeek the obligee* or feoffee *to make to him a tender*, if he be within the realm where *no place certain is limited.* But he is not bound to ſeek for him out of the realm; and therefore it ſeems that it is a good plea, that he was not within the realm at the time, &c. Br. Conditions, pl. 200. cites Littleton, Chap. Eſtates.

6. A. is bound *to deliver to the obligee* 10 *buſhels of wheat*, and *no place is limited* where the payment ſhall be. A. is not bound to ſeek the obligee whereſoever he ſhall be, as he ſhall in caſe of payment of money; for the *inſupportableneſs* of it ſhall excuſe him; per Clark, which Manwood granted. 3 Le. 260. pl 347. Mich. 32 Eliz. Obiter, in the Exchequer.

4 Le. 46. pl. 122. S.C. & S. P. by Clark and Manwood. ——Co. Litt. 210, b. S. P. and ſo of ſo many load of timber, &c. *but the obligor* or feoffor *before the day muſt go to the obligee*, &c. *and know where he will appoint to receive it*, and there it muſt be deliver'd; and ſo note a diverſity between money and things ponderous or of great weight.

7. Homage, or any other *corporal ſervice, muſt be done to the perſon* of the lord, and the tenant ought by the law of convenience to ſeek him, to whom the ſervice is to be done, in any place within England. Co. Litt. 211. a.

(Q. b.) [At what Place it muſt be *performed.*] Where a Place is limited.

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Br. Condition, pl. 21. cites S. C. & S. P. but

[1. IF the condition of an obligation be *to pay* 10 *l. at a day at S.* he is not bound to pay it in any other place. 41 E. 3. 25.]

if the obligee accepts it at any other place it is good.———Fitzh. Dette pl. 121. cites S. C. & S. P. by Finch ———S. P. if he pays it by the day; per Priſot, quod non negatur. Br. Conditions, pl. 15. cites 34 H. 6. 17.———See (X. b) pl. 2. S. P.———See (S. c) pl. 11. S. C.

* Br. Conditions, pl. 22. cites S. C. but S. P. does not appear.

[2. *So* in ſuch caſe, the *obligee is not bound to receive it in any other place* upon a tender. 41 E. 3. 25. * 46. E. 3, 4. b. 11 H. 4. 62.]

———Fitzh. pl. 121. cites S. C. and S. P. by Finch.——— See (S. c) pl. 11. S. C.

† Br. Defeaſans, pl. 14. cites S. C. which was of an indenture of defeaſance of a ſtatute merchant, that if the conuſor pay 10 l. at B. that then, &c. The conuſee is not bound to receive it in another place; but if he does receive in another place it is ſufficient; quod nota.———Fitzh. Audita Querela, pl. 3. cites S. C.

3. Upon a ſtatute merchant the *defeaſance* was *to make payment at B.* and the *party paid at T.* and yet well, becauſe the conuſee received it. Br. Tender, pl. 3. cites 4 E. 3. 4.

Br. Dette, pl. 43. cites S. C.

4. Payment at *another place than is compriſed in the condition of the obligation* is good. Br. Tender, pl. 5. cites 46 E. 3. 29.

5. If A. is *bound to pay* 10 *l. to J. N. at E. ſuch a day*, and he *accepts it at another place*, he ſhall be barred by the acceptance, and yet at firſt he was not bound to accept it, but at E. only. Br. Barre, pl. 27. cites 21 H. 6. 24. Per Markham.

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6. If the *condition of an obligation* be *to pay* ſuch a ſum *at Pauls in L.* yet it ſuffices if it be paid at any other place. Br. Lieu. pl. 33. cites 15 E. 4. 8.

7. If a man be bound in a bond *to pay* 20 *l.* the obligor, in whoſe diſcharge the condition goes, *ought to be ready at the place* &c. *all the day*, and the obligee may come any time of the day. Br. Conditions, pl. 192. cites 32 H. 8.

Mich. 7. Geo. in Canc. Wm. Phipps, Eſq. and lady Catharine his wife by Sir Conſtantine Phipps, their Prochein Amy v. the earl of Angleſea & al.

8. James *earl of Angleſea, upon his marriage* with lady Catherine, daughter of the counteſs of Dorcheſter, *made a ſettlement of lands in Ireland*, wherein, *after the uſual limitation in tail male*, there *was a term of* 500 *years* raiſed, in truſt *for raiſing* 12000 l. *for daughters portions to be paid at* 18 years of age, *or day of marriage* &c. Earl James *died without iſſue male, leaving the plaintiff, lady Catherine, his only daughter, and by his will deviſes to her* 3000 *l. to be added to her portion, and* 300 *l. per ann. increaſe of maintenance*, which was only 100 l. per ann. by the marriage ſettlement, and appointed her guardians by the will; two of the guardians died ſoon after earl James, the ſurviving guardian being Francis Anneſley eſq; and there being a ſuit in chancery in relation to the guardianſhip of the young lady, the court did commit her to the care of Mr. Francis Anneſley, with this caution, that he ſhould not treat of, or contract any match for her, without the leave and approba-

approbation of the court. The young lady was ſent by Mr. Anneſley in 1718 to her aunt, the lady Chriſtian Geare, to be with her during the ſummer at her houſe near Windſor. While the plaintiff, lady Catherine, was with her aunt there, the plaintiff Mr. Phipps, being with his father in the neighbourhood, got acquainted with the young lady, and made his addreſſes to her, and got her away from her aunt, and married her privately, without the conſent or privity of any of her friends or relations; and now both the plaintiffs being under age, bring their bill by their prochein amy, to have the intereſt of the portion and legacy paid to Mr. Phipps the huſband, and to have the portion itſelf, and the legacy given her by her father's will, laid out in land, and ſettled upon her and her children, in ſuch manner as the court ſhould think proper.

1ſt point was, if the 12000 l. *portion charged upon the term of* 500 *years, of lands in Ireland*, without impeachment of waſte, ſhould be *paid here in England, without any allowance or deduction for the exchange from Ireland to England?*

It was urged by the defendants counſel, that the money being to be raiſed out of lands in Ireland, and no place appointed by the ſettlement for the payment thereof, it was payable in Ireland where the lands lay out of which it was to be raiſed, and not in England, and therefore if the plaintiffs would have it paid here, they muſt allow for the exchange, and that ſeems to be the intention of the parties; for *in that part of the ſettlement which ſecures a rent-charge* of 2000 l. per annum *for the jointure* of the wife, *it is expreſly provided for, that the rent ſhould be paid at London without any abatement or deduction for the exchange, but in the declaration of the truſt of this term, thoſe words are omitted*, and it is only ſaid, in truſt to levy, raiſe, and pay out of the premiſes the ſum of 12000 l. of good and lawful money of England &c. Now the different penning of theſe clauſes, ſhew the intention of the parties to be different, viz. that in the one caſe the money ſhould be paid without deduction for the exchange, and in the other caſe not ſo; and that this 12000 l. portion being to be raiſed out of lands, ought to be paid where the lands lie, no place in particular being appointed for the payment thereof.

Per contra, it was argued that this portion of 12000 l. ought to be paid in England where the ſettlement was made, and not in Ireland, where the lands lie out of which it is to be raiſed; that the [210] *ſettlement was made in England, and the parties reſided here*; that *this is a ſum in groſs charged upon land, and not a rent iſſuing out of land*, that a tender of rent upon the land is ſufficient, but a *tender of a ſum in groſs charged upon land muſt be made to the perſon who is to receive it, whereſoever he is to be found*, and that the reaſon of the different penning of the clauſes, viz. that of the jointure, and this of the portion is, that the jointure is a rent-charge, and conſequently payable upon the land, unleſs another place be particularly appointed for the payment thereof; but the portion being a ſum in groſs, though charged upon land, is payable to the perſon of the grantee where ſhe reſides and is to be found, and therefore no occaſion

caſion to add the words without deduction for the exchange, becauſe the money is payable here. If a *man in England lends money here, and takes a mortgage of lands in Ireland for a ſecurity, the money is to be paid here where it was lent and the contract made*, and not in Ireland where the lands in mortgage lie, and there is no difference between theſe two caſes.

Parker C. was of opinion that the portion ought to be paid here where the contract was made and the parties reſided, and not in Ireland where the lands lie charged with the payment thereof; for that this is a ſum in groſs, and not a rent iſſuing out of land, and it was certainly the intention of the parties that the portion ſhould be paid here, and not to ſend the young lady over into Ireland to get her portion.

(R. b) [Disjunctive. Performance.] How. [*What ſhall be a ſaving of the Condition.*]

Br. Conditions, pl. 174. cites S. C. but S. P. does not clearly appear.

[1. IF the condition be *to pay* 10*l. at D. ſuch a day, or* 10*l. at S. ſuch a day*; if he *tenders it at D. the firſt day* the condition is ſav'd. 21 E. 4. 52.]

2. There is a *difference* between *disjunctive abſolute* and disjunctive *contingent*; *as* if a man be bound to *pay* 10*l. or to infeoff* one *upon the return of J. S from Rome.* If J. S. die before he return from Rome the obligation is ſaved though the 10l. be never paid; *but* if it be a voluntary act as to *pay* 10*l. or to infeoff you before Michaelmas*, there if the obligor dies before Michaelmas, yet his executors ought to pay the money; per Popham Ch. J. Goldſb. 192. pl. 141. Hill. 43. Eliz. Anon.

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See Parols (D)

(S. b) What ſhall be ſaid a Condition in the *Disjunctive.*

Where a man is bound to do one thing or another

[1. IF the condition be *in the copulative*, and it is *not poſſible to be ſo performed*, it ſhall be taken in the disjunctive. Vide 21 E. 4. 44.]

thing, and the *one is poſſible, and the other impoſſible*, he ought to perform that which is poſſible. Br. Conditions, pl. 47. cites 21 E. 3. 25.

As in debt A. was bound to J. in 100l. *to infeoff J. or the heirs of his body when he comes to his aunts*, and ſaid, that ſuch a day he came to his aunt, *and J. required him to infeoff him*, and he refuſed. Skipwith ſaid that here the plaintiff alleges two points in the condition, viz. that A. infeoff him or the heirs of his body, but does not allege breach of the other point; and here *A. may infeoff J. but he cannot infeoff the heirs of his body*; for he has no heirs in his life, and therefore though he cannot infeoff the heirs, &c. he ought to infeoff J. himſelf, and becauſe he did not, he ſhall forfeit his obligation; quod nota; and the time is certain, viz. when he comes to his aunt's, and the condition is in the disjunctive to do the one or the other. Br. Conditions, pl. 47. cites 21 E. 3. 25. —— S. C. cited Pl. C. 289. a. Trin. 7 Eliz. in caſe of Chapman v. Dalton, and ſays, that the ſenſe of the words are to be taken to infeoff the plaintiff if he be alive, and if he was dead, then to infeoff his heirs, and therefore the defendant was driven to anſwer to the count. ——— A man covenanted to infeoff J. S. and

and his heirs, whereas it is impoſſible to infeoff his heirs while J. S. himſelf is living; and therefore it ſhall be taken for a disjunctive. Ow. 52. Mich. 29 & 30 Eliz. Arg. cites it as Chapman's caſe.—S. C. cited Gouldſb. 71. in pl. 16.

[2. *As* if the condition be *that he and his executors ſhall do* ſuch a thing; this is in the disjunctive, becauſe he cannot have an executor in his life-time. 21 E. 4. 44 b.]

[3. *So* if the condition be, *that he and his aſſigns* ſhall ſell certain goods; this is in the disjunctive, becauſe both cannot do it. 21 E. 4. 44.]

4. *Leaſe* reſerving *rent before Michaelmas* a pound of *pepper or ſaffron*. Before the feaſt leſſee has election which to pay, but *after the feaſt* leſſor may have debt for which he pleaſe. D. 18. a. pl. 104. Trin. 28 H. 8.

A. covenanted with B. *to make a leaſe for years of lands to B. and his aſſigns*; the ſame ſhall be conſtrued *(or)* his aſſigns; and ſo the copulative ſhall be taken as a disjunctive; Arg. Le. 74. pl. 101. cites Pl. C. 289. 7 Eliz.

6. Condition of a bond was, that the obligor *ſhould bring in the ſon and daughter of J. B. at their full age to give releaſes*, as a third perſon ſhould require. This muſt be taken to be at their reſpective ages. Vent. 58. Hill. 21 and 22 Car. 2. B. R. Boſvill v. Coates. Mod. 33. pl. 78. S. C. held accordingly; and Twiſden J. ſaid, that if the words had been only, viz. (when they ſhall come to their ages of, &c.) it were enough to have the condition underſtood reſpectively; becauſe they cannot come to their ages at one and the ſame time; and adjudged accordingly.

7. A *leaſe was made to T. and E. (whom T. afterwards married) if he and ſhe, or any child or children between them, ſhould ſo long live*; afterwards *E. died without iſſue*. All the judges agreed, that the leaſe was not determined by the death of the wife; and judgment accordingly. Ow. 52, 53. Mich. 29 and 30 Eliz. Cooke v. Baldwin. Mo. 239. pl. 375. Baldwin v. Cooke, S.C. adjudged, that the leaſe was not ended; for the word (or) is diſtributive and to be applied to any one of the three, and Anderſon ſaid, that this was the opinion of all the juſtices of England.——And 161. pl. 206. S. C. adjudged and agreed in C. B. that the word (and) viz. (if he and ſhe) notwithſtanding it be copulative, ſhall be taken disjunctively and that the leaſe continues; for it appears that this leaſe was made for the benefit of the feme who intended to marry with T. which benefit in effect ſhe ſhould not have if by * the death of T. ſhe ſhould loſe her eſtate &c.——Gouldſb. 71. pl. 16. S. C. adjudged accordingly. And Periam, Windham and Anderſon ſaid, that it appears by the disjunctive ſentence, which comes afterwards, that the intent was, that the leaſe ſhould not determine by the death of one of them, and the reaſon which moved the lord Anderſon to think ſo was becauſe the leaſe was made before the marriage, and ſo it was as a jointure to the wife, and conſequently not determined by the death of one of them.——Le. 74. pl. 101. S. C. Anderſon ſaid it would be in vain to name the wife in that leaſe, if the leaſe ſhould ceaſe by the death of the huſband; and adjudged that the leaſe was not determined by the wife's death.——S. C. cited Cro. E. 279. pl. 11. as adjudged, and ſays, that Anderſon commanded Nelſon the prothonotary to enter upon the record that the leaſe continued ſo long as any of them live.——S. C. cited Le. 244. pl. 330. ſays the huſband held the land though the wife was dead; for the disjunctive (or) before the word (child) made the ſentence disjunctive; and Gawdy J. ſaid this had been law if no ſuch word had been in the caſe.—— Co. Litt. 225. a. S. C. ſays the disjunctive refers to the whole, and diſjoins not only the latter part as to the child, but alſo to the baron and feme; ſo as the ſenſe is, if the baron or feme, or any child, ſhall ſo long live.——And *ſo if an uſe be limited to certain perſons till A. ſhall come from beyond ſea, and attain his full age or die.* If he comes from beyond ſea, or attains his full age, the uſe ceaſes. Co. Litt. 225. a. cites it as adjudged. Hill. 35 Eliz. B. R. lord Mordaunt v. Vaux.——Cro. E. 269. pl. 11. lord Vaux's caſe S. C. & S. P. agreed.—Le. 245. pl. 330. S. C. argued; ſed adjornatur.

8. A. and

Raph. 200. Saunders v. Meriton S. C. states it, that it was from all incumbrances made by them or any other person, and therefore extends as well to incumbrance made severally as jointly. ——— Noy 86 S. C. resolved accordingly, but seems misprinted in two words, viz. (Alien) (for enjoy) and (debt) for (covenant.)

8. A. and B. leaſe for years, and covenant that leſſee may enjoy free from all *incumbrances made by them*, and afterwards leſſee is diſturbed by J. S. to whom A. had made a precedent leaſe, it is a breach; for *(them)* ſhall be taken ſeverally and not jointly only. Lat. 161. Trin. 2. Car. Meriton's caſe.

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9. If a condition be *to make an aſſurance of land to the obligee and his heirs*, and the *obligee before the aſſurance made dies*, yet the aſſurance ſhall be made to the heir; for this copulative is a diſjunctive; per Allibone J. 3 Mod. 235. Trin. 4 Jac. 2. B. R.

3 Chan. Rep 206. S. C.

10. *Legacies* to four grand-children on condition, that *as they come of age they ſhould releaſe* all claims to the teſtator's eſtate; this condition muſt be taken diſtributive, and ſuch only as refuſe to releaſe ſhall forfeit their legacies; per Wright K. 2 Vern. 478. pl. 432. Hill. 1704. Hawes v. Warner.

See Tit. Books (E) (F).

(T. b) Perform'd. At what *Time* it ſhall be. Where a *Day is limited.*

[1. IF a *latitat* to arreſt J. S. be *returnable die lunæ prox' poſt craſtinum ſanctæ Trinitatis*, which this year *was the 10th of July*, and the *ſheriff arreſts him the 10th of July*, and *takes an obligation* from him *the ſame day*, with a condition *to appear* coram domino rege *die lunæ prox' poſt craſtinum ſanctæ Trinitatis* ad reſpondend &c. it ſeems he ought to appear the *ſame day*, and not this day twelve-month. Trin. 3 Jac. B. R. between *May and Hooper*, dubitatur.]

[2. If the condition of an obligation be *to pay 8 l. anno domini* 1599, *in and upon the 13th day of October next after the date* hereof at D. &c. where the *13th of October next after the date is a long time before* 1599, yet it ſhall be paid in 1599, and not before; for it appears the intention was, that it ſhould be paid in 1599, and this is firſt expreſſed; and therefore if the *ſubſequent words*, upon the 13th of October next after the date hereof, are *contrary*, they
[213] *ſhall be void*; *but* it ſeems they may be interpreted, that it ſhall be paid the 13th of October, which ſhall be anno domini 1599 next after the date thereof, and ſo *all may ſtand together*, otherwiſe not. Mich. 37 & 38 Eliz. B. R. between *Hankinſon and Rile*, per Curiam.]

Br. Jours, pl. 72. cites 20 E. 4. 18. S. P. ——— And it ſhall be intended St. Michael the Archangel which is the moſt notable, and not St. Michael in Tumba. Br. Jours, pl. 5. cites 20 H. 6. 23. ——— 2 Inſt. 485, 486.

[3. If A. be *obliged* to B. *the 1ſt of May*, upon condition *to pay* to him 10 l. *at the feaſt of St. Michael, without* ſaying *more*, it ſhall be intended the feaſt of St. Michael next enſuing. Mich. 12 Jac. B. between *Lewkner and Smallwood*, adjudged.]

4. *Tenant*

4. *Tenant in dower granted her eſtate to him in reverſion by deed, rendring rent, and for default of* payment *a re-entry*, and the *tenant in dower for the rent arrear at the firſt term immediately entred*, and the heir who had the *reverſion tender'd her the rent and re-entred*, and the tenant in dower brought aſſiſe, and the opinion of the court was with the tenant. Quære caſtam it ſeems in as much as ſhe re-enter'd without demand, quære. Br. Tender, pl. 40. cites 43 Aſſ. 3.

5. Where a man is bound by indenture or obligation *to pay* 10*l.* *at a day*, and *pays it after the day*, this does not excuſe the forfeiture; by all the juſtices. Br. Conditions, pl. 60. cites 22 H. 6. 57.

6. Debt of 20*l.* by obligation, which was, that *the obliger ſhall receive* 5 *l. by the hands of A. when K. comes to his houſe*, and *at Michaelmas* 5 *l.* and *at St. Andrew then next following* 5 *l.* and at *Chriſtmas then next* &c. 5 *l.* And as to that which A. ſhould pay, and which ſhould be paid by the hands of A. this is void, and *ſhall be paid immediately* by the obligor; but by the words that it ſhall be paid when K. comes *to* his houſe, therefore it is not payable till he comes to his houſe. And per Brian, as to the words (and 5 l. at the feaſt of St. Michael then next following) by this he ſhall pay 5 l. at next Michaelmas after the making of the obligation, by reaſon of theſe words, then next following; for *if thoſe words (then next following) had been left out*, it ſhould be Michaelmas next after the coming of K. to his houſe, quod tota curia conceſſit. Br. Obligation, pl. 56. cites 20 E. 4. 17.

7. An obligation *to be paid at dooms-day* is payable preſently. D. 93. b. pl. 28. Marg. cites Pl. C. 192. and 6 Rep. 36.

8. Bond to pay money *at the feaſt of our Lady*, without mentioning nativity, conception or annunciation; per tot. Cur. the deed ſhall be conſtrued to intend ſuch Lady-day which ſhould next happen and follow the date of the ſaid obligation. 3 Le. 7. pl. 10. 6 Eliz. B. R. Anon. Br. Jours, pl. 5. cites 20 H. 6. 23. that if he does not ſhew what feaſt, it is ſaid not to be good.

9. An obligation was condition'd that *if A. deliver to B.* 20 *quarters of corn* 29 *Feb. next following the date* thereof, than then &c. The next February had but 28 days. It was held that A. is not bound to deliver the corn until ſuch a year as is leap-year, and then he is to deliver it, and the obligation was held good. Le. 101. pl. 132. Paſch. 30 Eliz. B. R. Anon.

10. If I am *bound* in an obligation *in Lent*, upon condition *to pay a leſſer ſum in quarto ſeptimana quadrageſimæ proximæ futuræ*, this money ſhall be paid in Lent twelvemonth after; per Coke. Gouldſb. 137. pl. 40. Hill. 43 Eliz.

11. And *ſo* it is *upon the feaſt day of St. Michael*, if I am bound to pay a leſſer ſum upon the feaſt day of St. Michael prox' futur', without queſtion it ſhall be paid the twelvemonth after, and not the inſtant day; per Coke. Gouldſb. 137. pl. 40. Hill. 43 Eliz.

(T. b. 2) Performance. At what Time. Where a Thing is *to be done on or before such a Day.*

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Mo. 122. pl. 266. Anon. S. P. and seems to be S. C. and Anderson Ch. J. held that if he tenders it the last instant of the 28th day, he has saved his obligation; for he intends that if this word *(before)* may receive any good construction, it is not the office of the judges to make it to be void, and he thought that this word continues [or *takes in*] *all the time from the date of the obligation till the 1st instant of the 29th* day, and that this is reasonable; and argued that where a man has liberty of time to do an act, that he shall do the act in the last instant of the time, and therefore the tender on the last instant of the 28th day shall save the obligation; but the other judges held e contra, and thought that the word (before) is not to have any construction, but that the obligor shall thereby be admitted to pay before the day by agreement of the obligee. But the reporter says quære, for this seems no more than is given by the law.

1. DEBT upon an obligation, condition'd *to pay at or before the 29th* of September next, at such a place 10 l. to the obligee. It was held by the court that if the obligor *tenders the money the 28th* day of September at the place, and the *obligee* is *not* there to receive it, it is a void tender, for the tender is to be the last day; but if the obligor * meets the obligee at the place before the day, and he then tenders it, this is sufficient, and the obligee ought to receive it. Cro. E. 14. pl. 1. Pasch. 25 Eliz. C. B. Hawley v. Simpson.

* Co. Litt. 211. a. S. P.

S. P. by Clench J. who said that perhaps at the last day the obligor may not find the obligee. Cro. E. 73. in case of Allen v. Andrews.

2. Debt upon *obligation, conditioned to pay* 14 *l. yearly* to the party during the life of the wife of the defendant, at Mich. or within one month after *at D.* The defendant pleads that 2 days before the end of the month he *came to D. and there tendred* the 14 l. *and there was none to receive it*; the justices held that if the tender had been to the plaintiff himself *in person within the month*, if he had come thither, this peradventure had been good, but it seemeth hard to tender it when the plaintiff was absent, and to compel him to attend all the month was not reasonable. But by Wray, it is more reasonable that the *last day* shall be for one to tender and the other to receive, but they were in doubt of this case; but afterwards it was adjudged for the plaintiff. Cro. E. 73. pl. 31. Mich. 29 & 30 Eliz. B. R. Allen v. Andrews.

* Fol. 445.

(U. b.) Performed. At what *Place* it ought to be. Where none is limited.

Hob. 134. pl. 180. Coventry v. Woodhall, S. C. adjudged.—Brownl. 67. Coventry v. Windal, S. C. adjudg'd.—See (S. a) pl. 2. S. C.

[1. IF the condition of an obligation be to perform covenants, of which one is, that whereas he is a *common surgeon*, and *had taken J. S. to* be his apprentice, he *covenants to instruct him* in his trade, *and to keep him in domo sua propria & servitio*; if he after *sends the apprentice to the East-Indies* in a voyage to exercise his trade, this is a forfeiture of the obligation, because he cannot send him out of the realm for the danger thereof, for this is not any keeping in domo sua propria & servitio. Hill. 14 Jac. B. *Coventrie* against *Boswell* adjudged.]

2. But

[2. *But* in this caſe it was agreed per Curiam, that he may, without forfeiture of the condition, ſend him *to any place in England to cure a patient.*] Hob. 134. pl. 180. Coventry v. Woodhall, S.C. & S.P.

——Brownl. 67. S. C. & S. P.

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[3. [*But*] if an *apprentice* be bound *to a merchant*, and the maſter binds him *with ſuch words* ut ſupra, he may ſend him over the ſea; for this is his trade, and *incident* to it. This was ſo agreed in the ſaid caſe.] Hob. 134. pl 180. S. C. & S. P.—— Brownl. 67. S.C.&S.P.

[4. If an *annuity* be granted *upon condition to do ſervice to the grantor, and to counſel him in time of war and peace*, and after the *king warns the people to go with him into Britany*, upon which the *grantor goes* there with the king, *and warns the grantee to go with him* &c. If he refuſes, the condition is broke, though it be out of the realm, becauſe the word *war*, which cannot be properly within the realm, *implies* as much. Dubitatur, 17 E. 3. 26.]

[5. *But* if the condition had been *to ſerve* him, *and counſel him generally*, he had not been bound to go with him out of the realm, becauſe of common right, a man is not to travel out of the realm. 17 E. 3. 26. admitted.]

[6. If a man *mortgages* land, *upon condition to enter upon payment of* 10 *l.* he may *tender it upon the land*, without ſeeking the perſon of the mortgagee, becauſe this is to be paid in recompence, in lieu of the land. 11 H. 4. 62. b. per Skreene. 19 H. 6. 50. b. per Forteſcue. Litt. 78. Quære.] Litt. S. 340. S. P. and ſays the opinions as to this point were different.—— Co. Litt. 210. a. in his Commentary on the ſaid ſection obſerves, that Littleton always ſets down the better opinion, and his own laſt, and that ſo he does here; for at this day, Coke ſays, this doubt is ſettled, it having been oftentimes reſolved, that ſeeing the money is a ſum in groſs, and collateral to the title of the land, the feoffor muſt tender the money to the perſon of the feoffee, and that it is not ſufficient for him to tender it on the land. But if the feoffee be out of the realm of England, he is not bound to ſeek him, or to go out of the realm unto him.

[7. If a man *releaſes all his right in the land*, upon *condition if he pays the other* 10 *l. ſuch a day, the releaſe ſhall be void*; it ſhall be paid upon the land, or to his perſon. * 317 E. 3. † 17 Aſſ. 2.] * This is miſprinted, and ſhould be 17 E. 3. 16.——

† Br. Conditions, pl. 103. cites S. C.——Br. Tender, pl. 17 cites S. C.

[8. In this caſe the *payment ſhould be* made *in what place his perſon could be found.* 17 E. 3. 16.]

[9. If a man makes a *feoffment reſerving a rent to a ſtranger, and for default* of payment, that it ſhall be lawful for the *feoffor to reenter*, this is not any rent, becauſe it cannot be reſerved to a ſtranger, and therefore the feoffee ought to tender the ſum to the perſon of the ſtranger where he may be found, otherways the condition is broke. Litt. 80.]

10. *Where an act is to be done at a place*, as to come to D. and there to repair my Hall, this is material. Br. Conditions, pl. 103. cites 17 Aſſ. 1.

(X. b) At what *Place* it ought to be performed, where a Place is limited.

[1. IF the condition of an obligation be *to appear coram juſticiariis* apud Weſtmonaſterium, he ought to appear in B. and not in B. R. for this is not the ſtile of the king's bench. Hill. 14 Jac. B. R. between *Muſgrave and Robinſon*, per Curiam.]

[2. If a *place of payment* be *limited* by a condition, he is *not bound to pay it in any other* place. 17 E. 3. 16. 42. b. * 17 Aſſ. 2.]

* Br. Conditions, pl. 103. cites S. C.——Br. Tender, pl. 17. cites S. C.——See (Q. b) pl. 1. S. P.

[3. [*And*] if a place be limited by the condition where it ſhall be performed, *the* * *other* is *not bound to receive it in another* place. 17 E. 3. 2. b. 3. 16. 17 Aſſ. 2.]

* Fol. 446. See (Q. b.) pl. 2. S. P.

[4. *As* if a releaſe be upon condition of payment of 20 l. to another *at D.* he is not bound to receive it out of D. upon a *tender to his perſon*. 17 E. 3. 2. b. 15. b.]

[5. *So* if the condition be *to come to the releaſee at D. to help him with his counſel*; it is not performed if he tenders his counſel at the day at another place. 17 E. 3. 2. b.]

[6. If the condition be *to pay* a ſmall ſum of money at ſuch a place, the obligee is not bound to receive it in another place. 21 E. 3. 45.]

(Y. b) *How* a Condition is to be performed, *where divers Things* are [*or the ſame Thing is at different Times*] to be performed in the *Diſjunctive*. [*Election.*]

[1. DY. 18 Eliz. 347. the condition of an obligation was, *if* the obligor *before Michaelmas make a leaſe to the obligee* for 31 years, *if A. will aſſent*, and if he *will* not aſſent [then] for 21 years, then the obligation ſhall be void; and A. would not aſſent. A leaſe for 21 years ought to be made before Michaelmas.]

And. 49. pl. 124. Cage v. Furtho, S. C. adjudged for the plaintiff, and the plaintiff need not make any requeſt, but the defendant at his peril ought to have made the leaſe for 21 years before the ſaid feaſt.——S. C. cited 2 Saund. 131. Paſch. 22 Car. 2.

[2. If the condition be *to infeoff* the obligee *of D. or S.* the obligor hath election. 18 E. 4. 17. b.]

Br. Conditions, pl. 161. cites S. C. but S. P. does not appear.

[3. *So* if the condition be to infeoff him *of D. or S. upon requeſt*, the obligor hath election. 18 E. 4. 17. b.]

[4. The *ſame* law if it be *to pay* 20 *l. or a pint of wine*, upon requeſt. 18 E. 4. 17. b.]

[5. The

[5. The *ſame* law if it be *to ſhew evidences to the obligee or his counſel*, upon requeſt made by the obligee. *18 E. 4. 17. 20. b. Et 19 E. 4. 1. it was repleaded.]

* Br. Conditions, pl. 161. cites S. C. but where it is thus, viz. debt upon obligation with condition, *that if the defendant ſhews his evidence of ſuch rent to the plaintiff 's counſel, or does ſuch other act as he ſhall be required by the plaintiff*, that then, &c. and ſaid, that the plaintiff required him to ſhew it to his counſel at B. ſuch a day, and the defendant was there all the day, and the plaintiff's counſel came not; judgment, &c. and it was agreed, that when the condition is in the disjunctive, the obligor has the election to do the one or the other; for the condition is in the advantage of the obligor. Br. Conditions, pl. 161. cites 18 E. 4. 15. 17. 20. *And* per Brian and Choke J. fol. 17. this requeſt given to the plaintiff *does not take away the election from the defendant* but is only to limit the time when the condition ſhall be performed; but yet the election ſhall remain to the obligor ſicut prius. Ibid.

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[6. The *ſame* law if it be *to cut* 20 *acres of meadow or corn* upon requeſt. Dubitatur, 18 E. 4. 20. b.]

[7. The *ſame* law if it be *to go with me or my wife to church* upon requeſt. 18 E. 4. 21.]

[8. The *ſame* law if it be *to go to York, or marry my daughter*, upon requeſt; for in all theſe caſes the * *requeſt is* of no other effect *but to appoint a time when the obligor ſhall do the one or the other.* 18 E. 4. 21.]

* See the notes at pl. 5. ſupra.

[9. A. covenants with B. *to diſcharge* him from *the wardſhip of his body at* his age of 21 *years, or before upon the requeſt of B.* Quære which of them hath the election, if B. requeſts before 21. D. 1, 2. Ma. 108. 32.]

[10. If I am obliged in 10 l. *to pay* 5 *l. at the feaſt of P. next* &c. *or before, at the requeſt of the obligee*, the obligor hath given his conſent, that the obligee ſhall have the election in this caſe. D. 1, 2. Ma. 108. 32.]

[11. But *otherwiſe* it is, *if the words are retrorſum*, as if the condition be to pay 5 l. before the feaſt of P. at the requeſt of the obligee, or at the feaſt of P. there the obligor hath the election. D. 1, 2. Ma. 108. 32.]

D. 108. b. pl. 32. S. C. ſays only, that it ſeems the obligor has the election.

[12. D. 20 Eliz. 361. 9. Windſor, *bargainee* of land for 60 l. by *another indenture, covenants to make back* to the bargainor and his heirs, *ſuch aſſurance as the counſel of the bargainor ſhall deviſe, within one year after, provided* that *if* the vendee makes *default* in the aſſurance, *then if he does not pay* 500 *l. to the vendor*, that *he ſhall ſtand ſeiſed to the uſe of the vendor*; the vendor does not tender an aſſurance, and the 500 l. *is not paid*; per Curiam the vendee hath a right to the land, becauſe it was the folly of the vendor, that no aſſurance was deviſed and notified to the vendee, and therefore there was no default in the vendee.]

13. Debt upon *an obligation to pay* 20 *l. or* 20 *bales of wool*, and he demanded the 20 l. And per Pigot and Brian, *before the day of payment* the obligor has election to tender which of them he will, but after day of payment, and no tender made, there is election in the obligee or grantee to demand which of them he will; but where a man is bound to pay 10 l. at Eaſter, or 10 l. at Michaelmas, he has election to pay at the one day or the other. Br. Dette, pl. 159. cites 13 E. 4. 4.

14. The teſtator *deviſed a houſe to W. S. upon condition that he ſee my mother well provided for during her life, or give her* 20 *l.* &c. The jury found that the *mother lived with S. for* 2 *years*, and that ſhe was well provided for during ſuch time, *but* that *afterwards ſhe went from him*, and then was not provided for, and that ſhe requeſted the 20 l. but S. refuſed. The whole court held that *S. had his election either to pay her the* 20 *l. or to provide otherwiſe for her*; and that by having ſuffered her to dwell with him 2 years, he had made his election, and it was her folly to leave him, for now he is not obliged to pay the 20l. &c. But had the jury found that he had *turn'd her away* after the 2 years, he muſt pay the 20 l. Palm. 76. Hill. 17 Jac. B. R. Shaw's caſe.

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2 Roll. Rep. 215. S. C. The judges at firſt doubted but afterwards it was adjudged for the plaintiff.

15. Debt upon obligation, the condition was, that *if he paid to A. or his heirs annually* 12 *l. at Midſummer, or Chriſtmas, or paid to him or his heirs at any of the ſaid feaſts* 150 *l.* then &c. Upon demurrer it was objected that defendant had election at any time to pay the 12 l. or 150 l. and ſo no breach ſo long as he liveth; but per tot. Cur. the obligation is forfeited. It is true he hath election to pay the one or the other; but for as much as he hath not alledged payment of the 12 l. or the 150 l. the bond is forfeited, and judgment for the plaintiff. Cro. J. 594. pl. 15. Mich. 18 Jac. B. R. Abbot v. Rockwood.

Sid. 27. pl. 8. Soome v. Glean. Hill. 12 Car. 2. C. B. the S. C. but is only as to the point whether ſuch a bond is uſurious or not, and held that it is not.

16. Debt on bond conditioned, that *if a ſhip at ſea, or the goods therein, or the obligor returned ſafe, then to pay ſo much* money. The defendant *pleaded that the obligor died before he returned*, and the plaintiff demurred; for the money was to be paid upon 3 contingents, the return of the ſhip, or of the goods, or of the obligor, which being all, *the law ſupplies theſe words*, viz. *(which ſhall firſt happen)* and ſo the money is to be paid at ſuch contingent which firſt happens and foreclоſes the election of the obligor, and gives it to the obligee to take his action upon the contingent firſt happening; reſolved, and judgment for the plaintiff. Lev. 54. Hill. 13 & 14 Car. 2. B. R. Sayer v. Glean.

17. Debt upon bond for 40 l. condition'd that *if the defendant ſhould work out* 40 *l. at the uſual prices in packing* &c. *when the plaintiff ſhould have occaſion &c. to employ him, or otherwiſe ſhall pay the* 40 *l.* then the bond to be void. The defendant *pleads that he was always ready to have worked out the* 40 *l. but that the plaintiff never employ'd him.* But upon demurrer the plea was held ill, becauſe the defendant did not aver that the plaintiff had any occaſion to make uſe of him, and for that it was in the election of the plaintiff either to have the work or money, and that by not employing him, but bringing an action for the money, he has determined his election to have the money, and judgment accordingly for the plaintiff. 2 Mod. 304. Paſch. 30 Car. 2. C. B. Wright v. Bull.

18. If A. obliges himſelf *to pay to B.* 10 *l. or ſo much as J. S. ſhall appoint*, if *J. S. will not appoint any ſum* to be paid, A. ſhall pay the 10 l. per Powel J. Lut. 694. Trin. 9 W. 3.

(Y. b. 2) Condition Copulative. What is; and how to be performed.

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1. IF I am bound to J. N. in 40 l. upon condition *to infeoff him before Chriſtmas*, and that then the obligation ſhall be void, *and that if he does not infeoff him* &c. *if he pays him* 10 *l. at Eaſter* then next &c. that then the obligation ſhall be void; if I do not infeoff him at Chriſtmas my obligation is forfeited, which cannot be ſaved by the payment afterwards, for that which is once *forfeited cannot be ſaved afterwards*, per Brudnel, which Brooke in a manner affirmed. Br. Conditions, pl. 66. cites 14 H. 8. 15.

2. *Otherwiſe it is*, as it ſeems, if the condition had been *in the diſjunctive* and not in the copulative as before; but Brooke makes a quære of the firſt caſe, becauſe he ſays it ſeems to him, that a man may make ſeveral defeaſances of one and the ſame obligation, and if any of thoſe be obſerved it is ſufficient. Ibid.

3. If a man *mortgages* his land *to W. N.* upon condition, that *if the mortgagee and J. S. repays* 100 *l. by ſuch a day, that he ſhall re-enter, and* he *dies before the day*, but *J. S. pays by the day*, the [219] condition is performed, and this by reaſon of the death of the mortgagor, notwithſtanding that the payment was in the copulative; and e contra if it was not in the caſe of death. Br. Conditions, pl. 190. cites 30 H. 8.

4. Debt upon bond conditioned, *that the plaintiff ſhould enjoy ſuch lands until the full age of J. S. and if J. S. within one month after his full age, make an aſſurance of the ſaid lands to the plaintiff the obligee*, that then &c. The defendant *pleaded, that J. S. is not yet of full age*; but becauſe he *did not anſwer whether he had enjoyed it in the mean time*, and the condition is in the copulative, it was adjudg'd for the plaintiff. Cro. E. 870. pl. 4. Hill. 44 Eliz. B. R. Waller v. Croot.

5. The defendant covenanted, *that he or his ſon R. or either of them, ſhall work with the plaintiff in grinding and poliſhing of glaſſes, paying to each of them ſo much*, and in an action of covenant brought he aſſigned the *breach, that he had required R. the ſon to work, and tendered him ſo much*, &c. After verdict it was moved in arreſt, that the declaration was of a requeſt to R. only, who is a ſtranger to the covenant, and no notice given to the covenantor himſelf, and the covenant is in the diſjunctive (or) and the words (either of them) is the ſame as (one of them;) but Glyn Ch. J. ſaid, that the word (either) by our books, may be taken conjunctive or diſjunctive, and often has reference to more than two, and that the words (each of them) would have been more proper here; and ſo it ſeems that the action is well brought, and that the plaintiff had his election; and judgment for him. 2 Sid. 107. Mich. 1658. B. R. Neale v. Reeve.

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(Z. b) *How* a Condition is to be performed, where *several Things* are to be performed *in the Disjunctive*. In what Caſes he ought to *make a Tender* [*or Requeſt.*]

[Election.]

Cro. E. 396. pl. 1. S. C. adjornatur ——Ibid. 539. pl. 1. Hill. 39 Eliz. S. C. adjudged by 3 J. Popham e contra, who ſaid, that if it were an abſolute diſ-

[1. IF the condition of an obligee be, that *if* the obligor *delivers certain obligations* to the obligee before ſuch a day *to be cancelled*, or elſe *if he ſeal a deed or releaſe of all actions which the obligee ſhall cauſe to be made by the advice of his counſel, and ſhall deliver it to the obligor to be ſealed before the day* aforeſaid, &c. In this caſe both are in the election of the obligor; for if the obligee does not deliver to him any releaſe to be ſealed by him, he is not bound to deliver the obligations, for both are only in his power. H. 38. El. B. R. between *Grenyngham and Ewer*; and H. 39. El. adjudged per Curiam, contra Popham.]

junctive condition, that the obligor ſhould do the one thing or the other, then the election would be to the obligor abſolutely; and if the obligee diſables himſelf to perform the one part, the law ſhall diſcharge him of the other; but here it is only a conditional election, viz. if the obligee will deviſe an acquittance; and if he will not deviſe it, he is abſolutely obliged to deliver the obligations ——Mo. 395. pl. 515. Gramminham v Ewre, S. C. ſays it was reſolved that the firſt part of this condition made a condition clearly, and the ſecond gave a diſjunctive election to the obligor upon a contingency precedent, viz. upon deviſe of an acquittance by the counſel of the obligee before the day aforeſaid; but though there be not any ſuch deviſe, yet the obligor muſt perform the firſt part of the condition; and if ſuch acquittance be deviſed, then the obligor has election to perform which he pleaſe; but this is no diſcharge of both for want of an acquittance deviſed by the obligee's counſel.——Gouldſb. 142. pl. 55. S. C. Gawdy held the obligation void, becauſe an acquittance not being tendered by the obligee, he has taken away the election from him whereof he ſhall not take advantage, but Popham and Fenner e contra; for the election is not in the party, the making of the acquittance reſting in the will of the obligee, and ſo the obligor has no election. *——Poph. 98. Grinningham v. the executors of Heydon, S. C. but is only ſtated there.——S. C. cited 2 Mod. 201.——3 Mod. 2 4. Arg. cites S. C. as adjudged that the defendant had election to deliver or releaſe as the plaintiff ſhould deviſe, which if he will not do the defendant is diſcharged by the plaintiff's neglect; for the defendant being at his choice to perform the one or the other it is not reaſonable that the plaintiff ſhould compel him to perform one thing only.——2 Mod. 203. S. C. cited per Cur. and held to be law.

*[220]

Mo. 395, 396. pl. 515. S. C. & S. P. admitted per Cur.—Cro. E. 396. pl. 1. S. C. & 539. pl. 1. S. C. and S. P. admitted.

[2. In this caſe if the *obligee* had *delivered to him a releaſe* to be ſealed by him, then he ought to have had his *election either to deliver the obligations* to be cancelled, *or to ſeal the releaſe.* H. 38 El. B. R. per Popham.]

Cro. E. 396. pl. 1. and 539. pl. 1. S. C. but I do not obſerve S. P. ——But ibid. Popham ſaid,

[3. *So* if the condition of an obligation be *to deliver* to the obligee ſuch *obligations before ſuch a day*, or to *pay him* 10*l. if he requeſts it*; if he does not requeſt the 10*l.* the obligor ought to deliver the obligations, for he hath no election till requeſt made; but after requeſt made, he hath election which of them he will do. Hill. 38 El. B. R. per Popham.]

that if the condition had been, that he ſhould deliver the obligation, or ſhould make an acquittance before Mich. if the plaintiff ſhould require it, it had been clear that he ought to deliver the obligations, unleſs the obligee required an acquittance. But Gawdy ſaid, that there is great difference between the caſes; and therefore it was adjudged for the defendant.

4. Condition

4. Condition of a bond was, *to pay to S.* 20 *kine, or* 30 *l. within a month after the death of his mother, at election of S.* The obligee makes *no election* in the time. Per tot. Cur. election muſt be made within the month, and convenient time allowed for the proviſion of one of the things. Mo. 241. pl. 377. Mich. 29 Eliz. Kerne's caſe. Le. 69. pl. 92. Baſſet v. Kerne, S. C. and the court was clearly of opinion that the plaintiff ſhould be barr'd.—Cro. E. 119. pl. 6. Shepherd v. Kerne, S. C. adjudged againſt the defendant.

5. And per Windham J. if the condition be *to pay* 20 *l. in gold or in ſilver ſuch a day, at the election* of obligee, the obligor is not bound to provide both; but Anderſon and Periam J. thought, in ſuch caſe, that after the day the bond might be ſu'd, and the obligor ſhould pay the 20 *l.* be it in gold or in ſilver, becauſe it was *parcel of the obligation*; but it ſeems to be otherwiſe of a *thing collateral* which is not parcel. Mo. 241. in Kerne's caſe.

———But where the condition was to pay the obligee 20 kine, or 30 *l.* ſuch a day, *at the then election of the obligee*, the court agreed, that the obligor ought to tender both at the day appointed, the words being, at the then election; for the word (then) ſhall be referred to the day of payment. But had the word (then) been left out it had been otherwiſe. Mo. 246. pl. 387. Mich. 29 Eliz. C. B. Anon.———Le. 68. pl. 88. Fordley's caſe, S. C. adjudged clearly.———Le. 70. pl. 92. S. C. & S. P. by Windham J. but if the obligee does not make his election before the day, yet the duty remains payable; for the thing to be paid is parcel of the penalty; quod fuit conceſſum.

6. Bond conditioned *to ſettle on obligee within* 6 *months, as obligee's counſel ſhould adviſe, an annuity of* 20 *l. per annum during his life, or elſe to pay him within* 6 *months* 300 *l.* The defendant *pleaded, that the obligee had not tendered any grant of an annuity within the* 6 *months.* The whole court held the plea good, becauſe the defendant had the benefit of election, and the plaintiff not making the requeſt within the 6 months, had diſpenſed with one part of the condition, and the law had diſcharged the defendant of the other part; and judgment was given for the defendant. 2 Mod. 200. Hill. 28 and 29 Car. 2. C. B. Baſket v. Baſket. Mod. 264. Baſſet v. Baſſet, S. C. adjudged niſi &c. per tot. Cur. præter Windham. —Freem. Rep. 228. pl. 236. S. C. ſays the court inclined, that this being a disjunctive condition, and one part being impoſſible by the obligee's default, the obligor was excuſed from performing the other, becauſe he has election which he will perform, and the benefit thereof ſhall not be taken away by the obligee's own act, and it plainly appears that the 300 *l.* is by way of penalty, it being twice the value of the annuity.

(Z. b. 2) Where it is to do one of two Things; and Pleadings in copulative or disjunctive Conditions. [221]

1. IN *treſpaſs* the *defendant ſaid*, that *his franktenement*; the *plaintiff ſaid that he was ſeiſed in fee, and infeoffed the defendant in fee, upon condition to ſay maſs and dirge, and ring the bells to it ſuch a day quolibet anno* pro anima, J. N. &c. *and becauſe he did not ring nor ſay maſs he re-entred*, and was ſeiſed till the defendant did the treſpaſs. The *defendant ſaid that he had performed all as he ought*, and ſhewed how. And the *plaintiff ſaid that he did not ſay maſs*, and the other e contra; and after he amended his paper, and ſaid that he did not ring to the *dirge*, and good; for the *iſſue ſhall be*

upon one point only; for the condition *is a copulative. Contra upon a disjunctive*, for there the feoffee has *election*. Contra upon a copulative. Br. Conditions, pl. 95. cites 38 H. 6. 26.

2. Debt upon bond, conditioned, that *whereas certain persons became bound to the earl of Holland in* 8 *several bonds, which were assigned to the defendant to his own use*; Now *it was agreed that he should assign them to the plaintiff to his own use, and the defendant covenanted that the money should be paid on the several days mentioned in the bonds, or within* 8 *days after*; the *breach assigned was, that* 50*l. payable on the* 1*st day of March was not paid*, and found for the plaintiff; but it being moved that the replication was insufficient, because *it might be paid within the* 8 *days*, and also that the condition was for maintenance, and so the bond void, and judgment was stayed. All. 60. Pasch. 24 Car. B. R. Hodson v. Ingram.

3. Where a condition is in the disjunctive, and *one part of it is falsified* (as in the principal case it was by defendant's demurrer) the plaintiff must have judgment, and it was given accordingly. 8 Mod. 349. Pasch. 11 Geo. 1. Griffith's case.

(A. c) Disability [to perform the Condition, and what shall be said a disabling himself.]

[1. IF a man promises to perform an *award*, which is, *that he* shall *deliver up a certain obligation* to the other, in which the other is bound to him, *without limiting any time when* it shall be performed; if he *brings an action of debt upon the obligation, and recovers, and after delivers up* the obligation, yet it is not any performance of the condition, but is broke, because he ought to deliver it up as it was at the time of the award made; for the recovery in the mean time is a deceit, and a disability of itself by his own act to perform it. Trin. 15 Jac. B. R. between *Nicklas and Thomas* adjudged.]

[2. If the *feoffee upon condition to re-infeoff* the feoffor *infeoff a stranger upon condition* to perform the condition, yet the condition is broke, because the feoffee hath disabled himself to do it. 38 Ass. 7. per Mowbray.]

[222]

[3. If there be feoffee upon *condition to re-infeoff, or to infeoff a stranger*, and after *another recovers the land* against him *by default*, yet till execution sued the condition is not broke, for before execution he is not disabled, for perhaps he will never sue execution, and if he *sues execution* after he has made the feoffment according to the condition, the feoffor may re-enter, for the condition broke. *44 Ass. 26. Curia, † 44 Ed. 3. 9. b.]

* Br. Conditions, pl. 217. cites S. C. and says, that if the feoffee suffers a recovery against him and will not plead in bar the feoffor may re-enter; for thereby the feoffee has disabled himself to make a re-feoffment.

† Br. Conditions, pl. 26. cites 44 E. 3. 8. S. C. and the feoffor may enter upon the feoffee; for the feoffee disabled himself by suffering the false recovery, and especially if execution on the recovery had been sued against the feoffee, the feoffor has good cause of entry; contra if it was upon good title and by ordinary writ.——Fitzh. Entre congeable, pl. 33. cites Pasch. 44 E. 3. 8. S. C. ——If such feoffee suffers a recovery by default *upon a feigned title*, the feoffor may re-enter for this disability before execution sued. Co. Litt. 222. b. cites S. C.

[4. If

[4. If the feoffee upon *condition to re-infeoff* &c. *grants a rent-charge out* of the land; this is a forfeiture of the condition, becauſe he is diſabled to make a feoffment of the land as it was at the firſt feoffment. * 44 Aſſ. 26. † 44 E. 3. 9. b. per Pearſey; and if the feoffor ſhould accept the re-feoffment, he ſhould be ſubject to the charge.]

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* Br. Conditions, 217. cites S. C. & S. P. and ſo if he be bound in a ſtatute, &c. for by thoſe acts he has diſabled himſelf to make a re-feoffment, and ſays that Littleton in his book, Title Eſtates, is accordingly.

† Br. Conditions, pl. 26. cites S. C. & S. P. that if the feoffee charges the land the feoffor may re-enter.——Fitzh. Entre congeable, pl. 33. cites 44 E. 3. 8. S. C.——In ſuch caſe the feoffor may enter, and ſo defeat the charge. Litt. S. 358.——Co. Litt. 222. a. ſays it is to be underſtood, that the grant of the rent charge is a preſent diſability; and therefore though the grantee brings a writ of annuity, and ſo diſcharges the land of it ab initio, yet the caſe of entry being once given by the act of the feoffee, the feoffor may re-enter; and that ſo it is if the rent-charge was granted for life, and the grantee had died before any day of payment, yet the feoffor may re-enter.

Where a man is bound of covenants *to infeoff J. N.* of the manor of D. *and after grants a rent-charge out of it*, and makes the feoffment, the bond is not forfeited; per Keble and Fairfax, to which the juſtices in a manner agreed. Br. Conditions, pl. 126. cites 3 H. 7. 14.

5. In debt, a man was bound in 100 l. *to appropriate the advowſon of D.* to the houſe of C. *by ſuch a day at the coſts and charges of the obligor*, and a penſion was aſſigned out of it after; and after this the obligor appropriated it; and per Keble and Fairfax J. the obligation is not forfeited. Br. Conditions, pl. 126. cites 3 H. 7. 14.

6. A tenant in dower of land where trees were growing, which it was lawful for her to cut, covenants with B. (the reverſioner) that *it ſhould be lawful for* B. *every year to cut* 20 *trees*. A. deſtroys and cuts all the wood; this is a breach. Mo. 18. pl. 65.

7. If I give licence *to take a deer in my park every year*, I cannot diſpark my park; otherwiſe if I give *licence to hunt* only; per Dyer. Mo. 19. pl. 65.

8. Leſſor covenants that if leſſee ſurrender the old leaſe at any time during his life, he will *make a new leaſe for* a greater number of years. *Leſſor grants the reverſion* over, leſſee need not now ſurrender his leaſe, but may bring covenant, becauſe the leſſor has diſabled himſelf. 5 Rep. 20. b. Paſch. 38 Eliz. B. R. Sir Anthony Mayne v. Scott.

Mo. 452. pl. 619. S. C. in debt on bond for performance of covenants adjudged in C. B. and affirm'd in B. R.——2 And. 18. pl. 12. S. C. and the court held the bond forfeited.——Cro. E. 470. pl. 17. Scot v. Mayne, S. C. in C. B. adjudged and affirmed in error in B. R.——Cro. E. 479. pl. 11. S. C. reſolved by all the juſtices without any great argument, that the defendant having diſabled himſelf by this fine to make the leaſe according to the covenant, and becauſe the plaintiff is not to make the ſurrender but with an intent to have a new leaſe, which, now he cannot have, it would be in vain for him to offer his ſurrender, but the covenant is broken of itſelf, and ſo the judgment was affirm'd.—Poph. 109. S. C. and judgment affirmed.—Jenk 256. pl. 49. S. C. adjudg'd, and affirm'd in error.—S. C. cited 2 Roll. Rep. 347, 348.—S. C. cited Raym. 36.—S. C. cited Hard. * 387.——And ſuppoſe it be but *a term to begin at a day to come*, yet by this the obligation is forfeited, becauſe the obligor has thereby diſabled himſelf to perform the condition in ſuch a plight as he might have done it when the obligation was made. Poph. 110. pl. 6. Mich. 38 & 39 Eliz. per Cur. in caſe of Scot v. Mainy.

*[223]

9. If a man *grant an advowſon* upon condition that the grantee ſhall *regrant* the ſame to the grantor in tail, in this caſe if the *church become void before the regrant*, or before any requeſt made by the grantor, he may take advantage of the condition; becauſe the advowſon

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(B. c) How to be performed; [or rather, in what Caſes it cannot be performed by reaſon of the] Obligor, [or Feoffee being] diſabled. [*Though re-enabled afterwards.*] * Fol. 448.

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[1. IF a *day* be *limited to perform* a condition, if the *obligor once diſables himſelf* to perform it, *though* he be *enabled again before the day*, yet the condition is broke. 21 Ed. 4. 55.]

[2. *As* if the condition be *to infeoff before Michaelmas*; if before the feaſt he *infeoffs another*, though he *after re-purchaſes*, yet he cannot perform the condition. 21 E. 4. 55.] S. P. 5 Rep. 21. a. & S. C. cited per Cur. & 32 E. 3. Tit. Bar. 264. becauſe he was once diſabled to make the feoffment.

[3. *So* where *no time* is *limited*, if the obligor once diſables himſelf, he is perpetually diſabled. 21 E. 4. 54. b.] S. P. where no time is limited by the parties, but the time is appointed by the law. Co. Litt. 221. b.——S. P. by Fenner J. and the court accordingly. Bulſt. 117. Paſch. 9 Jac. Anon.

[4. *As* if the condition be, *that A. ſhall ſuffer B. to recover* in a formedon brought by B. againſt A. *and that then B. ſhall infeoff A.* if B. be *nonſuit* in this formedon, he hath diſabled himſelf to recover and make the feoffment. 21 E. 4. 55.]

[5. If *feoffee* upon condition *to infeoff another infeoffs a ſtranger*, this is a forfeiture, becauſe he hath diſabled himſelf. 19 H. 6. 34. b.] Litt. S. 353. S. P. and that ſo it is if the feoffee makes a leaſe for life.——Co. Litt. 220. b. 221. a.——If a man is bound to infeoff B. by a day, and he infeoffs C. who infeoffs B. by the day, yet he has forfeited the obligation, for he ought to have done it himſelf; per Keble. Br. Conditions, pl. 127. cites 4 H. 7. 3.

6. In debt, A. was bound to B. by *obligation* in 100 l. upon condition that *if the ſaid A. after the death of his father, and within 3 months after, made ſufficient eſtate in ſuch land to a feme*, that then &c. Per Fiſher J. if the *baron after the marriage had leaſed the lands to a ſtranger for one month, remainder to the feme in fee*; this had been a good performance of the condition. Quære inde, tamen non negatur. Br. Conditions, pl. 127. cites 4 H. 7. 3.

7. If a *feoffment* is made *by A. to B.* upon condition *to infeoff J. S. before a certain day*, and *B. before the day is profeſſed a monk*. A. may enter preſently into the land, and notwithſtanding that *B. is deraign'd before the day*, yet the condition ſhall not be revived. Perk. S. 801. Co. Litt. 225. b. S. P.

8. *So if* the *feoffee was ſole at the time of the feoffment*, and *before the day*, or the condition perform'd, *he takes a wife* &c. Perk. S. 801. Litt. S. 357. S. P. and the feoffor and his heirs may enter preſently, becauſe ſhe will be intitled to dower after the death of her huſband.——Co. Litt 221. a. S. P.——And tho' ſhe dies before the huſband ſo as this poſſibility took no effect, yet the feoffor may re-enter. Co. Litt. 221. b.——10 Rep. 49. b. S. P. and ſays the reaſon is, that the law has principal regard to the original and fundamental cauſe.

A ...ever-

The reason is, for that, as Littleton says, immediately by

9. A *diverſity* is to be obſerved *between a diſability for a time on the part of the feoffee, and* on the part *of the feoffor.* Co. Litt. 221. b.

the diſability of the feoffee the condition is broken, and the feoffor may enter; but it is not ſo by the diſability of the feoffor or his heirs, for if they perform the condition within * the time it is ſufficient, for that they may at any time perform the condition before the day; ſo it is if the feoffor enter *into relig on*, and before the day *is deraigned*, he may perform the condition for the cauſe above mentioned; et ſic de ſimilibus. Co. Litt. 221. b. 222. a.

* [225]

10. If a man makes a *feoffment* in fee, upon condition *that if the feoffor or his heirs pay* 100 *l. before ſuch a day* &c. The *feoffor* [*before the day*] *commits treaſon, and is attainted and executed*, now is there a diſability on the part of the feoffor, for he hath no heir; but *if the heir be reſtored before the day* he may perform the condition, as it was reſolved Trin. 18 Eliz. C. B. in *Sir Thomas Wiat's caſe*, which lord Coke ſays he heard and obſerved; otherwiſe it is if ſuch a diſability had grown on the part of the feoffee. Co. Litt. 221. b.

S. P. reſolved per tot. Cur. 2 Rep. 59. b. Mich. 40 & 41 Eliz. B. R. the 3d reſolution in Winnington's caſe. ——Jenk. 253. pl. 44. S. C. & S. P. reſolv'd.

11. If the *feoffee is diſſeiſed*, and after *binds himſelf in a ſtatute* ſtaple, or merchant, *or recognizance, or takes wife*, this is no diſability in him, becauſe during the diſſeiſin the land is not charged therewith, neither is the land in the hands of the diſſeiſor liable thereunto. And in that caſe, if the wife dies, or the conuſee releaſes the ſtatute or recognizance, and after the diſſeiſee enters there is no diſability at all, becauſe the land was never charged therewith, and therefore in that caſe the feoffee may enter and perform the condition in the ſame plight and freedom as it was conveyed unto him. Co. Litt. 222. a.

Comb. 299. S. C. but S. P. does not appear.

12. Where a *perſonal notice* is neceſſary, and the plaintiff by his *act in abſconding* had prevented it, ſo that it could not be given, the defendant was not bound to ſeek the plaintiff to give notice. 1 Salk. 214. Paſch. 6 W. 3. B. R. Nurſe v. Frampton.

(C. c) *What* ſhall be a *Diſability.*

Br. Conditions, pl. 26. cites S. C. ——Fitzh. Entre congeable, pl. 33. cites Paſch. 44 E. 3. 8. S. C.

[1. IF a *ſtranger recovers* by real action *againſt feoffee* upon condition *to re-infeoff*; this is no diſability of the feoffee before *execution ſued*, for perhaps he will not ſue execution. 44 E. 3. 9. b.]

——See (A. c) pl. 3. and the notes there.

Br. Conditions, pl. 26. cites S. C. ——Fitzh. Entre congeable, pl. 33. cites Paſch. 44 E. 3. 8. S. C.

[2. *But if he* that recovers *ſues execution, or enters* upon the feoffee, the condition is broke, for he is diſabled. 44 Ed. 3. 9. b.]

Br. Conditions, pl. 26. cites S. C. ——Fitzh. Entre congeable, cites Paſch. 44 E. 3. 8. S. C.

[3. *So if after ſuch recovery* the *feoffee makes a re-feoffment, and* after *he that recovers enters* upon him, *or ſues execution*, now the condition is broke, and the feoffor may re-enter. 44 Ed. 3. 9. b.]

[4. If

[4. If an *annuity* be granted *till* he is *promoted to a benefice*, if the *grantee takes a wife*, the annuity is determined, becauſe by the marriage he is diſabled, & lex non cogit inutile, ſcilicet, to proffer it to him. 7 H. 4. 16.] Br. Annuity, pl. 16. cites S. C.

5. In debt A. was bound to B. by *obligation* in 100 l. upon condition that *if the ſaid A. after the death of his father, and within three months after, made ſufficient eſtate in ſuch land to a feme*, that then &c. The obligor himſelf married the feme; this is clearly a forfeiture of the obligation. Contra if the obligee had married her. Br. Conditions, pl. 127. cites 4 H. 7. 3. [226]

6. He, who is *bound to carry my corn*, cannot *ſay that he has no cart*. Br. Barre, pl. 111. cites 16 H. 7. 9. per Keble.

7. *So* where a *man is bound to mow my graſs*, it is no plea that he *has no ſcythe*. Ibid.

(D. c) What Thing will *excuſe the Penalty* of the Obligation *only*. *Acts of the Obligee.*

See Tit. Tender (N.) (Q.) (R.) See Tout Temps Priſt. (D) &c.

[1. IF the *condition* be *to pay a ſmall ſum*, and the *obligee refuſes it at the day*; this ſaves the penalty, but he ought to pay the ſmall ſum notwithſtanding. * 20 E. 4. 1. b. dubitatur. 22 E. 4. 26.] * Br. Tout Temps Priſt. pl. 31. cites S. C.——

The ſum mentioned in the condition is not loſt by the tender and refuſal, not only becauſe it is a duty and parcel of the obligation, and therefore is not loſt by the tender and refuſal, but alſo for that the obligee has remedy by law for the ſame. Co. Litt. 207. a.

[2. *So* it is, *though* there be a *place limited for payment*, and the obligee refuſes it. D. 3. 4. Mar. 150. 84. Contra 22 E. 4. 26. Contra † 7 H. 4. 18.] † Br. Condition, pl. 38. cites S. C.—— Br. Tout Temps Priſt, pl. 35. cites 5 H. 4. 18. S. P. [but it ſeems miſprinted and ſhould be 7 H. 4. 18. as in Roll, and ſo are the other editions.]——Br. Tender and refuſal. pl. 6. cites S. C. [but the point of the penalty being ſaved does not clearly appear in either of the two laſt books.]

3. In debt, if the defendant be bound to the plaintiff *in 20 l. to pay 10 l. ſuch a day*, and the *defendant tenders it at the day, and he receives part, and of the reſt he reſpites the receipt thereof till agreement be made between them*; and after the *plaintiff at another day required payment, and he refuſed*, yet the defendant ſhall not forfeit the penalty, for this is ſaved by the firſt offer. Br. Conditions, pl. 145. cites 7 E. 4. 3.

4. Where an obligation is made, and *afterwards a defeaſance* is made thereof *if he pays a leſſer ſum* &c. there by a tender of the leſſer ſum the obligor is diſcharged of all; but otherwiſe it is of an obligation with a condition to pay a leſſer ſum. Cro. E. 755. pl. 16. Paſch. 42 Eliz. C. B. Cotton v. Clifton.

(E. c.) *Per-*

(E. c) *Perform'd.* At what *Time* it ſhall be, *if no [or an uncertain] Time be limited.* And what not.

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Br. Obligation, pl. 56. cites 20 E. 4. 17. S. C.

[1. IF the condition be to pay *when he comes to his houſe*, it ſhall be paid when he comes there, and not before. 20 E. 4. 18.]

and after the words (when he comes to his houſe) the condition went on, viz. *and at Michaelmas 5 l. and at St Andrew's day then next following 5 l.* and at Chriſtmas then next, &c. 5 *l.* Brian * ſaid, that as to the words (and 5 *l.* at Michaelmas, &c. then next following) *he ſhall pay it at the next Michaelmas*, &c. after the making the obligation by reaſon of thoſe words (then next following;) for had thoſe words been omitted the payment ſhould be at the Michaelmas next after the coming to his houſe; quod tota curia conceſſit.

If a man be bound in 20 l. that *if he goes to Rome that the obligation ſhall be void*, or if he *inſeoffs the obligee*, &c. in this caſe he ſhall have all his life to do it. Br. Conditions, pl. 14. cites 33 H. 6. 47.——But Brook ſays, *quære* inde and ſee T. 9 E. 4. 22. that *upon requeſt he ſhall do it immediately.* Ibid.

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2. The condition is, that *if goods are eſloined that then he ſhall ſatisfy*, that is, *as ſoon as* the goods are eſloigned. Br. Conditions, pl. 14. cites 33 H. 6. 47.

Fol. 449.

(F. c) [*Performed.*] How, [*and when. The Time not being certainly fixed. And where a Refuſal or Acceptance ſhall be peremptory.*]

S. C. cited per Cur. 8 Rep. 92. b.——S. C. cited Cro. E. 298. pl. 9. per Popham.——S. C. cited, Arg. 2 Bulſt. 243.——

[1. D. 19 Eliz. 354. 32. A *fine levied* by *Edward Barrowes* to *Anthony Barrowes* to the uſes in an indenture, where was a *proviſo*, *if Edward Barrowes pays or tenders 20 l. during his life at the Font ſtone* in the church of S. *to Anthony*, that *it ſhould be to the uſe of Edward in fee*; by three juſtices a tender of the ſaid ſum at the ſaid place is void, if he gives not *notice* to Anthony, that he or his deputy may be there to receive it, becauſe no day certain was appointed.]

S. C. cited 3 Bulſt. 306. Arg.——S. C. cited Arg. Palm. 434.——S. C. cited per Cur. 13 Rep. 2.——Co. Litt. 211. a. S. P. and cites S. C.——Cart. 93. Arg. cites S. C.——Mo. 622 pl. 833. Trin. 42 Eliz. in Cane. lady Burgh's caſe, alias, Burgh v. William, S. P. held accordingly by the judges of Serjeant's inn in Chancery-lane, on a reference by the lord chancellor, and ſo certified by them.

Where an *eſtate is veſted to be deveſted by the tender* of any ſum to any one, and no time is limited; in this caſe the tenderer muſt give notice. Jenk. 325. in Arg. of pl. 39.

So where an obligation is conditioned *to pay money at any time during his life at a place certain*, the obligor muſt give the obligee notice on what day he will pay it; but in this caſe as well as in the caſe of a feoffment as above, *if at any time the obligor or feoffor meets the obligee or feoffee at the place*, he may tender the money. Co. Litt. 211. a.——S. P. as to an obligation, Cro. E. 14. pl. 1. per Cur. Paſch. 25 Eliz. C. B.

Br. Conditions, pl. 65. cites S. C. but he ought to do it in as ſhort time as he can.——(N. b) pl. 4. S. C.

[2. *Where* a condition *by the expoſition of the law is to be performed upon demand*, yet he ſhall have a *reaſonable time* to perform it *after demand.* 15 Ed. 4. 30.]

[3. [And]

[3. [*And*] where it is to be performed in a reaſonable time after demand, by the expoſition of law, *if upon demand he refuſes*, the condition is broke, *although he performs it after within ſuch reaſonable time* as would have been a good performance, if there had been no refuſal. 15 Ed. 4. 30.]

[4. *So* if the condition be *to do a thing at a day which ſhall be aſſigned*; if he does not perform it at the day aſſigned, he cannot perform it after. 18 E. 4. 15.]

[5. If the condition be, that there ſhall be a *contract upon the liking or diſliking* upon the view [if he] once likes or diſlikes, he cannot *alter it*, for otherways there would be no end; but *otherways* it is * *where a day is limited*, there if he likes or diſlikes before the day, yet he may alter it at the day. † 46 E. 3. 5. b. 14 H. 8. 23. b.]

† Br. Conditions, pl. 30. cites S. C. and alſo 14 H. 8. 22. S. P. accordingly.——Fitzh. H. Dett. pl. 133. cites S. C.

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(G. c) [Performance.] What will excuſe the Performance of a Condition.

Acts of God.

[And how he ſhall perform it afterwards.]

[1. *Regularly*, if a condition, which was poſſible at the making thereof, becomes impoſſible by the act of God, the obligation is diſcharged.]

Co. Litt. 206. a. S. P. —If a feoffment be made upon condition that the feoffee ſhall go to Rome, &c. and he dies in the voyage, I may re-enter, becauſe the condition is not perform'd. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. per Paſton.——See pl. 8. and the notes there.——See (I. c) pl. 1. S. P.

[2. If a *man* be *let to mainprize*, it is a good plea at the day when the manucaptors ought to have the body &c. for the manucaptors to ſay, that he who was let to mainprize *was dead before the day*, ſo that they could not have his body at the day. * 21 E. 4. 70. b. Curia. Contra † 21 E. 3. 51. b. ſcilicet, that this cannot be averred by the manucaptors, but it *ought to come in by return of the ſheriff* upon a capias againſt him and the manucaptors.]

* (I. c) pl. 3. S. C. † Fitzh. Mainpriſe, pl. 24. cites S. C.—— condition, that A. ſhall appear before ſuch a day, if A. dies before the day, &c. the bond is ſaved. Arg. Palm. 514 cites 31 H. 6. Bar. pl. 60.—— Condition, that J. S. ſhall bring ſureties, and J. S. dies, the bond is diſcharged. Ibid. cites 15 H. 7. 2.

[3. *But* it is clear by theſe books, that *his death excuſes* the manucaptors, Mich. 32, 33. El. B. R. between Warter plaintiff, and Perry and Spring defendants, per Curiam.]

Cro. E. 199. pl. 20. S. C. at firſt the court held it no plea that the principal was dead the day of judgment given; becauſe it goes in avoiding the judgment, and proves it to be erroneous, which cannot be avoided but by error; but that they might plead the death of the defendant before the ſci. fa. and after the judgment, for then they could not bring in the body; but afterwards the plea was received, becauſe they cannot have a writ of error to reverſe the judgment. ——2 Le. 101. pl. 125. S. C. ſays it was ruled, that the defendant ſhould be ſworn that the plea was true.——See tit. Bail. (Y) per totum.——

[4. If

* Fitzh. Aſſize, pl. 102. cites S. C. —** Br. Conditions, pl. 106. cites S. C. and was to ſecure the payment of 8l. to B.

[4. If *A. agrees with B. to give him eight marks, to ſerve him three years, and* becauſe he hath not the money ready, *in ſurety of payment* he *enfeoffs him of lands in fee*, upon condition, *to continue till* the eight marks are *paid*, &c. and after *A. dies within three weeks* after this agreement, yet his death ſhall not excuſe the payment of the eight marks; for the heir cannot enter before payment thereof, or raiſing thereof out of the land. 21 E. 3, 11, b. * 21 Aſſ. Pl. 18.]

on his taking A. to be his apprentice for 3 years; and A. died within 3 weeks, yet the heir of A. cannot enter till the 8l. is paid, but after the money is levied he may, Brooke ſays, quod nota; for the condition on the feoffment was only for the 8l. and not for inſtructing A.——Br. Aſſize, pl. 230. (229) cites S. C.——

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Roll. Rep. 329. pl. 36. Fol. 450. S. C. and in ſci. fa. a-

[5. If A. *recovers a debt* againſt B. in Banco, and B. *brings a writ of error*, and *finds manucaptors* to proſecute with effect, *an after dies before the* * *return of the writ.* This act of God will excuſe the manucaptors. Hill. 13 Jac. B. R. between Sir Tho. Middleton, and Twinie, per Curiam.]

againſt the bail, the court thought that the plea was not good, and judgment was given for the plaintiff accordingly againſt the manucaptors.

See tit. Bail. (C) pl. 1. S. C. and the notes there.

[6. If a man becomes *bail* for another in an action, and after the *plaintiff recovers againſt the principal*, and the *capias againſt him is returned non eſt inventus, and* this is *filed*, and after the *principal dies before any ſcire facias* ſued againſt the bail; yet this ſhall not excuſe the bail, in as much as he died after the capias returned and filed; (yet it ſeems, that after this, and before the return of the ſcire facias, the bail is excuſed de gratia, by bringing him in.) Trin. 5 Jac. B. R. between *Timberly, and Boothe*, adjudged upon demurrer.]

See tit. Bail. (C) pl. 2. S. C. the notes there.

[7. But, *otherwiſe* it had been if he had *died before a capias returned or filed.* Trin. 5. Jac. B. R. agreed per Curiam Mich. 2 Car. between *Caſe and others plaintiffs, and Davies defendant*, adjudged upon demurrer, in as much as it was *not averred by the plaintiff in the ſcire facias* againſt the bail, that there was a capias returned againſt the principal before his death, which ought to come in of his part, and then was cited by juſtice Jones, 43 Eliz. B. R. between *Hobbes and Doncaſter*, adjudged, that the death of the principal before the return of the capias diſcharges the bail.]

If a condition be poſſibl at the time of the making it, as to in.eoff

[8. If a man covenants *to do* a certain thing, *before a certain time*, though it becomes impoſſible by the act of God, this ſhall not excuſe him, in as much as he hath *bound himſelf preciſely* to do it.]

J. S. and afterwards it becomes impoſſible by the act of God, or of J. S. As if J. S. dies or enters into religion by the day, the obligation is ſaved by the condition. Br. Obligation. pl. 45. cites 2 E. 4. 2. by the juſtices.——Co. Litt. 206. a.

[9. If a man, for a certain conſideration given by A. aſſumes *to deliver to A. certain goods in London*; though he after puts the goods into a boat to carry to London accordingly, and in going the *boat is overturned by the violence of the tempeſt* and water; yet this

ſhall not excuſe him in an action upon the caſe upon this promiſe. Tr. 32 El. B. R. between Tomſon and Miles, per Curiam.]

[10. If a man covenants *to build an houſe before ſuch a day*, and after the *plague is there before the day, and continues there till after the day*, this ſhall excuſe him from the breach of the covenant, for the not doing thereof before the day, for the law will not compel a man to venture his life for it, but he may do it after. H. 8. Jac. B. R. between Lawrence and Twentiman, per Curiam.]

[11. If the condition *conſiſts of two parts in the disjunctive*, in which the party hath an election which of them to perform, *and both poſſible at the time of the making* the condition, and one becomes impoſſible afterwards by the act of God. This ſhall excuſe the performance of that and the other alſo, for otherwiſe his *election* ſhould be taken away by the act of God. Co. 5. Laughton 22.] Cro. E. 398. pl. 5. Trin. 37. Eliz. B. R. Eaton v. Laughter S. C. the condition was, that if one R. aliened his wife's lands; if then during her life he purchaſed other lands of as good title and annual value to his wife, and her heirs; or do, or ſhall leave her by his laſt will, ſo much in value, by making her executrix, or in a legacy, that then, &c. R. alien'd the land. The wife died, leaving R. who neither in her life time, or ſince her death purchaſed other lands; all * the juſtices reſolved that the obligation was not forfeited; for the condition is expreſs, that R. perform it at any time during his life, and the impoſſibility thereof, being by the act of God, ſhall not turn the obligor to any prejudice. So as now being prevented of part of the time, he is diſcharged from performing it. But *when the law appoints a man time to do a thing during his life* he ought at his peril to perform it, or otherwiſe his obligation is forfeited. And when one has election to do one thing or another before a certain time, and by the act of God it is become impoſſible to perform the one, the law will privilege him from the other, that he ſhall not forfeit his obligation by the non-performance thereof. But Gawdy conceived that the obligation was not forfeited, but that R. ought during his life to purchaſe lands to his wife's heir, or otherwiſe the obligation will be forfeited; but the other juſtices were e contra in that point; and judgment for the defendant.——Mo. 357. pl. 485. Eaton's caſe. S. C. adjudg'd for the defendant; becauſe the condition of the obligation, was for the benefit of the obligor, to give him election to purchaſe other land, or to leave money, or goods; which election he is prevented of by the death of his wife, which is the act of God, and ſo in law a diſcharge of part of the condition, and then the whole condition, and obligation is diſcharged.——Poph. 98. S. C. but is only ſtated there.——S. C. cited Palm. 515, 516. Arg.——S. C. cited Arg. Mod. 265.——S. C. cited 2 Jo. 96. per Cur.——3 Mod. 233. Arg. cites S. C. and ſays it was inſiſted that the whole intent of the condition was to provide a ſecurity for the wife, ſo that ſhe dying before R. the non-performance could hurt no body, there being no manner of neceſſity that any thing ſhould be done in order to it after her deceaſe.——1 Salk. 170. pl. 2. the ground of Laughter's caſe was denied to be univerſal.——S. C. cited by Powell, J. Lutw. 694. Trin. 9 W. 3. and ſaid, that Laughter's caſe is good law, but the reaſon thereof given in 5 Rep. has been denied. And Treby, Ch. J. ſaid that Dolben, J. had informed him, that the reaſon of Laughter's caſe had been denied in a caſe when ſeint John was Ch. J. of C. B. and that 2 of the judges in that caſe, had ſpoke with 2 of the judges in Laughter's caſe, who affirmed to them that no ſuch reaſon was given for the reſolution in Laughter's caſe.—Ld. Raym. Rep. 280. Treby. Ch. J. cited the affirmation of ſeint-John as to Laughter's caſe, yet the whole court held that the principal caſe of Laughter was good law.——

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[12. [*But*] *if* a condition conſiſts of two parts, of which *one was not poſſible at the making* of the condition to be performed, he ought to perform the other. † 21 E. 3. 30. Co. 5. *Laughton* 22.] † Br. Conditions, pl. 47. cites 21 E. 4. 29. S. C.——And the performing the part which is poſſible is ſufficient; per Popham and Clinch. Cro. E. 780. in pl. 14. Mich. 42 Eliz. B. R.——

[13. *As* if the condition be *to infeoff J. S. or his heirs, when he comes to ſuch place*, he is bound to enfeoff J. S. when he comes, becauſe the other is not poſſible, for he cannot have an heir during his life, and ſo he had *not any election*. * 21 E. 3. 30. Co. 5. Laughton 22.] * Br. Conditions, pl. 47. cites 21 E. 3. 29. S. C. & S. P. accordingly.——5 Rep. 112. a. S. C. cited per Curiam.

[14. If

Brownl. 72, 73. S. C. adjudged for the plaintiff.

[14. If a condition of an obligation be *to make an assurance* of certain lands *to the obligee and his heirs*, and after the *obligee dies*, yet he ought to make the assurance to his heirs; for this copulative, *and* his heirs, shall have the signification of a *disjunctive*. Trin. 40 El. B. between *Horn and May*, adjudged.]

Fol. 451.

Brownl. 72, 73. S. C. but S. P. does not appear.

[15. If the condition of an obligation be *to enfeoff two before such a day*, and *one dies before the day*, yet he ought to enfeoff the other. Trin. 40. El. B. in the said case of *Horn and May*, adjudged.]

——Br. Conditions, pl. 127. cites 14 H. 7. 3. per Jay, that in such case he * may infeoff the other. * [All the editions of Brooke are (may) but the year-book is (shall) infeoff.] —— Bendl. 35. pl. 56. Pasch. 4 E. 6. S. P. held e contra by Mountague Ch. J. of C. B. and he said that this was Weston Browne's case, but cites Litt. Tit. Estates, that otherwise it is of feoffment upon condition.

Jo. 172. pl. 6. Wood v. Bates. S. C. resolved una voce, that the plaintiff shall be barr'd; for the condition is in the disjunctive, or upon a contingency, viz. that if the marriage takes effect, and the said B. does not receive 200 l. within 2 years after his death, either by his will, or by the custom of London, and the said B. dying within the said 2 years, making it become impossible by the act of God, that this part should be perform'd, therefore the obligor is not bound to perform the other part.

[16. If the condition of an obligation be, that whereas a marriage is intended between A. and B. *if* the said *marriage takes effect*, *and* if B. the *wife survives* A. *and does not receive* 300 *l. of A. by his will, or, by the custom of London, within three months after the death of A.* that *then if the obligor pays to B. or her executors* *500 *l. within six months* after, the obligation shall be void. And after the marriage takes effect, and B. survives A. and dies within three months, without receiving any thing of the said 300 l. by the will of A. or by the custom of London; it seems the *death of B. within the three months* shall not excuse the obligor to pay the 500 l. to the executors of B. because it is *not any* disjunctive condition, of which the obligor hath any *election* to do the one or the other. But the condition is, that if a stranger does not pay so much within a time, that he himself will pay another sum; so that the *death of the party who is to receive from the stranger* shall not excuse the obligor. Trin. 3. Car. between *Wood and* . . . .]

Palm. 513. S. C. and at first 3 justices were of opinion for the plaintiff. But after further argument, the whole court was against the plaintiff, because the performance is prevented by the act of God; for the feme ought to receive so much, and not to have so much left her by the baron only; and the court said that a difference taken by Noy (of counsel for the plaintiff) is not law, viz. that where it is in election of the stranger, that there, though part becomes impossible by the act of God, the condition is not discharged; for it is discharged by the common case of bail who enter into recognizance to pay, or that the principal shall render himself, in such case if the principal dies the recognizance is † [not] forfeited. Noy answered that here it might be impossible, upon the death of the baron, as to both parts; because the baron has left nothing by his will, and perchance the e is nothing left for the feme to take by the custom, and consequently the obligation forfeited immediately. But per Cur. this does not appear the one way or the other, and so is out of the case; whereupon judgment for the defendant nisi, &c.

† It seems the word [not] is omitted by the error of the press.

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This case is Mich. 34 E. 1. and in debt by the clerk on the bond the patron pleaded the clerk's taking a wife before the avoidance, and that so he was disabled to take the church; but by Hengham the patron is not to judge of this, but he ought to have presented him to the bishop, who ought to demand if he was convenable [capable] or not, and then the patron had been quit. Fitzh. Dette, pl. 164.

17. There is a *diversity* between a *disability and* an *impossibility*; as if I am *bound to present J. S. before Mich. &c. to the church of B. and J. S. in the mean time marries*, yet the condition is not discharg'd. Palm. 514, 515. Arg. cites Fitzh. Dette, pl. 164.

18. Where a man is bound *for the appearance of W. N. in Banco*, there if he *dies before the day*, the bond is ſaved. *Contra* if he be *languiſhing in priſon*. Br. Conditions, pl. 150. cites 8 E. 4. 12. 13. per Littleton. Br. Conditions, pl. 70. cites S. C. & S. P. by Littleton.

19. There is a diverſity where a condition becomes impoſſible *by the act of God*, as death, and where by a *3d perſon* [or ſtranger] and where by the *obligor*, and where by the *obligee*; the firſt and laſt are ſufficient excuſes of forfeiture, but the 2d is not; for in ſuch caſe the obligor has undertaken that he can rule and govern the ſtranger, and in the 3d caſe it is his own act. See Br. Condition, pl. 127. cites 4 H. 7. 73. per Brian Ch. J.

20. Debt upon obligation; the defendant ſaid, that it is *indorſed* upon condition, *that if J. S. comes to L. before ſuch a feaſt, and brings two ſureties with him, to be bound to the plaintiff in* 40 *l.* that then &c. *and that before the ſaid feaſt* J. N. *died*. Judgment &c. and a good plea per tot. Cur. And as to the time before the feaſt it is not material, for all this time is the defendant's, for if he does it in the vigil of the feaſt it is ſufficient. Br. Conditions, pl. 70. cites 15 H. 7. 2.

21. If I am bound by bond *to infeoff the obligee at Mich.* and I *die before Mich.* my *executors ſhall not be charged* with it; for the condition is become impoſſible by the act of God, becauſe *the land is deſcended to the heir*. 2 Le. 155. pl. 189. 19 Eliz. B. R. per Cur. in the caſe of Kingwell v. Chapman.

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22. In debt, the condition reciting that there were divers controverſies betwixt the plaintiff and J. K. a ſtranger, who ſubmitted themſelves to the award of J. C. the defendant bound himſelf in 200 *l.* to the plaintiff, *that J. K. ſhould perform the award on his part*. The arbitrator *awarded, that J. K. ſhould pay the plaintiff* 30 *l. viz.* 20 *l. at Eaſter, and* 10 *l. at Michaelmas next*. The defendant pleaded payment of the 20 *l.* at Eaſter, and that *J. K. died before Mich.* All the juſtices held that the obligation was forfeited, but no judgment was given in the caſe, becauſe the penalty was great for ſo ſmall a duty. Cro. E. 10. pl. 6. Mich. 24 & 25 Eliz. C. B. Kingwell v. Knapman. 2 Le. 155. pl. 189. Kingwell v. Chapman, 19 Eliz. B. R. the S. C. held accordingly, 1ſt. Becauſe the ſum awarded is now become a duty as if the condition of the bond had been for the payment of it. 2dly, Becauſe a day is appointed for the payment of it, and cites 10 H. 7. 18. 3dly, The executors cannot perform the condition.——S. C. cited per Cur. Raym. 415, 416. Mich. 32 Car. 2. B. R.

23. Huſband bound himſelf in a bond conditioned, *that he and his wife*, upon the reaſonable requeſt of the obligee, *ſhould levy a fine*, &c. The requeſt was made when the wife was ſick and could not travail. The court thought it not a reaſonable requeſt during her ſickneſs; and if ſhe is excuſed the baron is excuſed alſo, becauſe in ſuch caſe he and his feme cannot levy the ſaid fine, and joint-conuſance is intended by the ſaid condition, whereupon iſſue was taken on the ſickneſs. Mo. 124. pl. 270. Paſch. 25 Eliz. Anon.

24. A. covenants that B. ſhall make *ſuch reaſonable aſſurances*, &c. to D. and his heirs, *as D. or his heirs ſhould reaſonably deviſe* or require. *D. required a fine*. B. came before the juſtices to acknowledge

knowledge it, but B. was *non compos, and the juſtices would not take the conuſance*; the condition is not broken, the words being general; but if the words had been ſpecial *to acknowledge a fine* it would have been otherwiſe. Le. 304. pl. 432. Mich. 32 Eliz. C. B. Pett v. Callys.

Cro. E. 277. pl. 9. Trop v. Bendingfield, S. C. and the juſtices upon the firſt motion conceived the plea of the death of J. S. before the time of his being to go to the Guildhall porch to be good; becauſe by the act of God he is depriv'd of his appearance, and ſo his bond ſaved, though he pays not the 10 l. for he had election to do the one or the other; but they would adviſe.

25. The condition of a bond was, *that J. S. a ſtranger, ſhould ſtand to an award, if it be made before the laſt day of Auguſt next*, &c. *and if no award ſhould be then made, then he ſhould come into the porch of the Guildhall in Norwich, the 7 Sept. and there ſtay two hours, to be arreſted again at the ſuit of the obligee, or ſhould pay to the obligee 10 l. in that porch on Mich. day next after. No award was made by the time*, and J. S. *the ſtranger*, who was to perform theſe things, *died* [*before the 7 Sept.*] yet it was adjudged, that the money ought to be paid at Mich. Mo. 357. in pl. 485. cites Mich. 34 & 35 Eliz. B. R. Crapp v. Field.

26. Bond *to pay* 20 *l.* before the 1ſt of May, *or marry* J. S. before the 1ſt of Auguſt, if J. S. dies before the 1ſt of Auguſt, yet the bond is forfeited; per Walmſley. Cro. E. 864. pl. 42. Mich. 43 & 44 Eliz. C. B. in caſe of More and Morecombe.

27. If a condition be, that *if the mortgagor or his heirs pay ſuch a day*, &c. and *he dies before the day without heir*, whereby the condition becomes impoſſible to be performed by the act of God, the eſtate of the mortgagee is hereby become abſolute. Co. Litt. 206. a.

28. A bill to be *relieved* againſt a bond of 300 l. conditioned to pay 15 l. per annum during the plaintiff's life; but the plaintiff pretended, that the ſaid bond was for the performance of an agreement which was by the death of the plaintiff become impoſſible to be performed, and ſo the bond ought to be diſcharged. Decreed the plaintiff to pay the 15 l. per annum, and arrears with damages. Chan. Rep. 149. 27 Car. 1. St. Nicholas v. Harris.

[233] 29. In debt upon a bond conditioned *to give ſecurity* by a certain day *as the chamberlain* of London ſhould *appoint*, defendant pleaded that there was no chamberlain of London at the day. Adjudged on demurrer for the defendant. Vent. 186. Hill. 23 and 24 Car. 2. B. R. Sands v. Rudd.

3 Keb. 738. pl. 34. Hill. 28 & 29 Car. 2. B. R. the S. C. & per Cur. here is an election according to Laughter's caſe, and one part being become impoſſible the

30. The condition of a bond recited, that *W. was indebted to the plaintiff in* 70 *l.* by bond, and the *defendant became bound with him that he ſhould pay the money on or before the* 25th *December, or that the defendant, on or before the ſaid* 25th *December, ſhould render the body of W. ſo as the plaintiff might declare againſt him* in the cuſtody of the officer *next Hillary term*. The defendant pleaded, that *W. died before the* 25th *of December*. The court held that there was no difference between this caſe and that of *Laughter v. Monox*, 5. Rep. 21, and gave judgment for the defendant, quod querens nil capiat &c. 2 Jo. 95, 96. Mich. 29 Car. 2. B. R. Warner v. White.

bond

bond is ſaved; et adjornatur.——Ibid. 761. pl. 49 Paſch. 29 Car. 2. B. R. the court inclined ſtrongly that the defendant was excuſed by the death of W. ſed adjornatur.——Ibid. 770. pl. 9. Trin. 29 Car. 2. B. R. adjudged for the defendant; niſi.——2 Mod. 201, 202. Arg. cites S. C. but ſtates it that W. died after the 25th December, but before the term, and held that the bond was not forfeited; becauſe the obligor had election to do the one or the other, and the performance of the one becoming impoſſible by the act of God, the obligation was ſaved.

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31. Condition that A. (*a ſtranger*) ſhall pay ſo much ſuch a day, or perſonally appear ſuch a day at ten in the morning at B.'s houſe; tho' *ægrotus fuit ex viſitatione Dei* &c. is a good plea as to that part of the *disjunctive*, yet being in the caſe of a ſtranger the other part ought to be performed. Raym. 373. Trin. 32 Car. B. R. Topham v. Pannel.

32. Debt upon bond conditioned *to give the plaintiff a true account of all money received by him &c. by the 28th day of November &c. or render his body to priſon at the plaintiff's ſuit in any action he ſhall then commence againſt him*, then &c. The defendant *pleaded*, that he was *always ready* to render an account; *but farther, that the plaintiff had not commenced any action againſt him ad vel ante 28th November præd', whereupon he might render himſelf to priſon*; the plaintiff *replied*, that 300l. was due to him &c. and *that after the ſaid 28th November (viz.) 12 Aprilis, he ſued out an original in account; and the defendant not appearing he ſued out a capias, whereof he gave the defendant* notice *and required to render himſelf* according to the condition. Upon a demurrer judgment was given per tot. Cur. for the defendant; becauſe he being to do the firſt act, has election either to give an account, or render himſelf on the action. Beſides, the breach is not well aſſigned, for the defendant is not obliged to render himſelf on an action which ſhall not be ſued againſt him 28th Nov. the word in the condition being (then commenced) and is not to be conſtrued then, or from thenceforth; for that would be to give the plaintiff liberty to commence an action at any time during his life, and conditions are always made for the advantage of the obligor. 3 Lev. 137. Mich. 35 Car. 2. C. B. Stanley v. Fern.

33. One deviſed to his eldeſt daughter, upon condition ſhe ſhould *marry his nephew on or before ſhe attained the age of 21.* and the *nephew died young, and the daughter never refuſed*, and indeed never was required to marry him; and after the nephew's death, ſhe being about 17, married J. S. and it was adjudged in C. B. and affirmed in B. R. that the condition was not broken being become impoſſible by the act of God. 1 Salk. 170. pl. 1. Trin. 4 W. and M. in B. R. Thomas v. Howell.

4 Mod. 66. S. C. three judges were for affirming the judgment, but Gregory e contra.——Vent. 301. & 319. S. C. the judgment, was affirmed.——If there be a *condition ſubſequent*, which becomes impoſſible by the act of God, this excuſes and diſcharges the condition; per the maſter of the Rolls, Trin. 1731. and ſaid it is a rule in law, for lex non cogit ad impoſſibilia.

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34. Condition was to *make obligee a leaſe for life* by ſuch a day *or pay* 100 *l.* to him; obligee dies before the day, his executors ſhall have the 100l. Per Treby Ch. J. and the ground of Laughter's caſe was denied to be univerſal. 1 Salk. 170. pl. 2. Mich. 9. W. 3. C. B. Anon.

S. P. by Treby Ch. J. who ſaid that it had been reſolved accordingly in

time of Seint-John, Ch. J. Lutw. 694. Trin. 9. W. 3.——P. by Powell J. ibid.——S. P. said by Treby Ch. J. to have been adjudged accordingly, in time of Seint-John Ch. J. Ld. Raym. Rep. 279, 280. and the reporter adds a nota, that this case seems to be undistinguishable in reason from Laughter's case.

But see pl. 34. supra, an exception to this rule.

35. Where a condition is in the *disjunctive*, if one part becomes impossible by the act of God the obligor is discharged from performance of the other part. Arg. 10. Mod. 268. Mich. 1 Geo. 1. B. R.

(H. e) [What will excuse the Performance.] Acts of the *Law*.

[1. IF an *annuity* be granted upon condition, *that the grantee shall be attorney of the grantor in all pleas*; if he be after *made sheriff*, yet this shall not excuse him from the performance of the condition, but he ought to be his attorney, otherwise the condition shall be broke. 5 Ed. 2. Annuity 44.]

Cro. J. 374. pl. 5. S. C. adjudged.——Roll. Rep. 136. pl. 18. S. C. the court seem'd to incline that the condition was not broken.——

[2. If A. *devises* land *to B.* and his heirs upon condition, *that he his heirs and assigns, with the issues and profits* of the land, *shall pay yearly* so much for certain charitable uses, and dies, and after the *devisee dies his heir*, within age, and *in ward of the king*, the payment shall be excused during the time the king hath him in ward; for by the intent of the condition the payment ought to be made with the *issues and profits*, which *are transferred by act in law to the king*. Tr. 12 Jac. B. R. between *Slade and Tomson*, adjudged.]

Ibid. 198. pl. 1. S. C. adjudged per tot. Cur. for the plaintiff; but Crooke J. took a diversity between a collateral condition, and a condition which limits it to be paid out of the profits of the land; for had it been collateral it must have been paid notwithstanding the wardship.——3 Bulst 58. S. C. Crooke J. said the difference will be between this case and a sum in gross, which is certain.——Hard. 16. cites S. C.

3. If the *lease* was *upon condition* the *land recovered in value* shall be discharged of the condition. Br. Rents, pl. 12. cites it as said elsewhere.

Fitzh. Dette. pl. 75. cites S. C.

4. Note, when a man is taken by capias returnable Octab. Trin. and is bound *to the sheriff in 40 l. to appear at the same day to save him harmless*, and this term at the day, and all the *returns in it are adjourned to 15 Mich.* there his appearance shall not be recorded Octab. Trin. but at 15 Mich. and this shall save his bond and discharge him; for no appearance, essoin nor default, nor other thing, shall be entred at the term adjourned; for no roll is made of it, but only of the writ of adjournment, and all things which should be done at these days adjourned, shall be done at the day to which the term is adjourned; and this shall serve for all. Br. Conditions, pl. 142, cites 4 E. 4. 21.

(I. c) [What ſhall excuſe the Performance.] Acts of *God*.

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[1. *Regularly*, if a *condition* which was *poſſible becomes impoſſible* by the act of God, the obligation is diſcharged.] See (G. c) pl. 1. S. P.

[2. *As* if a man hath *liberty to perform* a condition *till a certain day*, if it after becomes impoſſible by the *death* of any perſon *before the day*, the obligation is ſaved. Dubitatur 14 E. 4. 3.] S. P. by Choke accordingly, but Littleton e contra

but both agree, that if the obligee had died before the day the bond had been ſaved. Br. Conditions, pl. 155. cites S. C.——If a man be bound to appear next term in ſuch a court, and before the day the conuſor or obligor dieth, the recognizance or obligation is ſaved. Co. Litt. 206. a.

[3. If a man be *let to mainpriſe*, it is a good plea at the day when the manucaptors ought to have the body &c. that he was *dead before the day* (for this excuſes the performance.) 21 E. 4. 70. b. Curia.] See (G. c) pl. 2. S. C.

[4. If the condition be *to infeoff* J. S. *within a certain time*, if J. S. *dies before the time* be paſſed, the obligation is diſcharged. 8 H. 4. 14.] Br. Conditions, pl. 173. cites 10 H. 7. 18. S. P.

[5. If *two* be *infeoffed to re-infeoff*, and *one dies*, the ſurvivor ought to perform it, and may, * 41 E. 3. 17. b. Co. 2. Cromwell 79.] * Br. Conditions, pl. 20. cites S. C.

[6. *But if feoffee to reinfeoff dies before* the feoffment, the condition is broke, for he is to perform it, and ought to do it during his life. Co. 2. Cromwell 79.]

[7. *But* if the condition had been *that the feoffee, or his heirs, ſhould re-infeoff*, and he dies, his heir may perform it. Co. 2. 79.] Co. Litt. 219. a. S. P. —Mo. 106. pl. 249. S. P.

agreed.——Ibid. 472. pl. 679. S. P. agreed.——2 And. 73. S. P.

8. If a man *mortgages* his land *to W. N.* upon condition that *if the mortgagor and J. S. repay* 100 *l. by ſuch a day that he ſhall reenter, and* he *dies before the day*, but *J. S. pays by the day*; the condition is performed, and this by reaſon of the death of the mortgagor; notwithſtanding the payment was in the copulative, and e contra if it was not in the caſe of death. Br. Conditions, pl. 190. cites 30 H. 8.

9. Where one was *bound to keep* and maintain *the ſea-walls from over-flowing*, if this happen by his negligence it ſhall be waſte, otherwiſe if it ſo happen by the act of God ſuddenly and ſo unavoidable; per Coke. 2 Bulſt. 280. in caſe of Bird v. Aſtcock, cites Dal. 6. Eliz. * Dal. 64. pl. 26. Anon. S. C.—Mo. 62. pl. 173. S. C.—— S. C. cited 10 Rep. 140. a.

10. The condition of an obligation was, that *if J. S. prove not a ſuggeſtion of a bill depending in ſuch a court, before utas Hilarii, then if the ſaid J. S. his executors or aſſigns, pay* 20 *l.* &c. The court ſeemed of opinion prima facie, that it is a good plea in bar, that J. S. died before the utas at ſuch a place. D. 262. a. pl. 30. Mich. 9 Eliz. Arundel v. Combe. S. C. cited Mo. 432. in pl. 607.—— S. C. cited Arg. Palm. 514.

11. When the law prescribes a *means to perfect* or settle any *right* or estate, if by the act of God this means in any circumstance *become impossible*, yet no party that was to receive benefit, if the means had been with all circumstances executed, shall receive any prejudice by the not executing it in such circumstance as becomes
[236] impossible by the act of God, if *all else be performed* without laches, which the party can do. Arg. 1 Rep. 97. b. Trin. 23 Eliz. B. R. in Shelly's case.

12. *Promise to carry* certain apples from Greenwich to London for the plaintiff, and the apples being in the boat, the boat by a great and *violent tempest* sunk in the Thames, so as the apples perished; this was held no plea in discharge of the assumpsit, by which the defendant had subjected himself to all adventures. 4 Le. 31. Trin. 26 Eliz. B. R. Taylor's case.

13. If a *house falls by sudden wind* it excuses the waste, and the tenant is not bound to rebuild it. Co. Litt. 53. a.

14. There is a diversity between a condition *annexed to estate in lands*, or tenements upon a feoffment, gift in tail, and *of an obligation* recognizance &c. For if a condition annexed to lands be possible at the making of the condition, and become *impossible by the act of God*, yet the estate of the feoffee shall not be avoided, Co. Litt. 206. a.

15. *As* if a man make a feoffment in fee upon condition *that the feoffor shall within one year go to the city of Paris about the affairs of the feoffee, and presently after the feoffor dies*, so as it is impossible by the act of God that the condition should be performed, yet the estate of the feoffee is become absolute; for though the condition be subsequent to the estate, yet there is a precedency before the re-entry, viz. the performance of the condition, and if the land should by construction of law be taken from the feoffee, this should work a damage to the feoffee, for that the condition is not performed which was made for his benefit, and it appears by Littleton, that it must not be to the damage of the feoffee. Co. Litt. 206. a.

16. *So* it is if the *feoffor shall appear in such a court the next term*, and *before the day the feoffor dies*, the estate of the feoffee is absolute. Co. Litt. 206. a.

17. *But* if a man be bound by *recognizance* or bond, with condition *that he shall appear the next term* in such a court, and *before the day the conusee* or obligor *dies*, the recognizance or obligation is saved, and the reason of the diversity is this, because the *state of the land is executed* and settled *in the feoffee*, and cannot be redeemed back again but by matter subsequent, viz. the performance of the condition; but the bond or *recognizance is a thing* in action and *executory*, whereof no advantage can be taken until there be a default in the obligor, and therefore in all cases where a condition of a bond, recognizance &c. is possible at the time of the making, and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligee &c. there the obligation &c. is saved. Co. Litt. 206. a.

Godb. 153. pl. 199. Anon. S.C.

18. C. binds himself apprentice to S. for 7 years, and S. bound himself *to pay* C. his executors or assigns, 10*l.* *at the time of the end*

end or determination of his apprenticeship. C. *ſerves 6 years and then dies*; the money ſhall not be paid to his executor. The whole court, (abſente the Ch. J.) held that the obligation was diſcharged, and that the money ſhould not be paid. Brownl. 97. Mich. 5 Jac. Cheyney v. Sell. adjudged accordingly; but had the bond been to pay 10l. after the expiration of 10 years it would be otherwiſe.

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19. When *two things* are *depending upon another*, there the act of God preventing one of them, both are diſcharged. D. 262. a. pl. 30. Marg. cites 8 Jac. B. R. Skidmore's caſe.

20. If leſſee *covenants to repair* a houſe, though it be *burnt by lightning*, or thrown down by *enemies*, yet he muſt repair it; for when the party by his own contract creates a duty or charge upon himſelf, he is bound to make it good if he can, notwithſtanding any accident * by inevitable neceſſity, becauſe he might have provided againſt it by his contract. Allen, 27 Mich. 23 Car. B. R. Paradine v. Jane. In ſuch caſe he muſt repair in convenient time; and ſo of banks ſtung down by a ſudden and outragious flood, but if there was any penalty to be forfeited that is excuſed, becauſe it was the act of God. D. 33. a. pl. 10, 11. Paſch. 28 & 29 H. 8. by Fitzherbert and Shelly.

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21. The condition of the bond was, that *whereas Chriſtopher the anceſtor did affirm that he had paid* 60 *l. to H. L. which H. L. did deny, if Chriſtopher by the* 10*th of November did not legally prove the money paid, then if he paid the money the ſaid* 10*th of November the bond ſhould be void.* The defendant *pleaded, that Chriſtopher died before the* 10*th of November.* The plaintiff demurred; but the court held this was not like a diſjunctive condition, though it did depend upon a condition, and the party having undertaken to make proof, it was at his peril if he did not; and though he was prevented by the act of God, yet the bond was forfeited; judgment pro quer.' Freem. Rep. 269. pl. 297. Hill. 1679. Vinier v. Joyner. Raym. 415, 416. Joyner v. Viner, S. C. in error, and adjudged accordingly; for there is a *difference* where the *condition contains a duty veſted in the obligee*, and where it is *only a collateral act*; for in the firſt caſe the executors are bound to perform it.

(K. c) [Performance excuſed.] Acts of the *Law*.

* Fol. 452.

[1. IF the condition of an obligation be *to deliver a certain thing* to the obligee *bought* by him *of the obligor*, it is not any diſcharge that a *ſtranger recovered it from him after*. Contra 21 E. 3. 12. adjudged, as is ſaid.]

[2. If a man be bound in a *recognizance* in court *for the appearance of another*, in a ſcire facias he ſhall not avoid this recognizance by ſaying, that he that ought to appear was *impriſoned at the day*. 22 E. 4. 27.] Br. Conditions, pl. 182. cites 22 E. 4. 25. S. C. & S. P. by Brian and Choke accordingly; but Cateſby and Nele J. e contra, and that it is a good plea; and they ſaid that it is common in B. R. if it be a lawful impriſonment by the order of the law; quod nota.

Br. Conditions, pl. 182. cites S. C. but S. P. does not appear there.

[3. *But* in such case, at the day of appearance, *if the manucaptors* come and *shew it to the court, and the court*, of courtesy, do not record the default, but *send to the gaoler to certify* whether he be imprisoned, and for what; by this way he shall have advantage of the imprisonment to avoid the recognizance. 22 E. 4. 27.]

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S. P. So where he render'd himself before the chancellor. And after the time limited he was not permitted to plead on his coming in, but writ of inquiry of damages was awarded to the sheriff of L. For the *ordinance in parliament was a judgment in itself*, and because of his not coming in pursuant thereto is sufficient for the awarding the writ of inquiry; quod nota. Br. Parliament, pl. 11. cites 8 H. 4. 13. & 20.——And ibid. cites 9 H. 4. 1. that the plaintiff was view'd, and *upon view of the strokes, the court awarded double damages, viz.* 200 *marks*, notwithstanding it was alleged that J. S. was dead; for he was out of court before, and cannot be warn'd to appear again. And this as it seems by the awarding the writ of inquiry of damages.——This was for beating a servant of a knight as he was going with his master to the parliament. Anno 5 H. 4. Ibid.

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Br. Parliament, pl. 11. cites S. C. but S. P. does not appear there.

[5. [*So*] if there be a constitution made in parliament upon a penalty that J. S. render himself before the justices in B. R. *within a quarter of a year after proclamation* made, if *proclamation* be *made termino Paschæ*, so that the *quarter of* a year *is passed before Michaelmas term*, yet if he does not render himself within a quarter, he shall forfeit the penalty. 8 H. 4. 13. 20. adjudged. Yet he could not appear in the vacation; but some said that he might before the chief justice. (But in this case he ought in the term within the quarter, because he knows in principio, that in the vacation he cannot appear.)]

[This plea does not properly belong to this division.]

[6. *Regularly*, if a condition be *to be performed to a stranger and he refuses to accept* thereof, yet the obligation is forfeited, because the obligor takes upon him that a stranger shall accept it.]

S. P. Br. Conditions, pl. 233. cites 11 H. 7. 27.

7. A man is bound by *mainprise* in bank *to answer to W. N. in such action such a day*, and does not come all the day, but *protection is cast for him*, this shall save the mainprise and the bond, per Cur. Br. Conditions, pl. 231. cites 11 H. 4. 57.

Vent. 175. S. C. Twisden J. thought it hard that this should be a breach; for the defendant cannot be intended to covenant against an act of parliament, which was a thing out of his power. But Hale

8. *A. sold lands to B.* in fee, *and covenanted for quiet enjoyment against him and J. S. and their heirs, and all claiming under them. B. assigns a breach, that C. claiming under J. S. ejected him.* A. the defendant *pleaded that at the time of the covenant he had an indefeasable title by certain fines from P. and his wife (on whom J. S. had settled the same) but by an act of parliament afterwards made, reciting that such fines were unduly procured of her, enacted that they should be void, and that C. claimed under the wife of P. and enter'd by reason of the said act, and ousted him.* Upon demurrer, it was insisted that the title being good at the time of the covenant made, and that the title upon which the ouster is, being by act of parliament made afterwards, cannot be any breach, and cited lady Gresham's case, 9 Rep. 106, 107. But it was answer'd and resolv'd by Hale and Rainsford, that this act makes no new title,

but

but removes an obſtruction of the old one; and they ſaid that doubtleſs B. was named in the covenant for this purpoſe, in caſe this fine unduly obtain'd ſhould be ſet aſide. *But* Twiſden being of a contrary opinion, a writ of error was brought immediately. But the reporter (who was counſel for the defendant) ſays he knows not what became of it, 2 Lev. 26, 27. Mich. 23 Car. 2. B. R. Lucy v. Levington.

ſaid that my lady Greſham's caſe is not like this, for there the party was in by the queen's conſent to the alienation by the act ſhe paſſed, but here the covenant is broken, as much as if a man recovers land and then ſells and covenants thus, and then it be evicted in a writ of right, for this is in the nature of a judgment. Though it be by the legiſlative power, it may be the proſpect of this act was the reaſon of the covenant; nor has the defendant reaſon to complain, for the act was made becauſe of his own fraud and force; every man is ſo far party to a private act of parliament as not to gainſay it, but not ſo as to give up his intereſt. It is the great queſtion in Barrington's caſe, 8 Co the matter of the act there directs it to be between the forreſters and the proprietors of the ſoil, and therefore it ſhall not extend to the commoners to take away their common. Suppoſe an act ſays, Whereas there is a controverſy concerning land between A. and B. it is enacted that A. ſhall enjoy it. This does not bind others, tho' there be no ſaving, becauſe it was only intended to end the difference between them two. Whereupon judgment was given for the plaintiff.——The caſe was, Sir Thomas Greſham convey'd lands to certain uſes, with power of revocation, and then he revoked, and alien'd, and died; but the revocation being not purſuant to his power, it was afterward made good by act of parliament, and then proceſs went out againſt his widow for a fine, the lands alien'd being held in capite, but ſhe was diſcharged becauſe the *alienation took effect by an act of parliament*, which can do no wrong. Arg. Vent. 176. cites 9 Rep. 106. lady Greſham's caſe.——9 Rep. 106. b. 107. a. S. C. cited by the chief juſtice as adjudg'd Trin. 31 Eliz. in the Exchequer The queen v. lady Greſham.

(L. c) [Performance *excuſed. How.*] [239]
Acts of a Stranger.
[*And who ſhall be ſuch a Stranger.*]

[1. *A. and B. ſubmit* themſelves *to the award of C.* and A. enters into an *obligation to C. to ſtand to the award*, and ſo does B. alſo, and *C. awards A. to pay* 10*s. to B.* who tenders it, and *B. refuſes*; the obligor is excuſed becauſe * *B. is not a meer ſtranger*, but privy, and ſo is the obligee. 22 E. 4. 25. b. Curia.]

* B. is not a ſtranger to the obligation, becauſe he is named in the condition thereof.

Br. Conditions, pl. 182. cites S. C.——Br. Arbitrement, pl. 41. cites S. C.

[2. *But* if the condition be, *that the ſon of the obligor ſhall marry the daughter of the obligee*, if the *daughter* of the obligee *refuſes* the ſon, yet the condition is forfeited; for the daughter is a meer ſtranger, and the obligor hath taken upon him that his ſon ſhall marry her. 22 E. 4. 26. b. Perkins 756.]

Br. Conditions, pl. 182. cites 22 E. 4. 25. S. C. but I do not obſerve S. P. there.

[3. *So* if the condition be *to infeoff a ſtranger*, who refuſes, yet the obligation is forfeited. * 2 E. 4. 2. 39 H. 6. 10. b. † 22 E. 4. 26. b.]

* Fitzh. Barre, pl. 82. cites S. C.——Le. 199. S. C. cited per curiam.——S. P. and ſo of condition to pay money to a ſtranger; for the obligor, &c. took it upon himſelf to do it. Br. Conditions, pl. 136. cites 9 H. 7. 17. But Brooke ſays quære; for it was not adjudg'd.——6 Bulſt. 30. Coke Ch. J. held that if a man be bound that J. S. a ſtranger ſhall infeoff the obligee, and he refuſeth to take it, he ſhall take now no advantage of this; but if the condition was to infeoff a ſtranger who refuſes to take it, this is a forfeiture, becauſe he has taken upon him to do it; but the other, to whom it is to be done, has neither jus in re nor ad rem, and this is very clear; and if a day be limited, as if a man be bound that another ſhall pay ſo much to J. S. at Mich. next, and he dies before, this ought now to be paid to his executors.

† Br. Conditions, pl. 182. cites 22 E. 4. 25. S. C. but I do not obſerve S. P. there.

[4. [So]

Fitzh. Entre congeable, pl. 2. cites S. C. ——S. C. cited per Cur. Le. 199.

[4. [*So*] if there be a *feoffment upon condition to infeoff a ſtranger* if the ſtranger refuſes, yet the condition is broke, becauſe the *intent was not that the feoffee ſhould retain it.* 19 H. 6. 34. b.]

——Co. Litt. 209. a. takes a *diverſity* between a condition *to infeoff the obligee or a mere ſtranger* [*to his own uſe*] *and where it is to infeoff a ſtranger for the benefit* or behoof *of the obligee*, and that in the laſt caſe a tender and refuſal ſhall ſave the bond, becauſe he himſelf upon the matter is the cauſe why the condition could not be performed, and therefore ſhall not give himſelf cauſe of action. But if A. be bound to B. with condition that C. ſhall infeoff D. in this caſe if C. tender, and D. refuſes, the obligation is ſaved, for the obligor himſelf undertaketh to do no act, but that a ſtranger ſhall infeoff a ſtranger. And it is holden in our books, that in this caſe it ſhall be intended that the feoffment ſhould be made for the benefit of the obligee. Some to reconcile the books ſeem to make a difference between an expreſs refuſal of the ſtranger, and a readineſs of the obligor at the day and place to make performance, and the abſence of the ſtranger, but that can make no difference. I take it rather to be the error of the reporter, and the records themſelves are neceſſary to be ſeen, for the law therein is as hath been before declared.

See pl. 3. and the notes there. —Le. 199. S. P. per Cur. obiter, and cites 2 E. 4. 2 & 19 H. 6. 34. ——2 Le. 222, in pl. 283. S. P. by Dyer. ——Co. Litt. 209. a. S. P.

[5. But *otherwiſe* it had been, if the condition was *to make a gift in tail to a ſtranger*, and he refuſes; for there the *intent was* that *he ſhould have the reverſion.* 2 E. 4.]

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Where the covenant or condition is, *that the one ſhall marry a ſtranger, or ſhall infeoff him by ſuch a day*, the refuſal of the ſtranger is no plea, for the party has *taken upon him to do the thing.* Br. Conditions, pl. 73. cites 33 H. 6. 16. *Contra* if the act ſhall be done to the other party, for there the refuſal is a good plea. Note a diverſity, and therefore it is uſual in ſuch caſes of ſtrangers to add ſuch words, and if the ſaid ſtranger will conſent to it. Ibid. ——Br. Covenants, pl. 3. cites S. C. ——Fitzh. Barre, pl 62. cites S. C. ——3 Bulſt. 29, 30. Arg. S. P. cites 37 H. 6. 16, 17. Sir John Burre's caſe [but ſeems miſprinted for 33 H. 6. 16.]

[6. *Regularly, if* the condition be *to be performed by a ſtranger*, and *he refuſes*, the *obligation is forfeited*; for the obligor has taken upon him that the ſtranger ſhall do it.]

[7. *As* if the condition be *that my ſon ſhall ſerve J.* If he will not, my obligation is forfeited. 22 E. 4. 26. b.]

* Fol. 453.

Br. Conditions, pl. 182. cites S. C. but I do not obſerve S. P. there.

2 Le. 114. 115. pl. 153. Paſch. 28 Eliz. Parker v. Harrold, S. C. tho' the obligor has a new title derived from the new admiral, and the former title

[8. If the condition of an obligation be, that *whereas the obligor and obligee are jointly ſeiſed of the office of the court of admiralty*, if the obligor ſhall *permit the obligee to uſe the ſaid office, and to take the profits thereof only to his own uſe during his life without interruption made by the obligor*, then &c. Although after the admiral dies, and the *new admiral grants the ſaid office to a ſtranger* (as he may by law) *and he* interrupts and *ouſts the obligee*, yet if *the obligor after this interrupts the obligee* alſo, the condition is broke. M. 32, 33 El. B. R. between *Parker and Hardward*, adjudged.]

of the plaintiff is determin'd, yet againſt his own bond and deed he ſhall not put out the plaintiff, &c. And the court was clear of opinion that judgment ſhould be given for the plaintiff; but the cauſe was compounded by order of the lord chancellor. ——3 Le. 142. pl. 191. Parker v. Howard, S. C. in totidem verbis. ——Gwlb. 47 pl. 69. S. C. And Clench J. ſaid, that if the plaintiff occupies the office by right or by wrong, the defendant is not to interrupt him againſt his own bond.

9. If a man is *bound* to me *to carry a ſum of money, and is robbed thereof in his journey*, he is not excuſed of his bond. Per Cheer. arguendo

arguendo in covenant; but per Kirton, he certainly ſhall be. Br. Obligation, pl. 9. cites 40 E. 3. 6.

10. Feoffment upon condition *to infeoff the feoffor*; if day be limited there *he need not requeſt*; for if he does not infeoff him by the day, the other may re-enter without requeſt. Br, Conditions, pl. 26. cites 44 E. 3. 8.

11. If *A. is bound to B. that I. S. ſhall make him a houſe by ſuch a day, or elſe to pay him* 20 *l. by ſuch a day.* It is no plea for him to ſay that *I. S. was dead before the day*, for that another might have made it, per Coke, Ch. J. 3 Bulſt. 30. cites 31 H. 6. Fitzh. Tit. Bar. pl. 59. and ſays that to this purpoſe is 15 H. 7. fol. 13.

12. If a man be bound *to appear* here *at Weſtminſter ſuch a day before the juſtices*, and at the day *no juſtice is there*, he ſhall not forfeit his bond; per Littleton. Quod nullus negavit. Br. Conditions, pl. 140. cites 2. E. 4. 2.

13. Debt upon obligation, the defendant ſaid that it is indorſed, that *if the defendant or any for him goes to Briſtol ſuch a day, and there ſhews to the plaintiff, or his counſel, ſufficient diſcharge of annuity of* 40 *s. per ann. which the plaintiff claimed out of* 2 *meſuages in D.* that then &c. and ſaid that A. and B. by aſſignment of the defendant came the ſame day to B. and *tender'd to ſhew to* N. and W. the plaintiff's counſel, a ſufficient diſcharge of the annuity, *and they refuſed to ſee it*, judgment ſi actio, and the plaintiff demurred, and it was awarded no plea by all the juſtices after great argument, becauſe he *did not ſhew what diſcharge he tender'd*, as a *releaſe* or *unity of poſſeſſion*, &c. For this lies in the judgment of the court to adjudge it; but if they had ſaid that he did not come there at the day, this ſhall be tried per Pais. Br. Conditions, pl. 183. cites 22 E. 4. 40. [241]

14. In debt, A. was bound to B. by *obligation* in 100 *l.* upon condition that *if the ſaid A. after the death of his father, and within 3 months after made ſufficient eſtate in ſuch land to a feme*, that then, &c. The *defendant ſaid, that the ſame feme took the obligor to baron in the life of the father, which eſpouſals continued 3 months after the death of the father*, ſo that he cannot infeoff him. Per Townſend J. the obligation is forfeited; for when he is *bound to aſſure it to a ſtranger*, as here, he ought to do it at his peril; for in this he took upon him to rule the ſtranger. Br. Conditions, pl. 127. cites 4 H. 7. 3.

15. *And if the feme* in this caſe *had entered into religion*, the obligation had been forfeited. Ibid.

16. *But if* the *obligee himſelf be the cauſe* that the obligation be not performed; this is no forfeiture, for this is his own act. Ibid.

17. Debt upon obligation, the condition was *to pay the plaintiff, or his aſſigns* 20 l. *at ſuch a day and place*, that then, &c. The defendant pleaded that the *plaintiff appointed one A. to receive* the money of him at the day and place, and that he *tender'd the ſame to the ſaid A. who refuſed it.* The plea was held good, without alleging payment in fact. Mo. 37. pl. 120. Trin. 4 Eliz. Anon. Dal. 38. pl. 9. S. C. in tot dem verbis.

18. But otherwiſe it is when the condition is *to pay the money to a ſtranger*, for that the payment ought to be at the peril of the obligor, Mo. 37. pl. 120. Trin. 4 Eliz. Anon. Dal. 38. pl. 9. S. C. in totidem verbis.

19. Covenant

Noy 75. S. C. the court thought the leſſee diſcharged of the covenant, for by the lands being gone, the obligation is diſcharged.

19. Covenant. *Leſſee for years covenanted at the end of the term to yield up the tenements well repaired*; it was aſſigned for breach, that he had not left, &c. The defendant *ſaid that one B. was ſeiſed, until by the plaintiff diſſeiſed, who leaſed to the defendant, and after B. entered and enfeoffed J. S. who yet is ſeiſed*, &c. and adjudged a good bar. Cro. E. 656. pl. 21. Hill. 41 Eliz. B. R. Andrews v. Needham.

5 Rep. 23. Lambe's caſe, S. C. adjudged accordingly; for the defendant ought to have procured the judge to have deviſed and directed it.—S. C. cited Mo. 645. in pl. 892.—S. C. cited Cro. 2. 864. in pl. 42.

20. In debt on obligation, condition'd *to make ſuch a releaſe*, in Mich. term next, *as the judge of the prerogative ſhould think meet*; the defendant ſaid that I. S. was judge there at the time, and that he did not appoint or deviſe any releaſe; adjudged no plea, becauſe *not alleged that he cauſed a releaſe to be drawn and tender'd to the judge*, for he to get ſuch a releaſe drawn as the judge ſhall allow of. Cro. E. 716. pl. 41. Mich. 41 and 42 Eliz. C. B. Lamb v. Brownwent.

Cro. J. 13. pl. 17. Paſch. 1 Jac. B. R. Philips v. Hugre, S.C. in error and judgment affirmed.—Yelv. 38. Hughes v. Philips. Paſch. 1 Jac. B. R. the S. C. and judgment affirmed by all the juſtices.

21. Audita querela, that he was *obliged in a ſtatute* of 600 l. to the defendant, to the uſe of I. B. *defeaſanced, that if he paid ſuch ſums, at ſuch days, to J. B. it ſhould be void*; *and ſhewed that at every of the ſaid days and places he was paratus to pay the ſaid ſums, and obtulit them*; all the court held, that the tender was a ſufficient performance, the defeaſance being made to the uſe of J. B, but if he had been a meer ſtranger, and was not to have any benefit thereof, it would be otherwiſe, and judgment for the plaintiff. Cro. E. 754. pl. 18. Paſch. 42 Eliz. C. B. Huſh v. Phillips.

Cro. E. 864. pl. 42. S. C. adjudged for the plaintiff. ——S. C. cited 2 Mod. 202. Arg. Hill. 28 and 29 Car. 2. and ibid. 204. the court agreed this caſe to be law, but the rule there put was denied——S. C. cited Arg. Mod. 265. ſays the reſolution of that caſe is law, and that there needed no ſuch rule, and that it goes upon the reaſon of Lamb's caſe, 5 Rep. [23. b.]

22. In debt upon bond, conditioned *to deliver* to the plaintiff, *all the tackle of ſuch a ſhip under the hands of 4 perſons, or in default thereof, to pay to the plaintiff ſo much money, &c. as the 4 perſons ſhould* **value the tackle to be worth*; the defendant *pleaded, that the 4 perſons had not valued the tackle*; and upon a demurrer to this plea the plaintiff had judgment, for where the defendant has election by the condition to do one of 2 things, if by any default of a ſtranger, or of himſelf, or of the obligee, or by the act of God he cannot do one of them, there he ought to do the other; and the defendant in the principal caſe ought to have got the 4 perſons to value the tackle. Mo. 645. pl. 892. Paſch. 43 Eliz. Moore v. Morecombe.

* [242]

23. If *A. is bound to build a houſe for B. before ſuch a time*, and *A. dies before the time*, his executors are bound to perform this; per Coke Ch. J. 3 Bulſt. 30. Paſch. 13 Jac.

(M. c) What *Things* will *diſpence with* a Condition. *Acts of him that will have the advantage.*

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[1. *IF* a condition be *to recover certain land againſt J. S. and thereof to enfeoff another, who is party to the obligations*, if *he to whom* the feoffment is to be made, *accepts a feoffment* of the land *before any recovery had* by the other, the condition is performed (it ſeems, becauſe he had diſpenſed with the condition.) 39 E. 3. 3. 5. 6 b. But quære, for perhaps he hath diſſeiſed J. S. but it is there ſaid, that it ſhall be intended that he himſelf was ſeiſed thereof.]

[2. If a leaſe for years be made upon condition *not to alien without licence*, and after the *leſſor licenſes* the leſſee to alien, *and dies before alienation*, yet the leſſee may alien; for the death of the leſſor is not any countermand; for this was executed on the part of the * leſſor as much as it could be. Co. Lit. 52. b. cites M. 3 Jac. b. to be reſolved.]

* In Roll. it is miſprinted (Leſſee.) Cro. J. 102. pl. 36. Mich. 3 Jac. B. R. Walker v. Bellamie, ſeems to be S. C. only here it is ſaid to be that the leſſor died before the alienation, whereas in Cro. it is ſtated that the alienation was after a grant of the reverſion by the leſſor, and attornment by the leſſee; and held that though the alienation was after the grant of the reverſion by the licence of the grantor, yet it was good enough, and judgment accordingly.

3. If a man be bound *to preſent J. N. to the church of D.* and *J. N. takes feme, and the church voids*, yet the obligor ought to preſent J. N. for otherwiſe he ſhall forfeit his obligation; the reaſon ſeems to be, in as much as it is a condition in fact, as to ſtand to a void award &c. Br. Conditions, pl. 189. cites 34 E. 1. and Fitzh. Debt 164.

4. *Annuity* was brought by a man, to whom it was granted *till* he was *promoted to a competent benefice*. The *defendant ſaid, that the plaintiff had taken feme, and ſo could not receive a benefice*, and a good plea by award. Br. Annuity, pl. 16. cites 7 H. 4. 16. Br. Tout TempsPriſt. pl. 18. cites S. C.

5. If a man is *bound* in an obligation of 40 l. upon condition or defeaſance that *if J. S. be ſervant to the obligee for 7 years*, that the obligation ſhall be void; per Cur. it is a good plea that the *obligee licenced the ſervant to go*, &c. though the licence be only *by parol*. Br. Licences, pl. 18. cites 6 E. 4. 2.

6. Where a *man leaſes* land, *rendring rent*, and the *tenant is bound to pay it*, and the *obligee enters into part of the land*, the obligation is determined; for this is an advantage of the obligee. Br. Conditions, pl. 128. cites 4 H. 7. 6. [243]

7. A. *leaſed a houſe and lands* for 21 years to B. reſerving rent annually, *provided that* the ſaid B. &c. *ſhould not parcel out from the ſaid meſuage any lands without A's conſent*. B. *leaſes parcel* of the land to C. for part of the term. The *rent became arrear, and A. accepted the ſame*, and afterwards entered for breach of the condition. Two judges held that the entry was gone, but the other (there being only one more in court) was of a contrary opinion. 2 And. 42. pl. 28. Hill. 38 Eliz. March v. Curtis. 2 And. 90. pl. 54. S. C. 3 judges held, that this acceptance ſhall not conclude A. but that he may enter and avoid

the

the leaſe; for it might be that the leſſee had firſt conveyed the parts, and ſo broken the condition; and yet A. might not have any notice thereof, and then it would be hard to conclude him in ſuch caſe; for if it ſhould, then every one in ſuch caſe may be defrauded of the benefit of his condition. ——— Cro. E. 528. pl. 57. S. C. Anderſon and Beaumond held, that the entry was barr'd by the acceptance, but Walmſley e contra, Owen abſente; adjornatur. ——— Mo. 425. pl. 594. S. C. according to Cro. E. ſupra. ——— Brownl. 78. S. C. but S. P. does not appear. ——— 3 Rep. 65. a. S. C. cited by the reporter, and ſays, that it was adjudged by Anderſon, Walmſley, and the whole court, that though the leſſor accepted the rent by the hands of the leſſee, yet inaſmuch as the leſſor had no notice of the aſſignment, the acceptance did not conclude him of his entry.

8. The plaintiff had *entred into articles* to purchaſe land, but objections being made to the title they were removed, after which he paid a conſiderable part of the money, and *came into ſeveral orders of court* with the defendant, *to pay the reſidue* by ſuch a day, and *in default* thereof *to give up the articles, and loſe what* he had *before paid*. The plaintiff made further default, and prayed to be relieved on payment of principal and intereſt. Lord chancellor ſaid, that *the agreements* being looked upon to be *intended only as a ſecurity* for payment of the money, if the defendant had his principal, intereſt, and coſts, he could not complain; that at the time when the money was to have been paid, being in 1720. Money was locked up; that a delay happened by the death of defendant's father, and his executors not acting, and the defendant's delaying to adminiſter to his father with the will annexed, which was the *default of the party, ſo that the plaintiff's payment at the exact time was diſpenſed with*, and therefore decreed the plaintiff to be relieved upon payment of principal, intereſt, and coſts. Trin. 1722. 2 Wms's Rep. 66. Vernon v. Stephens.

(N. c) What *Act or Thing* will *excuſe the Performance* of the Condition. Acts *of him who is to have the Advantage.*

[1. IF a condition be *to infeoff the obligee*, though the *obligee diſſeiſes him* of the land, yet this does not excuſe the performance of the condition, for *he may re-enter*, and perform it notwithſtanding. Co. 8. *Francis* * 32. Co. 2. *Julius Win.* [*Winnington's caſe.*] 59. b. admitted.]

* This ſhould be 92. a. in principio, per Cur. Obiter; for the obligee had no colour to enter upon the obligor. ——— S. P. Arg. Godb. 75. in pl. 90 ——— See pl. 9. S. C.

If a man makes a feoffment in fee, upon *condition that the feoffee ſhall re-infeoff him at ſuch a day*, and before the day the *feoffor diſſeiſes the feoffee*, and holds him out by force until the day be paſt, the ſtate of the feoffee is abſolute, for the feoffor is the cauſe, wherefore the condition cannot be performed, and therefore ſhall never take advantage for non-performance thereof. Co. Litt. 206. b.

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[2. If leſſee for years covenants *to drain the water* which is upon the land *before ſuch a day*, and after the *leſſor enters* before the day, and there *continues till the day is paſt*, yet this ſhall not excuſe the performance of the covenant, becauſe this is *collateral* to the land. Hill. 37 El. B. R. per Curiam adjudged.]

Cro. E. 374. pl. 22. Carrel v. Read, S. C. adjudged no plea, unleſs he had ſaid that the leſſor held him out, and diſturbed him to do it. ——— Mo. 402. pl. 534. Carith v. Read, S. C. is, that a leaſe was made of certain fenny grounds in the county of C and the leſſee covenanted to drain certain other lands in the ſaid county not in the leaſe, and upon covenant brought he pleaded, that leſſor had enter'd

enter'd into the land leaſed, and adjudg'd no plea; becauſe the covenant was collateral, and not for the doing a thing inherent to the land demiſed; but if the covenant had been, that upon the land demiſed he ſhould do ſuch an act, the entry into the land leaſed may excuſe the act; and cites 15 H. 7. 10. 10 E. 4. 18. 19 E. 4. 2. and 35 H. 6. Finch. Barre, 162. ——Ow. 65, 66. S. C. adjudged accordingly.

[3. If a man be bound *to build an houſe*, &c. he is excuſed if the *obligee will not ſuffer him* to build it; for he cannot come upon the land without his will. 19 E. 4. 2. b. per Curiam.] Br. Covenant, pl. 31. cites 18 E. 4. 8. which is the commencement of the S. C. and ſays it is a good plea in covenant brought for the not building, that the plaintiff commanded him not to build it, but a diſcharge it cannot be, unleſs it be by writing, where the covenant is by writing, as in the principal caſe it was; per the opinion of the court.

[4. If a condition be *to repair a houſe*, he is excuſed thereof if a *ſtranger by the command of the obligee himſelf diſturbs him*, and will not ſuffer him to do it. 9 H. 6. 44. b.] Fitzh. Double Plea, pl. 39. cites S.C. & S.P. admitted by iſſue; and cites alſo Mich. 6 H. 6.

[5. If a condition be *to erect a mill*, and after he comes to the obligee, and ſays all is ready for the erecting thereof, and demands of him when (*) he ſhall come with the mill to erect it, if the *obligee ſays he will not have the mill*, and entirely diſcharges him of the mill, this ſhall excuſe him of the performance. 3 H. 6. 37. admitted by the iſſue.] * Fol. 454. See pl 3. in the notes there.

[6. If leſſee for years covenants *to drain the water* that ſtands upon the land *before ſuch a day*, and after the *leſſor enters* upon the land, *and diſturbs* the leſſee; this is a good excuſe of the performance of the condition. Hill. 37 Eliz. B. R. per Curiam.] See pl. 2. S. C. and the notes there.—— Godb. 70. in pl. 84.

Mich. 28 & 29 Eliz. Arg. cites a caſe in the ſame term in C. B. where leſſee for 5 years covenanted to build a mill within the term, and becauſe he had not done it, the leſſor brought an action of covenant; and the defendant pleaded, that within the laſt three years the leſſor forcibly held him out, &c. ſo as he could not build it; and by the opinion of all the juſtices, he ought to plead that the leſſor with force held him out, otherwiſe it would be no plea.

[7. If a man covenants with me *to collect my rents* in ſuch a town, if *I interrupt him* in the collecting thereof, this excuſes the covenant. 13. H. 7. Keble 34. b.]

[8. If leſſee for years of an houſe covenants *to repair* it, *and to leave it in as good plight as he found it*, and after certain *ſparks of fire come out of the chimney of the leſſor* into an houſe not much remote, *by which the houſe of the leſſee is burnt*, this will excuſe the performance of the covenant to the leſſee, ſo that he is not bound to re-build, becauſe this comes by the *act of the leſſor himſelf*. Trin. 12 Jac. B.]

[9. If the condition of an obligation be, that the obligor ſhall *infeoff the obligee* of the land *before ſuch a day*, and after before the day the *obligee diſſeiſes the obligor, and keeps* it *with force till after the day*, ſo that the obligor cannot enter, this will excuſe the performance of the condition. Co. 8. *Frances* 92.] 2 Brownl. 277. Mich. 7 Jac. Miller v. Francis, S. C. but S. P. does not appear.——

2 Rep. 92. a. per Cur. in Francis's caſe.——Where a perſon agrees to do a thing, he muſt *ſhew* * he has *done all in his power* to perform it, and he ought *likewiſe to ſhew how it came to paſs*, that it was not performed; as that the defendant was there and refuſed to accept, or was not there at all, or on the laſt convenient time of the day which the law appoints for doing the matter, and all this the plaintiff

plaintiff ought to ſhew to intitle himſelf to his action; per Holt Ch. J. 12 Mod. 532. Trin. 13 W. 3. in caſe of Lancaſhire v. Killingworth.

And upon this reaſon of law is the caſe in 8 Rep. 92. Francis's caſe. One makes a *feoffment, upon condition that* the *feoffee ſhould re-infeoff obligee by ſuch a day*, and before the day the feoffee, or obligor, is *diſſeiſed by him that was to be infeoffed*, and then the bond is put in ſuit, it is not a good *plea* to ſay, that *you were always ready* to infeoff him, but that he himſelf before the day ouſted you, but you *muſt proceed further*, and ſay, *that he kept you out of the poſſeſſion till after the day with force*; for though he had interrupted you, perhaps you might have come upon the land after and performed the agreement, or made a tender, which if he refuſed would have been tantamount; for you ought not only to ſhew a diſturbance by him, but alſo ſuch continuance of that diſturbance as made it impoſſible for you to perform on your ſide, and in that caſe he ought to ſhew, that he came to endeavour to make a feoffment, but could not do it by reaſon of the force he met with from the plaintiff, and that had been a good excuſe; per Holt Ch. J. 12 Mod. 532. Trin. 13 W. 3. in caſe of Lancaſhire v. Killingworth.

* Godb. 70. Arg. cites S. C. but not S. P.— Ibid. 75. cites the maſter of St. Catherine's caſe. S. C. & S. P.

[10. If a leaſe be made upon condition that the leſſee *ſhall not permit or harbour any whore* within the houſe to him let, *and* that *if he ſuffers ſuch woman to ſtay there for* 6 *weeks after warning*, &c. it ſhall be lawful for the *leſſor to enter*; and after the *leſſee ſuffers ſuch woman to be there, and warning is given him* by the leſſor; although *after the leſſor commands the woman to ſtay there for* 6 *weeks* yet this ſhall not excuſe the performance of the condition, becauſe the leſſor did not do any act; and notwithſtanding the command, the leſſee might have removed her. * 35 H. 6. Bar. 162. per Curiam. Co. 8. Frances 91. B.]

8 Rep. 92. a. in Frances's caſe cites S. C. & S. P.

[11. *But* in the ſaid caſe, *if the leſſor ouſts the leſſee, and with force*, and againſt the will of the leſſee, *puts in the woman, and violently makes her ſtay there* with force, *againſt the will of the leſſee for* 6 *weeks*, this ſhall excuſe the performance of the condition. 35 H. 6. Bar. 162. Co. 8. 92.]

[12. If a leſſee for years covenants *to leave part of the land at the end of the term fallowed and fit for wheat, provided* that the *leſſee, upon ſuch warning, may ſurrender and depart at any feaſt of Michaelmas at any time within the term, performing the covenants*; if after warning he ſurrenders, and does not leave the land fallowed, he hath forfeited his covenant; for the acceptance of this ſurrender does not diſpenſe with the covenant, in as much as by the covenant he is to accept thereof. Hill. 4 Jac. B. R. between *Moyle and Auſtion*, adjudged.]

Cro. E. 655. pl. 19. S. C. held accordingly.— Mo. 555. pl. 751. Terry and Lowe v. Redding, S. C. adjudg'd.

[13. If *two* are *bound in a ſtatute, with a defeaſance, that they two ſhall make ſuch aſſurance as ſhall be deviſed*, &c. if an aſſurance be deviſed and tender'd to *one*, and he *refuſes* to ſeal it, the condition is broke for both; for he need not requeſt both at one time. H. 41 Eliz. B. R. *Lowe and Terry's caſe.*]

* Fol. 455.

[14. *Upon a marriage* between A. a woman and B. by indenture between A. and B. and C. a friend of A. *it is agreed, That C. ſhall have all* the ſtock, portion, and eſtate of A. prout tunc fuit, vel potuiſſet eſſe appreciat' vel extunc poſtea foret invent', reſtaret & remaneret in manibus & uſu, Anglice, employment of C. vel ubi ipſe diſponeret, *till B. ſhall provide a certain jointure*, &c. *ipſo C.* * *annuatim ſolvendo querenti intereſſe proinde ſecundum ratam* 8 *l. pro quolibet* 100 *l.* pro quolibet anno durante tempore quo ſtatus ipſius A. in manibus vel diſpoſitione C. remaneret; and after the

the marriage is had, and then 400 l. *of the ſubſtance of A comes to the hands of C. and for one year continues in his hands; but B. takes and detains* in his hands *of the ſubſtance of A. goods to the value of* * 100*l. over and above the ſaid* 400*l.* and this alſo *againſt the will of C. ſo that C. hath not all the ſubſtance of A. in his hands*; yet he ſhall pay according to the rate of 8 l. for every 100 l. of the ſaid 400 l. which he had in his hands, in as much as the words are, That he ſhall pay 8 l. *pro quolibet* 100 *l.* Mich. 8. Car. B. R. between *Croſſe and Northey*, adjudged upon demurrer, I being de conſilio querentis.]

15. Where a man is bound, *that he ſhall not refuſe to make ſuch indentury*, and he *ſays that the plaintiff required him, and he was ready, and the plaintiff refuſed*; and the other ſaid, *that at another time the defendant refuſed*, and the other e contra, and found for the plaintiff; and alleged in arreſt of judgment, becauſe the iſſue ſhould be upon the refuſal of the plaintiff & non allocatur, but the plaintiff recovered; for the defendant ought not to refuſe at any time; quod nota. Br. Repleader, pl. 15. cites 7 H. 6. Br. Conditions, pl. 49. cites 7 H. 6. 24. S. C.

16. If the condition had been *to infeoff J. S. before ſuch a day*, and *J. S. in the mean time enter'd into religion*, the obligation was ſaved by the condition. Br. Obligation, pl. 45. cites 2 E. 4. 2

17. Writ of entry of 40 s. rent out of the monaſtery of S. where variance was between the plaintiff and defendant for tithes, and the *plaintiff granted to the defendant the tithes*, and *he granted the* 40 *s. rent to the plaintiff* and his ſucceſſors *for the ſaid tithes*, and the defendant ſaid, that the plaintiff had taken 24 loads of the tithes; judgment ſi actio. And per Littleton and Brian the bar is no plea; for where the rent was granted for the tithes, *all is executed*, therefore the one cannot be eſtopped for the other; for the *grant of one thing for another* is no condition. Br. Conditions, pl. 61. cites 9 E. 4. 19. Br. Conditions, pl. 61. cites M. 15. E. 4. 2. accordingly.

18. *But* where *annuity* is granted *pro conſilio impendendo*, and the grantee refuſes to give him counſel, this is a forfeiture of the annuity; for this is a condition in law, and the *counſel is executory*. Ibid.

19. *So* where *one is bound to make a new pale* of the park, *and he ſhall have the ancient pale*, there if he be diſturbed of the ancient pale, he is not bound to make the new. Br. Conditions, pl. 61. cites 9 E. 4. 19.

20. *So* where a man *grants* to me 10 l. *annuity to have a gorſe or gutter in my land*, and *I ſtop* the gutter or *gorſe*, I ſhall not have the annuity; for theſe are *things executory*; and there if the one be diſturbed, the other may do the like. Ibid.

21. *And* where a man *is to have my meadow in ſeveralty after the hay carried away, becauſe I ſhall have eaſement to carry it over his land*, if he *diſturbs me of the eaſement*, I may diſturb him for the meadow. But it is not adjudged. Ibid.

22. *But* per Littleton, where a man *grants an advowſon to me*, and *I grant to him an annuity*, and I *diſturb him of the advowſon*, this is no bar of the annuity, for *both are executed*; for the annuity is executed by the grant. Ibid. cites M. 15 E. 4. 2.

23. If the *obligee himſelf be the cauſe* that the obligation cannot be performed, this is no forfeiture; for it is his own act. Br. Conditions, pl. 127. cites 4 H. 7. 3.

The law is the ſame if he was tenant at common law, and the obligee ceaſes, the obligation is ſaved, becauſe it was the act of the plaintiff himſelf; quod nota. Ibid.

24. A man ſurrendered copyhold to J. S. and is bound in an *obligation that J. S. ſhall enjoy it without interruption* of any, and J. S. afterwards *committed a forfeiture, and the lord entred*, the obligation is not forfeited, becauſe it was his *own act*. D. 30. a. pl. 205. Hill. 28 H. 8. Compton v. Brent.

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25. It is a *general rule* in conditions, that if the plaintiff himſelf be the cauſe of diſablement, ſo as the condition cannot be performed, he ſhall not take advantage of the condition. Arg. Godb. 76. pl. 90. Mich. 28. and 29 Eliz.

3 Le. 159. pl. 206. Mich. 29 and 30 Eliz. S. C. in totidem verbis.

26. A. *leaſed to B.* at 40 l. per ann. and a *ſtranger covenanted with A. that B. ſhould pay the 40 l. for the farm and occupation of the lands*; A. brought an action of covenant againſt the ſtranger, who *pleaded, that before the day of payment, the plaintiff ouſted B.* of the farm; it was objected that this was no plea, becauſe this is a collateral ſum, and not for rent iſſuing out of the land; but the court held the contrary, that it is a conditional covenant, and that the conſideration upon which the covenant is conceived, viz. The farm and the occupation of it was taken away by the act of the plaintiff himſelf. 2 Le. 115. pl. 153. Trin. 32 Eliz. B. R. Bedell's caſe.

Brownl. 78. S.C. & S.P. by Sir Edward Coke.

27. *Acceptance of rent*, is a diſpenſation of a forfeiture for non-payment of rent, but not of a breach of a collateral condition. Cro. E. 528. pl. 57. Mich. 38 and 39 Eliz. C. B. Marſh v. Curtis.

28. Debt on a bond condition'd *to ſave harmleſs from a bond made to C. for payment of* 100 *l. at a day and place, &c.* The defendant *pleaded, that at the day of payment, he was going to the place to pay it; and the plaintiff by covin cauſed him to be impriſoned till after ſun-ſet of the ſame day, to the intent the* 100 *l. ſhould not be paid, and ſo the obligation to be forfeited*; and ſo he could not come to the ſaid C. to pay him the ſaid 100 l. Adjudged upon demurrer, that ſuch a bare ſurmiſe was no bar. Cro. E. 672. pl. 30. Paſch. 42 Eliz. C. B. Morris v. Lutterel.

S. C. cited by Holt, Ch. J. 12 Mod. 532. and calls it a very remarkable caſe.

29. The condition of a bond was, that *before ſuch a day*, the *obligor* would *procure ſuch* a woman *to marry the obligee*; the obligee goes to her, and *tells her, how barbarouſly he would uſe her* if ſhe married him, and called her whore, and threatened to tie her to a poſt, and told her ſuch things that no woman in her ſenſes would marry ſuch a man; after the day, debt was brought upon bond, and this matter ſpecially pleaded in bar, and adjudged to be no good plea, but that, notwithſtanding the menaces, the obligor *ought to have ſhewed*, that *he had done his utmoſt* endeavour to procure her to marry him, *but* that *ſhe by reaſon of the menaces refuſed*, and ſo he was hindred by the plaintiff. Cro. E. 694. pl. 4. Mich. 41 Eliz. B. R. Blandford v. Andrews.

30. A *feoffment* was made *on condition to pay 200 l. at ſuch a day, and to make a ſufficient leaſe of Bl. Acre, parcel thereof, for 21 years. The 200 l. was paid, but as to Bl. Acre it was inſiſted that that was parcel of the land, whereof the feoffment was made, which the feoffee yet continued in poſſeſſion of, ſo that he could not make a leaſe thereof*; the feoffee demurr'd, becauſe it was not alleg'd that the leaſe of Bl. Acre was made; but it was held that he need not to allege performance of that part, becauſe it is impoſſible to be perform'd; and his performing the poſſible part is ſufficient. And here he cannot make a ſufficient leaſe, becauſe the feoffee is always ſeiſed; and it is *not intended that he ſhould make a leaſe by eſtoppel*, the words being that he ſhould make a ſufficient leaſe, Cro. E. 780. pl. 14. Mich. 42 and 43 Eliz. B. R. Wigley v. Blackwall.

31. If *A.* be *bound to B. that J. S. ſhall marry Jane G.* before ſuch a day, and before the day *B. marries with Jane*, he ſhall never take advantage of the bond, for that *he himſelf is the mean that the condition could not be perform'd*, and this is regularly true in all caſes. Co. Litt. 206. b.

32. A *mortgagor, or obligor muſt* on the day of payment *ſeek the mortgagee or obligee*, and tender the money, &c. *if* the mortgagee, &c. be *in the realm of England*; but if he be out of the realm of England, the other is not bound to ſeek him there, but ſhall have the ſame benefit as if he had made a tender. Hawk. Co. Lit. 294. 295. Litt. S. 340.

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33. *Queen Mary granted to T. a reverſion in tail upon condition that if T. or his heirs pay 20 s. at the receipt of the exchequer*, &c. *the grantee ſhall have a fee*; reſolved, that if afterwards the *queen, under her great ſeal, refuſes to receive the money*, yet if the *grantee tenders it at the receipt of the exchequer*, he ſhall gain the fee; for the queen by no means can countermand or hinder the increaſe of the eſtate in ſuch caſe. Adjudged 8 Co. 76. b. Trin. 7 Jac. Lord Strafford's caſe. 2 Brownl. 252. Malin v. Tully, S. C. & S. P. accordingly.

34. In covenant plaintiff counts that he by indenture *leaſed his perſonage rendring rent, and the leſſee covenanted to pay his rent. The leſſee pleaded that before any day of payment, the parſonage was ſequeſtred for non-payment of the firſt fruits*; the court held this no plea; for he does *not ſhew that any act was done by the plaintiff himſelf in his default*, and he *cannot ſay that the leſſor had nothing at the time of the leaſe made*; ſo in caſe of an obligation for payment of the rent; for he had bound himſelf to pay it, and the occupation is not material where the leaſe is for years or for life; but otherwiſe of a leaſe at will. Het. 54. Mich. 3 Car. C. B. Jeakill v. Linne. An eviction of the poſſeſſion of leſſee for years diſcharges all rents, bonds, and covenants in any ſort depending upon the intereſt; per Fenner and Yelverton, J. Obiter. Yelv. 23.

Mich. 44 and 45 Eliz. ——When a thing iſſues out of the profits, if the profits are taken away, that which iſſues out of them are alſo diſcharged. Arg. Roll. Rep. 198. cites 20 H. 6 a rent is reſerved out of land, if the land be evicted the rent is diſcharged, and ſo it is if he had entered into an obligation to pay the rent; becauſe it iſſues out of the profits which are evicted, and conſequently the obligation and rent are diſcharged.

35. If he, to whom a thing is to be done, *hinder the other*, that is to do it, ever ſo much, yet the *other muſt uſe his utmoſt endeavours* on his ſide to perform; and ſhew that he has done it, or elſe

he forfeits his bond, or breaks his agreement. 12 Mod. 532. Trin. 13 W. 3. per Holt Ch. J. in delivering the opinion of the court in caſe of Lancaſhire v. Killingworth.

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(O. c) What *Things excuſe* the Performance of Conditions, and what not. Acts *of him who ſhall have the Advantage.* [*Refuſal.*]

[1. IF the condition be *to do a collateral act*, and not to pay money, which is of the nature of the principal ſum, it ſeems if the obligee *refuſes* it at the day, this diſcharges the whole obligation. D. 3. 4. Ma. 150. 84. 12 H. 4 23.]

Br. Repleader, pl. 15. cites 7 H. 6.

2. *Detinue* by executors *of obligation bailed by the teſtator to the defendant*, who *ſaid that he and N. D. bailed upon certain conditions*, &c. and prayed garniſhment againſt N. and had it; *N. came and ſaid that it was delivered upon condition*, that *if he refuſed to make ſuch indenture to the teſtator when he ſhould be required*, that *then it ſhall be delivered to the teſtator*, and *otherwiſe to the ſaid N. and* ſaid that *ſuch a day he was ready to have made the indenture, and the teſtator refuſed*; by which he prayed livery of the obligation; the *plaintiff ſaid that at another time*, viz. *ſuch a day the teſtator required him and he refuſed*, and the other ſaid that he did not refuſe, Priſt, and ſo to iſſue, and found for the plaintiff; and it was pleaded in arreſt of judgment, becauſe when the teſtator *once refuſed*, the iſſue ſhall be upon this plea, and the refuſal of the garniſhee after is not material, and yet becauſe he was bound that he ſhould not refuſe, therefore it ſeems that he ſhall not refuſe at any time, and after the plaintiff recovered by judgment. Br. Conditions, pl. 49. cites 7 H. 6. 24.

[249] But per Afcue to that which is ſaid, that by the refuſal of the baron and feme in the principal caſe, that the feoffees ought to enfeoff R. to whom the remainder is limited, it is not ſo, for it is confeſſed.

3 In quare impedit, a man *ſeiſed of a manor with advowſon appendant enfeoff'd* 3, upon condition, *that they or any of them who ſurvived, or their heirs, within* 40 *days next after* 10 *years next enſuing the date of the charter, ſhall re-infeoff J. and E. his feme in tail*, the *remainder to K. in fee*, and *they made a deed accordingly with letter of attorney* to W. P. to deliver ſeiſin, and delivered it to the attorney of M. in the county of E. ſuch a day, within the 40 days, and commanded him to make the feoffment accordingly; *which attorney*, ſuch a day and year, at the manor *offered to the baron* to make eſtate within the 40 days according to the deed and condition, *and the baron refuſed, and* alſo *the attorney was upon the manor all the* 40 *days, ready to have made livery*. Br. Conditions, pl. 55. cites 19 H. 6, 67, 73, 76.

that the baron and feme are alive, and R. ought not to have it till after their deaths; and therefore it ſeems that after their deaths they ought to infeoff him. And ſo it is the beſt opinion here, that by the refuſal of the baron and feme, the feoffees ſhall not retain the land; for this was not the intent of the feoffor, therefore the entry of the feoffor lawful. Ibid.

4. And

4. And *ſo* it ſeems that *where time is limited*, if a man refuſes at one time, he *may agree at another day within the time*, and all well. Quære. Ibid.

5. And if the *baron and feme die within the* 40 *days*, there the feoffees ought to make eſtate to R. to whom the remainder is limited, *and if all die* within the 40 days, the feoffor may re-enter; for the feoffor ſhall not loſe the land where the condition is not performed, and no default in the feoffor. Ibid.

6. And if A. infeoffs B. upon condition *to re-infeoff him in fee*, and A. dies, yet B. *ought to infeoff the heir of A.* and if B. had tender'd a feoffment to A. and he refuſed, and died, yet the *heir* of A. ſhall make requeſt, and ſhall have the land; quære inde where *no time is limited.* Ibid.

7. Debt upon obligation by J. B. againſt J. C. who ſaid that the obligation is indorſed, that *if A. made eſtate tail to B. before Michaelmas*, that then, &c. and that *A offered ſeiſin to B. by deed ſealed, and he refuſed*, and that the obligation was made to the uſe of the ſaid B. It was held, that the refuſal of G. ſhall ſave the obligation, becauſe the obligation was to the uſe of G and conſequently G. was privy; but the ſame was not expreſly ruled. Br. Conditions, pl. 140. cites 2 E. 4. 2.

8. Where a man is bound in an obligation *to do a thing out of the obligation, as to infeoff J. S by ſuch a day*, and he *offers a feoffment*, and the other refuſes, he ſhall never be bound to make the feoffment, and the law is the ſame in like caſes; *but of things within, as* an obligation *of* 20 *l. to pay* 10 *l.* notwithſtanding that he refuſed the 10l. offered at the day, yet he ſhall recover the duty after, viz. the 10l. but not the penalty, for the 10 l. is within, and not dehors. Br. Conditions, pl. 145. cites 7 E. 4. 3.

If a man makes an obligation of 100 l. with condition *for the delivery of corn or timber, &c. or for the performance of an arbitrement of the doing of an act*, &c. this is *collateral* to the obligation, that is to ſay, is not parcel of it, and therefore a tender and refuſal is a perpetual bar. Co. Litt. 207. a.

9. *And* per Danby, the obligor ſhall ſay, that he *attended all the day*; contra per Littleton, for if the obligee refuſes at one time it is ſufficient; quod nota; which Brooke ſays ſeems to be law. Br. Conditions, pl. 145. cites 7 E. 4. 3.

10. Where the condition is *to do a thing by a day*, the refuſal *before the day* is not material if he performs it at the day or before the day. Br. Conditions, pl. 67. cites 14 H. 8. 17. per Pollard. Ibid. pl. 65. cites 15 E. 4. 30. per tot. Cur.

11. Refuſal and denier *to him who is privy* is material, and *to a ſtranger* is nothing to the purpoſe. Br. Conditions, pl. 26. cites 14 H. 8. 22.

(P. c.) [*Excuſe.* Acts of the Obligee. [*Refuſal.*] [250]

[1.] IF the condition be, *that the ſon* of the obligor *ſhall ſerve the obligee for* 7 *years*, if he *tenders his ſon*, and the obligee refuſes, it is no forfeiture. 22 Ed. 4. 26. 2 Ed. 4. 2.]

2. A man is bound to *J. N. that A. B. ſhall make obligation of* 10 *l. to the ſaid J. N. by a day*, and A. B. offers, and *J. N. the obligee refuſes*, the obligation is not forfeited; for the refuſal was by the obligee himſelf; contra if it ſhall be made to a ſtranger, and he refuſes, &c. Br. Conditions, pl. 197. cites 10 H. 6. 16.

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(P. c. 2) Tender and Refuſal. Pleadings.

1. DEBT upon obligation, with condition *that the defendant infeoff A. B. and his feme*, and *ſaid, that he tendered eſtate* to the baron and feme, and the *baron refuſed*; per Cateſby, this is no plea, but ſhall ſay, that the baron and feme refuſed; but per Brian J. if the *baron once refuſes*, the defendant is diſcharged for ever; and if the baron refuſes, it is the refuſal of the baron and feme. Br. Conditions, pl. 62. cites 15 E. 4. 5. 6.

2. *Ani* ſo it is held there, that *refuſal of a ſtranger* to the obligation ſhall ſave the obligation. Ibid.

3. Debt upon obligation; the defendant ſaid, that it is indorſed, that *if the defendant, or any for him, come to Briſtol ſuch a day, and there ſhew to the plaintiff, or his counſel, ſufficient diſcharge of annuity of* 40 *s. per annum, which the plaintiff claims out of two meſſuages in D.* that then, &c. and ſaid, that A. and B. by aſſignment of the defendant, came the ſame day to B. and *tendered to ſhew* to N. and W. of counſel with the plaintiff, a ſufficient diſcharge of the annuity, *and they refuſed to ſee it*; judgment ſi actio; and the plaintiff demurr'd, and it was awarded no plea by all the juſtices, after great argument, becauſe he did not *ſhew what diſcharge he tendered*, as a *releaſe* or *unity of poſſeſſion*, &c. for this lies in the judgment of the court to adjudge it; but they ſaid, that if he came not there at the day, this ſhall be tried per Pais. Br. Conditions, pl. 183. cites 22 E. 4. 40.

(Q. c) [*Excuſe.*] Acts of the Obligee.

[1. IF A. is obliged to B. and the condition is, *that the ſon* of A. *ſhall ſerve B. for ſeven years*, if *B. takes him, and after*, within the term, *commands him to be gone* from him, the obligation is not forfeited, 22 E. 4. 26.]

Bendl. 18. pl. 26. Anon, S. C. and the plea awarded good.

[2. If the condition of a bond be, that the obligee ſhall *peaceably enjoy* certain copyhold land *without the interruption of any*, and after the *lord enters for a forfeiture by nonpayment of the rent according to the cuſtom*, yet the obligation is not forfeited, for this was the neglect of the obligee himſelf. Hill. 28 H. 8. Dier 30. pl. 205.]

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3. A bond was conditioned *to deliver to the obligee a releaſe of* &c. In debt brought the obligor *pleaded, quod paratus fuit at the day to ſeal and deliver it, and that it was wrote, and wax fixed to the label, but the plaintiff refuſed to accept it*; but by Chamberlaine J. the defendant did not do all that he might have done without the plaintiff, for *he ſhould have ſealed it*, but did not, and therefore the plaintiff's

plaintiff's refusal was not ill; for that would be acceptance of paper; and Haughton J. agreed. 2 Roll. Rep. 238. Mich. 20 Jac. B. R. Anon.

4. A. gave a *bond for* his *true imprisonment, and* after *escaped*, and the marshal assigns the bond to the plaintiff who sues it to judgment, *the obligee brings in the original defendant*, and the *marshal accepts him*, and per Cur. he by the acceptance has dispensed with the forfeiture of the bond. 12 Mod. 454. Pasch. 13 W. 3. Mason v. Atherbury.

(R. c) [*Discharged by*] Acts of both.

[1. IF the *obligor pays part of a small sum contained in the condition at the day, without* any *mention of the rest*, yet the whole obligation is forfeited. 21 Ed. 4. 25. B.]

[2. If the condition be, that he shall *not disturb the obligee* in certain land leased to him; yet if *he surrenders to the obligor*, this is a good discharge of the obligation. 22 Ed. 4. 37. admitted.]

[3. [If a] *condition* [is] *broke*, performance with the *acceptance of the obligee after* will not excuse. 20 Ed. 4. 8. 6.] Per Brian, contra Suliard; and the reporter says, Ideo quære.

4. If A be *bound to an abbot that B. shall infeoff the abbot by such a day*; there if *B. enters into religion in another house* before the day, the obligation is forfeited; and *contra* if he enters into religion *with the same abbot*, for now the obligee is in default by acceptance of him into religion. Br. Conditions, pl. 127. cites 4 H. 7. 3.

(R. c. 2) *Excuse* pro Tempore. *Accident.*

1. FINE by an abbot *to find a chaplain to chant in such a chapel* or church, the *defendant said, that the* church or *chapel fell such a day*, &c. *so that he could not do his service there*; per Keble this is no plea, for the conusor is bound to do it there, and therefore he shall make the chapel; but the opinion of the court clearly was, that the plea that the chapel was fallen was a good plea for the time, and that the conusee shall make the chapel who took the commodity of the services, and the judgment in these cases is distringas ad facienda servitia, which cannot be till the chapel be rebuilt; but judgment may be given, quod cesset executio, till the chapel be made, per Keble; but per Fineux contra. And this case of the divine service *is the default of the plaintiff for not making of the chapel*; so judgment shall not be given for the plaintiff where all the default is in the same plaintiff, and the defendant shall not do divine service in the place when the chapel is fallen, and it is a *bar* Br. Conditions, pl. 241. cites 10 H. 7. 13. that the obligor is excused, Brook says *Quære if for ever &c.*

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for the time; per Fineux, Brian and Danvers, but per Vavisor it is a bar for ever. Br. Bar, pl. 111, cites 16 H. 7. 9.

S. P. Br. Conditions, pl. 241. cites 20 H. 7. 13.

2. *So* if a man be *bound to carry the corn to the barn of J. S.* and the *barn falls*, he is discharged of the carriage. Per Brian. Ibid.

3. Covenant *to levy a fine* by him and his wife *at the reasonable request*; sickness of the wife is excuse. Mo. 124. pl. 270. Pasch. 25 Eliz.

See Tit. accord. per totum.

(S. c) In what Cases a *collateral Thing* may be given *in Satisfaction* of a Condition.

* 2 Brownl. 131. S. C. & S. P. by Coke Ch. J. —† If the condition (*) F. 1. 450. be to make up an account, it is no plea that he made him a lease of a house and land in full satisfaction of all accounts, &c. D. 1. Pasch. 4 H. 8.

[1. IF a man be *bound* in 20 l. *to do a collateral act* as a feoffment, or to be bound in a statute, or to render a true account; there *money or other thing* given *in satisfaction is no performance* of the condition. Co. 9. * *Peytœ* 79. b. † D. 4 H. 8. 1. Perkins S. 753. contra ‡ 9 H. 7. 18. per Vavisor. H. 13. Jac. B. R. between § *Forwood and Dicton* adjudged, (*) that money cannot be given in satisfaction. ‖ 12 H. 4. 23. adjudged. Contra 4 H. 6. 23. admitted.]

‡ S. C. cited 9 Rep. 79. b.

§ 3 Bulst. 148. Morewood v. Dickens, and was on a bond of 20 l. conditioned to deliver to the obligee before such a day so much lead; the defendant pleaded, that before the day at the request of the plaintiff himself he had paid one S. 10 l. which the plaintiff was indebted to him, and this he paid for the plaintiff in full discharge of the first bond, and that so the plaintiff had accepted of it. The whole court were clear of opinion that the plea was not good, and that the plaintiff had good cause of demurrer, and gave judgment for the plaintiff.——Roll. Rep. 296. pl. 5. S. C. says it was adjudged per tot. Cur. against the plaintiff. (But it is added, that it seems it was for the plaintiff.)

‖ Br. Conditions, pl. 4. cites S. C. for the condition being to be bound in a statute the acceptance of a lease of a house for his life in satisfaction is no performance, for this is a condition dehors, and must be performed strictly.——Fitzh. Barre, pl. 189. cites S. C.——, Bulst. 148. Arg. cites S. C.——S. C. cited 9 Rep. 79. b.——Co. Litt. 212. b. S. P.

* In such case the payment of another thing is good, if the obligation be to pay a certain sum of money; per Coke Ch. J. 2 Brownl. 131 in S. C.

[2. *But* when the *condition* is *to pay money* there any other *collateral thing will be a satisfaction*. Co. 9. * *Peytoe*, 79. † 19 Ed. 4. 1. B. ‡ 12 H. 4. 23. B.]

† Br. Conditions, pl. 161. cites 18 E. 4. 15. 17. 20. and is the S. C. with that of 19 E. 4. 1. b.——

‡ Br. Conditions, pl. 41. cites S. C. as if he pays corn for the money, it is good; per Hanke.——Fitzh. Barre, pl 189. cites S. C.

Co. Litt. 212. b. S. P. and says not only *things in possession* may be given in satisfaction, but also if the feoffee or obligee accept a *statute or a bond* in satisfaction of the money, 'tis a good satisfaction.——3 Bulst. 149. S. P.

Debt upon condition upon obligation *to pay* 10 *l. before such a day*; the defendant said that before the day of payment he *delivered a horse in full satisfaction, to which he agreed*, judgment si actio, and a good plea; by which the plaintiff took the receipt by protestation, and traversed the agreement; but it seems there that it is a good plea that he did not pay the horse. Br. Conditions, pl. 199. cites 2 R. 3. 22.——Co. Litt. 212. b. S. P.

[3. A man *bound in* 200 *quarters of malt*, upon condition *to pay* 20 *l.* A *ring or horse*, or other collateral thing, is a satisfaction. Co. 9. 79. [a].]

[4. So

[4. So a *feoffment* upon condition *to pay* 20 *l.* A collateral thing is a ſatisfaction. Co. 9. *Peytoe*, 79. [a].] Co. Litt. 212. b. S.P. ——In caſe of feoffment in mortgage, if the feoffor pay to the feoffee a *horſe* or *gold ring*, &c. in full ſatisfaction of the money, and the other receives it, it is good enough, and as ſtrong as if he had received the money, though the horſe was not the twentieth part of the value, becauſe the other had accepted it in full ſatisfaction. Co. Litt. S. 344.

[5. A man bound *in* 20 *quarters of grain*, conditioned *to pay five quarters*, money or other collateral thing, is not a ſatisfaction, becauſe of the original contract]

[6. But *otherwiſe* it is in *contract without deed.* Co. 9. 79. b.] In ſuch caſe payment of money is a clear diſcharge of the contract; per Haughton J. 3 Bulſt. 149.

[7. If the condition be *to pay a leſs ſum* at a day; if the obligee *agrees that he ſhall pay an horſe*, or other thing in ſatisfaction, yet if he *refuſes* it, the obligor ought to pay the ſmall ſum at the day, otherwiſe he hath forfeited the obligation; for the *agreement by parol, without acceptance, cannot alter the agreement by deed before.* 19 E. 4. 1. b. 2.] Br. Conditions, pl. 161. cites 18 E. 4. 15. 17. 20. and is the commencement of the S. C. cited by Roll; but if the obligee *accepts the horſe in recompence*, this is a good diſcharge of the bond. Ibid.

[8. *So* if the condition be *to erect an houſe of ſuch a length*, &c. he cannot plead *another agreement in another manner* in ſatisfaction thereof, unleſs it be *by deed.* 19 E. 4. 2. 6. per Curiam.]

[9. *So* if the condition be *to pay a ſmall ſum at D, at ſuch a day*; an *agreement to pay at another place*, without acceptance, is not a diſcharge. 19 E. 4. 1. b.] So in debt on a bond, the defendant pleaded that before the day, the plaintiff, in regard the plaintiff's cattle had done ſome treſpaſs on the defendant's lands, gave him a longer day of payment of the money, which day is not yet come; adjudged per tot. Cur. to be no plea, becauſe a parol agreement cannot diſpenſe with a bond. Cro. E. 697. pl. 8. Mich. 42 & 42 Eliz. B. R. Hayford v. Andrews.

[10. *So* if a *thing be to be done by implication of law to the perſon of any perſon*, and the *obligee appoints* him to do it *at a place in certain*, yet if the perſon be not there to accept it, it is not diſcharged, but the other ought to ſeek him. 19 E. 4. 1. b.] Br. Conditions, pl. 161. cites 18 E. 4. 15. 17. 20. and is part of the S. C.

[11. If a condition of an obligation be *to pay* 10*l.* *at a day at D.* if the obligee *accepts it at another place*, it is a good performance without deed. *41 E. 3. 25. †46 E. 3. 29. b. ‡3 H. 4. 9. ‖11 H. 4. 50. 62. 21 E. 3. 45. 49 E. 3. 6.] * Br. Conditions, pl. 21. cites S. C.—— Fitzh. Dette, pl. 121. cites S. C.——See (Q. b) pl. 1, 2. S. C. † Br. Conditions, pl. 31. cites S. C.——Br. Dett. pl. 43. cites S. C. ‡ Br. Eſtoppel, pl. 53. cites S. C.——Fitzh. Eſtoppel, pl. 95. cites S. C. ‖ Br. Charters de Terre, pl. 20. cites S. C. but not S. P.

[12. *So* if the defeaſance of a ſtatute be *to pay at D. ſo much rent.* 46 E. 3, 4.] Br. Defeaſance, pl. 14. cites S. C. & S. P. as to payment of money, but mentions nothing as to rent.——Fitzh. Audita Querela, pl. 1. cites S. C.——(Q. b) pl. 2. S. C.

[13. If

[13. If a condition be *to pay a rent to the obligee*, an *agreement to pay to his bailiff, who refuſes*, is no plea without deed. Dubitatur, 9 H. 6. 29. b.]

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Br. Conditions, pl. 24. cites 42 E. 3. 23. [and is at 23. a. pl. 2. and not at 22 b. as in Roll.]

[14. If a condition be *that a ſtranger ſhall infeoff the obligee* of land, which *the ſtranger tenders*, and *he refuſes* to accept, *but by his command he infeoffs another*, this is a good performance without deed. 42 E. 3. 22. b. It ſeems the refuſal is the great cauſe thereof, yet there the iſſue is taken upon the command.]

and the plea held good; but Brook ſays quod mirum! becauſe the contrary is held Trin. 12 H. 4. 23. becauſe things de-hors ſhall be taken ſtrictly; but payment to the plaintiff and payment to a ſtranger by his command is all one.——Fitzh. Barre, pl. 190. (bis) cites S. C.

Br. Conditions, pl. 32. cites S. C. but ſays nothing as to performance being without deed,

[15. If the *defeaſance of a ſtatute* be *to pay* 10 *l. rent* at a day, it is a good performance without deed, that he *paid part for the expences of one of the conuſees, and the reſidue for the reparations of the houſes* (which he himſelf was not bound to repair) by the command of the conuſee. 46 E. 3. 33. b. adjudged.]

but only that it was by command of the conuſee, and awarded a good performance; and Brooke ſays that ſo it ſeems it amounts to a payment per auter mains; quod nota.——Br. Audita Querela, pl. 6. cites S. C. accordingly.

Br. Conditions, pl. 228. cites S. C.——

[16. If a *leaſe* be made by deed, *rendring rent* upon condition, it is a good performance, that *by accord the rent ſhould be re-couped* for the table of the leſſor. 47. E. 3. 24. b.]

Br. Covenant, pl. 13. cites S. C. but Brooke ſays, quære if ſuch agreement without deed be ſufficient to diſcharge a covenant which is by deed; for by Parn. it is not ſufficient.——A condition was to pay money at Mich. and it was agreed between the parties that the plaintiff ſhould retain ſo much rent as the monies due to the obligee on the day they were payable ſhould amount unto, in ſatisfaction of the monies; but becauſe the rent was not due till after that day, he could not contract for it, and conſequently the condition was not performed. Arg. Roll. Rep. 296. cites Mich. 40 & 41 Eliz. Andrews v. Harriſington. But ſays that it was there agreed, and that ſo is 22 E. 4. 5. that otherwiſe it is in caſe of 2 obligations becauſe both are duties.

[17. If I *deliver money* to another *without deed to my uſe*, and make a *defeaſance by deed to pay a leſs ſum*, if I accept *corn in ſatisfaction without deed*, this is not any diſcharge. Contra, 18 E. 3. 39. b.]

* Fol. 457.

† Br. Conditions, pl. 31 cites S. C.——Br. Dett. pl. 43. cites S. C.

[18. If the obligee *accepts the thing* to be done *after the condition is broke*, (*) yet this is not a diſcharge of the obligation without deed. † 46 E. 3. 29. b. ‡ 47 E. 3. 14. Contra, 18 E. 3. 58. b.]

‡ Fitzh. pl. 218. cites S. C.

Fitzh. Barre, pl. 224 cites S. C.

[19. If the condition be *to ſtand to an award to be made ſuch a day*; if at the day *no award is made, but* the arbitrators, by aſſent of parties, *appoint another day* to do it, and do make it at the day, yet he is not bound to perform it. 49 E. 3. 9. demurrer.]

[20. If a *grantee of an annuity, pro conſilio impendendo, promiſes* the grantor *to come to a certain place at a certain day to give him counſel*, if he does not come at the day there, yet the condition is not broke, for he is not bound by the condition to go there, and this cannot alter it. 21 E. 3. 7. b.]

21. If

21. If the *diſſeiſee takes homage of the diſſeiſor*, this ſhall bind him for his life, and *contra againſt the heir* in writ of entry ſur diſſeiſin. Quære of the diſſeiſee. Br. Acceptance, pl. 16. cites 17. Aſſ. 3.

22. Debt *for meat and drink*, it was ſaid for law that it is no *plea that a ſtranger has made an obligation to the plaintiff for the ſame debt*, *contra* to ſay *that the plaintiff himſelf has* made an obligation to him for the ſame debt, tho' it be in ſuch action of debt in which the defendant may wage his law. Br. Dette, pl. 19. cites 28 H. 6. 4.

23. Condition of a bond was, that a *ſtranger ſhall pay to the obligee* 10 *l.* ſuch a day. The defendant pleaded acceptance by the plaintiff of a horſe in ſatisfaction at the day. This was held a good plea; *but* if the payment had been to be made by the ſtranger, or by the obligor himſelf *to a ſtranger* who had accepted ſuch recompence, the plea would not be good; for it ought to be performed ſtrictly according to the condition. D. 56. a. b. pl. 18, 19. Trin. 35 H. 8. Anon. [255]

24. When the condition is for *payment of money*, there is a diverſity when the money is to be paid *to the party*, and when to *a ſtranger*; for when the money is to be paid to a ſtranger, there if the ſtranger *accepts an horſe*, or any collateral thing in ſatisfaction of the money, it is no performance of the condition, becauſe the condition in that caſe is ſtrictly to be performed; but if the condition be, *that a ſtranger ſhall pay* to the obligee or feoffee a ſum of money, there the obligee or feoffee may *receive a horſe*, &c. in ſatisfaction. Co. Litt. 212. b.

25. Right or title of *freehold* or inheritance cannot be *barr'd* by any collateral ſatisfaction but by releaſe or confirmation, or ſome act which is tantamount. 4 Rep. 1. Mich. 14 & 15 Eliz. Vernon's caſe. Arg. cited Roll. Rep. 297. in caſe of Forwood v. Dicton.

26. *Debt on a ſingle bond for* 8 *l.* The defendant *pleaded*, *that after his entering into that bond, he enter'd into another to the plaintiff of* 14 *l. for the payment of* 7 *l.* at ſuch a place and day not yet come, *which the plaintiff accepted in diſcharge of the ſaid bond for* 8 *l.* Adjudged for the plaintiff that the plea was ill, and not any bar. Cro. E. 716. pl. 40. Mich. 41 & 42 Eliz. C. B. Manhood v. Crick.

27. Debt on a *bond*; the defendant pleads that he hath given a *bill of exchange* in ſatisfaction, and ruled a good plea. Comb. 19. Paſch. 2 Jac. 2. B. R. Hilliard v. Smith.

28. The *reaſon why* a collateral thing cannot be ſatisfied with money, or other collateral thing is, becauſe the collateral thing is not due, and ſo no contract can be made of it till the day of payment. Arg. Roll. Rep. 296. pl. 5. Hill. 13 Jac. B. R. in caſe of Forewood v. Dicton. And per Coke Ch. J. the reaſon why money may be ſatisfied by other collateral thing is, becauſe it is of a certain value. Arg. Roll. Rep. 297. Hill. 13 Jac. B. R. in caſe of Forewood v. Dicton.

29. In *debt* by an executor *upon a bond* to his teſtator, the defendant confeſſed the bond, but *pleaded*, *that he gave another bond* to the teſtator *in ſatisfaction of that bond, which bond the teſtator accepted*

cepted of in ſatisfaction. The court held it an ill plea to ſay, that one did accept of one choſe en action (for ſo is a bond till the debt is recovered) in ſatisfaction of another choſe en action, and here the defendant has confeſſed the debt, and at another day judgment was given againſt him. Style 339. Mich. 1652. B. R. Brock v. Vernon.

30. A. *ſells* land to B. A. takes a leaſe of the ſame lands of B. at a rent beyond the value, with a condition of *re-entry*, and gives collateral ſecurity for the *payment of the rent.* A. was arrear 5 years rent. B. re-enter'd. A. could have no *relief* againſt the collateral ſecurity without payment of the arrears, as well after as before the re-entry; the land was worth but 160 l. but the rent was 250 l. per annum. Chan. Caſes 261. Trin. 27 Car. 2 Anon.

31. *A. is bound to B. to pay B.* 100 *l*, *B. may take* any collateral ſatisfaction for it; but if A. is bound to B. *to pay C.* 100 *l.* there C. ſhall not receive any collateral ſatisfaction to ſave the bond, for he cannot alter the terms of an agreement made between ſtrangers; per Holt Ch. J. Farr. 144. Hill. 1 Ann. B. R. in caſe of Booth, alias Gould v. Johnſon.

[256] (T. c) *Who may diſpenſe* with a Condition. A *Stranger.*

[1. IF the condition of an obligation be, *to aſſure a copyhold to A. and B. his wife*, (who are *ſtrangers to the obligation*) *for the life of C.* and the *obligor at the requeſt of A. ſurrenders it to the uſe of A.* &c. *to the uſe of ſuch perſon as he ſhall nominate*, this is not any performance of the condition; for A. who is a ſtranger cannot diſpenſe with the condition, nor by his agreement alter the thing to be done, but he ought to take it as the condition limited it. Mich. 15 Jac. B. R. between *Stile and Smith* adjudged upon a demurrer.]

(U. c) What *Things* will *excuſe* the Performance of a Condition.

Acts of him that ſhall have the Advantage. *Abſence.*

[1. IF a *thing* be to be performed by a condition, *which cannot be performed without the preſence of the obligee* there his abſence ſhall excuſe the performance. 12 H. 4. 23. b.]

[2. If a condition be *to make a feoffment to the obligee*, if the obligee be not preſent at the time, the performance is excuſed. 12 H. 4. 23. implied.]

Br. Entre congeable, pl. 39. cites [3. If a *rent* be *reſerved to be paid at a certain day upon condition*, if the *leſſee* be *ready* at the day, and none comes for the leſſor, this

this will excuſe the performance of the condition. (And here the leſſor ought to demand.) Contra 4 H. 6. 9.] S. C.—— Ibid. pl. 81. cites 40 Aſſ. 11. S. P. accordingly.——See Tit. Rent (P. a) pl. 2. S. C. and the notes there.

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[4. If the condition be *to enter into a ſtatute to the obligee*, if the obligee be abſent at the day, yet becauſe it *may be performed in his abſence*, he ought to do it. 12 H. 4. 23. b. Otherwiſe e contra. 12 H. 4. 24. b.]

[5. If an abbot covenants with B. *to ſing maſs ſuch a certain day in his manor of D. for him and his ſervants*; though B. nor his ſervants do not ſtay there, yet he ought to ſing. 42 E. 3. 3. b.]

[6. If a condition be *to take an eſtate to himſelf for life, remainder to another*, (who is *privy to the condition*, and is to have benefit by the obligation) *at a certain day*, though he in *remainder* be *not there* at the day, yet it is forfeited if it is not taken accordingly; For this may be performed notwithſtanding his abſence. 40 E. 3. 12.] Br. Conditions, pl. 226. cites S. C. accordingly; for he may leaſe for life, remainder to the plaintiff, or grant it otherwiſe, though the plaintiff be not preſent.——Br. Garniſhment, pl. 12. cites 40 E. 3. 11. S. C. adjudg'd for the plaintiff; for it was not ſaid in the negative, that if the plaintiff did not come that no eſtate ſhould be made.

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[7. *But* in this caſe, if the *condition* had been alſo, *that he in the remainder ſhould be preſent at the day*, his abſence would excuſe the performance of the condition, ſcilicet, of the taking of the remainder, and of the leaſe to himſelf alſo. Contra 40 E. 3. 12.]

8. *He who will have advantage of the condition ſhall make the attendance*, and therefore in debt upon an obligation the obligor ſhall make the attendance, *and ſo it ſhall be pleaded*, and upon leaſe for years the leſſor ſhall make the attendance. Br. Entre Congeable, pl. 2. cites 20 H. 6. 30, 31.

9. *For he of whoſe part it comes to plead the condition*, ſhall make mention of the whole day, which ſee in the end of the book Intrationum Placitorum. Br. Entre Congeable, pl. 2. cites 20 H. 6. 30, 31.

10. And *therefore* it was ſaid, that the *tenant may come the laſt inſtant of the day, and this ſuffices*, and of *the obligee the like*; contra ex parte the obligor or leſſor, for they ſhall plead the condition, and therefore they ſhall make the attendance. Br. Entre Congeable, pl. 2. cites 20 H. 6. 30, 31 & 32, & 36 H. 8. accordingly.

11. In debt, A. was bound *in* 40 *l.* to B. *that C. ſhould infeoff B. of ſuch a manor by ſuch a day*, and *ſaid, that the ſaid C. ſuch a day*, viz. *in the vigil of the day, was upon the manor all the day to have infeoff'd B. and B. did not come all the day.* Sulyard ſaid, that B. was there upon the manor all the day to have taken the eſtate, abſque hoc that C. was there, and good; for the firſt plea in the affirmative ought to make the iſſue, and the refuſal of the obligee is not material in this caſe. Br. Conditions, pl. 186. cites 22 E. 4. 43.

(X. c) What

Fol. 458.

(X. c) What Thing will *excuſe* the Performance of the Condition.

In what Caſe he, that ſhall have advantage, *ought to do the firſt Act.*

Acts of him that ſhall have the Advantage.

Br. Conditions, pl. 42. cites S. C. accordingly, per Curiam.—Fitzh. Barre, pl. 190. cites S. C.

[1. IF the condition of an obligation be, *that* the *obligor*, being a *parſon, ſhould reſign* to the obligee *within a certain time for a certain penſion as they ſhould agree*, the *obligee ought to agree for* penſion, *and tender a deed* thereof to the obligor before he is bound to reſign. 14 H. 4. 18. b.]

[2. If an *annuity* is granted *till* he is *promoted to a benefice by the grantor*; if the grantee after accepts a benefice from another, and after the grantor profers him a preſentation to his benefice, and he *refuſes*, the annuity is determined. 17 Ed. 3. 11. dubitatur.]

* Br. Entre Congeable, pl. 3. cites S. C.—Fitzh. Entre Congeable, pl. 6. cites S. C.

[3. Where a *rent* is *to be paid upon condition at a* certain *day*, he *cannot enter* for the condition broke *before a demand* of the rent. * 20 H. 6. 30, 31. † 40 Aſſ. 11. adjudged.]

† And Fitzh. Ibid. cites 40 Aſſ. accordingly.—Br. Conditions, pl. 216. cites S. C.—Br. Entre Congeable, pl. 81. cites S. C.

[4. *And* the demand ought to be *at the day*, and it is not ſufficient after. Contra 20 H. 6. 30, 31.]

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Br. Entre Congeable, pl. 39. cites S. C.—Ibid. pl. 81. cites 40 Aſſ. pl. 11. S. P. accordingly.

[5. Where a *rent is reſerved to be paid upon condition at a certain day*, the *leſſor ought to demand it*, at the day, otherwiſe the performance of the condition is ſaved, *although the leſſee was not there ready*. Contra 4 H. 6. 9.]

—See Tit. Rent (P. a) pl. 2. S. C. and the notes there.

* Br. Entre Congeable, pl. 2. cites S. C.

[6. If the condition of an *obligation* be *to pay a ſum at a certain day*, the obligor ought to *tender it without any demand*. * 20 H. 6. 30. 2 Ed. 4. 3. b. 8 Ed. 4. 1.]

Br. Arbitrement, pl. 57. cites S. C. but S. P. does not appear.—Fitzh. Arbitrement, pl. 15. cites S. C. & S. P. by Cateſby, which Jenny agreed.

[7. If I am bound *to be attendant upon you* at all times when *you come to your manor of D.* I ſhall be bound to *take notice when you come* to your manor of D. at my peril, without any notice given by you. 8 Ed. 4. 1. b. per Bingham.]

Br. Arbitrement, pl. 57. cites S. C. and ſays it was much argued, whether

[8. If the condition of an obligation be *to ſtand to the award of J. S.* &c. who awards a certain thing to be done to another at a day, he *ought to perform* it at his peril, *without any notice* given by any other. 8 Ed. 4. 1.]

ther notice ought to be given, especially where the obligation is made to the arbitrator himself, but it was not adjudged.——Fitzh. Arbitrement, pl. 15. cites S. C. and says, vide Librum, for it was well debated three times, and several good matters are in the case.——Br. Notice pl. 18. cites 8 E. 4. 1. 20. S. C.——8 Rep. 92. b. in Francis's case, per Cur. cites * 18 E. 4. fol. [18.] a. & 24. a. that it was held by all the court, that the plea of want of notice was sufficient, and that it was there agreed by Brian, Vavasor, and Catesby J. that in such case of Arbitrement the obligor must take notice at his peril, and said, that so it was adjudged in the same king's time in B. R. and that so the law is without question against a sudden opinion in 8 E. 4. fol. 1. a.

* Br. Notice, pl. 13. cites S. C.——Br. Dette, pl. 168. (169.) cites S. C.

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9. A man was bound in a bond *to make a sufficient leaſe* to the obligee *before ſuch a day*, the ſame to be made *at the coſts of the obligor*; in debt upon the bond it was holden a good plea, that the plaintiff did not tender the coſts to him, and if he had, that then he was ready, &c. Mo. 22. pl. 76. Hill. 3 Eliz. Anon. Dal. 27. pl. 10 S. C. in totidem verbis.

10. D. made a deed of *feoffment of lands in divers counties*, dated 15th Octob. 4 Mariæ, upon *condition the feoffee ſhould re-infeoff him of all the lands within* 20 *days after* the date of that deed, and it was reſolved that if *D. made his feoffment but of part within the* 20 *days* the condition was not broken, though all were not reconveyed within the 20 days according to the letter of the condition, which is entire. The reaſon was, becauſe it was *his own fault* that it was not conveyed, without which it could not be conveyed, and therefore the letter was abridged, the condition being taken that *he ſhould reconvey ſo much as was conveyed.* Hob. 24. cites it as reſolved 26 Eliz. in lord Dacre's caſe.

11. Condition was, *if obligor before Eaſter pay* 100 *l. ſo as obligee be ready at payment thereof to enter into bond of* 200 *l. with ſureties to purchaſe ſuch land*, &c. that then, &c. per Wray Ch. J. the firſt act is to be done by the obligor, and at the payment the other is to do that which to him belongs to do. 4 Le. 91. pl. 190. Paſch. 31 Eliz. B. R. Harris v. Whiting.

12. *Covenant to ſeal* and deliver *a leaſe* for years *to commence from Michaelmas next*, and a bond for performance of covenants, and on an action of debt brought on that bond, the breach aſſigned was, that the obligor had *not made* any part of *ſuch leaſe before the ſaid time*, whereupon the obligee put one part in writing and tendered it to the obligor to ſeal, which he refuſed. Et per Cur. where a man [259] covenants to ſeal and deliver a deed, he is bound to put it in writing; but if he refuſe, the covenantee may do it, and 'tis warranted by law. 2 Roll. Rep. 177. Trin. 18 Jac. B. R. Steele v. Spight.

13. A. covenants in conſideration of 20 l. paid, and 50 l. more to be paid, *to grant a leaſe of an houſe* to B. to have and to hold *for the life of B. and of two other ſuch perſons as B. ſhould name*, and after covenants *to deliver poſſeſſion before Chriſtmas*; B. does not *name the two lives* before or at Chriſtmas, nor does A. give poſſeſſion. B. brings covenant becauſe A. did not give poſſeſſion; but adjudged for defendant. Cart. 206. Trin. 21. Car. 2. C. B. Twiford v. Buckley.

14. *Debt* upon bond conditioned *to pay* 1500 *l. the plaintiff aſſigning over to the defendant ſuch a judgment.* Defendant pleads that plaintiff had not aſſigned. Plaintiff replies, that he was ready to aſſign.

ſign. Judgment pro Quer. for it was ſaid that payment of the money, and aſſignment of the judgment, were concomitant acts; and therefore the defendant could not excuſe himſelf merely upon the neglect of the plaintiff, but ought to have pleaded *tender* of this money, though he was not bound to have paid the money in conſequence of the tender, unleſs the judgment was at the ſame aſſigned over to him. 10 Mod. 153. 189. 222. Paſch. 13. Ann. B. R. Turner v. Goodwin.

(Y. c) In what Caſes the *Obligee* ought *to do the firſt Act.* [And *what* is a *ſufficient doing* ſuch firſt Act.]

Every one of the books here mentioned ſeem to be miſcited; for

[1. IF the condition of an obligation be *to levy a fine to the obligee*, he is not bound to levy it, if the obligee does not *ſue a writ of covenant* againſt him. 18 Ed. 3. 27. b. 8 Ed. 4. 2. b. per Markham, 21. b. Co. 5. *Palmer* 127. 7 Ed. 4. 2. b.]

I do not obſerve any ſuch point in any one of them, nor any thing applicable thereto.——But Hutt. 48 Hill. 19 Jac. Waldrond v. Hill, the condition of a bond was, *that ſuch a one and his wife, before Eaſter term, &c. ſhould levy a fine of ſuch lands to the plaintiff*; the defendant *pleaded, that before the end of that term the plaintiff did not ſue forth a writ of covenant* whereupon a fine might be levied, and Hobard Ch. J. was of opinion it was a good plea; for that the plaintiff ought to procure the writ to have made himſelf capable of the fine.——Win. 29. Hill v. Waldron, Paſch. 23 Jac. C. B. the S. C. & Hobard Ch. J. ſaid it was not reaſonable to compel the obligor who is a ſtranger to the eſtate, which paſſes by the fine to ſue out a writ of covenant, to which Hutton J. agreed, but Winch doubted.

[2. If the condition be to levy a fine *upon warning* given; if he be *ſummoned in a writ of covenant*, this *is ſufficient* warning. 29 Ed. 3. 44. b.]

[3. If a *defeaſance* be *to pay a ſmall ſum* in diſcharge, &c. *he ought to pay it at the day, though the plaintiff will not give him any acquittance* for it; becauſe in an action for the principal ſum, he may plead payment of the leſs ſum, without any acquittance. Quære, 18 Ed. 3. 39. b.]

[4. If a condition be *to inroll a deed* in Guildhall, he is not bound to do it before *requeſt* made by the other. 39 Ed. 3. 3.]

5. A leſſee for years upon condition, that *if the leſſee ſell, the leſſor to have the firſt offer, he giving as much as another*; here the leſſee ought to demand, if the leſſor will give as much for the term as another will, if he ſay, No, he ought to ſhew him no more; but if the leſſor ſay that he will, then the leſſee ought to *ſhew how* [260] *much another will give* more. And this queſtion the leſſor is to determine of preſently; for it was no reaſon to defer the ſale while he conſiders of it. Dyer, 13. b. 14. a. pl. 65. &c. Trin. 28 H. 8. Anon.

Hutt. 18. Arg. cites the caſe of Burnell v. Brook, S. P. accordingly, and ſeems to be S. C.

6. An obligation was conditioned, *that J. S. ſhall acknowledge a judgment* in C. B. to J. D. In debt the defendant pleaded, that the *plaintiff had not ſued forth any original writ*, and it was held a good plea. Arg. Win. 30. cites Paſch. 4 Jac. Burnell v. Bowle.

7. Covenant

7. Covenant was at the end of two years to procure a deputation for J. S. *Proviſo, that upon the granting thereof J. S. ſhould give ſecurity for payment* of 100 l. per annum rent for it and performance of covenants. J. S. need not give ſecurity till the deputation made. Cro. J. 297. pl. 4. Hill. 9 Jac. B. R. Barwick and Turner v. Gibſon.

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8. In debt on bond conditioned *to make all the linen for the neceſſary wearing of the obligee during his life*, the court held, that the *obligee muſt deliver to the obligor the cloth of which it is to be made*; for all contracts are to be interpreted according to the intent and ſubject-matter. As if a ſeamſtreſs is bound to make me a linen-ſuit ſhe is to find the linen, but it is not thereon that the obligor was a ſeamſtreſs, or ſuch perſon as uſed to make linen and ſend the ſtuff; and therefore judgment was given for the defendant. Lev. 93. Hill. 14 and 15 Car. 2. B. R. Oles v. Thornhill. Keb. 466. pl. 69. Oats v. Thornhill. S. C. Windham ſaid, that the intent muſt guide contracts, and here it appears that the plaintiff is a ſeamſtreſs, and it is her proper trade to make linnen, and therefore, as a taylor, ſhe is not bound to find the linnen, which Twiſden agreed; but otherwiſe of a ſhoe-maker or goldſmith; and judgment for the plaintiff.

9. *So if a taylor is bound*, or promiſes *to make a ſuit of cloaths* for me, I ought to deliver him the cloth, becauſe this is uſual, and not for him to provide it; Per Cur. Lev. 93. in S. C.

10. *But if a ſhoe-maker is bound to make me a pair of ſhoes*, he is alſo bound to find the leather, becauſe it is uſual; Per Cur. Lev. 93. in S. C.

11. Debt on bond, conditioned *to pay ſuch coſts as ſhould be ſtated* by 2 arbitrators by them choſen, defendant pleads that none were ſtated, plaintiff replies that *defendant brought not in his bill*, to which it was demurred; for tho' if the defendant were the cauſe that no award was made, it was as much a forfeiture of his bond as not to perform it would be; yet here there was a precedent act of the plaintiff's neceſſary, viz. to chooſe an arbitrator, which he ought to have ſhewn before any fault could be aſſigned in the defendant in not bringing in of his bill, and to this the court did incline. Sed Adjornatur. Vent. 71. Paſch. 22 Car. 2. B. R. Baldway v. Ouſton.

12. If by the agreement of the parties, *2 acts are to be done*, and *time is limited for doing of one, and no time for the other*, there if the *nature of the thing* will bear it, that thing is to be done firſt for which the time is limited. Arg. 10 Mod. 224. Paſch. 13 Ann. B. R. in caſe of Turner v. Goodwin, cites Vent. 147. Saund. 319. Cro. C. 384, 385. 2 Saund. 350. 352. Lutw. 251. 490. 565.

(Y. c. 2) *Demand. Neceſſary*; in what Caſes. [261]

1. DEBT upon indenture of covenant *to pay 4 l. annually, and 12 s. rent per ann. ad quas conventiones perimplend'* the *defendant bound himſelf in* 100 *l. by the ſame indenture*, and brought debt, and *counted that the one and the other were arrear*; and the *defendant ſaid that he was at all times ready to pay, and yet is, and*

tendred the money in court, absque hoc, that the plaintiff required it; and by the best opinion he ought to pay it at the day without requeſt, becauſe he is bound to pay it; and *contra* where he grants *annuity*; there it is no damage unleſs the grantee requires payment; note a diverſity. Br. Conditions, pl. 153. cites 11 E. 4. 10.

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But if he be bound in another obligation to pay the firſt ſum, there he ought to tender; quod non negatur. Ibid.

2. Debt upon *obligation, that* if the *plaintiff ſhall enjoy an annuity* which the defendant had granted to him out of the manor of Dale, according to the form of the gift, that then, &c. and ſaid *that at every day he was ready to pay*. Quære if he ought to tender; becauſe if a man be *bound in a ſingle obligation payable at ſuch a day*, there he need not pay without requeſt, and the plaintiff ſhall not recover damages without requeſt. Br. Tender, pl. 22. cites 14 E. 4. 4.

If no day of payment is limited, it is not payable before requeſt. Br. Tender pl. 14. cites 14 H. 8. pl. 29.——S. P. but contra of condition to pay ſuch a day, &c. Br. Tender pl. 27. cites 14 H. 8. 29.

3. In debt upon a *ſingle obligation* the plaintiff ought to requeſt payment; but upon an obligation of a greater ſum, to pay a leſs, the defendant ought to tender it. Per Huſſey Ch. J. Br. Tender, pl. 25. cites 21 E. 4. 42.

4. If a man be *bound* to me *in* 20 *l.* by *ſingle obligation*, he is not bound to offer it before requeſt. Br. Tender, pl. 34. cites 21 E. 4. 50. 42.

5. *But* if he be *bound in* 40 *l. by another obligation to pay the ſum in the firſt obligation*, there the defendant ought to tender it. Br. Ibid.

6. *And* if *no day* be limited, he ought to do it in as *convenient time* as he can, quod nota. Ibid.

7. If a man is *bound in* 20 *l. to pay* 10 *l.* there he ſhall make tender at his peril. Br. Tender, pl. 43. cites 16 H. 7. 14.

8. *So* where he is bound *to perform an arbitrement*. Ibid.

9. *But* where it is *by contract or ſingle obligation*, there the creditor ought to make requeſt, and upon this the debtor ought to be ready to pay, and there without actual requeſt the plaintiff ſhall never recover damages; per Brian and Fineux, and therefore the requeſt ſhall make the iſſue. Ibid.

10. Debt upon bond condition'd, that the obligee, his heirs and aſſigns, *ſhall, and may lawfully hold and enjoy a meſſuage*, &c. *without the let*, &c. *of the obligor, or his heirs, and of every other perſon diſcharged*, or elſe, *upon reaſonable requeſt, ſav'd harmleſs* by the obligor *from all former gifts*, &c. The defendant *pleaded, that no requeſt was made* to ſave harmleſs. Adjudg'd for the plaintiff, becauſe the condition has two parts, one for enjoyment, the other to ſave harmleſs upon requeſt, and to the enjoyment of the land the defendant has not made any anſwer. Mo. 591, 592. pl. 797. Trin. 39 & 40 Eliz. C. B. Creſwell v. Holmes.

11. Debt upon *bond with condition to reſign a benefice within* 3 *months after requeſt*, viz. *at the parſonage houſe of C.* that then, &c. the defendant *pleaded non requiſivit*, upon which they were at iſſue, and the jury found for the plaintiff, who had judgment accordingly;

it was assigned for error, 1st. that the *plaintiff did not set forth the request precisely at the parsonage-house, but* alleged a request at the parsonage-house of C. *by a (viz.)* sed non allocatur; for it is the usual course; 2dly, that he did *not shew that the defendant was there present, or had notice of the time of the request*; but non allocatur; for *being alleged to be made unto him at the said place, it must necessarily be intended* that the defendant was present, and had sufficient notice of it, otherwise they ought not to have found the request. Cro. J. 274. pl. 2. Pasch. 9 Jac. B. R. Lawrence v. Johns.

12. A. covenanted to *transfer stock* to B. *provided that B.* such a day *by word, or by writing, left at the East-India-House* in Leaden-Hall-street, *demand the said stock* to be transferr'd to him. Upon the day B. made *demand ore tenus* (and not by writing) at the East India-House, and held good, and that it need not to be to the person, nor at the last hour of the day. Per Cur. and judgment for the plaintiff. Carth. 268. Per Cur. Pasch. 5. W. and M. in B. R. Hall v. Cupper. Skinn. 391. pl. 27. S. C. Adjudged.

(Z. c) *Demand. Where another* than he who is to perform the Condition *is to do the first Act.*

Fol. 456.

See Tit. Penal Bill. (A). See Tit. Rent (J.) (P. a)

[1. IF a man *leases* land for life, or years, or &c. *reserving a rent, and* default of payment, a *re-entry.* The lessor ought to *demand* the rent *at the day*, otherwise the condition shall not be broke by the non-payment of the rent.]

[2. *So* if a man leases land, reserving a rent *to be paid at a place out of the land*, upon condition of non-payment to re-enter; though the rent be to be paid out of the land, yet this is a rent and not an annuity, and therefore the lessor ought to demand it at the day, otherwise he shall not enter for the non-payment. Co. 4. * *Boroughs* 73. resolved. Hill. 32 Eliz. B. R. between † *Smith and Bastard*, per Curiam, and said to be so lately adjudged. Hill. 32 El. B. R. admitted. Trin. 39 El. in Camera Scaccarii, between ‖ *Edmunds and Buskin*, per Curiam in a writ of error upon a judgment in B. R. where it was so adjudged. But Trin. 39 El. B. R. contra, Co. *Kid. and Brand.* 71.

* Cro. E. 462. (bis) pl. 13. Borough v. Taylor. Pasch. 38 Eliz. B. R. the S. C. but S. P. exactly does not appear. —Mo. 404. pl. 540. Burrough v. Taylor. S. C. and

was of a lease by the queen, in which the rent was made payable at the receipt of the Exchequer, and the queen granted the reversion to D. who demanded the rent of the receipt at the Exchequer, and the tenant tender'd it upon the land; and adjudg'd for the defendant that the tender was good; for the grant of the reversion had alter'd the place of payment from the Exchequer to the land.——Gouldb. 124. pl. 9. Hill. 43 Eliz. S. C. adjudg'd that the grantee of the reversion must demand the rent on the land; for now the rent shall ensue the nature of other rents reserved by common persons, and such are payable on the lands.

† Le. 141. pl. 198. Trin. 31 Eliz. Smith v. Bustard. S. C. but S. P. does not appear.——S. C. cited 10 Rep. 129. a. but S. P. does not appear.

‖ Cro. E. 415. pl. 7. Mich. 37 & 38 Eliz. B. R. Buskin v. Edmunds, S. C. which was a lease of lands in Bucks, rendring rent at the receipt of the Royal Exchange in London. Gawdy J. held that there needed not any demand; but all the other justices held that there ought to be a demand at the place where it was payable, for it remains a rent which in its nature is demandable by him who would have it, and that so it had been adjudged, and judgment accordingly that the entry of the lessor was not lawful.——Ibid. 535. pl. 69. Mich. 38 & 39 Eliz. in Cam Scacc. and all the justices and barons held that there ought to be a demand, besides Anderson, who held e contra; for he said that it being appointed to be paid out of the land, it is only a sum in gross, and no rent.——Cro. E. 636. pl. 33. Mich.

Mich. 40 & 41 Eliz. B. R. is upon a D. P.——[* This should be Pl. Com. Kidwellie v. Brand——Mo. 598. pl. 821. S. C. adjudg'd that the rent ought to be demanded, or no re-entry can be; contrary to Kidwelly's case in Pl. C.——And so of Kidwelly's case in Pl. C. 70. as to this point was utterly denied by the whole court. 4 Rep. 73. a.——Co. Litt. 202. a. S. P. accordingly, and cites S. C.——See Tit. Rent (I) pl. 3. and the notes there.——And see Tit. Rent (K) (L).

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Hob. 133. pl. 177. Mich. 13 Jac. S. C. resolved.—Brownl. 179. Howell v. Sambey. S. C. & S. P.

[3. [*But*] if a man reserves a rent, and that if the rent be arrear, he shall forfeit so much by way of *nomine pœnæ*, the *nomine pœnæ* shall not be *forfeited without demand* made. Mich. 10 Jac. B. R. per Curiam. Hobart's Reports 180. per Curiam, between * *Howel and Sandback*. Hobart's Reports 113. between *Sir* † *Richard Grobham and Thornborough*, adjudged upon demurrer.]

† Hob. 82. pl. 108. Hill. 10 Jac. S. C. & S. P.——Brownl. 75. S. C. accordingly.

S. C. cited Palm. 490.——As to nomine pœnæ, see Tit. Rent. (D. b) to (I. b).

[4. [*So*] if a man *grants a rent-charge* to another, and for default of payment to forfeit a nomine pœnæ, no forfeiture shall be of the nomine pœnæ without a demand at the day. Co. 7. *Maund.* 28. b.]

Per Cur. Obiter 5 Rep. 40. b. Pasch. 35 Eliz. B. R. in Dormer's case.

[5. If a man *leases* land for life or years, *reserving a rent upon condition*, that *if the lessee does not pay* the rent *at the day*, *without any demand* made by the lessor, that *then* it shall be lawful to the *lessor to re-enter*; In this case, by this *special agreement* of the parties, the lessor may enter for default of payment of the rent, without any demand. Co. 5. *Dormer* 40. b.]

Mo. 87. pl. 218. Pasch. 10 Eliz. Anon. Dyer held that debt does not lie; because after failure of payment the lessee is only tenant at sufferance; but

[6. [*But*] if a man leases land for years, reserving a rent, *with condition for non-payment to be void*; In this case the *lessor ought to demand* the rent *at the day* of payment by the condition, or otherwise the lease is not void, though it be not paid by the lessee. Pasch. 1649. adjudged. Intratur. Hill. 24 Car. B. R. Rot. 312. between *Dennis and Rashley*, adjudged upon demurrer per Curiam, where an action of debt, for rent incurred after, was brought by the lessor against the lessee, and this matter pleaded, scilicet, non-payment of the rent at a day before, but no demand pleaded to be made by the lessor, and adjudged that the action lies.]

Weston e contra, that debt lies for all the time that the lessee continues in possession after; but Dyer said that there is a diversity between the cases.——Jo. 9. 10. pl. 9. Mich. 18 Jac. C. B. Hanson v. Norcliffe. Resolv'd, that the non-payment at the day does not make the lease void, and if the party would defeat the lease he ought to plead the demand, and so the defendant ought to have done in this case, whereupon judgment was given for the plaintiff in debt for the rent.——Hob. 331. pl. 411. S. C. and resolved that for want of the defendant's alleging a demand actually his plea was naught, and that so it is at the election of the lessor and his heirs to continue or avoid the lease in such case.——S. P. Arg. 2 Le. 141.

* Infra, pl. 14. S. C.—Error (R. b) pl. 4. S. C.——Parols (H) pl. 1. S. C.——Trial (A. g) pl. 3. S. C.

[7. [*But*] *where* a man leases to another, reserving a rent, and the *lessee covenants to pay* the rent *at the days limited*, he ought to pay it without any demand, at his peril, in as much as he hath bound himself to pay it. Hill. 4 Jac. B. R. between * *Fretvile and Molineux*, per Curiam. Mich. 7 Jac. B. between † *Hare and Sir John Savill*, adjudged. Pasch. 10 Jac. B. between ‡ *Manly and Jennings*.]

but S. P. does not appear in either of the said places. † Brownl. 19. S. C. but S. P. does not appear.——2 Brownl. 273. S. P. does not appear. ‡ 2 Brownl. 176. S. C. argued, sed adjornatur.

[8. [*So*]

[8. [So] if a man leaſes land by indenture for years, reſerving a rent *payable at certain days at London, and* the *leſſee in the ſame indenture covenants to pay the ſaid rent at the days and place aforeſaid,* he ought to pay it by force of this covenant, without any demand of the leſſor, otherwiſe he hath broke his covenants. * Paſch. 5 Jac. B. R. between *Sir J. Spencer and Sir J. Poines, per Curiam.*]

Godb. 154. pl. 203. S. C. but the point there is of a *nomine pœnæ*, and the better opinion of the court was that debt lay not without a demand. * Fol. 460.

———*Bond for payment* of rent reſerved is not forfeited unleſs there be a demand of the rent upon the land. But if the bond be to pay the rent at a collateral place *off the land*, he ought to pay it at his peril without any demand; becauſe he pays it in another nature than as rent; per Popham. Ow. 111. Paſch. 38 Eliz. B. R. in caſe of Stroud v. Willis. ———See Tit. Rent (F. b) pl. 1. S. C.

In covenant for non-payment of rent, the plaintiff in his declaration did not allege any demand; whereupon exception was taken thereto; but it was anſwer'd that the *covenant was to pay ſuch a ſum for the rent expreſsly*, and therefore well; *but* if the condition of a *bond* is *for performance of covenants expreſſed in ſuch a leaſe*, one of which is for payment of rent, in that caſe the bond will not be forfeited without a demand; and of that opinion were the court. Vent. 259. Paſch. 26 Car. 2. B. R. Norton v. Harvy.

*[264]

[9. If a man *leaſes* for years, reſerving a rent, with a *clauſe of re-entry*, and upon the making the leaſe the *leſſor lends* him 200 l. *ſtock, and* the *leſſee covenants to pay the rent at the days and place*; *and* after, by another covenant, covenants *that if default of payment of the ſaid rent be made at any of the days in which it ought to be paid, according to the effect, limitation, and true intent of theſe preſents, then* the leſſee covenants *to re-pay the ſaid* 200 *l.* Though there needs no demand of the rent to make the firſt covenant to be broke by non-payment, yet there *ought to be a demand to intitle him to the* 200 *l.* For this *laſt covenant does not refer to the covenant before, but to the reſervation*; the words are (according to the limitation of the indenture) which is the reſervation, and by theſe preſents is intended the indenture, or the moſt notable part thereof, which is the reſervation. Paſch. 5 Jac. B. R. between *Sir J. Spencer and Sir J. Poines*, by two againſt one.]

Godb. 154. pl. 203. S. C. and the opinion of the court was, that without a demand of the rent, the action of debt did not lie for the 200 l. *nomine pœnæ*. ——— S. C. cited 2 Jo. 33.

[10. If a man *leaſes* land *by indenture, reſerving a rent*, and the leſſee binds himſelf by *obligation*, upon condition *to perform all covenants, articles, agreements and payments in the indenture* mentioned; in this caſe there ought to be a *demand* by the leſſor to make the obligation to be forfeited. Paſch. 12 Jac. B. between *Baker and Spaine*. The ſame caſe Hobart's Reports 11 Hill. 2 Car. in Scaccario, between *Chapman and Davilon*, per Curiam, upon a demurrer; but the court gave leave to the plaintiff to diſcontinue the ſuit, becauſe that otherwiſe this would have been a perpetual bar of the obligation, if judgment ſhould be given againſt him.]

* Hob. 8. pl. 16. S. C. adjudged for the plaintiff. And Warburton J. ſaid that S. P. was reſolved accordingly in a former caſe in this court; but that he is

not bound to ſeek the leſſor, but to tender it only on the land; for he has bound himſelf to pay it, but ſtill *as a rent*, and where the law will. ———Brownl. 76. Baker v. Pain. S. C. & S. P. ſeems to be admitted. ———So where the *bond* was *to perform all the covenants and agreements contained in the deed*, and *leſſor brings debt for non-payment of the rent*, and the *obligor pleads performance* of all covenants and agreements; the leſſor *replies that the rent is behind*, it was held no plea to ſay that the rent was never demanded, but he *ſhould have pleaded that he had performed all covenants* and agreements, *except the payment of the rent, and as to that, that he was always ready* to have paid it, *if any had come to demand it*; but as to the firſt plea it was held not to be good; and as to the demand of the rent, the court was of opinion that it was to be demanded; for the payment of the rent is contained in the word (agreements) and not in the word (covenant.); and then if he be not to perform the agreements in other manner than is contained in the deed of that agreement, the law ſaith, that he ſhall

19. In debt, a man was bound in 100 l. *to make ſuch eſtate by ſuch a day as the counſel of the obligee ſhould deviſe*; in this caſe the *obligor need not tender the aſſurance nor make requeſt*, becauſe the firſt matter is the deviſe which muſt come from the obligee. Br. Conditions, pl. 133. cites 6 H. 7. 4.

20. *But* where a man is bound to *pay ſuch a ſum*, or to make a feoffment, &c. there he ought to tender it without requeſt. Ibid.

Litt. S. 345. Co. Litt. 223. b. 21. A man makes a feoffment on condition *that the feoffee, and his heirs, ſhall pay a rent to a ſtranger and his heirs*, this is a good condition, yet ſuch payment is not properly rent, becauſe it iſſues not out of land, and an aſſiſe lies not for it; and yet if it be not paid the feoffor ſhall re-enter, and the feoffee *ought to ſeek the ſtranger*; for the payment is but of a ſum in groſs. Hawk. Co. Litt. 297.

[267] 22. A. ſeiſed of lands in fee, covenants *to infeoff J. S. thereof upon requeſt*, and after *makes feoffment in fee to another of the ſame lands*; J. S. ſhall have action of covenant without requeſt. 5 Rep. 21. a. reſolved, Paſch. 38 Eliz. B. R. in Maine's caſe.

23. A. *conveyed lands to J. S. in tail male, upon condition that J. S. and the heirs male of his body, pay to the daughter of A.* 200 *l.* or ſo much thereof as ſhall be unpaid at the death of A. *according to the intent of his laſt will.* Afterwards *A. by will makes the ſaid J. S. his executor, and deviſes to his daughter* 200 *l.* viz. 100 *l.* to be paid that day twelve-month next after his death, and the other 100 *l.* that day twelve-month next after, &c. and dies. J. S. is not bound to pay the 200 *l.* without demand, for the payment is referred by the indenture to be according to the will, and the 200 *l.* was *deviſed as a legacy, which ought to be paid but upon demand*, and not at the peril of the executor, and therefore the nature of the payment is altered by the intent of the will, and ſo being not demanded, the non-payment ſhall not prejudice the tenant in tail of his land if it had been a condition, for then it ſhould be but a condition to be paid according to the nature of a legacy upon demand, and not at the peril of the party. The opinion of three judges was certified to the chancellor accordingly. Poph. 102, Hill. 38 Eliz. Slaning's caſe.

24. Covenant to ſtand ſeiſed to the uſe of himſelf for life, and after *to his wife for life, ſo long as ſhe ſhould be effectually ready to demiſe it to his heir* at 50 *l.* rent, *when ſhe ſhould not dwell on it herſelf*, and for ſo long as ſhe ſhould not dwell on it. The huſband died, and the wife married, and did not live upon it, yet ſhe need not make any demiſe unleſs the heir demands it. Mo. 626. pl. 860. Mich. 43 & 44 Eliz. Sir Cha. Rawleigh's caſe.

25. A *copyholder in fee of lands in burrough Engliſh had iſſue three ſons, B. C. and D.* and *ſurrendered it to the uſe of his will*, by which he *deviſed it to C. in fee*, upon condition he *to pay to his 4 daughters 20 l. a-piece at their full age*, and dies. B. had iſſue two daughters, and dies. C. is admitted, and does not pay the ſaid ſums to the daughters at their full age. It was held by all the juſtices, beſides Williams, that it is a condition, but that it was not broken without

without a demand of those sums after their full age, for he is *not bound of himself to take notice of their age*, but after notice ought to pay it. Cro. J. 57. pl. 2. Hill. 2 Jac. B. R. Curtis v. Wolverston.

26. A. covenanted with B. *to procure a deputation at 2 years end* for B. for 7 years, in the same manner as J. S. had it; A. is bound to procure it at his peril, and such an one as J. S. had, without being shewn by B. how that was. Cro. J. 297. pl. 4. Hill. 9 Jac. B. R. Barwick v. Gibson.

27. In assumpsit, &c. the plaintiff declared, that the defendant, in consideration that the plaintiff had paid him so much money, promised *to join in him with the surrender of certain copyhold lands*. It was objected, that the plaintiff should have shewn that he requested the defendant to join with him in the surrender, for it was not a single act to be done by the defendant alone, but he was to join in the act with another, and Roll Ch. J. held accordingly, and judgment against the plaintiff. Sty. 107. Trin. 24 Car. B. R. Freebern v. Purchase.

All. 68. Freeborne v. Pincras, S.C. resolv'd by Roll that the declaration was insufficient, because he did not allege that he gave notice to the defendant that he was ready to join with him.

28. On an action brought on a charter-party, Hale Ch. J. said, that *upon a penalty* you need not make a demand, *as in case of a nomine pœnæ*; as if I bind myself to pay 20 l. on such a day, and in default thereof to pay 40 l. the 40 l. must be paid without any demand. Mod. 89. pl. 52. Mich. 22 Car. 2. B. R. Bradcat v. Tower.

29. *Covenant by baron and feme to* make assurance on request *within 7 years*. The feme *dies within 7 years, no request being made* and the heir of the feme (whose the estate was) was an infant; per Cur. the covenant is not broke, for it was the plaintiff's fault not to demand the assurance in the life of the wife, it appearing by the verdict that she was of age before she died, and so the breach not well assigned. 2 Jo. 196. Pasch. 32 Car. 2. B. R. Nash v. Aston.

[268] Skin. 42. pl. 13. S.C. and held, that if she was above age at her death it is no breach.

30. Where the condition of a bond is *to pay such sums as shall become due for such and such things*, no demand is necessary, the money becoming due being as a *sum in gross*; per Holt Ch. J. Ld. Raym. Rep. 596. Trin. 12 W. 3. Levins v. Randolph.

This was on a bond given to the society of Gray's Inn by a member for payment of commons and other dues to the house.

31. *After pleading general performance*, the defendant is *estopp'd to say that there was no demand*; per Gould. Ch. J. to which Holt Ch. J. agreed. Ld. Raym. Rep. 596. Trin. 12 W. 3. in case of Levins v. Randolph.

32. *Where the thing in its nature requires a demand, a bond for doing thereof is not forfeited till demand*; and in that case the defendant must take advantage of the want of demand by pleading that he was always, and still is, ready to pay it; for if he plead performance generally, and plaintiff assigns a breach in his replication, the defendant shall not rejoin and allege want of demand, for that would be a departure; per Gould J. quod Holt concessit. 12 Mod. 414. Trin. 12 W. 3. Levins v. Randall.

(A. d) What

himſelf to perform it at his peril. My Reports, 13 Jac. between *Goats and Sir Baptiſt Hixt*, per Curiam.]

and Haughton, no notice need be given, becauſe he is privy to the covenant, and for this point judgment was given for the plaintiff.——Godb. 297. pl. 284. S. C. but S. P. does not appear.——Cro. J. 390. pl. 4. S. C. ruled, that being privy to the covenant, he ought to take notice as well as the plaintiff; and in point of covenant notice is not to be given ſo ſtrictly as it is upon an obligation, which is in point of forfeiture; and afterwards, notwithſtanding the exceptions, judgment was affirmed.——4 Le. 248. pl. 404. S. C. but S. P. does not appear.——Jenk. 337. pl. 83. S. C. & S. P. adjudg'd and affirmed in error.——See (C. d) pl. 7. 8. S. C.——S. P. where the covenant was, that if upon meaſuring it did not amount to ſo many acres of wood, he would make it up ſo out of the woods adjoining. The words did not hold meaſure. The court held notice not neceſſary, becauſe the defendant had taken upon himſelf by covenant to make it up, and he might meaſure it as well as the plaintiff. Freem. Rep. 259. pl. 270. Paſch. 1678. Clarke v. Child.

[8. *So* in this caſe, *if* by the agreement *no certain perſons had been appointed to meaſure it, but that it ſhould be meaſured by one elected by one* of the parties, *and by another elected by the other*, if the *vendee elects J. S. and gives notice thereof to the other, and of a certain time* to meaſure it, and *J. S. does it at the day, and none comes for the other to join with him*, yet he ought to take notice, at his peril, how many acres it wants of 20, otherwiſe an action of covenant lies; for now, by the matter ſubſequent, and the default of the vendor, it is as much as if J. S. had been appointed at the beginning to have meaſured it. My Reports, 13 Jac. between *Goats and Sir Baptiſt Hixt*, adjudged.]

Fitzh. Arbitrement, pl. 15. cites S. C.——Br. Arbitrement, pl. 37. cites S. C.——Br. Notice, pl. 18. cites S. C——S. C. cited 8 Rep. 92. b. ad finem, per Cur. and called a ſudden opinion, and ſays it was hel per Cur. in 28 E. 4. fol. [18] a. & 24. a. that the plea was inſufficient, becauſe he had bound himſelf to it, and taken upon himſelf to take notice at his peril, and there Brian, Vavaſor, and Cateſby J. agreed, that in the ſaid caſe of arbitrement the obligor ought to take notice at his peril, and ſo they ſaid it was adjudg'd in the ſame king's time in B. R. and in Francis's caſe the court ſaid, that ſo the law is without queſtion.

[9. If the condition of an *obligation* be *to account before ſuch auditors as the obligee will aſſign*, and the *obligee aſſigns auditors*, he ought to give notice thereof to the obligor, otherwiſe he is not bound to account. 8 Ed. 4. 1. b. per Fairfax.]

Fol. 463.

[10. If I am bound *to infeoff ſuch perſons as the obligee ſhall name*, he ought to give notice of thoſe which he names, otherwiſe I am not bound to infeoff them. 8 Ed. 4. Arbitrement, 15. per Billing.]

[11. If the condition be *to ſeal ſuch obligation as an eſcrow as the obligee ſhall write*, he is not bound to ſeal it without notice of the eſcrow written.]

A man is bound *to pay* 100 *l. two months after A. returns from Rome*, he ought to give notice of his return before

[12. If the condition of an obligation be, that *if the obligee returns from beyond the ſeas before the 22d of April next, then if the obligor pays unto him at Eaſter following* 100 *l.* the obligation ſhall be void. If the *obligee returns within the time*, he is not bound to * give notice thereof to the *obligor*; but he *ought to take notice thereof* at his peril, for he hath bound himſelf to this inconvenience. Mich. 37, 38. Eliz. B. R. between *Eue and Dautry*, per Curiam.]

that he can have an action upon this obligation, for *he may land at Newcaſtle or Plymouth, where by common intendment the obligor cannot know whether he be returned or not*; per Doderidge J. and this was agreed by the Ch. J. and Jones. Poph. 164. Paſch. 2 Car. B. R. in caſe of Hodges v. Moore.

[13. If

[13. If the condition of an obligation be *to pay* 20 *l. within* 10 *days after J. S. hath rode* five times in six days from London to York, and from York to London; he ought to take notice of the doing thereof at his peril, becauſe it is to be done by a *ſtranger*. Mich. 4 Jac. B. R. between *Herby and Pope*, dubitatur.]

Cro. J. 137. pl. 14. Normanvile v. Pope. S. C. After verdict it was moved, that this bill obligatory is not payable but at 10 days after notice of his going and returning, and that licet ſæpius requiſitus would not ſerve. Popham ſaid the bar was not good; et adjornatur. Ibid. 250. pl. 10. S. C. and Tanfield held, that as this caſe is there needed no notice, becauſe the act is to be done by a ſtranger, and his *time of return lies as well in the notice of the obligor as the obligee*; wherefore the obligor is at his peril to take notice thereof; but the other juſtices doubted thereof, and judgment was given upon another point.——See (D. d) pl. 2. and the note there.

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[14. [*So*] if the condition of an obligation be *to pay* 20 *l. to B. the obligee, within one year after B. ſhall marry C.* In this caſe he is bound to pay it to B. within one year after the marriage, without any notice given of the marriage by B. for he hath taken upon himſelf to pay it within a year; and he may take notice of the marriage of C. who is a ſtranger to the condition. Trin. 1651. between *Shepherd and Frie*; and in another action between *Shepherd and Latch*, adjudged upon demurrer.]

See pl. 3. & the notes there.——See (D. d) pl. 5. and the notes there.

[15. [*But*] if *A. ſells to B.* certain weys of barley, or other things, and *B. aſſumes to pay for every wey as much as he ſells* a wey *for to any other man*, if *he after ſells to others* certain weys *for a certain ſum*, he ſhall not have an action upon the caſe againſt B. upon his promiſe, till he hath given him notice for how much he ſold the wey to others; for B. is not bound to pay it till notice, becauſe it is uncertain, and not known to him, and *here he aſſumes in general*, and *not in particular*; ſcilicet, to pay ſo much as J. S. ſhall pay for a wey, and ſo he does not aſſume to take notice at his peril. My Reports, 13 Jac. between * *Haule and Hemyng* adjudged.

between † *Homes and Twiſte*, in camera ſcaccarii adjudged in a writ of error, the ſame caſe. Hobart's Reports 70.]

* Roll. Rep. 285. pl. 2. S. C. adjudg'd againſt the plaintiff.——Cro. J. 432. pl. 12. Henning's caſe, S. C. adjudg'd accordingly.——3 Bulſt. 85. Hall v. Hemming, S. C. adjudg'd per tot. Cur. clearly for the defendant. † Hob. 51. pl. 57. Holmes v. Twiſt, S. C. which was, that H. ſold to T. a ton of wood, [woad] to be paid for in 6 months, after the rate that he ſhould ſell the reſt, and alleged, that he ſold a ton to C. at the rate of 23 l. a ton; and adjudged in B. R. for the plaintiff, but reverſed in Cam. Scacc. for want of alleging notice to the defendant of the ſale and price, being a thing of his private knowledge; and Hobart ſays, that ſome judges of B. R. allowed of the judgment.——Jenk. 294. pl. 43. S. C. adjudged by the judges of both benches.——S. C. cited per Cur. Cro. J. 432. in pl. 12.——Roll. Rep. 285. pl. 2. S. C. cited Arg.——S. C. cited Arg. 3. Bulſt. 86.——Jenk. 311. pl. 92. S. C.

[16. *But* if he had aſſumed *to pay as much* for every wey *as he ſold a wey for to J. S.* if J. S. after bought a wey for a certain ſum, he ought to take notice thereof at his peril, without any notice given, otherwiſe he hath broke his promiſe. Mich. 15 Jac. B. R. between *Pollington and Lingham*, per Curiam.]

S. P. per Cur. Cro. J. 432. pl. 12. Trin. 15 Jac. B. R. in Henning's caſe, obiter.

[17. If *A.* is *indebted to B. by obligation in* 60 *l. for* the *payment of* 30 *l. and thereupon, in conſideration that B. will mutuo dare to C. a ſtranger upon requeſt, ſo much as will make it* 100 *l. and will accept C. and D. to be bound to B. for the payment of the* 100 *l. and will deliver up the ſaid obligation of* 60 *l.* A. *aſſumes to B. that the ſaid* 100 *l. with intereſt, ſhall be paid* as certainly as any money in England. In an action upon the caſe by B. he is not bound to allege more,

more, but that he lent the 70 l. to make the 30 l. 100 l. to C. without averring that he gave notice thereof to A. for the reaſon aforeſaid. Trin. 22 Car. B. R. adjudged. Intratur P. 22 Car. Regis.]

S. P. by Shuttleworth, Le. 105. in pl. 141.—See (P. a) pl. 10. and the notes there.

[18. If *A. covenants with B. to make ſuch aſſurance to him of the manor of D. as the counſel of B. ſhall deviſe before ſuch a day*, and after the counſel deviſes an aſſurance, B. ought to give notice thereof to A. otherwiſe he is not bound to perform it. Paſch. 42 Eliz. B. R. per Gawdy.]

Fol. 454.

[19. *But* if A. covenants *to make ſuch aſſurance as the counſel of A. himſelf ſhall deviſe*, then, if his counſel deviſes, he ought to perform it without notice given by B. Paſch. 42 Eliz. B. R. per Gaudy.]

S. P. by Shuttleworth. Le. 105. in pl. 141.——See (P. a) pl. 10. and the notes there.

Cro. C. 132. pl. 7. Juxon v. Thornhill, S. C. the plaintiff did not allege that he gave notice of the Ld. Manchester's order, yet he alleged that he required the ſum according to the ſaid order, which is an implied notice; whereupon it was adjudged for the plaintiff niſi.

[20. If in an action upon the caſe upon a promiſe the plaintiff declares, that the defendant promiſed *to pay ſo much for his paſſage over certain locks in a river made by the plaintiff in his own ſoil, as the lord of Mancheſter thereafter ſhould appoint to be paid for the paſſage of every boat*, and alleges, that the *lord of Mancheſter after appointed ſo much in certain to be paid*, &c. and that he requeſted the defendant ſuch a day to pay it, this is a good declaration, without alleging that he gave any notice to the defendant of the appointment of the ſum made by the *lord Mancheſter*, becauſe the plaintiff *is* as great a ſtranger thereto as the defendant, and it does not lie more in his conuſance than in the conuſance of the defendant, this being to be appointed by *a ſtranger*. Mich. 4 Car. B. R. between *Jackſon and Thornell.*]

Cro. E. 834. pl. 5. Eaſt v. Thoroughgood, S. C. and held that he ought to take notice of the diſlike, becauſe he bound himſelf thereto by his expreſs promiſe.

[21. If *A. bargains with B. for* certain *land for* 100 *l.* in this manner, *ſcilicet*, he gives him 20 *l. preſently, and* ſays further, *if he likes* the land and aſſurance, that *then this* 20 *l. ſhall be in part of payment of the* 100 l. *but if he does not like* it, that *then he ſhall have back his money again*, and after *he diſlikes* the bargain, he may have an action of debt for the 20 *l.* before any notice given to B. of his diſlike, for he ought to take notice thereof at his peril. Trin. 43 Eliz. B. R. between *Thoroughgood and Eaſte* adjudged.]

Roll. Rep. 312. pl. 22. S. C. and judgment affirmed notwithſtanding this and ſeveral other exceptions.——3 Bulſt. 152, 153. S. C. and judgment affirmed.——Jenk. 324. pl. 39. S. C.

[23. If

[23. If *A. assumes to B. in consideration that B. will deliver to D. certain wood to the use of A. that he will pay so much*, &c. *for every load to B. upon request*; in an action upon the case, if he alleges that he delivered so much, &c. to D. to the use of A. and that he after required A. to pay so much for every load, &c. this is good, without alleging any *notice* given to A. *when he delivered* the wood to his use to D. for he ought to take notice thereof at his peril, though the time of the delivery is uncertain. P. 9 Car. B. R. between *Jewel and Pampe*, per Curiam adjudged.] [273]

[24. If a condition of an *obligation* be *to perform an award*, and the *arbitrator awards, that one shall make a general release of all things till the date of the obligation*, it is not an excuse to him to say, that he was at all times ready to make such general release, but the other never requested him to do it. Mich. 14 Car. B. R. between *Rily and Hilman* adjudged upon demurrer. Intratur Mich. 13 Car. Rot. 187.]

Roll. Tit. Error, pl. 5. S. C. but S. P. does not appear. ——S. P. where an award was to pay money per totam.

hey. See Tit. Arbitrement (F. a) (G. a)

[25. *After a marriage by C. with D. the daughter of A. B. the father of C. in consideration that A. will give* 50 *l. to C. for the better maintenance of C. and D. and at the request of B. B. promises A. to pay* 100 *l. to D.* the daughter of A. *if she survives C.* her husband. In an action upon the case by the administrator of A. against B. after the death of C. it is a good declaration to aver, that *A. paid the* 50 *l. to C. in his life*, and yet the defendant B. did not pay the 100 l. to D. who survived C. without averring any *notice* given *of the payment of the* 50 *l. by A. to C.* for he hath taken it on himself to pay it at his peril. Mich. 22 Car. B. R. between *Playfield and Collard* adjudged, this being moved in arrest of judgment. Intratur Trin. 22 Car. Rot. 673.]

All. t. Playfield v. Collard. S. C. but the resolution there was that there needed no notice of the death of C. the son. —— Sty. 6. Anon. S. C. but S. P. does not appear.

——Hardr. 42. Arg. cites S. C. held per Curiam according to All. t. ——See Actions (Z.) pl. 6. S. C. but not S. P.

[26. If a man *promises* another at another time, *upon request, to make to him a good and sufficient assurance of certain lands for seven years*, he ought, upon request, to make a lease for the years, without any *tender of a lease by him to whom the promise is made*, for he ought to make a good lease at his peril; for here *the request does not refer to the manner* of the conveyance to be made, *but only to the time when* the lease shall be made. Trin. 15 Jac. B. R. between *Rowland and Courtman* adjudged.]

* Fol. 465

[27. If the condition of an obligation be, that whereas the obligor is lessee for years from the obligee of certain lands, *if he renders up the possession of the land, at the end of the term, to the lessor, his heirs or assigns, upon request*, then the obligation shall be void, &c. and after the *lessor assigns over* his reversion, and the *assignee at the end of the term requests* him to render up *the possession* to him, he is bound to do it, *without any notice* given him *that he is assignee*, for he ought to take notice thereof at his peril, in as much as he hath bound himself to render it up to the assignee. Pasch. 16 Jac. B. R. between *Linghen and Pain* adjudged.]

Cro. J. 475, 476. Hinges v. Payn. S. C. adjudg'd for the plaintiff. —Bridgm. 128. S. C. adjudg'd per tot. Cur. —— Godb. 272. pl. 381. Ingen v. Payn. S. C. adjudged.

[28. If

Brown. 23. S. C. but not very clearly reported.—Hob. 12. pl. 14. S. C. but S. P. does not appear.

[28. If a man *leaſes a mill* for years, and the *leſſee covenants to repair* the mill, and the *leſſor covenants to find him great timber* for it, the leſſee ought to give *notice* to the leſſor, *how much will ſuffice* for the reparation, and not to demand in general timber for reparations, or otherwiſe the leſſor is not bound to deliver any. Trin. 12 Jac. B. between *Holder and Taylor*, per Curiam.]

G. having a Fi. Fa. againſt the goods of L. aſſumed to the ſheriff that he would enter into the bond to them when required, *to ſave them harmleſs if they would enter into ſuch a ſhop, and take execution of the goods there.* In aſſumpſit the plaintiffs declared that licet ſæpius requiſitus, G. had not entered into bond. Exception was taken that he did not ſhew by whom the requeſt was made; and likewiſe for that he did not ſhew that he tendered a bond to them, for that he being to enter into bond upon requeſt, he that would have the bond ought to make it ready, and to require it, &c. ſed non allocatur. And notwithſtanding theſe and other exceptions, judgment was given for the plaintiff. Cro. J. 652. pl. 21. Mich. 20 Jac. B. R. Arundel v. Gardiner.

* [29. If the condition of an obligation be, that *if the obligor, with two others, make, and upon requeſt ſeal, to the obligee an obligation of* 40 *l.* then, &c. It is ſufficient for the obligee to make *requeſt* only, *without tendering any writing* to them, for he ought to do it at his peril. Mich. 3 Jac. B. *Stokes's caſe*, adjudged in an action upon the caſe upon a promiſe to do it.]

A. covenanted that if B. ſhould *pay* 60 *l. for which C. ſtood bound, that then B. ſhould have and enjoy a grant of the ſaid C. of a moiety of ſuch and ſuch goods.* B. paid the money, but exception was taken becauſe he did *not ſhew that he requeſted the moiety of the goods, and tendered a writing* to him to ſeal, for that he being the party who is to have the benefit thereof ought to make the tender; and for this and other cauſes a judgment in C. B was reverſed. Cro. J. 660. pl. 10. Hill. 20 Jac. B. R. Archer v. Dalby.——Palm. 278. S. C. but S. P. does not appear.

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Hob. 69. pl. 80. S. C. and S. P. held accordingly.——Ibid. 77. pl. 98. S. C. adjudged againſt the plaintiff.—Brownl. 18. S. C. but S. P. does not appear.

[30. If the plaintiff in an action upon the caſe declares, that *in conſideration that he would become bound to the defendant, by obligation, for the payment of* 11 *l. at a day, the defendant aſſumed to deliver an horſe to the plaintiff*; and the plaintiff avers, that he offered to be bound to the defendant, &c. and did *not ſay the obligation was ſealed*, and that he offered to deliver it ſo ſealed, as he ought; this is not good, for he ought to do it of his part. Hobart's Reports 25, 105. between *Auſten and Gervas.*]

[31. If A. being a *bailiff of* the *Borough-court* of Weſtminſter, *in conſideration of* 10 *l.* given to him *by B. promiſes B. to arreſt J. S. at the ſuit of B. by proceſs out of the ſaid Borough-court.* In an action upon the caſe upon this promiſe, it is a good plea for A. to ſay, that he was always ready after the ſaid promiſe to arreſt J. S. at the ſuit of B. if he had brought to him any ſufficient warrant to do it; but ſays B. never brought him any proceſs out of the ſaid court to arreſt him; this is a good plea, becauſe *it belonged to B. to ſue out the proceſs*, for it will be maintenance in A. to do it, and the law (where the words are general) will ſo marſhal them, that he ought to do it for whom it is moſt proper. Trin. 7 Car. B. R. between *Davis and Ridgeway* adjudged upon a demurrer.]

Fitzh. Dett. pl. 87. cites S. C.—Br. Conditions, pl. 72. [32. If the condition of the obligation be, *that the great bell of Mildenhall ſhall be carried to the houſe of the obligor, in W. at the coſts of the men of Mildenhall, and there* ſhall be *weighed, and put in the fire in præſentia hominum de Mildenhall, and then the obligor ſhall thereof*

make a tenor, to agree in tono and ſono to the other bells of Mildenhall; in this caſe the *obligor ought to weigh* and put it in the fire; for he ought to do it *to whoſe occupation it properly belongs* to do it; which is the defendant, who ought to make the bell. 9 Ed. 4. 3. b.] cites 9 E. 4. 3. S.C. and S.P. accordingly. For where it is not put in

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certain who ought to make the thing, then it ſhall be intended that he who has the beſt ſkill in it ſhall make it, to whoſe occupation it belongs, which is the bell-founder, which is the defendant. And per Choke, becauſe it is that it ſhall be weighed in præſentia hominum de M. therefore the men of M. ſhall weigh it. Per Nedham and Pigot, the defendant is not bound to make the bell till it be weighed, and the plaintiff has as good ſkill to weigh it as the defendant, and he that would have the advantage of the obligation ſhall make it in his own diſpatch; and Danby J. was againſt the defendant.——So where a man is bound to a *taylor*, that if he *brings* 3 *ells of cloth which ſhall be ſhaped*, and that if he makes him a coat of it, that then he ſhall pay to him 10 s. there the taylor ſhall ſhape the cloth, per Jenney, which Choke, Littleton, and Moile, J. agreed. Ibid.

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[33. If A. binds himſelf to B. *to deliver to B.* a certain quantity of *hops, well pick'd and condition'd, and that B. ſhall have the choice of theſe hops, out of* 204 *bags of hops of A. of his own growth.* In this caſe *B. ought to* do the firſt act, ſcilicet, he ought to *require A. to ſhew him to view his* 204 *bags, out of which B. ſhall have his election*; for otherwiſe B. cannot make any election without view of the 204 bags which are in the cuſtody of A. himſelf, *and A. cannot deliver them before election.* Tr. 14 Car. B. R. between * *Brooke and Boothe*, plaintiffs, and *Woodward*, defendant, per Curiam, upon demurrer, but judgment given againſt the plaintiff for a fault in his declaration. Mich. 15 Car. B. R. between the ſame parties, in a new action brought upon the ſame deed, and thereupon a demurrer, and the court of the ſame opinion, but the demurrer waved by conſent, and iſſue taken. Intratur Tr. 15 Car. Rotul. 434.] Fol. 436. * Mar. 74. pl. 113. S. C. the court ſtrongly inclined that B. ought to do the firſt act, viz. to requeſt A. to ſhew the bags, and adviſed the plaintiff to wave the demurrer

and plead de novo, which they did.——In conſideration of the goods of the value of 40 l. delivered by P. to C. the defendant C. promiſed *to deliver to P. ſo many pipes of ſack, then lying in the cellar of J. S. in London, as ſhould be of value of* the ſaid goods *per præfatum P. querentem eligend'* and *averred that at Norwich he required the defendant deliberare* vinum prædict' to the plaintiff ad eligendum ſo many pipes as ſhould be of the value of the ſaid goods, &c. It was admitted that a requeſt ought to be made, and reſolved that the requeſt was well made; for the plaintiff muſt make it when he can meet with the defendant, and thereupon the *defendant ought to appoint a reaſonable time, when he will be ready to go with the plaintiff to the cellar* to make his election, and that the requeſt was well as to the manner, for he has perform'd the agreement directly, which was to deliver them to the plaintiff to be choſen, and is all one as requiring him to perform his promiſe, which muſt be by ſhewing the plaintiff the wine in his cellar, that he might make his choice, which muſt be by taſting the wine before he need make his election; and upon good debate, the plaintiff had his judgment. Allen. 25. Trin. 25 Car. B. R. Parmenter v. Creſſey ——Sty. 49. S. C. ſays, the court held that a ſpecial requeſt ought to be made to deliver the wines, becauſe it is upon a contract, and that afterwards judgment was given quod querens nil capiat per Billam.

[34. If a man covenants *to make further aſſurance at all time and times, at the charge of the covenantee*, and the *covenantee demands a fine* after for further aſſurance, the covenantor is not bound to levy it, if he does not *appoint a certain day when* he will have it levyed. H. 37 El. B. per Curiam.]

[35. If a man promiſes *to make ſuch aſſurance of ſuch lands as he hath by copy* to another, *before ſuch a day as his council learned ſhall adviſe*; if *he tenders an aſſurance* to him *without any advice of his counſel*, yet he who made the promiſe is bound to ſeal it, otherwiſe he hath forfeited the aſſumpſit. P. 38. El. B. R. between *Cliſton and Gibbon* adjudged.] Cro. E. 465. 466. (bis) pl. 20. S. C. adjudged for the plaintiff; for the having of counſel is only

for the ſtrengthening of his aſſurance, and if the plaintiff at his own peril will inquire of it himſelf, the defendant ought to do it as he requires, and judgment accordingly.——See (P. a) ſupra, pl. 31. Moor v. Roſwell e contra, and the notes there.

[16. In an action upon an aſſumpſit, if the plaintiff declares, that *whereas he, at the requeſt of the defendant, had delivered to the defendant ſo much old lay-metal, to be artificially made by the defendant into pewter veſſels, capiendo inde* of the plaintiff *tantum quantum for his labour he ſhall reaſonably deſerve; in conſideratione inde the defendant* after, ſcilicet, the ſame day, *aſſumed to deliver to the ſaid plaintiff, lay-metal artificially made into pewter, when he ſhould be requeſted*; and avers, that although the defendant was requeſted to deliver the ſaid old lay-metal made into pewter veſſels, yet he had not delivered it, &c. and the defendant pleads non aſſumpſit, and it is found for the plaintiff. Though it is *not averred, that he tendered to the defendant ſo much as he deſerved for the making thereof into pewter veſſels*, yet the delaration is good, for *this is not a precedent condition*; but the words *capiendo proinde*, &c. *is but to ſhew the contract* between them, upon which he may have an action of
[276] debt, though the defendant may retain the goods till he had paid as much as he deſerves, and that he was ready to deliver it upon payment thereof; for this ought to come properly of his part, in as much as it does not lie in the conuſance of the plaintiff how much he deſerves, without ſhewing thereof by the defendant; and alſo it is at the election of the defendant, either to bring his action for what he deſerves, or retain the goods till payment, and therefore it ought to come of his part; and here the defendant does not rely upon it, but pleads non aſſumpſit. P. 1649. between *Brockleſby and Brockleſby* adjudged in B. R. in a writ of error upon ſuch a judgment in banco, and the judgment affirmed accordingly. Intratur Mich. 20 Car. Rot. 73.]

Gro. C. 176. pl 23. Mich. 5 Car. B. R. the S. C. but S. P. does not clearly appear.—— Ibid. 299, 300. pl. 1. S. C. reſolved, that the covenant being to make a ſurrender on requeſt, A. is not bound to make a letter of attorney to make a ſurrender, and ſo the breach is not aſſigned according to the covenant, and it ought to be an expreſs requeſt to make a ſurrender and not an implied one, and judgment accordingly for the defendant nil.

[37. If *A. covenants with B. to ſurrender a copyhold*, which he hath for life, *to the uſe of B. who hath the reverſion thereof upon requeſt made by B. to A.* and after *B. tenders to A. a letter of attorney* in writing, *by which he gives power to two attorneys to ſurrender for him, at the next court of the manor, to the uſe of B.* and this courſe is warrantable by the cuſtom of the manor. In this caſe, upon this tender and requeſt to ſeal, A. is * not bound to ſeal the letter of attorney, nor to ſurrender in court or otherways; for A. hath taken upon him to ſurrender upon requeſt; ſo that it is at the election of A. whether he will ſurrender in court or by letter of attorney, or any other ways that he may; and this election cannot be taken away by B. and therefore when B. does not require him to ſurrender, but only to ſeal a letter of attorney, this is a void requeſt, and as no requeſt, and therefore B. [*A.*] *is not bound to ſeal the letter of attorney, nor to ſurrender in court, or otherwiſe, upon this requeſt.* Paſch. 9 Car. B. R. between *Simes and Walker*, plaintiffs, and *Dame Smith*, defendant, adjudged upon a demurrer. Intratur Hill. 6. Car. Rot. I being of the counſel for the defendant.]

* Fol. 467.

hill.——Jo. 218, 229. pl. 8. S. C. but S. P. does not fully appear.——Ibid. 314, 315. pl. 1. S. C. and 3 justices (absente the Ch. J.) held that the requeſt to ſurrender by letter of attorney is no requeſt at all, and therefore the defendant was not bound to do it ſo or any other way with a new and better requeſt.——Godb. 445. pl. 513. Trin. 8 Car. S. C. adjornatur.

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[38. If *A. and B. aſſume one to the other to perform the award of J.* who *awards that A. ſhall pay to B.* 8*l.* 8*s. or* 3*l. and all coſts that B. expoſuiſſet in & circa proſecutionem cujuſdam placiti tranſgreſſionis inter ipſos A. & B. pendent' prout per notam attornati predict B. apparerent, ad libitum ipſius A.* In this caſe, B. is not bound to tender a note of his attorney to A. of the coſts that he hath expended in it, without requeſt made by A. to do it, becauſe A. hath election to pay one or the other, ſcilicet, the 8*l.* which is certain, or the 3*l.* and coſts of ſuit, which are uncertain; and B. does not know whether he will pay the one or the other, and therefore *A. ought to do the firſt act, ſcilicet, to pay the* 8*l. or requeſt B. to give him a note from his attorney of the coſts*, and if B. refuſes to deliver it, A. is excuſed. Hill. 17 Car. B. between *Pollen and Kingeſmeal* adjudged per totam Curiam, this being moved in arreſt of judgment; but *ſome of the judges* gave another reaſon, ſcilicet, becauſe they *conceived that the attorney of B. ought by this award to give the note, and he is a ſtranger*, and therefore it need not be ſhewed before requeſt made. Intratur Hill. 16 Car. B. Rot. 1483.]

Mar. 108. pl. 186. Trin. 17. Car. C. B. Dewel v. Maſon, S. P. and ſeems to be S. C. ſed adjornatur, becauſe Reeve J. was not preſent in court.—— Ibid. 156. pl. 225. S. C. adjudged per tot. Cur. that the plaintiff ought to have judgment, and that upon

theſe *differences*, firſt *where the defendant is to do a ſingle act only*, and where he hath *election of 2 things to do.* * 2dly, The 2d difference ſtood upon this, that no notice is to be given, or tender made of a thing which lies not in the power or proper conuſance of the plaintiff, ſo as the difference ſtands *where it is a thing which lies in the conuſance of the plaintiff and where not*, and therefore where the award was that the defendant ſhould pay to the plaintiff 8*l.* or 3*l.* and coſts of ſuit, as ſhould appear by a note under the attorney's hand of the plaintiff, it was reſolved in that caſe, that altho' the attorney be in ſome reſpect as a ſervant to his maſter, yet to this purpoſe he is a meer ſtranger, and therefore the plaintiff was not bound to make any tender of that note, but the defendant ought to have gone to the plaintiff's attorney, and required a note of him of the coſts of ſuit, ſo as he might have made his election; but they all agreed that where it is a thing which lies in the knowledge of the plaintiff, that there he ought to have made a tender or given notice, but in this caſe it lieth not in the knowledge of the plaintiff, and he cannot compel the attorney to make it, wherefore it was reſolved that the plaintiff ſhould have judgment.

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[39. If *A. be bound* in an obligation *to C.* of which the condition is, *that A. ſhall pay to B. all ſuch money, as by a true and juſtifiable bill, under the hand of the attorney of B. ſhall appear before diſburſed by B. or his attorney, or any of them, or by any of their means or appointment upon ſuch a day*, in ſuch a certain ſum, between, &c. In an action upon this obligation, if *B. aſſigns for a breach, that* 24*s. by a true and juſtifiable bill under the hand of J. S. the attorney of B. appeared before to be diſburſed, which A. did not pay*, this is a good breach, *without alleging that A. had notice thereof, or that the bill of the attorney was ſhewed to him*, and though it was expreſly alleged by A. that no ſuch bill was tendred to him, by which it appeared what ſum was diſburſed; becauſe the *attorney was a ſtranger*, of which A. ought to take notice at his peril. Hill. 15 Car. B. Rot. 432. between *Dewell and Wilmot*, adjudged upon demurrer.]

S. C. cited 4 Mod. 230. Mich. 5 W. and M. in B. R. in caſe of Pitman v. Bidlecombe, which was debt upon a bond conditioned *to pay all ſuch charges as ſhall appear to be due to the plaintiff's attorney* in proſecuting the defendant, at the plaintiff's ſuit; the defendant pleaded, that it did not appear what was due to the attorney, &c. the plaintiff replied, that 9*l.* was due, of which the defendant had notice, but did not pay it; the defendant rejoined, that it did not appear what was due, &c. and traverſed the notice

notice; and upon demurrer the plaintiff had judgment, because *the attorney was a ſtranger* to the action, and the defendant ought to take notice at his peril, what was due to the attorney; 'tis true where the matter falls under the cognizance of the plaintiff himſelf, he ought in ſuch caſe to give the defendant notice.

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40. In caſe of an obligation, *where the ſubject matter of th notice is ſecret*, and ex parte the plaintiff, notice is neceſſary. Jenk. 311. pl. 92.

41. Covenant. The caſe was, A. covenanted with B. *to make ſuch aſſurance as his counſel ſhould adviſe*; the court held clearly that B. muſt give notice of the aſſurance, for otherwiſe A. does not know his counſel, or their advice. Cro. E. 9. pl. 1. Mich. 24 and 25 Eliz. C. B. Bennet's caſe.

Cro. E. 517. pl. 42. Hallins v. Cannard. S. C. adjudged.—Ow. 157. S. C. but not ſaid to be adjudged; but Walmſley

42. In debt on bond to perform covenants, whereof one was *to aſſure to the obligee and his wife, lands before ſuch a day, at the coſts of the obligee*; but *no requeſt* of any part *was mentioned in the covenant*; adjudged the obligor having election what manner of aſſurance he would make, ought firſt to give the obligee notice, that he would make ſuch a particular aſſurance, and then the obligee is to ſupply the coſts. Mo. 454. pl. 622. Trin. 38 Eliz. Hollins v. Connard.

ſaid that the charge ought to precede the aſſurance, but he ſhould firſt declare what manner of aſſurance ſhould be made; and Beaumond of the ſame opinion.———Mo. 457. pl. 631. S. C. adjudged for the plaintiff; but it was held by the whole court, that if the aſſurance had been expreſs'd in the covenant, viz. that he ſhould levy a fine, or make a feoffment, at the coſts of the covenantee before ſuch a day, there the covenantee ought to tender the coſts.——— 5 Rep. 22. b. Hailing's caſe. S. C. adjudged; and it was ſaid that it was all one when the covenant was general, and when it was particular; as if it was to make a feoffment, the covenantor ought to do the firſt *act*, viz. to ſhew what manner of feoffment he would make, whether by indenture or deed poll, &c. ——— D. 371. a. pl. 1. Marg. cites Mich. 38 & 39 Eliz. C. B. the S. P.——S. C. cited by Anderſon, as adjudged 35 & 36 Eliz. And. 300. pl. 309 in caſe of Frank v. Foſter, in which caſe S. P. was agreed accordingly. Trin. 34 Eliz. and ſome inclined that the covenantor ought to give notice alſo of the coſts and charges which ought to be paid or tendred before the ſealing and delivery thereof, or other thing done by the defendant.———S. C. of Frank v. Foſter, cited as adjudged accordingly, which Glanvill affirmed, he being of counſel therein. Cro. E. 517. pl. 42.

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Noy. 111. Fletcher v. Muffet. S. C. but S. P. does not appear.

43. Covenant *to aſſure* ſuch *copyhold land to the plaintiff, if he married with his daughter*, and *alleged that he rite & legitime eſpouſed* the daughter of the defendant; it is ſufficient for the plaintiff to allege, licet ſæpius requiſitus, without giving notice of the marriage, for he at his peril ought to take notice thereof; judgment for the plaintiff. Cro. J. 102. pl. 35. Mich. 3 Jac. B. R. Fletcher v. Pinfet.

S. C. cited 2 Sid. 115.

44. In caſe the plaintiff declared, that *there being a difference between him and the defendant, concerning how much rent he ought to pay; the defendant promiſed, that if J. S. would ſay that the rent reſerved was 6 l. then he would pay double that ſum*, and that the ſaid *J. S. did affirm the rent to be 6 l.* After verdict, upon non aſſumpſit, it was mov'd in arreſt of judgment, becauſe the plaintiff did *not allege that he had given notice to the defendant*, but only that J. S. did affirm that the rent reſerved was 6 l. but adjudged for the plaintiff; for the defendant is to take notice of what J. S. ſhould affirm, and ſo the declaration good without alleging any notice given. 2 Bulſt. 143. Mich. 11 Jac. Child v. Horden.

45. A. at

45. A. at B's requeſt, demiſed a houſe to J. for a year, rendring 50 s. quarterly, and B. promiſed, *that if J. did not pay the rent he would*; notice need not be given of the non-payment, but B. at his peril, muſt take notice of the non-payment, and pay the rent; for otherwiſe the promiſe is broken; and ſo a judgment in B. R. was affirmed in the Exchequer-chamber. Cro. J. 684. pl. 2. Hill. 21 Jac. Brookbank v. Taylor.

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46. The teſtator made a *leaſe* of lands *for years, rendring rent,* and *deviſed the reverſion to T. in fee, and by his will declared, that his intention was, his executors ſhould have the reverſion during the term, upon condition that they give bond to the ſaid T. within ſix months after his deceaſe, by the advice of the overſeers of his ſaid will, to pay him 34 l. per annum during the ſaid term.* The *executors within 3 months ſhewed the will to the overſeers, but they adviſed no bond, nor was any given by the executors, nor any rent paid, though required by the plaintiff.* Adjudg'd this was a condition by which the term was veſted in the executors, but it was in T. till the condition was performed, which not being done, he in reverſion ſhall have the rent. Win. 69, Hill. 21 Jac. C. B. Treherne v. Claybrooke. Jo. 43. pl. 2. Traheurne v. Cleabrooke, S.C. but S. P. does not appear. —— 2 Roll. Rep. 382. Trea v. Cleabrooke, S. C. but S. P. does not appear. —— Hutt. 68. S. C. and S. P. appears, but nothing ſaid to it.

47. Leſſee for years covenanted *to find neceſſary proviſion for the ſteward, and the lord, and his ſervant, and horſes, at all times when he ſhould hold courts there.* Per Doderidge, the leſſee ſhall take notice when the courts are to be holden, and *no perſonal notice need be given*; for a general notice is given him, as by the proclamation at the court. Palm. 532. Paſch. 4 Car. B. R. the biſhop of Roceſter v. Young.

48. A promiſe was *to pay ſo much money at the full age of an infant*; it was held, that notice need not be given of his attaining his full age, becauſe it is *as notorious to the one as to the other.* Hard. 42. Arg. cites Paſch. 23 Car. B. R. Page v. Barnes.

49. In debt upon an obligation *to pay* ſo much money *upon the return of ſuch a ſhip from ſea*, notice of the return need not be given; but where a thing lies more properly in the conuſance of the plaintiff than of the defendant, there notice ſhall be given, as in the caſes that have been cited by the adverſe party, viz. *to give the plaintiff ſo much for a commodity as any other had before that time given him for the like*, or *to give ſo much for every cloth the plaintiff ſhould buy*, or *to pay the plaintiff what damages he had ſuſtained by a battery*, or *to pay the plaintiff's coſts of ſuit.* Hard. 42 cites Trin. 23 Car. B. R. Bear v. Choldwich. [279]

50. Aſſumpſit, &c. *to pay the plaintiff 2 s. a-piece for every piece of cloth he ſhould buy for the defendant*, and *declares for ſo much money due, and ſhewed a requeſt.* After verdict it was moved, that he had *not alleged that he gave notice to the defendant how many cloths he had bought for him*; to which it was anſwered, that they were bought for the defendant himſelf, and he may take notice of the number without any notice given him; and that the requeſt ſet forth, for the payment implies a notice; but Roll ſaid, that the requeſt does not imply a notice, and that ſo is Twiſt's caſe; and beſides, the All. 24. S. C. ſtates it, that the plaintiff averred, that he had bought 100. pieces for the defendant's uſe, for which he ought to

have 10 l. and alleged a ſpecial requeſt of the 10 l. to be paid by the defendant according to his promiſe; and that after verdict it was moved, that the plaintiff had not averred he had given the defendant notice how many pieces he bought for him; reſolved that notice is neceſſary, and not ſuppoſed by the ſpecial requeſt; for the defendant cannot tell that ſo much is due as the plaintiff requires, unleſs he had notice how much he bought for him; and judgment againſt the plaintiff.

notice ought not to be by implication, but muſt be averr'd certainly; ſed adjornatur. Sty. 53. Mich. 23 Car. B. R. Tanner v. Lawrence.

All. 68. S.C. adjudged, and ſays, it was ſo reſolved in B.R. Paſch. 9 Car. in caſe of Sims v. the Lady Smith.——And Sty. 107. cites 9 Car. Sims v. Walker accordingly.

51. A. covenanted *to ſurrender to B. copyhold land upon requeſt*; aſſigning a *breach, that he did not ſurrender it into the hands of two tenants of the manor* is not ſufficient; for he may ſurrender it into the hands of the lord, or in court, and the ſurrendering into the hands of two tenants *is only a particular way*. Sty. 107. Trin. 24 Car. B. R. Freeborn v. Purchaſe.

52. L. promiſed J. the plaintiff, *to enter into a judgment to him for ſo much money as H. owed the plaintiff, if he would take common bail of defendant in caſe H. ſhould die before Mich.* After verdict it was moved, that it did *not appear that the plaintiff gave notice to the defendant how much was due from H.* But Roll Ch. J. ſaid, that notice was not neceſſary; for defendant, at the time of the aſſumpſit, had taken upon himſelf to know it, but if it was neceſſary, he might have gone to H. to tell him, and ſo it ſhall be intended that he both knew it himſelf, and alſo might have known it by others; and Nicholas and Aſk were of the ſame opinion, but Jerman doubted; and judgment pro Quer' Niſi. Sty. 184. Mich. 1649. Johns v. Leviſton.

Vent. 6. cites S. C. but not S. P. of notice.—A. promiſed B. the plaintiff, that if he would marry M. the defendant, A's niece, he would give B. 50 l. in aſſumpſit for the 50 l. Exception was taken becauſe the plaintiff had not declared, that he gave the defendant notice of the marriage; but the Ch. J. ſaid it had been adjudged, that where the plaintiff is upon marriage of the defendant's daughter to have 20 l. that the action lies without notice, and he thought there was no difference as to this between a daughter and this caſe of a niece, wherefore, &c. Sid. 36. pl. 4. Paſch. 13 Car. 2. C. B. Brown v. Stephens.

53. A. the defendant promiſed B. the plaintiff, that *if ſhe married with the conſent of C. he would ſettle ſuch a farm on her* for the advancement of her marriage. B. married, and for not ſettling the farm B. and her baron brought action ſurcaſe. After a verdict, and 1300 l. damages, it was moved in arreſt, that the plaintiffs had not given the defendant notice of the conſent of C. but where one may take notice as well as the other, no notice need be alleged, and judgment was given per tot. Cur. for the plaintiff. 2 Sid. 115, 116. Mich. 1658. B. R. Sprat v. Agar.

All. 9. Needler v. Gueſſent S. P. does not appear.

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54. The defendant took the plaintiff's ſon to be his clerk, and covenanted *to give him ſo much for every quire of paper he ſhould write*, and for non-payment the plaintiff brought his action, *without alleging notice*, and reſolved to be good; for each of them may take notice how many quires of paper are written, it being to be *done by a third perſon*. 2 Sid. 115. cites it as the caſe of Needler v. Keſs, [alias Gueſt.]

55. Debt upon a bond of 200 l. conditioned *to pay* 100 *l. on the* 10*th day of January, upon* 3 *months warning.* The defendant *pleaded, that the plaintiff had* * [*not*] *given* 3 *months warning.* Windham J. ſaid, that although it had been to pay on the 10th January after the date of the obligation, upon three months warning by the obligee, and the obligee omits the warning, yet the money ſhall not be loſt, and that ſo it had been reſolved in the time of Roll Ch. J. and that the other ſhall be bound to pay it at any three months warning. Adjornatur. Raym. 61. Mich. 14 Car. 2. B. R. Lawſon v. Witherington.

* The word (not) is not in the original, but ſeems to be the omiſſion of the printers.—Ley. 85, 86. S. C. ſtates it, the condition was *to pay the money on the* 10*th January; or three months warning.* The defendant pleaded actio non, becauſe the plaintiff did not give three months warning next after the ſealing the obligation. The court on the firſt motion thought the warning ought to be given by the plaintiff, becauſe otherwiſe, if the defendant would never give warning, the money would never be paid; et adjornatur. But upon its being moved again they held, that it ſhall be taken that the obligor is to pay the money upon the 10th January next, he giving the plaintiff three months warning thereof; for the words ſhall be taken ſtrongeſt againſt the obligor, and ordered judgment for the plaintiff niſi.——Keb. 380. pl. 86. S. C. adjornatur. Ibid. 415. pl. 122. S. C. adjudged for the plaintiff niſi.——Lutw. 409. Paſch. 2 Jac. 2. Terry v. Wade, S. P. and held that notice ought to be given by the defendant.

56. In covenant *to make a leaſe for lives*, the defendant *pleads, that none of the lives were named by the plaintiff*, to which the plaintiff demurred; and per Cur. judgment for the defendant, and that the plaintiff muſt name them. 3 Keb. 203. pl. 60. Trin. 25 Car. 2. B. R. Twyford v. Buckley.

57. *B. ow'd A.* 30 *l. by bond. C. promiſed A.* that *if he would deliver up the bond he would pay A. the* 30 *l.* In aſſumpſit A. declared that *he delivered up the bond to B. whereof C. the defendant had notice*, but had not paid the 30 l. A. had a verdict, and the court held, 1ſt, that delivery muſt be intended to the obligor, for that is properly a delivering up, and delivering up muſt be conſtrued the moſt effectual delivery, which is ſuch, as that the bond may be cancelled. 2dly, There needs no notice, becauſe the defendant *C. knew who to reſort to*, and the *difference is, where a perſon is named, and where not.* 2 Salk. 457. pl. 2. Paſch. 4 Ann. B. R. Smith v. Goff.

58. R. agrees *to deliver to the plaintiff C.* 31 *bags of hops at London, on or before the* 31*ſt of October.* It was objected that the plaintiff, to allege a proper breach of this agreement, ought to *ſhew at what place he appointed the goods to be delivered*; ſed non allocatur. Reſolved, 1ſt, That where a ſum of money is to be paid, which is a *ſum in groſs, and collateral to the title of the land, the feoffor muſt tender* the money to the perſon of the feoffee, and it is not ſufficient to tender it upon the land. *Contra*, it is *of a rent that iſſues out of land*; but if the condition of a *bond or feoffment be to deliver wheat, or other ponderous things*, the obligor or feoffor is not bound to carry the ſame about, and ſeek the feoffee or obligee, but *before the day he muſt go to the feoffee or obligee, and know where he will appoint to receive it*, and there it muſt be delivered. 2dly, That *R. ought here to have gone to C. and to have aſked him where he would have the goods delivered*, i. e. at what place in London and as C. was to name the place, *ſo R. was to tell the time when he would deliver*

them, that C. might be ready to receive them; so that *one has the election of the place, and the other of the time*; the doing the thing lies on the obligor, but he is excused where the goods are ponderous, and where he cannot do all, he must do as much as he can; the obligee has agreed to do nothing. *Three things are requisite, 1st, requesting a place for the delivery. 2dly, A place appointed.* And *3dly, A time;* because the obligor may deliver at any time. Judgment for the plaintiff. Trin. 4 Geo. B. R. Colwell v. Sir Ralph Ratcliff.

[281] (B. d) What Thing shall *excuse* the Performance of the Thing, [Condition.] Where he that is to have the Advantage ought to *do the first Act*: Where *before Notice*.

* Fol. 468.

[1. IF a man *assumes* to me, *in consideration that I will enter into an obligation to J. S. for his debt, to save me harmless from all such obligations* in which I shall enter to J. S. for his debt *not exceeding* 500 *l.* If I enter into an obligation to J. S. under 500 l. he ought to save me harmless at his peril, without any *notice* given to him *that* (*) *I have entered into* an obligation, because he hath bound himself to it. Hill. 14 Ja. B. R. between *Gerrard and Payne* adjudged.]

† S.C. cited 8 Rep. 92. b.——Br. Debt. pl. 168. (169.) cites S. C. ——Br. Notice, pl. 33. cites S. C.

[2. If the condition be, *that he shall pay so much as he shall be found in arrear before such auditor as the obligee shall assign*; when the auditor is assigned, he ought to *take notice* at his peril *how much* he is found in arrearages, and perform it. † 18 E. 4. 18. 24. My Reports, 13 Ja. per Coke.]

——Roll. Rep. 286. in pl. 2. Hill. 13 Jac. S. P. by Haughton.

‡ Br. Dette, pl. 158. cites S. C. ——see Tit. Arbitrement, (E. a) pl. 14. Collet v. Padwell.

[3. *So* if the condition be *to stand to the award of J. S.* he ought to take notice of the award at his peril, and perform it. ‡ 18 E. 4. 18. 1 H. 7. 15. Contra, 7 H. 8. *Kellowey* 175.]

[4. If the condition of the obligation be *to pay the damages that shall be recovered by J. S. against him*; he ought to *take notice of the sum recovered* at his peril, and pay it. 18 E. 4. 18.]

S. P. by Haughton J. quod fuit concessum per Cur. Roll. Rep. 434. in S. C.

[5. If a man promises another *to pay him so much at the marriage of a stranger*, he ought to take notice of the marriage at his peril, without notice given. My Reports, 14 Ja. *Beresford and Goodrouse*.]

——See (A. d) pl. 3. 4. S. P.

Jo. 449. pl. 14. S. C. is a different

[6. If *A.* be *indicted in a leet for incroachment* upon the highway, and after *A. dies*, and *B. his heir continues the incroachment*, and thereupon

thereupon *an order is made for leet, that B. ſhall reform the incroachment by a day upon the pain of* 40 *s. and for not reforming* thereof, *the lord* of the leet *brings* an action of *debt for the* 40 *s. and declares thereupon as before*; this is a good declaration, *without alleging that B. had notice of the order made*; inaſmuch as he is within the juriſdiction of the leet, he ought to take notice thereof at his peril. Mich. 11 Car. B. R. between *Lee and Boothby*, adjudged per Curiam, this being moved in arreſt of judgment. Intratur, Tr. 11 Car. Rot. 1002.] point.— Cro. C. 321. pl. 22. S. C. is a different point.— 2 Roll. Abr. Tit. Nuſans. (B) pl. 4. S. C. but the point of notice does not appear.

7. Debt upon bond condition'd that the obligor *ſhould make an eſtate of inheritance to the obligee, at ſuch a day and place*; the defendant *pleaded that he was ready at the day and place*, &c. to make an eſtate of inheritance, &c. The plaintiff demurred, becauſe defendant * had *not ſet forth that he gave the plaintiff notice what eſtate he would make*; and Roll Ch. J. held the plea ill, and judgment niſi, &c. Sty. 61. Mich. 23 Car. Brook v. Brook. All. 24, 25. S. C. adjudg'd for the plaintiff; becauſe the defendant ought to have given the plaintiff notice that

he would make him ſuch a conveyance, to the making whereof the preſence of the plaintiff was neceſſary; but if the condition had been for the making a feoffment, then becauſe a day certain was appointed, the plea had been good; for the plaintiff at his peril ought to attend at the day.

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8. *Debt upon bond* conditioned, that *whereas the plaintiff was bound with the defendant* (who was an *exciſeman*) *that he ſhould give a true account in the Exchequer* for ſuch monies as he ſhould receive for exciſe, &c. that *the defendant ſhould ſave him harmleſs*, &c. He pleaded that no ſuits, proceſs, &c. were againſt him on that bond, and ſo he ſaved him harmleſs. The plaintiff replied, that a *ſcire facias was brought againſt him out of the Exchequer upon the ſaid bond*, and that he was forced to retain an attorney, and paid 1 s. for his appearance. The defendant demurred, becauſe the plaintiff did not allege that he gave him notice of the ſcire facias; adjornatur. Vent. 35. Trin. 21 Car. 2. B. R. King v. Atkins. Vent 78. Paſch. 22. Car. 2. B. R. the S. C. and after having been ſpoken to ſeveral times, the court thought notice not requiſite.— Sid. 442. pl. 23. S. C. and all the court except

Morton held that particular notice was not requiſite, becauſe the defendant took it upon himſelf to acquit the plaintiff.

9. Leſſee of a mill covenanted *to leave the mill-ſtones as good as when he entered, or to pay the difference according to the diſcretion of the parties who viewed the ſame at the firſt*, and gave a bond for performance of covenants. In debt on the bond, the defendant *pleaded that he left* 2 *ſtones in the mill at the end of the leaſe, and that the perſons who viewed thoſe which were there when he entred had not agreed how much thoſe that he left were worſe than the other.* Upon demurrer, the plaintiff had judgment; (Treby Ch. J. and Powel J. being only preſent) for this being a disjunctive covenant, and by conſequence for the advantage of the defendant, and he having undertaken that ſuch perſons ſhall adjuſt the value who were ſtrangers to the agreement between him and the leſſor, he muſt procure them to do it, and if he cannot, he muſt leave as good ſtones in the mill as thoſe were when he entred. Lutw. 688. 693. Trin. 9 W. 3. Studholme v. Mandall. Ld. Raym. Rep. 270. S. C. adjudg'd for the plaintiff. But had the eſtimation been to be made by ſuch perſons as the obligee ſhould appoint, and he had refuſed to appoint any, this would have excuſed the

defendant, becauſe the performance of the covenant is render'd impoſſible by the act of the obligee. Arg. And of this opinion was the whole court.

Cro. C. 571. pl. 9. Hill. 15 Car. Anon. seems to be S. C. and though it was alleged that the defendant habens notitiam inde, and though upon such a day he was requested he had not paid, yet it was held clearly, that the declaration was insufficient for this cause; for he ought to have alleged express notice, and shewn the day and place of such notice given; and for this and another cause the judgment was reversed.——See (A. d) pl. 12, 13. and the notes there.

[2. If *A. in consideration of* 10 *l. given to him by B. assumes to pay* 20 *l. when such a ship, which was ready to go from D. to Hamburgh*, beyond the seas, *should go from D. to Hamburgh and return to the same place*, scilicet to D. aforesaid; it seems he ought to pay the 20 l. upon the return of the ship, without any notice given by the obligee; for he hath taken upon himself to pay it at his peril upon the return of it. Contra, H. 13 Car. B. R. between *Bully and Hubbins*, adjudged per Curiam, in a writ of error upon a judgment in the Marshalsea, where the judgment was reversed for not alleging notice of the return.]

Sty. 172. S. C. the exception of the want of notice was taken by Roll Ch. J. and that the plaintiff made no demand during the fair of any sum of money due, and that so the declaration was too general, and the counsel desiring not to be further heard in it, the judgment was reversed.

[3. If *A. promises B. in consideration that B. will permit A. and C. to enjoy a tavern in Sturbridge-fair during the fair, to pay to B.* 10 *l. for the use of the tavern*; *and also* that *before the end of the fair, he will pay all such money as B. shall disburse for wine and beer for the said A. and C. during the fair aforesaid, to be expended in the said tavern*. In an action upon this promise, after the end of the fair, if the plaintiff does not aver, that he gave notice before the end of the fair, how much he had disbursed for wine and beer for them to be there expended, this is not good, though he avers how much he disbursed for it; and a *demand thereof after the fair is not sufficient, for A. could not know how much he had disbursed without notice, and notice thereof after the fair is not sufficient* (*) *in as much as it is to be paid for by A. during the fair*. Mich. 1649. between *Harris and Gibbon*, adjudged in a writ of error upon a judgment in Cambridge, and the judgment reversed accordingly. Intratur. P. 1649. Rot. 303.]

(*) Fol. 470.

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Sty. 295. S. C. adjornatur, to be argued again. ——Ibid. 303, 304. S. C. was spoken to again, but the court were divided, and would advise.—— But at the end of the case fol. 295. says that upon its being argued again the next term, judgment was then given for the plaintiff, for the reason mentioned in Roll.——Raym. 400, 401. Arg. cites, S. C. as adjudged accordingly.

[4. If *A. and B. agree* and promise *to marry one with another*, and after *B. the man, promises A. in consideration that she will disengage him of his said promise, he will give her* 1000 *l.* In an action by A. against B. for the 1000 *l.* if *A. avers, that she after the same day exoneravit ipsum* (Anglice, *did disengage him*) of his said promise, and yet he hath not paid the 1000 l. this is a good averment of the performance of the promise, *without alledging any notice given to B. of the disengagement*; for it shall be intended, prima facie, that this disengagement was made to B. himself, and not in the absence of B. for it shall be a full disengagement made to the person of B. so that he should have his liberty to marry any other. Mich. 1651. between *Baker and Smith*; adjudged per Curiam, this being moved in arrest of judgment. Intratur.]

[5. [So]

[5. [So] if *A. promiſes B. (a woman) that if ſhe will leave her father's houſe, and come to his houſe, that he will marry her; in an action by B. againſt A.* upon this promiſe, if *ſhe avers, that ſhe hath left the houſe of her father, and come to the houſe of A. and there obtulit to marry him*, and yet the ſaid A. did not marry her; this is a good averment that B. had *notice* thereof; for by the obtulit to marry the defendant, is *intended*, that ſhe obtulit herſelf to the perſon of the defendant himſelf, in as much as this is a perſonal act to be done between them. Tr. 1651. adjudged per Curiam, after a verdict for the plaintiff.] Sty. 263. Paſch. 1651. Peck v. Ingram S. C. and Roll Ch. J. was of the ſame opinion; but adjornatur.—— Ibid. 273. S. C. adjudged for the plaintiff.

——See (A. d) pl. 3. and ibid. pl. 14. and the notes there.

6. Debt upon obligation by J. B. againſt J. C. who ſaid, that the obligation is indorſed, that *if F. makes eſtate tail to G. before Michaelmas*, that then, &c. *notice ſhall be given to him who takes the eſtate* becauſe he is a ſtranger to the condition; by which he pleaded accordingly. Br. Conditions, pl. 140. cites 2 E. 4. 2.

7. If a man be bound *to infeoff ſuch a man as the obligee ſhall name*, there if *the obligee names him to a ſtranger* it is void; for he ſhall do it to the obligor who is party. Br. Conditions, pl. 150. cites 8 E. 4. 12, 13. Ibid. cites 14 H. 8. accordingly.

8. Condition *to repair a houſe by leſſee* within ſix months *after notice*; leſſee aſſigns part of his term. Aſſignee of the reverſion *gives notice to an under leſſee then in poſſeſſion of the houſe.* This condition is merely collateral to the land, and perſonal, ſo notice is not of neceſſity to be given at the houſe, but ought to be made to the perſon of the leſſee who has the grand intereſt. Yelv. 36. adjudged, Paſch. 1 Jac. B. R. Sweton v. Cuſhe. Mo. 680. pl. 932. Swelnam v. Cutt, S. C. adjudged, that where there is no aſſignee the notice muſt be to the

perſon of the leſſee, and need not be at the place, and the time when is to be underſtood when the leſſee continues the eſtate; for in caſe he aſſigns it to another, it ſhall not be to the perſon of the aſſignee.——Cro. J. 9. pl. 11. Swetman v. Cuſhe, S. C. adjudged.——Ow. 114. Streetman v. Eversley, S. C. adjudged.——Brownl. 135. Stretton v. Cuſh, S. C. adjudged, but ſeems to be only a tranſlation of Yelv.

9. Leaſe rendring rent per annum *quandocunque, the leſſor ſhall demand it*; if leſſor comes to demand it before the end of the year his demand on the land is not good unleſs the leſſee be there alſo; for the time being uncertain when the leſſor will demand it, he ought to give notice to the leſſee of the time; but if leſſor ſtay till the end of the year, notice is not neceſſary; per Popham, quod fuit conceſſum. Yelv. 37. Paſch. 1 Jac. B R. in caſe of Sweton v. Cuſhe. Cro. J. 9, 10. S. C. & S. P. by Popham, and that the leſſor's way to is appoint the leſſee that ſuch a day he will be

upon the land and demand his rent; and then if the leſſee be not there to pay it upon his demand, the leaſe is forfeited.

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10. An *eſtate was limited by uſe to J. F.* by deed *after his father's death* (he *being heir at law* to this uſe) and there was a *proviſo, that if the ſaid J. F. ſhould not ſuffer his father's executors quietly to take away the goods and chattels of his ſaid father, which ſhould then be in the houſe, then the ſaid uſes limited to the ſaid J. F. ſhould ceaſe and be void.* It was reſolved, that J. F. the ſon being a ſtranger 2 Brownl. 277. Miller v Frances, S. C. adjudged. ——V. nt. 200, 201. S. C. cited by Ramſ-

ford J. as resolved accordingly; and ibid. 205. by Hale Ch. J.

a ſtranger to the feoffment, though he had diſturbed the executors contrary to the words of the proviſo, yet he ſhall not loſe his eſtate without notice given him of the proviſo and his father's will. 8 Rep. 89. b. 92. a. Mich. 7 Jac. Fraunces's caſe.

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but ſaid that there would have been no need of notice if he had not been heir.——S. C. cited Mod. 86 & 87.——Raym. 237. S. C. cited per Cur.——S. C. cited Arg. 3 Mod. 32.——S. C. cited 2 Show. 316, 317. Arg.——S. C. cited Skinn. 126. 128.——S. C. cited as agreed by Bridgman Ch. J. in delivering the opinion of the court. Cart. 172.——S. C. cited Lutw. 813. and agreed by the whole court of C. B. Trin. 8 W. 3. in caſe of Whalley v. Read, that this caſe is good law, and a good point adjudged there accordingly.

11. In debt upon a bond of 200*l.* conditioned *to pay* 100*l. to the plaintiff on his marriage-day*; defendant *pleaded* in bar, that he had *no notice given him of his marriage-day.* Coke and the whole court agreed herein, that no notice of the marriage-day was here to be given, but that at his peril he ought to take notice of it; and judgment was given for the plaintiff. 2 Bulſt. 254, 255. Mich. 12 Jac. Selby v. Wilkinſon.

12. Leſſee for years was bound in a bond *to deliver poſſeſſion* of a houſe *to leſſor, his heirs and aſſigns, upon demand at the end of the term.* The leſſor *bargained and ſold the reverſion* to A. and B. by deed inrolled. At the end of the term *B. demanded delivery* of the poſſeſſion. The leſſee refuſed, pretending that he had no notice of the bargain and ſale. It was adjudged, that the bond was forfeited. Godb. 272. Paſch. 16 Jac. B. R. Ingin v. Payne.

All. 21. S. C. the plaintiff ſet forth that he was damnified by the ſaid battery 30*l.* which the defendant, though at ſuch a time and place

13. The defendant promiſed, that *if the plaintiff would forbear his ſuit againſt one B. who had aſſaulted and beaten him, that he would pay the plaintiff as much as he was damnified by the ſaid aſſault*; it was moved after verdict, that the plaintiff did not ſet forth that he gave the defendant any notice what damages he had ſuſtained by the battery; but the court held, that as to the notice of what damages the plaintiff had ſuſtained, the requeſt to perform the aſſumpſit implies that ſufficiently, and gave judgment for the plaintiff. Sty. 57. Mich. 23 Car. Finer v. Jeffery.

requeſted, had not paid, and adjudged for the plaintiff, tho' he had not given notice to the defendant how much he was damnified; for the defendant took upon him to pay the damage ſuſtained, which when the plaintiff aſcertains to him, the defendant at his peril muſt pay him on requeſt, if in truth he was ſo much damnified.

Skinn. 125. pl. 4. Mattoon v. Fitzgerard, S. C. argued ſed adjornatur.——Ibid. 179. pl. 8. S. C. adjudged accordingly and ſo a judgment in Ireland was affirmed.——2 Show. 325. pl. 330.

14. *J. F.* ſeiſed in fee, *had iſſue K. his only daughter, and ſettled his lands upon truſtees, and their heirs to the uſe of himſelf for life, and after to K. in tail, provided ſhe married with the conſent of the truſtees, or the major part of them,* &c. *but if not, then the ſaid truſtees ſhould raiſe a portion out of the ſaid lands for her maintenance, remainder over to Lætitia (his ſiſter) in tail,* &c. The daughter *K.* being then but 2 years of age, *had notice of this ſettlement at 14 years old, but not by the direction of the truſtees*; and at the age of 18 years ſhe married, &c. without the conſent of the truſtees, or the major part of them. It was argued that the eſtate tail to K. was determined, and that notice was not neceſſary to be given her, becauſe her father had not order'd it in his ſettlement, and that he might diſpoſe of his eſtate as he pleaſed; and having made

made particular limitations of it, there is no room now for the law to interpoſe, to ſupply the defect of notice in the deed; that as K. took notice what eſtate ſhe has in the land, ſo as to purſue * a proper remedy to recover it, ſo ſhe ought to take notice of the limitations in the ſettlement, and has the ſame means to acquaint herſelf with the one as with the other, and the ſame likewiſe as her aunt had to know the remainder. But in Eaſter term following it was adjudg'd that the eſtate tail was not determined for want of notice, according to the reſolution in Frances's caſe. 3 Mod. 28 to 35. Mich. 35 Car. 2. B. R. Malloon v. Fitzgerald.

Malloone v. Fits Gerard S.C. argued.——Like point in the caſe of Williams and Fry, per Curiam. 2 Lev. 22. Mich. 23 Car. 2. B.R.

(E. d) What *collateral Thing* ſhall be ſaid *a Satisfaction.*

See Tit. Accord per totum.

[1. IF the condition of an *obligation* be *to pay* 10 *l. at a day*; if *at the day of payment he enters into another obligation to the ſame obligee for the ſame ſum* as the firſt was, and this *with a ſurety*, which was more than was done in the other, yet this is not any diſcharge of the firſt obligation, becauſe *it is but a thing in action*, and no preſent ſatisfaction; and this was adjudged twice in banco. Mich. 13 Ja. upon demurrer, and there other judgments cited accordingly, quod vide, Tr. 13 Ja. B. between * *Hawes and Birch* adjudged. Hobart's Reports 94. between † *Lovelace and Arthur*, adjudged upon demurrer.]

* Brownl. 71. S. C. adjudg'd per tot. Cur. that the plea is naught; for one choſe en action cannot be a ſatisfaction for another choſe en action; but this being done by a ſtranger is by no means good.

† Hob. 68. 66. pl. 77. Mich. 6 Jac. Lovelace v. Cocket, S. C. adjudged; for it was held no actual and preſent ſatisfaction as it ought to be.——Brownl. 47. S. C. and adjudg'd; for one bond cannot overthrow another.——S. C. cited per Cur. as adjudged not a good diſcharge; for the obligee was in no better condition than he was before.——Litt. Rep. 58. Mich. 3 Car. C. B. Ene's caſe, S. P. adjudged; and it was ſaid to have been divers times ſo adjudg'd; and Hutton J. ſaid one reaſon was, becauſe a choſe en action cannot be a ſatisfaction.——Cro. C. 85. pl. 9. Anon. ſeems to be S. C. and ruled accordingly.——Ibid. 86. in pl. 9. S. P. cited to have been ruled by the court to be no good plea. Trin. 41 Eliz. Rot. 1409. Maynard v. Crick.——Cro. E. 716. pl. 40. Mich. 41 Eliz. C. B. Manhood v. Crick. S. C. adjudg'd accordingly.——So where a ſtranger join'd with the obligor in the 2d bond, it was adjudg'd for the plaintiff; for one deed cannot determine a duty upon another deed. Cro. E. 727. pl. 61. Mich. 41 Eliz. C. B. Norwood v. Grype.

Debt upon a bond of 100 *l.* The defendant *pleaded that he delivered up to the plaintiff a bond, wherein the plaintiff was bound to him, which he accepted in ſatisfaction of the ſaid bond.* Reſolved per Cur. this is a good plea, for although the giving of one bond is not a good ſatisfaction for another, yet this *is tantamount to a payment* when the defendant diſcharged ſuch a debt due to him from the plaintiff; and ſo differs from the caſe of Hob. 68, &c. Freem. Rep. 532, 533. pl. 719. Mich. 1680. Marſhall v. Jenniſon.

[2. If a man be *bound in* 20 *l. in a ſtatute*, and he *makes an obligation to him for it, and he accepts it*, this is not any ſatisfaction, becauſe the ſtatute is of greater advantage than the obligation. 12 H. 4. 23. b.]

[3. If the condition of an *obligation* be *to pay* 25 *l. at Michaelmas*, and the *obligor leaſes land to the obligee, rendring* 39 *l. rent at the ſaid feaſt of St. Michael; and after, before the ſaid day of payment, concordatum & agreatum fuit, that the ſaid obligee*, being the leſſee, *ſhould retain* 25 *l. of the ſaid rent, in ſatisfaction of the ſaid obligation, and for the reſidue* of the rent, that *he ſhould remain anſwerable*

Debt upon an obligation, with condition that *if the defendant grants to the plaintiff &c.*

fore Whitſontide the leaſe, and farm of the mill of D. Habend, &c. *till 6 l. be paid,* that then, &c.

ſwerable to the obligor, and after at the ſaid day, becauſe of the ſaid agreement, the obligor does not pay the ſaid 25 l. This obligation is forfeited, for this agreement cannot be any diſcharge of the obligation, in as much as the rent at the time of the * agreement made was not due. M. 41, 42 El. B. R. between *Harrington and Andrews*, adjudged.]

and *ſaid that before Whitſontide the defendant leaſed to the plaintiff the mill for term of* 10 *years, rendring ſuch rent per annum, &c. and that the plaintiff ſhould retain in his hands of the rent which ſhould amount to* 6 *l.* and per Needham this is good, though the rent and farm were not in eſſe at the time of the obligation made, but the leaſe was made after; but Laicon contra; and that the retainer of the rent till the 6 l. be paid, is as good as payment of the rent or grant to the plaintiff of the rent till 6 l. be paid; et adjornatur. Br. Conditions, pl. 81. cites 37 H. 6. 26.

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Cro. C. 68. in pl. 7. cites Mich. 2 Jac. Rot. 3272. Branthwaite v. Cornwallis, S. P. * Fol. 471.

[4. If the condition of an *obligation* be *to pay* 10 *l. at a day, which is not paid at the day*, but *after the day the obligee accepts a ſtatute ſtaple from the obligor for the ſame debt, in full ſatisfactio nof the obligation*, yet this is not any ſatisfaction; for though the ſtatute be a matter of record, and higher than the obligation, yet the obligation remains in force, and the *obligee hath his election to ſue the one* (*) *or the other. Braithait's caſe*, cited in Co. 6. *Higgen's caſe*, 44. b. adjudged.]

and ſeems to be S. C.——6 Rep. 45. b. the court held the caſe of Branthwaite v. Cornwallis to be good law; for a ſtatute ſtaple, or an obligation in nature thereof, is only an obligation recorded, and one obligation, be it of record, or not of record, cannot merge another obligation; beſides an obligation and an obligation in nature of a ſtatute ſtaple are 2 diſtinct liens made by aſſent of parties, without proceſs of law, whereof the one has no dependance on the other; but in action on an obligation, the ſuit is founded on the obligation, and the plaintiff has judgment to recover the debt due by the obligation, ſo that by judicial proceedings and act in law, the debt due by the obligation is changed into a matter of record, and judgment in court of record is more high than a ſtatute ſtaple, merchant, or any recognizance, confeſſed by aſſent of the parties without judicial proceeding.

See Tit. Audita Querela (F) pl. 15. Lutterford v. Le Mayre, and the notes there.

S. C. cited Cro. E. 697. in pl. 8. Mich. 41 & 42 Eliz. B. R. and agreed to be good law; becauſe the agreement to retain is as a payment, and therefore the obligation is diſcharged.——Co. Litt. 212. b. 213. a. S. P. accordingly.

[5. If the condition of an *obligation* be *to pay* 100 *marks at a day*, and *at the day the obligor and obligee account together at another place, and becauſe the obligee owes to the obligor* 20 *l. by another contract, the obligee allows the* 20 *l. in payment of the* 100 *marks*; this is a good ſatisfaction of the condition, for this is all one as if the obligor had paid the obligee, and he had repaid him. 12 R. 2. Barr. 243. This is a payment by way of retainer.]

Cro. C. 195. pl. 3. Simmons v. Newdeſworth, S. C. adjudged for the plaintiff.

[6. If the *obligee and obligor, before the day of paymeat of* the money to be paid by the condition, *agree* together *that the obligor ſhall do ſeveral particular things, as* amongſt other things, *to aſſign his intereſt in the farm of the cuſtoms of French wines, and he pleads that he did all in particular, ſhewing how, and it appears to the court that he could not by law aſſign his intereſt in the ſaid cuſtoms, they being in covenant only*; though the *obligee had enjoy'd them accordingly*, yet this is not any diſcharge of the obligation, in as much as this is like an accord, ſo that all ought to be performed, otherwiſe it is not good, becauſe the *obligee hath not any remedy for that which is not performed.* Trin. 6 Car. B. R. between *Simons and Mowlſton* adjudged, this being moved in arreſt of judgment.]

7. Before

7. Before the day of payment, obligee agrees to accept *a debt due by obligee to obligor*, in ſatisfaction of the ſum payable by the condition. Mo. 573. in pl. 787. Hill. 41 Eliz. cites 12 R. 2. Fitzh. Barr. 243. which was agreed to by the court.

8. If a *man by deed acknowledges himſelf to be ſatisfied*, this is a good * bar without receiving any thing. As 36 H. 6. 37. In debt upon a *bond for* 10 *l.* the defendant pleads that F. was bound with him, and that plaintiff had made an *acquittance* to F. *bearing date before the obligation, and delivered afterwards*, by which acquittance he acknowledged the receipt of 20 s. in full ſatisfaction of the 10 l. 5 Rep. 117. b. in Pinnel's caſe, the reporter in a nota cites 36 H. 6. Tit. Barre, 37. Dal. 49. pl. 13. Anno 5 Eliz. S. P. and in Marg. cites S. C. * [289]

9. In *annuity of* 10 l. the defendant *pleaded that the plaintiff promiſed him that if he pay him annually at Eaſter* 20 s. *that the annuity ſhould be void, and ſaid that he paid it except at Eaſter laſt, and that then he leaſed to the plaintiff the veſture of an acre of land for the* 20 s. and a good plea, per Curiam. Brooke ſays it ſeems that the promiſe was in writing. Br. Annuity, pl. 54. cites 11 H. 7. 20. and ſays it is there agreed that tho' an annuity be charged on land, yet another thing in recompence ſuffices. Br. Conditions, pl. 246. cites S. C. —— But Br. Annuity, pl. 1. cites 19 H. 8. 9. e contra, where in debt for arrearages of annuity, the defendant pleaded that he leaſed ſuch land to the grantee in recompence of the annuity, or arrearages of the ſaid annuity, but the court held it no plea; for the *annuity* is *in writing*, and *cannot be diſcharged by matter in fact*; quod nota; Brooke ſays, quære if it was annuity by preſcription. —— The year-book ſays the plea was only matter in ſurmiſe.

10. In debt upon an obligation, the defendant *pleaded* in bar, *that it was* indorſed *upon condition to make account before Michaelmas*, &c. and *that the plaintiff before the day had accepted of a leaſe at will of a houſe and* 200 *acres of land, in ſatisfaction of all accounts*, &c. judgment, &c. The plaintiff demurred, and it was adjudg'd no bar; for where a condition is collateral, the acceptance of another thing is no bar; contrary, where the condition is to pay money. D. 1. pl. 1, 2, & 3. Paſch. 4 H. 8. Anon.

11. If *A. and B. contract with C.* for corn, and at the price of 100 l. and after *C. takes bond from A. only for the money*, now is B. diſcharged of the debt, becauſe B. ſtood charged only by the contract, which is extinguiſhed by the ſaid ſpeciality. Went. Off. Ex. 116, 117.

12. In *debt on bond* of 150 l. the defendant ſaid he was poſſeſſed of 3 writings, viz. a releaſe by one F. of all his right in ſuch lands to perſons, &c. and that he *delivered* all thoſe *writings to the plaintiff in full ſatisfaction* of the ſaid debt, and that he accepted it. Manwood held the plea ill for want of alleging a value, as if he had ſaid that he had given him a ruſh or a feather it would not be good, becauſe of no value; beſides perhaps the plaintiff may take iſſue on the value; whereupon the counſel for the plaintiff ſaid he would put in a value. Dal. 105. pl. 51. Anno 15 Eliz. Temple v. Atkinſon.

13. In debt on bond for 300 l. the condition was, *that a ſtranger ſhould make a good eſtate to the plaintiff and his heirs of lands in E. in the county of N.* The defendant *pleaded that the plaintiff had*

had accepted a judgment with certain covenants therein contained, in full satisfaction for the 300 l. and adjudged per tot Cur. to be no plea. D. 1. a. Marg. pl. 1. cites Mich. 27 & 28 Eliz. B. R. Dod v. Alphin.

14. If a *feoffment in fee* be made, *on condition* to pay 100 l. on such a day, and at the day the feoffees *make an obligation* to feoffor for payment of it, the same is no performance of the condition; per Anderson Ch. J. Le. 112. pl. 153. Pasch. 30 Eliz. C. B. in case of Stamp v. Hutchins.

Cro. E. 46. pl. 2. Pasch. 28 Eliz. C.B. Anon. An agreement was made before the day of payment, to accept the money after the day of payment. The defendant pleaded acceptance after the day, but held the plea not good.

15. Debt upon obligation dated 29 April 23 Eliz. conditioned *to pay 10 l. at St. Thomas's day next at the church porch of N.* The defendant *pleaded, that before the said feast the plaintiff agreed, that if he would provide for him 6 l. and pay it at his house in N. the 15th of December next, and promise to pay the other 4 l. at Midsummer day following, he would accept of it in satisfaction of the said sum of 10 l.* and defendant pleaded payment of the 6 l. at the day, and that plaintiff accepted his * promise for the rest in full satisfaction. It was the opinion of the justices, that it was no good plea to avoid an obligation upon such naked matter, and gave judgment for the plaintiff. Cro. E. 304. pl. 1. Mich. 35 & 36 Eliz. B. R. Balston v. Baxter.

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16. *Debt on bond* of 14 l. for payment of 7 l. Defendant pleads payment at the day; it was found the defendant paid 50 s. *in part*, and that defendant *then delivered hats to the plaintiff* to the value of the residue, which he accepted. Adjudged against the defendant, for this is no payment, but he might have *pleaded specially* this matter, and then the acceptance of the plaintiff had been a bar. Cro. E. 309. pl. 17. Mich. 35 & 36 Eliz. B. R. Thimblethorp v. Hunt.

17. Condition of a bond was, that *if A. appear before the plaintiff at the commissary's court at Oxford, such a day*, that then, &c. Defendant pleaded that he *appeared before the plaintiff before the day at S.* which the plaintiff *accepted of*, and allowed for his said appearance to be at O. &c. Adjudged for the plaintiff on demurrer, because it was to do a collateral thing, and the acceptance of another thing cannot dispense therewith, nor is a discharge of the bond. Cro. E. 458. (bis) pl. 4. Pasch. 38 Eliz. B. R. Norton v. Risden.

18. Debt upon an *obligation conditioned for the payment of 20 l.* at a day certain. The defendant *pleads, that before the day the plaintiff, in respect of a trespass by his beasts in the defendant's land, gave unto him a longer day of payment, which is not yet come.* It was adjudged for the plaintiff; for a parol agreement cannot dispense with an obligation. Cro. E. 697. pl. 8. Mich. 41 & 42 Eliz. B. R. Hayford v. Andrews.

19. In debt on a bond, the condition of the bond being, *that the defendant should pay a sum* of money unto the plaintiff *on the birthday of the first child of the plaintiff*, &c. The defendant *pleads, that after the bond, and before the birth* of the child, the *plaintiff accepted*

cepted of the defendant one load of lime in full ſatisfaction dicti ſcripti obligationis, &c. Held to be an ill plea, for this cannot be a diſcharge of an obligation by words, but by writing. *Contra* if the acceptance had been of the load of lime *in full ſatisfaction of the ſum of money contained in the condition.* 1 Bulſt. 66 Mich. 8 Jac. Neal v. Sheffield.

20. In debt upon bond, the defendant *pleaded acceptance by the plaintiff of a bill ſealed for the ſame money after the obligation made.* Adjudged no good plea. Mo. 872. pl. 1212. 12 Jac. Beard v. Heynes.

21. In an action of debt brought upon a *bond for payment of money ſuch a day*; the defendant *pleads, that he the ſame day made an obligation for the payment of the ſaid money another day, which the plaintiff accepted for the money*, and iſſue taken thereupon, and tried for the defendant; and after the verdict the plaintiff moved the court to have judgment, though the verdict paſſed againſt him, becauſe the plea was inſufficient, and that he confeſſed the debt, but the court would not grant it. Brownl. 74. Trin. 13 Jac. Rawdon v. Turton. The like Mich. 6 Jac. Rot. 1061. and the like Hill. 12 Jac.

22. If a man be bound to pay 20 l. by bond, and the obligee, *for a leſs ſum* paid by the obligor, *promiſes to deliver the bond*; if this be not any ſatisfaction of the debt, yet it is ſufficient to ground an action of the caſe upon, becauſe he has no remedy for the money; per Coke Ch. J. Roll. Rep. 355. pl. 5. Paſch. 14 Jac. B. R.

23. In *debt upon a ſingle bill*, the defendant *pleaded, that he infeoffed the plaintiff of ſuch land in diſcharge of the ſaid bill, which he accepted*, and it was held an ill plea. Cro. C. 86. in pl. 9. cites Trin. 14 Jac. Rot. 734. Oliver v. Leaſe.

24. The condition of an obligation was *to make an aſſurance of lands to ſuch uſes as therein expreſſed; an acceptance of a feoffment thereof to other uſes was pleaded*, but held ill, becauſe he ought not to vary from the condition. Brownl. 60. Hill. 14 Jac. Potter v. Tompſon. [291]

25. In debt on bond againſt the *heir of the obligor*, he *pleaded, that the obligor died inteſtate, and that J. S. adminiſtered, and had given the plaintiff another bond in full ſatisfaction of the former*, &c. Upon iſſue the defendant had a verdict. It was held, that if the ſecond bond had been given by the obligor himſelf it would not have diſcharged the former, but it being given by the adminiſtrator, ſo that the plaintiff's ſecurity is better'd, and the adminiſtrator chargeable de bonis propriis, it is a ſufficient diſcharge of the firſt bond, per 3 juſtices, contra Atkins; and Windham J. ſaid, that otherwiſe the heir and adminiſtrator might both be chargeable; and judgment for the defendant niſi. Mod. 225. pl. 14 Trin. 28 Car. 2. C. B. Blythe v. Hill.

Mod. 221. pl. 9. S. C. but not S. P. —— 2 Mod. 136, 137. Peck v. Hill, S. C. but that it in debt brought againſt the defendant as adminiſtrator, and by 3 juſtices held accordingly; and

that the adminiſtrator being now chargeable in his own right, it may well be ſaid in full ſatisfaction of the firſt obligation, and that *if a ſecurity be given by a ſtranger*, it may diſcharge a former bond, and this in effect is given by ſuch; but Atkins inclined e contra.

In debt upon bond condition'd to pay 10 l. the defendant pleaded an agreement that defendant ſhould give the plaintiff a new ſecurity for this debt and another, and that he being executor of the

obligor, and the perſon with whom the concord was made, gave thereupon a penal bill ſealed by himſelf; but judgment was given for the plaintiff; for one bond given in ſatisfaction of another is no diſcharge, be it given by agreement or not, and the agreement cannot mend the matter, and yet here the new bond binds him de bonis propriis, whereas the firſt bond bound him only de bonis teſtatoris. 3 Lev. 55. Mich. 33 Car. 2. C. B. Lobly v. Gildart.

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26. A bond was given as an *accumulative ſecurity* for payment of a ſum decreed. This bond ſhall not go in diſcharge or ſatisfaction of any ſubſequent debt. Fin. Rep. 296. Paſch. 29 Car. 2. Whitton v. Searl.

27. Executor of an obligee accepted a *note on a goldſmith* for the money; the goldſmith accepted the bill, and before payment fails; the executor afterwards brought action on the *bond*, and this matter being given in evidence was adjudged a *good payment*; cited per Jefferies C. to have been adjudged in Ch. J. Pemberton's time. Vern. 474. pl. 463. Mich. 1687.

28. In debt on bond conditioned *for payment of* 12 *l. at a certain day*, the defendant *pleaded, that after the day he paid* 8 *l. and then the defendant and one J. S. gave another bond conditioned for payment of* 10 *l. which the plaintiff accepted in full ſatisfaction.* It was adjudg'd ill; for admitting one bond may be given in ſatisfaction of another, yet here the firſt obligation was forfeited, and the whole penalty due in law, and in ſuch caſe acceptance of a leſs ſum cannot be ſatisfaction for a greater. Lutw. 464. Mich. 3 Jac. 2. Geang v. Swain.

29. In debt on bond, the defendant *pleaded that the plaintiff, after the day, did accept a ſecond obligation in ſatisfaction and diſcharge of the ſum in the condition of the former.* Judgment was given for the plaintiff per tot. Cur. though no exception was taken to the plea, for *want of alleging that the ſecond obligation was given in ſatisfaction*, &c. but only that the plaintiff accepted it in ſatisfaction and diſcharge, &c. Lutw. 501. Mich. 3 W. & M. Girle v. Field.

30. One *on the marriage of his daughter gives a bond to the huſband for the daughter's portion*, and afterwards by will *deviſes land of much greater value to the huſband and the wife, and their heirs.* The deviſe is no ſatisfaction of the bond, though there be a defect of aſſets to pay the teſtator's debts. 2 Vern. 298. Trin. 1693. Goodfellow v. Burchett.

[292] 31. One *bond* cannot be a ſatisfaction *for another.* Litt. Rep. 58 Ene's caſe.

S. P. per Cur. Sty. 339, 340. Trin. 1652. Brock v. Vernon.——A bond is no ſatisfaction *of money due*, though it may be of money *before it is due.* 12 Mod. 86. Mich. 7 W. 3. Stayney v. Baker.

32. Debt upon ſeveral *aſſumpſits*; defendant pleads, that he had given *a bond for the ſame*, and on demurrer judgment for the defendant. 12 Mod. 406. Trin. 12 W. 3. King v. Woolaſton.

33. Debt upon a bond; the plaintiff did *by* his *deed* grant and *agree* to, and with the defendant, *to accept a bond for the building of a houſe*, in ſatisfaction of the firſt bond, and now it was held not to be a good plea, for it amounts to no more than a *covenant*, and *not to a releaſe.* 12 Mod. 539. Trin. 13 W. 3. Baber v. Palmer.

34. Holt

34. Holt Ch. J. ſaid, that a *bond* may be a ſatisfaction of the condition *of another bond before* it is *forfeited*; *otherwiſe after*. 12 Mod. 539. Trin. 13 W. 3. Baber v. Palmer.

35. In *debt upon bond the* defendant *pleaded in bar, that he made a feoffment to the plaintiff of lands, and that the plaintiff accepted thereof in ſatisfaction*, and ſeems admitted for a good plea; but per Cur. the acceptance muſt be laid where the feoffment was made, it being local. 6 Mod. 82. Mich. 2 Ann. B. R. Williams v. Farrow.

36. A. covenants on his marriage *to purchaſe lands of* 200 *l. a year, and ſettle them for the jointure of his wife, and to the firſt, &c. ſons* of the marriage. He *purchaſes lands of that value, but makes no ſettlement*, and on his death *the lands deſcend to his eldeſt ſon*. On a bill by the ſon for a ſpecifick performance, decreed the lands deſcended to be a ſatisfaction of the covenant. 2 Vern. 558. Trin. 1706. Wilcocks v. Wilcocks.

S. C. cited by Sir Joſeph Jekyll, maſter of the Rolls, and ſays, *the book takes notice, that the lands were worth* 200*l. per annum*, which imports, that they were juſt of that value, and this plainly ſhews, that the lands were brought with an intention to ſatisfy the covenant, and the eldeſt ſon could not complain, or object, when he had his 200 l per annum from his father, that it was another eſtate than what was covenanted to be ſettled upon him, viz. that it was a fee-ſimple inſtead of an intail, for which cauſe this ſeems to have been a reaſonable decree. 3 Wms's Rep. 225, 226. Mich. 1733.

37. *W. deviſed a leaſehold eſtate to M. chargeable with* 10 *l. a year to A. for life*. Afterwards *M. by will made J. S. executor, and deviſed alſo* 10 *l. a year to A. for life*. *J. S.* being afterwards ſeiſed in fee of other lands, *ſettled his eſtate* on himſelf for life, remainder over, &c. *Remainder to truſtees for* 99 *years, to pay his debts and legacies, and afterwards that A. ſhould have and receive* 20 *l. a year for life*; the remainder veſted in the truſtees. Ld. Chancellor agreed the gifts by the will to be good, and that where a man is debtor in 10 l. and gives 20l. it ſhall be a ſatisfaction, and not a legacy, and that he believed, in his own private opinion, that the 20 l. a year annuity was intended for a ſatisfaction, and that (as Mr. Dolbin had ſaid) there was no caſe like this in point. Gilb. Equ. Rep. 65. Paſch. 7 Ann. in Canc. Daviſon v. Goddard.

38. *Sir William Davie had an eſtate in Somerſetſhire by his firſt lady, which was to her in tail*; they *levy a fine, and declare the uſes to them, and the iſſue of their body, remainder to Sir William and his heirs*; they *have a daughter Mary*, and the *feme dies*. On this *marriage* there were *articles, that Sir William ſhould leave his daughter* 2500 *l. if the truſtees demanded it within one year after his death*, &c. Sir Jo. the *father of Sir William was then living. Sir William marries a ſecond wife, and* by her *had iſſue ſeveral daughters. By deed* executed in his life-time *he gives the eſtate in Somerſetſhire to Mary and her heirs, and* by deed alſo *charges his lands in Devonſhire which he had purchaſed with* 5000 *l. a-piece to the three daughters, and dies. Mary demands the* 2500 *l. and intereſt*; [293] but to this it was objected, that the gift of the Somerſetſhire eſtate was an equivalent, or the reverſion of the lands in Devonſhire was eſteemed to be ſuch, and that Sir William often declared, that he would leave all his children equal, and amongſt his debts, of which there was a liſt of his own hand writing, this 2500 l. was not

mentioned; but decreed by lord keeper Harcourt, that Mary ſhould have the 2500 l. with intereſt from Sir William's death, at 5 l. per cent. That *the Somerſetſhire eſtate could not be an equivalent, becauſe it mov'd from her mother, and was the condition of the agreement for the* 2500 *l.* That *the reverſion of the lands in Devonſhire could not be ſo, becauſe Sir William's father was then living,* and there was no reſpect had to theſe reverſions, neither were they then in being, and *to make it an equivalent, it ought to be in being, and in view at the time of giving* the equivalent. Mich. 9 Ann. Canc.

39. Bill to have *a performance of a marriage agreement* contained in a condition of a bond, viz. *that the huſband ſhould purchaſe lands of the value of* 800 *l. to be ſettled upon himſelf for life, remainder to his wife for life,* remainder *to the heirs male of the huſband begotten on the body of the wife, remainder to the right heirs of the huſband,* &c. The eldeſt ſon of the marriage brings this bill againſt the executors of his father to have the benefit of this agreement. The *defendant inſiſts, that the father in his life-time purchaſed a copyhold eſtate which deſcended to the plaintiff, and likewiſe by his will deviſed* 100 *l. legacy to be raiſed out of land to the plaintiff, and that this copyhold and legacy ſhall be taken as a ſatisfaction of the marriage agreement,* eſpecially in this caſe where the huſband and wife were tenants in tail and might bar the iſſue. Harcourt C. decreed the plaintiff muſt have a ſatisfaction of the agreement in the bond, and 4 l. per cent. allowed him for intereſt of the 800 l. from the death of his father; that the copyhold eſtate deſcended to him, from his father, muſt be taken as a ſatisfaction pro tanto of the agreement, according to the value of the land and the purchaſe money, but the legacy of 100 l. being deviſed out of land is not to be taken in part of the ſatisfaction; and as to a conveyance made of 6 acres ſaid to be made by the father to the plaintiff in his life-time, to inquire whether it was a *voluntary conveyance,* and then *to go pro tanto* in ſatisfaction of the agreement; but if the purchaſe money was paid to the father, then to be no part of the ſatisfaction. MS. Rep. Trin. 12 Ann. Canc, Wilks v. Wilks.

40. H. being *ſeiſed in tail of ſome lands with remainder over, and alſo* ſeiſed *for life of other lands, with a power to make a jointure in bar of dower, with remainder over,* &c. during his minority, *in conſideration of a marriage to be had with the daughter of U. and* 1000 *l. paid down, and* 3000 *l. more to be paid by U. to H. at his age of* 21, *doth covenant by his guardian to ſettle a jointure of* 500 *l. per annum, when he comes of age,* upon his intended wife. The marriage took effect, and afterwards U. the plaintiff's *father, pays H. the* 3000 *l. reſidue of the portion, when he came of full age,* and then *H. in purſuance of the covenant entered into by his guardian, doth ſettle a jointure of* 500 *l. per annum* upon his wife the plaintiff. Some years after *H. makes his wife an additional jointure of* 250 *l. per annum upon her father's dying, and leaving her the value of* 9000 *l.* and at the ſame time *perſuades his wife to join with him in a fine of all the reſidue of his eſtate.* Afterwards *H. dies, and by his will deviſes a houſe and lands to his wife for her life, to the value of* 270 *l. and gives her a legacy of* 4000 *l. and his plate and jewels, to the value of* 2000 *l. more, and makes her executrix, and gives her the*

moiety

moiety of the reſidue of his perſonal eſtate, &c. It happened that *the jointure*, made purſuant to the marriage articles, *proved defective both in title and value*, and thereupon ſhe brought a bill againſt the [294] remainder-man, to have a ſatisfaction out of the real eſtate for the deficiency of her jointure, &c.

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There were two principal points in this caſe.

1ſt. *If the additional jointure, being a voluntary ſettlement after marriage, ſhould go in ſatisfaction pro tanto of the jointure* made purſuant to the marriage articles.

2dly, *If the* 270 l. *per annum, deviſed to her for life, ſhould* go in ſatisfaction of the marriage articles, *or if the legacies left her by the will ſhould* be deemed a full ſatisfaction.

Harcourt C. was of opinion, that the additional jointure of 250 l. per annum ſhall not go in part of ſatisfaction of the marriage agreement, which, though made by the guardian, did bind H. as ſtrongly as if he had been of full age, and had ſigned the articles himſelf, eſpecially ſince H. at his full age did receive the 3000 l. reſidue of his wife's portion, and did actually make a jointure of 500 l. per annum to his wife in purſuance of thoſe articles. Now when he ſettled the additional jointure of 250 l. per annum upon his wife, he could not intend it in ſatisfaction pro tanto of 500 l. per annum, becauſe before that time he had made her a jointure of 500 l. per annum, purſuant to the marriage articles, which he then thought to be a good ſettlement, and therefore there is no room left for the preſumption in equity, that a voluntary ſettlement ſhall be intended in ſatisfaction of a precedent covenant or agreement, though not made in purſuance of it; and ſo as to the deviſe of 270 l. per annum for her life, and the 4000 l. legacy, &c. they cannot be intended by H. in ſatisfaction of the jointure by the marriage articles, but given to her as a bounty by her huſband, becauſe at that time he thought his wife's jointure was well ſettled and ſecured; beſides *money or perſonal eſtate ſhall never be deemed in equity a ſatisfaction for a freehold.*

And decreed, that the remainder-man do ſettle 500 l. per annum upon the plaintiff for life, out of the lands which came to him upon the death of H. and that the lands contained in the additional jointure, or deviſed to the plaintiff, ſhall not come in aid of the other lands pro rata to make a ſatisfaction for the marriage articles, but *the whole* 500 *l. per annum ſhall entirely come out of the other lands in remainder, notwithſtanding the fine levied by H. and his wife the now plaintiff of thoſe lands*, though that be a bar and eſtoppel of her dower at common law. And that the plaintiff have a ſatisfaction for the ſaid 500 l. per annum from the time of the death of her huſband H. His lordſhip did alſo direct the defendant to account for the rents and profits of the additional jointure of 250 l. per annum from the death of H. But the counſel for the defendant moved, that the additional jointure was made out of the lands of which H. was only tenant for life, with a power to make a jointure, &c. and that the power was not well executed at law, and being a voluntary ſettlement, if the power was not well executed, it ought not to be aided in equity; to which lord C. ſaid, he ſaw no reaſon why a defective execution of a power for the benefit of

the wife, though otherwiſe provided for, ſhould not be aided in a court of equity, as well as want of a ſurrender of a copyhold in caſe of a deviſe to a child, who hath another proviſion by the will, but ſince it was inſiſted on, that there is no precedent in this court, of ſupplying a defective execution of a power in caſe of a voluntary ſettlement, he gave leave to try the validity of the execution of the power at common law, and retained the bill quoad that part until it be determined at law. Decree affirm'd in Dom' Procer'. MS. Rep. Mich. 12 Ann. Canc. Lady Hooke v. Grove & al'.

[295] 41. One covenants *to leave his wife* 650*l.* He dies inteſtate, and the *wife's ſhare on the ſtatute of diſtributions comes to more* than the 650 l. this is a ſatisfaction. 2 Vern. 709. pl. 631. Hill. 1715. Blandy v. Widmore.

42. A. by marriage articles is bound *to pay his wife, if ſhe ſurvives him* 1500 *l. in full of dower*, thirds, cuſtom of London, or otherwiſe, out of his real and perſonal eſtate. A. *dies inteſtate*, this bars the wife of her ſhare by the ſtatute of diſtributions. 2 Vern. 724. Mich. 1716, Davila v. Davila.

1 Mod. 438. 439. S. C. reported thus, viz. A. had iſſue two ſons, B. and C.—B. married the daughter of D.—C. having made his addreſſes to a lady, and all things concluded upon for the wedding, D. took C. aſide, ſhewed him a bond ready drawn, which, as he ſaid, was prepared by the direction of A. and told him, that unleſs he would execute it, A. would not ſuffer the match to proceed; and moreover, that he muſt not ſo much as mention any thing relating to this bond, as he valued his father's diſpleaſure. The condition of this bond was, that if he ſhould die without iſſue by that marriage, he would leave 3000 l. to one or more of the children of B. who had married the daughter of D. Under this terror C. executes the bond. Afterwards he ſpoke to his father of it, who denied that he ever gave ſuch directions, and gave him 3000 l. to indemnify him againſt the bond, which 3000 l. was, when this bond ſhould be delivered up to him, to be diſtributed among the grand-children. A dies. C. in his life-time, and by his will, gave in land and money more than 3000 l. to one of the children of B. and dies without iſſue. The only evidence of the manner by which this bond was extorted, was a recital in the will of C. It was prov'd in the cauſe, that when C. was making theſe gifts in the favour of B's ſon, he was adviſed to declare, that this was in ſatisfaction of the bond; but his anſwer was, that this would look like complying with a bond which he had all along declared had been unjuſtly extorted from him. This bond was of 50 years ſtanding. Ld. C. Parker ſaid, he made no doubt but this bond was fraudulently extorted, but knew not how to come at it; for to allow a recital in the will of the obligor, as evidence to overthrow a bond, may be of dangerous conſequence; however, he thought the bond had been ſatisfied, and the reaſon given why he would not declare it to be in ſatisfaction, does very plainly amount to a declaration of his intention, that he did not deſign to make the gifts he did over and above the ſatisfying his bond.

43. *A. having two ſons*, E. and H. *has a deſign to diſinherit the eldeſt, and to that purpoſe gives an eſtate to the youngeſt*, and thereupon he marries and obtains a conſiderable fortune; but *the eldeſt contrives, (by inſinuating as if the father had commanded it) that he ſhould give a bond to leave* 3000 *l. to one of the children of the eldeſt.* The bond was dated in 1668. H. makes his will, and takes notice of this bond, and declares that he would never pay it as a debt, but gives an eſtate in land to theſe children, &c. The queſtions were, 1ſt, Whether the court would not damn this bond? 2dly, Whether, conſidering the length of time, and here being a deviſe, this ſhall not be taken as a ſatisfaction, &c. And lord C. Parker choſe rather to make his decree on the latter, and the maſter was directed to enquire into the value of this eſtate ſo given. An eſtate for life is no compenſation for a ſum, becauſe of the uncertainty of its duration. The ſatisfaction ariſeth according to the declaration of the party; the preſumption is always in favour of the ſatisfaction, unleſs the intent of the party appear to be otherwiſe, which muſt come on that party who would not have it to be a ſatisfaction. Trin. 5 Geo. Canc. Hancock v. Hancock.

44. In

44. In a settlement a *term was raised for daughter's portion*, (viz.) 10,000 *l.* with a *proviso, that if the father by deed or will should give, or leave the sum of* 10,000 *l. to his said daughters, it should be a satisfaction.* The father leaves land to the daughters of the value of 10,000 l. this is no satisfaction. 3 Wms's Rep. 245. Pasch. 1734. Chaplin v. Chaplin.

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(E. d. 2) Where the *Acceptance* of the like, or a lesser Sum, or Estate, shall be a good Barr. [296]

1. IN debt upon obligation, where a man is *bound in* 200 *l. to pay* 100 *l.* at a day, and he *pays it after the day*, and the plaintiff accepts it, yet the obligation is forfeited; *but* if a man be bound upon condition *to pay at such a place*, and he pays it at another place, this is good by the acceptance of the plaintiff, note a diversity, Br. Conditions, pl. 31. cites 46 E. 3. 29. Br. Dett. pl. 43. cites S. C.—— S. P. and it was agreed in audita querela, that where a man is *bound in a statute merchant* with *defeasance to pay* 40 *l. to C. such a day*, if he *pays it elsewhere at the day or before the day* it suffices. Br. Conditions, pl. 48. cites 21 E. 3. 45.

2. *Acceptance of land* to the value *of* 10 *l. per ann. where it ought to be* 20 *l.* per ann. is no discharge of the bond in which he is bound to make estate of 20 l. land per ann. Br. Acceptance, pl. 12. cites 3 H. 7. 4. Br. Conditions, pl. 126. cites S. C.

3. Where the condition is for payment of 20 l. the obligor or feoffor can't *at the time appointed* pay a lesser sum in satisfaction for the whole, because 'tis apparent that a lesser sum of money can't be a satisfaction of a greater. Co. Litt. 212. b. 3 Bulst. 302. in case of Tompson v. Butcher. Jones J. and ibid. 302. S. P. accordingly, by Crew Ch. J. and by Doderidge J. tho' 20 l. cannot be paid in satisfaction of a greater, as for instance, of 200 l. in the principal case there, yet 20 l. may well be paid to end a suit for 200 l. and this may well be so done by law, and judgment was given for the plaintiff accordingly by the opinion of the whole court. Mich. 1 Car. B. R.——5 Rep. 117. a. Trin. 44 Eliz. C. B. Pinnel's case, S. P. adjudged accordingly.——Mo. 677. pl. 923. Penny v. Core, S. C. held accordingly.

4. But if the obligee or feoffee do at the day receive part, and thereof make an *acquittance under* his *seal in full satisfaction* of the whole it is sufficient, by reason the deed amounts to an acquittance of the whole. Co. Litt. 212. b. S. P. If he gives acquittance in full satisfaction of the greater sum, but this is by reason of the writing, for if it was without writing then the payment of part could not be a satisfaction for the whole, as Bendlows said was lately argued and adjudged. Mo. 47. pl. 142. Pasch. 5. Eliz. Anon.

5. If the obligor or feoffor pay a lesser sum either *before the day* or *at another place* than is limited by the condition, and the obligee or feoffee receives it, this is a good satisfaction. Co. Litt. 212. b. 3 Bulst. 301. —Cro. E. 46. pl. 2. Pasch. 28 Eliz. C. B. the S. P. held accordingly.——D. 1. Marg. pl. 3. cites S. P. Per Periam v. Anderson, and 18 E. 4. 15. 17. 20.——5 Rep. 117. a. b. Trin. 44 Eliz. C. B. Pinnell's case, S. P. adjudged accordingly; but then he must not plead generally that the plaintiff accepted it in full satisfaction, but also that he paid it in full satisfaction; for the manner of payment is to be directed by him who makes it, and not by him who accepts it, and judgment was given accordingly.——5 Mod. 86. cites S. C.

6. A *bond*

Mo. 677. pl. 923. Penny v. Core, S.C. the court thought the plea good, becauſe the acceptance was before the day,

6. A *bond to pay* 8 *l.* 10 *s.* 11 Nov. 1600. In debt, defendant *pleads that he at the plaintiff's requeſt before the day, viz.* 1 *Octob. paid* 5 *l.* 2 *s.* 2 *d. which plaintiff accepted in full of ſatisfaction* of the 8 l. 10 s. judgment for the plaintiff on the defendant's plea for he doth not plead that he paid the money in full ſatisfaction as he ought, but pleads payment generally, and that the plaintiff accepted it in full ſatisfaction. 5 Rep. 117. Trin. 44 Eliz. C. B. Pinnell's caſe.

but payment of part at the day and place cannot be, by acceptance, a ſatisfaction of all of the ſame kind.——And 5 Rep. 117. a. the court reſolved that the payment and acceptance before the day of parcel in ſatisfaction of the whole ſhall be a good ſatisfaction in reſpect of the circumſtance of the time; for perhaps parcel of it before the day will be more beneficial to him than the whole at the day, and the value of the ſatisfaction is not material. But judgment was given for the plaintiff for the inſufficient pleading.

*[297]

7. An executor brought *debt upon* ſeveral *bonds* made to the teſtator, the defendant *pleaded that he paid a leſſer ſum than expreſſed* in the bonds to the teſtator in his life-time, *and that he did accept the ſame in full ſatisfaction of the ſaid bonds*; upon demurrer the queſtion was, whether the *payment or* the *acceptance* of the money ſhould be traverſed. Roll. Ch. J. held it indifferent to traverſe either, but that it was more to take iſſue upon the payment, but the court would adviſe. Sty. 239. Mich. 1650. Bois v. Cranfield.

8. Payment of a leſſer ſum in ſatisfaction of a greater is *good in aſſumpſit, but in debt upon obligation* the defendant pleaded in abatement that the plaintiff received part of the money after the action brought, and *ruled ill.* Comb. 19. Paſch. 2 Jac. 2. B. R. Hilliard v. Smith.

(F. d) *By whom* the *Collateral Thing* being *given*, it ſhall be a good Satisfaction.

Cro. E. 541. pl. 6. S. C. held by Popham and Gawdy, cæteris juſticiariis abſentibus,

[1. IF the condition of an *obligation* be *to pay* 20 *l. at a day*, and a *ſtranger ſurrenders a copyhold to the uſe of the obligee in ſatisfaction of the* 20 *l. which the obligee accepts*; this is a good ſatisfaction and diſcharge of the obligation. Trin. 39 Eliz. B. R. between *Grimes and Blofield.*]

that it is not a good plea, for he is in no ſort privy to the condition, and afterwards adjudged, per Popham and Clench (cæteris abſentibus) for the plaintiff.

(F. d. 2) Pleadings as to Acceptance of Collateral Things.

1. DEfendant pleaded that plaintiff accepted wares in full ſatisfaction, &c. of the reſidue of the debt (upon bond) but upon demurrer it was adjudged ill, becauſe he *did not plead that he gave the wares in full ſatisfaction*, but only that the plaintiff accepted them in full ſatisfaction, which can't be, unleſs the defendant gave

gave them for that purpoſe. Carth. 237, 238. Paſch. W. & M. in B. R. Frederick v. Goſfright.

2. *And* ſo likewiſe muſt the *acceptance* be pleaded in ſatisfaction. Carth. 347. 348. Paſch. 7 W. 3. B. R. Young v. Rudd.

In a bill in chancery, the plaintiff ſet forth an *agreement for purchaſing ſtocks of the defendant* at ſo much, *and that he paid 6 d. as earneſt*; the defendant *pleaded, that he did not accept or receive it as earneſt*; per lord C. King, this is not well pleaded; for it is not material how or in what manner the plaintiff received or accepted it, but how the other paid it; for *quicquid ſolvitur, ſolvitur ad modum ſolventis*, and cited 5 Rep. 117. Pinnel's caſe, and ſo over ruled the plea. Mich. 1725. 2 Wms's. Rep. 304. 308. Colt v. Nettervill.

(G. d) In what Caſes the *Diſpenſation or Extinguiſhment of Part* of the Condition ſhall be of the Whole.

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See Tit. Apportionment, per totum.

[1. IF a man *leaſes for years upon condition that the leſſee or his aſſigns ſhall not alien without licence of the leſſor*, and after the *leſſor licences the leſſee to alien to whom he pleaſes*, who after aliens to J. S. The condition is quite gone by this licence, for by the diſpenſation to the leſſee, the condition is utterly diſcharged, as to the aſſignees. Co. 4. * *Dumper againſt Sims* 119. b. Paſch. 43 Eliz. B. R. adjudged; for a condition is to be taken ſtrictly, and by his alienation with licence, the condition is ſatisfied. M. 3 Jac. B. between † *Walker and Bellamy*, adjudged.]

* Cro. E. 815. pl. 5. S. C. adjudged accordingly, for it cannot be diſcharged for a time and in eſſe again afterwards.

† Cro. J. 102. pl. 36. S. C. but S. P. does not appear.

[2. [*So*] if a man leaſes land upon condition *that he ſhall not alien the land, nor any part thereof, without the aſſent of the leſſor*, and after *he aliens part with the aſſent of the leſſor*; he may after alien the reſidue without his aſſent, for all the condition is gone by this, for it cannot be divided or apportioned. Co. 4. *Dumper's caſe*, contra, D. 16. Eliz. 334. 32. adjudged.]

S. P. by Popham Ch. J. 4 Rep. 120. a. in Dumpor's caſe, and he denied the caſe in Dyer, and ſaid that he thought the ſaid caſe in Dyer to be falſely printed, for he held it clear that it was not law. ——Cro. E. 816. S. C. and held by Popham accordingly.——Mo. 205. Arg. cites the caſe of 36 Eliz. D. 334. but ſays, that if any part of the land ſhall be diſcharged of the condition all is gone, but that it is not ſo where the perſon is diſcharged of parcel of the labour which ſounds to his eaſe; but Anderſon and Rhodes e contra in this point, and yet both agreed with him, that if a ſubject has a reverſion to which a condition is incident, and grants over parcel of the reverſion, or purchaſes by ſurrender parcel of the land, the condition is gone for the whole; for ſo it was adjudged in one Winter's caſe and in Somerford's caſe in Hill. Term Hill. 27 Eliz.——Where one has an intire condition he cannot by his own act divide it, but by act of law it may be divided, as by recovery in waſte, or deſcent of part of the reverſion in gavelkind or borough Engliſh, but not by grant of the perſon himſelf; per Cur. Mo. 98. pl. 241. Trin. 14 Eliz.——S. P. by Roll. Ch. J. Sty. 317. Hil. 1651.——S. C. cited Arg. Raym. 287. ad finem. and ibid. 288. cites 14 Car. 2. Gardiner's caſe, that in ſuch caſe the condition is gone even in the queen's caſe.

[3. If a man be *bound to build an houſe*, and the *obligor diſcharges one poſt*, he is diſcharged of the whole. 4 H. 7. 6. b. per Keble.]

[4. If a man be *bound to go with A. C. and D.* and the obligor *diſcharges him from* [*going with*] *D*, he is diſcharged by this from going with A, and C. though that which diſcharged is for advantage, for the condition is entire. Contra, 4 H. 7. 6. b. per Brian.]

Mo. 205. per Periam J. Arg. cites S. C. that though I

[5. *So* if the condition be *to plough my land in such a town* and *I discharge him of parcel*; this also discharges the rest. Contra, 4 H. 7. 6. b. per Brian.]

discharge him of plowing one or two acres, yet he shall plough the residue.

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[6. If a man *hath a power of revocation*, and *he by his own act extinguishes his power* of revocation *in part*, as by levying a fine of part; yet the power of revocation remains for the residue, because *this is in nature of a limitation and not of a condition.* Co. Litt. 215. cites the earl of *Shrewsbury's case* in curia wardorum, Pasch. 39 Eliz. & Mich. 40 & 41 Eliz. resolved.]

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Godb. 93. pl. 104. S.C. the lessor made a licence that A. B. or C. [who were

[7. If A. *leases* land *to three* upon condition, *that they, or any of them, shall not alien without licence of the lessor*; and after *one aliens with the licence* of the lessor, this discharges all the condition as to the other two also. Trin. 28 Eliz. B. between *Leeds and Crompton*, adjudged; cited Co. 4. 120.]

the three lessees] might alien; this is a good licence notwithstanding the uncertainty, and thereby they have several authorities to alien.——4 Le. 58. pl. 146. Lees v. lord Stafford, S. C. adjudged for the lessee who aliened by virtue of this licence.——S. C. cited Noy 32. that the lessor licenced A. to alien his part, and afterwards B. and C. aliened without licence, and that the entry of the lessor was adjudged not lawful because the condition was entire; and cites 4 H. 7. 9. & S. P. but the reporter says, quære if they had made partition by consent before that licence. —— S. C. cited by the name of Lylds v. Crompton, Cro. E. 816. that it was adjudged that the lessor did not enter; for the condition was dispensed with before.

[8. If the *owner of a ship covenants with B. that he will receive such lading as he shall appoint at York by such a day, and then to go with the first wind to R. and there to unload and take in other wares*; and after *B. discharges him from taking in goods at Y. but that he shall receive his lading at R.* This discharge of parcel of the covenant is not any discharge of the residue. Trin. 11 Jac. B. between *Smith and Barnes*, per Curiam, for these are several.]

Br. Contract, pl. 8. cites S. C. ——S. P.

9. In *contract of* 20 *l.* the taking of a *bond for* 10 *l. thereof determines the whole contract*, and the issue taken there was, that it was for another cause. Br. Obligation, pl. 21. cites 3 H. 4. 17.

But a Bond *cannot determine debt of record, or by specialty*, as bond upon bond, or bond of debt due by account before auditors. Br. Obligation, pl. 23. cites 11 H. 4. 79.

10. If a man makes a *lease* for life *of* 2 *acres* upon condition, and after the condition is broken, the lessor may enter into one acre only and wave the benefit of the other acre, and yet the condition is entire; per Cottesmore. Co. R. on fines, 13. cites 1 H. 6. 4.

11. *Three parceners* are, and the *one enters and leases to me* rendring rent, and *I am bound to pay* the rent, and *after the two enter*; I forfeit the obligation if I do not pay the 3d part of the rent, but by the entry *two parts of the rent are extinct.* Br. Conditions, pl. 207. cites 20 H. 6. 23.

Br. Dette pl. 178. cites S. C.

12. Debt upon a *bond for payment of rent reserved upon a lease for years made by the plaintiff to the defendant*, the *defendant said that, before that the plaintiff any thing had, J. N. was seised, and had issue the plaintiff and two other daughters, and died*; *and the plaintiff entred into all and leased to the defendant rendring the rent*, and he

was

was bound to pay it; *and before any day of payment the two other daughters entred* judgment ſi actio. And the beſt opinion was, becauſe by the entry into two parts the rent ſhall be apportioned, and the defendant has not paid the third part according to it, therefore *the obligation is forfeited.* Br. Obligation, pl. 6. cites 20 H. 6. 23.

13. *For a bond cannot be apportioned*; for where he is bound in 10l. to pay 4l. and he pays 3l. and not 4l. the bond is forfeited. Ibid.

14. Brook ſays it ſeems there, that *if the entry had defeated the eſtate of the plaintiff in the whole*, that then *the bond had been diſcharged in all.* Ibid.

15. If *A. infeoffs B. upon condition*, &c. *to re-enter*, there if a man *impleads B. who vouches A.* and ſo recovers, *or if A. re-enters upon B. without cauſe, and is impleaded and loſes*, there, in the one caſe and the other, the condition is determined; for the land is recovered againſt him who made the condition. Br. Judgment, pl. 136. cites 26 H. 8.

16. If a man leaſes land for life, or years, rendring rent with clauſe of re-entry, if the *leſſor enter into any part of the land* he cannot re-enter for the rent again afterwards, by reaſon that condition * cannot be apportioned nor the rent. Br. Conditions, pl 193. cites 33 H. 8. and P. 9. E. 4. 1. *[300] S. P. For condition cannot be apportioned nor divided. Br. Extinguiſhment, pl. 49. cites 33 H. 8.

17. Feoffment to two upon condition *to make an eſtate back to the feoffor for* term of *life*, the *remainder over* in fee to a ſtranger; *one of the feoffees makes an eſtate accordingly*; it ſeemed to ſeveral, that this is good for the moiety, becauſe the party to the condition hath diſpenſed with the condition by the acceptance of the eſtate. Dy. 69. b. 70. a. pl. 36. Paſch. 5 E. 6. Anon.

18. *Leſſee for years has execution, by elegit of a moiety of the rent and reverſion, againſt the leſſor where the leaſe was upon condition.* This is a ſuſpenſion of all the condition during the time of the extent; and though only a moiety of the rent was extended, yet the *entire condition was ſuſpended*, for it cannot be apportioned; per Curiam. Mo. 22. pl. 75. Paſch. 2 Eliz. Anon. Le. 201. pl. 322. in times of queen Eliz. S. P. where debt was recovered againſt the leſſor, it was held, that the moiety of the rent and the reverſion was extendable by elegit, and upon ſuch extent the condition is ſuſpended during the extent, *as well in the leſſor as in the party who has the extent.*

19. If leſſor *recovers part* of the land in an action of *waſte*, or *enters for forfeiture* into part for an alienation in fee, the condition remains, as Manwood conceived. 4 Le. 29. in pl. 82. S. P. by the juſtices, Mo. 98. pl. 241. Trin. 14 Eliz. and ſeems to be S. C.——S. P. per Periam J. Mo. 203. Paſch. 27 Eliz.——Mo. 114. pl. 255. Paſch. 20 Eliz. S. P. obiter, by Dyer and Manwood.

20. A *parſon leaſed land, whereof he is ſeiſed in his own right, and land whereof he is ſeiſed in the right of his church*, for years, rendering rent, with clauſe of re-entry, and dieth; the rent ſhall go according to his reſpective capacity, and the condition divided. Per Jefferies. 4 Le. 28. in pl. 82.

21. *So*

Mo. 203. in pl. 349. Paſch. 27 Eliz. S. P. by Periam J.

21. *So if part* of the land ſo demiſed *be evicted*, the rent ſhall be apportioned, and the condition alſo. Per Jefferies. 4 Le. 28. in pl. 82.

22. A man makes a leaſe for years, rendring rent, with clauſe of re-entry, takes a wife and dies; the *wife recovers the 3d part of the land demiſed for her dower*, now that 3d part is diſcharged of the condition during the eſtate in dower, but the reſidue is ſubject to the condition; per Mounſon J. 4 Le. 28. in pl. 82.

S P. agreed, 4 Rep. 120. b. Hill. 45 Eliz. B. R. in Dumpor's caſe. ——Same diverſity D. 309. pl. 75. in Winter's caſe.——Godb. 3. Paſch. 20 Eliz. C. B. S. P.——Mo. 98. pl. 241. Trin. 24 Eliz. at the end of the caſe of Appowell v. Monoux.——Co. Litt. 215. a. S. P.

23. Where one has entire condition, he cannot *by his own act* divide it, but by *act of law* it may be divided; as by recovery in waſte, or deſcent of part of the reverſion in gavelkind or borough Engliſh, but not by grant of the perſon himſelf. Mo. 97, 98. pl. 241. Trin. 14 Eliz. Appowell v. Monoux.

24. A. *termor for* 20 *years*, and *ſeiſed in other lands in fee, leaſes all for* 10 *years*, reſerving rent, with clauſe of re-entry, and *dies*; now the heir has a reverſion for the land in fee, and the executor for the other land, ſo the condition is divided according to the reverſion. 4 Le. 27. pl. 82. per Manwood.

25. A. has a *general tail in Bl. Acre, and ſpecial tail in Gr. Acre, and leaſes both*, rendring rent, and dies having *ſeveral iſſues inheritable to each tail*; now the condition ſhall go according to the rent; per Manwood. 4 Le. 27. pl. 82.

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S. P. accordingly, by Dyer and Manwood. Mo. 114. in pl. 255. Paſch. 20 Eliz.——S. P. by Periam. Goldſb. 21.——S. P. by Jefferies, 4 Le. 28. in pl. 82.

26. If leſſor accepts *ſurrender of part*, the entire condition is gone, for 'tis his own act, per Periam J. Mo. 203. pl. 349. Paſch. 27 Eliz.

If 2 *jointenants* make a leaſe for years reſerving rent upon condition, and after they *make partition* (as they well may, having the reverſion and freehold in them) neither the one nor the other ſhall enter for the condition broken. Per Rodes J. Goldſb. 22. Trin. 28 Eliz.

27. *Two coparceners of a reverſion* with condition, make *partition by agreement*, the condition is gone. Mo. 203. per Periam J. ſays it was ſo adjudged 4 & 5 Phil. & Mary. But if *by writ* the condition remains; per Anderſon Ch. J. Mo. 205, 206. in pl. 349. Paſch. 27 Eliz.

28. A condition is an entire thing, and *cannot be divided*; as if I *leaſe* 3 *acres* for years, *with a condition of re-entry for non-payment* of rent, and then *I grant the reverſion of* 2 *acres*, the condition is deſtroy'd, for it is entire, and againſt common right; but in the king's caſe the condition is not deſtroy'd, but remains ſtill in the king. Co. Litt. 215. a.

Co. Litt. 215. a. S. P. ——Mo. 203. S. P. by Periam.—

29. So a condition may be apportioned *by the act or tort of the leſſee*; as if a *leſſee makes a feoffment of part*, and the *leſſor enters for the forfeiture*; or recovers the place waſted, the rent and condition ſhall be apportioned; for the leſſor ſhall not be prejudiced by the

the act of the leſſee, and no one ſhall take advantage of his own wrong. 4 Rep. 120. b. Hill. 45 Eliz. B. R. Dumpor's caſe, alias Dumpor v. Symms. S. P. Arg. Roll. Rep. 331. at the end of pl. 37.

30. [A condition may be *extinguiſhed as to one, and in eſſe as to another*] as where tenant for life of a rent acknowledged a ſtatute, and releaſes to the tertenant, the ſtatute is forfeited, it was held that the rent *as to* the conuſee was in eſſe, per Coke and 2 other juſtices. 4 Le. 235. pl. 370. Mich. 5 Jac. C. B. Anon. 4 Le. 239. pl. 386. S. P. by Coke Ch. J. in C. B. in Duncomb's caſe, and ſeems to be S. C.

31. If *leſſor grants reverſion of part of the land*, all the condition is deſtroy'd. 2 Roll. R. 332, 333. Trin. 21 Jac. B. R. Anon. S. P. per Periam J. Mo. 203. in pl. 349.

——D. 309. a. pl. 75. in Winter's caſe, S. P.——S. C. cited per Cur. and admitted.—— Godb. 336. in pl. 431. Trin. 21 Jac. B. R.——S. P. Arg. Goldſb. 114. pl. 6. Mich. 39 & 40 Eliz. ——Co. Litt. 215. a. S. P.

32. *Covenant to levy a fine* to the uſe of himſelf and wife for life, and *afterwards made a leaſe* of the lands for 21 years, *rendring rent* every half year, *and after the death of J. S. to pay a fine of* 125 *l. by* 5 *l. per ann. quarterly; proviſo, that if the rent or fine is not paid, it ſhall be lawful for the leſſor to re-enter.* Afterwards he *levied a fine, and then aſſigned over the reverſion.* It was objected that the condition, as it reſpects the fine of 125 l. is a condition in groſs, and not incident to the reverſion, and ſo not transferred by the aſſignment, but that the condition as to the rent is transferred; but Roll. Ch. J. ſaid that a man cannot by his own act divide a condition which goes in deſtruction of an eſtate, and by aſſigning over the reverſion the whole condition is gone; and this is not within the ſtatute of 32 H. 8. to which all the juſtices agreed. Sty. 316. Hill. 1651. Dekins v. Latham.

33. Where the condition *runs with the rent*, if the *rent is gone* the condition is gone. See Tit. Reſervation [N] pl. 6. and the notes there. [302]

(G. d. 2) What ſhall be a Suſpenſion.

1. *TENANT in tail made a feoffment in fee, and retook eſtate in fee*, and after *was bound in a ſtatute-merchant, and* then *made a feoffment in fee upon condition, and died*; the *iſſue in tail within age enters for the condition broken*, and *was remitted* by his nonage. Per Keeble, the *execution of the ſtatute was ſued againſt the father of the iſſue in his life, which* execution *is not yet incurred*, therefore the condition was and is *ſuſpended during the execution*; for he who may make a condition may ſuſpend or diſcharge it, and this is as a grant to diſcharge the land of the condition during this time *by the equity of the ſtatute of anno* 1 *R.* 3. For the father might have releaſed the condition, or * if he had taken a leaſe for years after, and had granted it over, there, during this leaſe, the condition had been ſuſpended. But Rede contra. But Brook ſays, it ſeems, * S. P. per Keble. Br. Conditions. pl. 249. cites 11 H. 7. 21.

ſeems, the law is with Keble, and not denied but that a condition may be ſuſpended. Br. Conditions, pl. 134. cites 8 H. 7. 7.

2. In Treſpaſs. *Tenant in tail diſcontinues upon condition, and after is bound in a ſtatute-merchant*, and the *conuſee has execution; the tenant in tail dies; the condition was performed in the life of the feoffor.* The iſſue in tail may enter, and the condition is not ſuſpended by the execution, per Brian Ch. J. and his companions; but Brook ſays quod mirum! becauſe it ſeems that the execution ſuſpends the condition, and alſo the tail is diſcontinued; and then if the heir does not recover by formedon, or otherwiſe be remitted, the heir cannot enter. Br. Conditions, pl. 249. cites 11 H. 7. 21.

Mo. 71. pl. 293. Trin. 6 Eliz. Anon. S. P. and ſeems to be the caſe intended, and there agreed, and that if the rent be arrear he cannot enter into the other moiety.——Dal. 72. pl. 50. 6 Eliz. S. C.——The condition is ſuſpended for the whole, though only a moiety of the rent is extended; for condition cannot be ſuſpended for part and in eſſe for part. Mo. 91. pl. 225. Trin. 10 Eliz.——S. P. held, that the condition is ſuſpended during the extent, as well in the leſſor as in the extendor. 4 Le. 201. pl. 322. in time of queen Eliz.

3. *By extent on a recognizance* of the moiety of the rent and reverſion a condition of re-entry is ſuſpended; cited by Mead to be the opinion of the court. 6 Eliz. 4 Le. 28.

4. A. makes a *leaſe to a man and feme ſole*, rendring rent with clauſe of re-entry, and afterwards the *leſſor intermarries with the feme*, the condition is ſuſpended. Per Mead 4 Le. 28.

5. When a condition is ſuſpended *in part, it is ſuſpended in all.* A. leaſes for years on condition, and afterwards *leſſor confirms his eſtate in part of the land for life*, the condition is gone. Per Harper, 4 Le. 29, 30.

Co. Litt. 215 a. S. P.

6. Leaſe was made of land, part *borough Engliſh and part at common law* by licence of the lord, upon condition, that if, &c. afterwards reverſion of part deſcends to the eldeſt, and of the other part to the youngeſt ſon. Per 2 juſtices, the law which has *ſevered the reverſion* has ſevered alſo the condition; and where one purchaſed the part of the other, he ſhall have advantage for one part of the condition as heir, and the other as aſſignee. Mo. 113. pl. 254. Paſch. 20 Eliz.

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4 Rep. 52. Mich. 29 & 30 Eliz. B. R. Rawlin's caſe S. C.—— S. C. cited by Hale Ch. J. Vent. 257.

7. A. makes *leaſe to B.* rendring rent upon *condition to pay a fine on a day certain.* B. *re-demiſes* this land to A. before or after the day of payment of the fine, this is no ſuſpenſion of the condition becauſe it is *collateral*, but if the condition had been to pay the fine *annually* the re-demiſe would ſuſpend the whole condition, becauſe in ſuch caſe it is entire. Jenk. 254. pl. 46.

8. *Mortgagee demiſes* the land *to the mortgagor for years.* This demiſe does not ſuſpend the condition; for the payment of the mortgage-money does not ariſe from the profits of the land, and it is a condition *collateral.* Jenk. 254. pl. 46.

9. A. leaſes to B. 2 *acres for* 20 *years*, rendring rent with condition of re-entry; *leſſee leaſed* 1 *acre for* 10 *years*, and afterwards *granted the reverſion in the* 20 *years in the ſaid one acre to leſſor*, it was held to be no preſent ſuſpenſion of the ſaid condition, becauſe there was not any *poſſeſſion.* 3 Le. 221. pl. 295. Paſch. 30 Eliz. in Cam. Scacc. Brightman's caſe.

10. Leaſe

10. Leaſe with condition to *re-enter for not repairing*, &c. leſſor, with the conſent of the leſſee, builds a new barn on part of the land, and the leſſee takes a *new leaſe of the new barn*. By the new leaſe the condition is ſuſpended; for it cannot be apportioned, and the new leaſe is a ſurrender for that part. Noy. 126. Culcoe v. Sharp.

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11. If A. lets to B. for 10 years, and B. *re-demiſes* to A. for ſix years to commence *in future*, in the mean time this works no ſuſpenſion either of rent or condition; per Cur. Vent. 91. Trin. 22 Car. 2. B. R. in the caſe of Lion v. Carew. The condition is not ſuſpended; for the ſuſpenſion of the condition *ariſes by a preſent intereſt paſſed* by the leſſee to the leſſor, ſo that the leſſee ought to have profit of it; adjudged and affirmed in error. Jenk. 254. pl. 46.——4 Rep. 52. b. Mich. 29 & 30 Eliz. Rawlins's caſe.——S. C. cited Vent. 277. per Cur. who obſerved that the reſolution in that caſe as to ſuſpenſion of the rent was not neceſſary to the judgment given in that caſe which was upon the extinguiſhment of the condition, which is entire and not to be apportioned.

(G. d. 3) Revived in what Caſes.

1. IN debt, the defendant was bound to the plaintiff in 100 l. *to make his eldeſt ſon marry the daughter of the plaintiff, and* that *if he dies before carnal copulation, that he ſhall make his ſecond ſon marry the ſame daughter within a year, if the law of the church will permit it*; and after the *eldeſt ſon married her and died before carnal copulation*, and the *plaintiff obtained a licence*, and required the defendant to make the ſecond ſon marry with the daughter within the year, and he refuſed, and the plaintiff ſued the obligation; and they demur, &c. For it was agreed there, that at the time, &c. of the making of the obligation, it was not lawful that the younger brother ſhould marry her who was the feme of his eldeſt brother; and therefore quære if the obligation, which was diſcharged before by the licence, in as much as the law of the church would not permit it, may revive by the licence obtained after, and to be forfeited now where it was diſcharged before; for the *ſecond marriage was not permiſſible by law, but by the licence which came after*; for the giving of the licence proves that the law would not ſuffer it, for the licence is a diſpenſation with the law; and therefore it ſeems that the obligation is not forfeited. Br. Conditions, pl. 194. cites 12 H. 8. 5.

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(H. d) In what Caſes, *after Refuſal*, he ſhall ſay *Uncore Priſt*.

See Tit. Tout Temps priſt, per totum.

[1. A MAN *bound in 20 quarters of corn, upon condition* * [*to pay*] *for 10 quarters*; if it be *refuſed at the day*, he may plead it, without ſaying uncore priſt. Co. 9. *Peytoe* 79. for it is bonum perituram, † 28 H. 8. 25. 154. * 9 Rep. 79. a.—— And it is a charge to the obligee to keep it, and ſays, that ſo it was held in 28 H. 8. in C. B. as Carrel has reported. Ibid. 79. a. b.——Co. Litt. 207. a. S. P. accordingly.

† D. 24. b. 25. a. pl. 154. Hill. 28 H. 8. cites Trin. 12 H. 8. Rot. 542. Brickhead v. Wilſon S. P. adjudged for the plaintiff; for that the defendant ſhould have pleaded that he was uncore priſt to deliver the 10 quarters.

S. P. because it is no parcel of the sum contained

[2. A man *bound in a statute, recognizance, or obligation, defeasanced for a lesser sum*; the obligee *refused at the day*, it is gone for ever. Co. 9. *Peytoe* 71. b.]

In the obligation, &c. it being contained in the defeasance made at the time, or after the obligation statute or recognizance. Co. Litt. 207. a. b.——By the tender in such case he is discharged of all; but otherwise it is of an obligation with condition to pay a less sum. Cro. E. 755. pl. 16. Pasch. 42 Eliz. C. B. Cotton v. Clifton.——In the case of a defeasance the sum is collateral, and that is the reason that if the obligor tenders at the day, and obligee refuses it, that it is lost for ever. 9 Rep. 79. b. and cites 33 H. 6. 9. a. b.

3. In debt upon obligation upon condition, that if the defendant, *by and within the feast* of St. Bartholomew, or *before the feast*, deliver 40 cloths to the plaintiff, the plaintiff paying to him 10 l. for every cloth immediately, that then, &c. and that in the vigil of the feast, the defendant came to the plaintiff's house, and there was ready to have delivered, &c. and the plaintiff, nor any for him, were not ready to pay him; per Choke, you ought to say that you was there all the day, and the plaintiff, nor any other was ready to receive it, and that he is yet ready, which all the justices agreed, by which he said accordingly. Br. Conditions, pl. 174. cites 21 E. 4. 52.

4. In *debt upon obligation*, the defendant *pleaded that the plaintiff by deed indented* betwixt them *covenanted that the defendant paid him* 50 *l. at Mich.* the obligation should be void, *at which day he tendred the money, and the plaintiff refused it*; the court held the plea good without saying uncore prist; for the indenture of defeasance is a collateral covenant, and not parcel of the obligation, as the condition indorsed is; per Dyer, Mo. 36. 37. pl. 119. Trin. 4 Eliz.

This is to be *understood that he* that ought to tender the money *is* of this

5. In all cases of condition *for payment of a certain sum in gross, touching lands or tenements*, if lawful tender be once refused, he which ought to tender the money is of this quit and fully discharged for ever after. Litt. Sect. 338.

disel arged for ever *to make any other tender*; but if it were a duty before, though the feoffor enter by force of the condition, yet the *debt or duty* remained; as if A. borrows 100 l. of B. and after mortgages the land to B. upon condition for payment thereof; if A. tenders the money to B. and he refuseth it, A. may enter into the land, and the land is freed for ever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if A. without any loan, debt or duty preceding, infeoff B. of land upon condition for the payment of 100 l. to B: in nature of a *gratuity or gift*, in that case if he tenders the 100 l. to him according to the condition, and he refuseth it, B. hath no remedy therefore; and so is our author in this and his other cases of like nature to be understood. Co. Litt. 209. a. b.

[305] (I. d) *What* Things *will destroy* a Condition, and what not.

Acts by the Reservor.

* Y. 308. b. 309. a. Winter's case.——9. Litt.

[1. *D. 14 Eliz. 309. 75. agreed per Curiam that by the *grant of the reversion of part of the lands upon a lease for years, on which a rent upon condition is reserved*, all the condition is confounded, because it is *penal*, and therefore cannot be divided; and

he muſt deſtroy his own grant if the condition ſhall remain, *although* also this *condition was reſerved upon ſeveral rents.* Co. 5 † *Knight* 55. b. reſolved.] 215. a. S. P. & S. C. cited in Marg. S. C. cited

Godb. 336. pl. 431. S. C. cited And. 174. in pl. 211. S. C. cited by Anderſon and Rhodes. Mo. 205. S. C. cited by Periam J. Gouldſb. 21. S. C. cited 3 Le. 144. pl. 272.

† And. 173. pl. 211. Knight v. Brech. S. C. & S. P. admitted per Cur. Mo. 199. pl. 349. S. C. & S. P. admitted per Cur. Gouldſb. 15. pl. 14 & 19. pl. 1. S. C. & S. P. admitted. 3 Le. 124. pl. 178. Knight v. Beech. S. C. & S. P. admitted per Cur. 2 Roll. Rep. 332. Trin. 21 Jac. B. R. Anon. S. P.

[2. Co. 5. *Knight* 55. b. reſolved, [*if*] the *king grants part of the reverſion,* his *patentee ſhall not take advantage of the condition,* but the king by his prerogative may, becauſe it remains in him.] Mo. 203. S. C. & S. P. argued by Periam and Windham, that the condition was gone, but by Anderſon and Rhodes e contra, and at length the cauſe was ended by agreement. And. 174. pl. 211. S. C. & S. P. argued. Gouldſb. 15. pl. 14. S. C. 3 Le. 124. pl. 178. S. C. Co. Litt. 215. a. S. P. that in the king's caſe the condition is not deſtroyed.

[3. If a man *leaſes for life upon condition, the remainder over,* the condition is deſtroy'd, becauſe otherwiſe he ſhall deſtroy the remainder which he hath created.] See (P. d) pl. 2. & 9. and the notes there.

[4. *So* if a man *deviſes for life upon condition, the remainder to another*; this deſtroys the condition. 29 Aſſ. 17. Co. 10. Ma. Port. 40. b. and there 41. b. he cites * 4 Ma. per Curiam. Contra 2 Ma. 127. 52. becauſe it is made at the ſame time.] See (P. d) pl. 8. and the notes there. * Dr. Butt's caſe.

[5. If a man *leaſes for years upon condition, and after leaſes for years by indenture to another, to commence preſently,* this ſecond leaſe hath not given away the condition, for it is but by *eſtoppel between the parties.* Paſch. 41 Eliz. B. R. per Curiam.]

6. If a man *infeoffs me upon condition to pay him* 10 *l. ſuch a day, or to re-enter, and I leaſe the land to him rendring rent,* and at the day *I do not pay the* 10 *l.* now he ſhall retain the land, and the rent reſerved by me is extinct; per Brian Ch. J. Br. Conditions, pl. 167. cites 20. E. 4. 18, 19.

7. *But if* a man makes feoffment in fee, rendring rent, with clauſe of re-entry for non-payment, and the *feoffee re-infeoffs the feoffor*, the feoffor cannot re-enter for non-payment of the rent, becauſe he himſelf has the land out of which the rent is iſſuing; but that otherwiſe it is of a ſum in groſs as above; per Brian Ch. J. Br. Conditions, pl. 167, cites 20 E. 4. 18, 19.

8. And the law ſeems to be *the ſame of a leaſe made after by the feoffee to the feoffor* for years or life, for hereby the rent is ſuſpended, Ibid. per Brooke.

9. In debt, the maſter and brothers of St. Bartholomew of London had *granted to* J. S. for his life ſuch *corody*, &c. *faciendo talia ſervitia as N. and others did,* and the *grantee leaſed to the maſter and brothers for* 7 *years, rendring* 10 *l. rent*; the grantee brought debt, and the grantor ſaid that the plaintiff has not done the ſervices; and the plaintiff ſaid that he is excuſed by reaſon of the leaſe to the grantor, which is a ſuſpenſe, by which it was awarded that the plaintiff ſhall loſe his rent and the corody. Br. Conditions, pl. 167. cites 28 E. 4. 17. [306.]

10. If a man *mortgages* his land *upon defeaſance of re-payment to re-enter*, and the bargain to be void; and the *vendee leaſes* his land *to the vendor for* 10 *years by indenture* of defeaſance, *and further grants to him that if he pays* 1000 *l. within the ſaid term of* 10 *years, that* then *the ſale ſhall be void*, &c. and the *leſſee ſurrenders the term*, yet the tender of the 1000 l. within the 10 years is good, becauſe the 10 years is certain ſo the leaſe is ſurrender'd or forfeited; and e contra if it was *to repay within the term aforeſaid*, without theſe words (10 years.) For in the one caſe the term, viz. the leaſe is a limitation of the payment, and in the other caſe the 10 years. Note a diverſity. Br. Conditions, pl. 203. cites 35 H. 8.

11. *Leaſe* for life reſerving *rent*, and for default a *re-entry*, *the re-mainder over in tail*; this *remainder* does not deſtroy the condition, becauſe it was *made all at one time*. But when condition is once annexed to a particular eſtate, and after by *other deed* the reverſion is granted by the maker of the condition, now the condition is gone. D. 127. pl. 53. Hill. 2 & 3. P. & M. in caſe of Warren v. Lee.

A condition muſt be extinct where *part of the thing demiſed comes to the leſſor*, Becauſe it is annexed to

12. A. leaſes a houſe and lands to B. and *takes back a leaſe of part*, and after part of the rent is behind, and A. enters into B's part for the condition broken. Adjudg'd that the condition is gone and void by A's taking a leaſe back of part, becauſe a condition is ſpecial and entire, and not to be ſevered. Owen 41. Hill. 26 Eliz. Britman v. Stamford.

ſuch a rent in quantity; for if the *rent be diminiſhed* the condition muſt fail, per Hale Ch. J. Vent. 278. Mich. 27 Car. 2. B. R. in caſe of Hodgkins v. Robſon and Thornborough.

The caſe was, viz. A copyholder made a *leaſe for* 16 *years, rendring* 20 l. *rent*. *Leſſee made a leaſe of part* of the land *for* 10 *years without any rent*. The *laſt leſſee aſſigned his term to the firſt leſſor*. All the court agreed that the firſt leſſor ſhall have all the rent againſt the leſſee, and he nothing againſt his under-leſſee, becauſe he reſerved nothing, nor ſhall the under-leſſee have any thing againſt the firſt leſſor for the ſame reaſon. 2 Lev. 143, 144. Trin. 27 Car. 2 B. R. Hodgſon v. Thornborough.

13. A. gave *land upon condition* to B. and afterwards A. *by fine releaſes to* B. *all his right*, yet the condition remains. 2 And. 84. Mich. 39 & 40 Eliz. cites the caſe of Denham v. Dormer.

Ow. 116. S. C. adjudged.

14. A *leaſe* was made *for years upon condition to be performed by the leſſor*, and *before the time of performance* the *leſſor leaſes it to a ſtranger for years, and then performs the condition*. It was objected that by making this 2d leaſe the condition was diſpenſed with; but all the court e contra; for the eſtoppel is only between the leſſor and the 2d leſſee, and adjudg'd that the leſſor's entry was lawful. And Coke Att. Gen. being in court ſaid it was a clear caſe. Cro. E. 665. pl. 16. Paſch. 41 Eliz. Ferrers v. Burrough.

15. *But* if one makes a *feoffment on condition, and afterwards levies a fine to a ſtranger*, the condition is gone. Cro. E. 665. pl. 16. Paſch. 41 Eliz. in caſe of Ferrers v. Borough.

Cbdb. 336. pl. 431. Hawkeſworth v. Davis. S. C. and agreed by the juſtices that

16. *Leaſe* for years *rendring rent with clauſe of re-entry, leſſee aſſigned all his term in one part to one, and in another part to another, and kept a part to himſelf; leſſor levied a fine of the reverſion of the whole to J. S.* The rent is arrear. The firſt leſſee paid all the rent, The rent is arrear again. The aſſignee of the leſſor demands the rent and enters. Per tot. Cur. his entry is lawful; for the leſſee

by

by the apportionment of the land cannot deſtroy the condition, though true it is * if the leſſor grants the reverſion of part, all the condition is deſtroyed, and the *acceptance of the rent* is not material. 2 Roll. Rep. 332. Trin. 21 Jac. B. R. Anon.

* the condition was not deſtroyed by this, it being the act of the leſſee himſelf and ſo no colour to deſtroy the condition.——Palm. 382. S. P. on a leaſe made by Fitz Williams, and ſeems to be S. C. and for non-payment the grantee entered into the whole and held lawful; for the law by apportionment of the land cannot deſtroy the condition, as leſſor may by grant of part of the reverſion, and Chamberlain J. ſaid it had been ſo adjudged before in this court,

(K. d) [*Deſtroyed or ſuſpended by*] *Acts in Law.*

Fol. 473.

[1. D. 14 Eliz. 309. 75. per Curiam, if the *reverſion of a leaſe for years* be *ſevered in any part*, the entire condition reſerved upon the leaſe for years ſhall not be deſtroyed, if the ſeverance be *by diſcent, eviction, or act of the law*; otherwiſe *by the act of the party.*] D. 308. b. 309. a. Winter's caſe.

[2. If a man makes a *feoffment to the uſe of himſelf for life, the remainder to another*, &c. *with power of revocation*, and after makes a leaſe for years; he cannot after revoke during the leaſe. Paſch. 3 Jac. between *Yeoland and Fettis*, per Curiam, agreed.] Mo. 788. pl. 1087. Mich. 2 Jac. Yelland v. Ficlis, S. C.

[3. *But after the leaſe expired he may* revoke. Dubitatur, P. 3 Jac. B. between *Yeoland and Fettis.*] Coke Ch. J. held that he may revoke for all except the term; and that if one makes a conveyance with power to make leaſe, and with power of revocation, if he makes a leaſe he may revoke for the reſidue; but he ſaid the doubt here is, where he has no power to make leaſes and yet he makes one; the court were divided in opinion.——Mod. 114. pl. 13. Hale Ch. J. cited 16 Car. Snape v. Sturt, that if there be a power of revocation and a leaſe for years is made, it ſuſpends quoad the term, but after it is good.——See Tit. Powers, (A. 26) (D) & (E)

4. Leaſe for years, *proviſo, that* the leſſee, his executors or aſſigns, *ſhall not alien nor grant over the term without licence of the leſſor, but only to one of the children of the leſſee*; the leſſee died, and his *executor granted the term to one of his ſons.* Brooke, Browne, and Dyer held that by the grant to one of the ſons the reſtraint was not determined, and that the ſon could not grant over to a ſtranger without licence; but Stamford and Catline e contra. The reporter adds, Sed quære hoc, and alſo quære if this be a condition or only a covenant; for it was not agreed as to that point among the juſtices. D. 152. a. pl. 7. Mich. 4 & 5. P. & M. Anon.

5. Leſſee for 100 years leaſes for 20 years with clauſe for re-entry. The firſt leſſor grants the reverſion in fee, and attornment was had accordingly; *grantee purchaſes the reverſion of the term*, he ſhall neither have the rent nor re-entry; for the *reverſion* of the term, to which it was incident, *is extinct* in the reverſion in fee. Mo. 94. pl. 232. Paſch. 12 Eliz. Ld. Treaſurer v. Barton.

6. Condition was that *all aſſurances ſhall be to the uſes of the indenture*; this condition is not extinguiſhed by *a fine*; but without ſuch agreement Jenk. 252. pl. 43. S. C. the 3d re-

solution accordingly. —2 Rep. 72. b. S. C.

agreement condition should be extinct by fine, or *feoffment*, or by general entry into a *warranty*, or by being *received* generally. Mo. 106. pl. 105. Mich. 17 & 18 Eliz. Andrew's case.

[308] Jenk. 253. pl. 49. S. C.

7. *A. infeoffed B.* on condition *to convey it to A. for life, remainder to A's eldest son in fee; A. takes the profits, and leases the land to C. for years by indenture*, and yet continues the possession; resolved, that A's taking the profits, and making a lease for years, was a disseisin to B. and suspended the condition during the term. 2 Rep. 59. b. Mich. 40 & 41 Eliz. B. R. the 2d. resolution in Winnington's case.

8. A *termor* for years *granted his term* to J. S. *upon condition*, that if the grantee did not *yearly pay to R. 10 l.* that the grant should be void, and after the grantor made the grantee executor and died. Per Popham and Gawdy, the condition is extinguished, but Clench and Fenner, e contra. Goldsb. 181. pl. 117. Hill. 43 Eliz. Tutball v. Smote.

Per Doderidge J. Roll. Rep. 390.

9. A condition is annexed to 2 acres, 1 *acre is evicted* by an eigne title, the condition is gone. Per Haughton J. 3 Bulst. 60. Trin. 13 Jac.

(L. d) *Into what* Thing the *Entry may be* for the Condition broke.

[1. IF a man *leases two mills upon condition that if the lessee leases them, or assigns either of them* to another, *it shall be lawful to him to re-enter*; if *he leases one*, the lessor may enter into both, for the condition goes to both. 38 E. 3. 34.]

Le. 292. pl. 400. Anon. S. C. states it that one of the daughters levied a fine sur conusary de droit come ceo, &c. Clench J. said that the words are *(or any of his heirs)* and therefore it is a forfeiture, quod fuit concessum per tot. Cur. And judgment accordingly.

2. Lands were given *in tail upon condition if the donee, or his heirs, discontinue* the land, the donor shall re-enter; the *donee hath issue 2 daughters and dies, the daughters have issue 2 sons, and die; one of the sons discontinues* the land to another; and it was held by the court to be a breach of the condition. Cro. E. 35. pl. 2. Mich. 26 and 27 Eliz. Br. R. Croker v. Trevithin.

3. A *lease* was made *to 2 for years* upon condition *that they, nor either of them, shall alien any part of the land, without assent of the lessor*; they *make partition*, and *one alieneth his part*, this is a forfeiture of the whole. Cro. E. 163. pl. 2. Mich. 31 and 32 Eliz. C. B. Goslwick's case.

(M. d) At what *Time* he may *enter* for the Condition broke or performed.

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[1. IF A. make a *feoffment* of the land *to J. S. in fee upon condition* that *if he pays* 10*l. to J. S. the first of May*, 6 Car. that it shall be lawful for him to re-enter, and after *he pays* the 10 l. *before the day*, scilicet, the first of April, *and J. S. accepts it*; though this is a good performance of the condition, inasmuch as payment before the day is payment at the day, yet A. *cannot re-enter and revest his old estate* by force of the condition *till the first of May*, because the condition does not give him power to re-enter till the said day. Mich. 8 Car. B. R. between *Burgoyne and Spurling*, held by Barkly, in the case of a surrender of a copyhold.] C. to C. 273. pl. 10 & 283. pl. 27. S. C. but S. P. does not appear. —Jo. 306. pl. 17. S. C. but S. P. does not appear. [309]

2. In assise the jury said, that A. *leased* to B. upon condition, *that if A. or his heirs pay to B. or his heirs* 10*l. within a certain time, that he shall re-enter, and if he does not pay within the time, and B. pays him* 10 *l. within another term after, that then B. shall have fee*, and *A. nor B. does not pay*, and A. re-enters. and after that both days were passed B. ousted him, and A. brought assise, and took nothing by his writ, because it seems that B. has franktenement for his life by the first livery; for A. cannot re-enter, because he did not pay, and B. cannot have fee because he did not pay. Br. Conditions, pl. 102. cites 12 Ass. 5.

3. In assise a *feme* was *seised*, and *infeoffed a man, who had a feme, upon condition that he should marry her*. The *feoffee infeoffed A. who infeoffed B.* who infeoffed C. who infeoffed D. The *first feoffee died*; the feme entered upon D. 16 years after, and the entry good, for it is admitted a good condition; for though the feoffee cannot marry at the time of the feoffment, yet it may be that his feme shall die, and then he might have married the feofforess, and therefore a good condition, and the entry lawful, Br. Conditions, pl. 119. cites 40 Ass. 13. Br. Conditions, pl. 202. cites S. C. and F. N. B. 205

4. Note, by three justices, that if a man *covenants* with C. *that certain recoverers shall suffer him to take the profits of such land till J. satisfy him of* 100*l.* There C. shall take the profits till J. pay him 100 l. and the profits shall not be taken as parcel of the 100 l. Contra Shelley, but he did not persist strongly in his opinion. Br. Exposition, pl. 1. cites 27. H. 8. 5.

5. The condition of a feoffment was *to pay* 20 *l. at Michaelmas*, and so every year, and *after such default the feoffment to be void*. Ruled by the judge, that it is uncertain in this case when re-entry shall be made. Clayt. 86. pl. 145. Summer Assizes, 16 Car. before Foster J. Fall's case.

See Tit. Covenant, the notes on Stat. 32 H. 8. cap. 34. But it seems elsewhere, that if a man infeoffs another *to infeoff the first feoffor*, and the feoffee offers to him, and *he refuses*, there the feoffor cannot re-enter; for there is *default* in him. Contra in the other case; there is not any default in the feoffee when the stranger refused; per Newton and Paston J. and Fulthorpe J. accordingly, and so 3 justices in one opinion, and none to the contrary but Fortescue serjeant; quod nota. Br. Conditions, pl. 53. cites 19 H. 6. 34.

(N. d) *Who may enter* for the Condition broke.

[1. IF a *feoffment* be made *upon condition to infeoff a stranger*, and the feoffee does not perform it, the *stranger cannot enter* for the breach of it, because he is a stranger to the condition. 21 E. 4. 56.]

So if a man *infeoffs J. S.* upon condition *that if J. S. do not pay* 10 *l. yearly to a stranger, that* then the *stranger may re-enter*, and it is by deed indented, and after J. S. does not pay the stranger, there the *feoffor may enter*, but not the stranger; quod nota. Br. Conditions, pl. 205. cites Doct. & Stud. lib. 2. fol. 94.

S. P. for it appears that it was not the intent of the feoffor that the feoffee should retain the land. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76.

[2. *But* in this case the *feoffor* himself *may* enter for the condition broke. 21 E. 4. 56.]

[310] [3. He in *remainder cannot* enter for a condition broke by the particular estate. 29 Ass. 17.]

The alienation was by licence of the king, and the condition was to re-infeoff the tenant. Br. Conditions, pl. 105, cites S. C. ——— Co. Litt. 222. a. b. cites S. C. ——— 2 Rep. 80. a. b. cites S. C. and the reporter adds his observations upon it. ——— Tenant of the king infeoffed A. to re-infeoff him or his heirs, and died before re-infeoffment, his heir being within age, and this was found by office, whereupon the king seised for the condition. Br. Conditions, pl. 229. cites 42 Ass. 6.

[4. If the *king's tenant aliens upon condition, and dies*, his *heir in ward to the king for other land*, the *king may enter* in the right of the heir for the condition broke. 18 Ass. 18. adjudged, *lord Clifford's case.*]

Br. Conditions, pl. 104. cites S. C. and Brooke says, quod nota, that this was by entry descended, and yet the feoffment was by licence of the king; quære ideo legem.

[5. If the *king's tenant aliens in fee upon condition, and dies*, his *heir within age*, the *king may enter* in the right of the heir for the condition broke. 17 Ass. 20.]

Mo. 525. pl. 694. Davy ——— * Fol. 474. ——— v. Mathews and Binfield, *Mathewe.*

[6. If a man *leases for years, upon condition if the rent be arrear that the lease shall cease, and then grants over the reversion*, and after the condition is broke, the *grantee of the reversion may* enter into the land, for the lease * is determined before entry by the breach of the condition. H. 41. El. B. R. between *Darcy and*

S. C. but states it, that A. seised for life of his wife made a lease of a mill *to B.* the defendant in ejectment *for 17 years, who* afterwards *assigned the same to C. for 14 years, rendring* yearly 3 bushels of meslyn, and one bushel of wheat every Saturday, *and if any part thereof should not be paid the lease should cease.* B. enter'd and was possessed, and *C. being possessed by the reversion of deed-poll, granted all his reversion & totum statum & interesse to D. to whom B. attorn'd. D. demanded the rent, and for non-payment enter'd.* Clench, Gawdy, and Fenner (absente Popham) agreed, that by the common law the assignee de toto statu shall take advantage of the cesser of the term in esse, and make demand of the rent, if the grant de toto statuby by writing and attornment had, and vouch'd 11 H. 7. and Smith v. Stapleton,

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in Plowden. And they all, (abſente Popham) agreed, that by the Stat. 32 H. 8. the grantee of the reverſion of the term ſhall have benefit of the condition annexed to the leſſer term derived out of the firſt term, and this by reaſon of the words in the ſtatute, viz. that the grantees, their executors, &c. and therefore it was adjudged for the plaintiff.——Cro. E. 649. pl. 40. Davy v. Matthew, S. C. and Clench and Fenner held, that in this caſe the grantee ſhall take advantage by the common law; for the eſtate ſhall ceaſe without entry, becauſe * beginning by parol it may ſo determine; but if he cannot by the common law, he may clearly by the ſtatute, for by that leaſe made the leſſor has the reverſion, and the grantee has that reverſion and rent, and is within the intent of the ſtatute 32 H. 8. for he has the entire reverſion, and Gawdy was of the ſame opinion as to his being within the ſtatute; but he doubted whether he might by the common law; wherefore Popham abſente, it was adjudg'd for the plaintiff.——But in this caſe, if the leaſe had been for life upon ſuch condition, the grantee ſhall not take advantage of the breach of the condition, for this is but avoidable by entry after the condition broken, which cannot be by the common law transferr'd to a ſtranger. 8 Rep. 93. b. Trin. 7 Jac. per Cur. in Manning's caſe.——10 Rep. 48. b. S. P.

* [Quere what this means.]

7. Aſſiſe; *feme tenant in tail after poſſibility* of iſſue extinct, the *reverſion to R. in fee, takes baron*; the *baron and feme alien to him in reverſion, rendring rent for life of the baron* by deed indented, *with clauſe of re-entry for non-payment* within 8 days. The *alienee aliens over*. The rent [was] arrear. The baron and feme entered for the rent arrear, and the entry adjudged lawful becauſe of the rent arrear, and not becauſe of the alienation of the alienee; and it cannot be adjudged a ſurrender, becauſe it was made by the baron for his life, and the feme may ſurvive him, and it cannot be adjudged alienation to the diſinheritance, &c. for it was made by aſſent of him in reverſion, and it is not a diſcontinuance, becauſe it is made to him in reverſion. Br. Conditions, pl. 112. cites 29 Aſſ. 64.

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8. *Baron ſeiſed in jure uxoris infeoffed J. S. upon condition to leaſe to him and his feme for term of life, the remainder over in tail*, the remainder *in fee to the right heirs of the baron*. The *baron dies, J. S. leaſed to the feme for life, remainder in tail, remainder to the right heirs of the feme*. The heir enter'd for the condition broken, and the feme enter'd upon him, and per tot. Cur. præter Cheynie her entry is congeable. Br. Conditions, pl. 71. cites 4 H. 6. 2. 3.

Br. Entre Congeable, pl. 38. cites S. C. for by the re-entry the diſcontinuance is purged and thereby gives re-entry to the feme.——Br. Diſcontinuance, pl. 8. cites S. C.——S. C. cited 8 Rep. 44. a.——Co. Litt. 202. a. S. P. and when the heir has entered for the condition broken his eſtate vaniſhes, and the eſtate is preſently veſted in the wife.——Ibid. 236. b. S. P.

9. If A. infeoffs B. upon condition *to re-infeoff him in fee*, and A. dies, yet B. *ought to infeoff the heir of A.* and if B. had tendered feoffment to A. and he refuſed, and died, yet the *heir* of A. ſhall make requeſt, and ſhall have the land; quære inde, where *no time is limited*. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76.

10. If a man *leaſes land* for term of years upon condition *that if he does not go to Rome by ſuch a day his eſtate ſhall be void*, and the *leſſor grants the reverſion* over, the *tenant attorns*, and after *he does not go*, the grantee may enter. Br. Conditions, pl. 245. cites 11 H. 7. 17.

There is a diverſity between a condition *annexed to a freehold*, or to a *leaſe for years*; for if a man make a gift in tail, or a leaſe for

11. *Contra* if the condition was *to re-enter*. Ibid.

12. *But of a thing void* purchaſer may take advantage, and the ſame of leſſee for term of life. But Brooke ſays quære inde; for per Bromley Ch. J. 2 M. it is not void till an entry. Ibid.

lies upon condition, that if the donee, &c. goes not to Rome before such a day, the gift, &c. shall cease or be void. The grantee of the reversion shall never take advantage of the condition, because the estate cannot cease before an entry. Co. Litt. 214. b.

But if the lease had been but for years the grantee should have taken advantage of the like condition, because the lease for years, ipso facto, by the breach of the condition without any entry was void; for a lease for years may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony, and of a *void thing* an estranger may take benefit, but not of a *voidable* estate *by entry*. Co. Litt. 214. b.——S. C. cited Le. 61. in pl. 79. Patch. 29 Eliz. C. B. in case of Gamock v. Cliff, & S. P. per Curiam held accordingly.

13. A man gave *in tail* upon condition that *if the donee die without issue, or he, or his issue, alien in fee*, that *his estate shall cease and the land shall remain to a stranger*; the donee aliened in fee, and had issue and died, and it was held a good condition as to the donor, if he had reserved the entry to himself, but it is not good to make the stranger have the remainder; for rent, re-entry, condition nor remainder cannot be reserved nor appointed to a stranger quod nota, and so, per Frowick, the condition in the principal case cannot make the land to remain to a stranger, quod Vavasor concessit, and this by three justices. Br. Conditions, pl. 83. cites 21 H. 7. 11.

14. The prior of Saint John's in Jerusalem in England *leased for years* the commandry of Babsil by indenture to Martin Docknye, *proviso*, that *if the said prior, or any of his brothers there being commanders, would inhabit in it*, that *then the said M. D. and his assigns oblige themselves by the same indenture, upon a year's warning, to remove or give place to the said prior commandry*; and after the *prior died, and one who was brother at the time of the demise was made prior, and* was *also commandry*, by which he *gave warning* by a year, and M. D. would not avoid, and the prior entred, and it was in *question whether the prior may be commandry also* or not, *and if a man may give place to a dead person as the brothers were?* But this was not much weighed, &c. But the questions were, whether the words above were a condition, and if it be a condition whether they extend to the successor, because no successor was mentioned in the indenture; and by the best opinion it *does not extend to the successor* if it be a condition, because the indenture spoke only of the prior [312] and not of the successors. And, per Audley chancellor, this word *(habitation)* in the condition goes to the person of the prior only who is now dead. Br. Conditions, pl. 7. cites H. 8. 14, 15.

15. No manner of persons shall take advantage of conditions executory if they be not parties or privies; for *privies in estate* shall not take advantage of conditions executory, &c. Perk. S. 830.

16. If a man seised of land *leases it for life* upon *condition that the lessee shall pay 20 s.* at a day certain, the *remainder unto J. S. in fee*. J. S. shall not take advantage of this condition by way of entry, and yet he is privy in estate; for *both their estates were made at one and the same time*, &c. Perk. S. 831.

17. *Nor privies en fait* shall not take advantage of *conditions executory*; and therefore, if a man seised of land *leases it for life* upon condition, &c. and *afterwards grants the reversion unto a stranger in fee*, and the *lessee attorns*, yet the grantee shall not take advantage of this condition by way of entry, notwithstanding he be privy en fait, because he has the reversion by grant, &c. Perk. S. 831.

18. *Nor*

18. *Nor privies in law* shall not take advantage of condition executory; and therefore, if there be *lord or tenant*, and the *tenant doth lease the tenancy for life* unto a stranger *upon condition*, and afterwards the *tenant dies without heir*, and the *reversion escheats* to the lord, the lord shall not take advantage of the condition by way of entry; and the lord in this case is said privy in law, because he has his estate in the reversion by the law only, viz. by escheat. Perk. S. 831, 832.

S. P. that the lord by escheat shall not enter for breach of condition, because he is not heir to the lessor; but if any rent become in arrear he may distrain. Litt. S. 348.

19. *But privies in right* shall take advantage of conditions executory, &c. and therefore, if *lessee for years* be of land, and he *granteth his estate* unto a stranger *upon condition*, &c. and maketh his executors and dies; in this case *his executors shall take advantage of* this condition, *by way of entry*, for they are privies in right; for if the condition be broken, and they do enter into the land, &c. they shall have the same in right of the testator, &c. Perk. S. 832. 833.

Co. Litt. 214. b. S. P. accordingly, and so of an administrator where the lessee dies intestate; for they are privy in right, and represent the person of the deceased.

20. If a man seised of land for the *term of* 20 *years in right of his wife, leases it to a stranger for ten years rendring rent*, &c. *and for default* of payment *to re-enter*; the *husband dies* and then the rent is behind. I conceive that the wife shall have the rent, and not the executor, because the rent was to the husband by way of reservation, and the wife has the remainder of the term; but though the wife shall have the rent, yet she shall not enter for the condition broken; causa patet, &c. Perk. S. 834.

Baron & feme continue the right of the feme, upon condition, that after his death his heir shall enter into the land by reason of the condition broken, now the feme shall enter; per Fineux J. Kelw. 64. b.

21. If an *abbot infeoffs* a stranger of land, which he has in right of his house, *upon condition*, his *successor shall take advantage* of the condition by way of entry if it be broken, because that he is privy in right; the same law is of *dean and chapter*, and such like persons, mutatis mutandis. Perk. S. 835.

So if a *bishop, archdeacon*, prebendary, parson, or any other body politick or corporate, ecclesiastical or temporal, *make a lease*, &c. *upon condition* his *successor may enter* for the condition broken; for they are *privy in right*. Co. Litt. 214. b.——Mo. 52. pl. 152. Pasch. 5 Eliz. Eire's case, S. P. as to an entry for a condition in deed broken; but otherwise of a condition in law as waste, forfeiture, &c.—— And. 9. pl. 19. Anon. S. C. but S. P. does not appear.——D. 221. b. pl. 20. Ayer v. Orme, S. C. and was upon a lease made by the archbishop of York, and confirmed by the dean and chapter, in which the rent was reserved to the archbishop and his successor, provided that in time of vacancy of the archbishoprick the rent shall be paid pro rata of the vacancy * to the chapter of the cathedral church, ut in jure suo, &c. The see voided and continued void more than six months, and for rent arrear during the vacancy, the new archbishop entered; but *because the condition arises upon a rent to be paid neither to the lessor nor to his successor, and the breach* of the condition *being neither in the one's time nor in the other's*, it was held by Weston and Brown that *the successor could not enter*.

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22. And *privies in blood* as the *heir of the feoffor*, &c. shall take advantage of conditions executory by way of entry, &c. Perk. S. 835.

As in trespass of breaking his close the defendant pleaded, that his father, whose heir he is, infeoffed the plaintiff upon condition to re-infeoff him when required, and did not name his heir in the condition; but the heir shewed that he required the plaintiff to re-infeoff him after the death of his father, and because he would not, he re-entered;

entred; and the plea held good notwithstanding the heir was not named in the condition. Kelw. 137. pl. 325. Casus incerti temporis cites Mich. 7 H. 6.——Co. Litt. 219. a. the heir may enter.——8 Rep. 80. a. S. P. cites Lit. Cap. Conditions, fol. 82. [S. 353.]

23. *Deviſe* of lands to A. on condition *to pay* a certain debt, *and if A. fails payment, then to B.* and his heirs for ever on condition that he ſhall pay the debt, &c. Deviſor dies. A. the executor doth not pay the debt. B. dies. The money is demanded of his executor [who does not pay it.] *Quære, if the heir of B. may enter* to perform the condition or not. D. 128. pl. 59. Hill. 2 and 3 P. & M. Wilford v. Wilford.

24. *Bailiff* cannot by his office enter for condition broken without ſpecial warrant. Mo. 52. pl. 152. Paſch. 5 Eliz. per Cur. agreed. Eires's caſe.

If I infeoff one on condition to infeoff J. S. who refuſes, now the feoffee ſhall be ſeiſed to my uſe; but if it were to give in tail it would be contrary; held per Cur. And Harper J. ſaid, that if a feoffment in fee be made to J. S. on condition that he ſhall grant a rent-charge to A. who refuſes it, J. S. ſhall be ſeiſed to his own uſe. Le. 266. pl. 254. 20 Eliz. C. B.——S. P. Arg. Le. 199. cites 2 E. 4. 2 & 19. H. 6. 34.——Co. Litt. 209. a. S. P. as to making a gift in tail or granting a rent-charge; but contra as to condition to infeoff a ſtranger who refuſes; for there he ſays the feoffor may re-enter, becauſe by the expreſs intent of the condition the feoffee ſhould not have and retain any benefit or eſtate in the land, but is as it were an inſtrument to convey over the land.——See (L. c) pl. 4. 5. and the notes there.

25. A feoffment is upon *condition that the feoffee ſhall give the land in tail to a ſtranger*, who *refuſes* the gift, there the feoffor may re-enter; per Dyer. 2 Le. 222. pl. 281. Paſch. 16 Eliz. C. B.

26. But a feoffment upon *condition to infeoff a ſtranger, or to grant a rent-charge*, if the ſtranger refuſes, there the feoffor ſhall not re-enter; for his intent was not, that the land ſhould revert, &c. Per Dyer, 2 Le. 222. pl. 281. Paſch. 16 Eliz. C. B.

27. If a *feoffment of lands in borough Engliſh* be made *upon condition*, the heir at common law ſhall take advantage of it; agreed. But whether the younger ſhould enter upon him Manwood put as another queſtion. Godb. 3. pl. 3. Paſch. 20 Eliz. C. B. Anon.

Le. 298. pl. 409. S. C. adjudg'd for the heir (the plaintiff.)—— Savil. 76. pl. 155. S. C. adjudg'd that the entry was lawful.

28. R. *ceſty que uſe* after the Stat. 1 R. 3. and *before the ſtatute* 27 *H.* 8. *deviſed the uſe* to his younger ſon upon condition. The condition was broke. J. the eldeſt ſon of R. entred. Adjudg'd, after ſome doubting, for J. the heir; becauſe the 27 H. 8. gives the poſſeſſion in quality and condition with the uſe, and likewiſe to ceſty que uſe ſuch benefit and advantage as the feoffees had, ſo that J. was enabled to take benefit of the breach, whether it was a condition or a limitation. Mo. 212. pl. 353. Mich. 27 & 28 Eliz. Rudhall v. Milward.

29. Where the words of a condition are *quando dimiſſio prædicta erit vacua*, and no clauſe of re-entry is reſerved, ſo that privity is not requiſite, *tenant in dower ſhall* take advantage. Le. 61. pl. 79. Paſch. 29 Eliz. C. B. Gamock v. Clif.

No one can take advantage of a conditional fee ſimple but the donor, &c. and not a third perſon. 2 And. 22, 23.

30. *No one can defeat an eſtate of freehold by condition, unleſs the heir.* And. 184. pl. 220. Trin. 29 Eliz. in caſe of Paine v. Samms,

31. An *abbot leaſed lands to* 3 *men* for 80 years, and in the end of the ſaid leaſe was a clauſe, that *if they died within the ſaid term, then the leſſor might enter.* The *poſſeſſions of the abbey came unto the king, who granted the reverſion to J. S. who made a new leaſe thereof to J. D. for* 21 *years to begin after the expiration, determination or ſurrender of the former leaſe.* The 3 *leſſees died within the term.* All the juſtices held that *J. D. could not enter before J. S. had entred*; for it is in the election of J. S. if he will take advantage of the condition, and defeat the leaſe, but that ought to be by entry; and none can make ſuch entry but the leſſor himſelf, or by his expreſs direction, &c. 3 Le. 269. pl. 363. Paſch. 33 Eliz. C. B. Anon. 4 Le. 101. pl. 207. S. C. in ſidem verbis.

32. A. having 5 ſons deviſes land to B. the eldeſt and his heirs, and 20*l.* *to every of his younger ſons* to be paid by B. at their ages of 21 years. And *if B. does not pay*, then he deviſes the land *to the younger ſons and their heirs.* Adjudged that if the 20 l. be at the time unpaid to any one of the younger ſons, though all the others are paid, yet the eſtate by the condition precedent ſhall go to all 4, and not to that one only. Mo. 644. pl. 891. Hill. 41 Eliz. B. R. Hainſworth v. Pretty. Cro. E. 919. pl. 14. S. C. adjudg'd. ——Noy. 51. Aynesworth v. Batty, S. C. reſolved.

33. If a man makes a *leaſe for years* upon condition that the leſſee ſhall not go to Rome, or *upon any* other *collateral condition, with a concluſion that the leaſe ſhall be void*, if the leſſor here *grants over the reverſion, and after the condition is broken*, the grantee ſhall take benefit of it; *but if a leaſe for life be made with ſuch condition*, there the grantee ſhall never take advantage of it, for the eſtate for life doth not determine but by re-entry; and entry or re-entry in no caſe by the common law can be given to a ſtranger. 3 Rep. 65. a. Trin. 38 Eliz. B. R. in Pennant's caſe.

34. A condition or limitation annexed to an eſtate of land ought to *deſtroy the whole eſtate to which it is annexed*, and not part of it, and cannot determine it in part and continue it for the reſidue; per Cur. 1 Rep. 85. b. Paſch. 42 Eliz. C. B. in Corbett's caſe.

35. There is a *diverſity* between *a condition* that requires a re-entry and a *limitation* that ipſo facto determines the eſtate without any entry. Of the firſt no ſtranger ſhall take advantage, but in caſe of a limitation 'tis otherwiſe. Co. Litt. 214. b.

36. *As* if a man makes a *leaſe* quouſque (that is to ſay) *until J. S. come from Rome*; the *leſſor grants the reverſion* over to a ſtranger. *J. S. comes from Rome*; the grantee ſhall take advantage of it and enter, becauſe the eſtate by the expreſs limitation was determined. Co. Litt. 214. b.

37. *So* it is if a man make a leaſe *to a woman quamdiu caſta vixerit, or* if a man make a leaſe for life *to a widow, ſi tandum in pura viduitate viveret.* So 'tis if a man makes a leaſe for 100 years *if the leſſee live ſo long*, the leſſor grants over the reverſion, the leſſee dies, the grantee may enter. Co. Litt. 214. b.

38. *Diverſity between* a *reſervation of rent and a re-entry*; for a rent cannot be reſerved to the heir of the feoffor, but the *heir may take advantage of a condition which the feoffor could never do.* Co. Litt. 214. b.

39. *As*

39. *As* if I *infeoff* another, *upon condition that if my heir pay to the feoffee, &c.* 20 *s. that he and his heir shall re-enter*; this condition is good, and if after my deceaſe my heir pays the 20 s. he ſhall re-enter, for he is *privy in blood*, and enjoys the land as heir to me. Co. Litt. 214. b.

40. If *leſſee for years demiſes or grants the ſame upon condition*, &c. and dies, his *executors or adminiſtrators* may enter for the condition broken; for they are privy in right, and repreſent the perſon of the dead. Co. Litt. 214. b.

[315] 41. In caſe of a *leaſe for years* there is a *diverſity* where the condition is that the leaſe *ſhall ceaſe* or be void, or that the leſſor *ſhall re-enter*. In this laſt caſe the grantee ſhall never take benefit of the condition. Co. Litt. 215. a.

42. If *ceſty que uſe* had *made a leaſe for years, &c.* the *feoffees* ſhould not enter for the condition broken, for they are *privy in eſtate, but not* privy *in blood*. Co. Litt. 215. a. in principio.

43. By *act in law* a condition may be apportion'd in the caſe of a common perſon; *as* if a *leaſe* for years be made *of two acres, one of the nature of borough Engliſh, the other at the common law*, and the *leſſor, having iſſue two ſons, dies*, each of them ſhall enter for the condition broken; and likewiſe a condition ſhall be apportion'd by the act, and wrong of the leſſee. Co. Litt. 215. a.

44. *Guardian in chivalry, or in ſocage*, in the right of the heir, ſhall by the common law take benefit of a condition by entry or re-entry. Co. Litt. 215. b.

45. *No entry* nor re-entry *may be reſerved or given to any* perſon, *but* only to *the feoffor, or donor, or leſſor*, or to their heirs, and cannot be given to a ſtranger; for if a man leaſes land for life by indenture, rendring rent to the leſſor and his heirs, with a clauſe of re-entry, &c. if afterward the leſſor by deed grants the reverſion to another in fee, and the tenant for life attorn, &c. if the rent be after behind, the grantee of the reverſion may diſtrain for the rent, becauſe it is incident to the reverſion, but he may not enter into the land and ouſt the tenant as the leſſor might have done, or his heirs, if the reverſion had continued in them, &c. Litt. S. 347.

46. If feoffee on condition to re-infeoff *refuſes to re-infeoff, &c. on reaſonable requeſt* made by ſuch as ought to have the eſtate, the feoffor or his heirs may enter. Litt. S. 353.

47. In every *exchange* a condition is implied; as if B. exchange *with A. and A. with B.* and *B. aliens to C.* and *A. is evicted, he may enter upon C. but if C. be evicted by a title paramount, he ſhall not enter upon A.* For the condition runs in privity, and does not extend to the aſſignee. 4 Rep. 121. a. b. Paſch. 1 Jac. per Cur. in Buſtard's caſe.

48. If a leaſe be made upon condition *to be void if* 10 *l. be not paid at a certain day*, the *grantee of the reverſion* ſhall not enter for ſuch condition, becauſe it is *collateral*; reſolv'd. Mo. 876. pl. 1228. Chaworth v. Phillips.

(O. d) *What* Things shall be *avoided by Entry* for the Condition broke.

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[1. IF the *baron* be *infeoffed in fee, upon condition for the non-payment of a certain rent to re-enter*, and after the *baron dies*, and after the *condition is broke*, and the *feoffor enters upon the heir for the breach* thereof, *the wife of the baron shall not be endow'd*; for *her title is defeated by the entry* for the condition broke. 22 E. 3. 19. b. Curia.] Fitzh. Conditions, pl. 12. cites S. C.

2. In ejectione firmæ it was said by Finch, that if a man makes a feoffment upon condition *that the feoffee leafe to A. for life*, the *remainder to W.* and *he leases to A. reserving the reversion to himself*, and the *feoffor enters*; by this *he defeats the estate for life* which is well made, because he ought to take franktenement by his re-entry; but *contra if* the condition had been *to make a lease for years to A.* the *remainder to W.* and he leased for years to A. reserving [316] the reversion to himself; in this case the feoffor shall re-enter, and the lease for years is good; quod quære inde; for he that enters for condition in fait broken *defeats the mesne estates*, and is in as clearly as he was in at the time of making of the said feoffment. Br. Conditions, pl. 27. cites 44 E. 3. 22.

3. And it was said, that *if the feoffee* in such case *leases for life or for years*, and *after had granted the reversion to W. according to the condition*, it is a good performance of the condition. Ibid.

4. The father *surrenders a copyhold to the use of B. his son in fee, upon condition to perform covenants* in such an indenture. *B. after admittance surrenders to J. S. upon condition, that if B. pay* 10 *l. the surrender to be void.* B. neither pays the 10 l. nor performs the covenants. The *father enters and dies seised, and the lands descend to the son*, who enters, upon whom J. S. entered. It was the opinion of the court, that by the entry of the father both the surrenders were avoided, and that the son might then well enter, and so he may confess and avoid the surrender made to J. S. and judgment for the defendant. Cro. E. 239. pl. 6. Trin. 33 Eliz. B. R. Simonds v. Lawnd.

5. A. *infeoff'd B. on condition to convey to A. and his wife in special tail*, remainder to the heirs of A. If A. dies before the conveyance, and *B. conveys to the wife an estate for life only*, omitting the privilege of without impeachment of waste, (which should have been inserted in respect of the estate to be made to her) yet this omission shall not give the heir of A. (for whose benefit this omission was) a re-entry which would * *defeat the estate of the wife.* Hawk. Co. Litt. 304. Litt. S. 329. * 2 Rep. 82. 2. Hill. 43 Eliz. C. B. in Id. Cromwell's case S. P.

6. *Lease* for years was made, rendring rent, *upon condition of re-entry for non-payment.* Afterwards the *lessee acknowledged a statute. The rent was arrear, and the term was extended, but before the liberate the lessor enter'd and took the corn.* It was argued that this entry was lawful, for that an extent is only a valuation of the lands and goods, but does not alter the estate, and by consequence the lessor

leſſor may enter for a condition broken; and though by the extent the lands are ſeiſed into the king's hands, that is only a fiction in law, and is only with intent to do that which law and juſtice require, and it is not ſeiſed into his hands by way of poſſeſſion, for if it was, then the entry of the leſſor would not be lawful; and the court inclined that the entry was lawful, and gave the other a peremptory day to maintain his demurrer. 2 Roll. Rep. 468. 489. Mich. 22 Jac. B. R. Nicholas v. Simonds.

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(P. d) *How* he ſhall be ſaid *in, who enters for* the *Condition broke. Of the ſame Eſtate.*

4 Rep. 120. b. in a note of the reporter, in Dumper's caſe, S. P.——D. 309. a. in pl. 75. S. P.——S. P. but this fails in reſpect of *impoſſibility*; as if a man ſeiſed of lands in the right of his wife makes a feoffment in fee by deed indented, upon condition that the feoffee ſhould demiſe the land to the feoffor for his life, &c. The huſband dies. The condition is broken. In this caſe the heir of the huſband ſhall enter for the condition broken, but it is impoſſible for him to have the eſtate that the feoffor had at the time of the condition made, for therein he had but an eſtate in the right of his wife which by the coverture was diſſolved, and therefore when the heir was enter'd for the condition broken, and defeated * the feoffment, his eſtate vaniſhes, and preſently the eſtate is veſted in the wife. Co. Litt. 202. a.

[1. *Regularly*, he ſhall be in *of the ſame eſtate that he was when he parted with the poſſeſſion.*]

So in reſpect of *neceſſity*; as if ceſty que uſe after the Stat. of R. 3. and before the Stat. 27 H. 8. had made a feoffment in fee upon condition, and after had enter'd for the condition broken; in this caſe he had but a uſe when the feoffment was made, but now he ſhall be ſeiſed of the whole ſtate of the land, ſo that, as in the former caſe, the anceſtor had ſomewhat at the making of the condition, and the heir ſhall have nothing when he has enter'd for the condition broken, ſo in this caſe the feoffor had no eſtate or intereſt in the land at the time of the condition made, but a bare uſe, yet after his entry for the condition broken he ſhall be ſeiſed of the whole eſtate in the land, and that alſo for neceſſity; for by the feoffment in fee of ceſty que uſe, the whole eſtate and right was diveſted out of the feoffees, and therefore of neceſſity the feoffor muſt gain the whole eſtate by his entry for the condition broken. Co. Litt. 202. a.——Br. Conditions, pl. 71. S. P. per tot Cur. præter Cheynie, cites 4 H. 6. 2, 3.——Br. Entre Congeable, pl. 38. cites S. C. & S. P. held by all præter Cheyney.——Fitzh. Entre Congeable, pl. 2. cites S. C.——Br. Diſcontinuance, pl. 8. cites S. C.——8 Rep. 44. a. S. C. cited per Cur.

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The caſe of Warren v. Lee.——See infra, pl. 9. and the notes there.——See (I. d) ſupra, pl. 3.

[2. If an *eſtate for life* be *upon condition, the remainder over*, admitting it a good condition, *if he enters for breach* thereof, *it ſhall defeat the remainder*, becauſe the *livery is defeated.* D. 3. Ma. 127. 54.]

† In Roll, it is (upon deviſe for life upon condition &c.) which muſt be miſ-printed——D. cites it as that caſe of 11 H. 7. 6. and neither in D. or in the year-book is any mention of the word (deviſe) but as to the defeating the alienation for the tail only and not the fee, Dyer ſays, quære hoc.

[3. A *gift in tail, remainder to the right heir of the donee* † *upon condition that if the donee or his heir alien*, &c. this ſhall *defeat the tail only.* D. 23. Ma. 127. 55.]

[4. *Leſſee*

[4. *Leſſee for life makes a feoffment upon condition, and enters for breach*, he ſhall be leſſee for life, and reduce the reverſion to the leſſor. * 8 H. 6. 3. b.] Br. Entre congeable, pl. 38. cites 4 H. 6. 2. 3. ——Fitz. Entre congeable, pl. 1. cites 4 H. 6. 2. S. P. ——* This ſeems miſ-printed for 4 H. 6. 3. b. where the S. P. is by Fulthorp, and admitted by Chelney; but at H. 6. 3. is no ſuch point. ——4 Rep. 44. a. cites 4 H. 6. S. P ——Co. Litt. 202. b. S. P that he ſhall be tenant for life again, and ſubject to a forfeiture; for the ſtate is reduced but the forfeiture is not purged. ——Co. Litt. 252. a. S. P. ——See (J. d) ſupra. pl. 4.

[5. If *leſſee for life infeoffs the reverſion upon condition*, and enters for breach thereof, he ſhall be leſſee again, and the *rent due to the leſſor ſhall be revived*. 7 H. 6. 3.] Fitzh. Rent revive pl. 1. cites S. C.

[6. *Feoffment of two acres* upon *condition to enter into one*, if he enters for breach thereof, it *ſhall be but into one*. D. 3. Ma. 127. 55.] Such condition is good. Co. Litt. 202. b.

[7. *Leſſee for life and* the *reverſioner joyn in a feoffment upon condition, reſerved to the leſſee*; if he enters for breach thereof, *this ſhall not defeat the entire eſtate*. D. 3 Ma. 127. 55.]

[8. *Deviſe for life upon condition, remainder over*; (admitting it a good condition,) the *entry ſhall defeat the remainder, though* it is *not created by livery*, and the remainder may be without a particular eſtate by deviſe, for he ought to be in of the ſame eſtate which he had at the time of the deviſe. † 29. Aſſ. 17. admitted, per Curiam. ‡ Co. 9. [10] Ma. Port. 41. b. Contra, D. 3 Ma. 127. 54.] † As in aſſiſe by a clerk, it was found that the anceſtor of the defendant whoſe heir &c. was ſeiſed of the *land* deviſable in fee, and *deviſed* it by his teſtament *to the clerk*, upon condition that he ſhall have the land *for term of his life*, and *that he ſhall be chaplain and ſhall chaunt for his ſoul* during his life; *and after* his death, the land *to remain to the commonalty of D. for ever*, to find a chaplain for ever; and becauſe the *plaintiff* had *held the land for 6 years, and was not chaplain*, the *tenant as heir entered upon him*. And it appeared by inſpection that the *demandant was of ſuch age that he might have been chaplain immediately after the deviſe*. And per Birton, the entry is lawful clearly; and by the entry * for the default of the clerk, the commonalty have loſt their remainder; for the *heir by the entry cannot be ſeiſed of a leſs eſtate than fee ſimple*; and after the juſtices excited the jury to ſay for the plaintiff, by which they ſaid that the plaintiff was ſeiſed and diſſeiſed, and this was for conſcience of the remainder as it ſeems, quære. Br. Conditions, pl. 111. cites 29 Aſſ. 17. ——S. C. cited per Harper and Dyer, Pl. C. 412. b. in the caſe of Newys and Scholaſtica v. Larke. But ſee the ſaid caſe as there cited, remarked upon in 10 Rep. 40 b. and ſee 2 Lev. 21. where 10 Rep. 40. b. is denied. ——Fitzh. Aſſiſe, pl. 282. cites S. C. and 28 Aſſ. 71. ——‡ 10 Rep. 41. b. Portington's caſe, the reporter ſays he had ſeen a report in Hill. 3 & 4 P. and M. moved by Dyer ſerj. in C. B. that Dr. Butts was ſeiſed in fee, and having 3 ſons W. E. and T, deviſed part to his wife for life, upon condition that ſhe educate his ſons in learning and good manners, the remainder to T. his youngeſt ſon in tail. The reverſion in fee deſcended to W. his eldeſt ſon. The condition was broken. The queſtion was if the heir ſhall enter for the condition, or if T. ſhould enter as for breach of a limitation, or if the condition be deſtroyed by the limitation of the remainder over; and it was reſolved by Brooke Ch. J. and the whole court, that clearly this is no limitation, for they are expreſs words of condition, and the intent of the teſtator was, that his heir (who always is to take advantage of a condition) ſhall enter and defeat the eſtate of the feme, but his intent does not agree with law, becauſe he cannot defeat the eſtate for life, unleſs he defeats the remainder, and therefore by limiting the remainder over the condition is deſtroyed; but in ſuch caſe his intent never was that he in remainder ſhould enter for the condition broken. ——D. 126. b. 127. a. b. Warren v. Lee, S. C. argued.

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[9. If a man *leaſes for life, the remainder to another in fee*, reſerving a rent, *upon condition that if the rent be arrear, to enter and retain for all the life of the leſſee*; if he *enters for the condition broke*, he *ſhall defeat the remainder, and* ſhall *be ſeiſed in fee*. Dubitatur, 29 Aſſ. 17.] Br. Conditions, pl. 111. cites S. C. and that it was ſo ſaid, but that it was denied by Birton, but Brooke ſays, quære.—Fitzh. Aſſiſe, pl. 281. cites S. C.

10. *Tenant in tail made a feoffment in fee, and re-tookeſtate in fee,* and after *was bound in a ſtatute-merchant, and* then *made a feoffment in fee upon condition and died*; the *iſſue in tail within age enters for the condition broken,* and *was remitted* by his non-age. *Contra if he had been of full age*; for then he ſhould be adjudged in fee, as his father was when he made the feoffment upon condition, for he who entered for condition broken ſhall be in of the ſame eſtate as he was when he made the condition, at the time of the making thereof. Br. Conditions, pl. 134. cites 8 H. 7. 7.

11. *Tenant in ſpecial tail* has iſſue, and his wife dies. Tenant in tail *makes a feoffment in fee upon condition.* The iſſue dies, the condition is broken, the feoffor re-enters, he ſhall have but an eſtate for life as tenant in tail *after poſſibility* of iſſue extinct by the re-entry, and yet he had an eſtate tail at the time of the feoffment, and that alſo for *neceſſity.* Co. Litt. 202. a. b.

12. In ſome caſes the feoffor by his re-entry ſhall be in his former eſtate, but not in reſpect of ſome *collateral qualities*; *as* if *tenant by homage anceſtrel* make a feoffment in fee upon condition, and enters for the condition broken, it ſhall never be holden by homage anceſtrel again; and ſo it is if a *copyhold eſcheat,* and the lord makes a feoffment in fee upon condition, and enters for the condition broken, and the reaſon in both theſe caſes is; *for* that the *cuſtom or preſcription* for the time is *interrupted.* Co. Litt. 202. b.

1 Rep. 86. b. S. P. 13. Every limitation or condition *ought to defeat the entire eſtate,* and not to defeat a part and leave part not defeated, and it *cannot make an eſtate to ceaſe quoad unam perſonam and not quoad alteram.* Per Cur. 6 Rep. 40. b. Mich. 3 Jac. B. R. in Finch's caſe.

14. A. *tenant in tail, remainder to B. in fee. B. bargains and ſells the land to the king upon condition*; afterwards *A. dies without iſſue*; the *condition is broken.* B. recovers the land by the condition, and yet by the bargain and ſale he paſſed only a remainder; per Haughton and Doderidge J. and admitted by the counſel of both ſides at the bar. 2 Roll. Rep. 60. Mich. 16 Jac. B. R. Hoddy v. Hoddy.

[319] (Q. d) *Where* on a Condition of Re-entry for Non-payment of Rent, and a Retainer till Satisfaction, *the Profits* after Entry *ſhall be accounted as Parcel of the Satisfaction,* and what Eſtate Feoffor gains upon ſuch Re-entry.

When A. is ſatisfied either by perception of the profits or by payment, or tender, and refuſal, or partly by the one and partly

1. WHERE a *feoffment* is made reſerving rent, &c. upon condition that *if the rent be behind, the feoffor and his heirs may enter, and hold till ſatisfied,* &c. By entry of the feoffor, the feoffee is not altogether excluded, but the feoffor ſhall hold and take the profits until he be ſatisfied, and then the feoffee may re-enter and hold as before. For in this caſe the feoffor ſhall have the land but in manner *as a diſtreſs untill he be ſatisfied, &c.* though he take the profits in the mean time to his own uſe. Litt. S. 327.

partly by the other, B. may re-enter. Co. Litt. 203. a.——But if it was not for the words (to hold till ſatisfied of the profits) it would be an inheritance in the land to remain in the heir as a penalty; but becauſe of thoſe words it is only a chattle and ſhall go to the executors, who are the perſons to be ſatisfied of the arrears. Per Twiſden. Lev. 172. Trin. 17 Car. 2. B. R. in caſe of Jennmot v. Cooley.

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2. So if a man make a *leaſe for life*, with a reſervation of a rent, and ſuch a condition, if he enter for the condition broken, and take the profits of the land, quouſque, &c. he ſhan't have an action of debt for the rent arrear, for that the freehold of the leſſee continues. Co. Litt. 203. a.

3. *But* in caſe of *leaſe for years* reſerving a rent, with a condition that if the rent be behind, that the leſſor ſhall re-enter and *take the profits, until thereof he be ſatisfied*; there the profits ſhall be counted as parcel of the ſatisfaction, and during the time that he ſo takes the profits he ſhan't have an action of debt for the rent, for the ſatisfaction whereof he takes the profits. *But* if the *condition* be *that he ſhall take the profits until the feoffor be ſatisfied, or paid of the rent (without ſaying thereof)* or to the like effect; there the profits ſhall be accounted no part of the ſatisfaction, but to haſten the leſſee to pay it, and as Littleton here ſays, that till he be ſatisfied, he ſhall have the profits in the mean time to his own uſe. Co. Litt. 203. a.

(R. d) Where upon Condition broken or unperform'd a Man ſhall be *adjudged in Poſſeſſion* preſently, *without Entry, Claim, or Demand*, and ſo upon the Performance, &c.

1. *IF* a man infeoffs a feme, *upon condition that if he will marry her he may re-enter*, and *he marries her*; he may alien, for he has performed the condition, and by this he ſhall be enabled to alien; but quære how he ſhall be *adjudged in after the marriage*, if in jure uxoris or not, till he has made alienation, or done other act; it ſeems *in jure uxoris*. Br. Conditions, pl. 204. cites 5 E. 2.

2. If a man *infeoffs another, and that* upon condition perform'd [320] *the feoffment ſhall be void, or that the feoffor may re-enter*; in the one caſe nor the other upon the condition performed the frankte-nement is not in the feoffor till he has re-entred; quod nota: Br. Conditions, pl. 249. cites 11 H. 7. 2. per Brian Ch. J.

3. *Eſtate of inheritance*, as where eſtate tail is given on condition not to alien, &c. cannot ceaſe without entry; but *contra* of eſtate *for life*; for this cannot be ſurrender'd by parol, and ſo may ceaſe by ſuch condition. Br. Conditions, pl. 83. cites 21 H. 7. 11.

4. *As* if I *leaſe* land *for life or years*, upon condition that *if I pay to him* 10 *l. that his eſtate ſhall ceaſe*, there if I pay the 10 l. the eſtate is determined without any entry; contra of eſtate of inheritance; for this cannot ceaſe 'till the donor, or feoffor, or his heir has entred. Ibid.

Regularly when any man will take advantage of a condition, † *if he may enter, he muſt enter, and when he cannot enter, he muſt make a claim*; for a freehold and inheritance ſhall not ceaſe without entry or claim,

5. If land be granted for 5 years, that if he pay within the 2 firſt years 40 marks then he ſhall have fee, or otherwiſe but for 5 years, and livery is made. Now he hath a fee-ſimple conditional, &c. And if the grantee do not pay to the grantor the 40 marks within the firſt 2 years, then immediately after the ſaid 2 years paſt, the fee and the freehold is in the grantor, *becauſe the grantor cannot after the ſaid two years immediately enter* upon the grantee; becauſe the grantee hath yet title for 3 years by the grant. And ſo * becauſe the condition of the part of the grantee is broken, and the grantor cannot enter, the law will put the fee and the freehold in the grantor; for if the grantee does waſte, then after the breach of the condition, &c. and after the 2 years the grantor ſhall have his writ of waſte. And this is a good proof then that the reverſion is in him, &c. Litt. S. 350.

and alſo the feoffor or grantor may wave the condition at his pleaſure. Co. Litt. 218. a.

* 1 Rep. 97. a. b. cites S. C. † Pl. C. 133. b. in caſe of Browning v. Buſton.

Pl. C. 133. Browning's caſe.

6. If I grant a *rent*-charge in fee out of my land upon condition, there if the condition be broken the rent ſhall be *extinct* in my land, becauſe I (that am in poſſeſſion of the land) need make no claim upon the land, and therefore the law ſhall adjudge the rent void without any claim. Co. Litt. 218. a.

S. P. 20 E. 4. 19, a. 20 H. 7. 4. b. in pl. 12. by Pollard v. Yaxley.

7. If a man make a feoffment unto me in fee, upon condition to pay him 20 l. at a day, &c. before the day I let unto him the land for years, reſerving a rent, and after I fail of payment, the feoffee ſhall *retain* the land to him and his heirs, and the rent is determined and *extinct*; for that the feoffor could not enter, nor need not claim upon the land; for that he himſelf was in poſſeſſion, and the condition being collateral is not ſuſpended by the leaſe; otherwiſe it is of a rent reſerved. Co. Litt. 218. a. b.

8. If H. grants an *advowſon* to B. and his heirs, upon condition that if A. &c. pay 20 l. on ſuch a day, &c. the ſtate of B. ſhall ceaſe or be utterly void; though A. pays the money, yet the ſtate is not re-veſted in A. before a claim, and that claim muſt be at the church. So it is of a *reverſion or remainder of a rent, or common*, or the like, there muſt be a claim before the ſtate can be reveſted in the grantor by force of the condition, and that claim muſt be made upon the land. Co. Litt. 218. a.

9. If a man *bargain and ſell land by deed indented and inrolled* with a proviſo, that *if the bargainor pay, &c. the ſtate ſhall ceaſe* and be void. If he pays the money the ſtate is not reveſted in the bargainor before re-entry. Co. Litt. 218. a.

10. So it is if a bargain and ſale be made of a *reverſion, remainder, advowſon, rent, common, &c.* Co. Litt. 218. a.

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11. *So* it is if lands are *deviſed to B.* and his heirs, upon condition *that if B. pay not* 20 *l.* at ſuch a day, that *his eſtate ſhall ceaſe and be void.* The money is not paid. The ſtate ſhall not be veſted in the heir before an entry; and ſo it is of a reverſion, remainder, advowſon, rent, common, and the like. Co. Litt. 218. a.

(S. d) Entry. *Barr'd* by what.

1. IF a man infeoffs another upon condition *to re-infeoff him within 40 days*, there if the *feoffor makes no requeſt within the 40 days*, the feoffee ſhall retain the land for ever. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. Per Newton.

2. If the condition be broken for non-payment of the rent, yet if the *feoffee brings an aſſiſe for the rent due at that time*, he ſhall never enter for the condition broken, becauſe *he affirms the rent to have a continuance, and thereby waves the condition.* Co. Litt. 211. b.

3. *So* it is *if the rent had had a clauſe of diſtreſs* annexed unto it, if the feoffor had diſtrained for the rent, for the non-payment whereof the condition was broken, he ſhould never enter for the condition broken. Co. Litt. 211. b.

4. *But he may receive* the rent, *and acquit the ſame*, and yet enter for the condition broken. Co. Litt. 211. b.

5. *But* if he *accepts rent due at a day after*, he ſhall not enter for the condition broken, becauſe he thereby affirms the leaſe to have a continuance. Co. Litt. 211. b.

(T. d) What ſhall be ſaid a Condition to enlarge or encreaſe the Eſtate.

1. ASSISE by R. F. where it was found that *M. leaſed* the tenements *to the plaintiff for* 11 *years, and* in ſurety of it *made a charter* upon condition, *that if he was diſturbed of his term that he ſhall have the tenements in fee*, which *charter was delivered to keep, and to deliver according to the condition, and delivered ſeiſin of this charter*, and that *M. ſold within the term*, and for the diſturbance *C. delivered the charter to the plaintiff*, and livery of ſeiſin was upon the one charter and the other, viz. upon the ſale alſo, as it ſeems, by which it was awarded that the plaintiff recover; the reaſon ſeems to be, in as much as the *ſeiſin was upon the charter to the termor*, for otherwiſe the condition had come too late, as it appears in * Pleſington's caſe, 6 R. 2. Tit. quid juris clamat in Fitzh. 20. Br. Conditions, pl. 101, cites 10 Aſſ. 15.

* S. C. cited Arg. 2 Brownl. 227. in caſe of Stydſon v. Glaſs.

2. If a man leaſes *for life upon condition*, that *if the donor aliens in fee*, that the *leſſee ſhall have fee*, it is a good condition, by reaſon that the fee is in the leſſor; per Frowike. But Brook ſays quære, becauſe it ſeems that the law is contrary. Br. Conditions, pl. 83. cites 21 H. 7. 11.

3. *And* by Frowike, if I *leaſe for years* upon condition, that *if I enter upon him* then he *ſhall have for life*, it is a good condition. Ibid.

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4. Where an eſtate is to *encreaſe* by force of a condition, the *particular eſtate muſt continue* in the leſſee or grantee till the increaſe

But the alteration the eſtate

of the lessor shall not prejudice the lessee or grantee.

creaſe happens. Pl. C. 483. b. Mich. 17 & 18 Eliz. in caſe of Nichols v. Nichols.

Pl. C. 486. b. Nichols v. Nichols.

2 Brownl. 248. Anon. S. C. adjudg'd accordingly. —But ſuch *increaſe of an eſtate by force of a condition precedent, muſt have* theſe *four incidents,*

5. *Queen Eliz. ſeiſed of the reverſion* of an eſtate tail, *granted the ſame to T. in tail*, and further, on condition that *if T. or his heirs pay at the Exchequer* 20 *s.* that *then he ſhould have the ſaid reverſion in fee-ſimple.* T. paid the 20 s. reſolved per tot. Cur. that the grant is good, and that ſuch grant with condition precedent may be as well of things lying in grant, as of land which lies in livery, and may be annex'd to an eſtate tail, which cannot be merged, as to an eſtate for life or years, which may be merged by acceſſion of a greater eſtate. 8 Rep. 73. b. 75. a. Trin. 7 Jac. Lord Stafford's caſe.

1ſt. A *particular eſtate*, as a foundation whereon to ereſt the greater eſtate. 2dly, Such particular eſtate muſt *continue in the leſſee or grantee* till the increaſe happens. 3dly, It muſt *veſt at the time that the contingency happens*, or otherwiſe it never ſhall veſt. 4thly, The particular eſtate and the increaſe *muſt take effect by one and the ſame inſtrument or deed, or by ſeveral deeds delivered at one and the ſame time*, and not at ſeveral times. Reſolved. But Coke Ch. J. ſaid, that ſuch foundation muſt be permanent, and not revocable at the will of the leſſor or grantor. 8 Rep. 75. a. Trin. 7 Jac. Lord Stafford's caſe.——See Tit. Remainder (W) pl. 6, 7, 8, 9. and the notes there.

6. Where *two jointenants are upon condition to have fee*, and they *make partition*, they ſhall not have fee on the performance of the condition. Arg. 2 Roll. Rep. 402. Mich. 21 Jac.

(U. d) Declaration. And in what Caſes Performance muſt be averr'd.

1. ASSISE *of rent* upon a grant made *percipiend' apud W. and if* the rent be arrear, it ſhould be lawful for the plaintiff to *diſtrain in all his lands in W. M. and R.* and the aſſiſe was brought in W. only, and the land in W. only put in view, and M. and R. were in another county, and yet good; for *apud, in, vel de* tali tenemento are good words of charge, and the writ was awarded good; by which the *defendant ſaid, that the grant is, that the plaintiff ſhall chaunt in the church of W.* pro animabus, &c. or elſewhere, *and ſaid, that the plaintiff has not chaunted* according to the form of the charter; and the *plaintiff ſaid, that he had chaunted according to the form of the charter, and good, without ſhewing in what place.* Br. Aſſiſe, pl. 359. cites 41 Aſſ. 3.

2. Where a man is *retained* to go to Rome, or *to ſerve in other ſervice*, he *ſhall ſhew how he has done it*; the reaſon ſeems to be, in as much as theſe things are *executory*. Br. Count, pl. 5. cites 3 H. 6. 33.

3. But *contra* of things *executed*; as if a man counts of a horſe ſold, he need not ſay that the defendant has the horſe, for this is executed, and alters the property immediately. Ibid.

4. Where *condition* is *compriſed* in an obligation or recognizance *before the in cujus rei*, or the end of it, and this *gives cauſe of action*

tion to the obligee, there in debt he *ought to count of the condition performed*; per Wangford, Priſot, Littleton, Needham and Aſhton. Br. Count, pl. 52. cites 36 H. 6. 3.

* 5. *But* where the condition is *indorſed upon the obligation, or written under* the obligation, or the recognizance, he ſhall count ſimply upon the obligation or recognizance, and ſhall not ſay any thing of the condition; nota the diverſity. Ibid.

6. In debt if the plaintiff counts upon *condition contained in the obligation*, as of 20 l. *to be paid when the obligee has brought* one hundred loads of hay to the houſe of the obligor in D. there the obligee *ought to count* in his count, *that the condition is performed*, and ſhew certain, becauſe it is his advantage; contra if it be in his diſadvantage, or be contained in the back, and not in the obligation; per Vaviſor, quod non negatur. Br. Count, pl. 69. cites 21 E. 4. 36.

7. Debt upon obligation, with condition *contained in the obligation*, and not indorſed upon it; as where it is to *ſave harmleſs a ſurety* in another bond, there the count is good generally *without ſaying that the defendant has not diſcharged him*, nor ſaved harmleſs. Br. Count, pl. 73. cites 22 E. 4. 42.

8. *For* where the condition is *contained in the obligation, and to be performed by the obligee*; *as* if *A.* be *bound to B. to pay him* 10 *l. if B. gives to A. ſuch a horſe*, there *B. ought to count that he has given the horſe*, &c. and otherwiſe ill. Ibid.

9. *But* where the condition is *to be performed by the obligor*, and contained in the obligation, there the obligee may count generally *without ſaying that the defendant has not performed the condition*; note the diverſity. Ibid.

10. Where the *condition* is *compriſed in the obligation, and not indorſed*, he *ſhall count that he has performed it if* it be to be done *of the part of the obligee*; *contra* if it be to be done *of the part of the obligor*, there the plaintiff ſhall not count of it. Br. Conditions, pl. 184. cites 22 E. 4. 42.

12. Debt upon an obligation upon condition, that if *obligee delivers a bull to the obligor* by ſuch a day that then the obligation ſhall be good, and otherwiſe void; and, per Cur. except Shelly, the plaintiff *ought to ſhew in his count that he has delivered the bull*, and this becauſe the condition ariſes on his part to make the obligation good, quod nota. Br. Obligation, pl. 1. cites 26. H. 8. 8.

This is miſprinted, and ſhould be 26 H. 8. 1. and ſo are the other citations.—Br. Dette, pl. 2. cites S. C.

——Br. Count, pl. 1. cites S. C.

13. The *difference* is between a *precedent* and *ſubſequent* condition; in the firſt caſe there ought to be averment of performance, but not in the other; for the eſtate, &c. is veſted. Jenk. 260. pl. 59.

7 Rep. 10. a. Trin. 33. Eliz. C. B. reſolved. Ughtred's caſe.

14. Where a *condition conſiſts of two parts*, and *one part is poſſible* to be performed, *and the other impoſſible*, it is ſufficient to *allege the performance of that which is poſſible*; per Clench and Popham. Cro. E. 780. pl. 14 Mich. 42 & 43 Eliz. B. R. Wigley v. Blackwall.

S. P. Arg. Palm. 325. as a condition to make a feoffment to A. in preſence of B. & C. and afterwards B. dies before the day, it ſhall be made in the preſence of C.

15. He that pleads a *diſpenſation to hold in commendam*, confirmed by the king's charter, muſt aver the performance of the conditions contained in it, Heath's Max' 37. cites Hob. 141, 142. [Mich. 10 Jac. in the caſe of Colt and Glover v. Coventry (biſhop) &c.]

* [324] Vent. 214. Trin. 24. Car. 2. S. C. and Hale Ch. J. was now of opinion that the plaintiff's ſaying paratus fuit & obtulit to do the work, though he did not ſay (and the other refuſed) yet it was a ſufficient averment after a verdict;

16. Aſſumpſit, &c. in which the plaintiff declared, that there was an agreement between them, *that the plaintiff ſhould pull down two walls* * *and build an houſe*, &c. *for the defendant, and that the defendant ſhould pay him pro labore in & circa diviſionem, &c.* 80 *l.* &c. *and lays mutual promiſes; and avers, that he was ready to perform all on his part, but that the defendant had not paid him the money.* After verdict for the plaintiff it was moved, that here the plaintiff had not averred that he had done the work. Hale Ch. J. held, that the words (pro labore) here makes it a condition precedent, and therefore the performance of the work ought to have been averred, though in caſe of a reciprocal promiſe it need not be. Twiſden J. held, that there needed no averment there being reciprocal promiſes on which the parties have mutual remedies. But Rainsford agreed with Hale & adjornatur. Vent. 177. Hill. 23 & 24 Car. 2. B. R. Peters v. Opie.

wherefore, though they would not agree in the other matter, yet judgment was given for the plaintiff. ——— 2 Lev. 23 Opy v. Peters S. C. and though Hale Ch. J. and Twiſden J. differed as to the other matter, yet as to the laſt all the court agreed, for that otherwiſe the jury would not have found for the plaintiff, and gave judgment for the plaintiff. ——— 2 Saund. 350. S. C. accordingly, and judgment for the plaintiff.

2 Mod. 42. S. C. cited in caſe of Lock. v. Wright.

17. B. agreed to pay 20l. ſix months after the bargain, A. *transferring ſtock*. A. at the ſame time gave *a note to B. to transfer the ſtock, the defendant paying*, &c. If A. ſues upon this agreement, A. muſt aver and prove a transfer or *tender*, and the other a payment or tender; and though there are *mutual promiſes*, yet if one thing be the conſideration of the other there a performance is neceſſary to be averred, unleſs a *certain day be appointed* for performance; per Holt Ch. J. 1 Salk. 112. pl. 1. Trin. 2 Annæ, at niſi prius at Guildhall, Callonell v. Briggs.

(W. d) Pleadings in the Negative or Affirmative.

1. DEBT upon obligation *to diſcharge a ſheriff*; it was held clearly, that the defendant *may ſay that he has diſcharged him without ſhewing how*; for he cannot ſhew a ſpecial diſcharge where he was not charged, but it is ſaid elſewhere that *non damnificatus eſt* is a good plea. Br. Conditions, pl. 143. cites 5 E. 4. 8.

2. *Contra* it is where he is bound *to be nonſuited* of all actions againſt the plaintiff, there he *ſhall ſhew the record in certain*; for this is his own act. Ibid.

3. The indenture is *that he ſhall ſerve the plaintiff by* 10 *years, fine abſentat one, niſi per ſpecialem licentiam querentis*; and he *ſaid that he had ſerved by ten years fine abſentatione, niſi per ſpecialem licentiam querentis*, and *did not ſhew at what time he licenced him*; and

and the court held the plea in this good, becauſe it *infues the words of indenture*, and it may be that he licenced him ſeveral times. Br. Conditions, pl. 144. cites 6 E. 4. 1.

4. Where a man is bound to *give all the money in his purſe*, and he *ſays that he gave him no money*, it is good, *without ſaying what* money he had in his purſe; *otherwiſe* it is where he pleads *in the affirmative*, that he gave but 10l. which was not all, this is not good; for he *ought to ſay what money he had in his purſe*. Br. Conditions, pl. 133. cites 17 E. 4.

5. If a man be bound *to give J. N. all the money* which is *in his purſe*, or to *infeoff him of all the land which deſcended to him from the part of his father*, he ought to ſhew how much money and how much land, &c. cites 17 E. 4. 5.

6. In error, an abbot *granted a corody* to W. S. and ſhewed [325] what, &c. *to be of good converſation, and to do ſuch ſervices as N. who had it before did*; and he ſaid that he was of good converſation from the time of the grant aforeſaid, &c. For the *law intends that every one is of good converſation till the contrary be ſhewn*; and therefore if he be *otherwiſe, the other ſhall ſhew it*, and therefore good by all the juſtices. Br. Conditions, pl. 168. cites 22 E. 4. 28.

7. *And* to the other point he *ſaid*, that *he had done all ſuch ſervices as N. had done*, and *did not ſhew what* ſervices, and yet good by the beſt opinion; for the *condition is general*, and not certain, and ſhall not ſhew what ſervices N. did. Ibid.

8. *But where* the condition is *certain*, as to perform the award of J. N. there he ſhall ſhew certain what award J. N. made, and that he has performed it; nota diverſitatem, per Curiam; for in the caſe above it is ſo incertain that it cannot well be ſhewn in certainty. But *the other party replied, and ſhewed in what he had broken*. Ibid.

9. In debt upon an obligation with condition *(inter alia)* for the obligor to account; to which the defendant pleads condition performed. The plaintiff replies, that the defendant did not account, and ill, becauſe he ſhews not what he had to account for; and difference is taken, when the condition is in the negative, *not to do a thing*, then it is ſufficient to ſay he did not do it; and when in the affirmative, to do, *as to perform his office*, or *to infeoff him of all his land*, &c. there he muſt ſhew what his office was, and what lands he had, and that he did infeoff, &c. Heath's Max. 53. cites Mich. 2 R. 3. fol. 17. Placito 44. & Trin. 4 H. 7. Placito 6.

10. In debt upon an obligation the condition was, that if the defendant *pay the plaintiff for ſo many loaves as ſhall be delivered to J. N. when he ſhall be required*, that then the obligation ſhall be void; the *defendant ſaid that he was never required by the ſaid plaintiff to pay him any money for any bread delivered*, &c. and becauſe by this plea, that he was never required to pay for any bread delivered, in which it is *imply'd that bread was delivered*, he ſhall not ſhew the certainty of the bread delivered, and therefore it was adjudged per Cur. in anno 5 H. 7, 8. that the plea is not good, quod mirum! for by the reporter the plea is good; for he has liberty to ſay that no bread was delivered, or to ſay that he was not required

as above; and per Keble, becauſe he pleads in the negative it ſuffices; contra if he had ſaid that he had paid for all the bread, &c. there he ſhall ſhew how much was delivered, and purſue the words of the condition verbatim, &c. and the whole court was againſt him; quod mirum. Br. Conditions, pl. 129. cites 4 H. 7. 12.

11. *And* per Keble there is a *diverſity* where a man pleads in the affirmative, and where in the negative; for *in the affirmative he ought to plead certain*; as where a man is bound to keep J. N. without damage, if he pleads in the affirmative he ought to plead certainly, how he has kept him without damage, as by releaſe, payment, or the like in certain. *Contra* where he pleads *in the negative*, as non damnificatus fuit, there he need not allege certainty. Ibid.

12. *So* where a man is bound *to ſtand to an arbitrement*, nullum fecit arbitrium ſuffices in the negative; but if he pleads in the affirmative, that he has performed the award, he ſhall ſhew what the award was in certain. Ibid.

Debt upon obligation, conditioned *to ſave the defendant and his lands in S. from an annual rent of 20 l. reſerved upon a leaſe thereof made by one J. G. to J. B.* The * defendant *pleaded that a tempore confectionis ſcripti obligatorii exoneravit*, & indemnem conſervavit the plaintiff and his lands from the ſaid rent; the whole court held that the plea being in the affirmative is ill, becauſe he did *not ſhew how* he ſaved him and his lands harmleſs. But if he had pleaded in the negative, *non damnificatus*, it had been good, and judgment for the plaintiff. Cro. J. 634. pl. 7. Hill. 19 Jac. in B. R. Horſeman v. Obbins.——2 Mod. 239. Arg. S. C. cited.

13. Condition *in the affirmative which implies a negative* ſhall be pleaded performed in the negative. As where a man is bound to keep W. N. without damage againſt J. S. he may ſay that J. S. *non damnificavit* dictum W. N. Br. Conditions, pl. 240. cites 10 H. 7. 12.

*[326]

14. Where a man *pleads that he has ſaved him harmleſs*, it is no plea without ſhewing how, becauſe he pleads in the affirmative; *contra where he pleads in the negative*, as non damnificatus eſt, Note the diverſity. Br. Conditions, pl. 16. cites M. 37 H. 8. per Cur.

15. Debt upon obligation the condition was, whereas the defendant was made ſub-collector of the ſubſidy by the plaintiff, *if he gave a ſufficient account*, and ſaved him harmleſs of thoſe *receipts* againſt the queen, *and procures a ſufficient acquittance* or diſcharge out of the Exchequer, &c. The defendant pleaded that he had accounted, and ſaved harmleſs the plaintiff, and had procured him an acquittance; it was moved that the plea was not good, for that being in the affirmative, he had *not ſhewed how*. Gawdy J. ſaid, *if the diſcharge be to a particular thing he muſt ſhew how, but not when it is to multiplicity of things*; for there a general pleading is good, and cited 5 E. 4. 8. ſed adjornatur. Cro. E. 253. pl. 24. Mich. 33 & 34 Eliz. B. R. Acton v. Hill.

16. Debt upon bond conditioned, *that the defendant ſhould at all times, upon requeſt, deliver to the plaintiff the fat and tallow of all beaſts which he, his ſervants, or aſſigns, ſhould kill or dreſs before ſuch day.* The defendant *pleaded, that upon every requeſt made to him he delivered to the plaintiff the fat and tallow of all beaſts which were killed by him or his ſervants or aſſigns before the ſaid day.* Exception

ception was taken that the plea was too general, but all the court held it a good plea; for when the *matter* to be pleaded *tends to infiniteneſs and multiplicity, the law allows of a general pleading in the affirmative*, and for that reaſon allows of the rule that he who pleads in the affirmative ſhall allege performance of covenants generally. Cro. E. 749. pl. 3. Paſch. 42 Eliz. B. R. Mints v. Bethell.

17. Bond was conditioned *not to kill any pheaſants* or partridges, &c. in ſuch a place. The defendant *pleaded that he had not killed*; the plaintiff *replied that he had killed a pheaſant, et hoc paratus eſt verificare*. Sid. 241. in pl. 4. Mich. 19 Car. 2. B. R. Arg. cites it to have been adjudged till upon demurrer; for it ſhould have concluded with petit quod inquiratur per Patriam.

(X. d) Pleadings. In what Caſe there muſt be Profert or Monſtrans of Deeds.

1. IF a man pleads condition *of franktenement in action real* or perſonal, he ſhall ſhew deed. Br. Conditions, pl. 220. cites 4 E. 3. 34, 35.

2. In aſſiſe, an *eſtate upon condition* was found by verdict at large, and for the condition broken the plaintiff, as heir of the donor, entred, and the entry adjudged good, and yet this was not pleaded, nor deed ſhewn; but it appears there, that if he who entred had not a deed to prove the condition he cannot enter; and it ſeems alſo there, that he *cannot plead the condition without ſhewing deed thereof*; quod nota. And ſo it appears in Littleton, Tit. Eſtates; Br. Monſtrans, pl. 99. cites 33 Aſſ. 11.

3. In debt upon an *obligation of* 40 *l. conditioned to pay* 5 *l.* the defendant may *plead payment of the* 5 *l. by averment*, without ſhewing any ſpeciality. Br. Conditions, pl. 23. cites 42 E. 13. [327]

4. *Condition* may be pleaded *of a contract*, without ſhewing deed. Br. Monſtrans, pl. 149. cites 44 E. 3. 27.

5. Audita querela upon *defeaſance by indenture to make certain payments*, and that then the eſtate ſhall be void, and *avers the payments without ſhewing acquittance in writing*, and good per Cur. Becauſe the covenants were compriſed in the indenture, for then the matter may be averr'd. Br. Monſtrans, pl. 151. cites 46 E. 3. 33.

6. In *treſpaſs*, a man may plead a *feoffment* upon condition of re-entry, *and may enter for the condition* without ſhewing deed; *contra in actions real*; the reaſon ſeems to be, in as much as the franktenement ſhall not be recovered in treſpaſs. Br. Monſtrans, pl. 135. cites 7 H. 6. 7. Ibid. pl. 111. cites 9 H. 7. 23. contra.

7. *In detinue* of a deed the *plaintiff may aver, that he delivered the deed* to the defendant *upon certain conditions to be performed*, to deliver it to the obligee, and otherwiſe to the plaintiff, who is obligor. Br. Monſtrans, pl. 136. cites 8 H. 6. 26. per Babb. Martin and Cotteſmore.

8. *So*

8. *So* againſt obligor, if the bailee delivers them to the obligee contrary to the condition; per Babb. Martin, and Cotteſmore. Br. Monſtrans, pl. 136. cites 8 H. 6. 26.

9. *But in debt by obligee* againſt the obligor he ſhall not aver ſuch condition without writing; per Babb. Martin, and Cotteſmore. Br. Monſtrans, pl. 136. cites 8 H. 6. 26.

10. In treſpaſs the uſage has been, in ancient time, that a man may plead *condition of eſtate de facto in actions perſonal*, as treſpaſs &c. without ſhewing deed, and e contra in actions *real*, for there it was uſed to ſhew deed; but at this day, and of late time, it has been uſed to ſhew deed in the one caſe and in the other; per the juſtices. Br. Monſtrans, pl. 114. cites 4 E. 4. 34, 35.

He muſt ſhew the indentures, per Cur. Ibid. pl. 146. S. P. cites 6 H. 7. 12.—Quære, for by ſeveral contra.

11. In *debt*, the *defendant ſhewed a condition* indorſed, *that if he performed covenants in certain indentures*, &c. that then, &c. and *ſhewed how he had performed them*, and the plaintiff replied to it, and ſo to iſſue, and good *without ſhewing of the indenture*, by reaſon that the *plaintiff did not demur* for the not ſhewing, but replied to it; and e contra, per Choke, if the plaintiff had demurred. Br. Monſtrans, pl. 116. cites 6 E. 4. 1, 2.

But 7 H. 4. 1. agrees with the court; quod nota bene. Ibid.

12. Debt upon obligation, the defendant pleaded condition, *that if J. P. ſerved the plaintiff for one year*, &c. *and for 7 years proxime*, &c. *in omnibus mandatis ſuis licitis*, quod tunc, &c. *and that the ſaid J. P. ſerved the plaintiff lawfully from this day till ſuch a day within the 7 years, at which day the plaintiff diſcharged him from his ſervice*; judgment, &c. And a good plea without ſhewing deed of the diſcharge, notwithſtanding that it was upon obligation, in as much as the condition is matter in fact. Br. Conditions, pl. 152. cites 10 E. 4. 15.

13. In *aſſiſe between feoffee and feoffor*, the *feoffee ſhew'd a deed poll* in pleading; the *feoffor may deny that the feoffment was upon condition, and ſhew the performance or breach of it, by which he enter'd without ſhewing counterpart or otherwiſe*, and yet the deed belonged to the feoffee, and not to the feoffor. Br. Monſtrans, pl. 157. cites Littleton, fol. 90 & 91.

14. There is a *difference* between the pleading of a *condition compriſed in a will and in an* eſtate or *grant* made by a man by livery, [328] where the eſtate is executed in his life; for in the firſt caſe, to plead the condition to defeat the eſtate, he need not have any deed, but in the other he ought. Dy. 127. b. pl. 56. Hill. 2 & 3 P. & M.

15. A man cannot plead a condition to *defeat a freehold* without ſhewing a record or deed to prove it; but a condition to defeat the grant of a chattel he may. Litt. S. 365.

Co. Litt. 225. a. b.

16. He that *pleads a deed to defeat a freehold*, ought to ſhew it to the court, that the court may judge whether it have legal words, and of ancient time the court, on view, judg'd it void if raz'd or interlin'd in places material; but now it is left to be tried by the jury, whether it were done before delivery. The deed itſelf muſt be ſhewn; nor can any inrollment thereof, or exemplification under the great ſeal be pleaded; but by ſtatute *a conſtat* or *inſpeximus* of letters patents made ſince the 27 H. 8. may be pleaded by the king's patentees, or any claiming under them, as well againſt the king

as

as any other. A *conſtat*, &c. can only be of the inrollment of record, but not of a deed or any other writing that is not of record; nor can a deed be inroll'd till duly acknowledg'd. Hawk. Co. Litt. 311.

17. Thoſe that come in by act of law, as *tenant in dower*, *ſtatute-merchant*, &c. may plead a condition without ſhewing the deed; but tenant by curteſy cannot, for the law preſumes that he had the poſſeſſion of his wife's deeds, *and he may keep them during his life*; nor ſhall the *lord by eſcheat*, becauſe the deed belongs to him; not *any that claims by coveyance* from the party, or juſtify *as ſervants* by his command, &c. plead a condition without ſhewing the deed. Hawk. Co. Litt. 311. Co. Litt. 225. b. 226. a.

18. Tenant in tail makes a feoffment on condition; re-enters, and dies; his *iſſue* being remitted needs not in pleading this ſpecial matter ſhew the deed, *for he by the remitter claims above the condition.* Hawk. Co. Litt. 312. Co. Litt. 226. a.

19. Tenant to *a præcipe* pleads in abatement of the writ *(for non-tenure)* that J. S. infeoffed him on condition, and re-enter'd, and was not compell'd to ſhew the deed, becauſe the demandant was a ſtranger, *nor did the tenant make himſelf a title againſt him by force of it*, and it may be, that on the re-entry the deed might be given up to the feoffor. Hawk. Co. Litt. 312. Co. Litt. 226. a.

20. The *leſſee of a mortgagee*, evicted by the mortgagor, may in an action of debt for the rent by mortgagee, ſhew the condition and re-entry without deed, for he is no way privy to it; and if the feoffee after a re-entry by the feoffor, for condition broken, enter and take away the deed and detain it, the feoffor in an aſſiſe brought againſt him ſhall not be inforced to ſhew the deed, *for the feoffee ſhall take no benefit of his own wrong.* A woman may in pleading aver a feoffment to be *cauſa matrimonii prælocuti*, albeit ſhe have not any writing to prove it. Hawk. Co. Litt. 312. Co. Litt. 226. a.

21. If the *deed remain in one court*, it may be pleaded in another without ſhewing forth quia *lex non cogit ad impoſſibilia.* Co. Litt. 231. b.

22. In *debt on bond*, defendant pleads a condition for *performance of covenants*, contained in certain indentures between them. Per Coke, this is a clear fault and without defence; for he ought to have pleaded thus, viz. to have ſhewed the indenture and to have ſaid hic in Cur. prolat', and this exception to the plea is unanſwerable (it being therein urged further, viz. that the defendant is *privy* to the indenture) and judgment accordingly. 2 Bulſt. 259, 260. Mich. 12 Jac. Duport v. Wildgooſe. Roll. R. 20. S. C.

23. In *debt on bond* defendant demanded oyer of the condition which was *to perform covenants in an indenture*, and then demanded oyer of the indenture; *plaintiff gave oyer omitting an indorſement* which was * made before the execution of the deed; on this oyer defendant pleaded performance; the plaintiff replied, and ſet forth the indorſement, and prayed judgment for the *variance*. Per Cur. † 1ſt, The defendant ſhould have ſet forth the indenture himſelf, being a party to it, and ſhould have pleaded performance to all the covenants therein. 2dly, The *plaintiff was not obliged to give oyer* [329] 6 Mo. 237. S. C. adjudged. The defendant ſhall ſhew the indenture if the *plaintiff demands oyer* of it, per tot. Cur. Br. Man-

of

Stranſ, pl. 28. cites 7 H. 4. 1.—Ibid. pl. 9. cites 28 H. 6. 7.—So if plaintiff makes title by a *conditional leaſe*, he may plead the leaſe without the condition. Arg. Le. 306. in the caſe of Carter v. Claypole.

of the indenture, and though he did, yet it being what he need not do, the ſetting it forth is not at his peril, as where he is obliged to ſet it forth; nor is he concluded to ſay, that there is more contained in the indenture, but is at liberty as well as if the defendant himſelf had ſet it forth; and the court held, that as the defendant was bound to ſet it forth, ſo he was bound to ſupply this omiſſion and make his plea compleat, and therefore judgment for the plaintiff. 2 Salk. 498. pl. 6. Mich. 3 Annæ B. R. Cook v. Remington.

† Keilw. 71. pl. 72. per Frowike.

(Y. d) Pleadings.

1. A MAN cannot *avoid a ſtatute-merchant, obligation, releaſe* or the like, againſt the conuſee himſelf named in it, and who ſhall take advantage of it, *to ſay that it was upon condition.* Br. Condition, pl. 25. cites 47 E. 3. 27.

Br. Conditions, pl. 11. cites S. C.

2. *Contra in detinue againſt a third perſon*, where there is livery in indifferent hands, note the diverſity. Ibid.

3. Debt upon *indenture*, which *comprehended ſeveral conditions of the part of the defendant*, and for non-performance of any of them, that the defendant ſhould forfeit 40 l. and the *plaintiff counted that all are broken*, and the defendant anſwered that No; and the *plaintiff ſhewed one certain*, and the iſſue ſhall be upon this only by the opinion of the court; but Brook ſays, it ſeems that this is not the courſe of pleading at this day; quod vide. Br. Count, pl. 3. H. 6. 8.

Ibid. pl. 21. cites 34 H. 8. and diſtinguiſhes between a defeaſance to a ſtranger and to one co-obligor.

4. *B. gives bond to A.* Afterwards *A. by indenture grants to J. S. that if J. S. performs certain conditions, the bond given by B. ſhall be void.* J. S. performed the condition, yet per optimam opinionem, B. ſhall not plead it in debt by A. againſt B. Br. Eſtranger al Fait, pl. 1. 3 H. 6. 18. 26.

5. If A. be bound to B. *to make him a ſufficient eſtate in ſuch lands*; in an action brought upon ſuch obligation it is no plea to ſay, that he hath made to him a ſufficient eſtate, &c. but he *ought to ſhew what eſtate.* Arg. 2 Le. 39. ad Finem, in pl. 52. cites 22 H. 6.

Br. Dette, pl. 15. cites S. C.

6. Debt upon *an obligation of* 20 *l. to pay* 10 *l. by a day*, the defendant *ſaid, that he paid it to J. N. by the day by the command of the plaintiff*, and no plea, by which he ſaid, that he paid it to the plaintiff by the hands of J. N. and a good plea. Br. Conditions, pl. 12. cites 27 H. 6. 6.

7. In debt the defendant pleaded *defeaſance* that *where the plaintiff was indebted to S. H. in* 100 *l. by obligation*, that *if the defendant ſhall obtain the ſame obligation and deliver it to the plaintiff, or ſufficient acquittance of it*, that *then*, &c. and he *ſaid that he had diſcharged*

charged him, &c. and the plaintiff demurred, and because he *did not shew how* he discharged him, therefore no plea, and the plaintiff recovered his debt and damages * per judicium. Br. Conditions, pl. 16. cites 35 H. 6. 19. & concordat H. 22. E. 4. 42.

8. In debt upon an obligation the *plaintiff declared, that the obligation was made for such a duty*, and the *defendant said that it was made for another duty absque hoc that* it was for this duty, and the others e contra. Br. Obligation, pl. 48. cites 4 E. 4. 30. Br. Issues joins, pl. 35. cites S. C.

9. If it was *to infeoff the plaintiff of all lands contained in a certain fine, and said that four acres are in the fine of which he has infeoffed him*, this suffices without saying that these are all, &c. Br. Conditions, pl. 144. cites 6 E. 4. 1.

10. *Contra if* it be *referred to the matter in fact and in certainty*, as to infeoff him *of all his lands of which his father died seised*, or of all his lands *in A.* there he shall shew how much the land is, and that he infeoffed him thereof, which are all the lands and tenements, &c. Ibid.

11. In debt upon obligation, the defendant pleaded a condition, *that if J. P. serve the plaintiff for one year*, &c. *and so for seven years next*, &c. *in omnibus mandatis suis licitis*, quod tunc, &c. *and that the said J. P. served the plaintiff lawfully from that day to such a day within the seven years, when the plaintiff discharged him of his service.* The *plaintiff said, that such a day, before the discharge, he commanded the said J. P. to keep such goods without alienation, and the said J. P. aliened them* to T. N. And the *defendant by protestation that he did not alien, for plea* saith, *that the plaintiff did not command J. P. to keep the goods*, and a good rejoinder per tot. Cur. for the defendant was not servant to the plaintiff, and also he is bound that J. P. *shall do all the commandments specially*; and therefore this is the very point of the condition; but *contra* if he was bound, *that J. P. should be a good and lawful servant*; and where a man is bound to serve in all commandments, there he is not bound to serve if he be not commanded. Br. Conditions, pl. 152. cites 10 E. 4. 15.

12. If one be bound *to repair such a house*, it is not sufficient to say that he has repaired it, but he *ought to shew in hoc vel in illo*. Arg. 2. Le. 39, 40. cites 7 E. 4.

13. If a man be bound upon condition, *that the plaintiff shall have licence of one J. N. to carry* 20 *load of wood out of his wood*, it suffices for the defendant to *plead that J. N. at his request licensed the plaintiff*, &c. *without saying that the plaintiff was not disturbed*; for he *is not bound to plead more than is in his condition*; for if there was disturbance it shall be of the part of the plaintiff by the best opinion, and so he did. *And* so it seems that where a *man* is *bound to licence*, he *cannot countermand it after*; contra if there was no bond. *And if a man be bound* as above *that the plaintiff shall have licence*, there if he be *disturbed by any*, the bond is forfeited. *But if* it *was that J. N. shall give him licence*, which he does, and *a stranger disturbs him*, there the bond is not forfeited; and so see a diversity between (*shall have* licence, and *shall give licence*). Br. Conditions, pl. 163. cites 18 E. 4. 18. 20. Br. Licence, pl. 13. cites S. C.

14. Where,

14. Where the defendant is bound *to ſuffer the plaintiff to enter, and to have all the fallows in D.* he ſhall ſhew how many fallows there were. Br. Conditions, pl. 177. cites 21 E. 4. 63.

15. *But* when he is *bound to repair all the houſes in D.* it ſuffices to ſay that he has repaired all the houſes. Ibid.

16. Where condition is *to do certain things*, the *defendant may ſhew the condition certainly, and ſays that he has performed all* the conditions *generally, and* if the *plaintiff* denies it, he *may ſhew in what point certainly he has broke* the condition, and from this the iſſue ſhall riſe; per Huſſey and Vaviſor, but Suliard contra, and that the defendant ought to plead certainly how he has performed the condition, and the plaintiff ſhall take iſſue thereupon at his peril, but the defendant ſhall not plead generally that he has per-
[331] formed the condition, but ſhall ſhew certainly how, and ſo is the uſe at this day. Br. Conditions, pl. 180. cites 22 E. 4. 14, 15.

17. *But* per Huſſey, if I am bound to J. N. *to ſave him harmleſs*, &c. *I may ſay generally that I have* ſaved him harmleſs, and good. *But if* I am bound *to acquit or diſcharge A. B. againſt J. S.* there he *ſhall ſhew certainly how* he has acquitted or diſcharged, and therefore it ſeems by him that non damnificatus eſt is a good plea. Ibid.

Br. Dette, pl. 172. cites S. C. 18. Debt upon *obligation of* 20 *l.* upon condition *to pay* 10 *l.* the *defendant ſaid that he paid* 5 *l. to the bailiff of the plaintiff by his command, and* [*as*] *to the* [*other*] 5 *l. he ſaid that he offered it to the plaintiff, and becauſe the plaintiff was indebted to the defendant in* 5 *l. he commanded him to retain it in ſatisfaction of it*, and it is a good plea, and this notwithſtanding that it was not by writing; for condition may be averred by parol to be performed, and e contra of ſingle obligation. Note a diverſity. Br. Conditions, pl. 181. cites 22 E. 4. 25.

19. Condition of an obligation *to ſhew a ſufficient diſcharge of an annuity*, you *muſt plead the certainty of the diſcharge* to the court; the reaſon whereof given by Brian and Choke is, that *the plea there contains* 2 *parts*, one a *trial per pais, viz. the writing of the diſcharge*, the other *by the court, viz. the ſufficiency and validity of it*, which the jury could not try; for they agree that if the condition had been to build a houſe agreeable to the eſtate of the obligee, becauſe it was a caſe all proper for the country to try, it might have been pleaded, and then it was a demurrer, nor an iſſue, as it is here. Hob. 107. per Hobart Ch. J. cites 22 E. 4. 40.

20. In debt upon an obligation conditioned that the defendant *ſhall repair and do other things, and alſo pay his rent every day of payment*. He pleaded performance of all conditions and payments generally. The court at firſt thought the plea good, but afterwards on ſeeing the books they thought he ought to plead performance ſpecially. Kelw. 95. b. pl. 3. Mich. 22 H. 7. cites Mich. 1 H. 7.

21. But where the condition *refers to ſuch a generality, that by intendment it is paſt the remembrance of man*, as if the under-ſheriff is bound to diſcharge his maſter from all accounts and returns of writs within the county, it ſuffices to plead performance of the condition generally. Per Cur. Kelw. 95. b. pl. 3. Mich. 22 H. 7. cites 1 H. 7.

22. Where

22. Where a man is *direct party to the performance of a condition*, he ought to plead ſpecially; *as* if it be *to infeoff the plaintiff of all his lands*; agreed. Kelw. 95. b. pl. 3. Mich. 22 H. 7. cites 1 H. 7.

23. Condition of obligation was, *that the obligor ſhall not enter nor claim ſuch a houſe*; and the *defendant ſaid that he did not enter nor claim.* Per Keble he claim'd, Priſt; per Brian he ought *to ſay that he came to the land, and claimed the land, and entered into it*, and yet *nothing of the entry ſhall be traverſed, but only the claim*; quod nota. Brook ſays, quære of this opinion; for there he alleged both points of the condition, &c. and alſo it ſeems that he ought *to ſay what year and day he claimed.* Br. Conditions, pl. 130. cites 4 H. 7. 13.

24. *In debt* if the *defendant pleads condition of the obligation indorſed, he ought to allege all performed*; but the *plaintiff ſhall ſhew one only broken*, upon which the iſſue ſhall be taken. Br. Conditions, pl. 131. cites 5 H. 7. 7.

25. *A. is bound to B. in* 50 *l. to make ſuch eſtate as the counſel of B. ſhould deviſe*; A. *pleaded that the counſel denied adviſement*, the *plaintiff ſhall not reply priſt, that they did, but ſhall ſhew ſpecially what deviſe his counſel made, and who made it*, and the *defendant ſhall rejoin that there was no ſuch deviſe*, prout, &c. Br. Replication, pl. 36. cites 6 H. 7. 4.

26. In debt, a man is bound in 100 l. *to make eſtate to J. S.* of land or tenements *to the yearly value of* 10 *l. by ſuch a day.* [The defendant pleaded] that *he infeoffed him of the manor of A. in the county of S. and of the manor of D. in the county of W. before the day, which are in value* 10 *l.* And per Brian he ought to *allege the particular value of each manor by itſelf*, by reaſon of the viſne; for otherwiſe, if he ſays that the manors are not of the value of 10 l. per ann. it ſhall not be tried by both counties; and Townſend agreed; by which he ſaid accordingly. And the plaintiff *ſaid that he made eſtate of the one manor before the day*, and good. Br. Conditions, pl. 244. cites 11 H. 7. 14. [332]

27. Debt upon obligation, the defendant ſaid that it is *indorſed* with condition, *that if he found J. S. ſufficient meat, drink, and apparel, till* 21 *years of age*, that then, &c. and he ſaid that he had found him ſufficient meat, drink, and apparel, during the time at D. and held a good plea, notwithſtanding that he *did not ſhew what meat drink and apparel* he found. Per Keble ſaid that he did not find ſufficient apparel during the time aforeſaid, and dared not take iſſue upon all the points for the doubleneſs, but *took iſſue upon the whole time*, and good; per Cur. quod nota. Br. Conditions, pl. 138. cites 12 H. 7. 14.

28. If the condition of an obligation be *to make to the obligee a lawful eſtate in certain land*, it is ſafe to plead that he was enfeoffed himſelf thereof, the which is a lawful eſtate, though ex rigore juris it is not neceſſary, becauſe it appears to be a lawful eſtate. Kelw. 95. b. pl. 2. Mich. 22 H. 7.

29. But if the condition be *to build a ſufficient houſe*, the defendant muſt ſay, that he has built ſuch a houſe, and conclude that the ſame is ſufficient. Kelw. 95. b. pl. 2. Mich. 22 H. 7.

30. In debt upon an obligation conditioned *to deliver all evidences concerning ſuch lands*, the defendant muſt plead that he has delivered ſuch and ſuch charters which are all the charters concerning the ſame land. Kelw. 95. b. pl. 2. Mich. 22 H. 7.

31. A ſcire facias iſſued upon a recognizance to perform covenants, whereof one was *to permit his tenants to have common in* the open fields of D. when they ſhould lie fallow; and another was, *that he would not* do, permit, or cauſe to be done, *any act to alter the courſe* of the fields in D. into any other plight than at this time was uſed; the *defendant ſaid that he had permitted, &c. and that he had not altered the courſe*, &c. The opinion of the juſtices was, that this general pleading was very good and ſo it was ruled; but Harper totis viribus e contra. D. 279. pl. 6. Mich. 10 and 11 Eliz. Anon.

S. C. cited by Ld. Ch. B. Gilbert, Gilb. Equ. Rep. 254. in the Exchequer in Ireland, and ſays that when the condition *conſiſts of matters to be done, that lie within his own knowledge*, there *though they conſiſt of great variety*, yet he cannot plead generally, but *muſt ſhew the particular performance of all matters in his plea.*

32. The condition of an obligation was, *that* the defendant, *bailiff of* the plaintiff's manor, *ſhould render an account* before ſuch a day *of all the rents of* the manor he has *received*; the defendant pleaded that before the ſaid day, he had accounted for all the rents which he had received, but becauſe he did not ſhew what he had received, it was adjudged to be ill. Cro. E. 749. in pl. 3. cites Hill. 37 Eliz. B. R. Sands v. Maleverer.

33. In debt upon an obligation conditioned *for the payment of 70 l. viz. 35 l. at one day, and 35 l. at another day*, the defendant *pleaded payment of the 70 l. ſecundum formam & effectum conditionis præd'* and the court held it well enough, for reddendo ſingula ſingulis, 'tis as if he had pleaded the ſeveral payments at the ſeveral days. Cro. E. 281. pl. 1. Trin. 33 Eliz. B. R. Fox v. Lee.

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Cro. E. 727. pl. 63. Mich. 41 and 42 Eliz. C. B. Lane v. Goldman, S. C. ſays the whole court held it a good iſſue and well triable; for the *condition* being *in the diſjunctive*, he may allege the one or the other at his election; and this power of ſpeaking, &c. ſhall be proved upon the evidence by ſuch as heard him recite it; but the moſt apt and proper iſſue had been, that he had a ſon *qui locutus fuit*, and ſo have tried a thing actually done.

34. In debt upon a *bond* on condition *to pay 20 l. within a month after the obligee had a ſon, that did or could ſpeak the Lord's Prayer in Engliſh, that he could be underſtood*; the plaintiff pleaded that he had a ſon, qui *loqui potuit* precationem domini ut intelligi potuerit; and the defendant demurred, becauſe it was pleaded he had a ſon qui loqui potuit, for that *is a ſecret ability* that cannot be known; Anderſon Ch. J. and Kingſmill, and Glanvill J. held the iſſue good; but Walmſley contra, that it is a ſecret thing and cannot be tried. Ow. 127. Lane v. Cotton.

35. The rule is *non ſunt longa quibus nihil eſt quod demere poſſis*, and therefore the length of the defendant's plea is unavoidable, where it is impoſſible to make it ſhorter; but *where it lies as well on the knowledge of the plaintiff as the defendant, there the unneceſſary prolixity is avoided*, if the defendant pleads generally according to the words of the condition, and it comes on the plaintiff's part to aſſign a breach. But *where there is no ſuch prolixity in the defendant's*

plea, there *he cannot depart from the rule by ſhewing a general performance, according to the words of the condition, but he muſt plead it eſpecially*, by ſhewing in certain how it is performed, or elſe does not plead a proper and ſubſtantive bar, according to the rule of law, by which he ſhould confeſs, and avoid the plaintiff's declaration; *as* if the condition be, *that the defendant pay the plaintiff all manner of coſts and charges that J. S. ſhall charge the plaintiff with for carrying on a ſuit*, the defendant *pleads he did pay all manner of coſts and charges*; this is ill becauſe it relates to one ſingle point, which may and *ought to be ſhewed in certain*, in order that the plaintiff may take iſſue on it. Gilb. Equ. Rep. 254. cites Lutw. 419. [Trin. 4 Jac. Parkes v. Middleton.]

36. Condition was *to pay the plaintiff* at his full age *all ſuch legacies and gifts, which were given him.* In debt upon this bond, the defendant *pleads that he has paid omnia talia legata qualia ad tale tempus generally* and *without ſhewing in particular*, and in certain *when, nor what*, and therefore it was objected that the plea is void for uncertainty. Williams J. held that he *ought to have ſhewed certainly in* his plea, *what he had paid and when, and alſo the time when he came to his full age* ſpecially in his plea, according to the condition of the obligation, and this the clear opinion of the whole court. Bulſt. 43, 44. Mich. 8 Jac. Stone v. Bliſſe.

37. If the condition of a bond be *to diſcharge a meſſuage of all incumbrances*, one may plead generally that he did diſcharge it of all incumbrances, *but* if it be *diſcharged of ſuch a leaſe*, then I muſt ſhew how. 1 Brownl. 32. Paſch. 10 Jac. Anon.

38. Debt on bond *for payment of children's portions tam cito as they ſhould come to the age of 21 years*; the defendant *pleaded that he had paid them tam cito as they came of age*; Doderidge J. ſaid that the time being uncertain, he ought to ſhew in his plea certainly when they came to the age of 21 years, and when he paid the money, and alſo ought to have ſhewed who made the will, and how he had performed the ſame, ſo as the ſame might appear judicially to the court; whether well performed or not, and judgment for the plaintiff. 2 Bulſt. 266, 267. Mich. 12 Jac. B. R. Haulſey v. Carpenter. Cro. J. 359. pl. 20 Haſley v. Carpenter, S. C. adjudged accordingly.

39. Condition was *that the obligee ſhould enjoy an eſtate according to a grant of letters patents*, he muſt not plead it hæc verba but he *muſt ſhew the effect of the letters patents, and the enjoying accordingly.* Per Hobart Ch. J. Hob. 295. Mich. 15 Jac. in caſe of Slade v. Drake.

40. Condition of the obligation was, that the obligor *ſhould ſurrender his copyhold land to the uſe of the obligee*, and he *pleaded that he had ſurrendered it*, and upon that plea, the plaintiff demurred, and it was adjudged, upon the opening of the caſe, by Warberton and Hutton, being only preſent in the court, that judgment ſhall be given for the plaintiff, for the plea in bar is not good, becauſe the defendant had *not ſhewed when the court of the lord was holden.* Win. 11. 19 Jac. Lewelling's caſe. [334]

41. If a man is bound *to give all the money in his purſe, or to inſcoff one of all his lands*, he cannot plead that he has given all the money

money or land, but he *ought to ſhew certainly what money or land he had, and that he had given it.* Lat. 16. Paſch. 2 Car. Wilkinſon's caſe.

42. Debt upon bond *to make ſatisfaction for all goods that an apprentice ſhall waſte*; in the replication the plaintiff aſſigned a breach, that the apprentice had waſted ſeveral goods, to the value of 100 l. Exception was taken, that the *replication did not ſhew what the goods were*; but the court held it well enough here in action on the bond, where damages are not to be recovered, but the penalty of the bond upon any breach, though otherwiſe in covenant, where the recompence is to be for damages; and judgment for the plaintiff. Lev. 94 Hill. 14 & 15 Car. 2. B. R. French v. Pierce.

But if the *condition* had been *to pay the moiety* of ſuch money as he ſhould receive *without ſaying (from time to time)* it ought to be pleaded ſpecially. Ibid.

43. Debt upon bond condition'd, *that the obligor ſhall pay from time to time the moiety of all ſuch money as he ſhall receive, and give account.* The defendant *pleaded, that he had paid a moiety.* Plaintiff demurr'd. The court held this a good plea without ſhewing the particular ſums, and this for avoiding ſtuffing the Rolls with multiplicity, and plaintiff cannot take any advantage but by replying, that the defendant had received ſuch a ſum, whereof he had not paid the moiety. Sid. 334. pl. 18. Paſch. 19 Car. 2. B. R. Church v. Brownwick.

The reporter ſays, quære diverſitatem.——2 Keb. 220. pl. 64. Church v. Brownbrick, S. C. held accordingly, per Cur. becauſe hereby is a certain iſſue, and the difference is where the thing lies only in the defendant's notice; as where it is to deliver all the money in my pocket, there I muſt plead ſpecially; but here others may take notice of it, and the plaintiff may reply, that the defendant received 20 l. and cited the caſe of Woodcock v. Cole, which Twiſden ſaid he never was ſatisfied with; and judgment for the defendant.

Sid. 340. pl. 4. Heyman v. Gerard, S. C. adjudg'd accordingly. ——Saund. 102. Hayman v. Gerard, S. C. the court ſeriatim delivered their opinions, that the replication was

44. Debt on bond condition'd *to give an account of all ſuch monies as ſhould come to his hands, and to pay them to the plaintiff.* The defendant *pleaded, that no money came to his hands.* The plaintiff *replied, that* 50 *l. came to his hands.* The court held the replication ill, becauſe it did *not ſet forth any breach that he refuſed to account*; for the plea is of matter within the condition, and therefore it is not ſufficient to anſwer it without aſſigning a breach; for perhaps he has paid it, and therefore *plaintiff ſhould have ſaid, that* 50 *l. came to his hands, and that he had not accounted or paid it*; and judgment per tot. Cur. ruled againſt the plaintiff. Lev. 226. Mich. 19 Car. 2. B. R. Hegman v. Gerard.

ill for not ſhewing a breach, and were ready to give judgment for the defendant, but at the inſtance of the plaintiff's counſel, the matter was referr'd to the 2 counſel, who determined it by their award, and ſo no judgment was enter'd.——S. C. cited and denied per Cur. and ſaid, that they of their own knowledge were ſatisfied that it was not law, nor taken to be ſo at the bar when the judgment in that caſe was given. Carth. 116. Paſch. 2 W. & M. in B. R. in caſe of Meredith v. Allen, which ſee infra, pl. 51.

Debt on a bond, after oyer crav'd of the condition, it appeared to be *for per-*

45. Debt upon an obligation *to do divers particular things in the condition mentioned.* The defendant *pleads performavit omnia*, &c. and upon demurrer held an ill plea; for the particulars being expreſſed in the condition, he ought to plead particularly to every one diſtinctly; *but* * where the condition is *to perform all covenants in an indenture*, there he may plead performavit omnia generally, if

ſo

ſo be they be all *in the affirmative*, without anſwering particularly to every particular. 1 Lev. 303. Mich. 22 Car. 2. B. R. Wimbleton v. Holdrip.

formance of covenants in a certain indenture made between the plaintiff and defendant. The defendant *pleads quod performavit omnia & ſingula* ex ejus parte, &c. and mentions none in particular, and held naught, for he ought to ſet them forth. 2 Show. 86. Hill. 31 & 32 Car. 2. B. R. Pawlet v. Savage.

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46. Debt upon bond condition'd, that *if a ſhip* going ſuch a voyage *ſhould return, the perils of the ſea excepted, then the defendant ſhould pay ſo much, but if ſhe be loſt, then to pay nothing.* The defendant pleaded, that the ſhip proceeded in the voyage, but in her return was loſt. Plaintiff demurr'd, becauſe it was *not ſaid that ſhe was loſt per pericula maris*, for it might be by his own negligence; but adjudged, that the plea being in the very words of the condition, it is good. 2 Lev. 7 Paſch. 23 Car. 2. B. R. Watton v. Waddington.

47. The condition of the bond was, that *if the plaintiff ſhall ſeal to the defendant a good and ſufficient conveyance*, in the law, *of his lands in Jamaica, with uſual covenants*, in ſuch manner *as by the defendant's counſel ſhall be adviſed, then if the defendant ſhould thereupon pay unto the plaintiff ſuch a ſum* of money, &c. *the condition ſhould be void.* In debt brought upon this bond, the defendant (after oyer of the condition) *pleads, that Mr. Wade, a counſellor at law, did adviſe a deed of bargain and ſale* from the plaintiff to the defendant, *with the uſual covenants, of all his lands in Jamaica, and tendered the conveyance to the plaintiff, who refuſed to ſeal* the ſame, and ſo would diſcharge himſelf of the condition, the money being not to be paid unleſs the aſſurance was made. The plaintiff *demurr'd*, 1ſt, *Becauſe* the defendant has *not ſhewed the conveyance*, and an affirmative plea ought to be particular, and not ſo general as this. 2dly, *The matter of the condition conſiſts both of law and fact; and both ought to be ſet out*; the preparing of the deed is matter of fact, and the reaſonableneſs and validity thereof is matter of law, and therefore they ought to be ſet forth *that the court may judge thereof.* 3dly, The plea is, *that the indenture had the uſual covenants, but does not ſet them forth*, and for that cauſe it is alſo too general. The whole court were of opinion, that this plea was good; for if the defendant had ſet forth the whole deed verbatim, yet becauſe the lands are in Jamaica, and the covenants are intended ſuch as are uſual there, the court cannot judge of them, but they muſt be tried by the jury. He has ſet forth, that the conveyance was by a deed of bargain and ſale, which is well enough, and ſo it had been if by grant, becauſe the lands lying in Jamaica paſs by grant, and no livery and ſeiſin is neceſſary; if any covenants were unreaſonable and not uſual, they are to be ſhewed on the other ſide; and ſo judgment was given for the defendant. 2 Mod. 239, 240. Trin. 29 Car. 2. C. B. Goſſe v. Elkin.

48. Debt upon *bond for payment of* 120 *l. on the 4th of January, according to agreement in writing.* The defendant *pleaded the agreement, which recited a controverſy concerning the probate of a nuncupative will of A. E. and that the plaintiff was her next of kin, and*

58. *So* is the reaſon of Specott's caſe, 5 Co. 57. *Schiſmaticus inveteratus* was not ſufficient being too general, ergo uncertain for the court to judge; *but* where the condition is *to do facts merely*, the record is not to be ſwelled up therewith, and if there be occaſion you may aſſign a breach, and cites 3 Bulſt. 31. and cites 1 Roll. Rep. 173. Arg. Holt's Rep. 207. in caſe of Annefly v. Cutter.

59. *So* if the condition be a *thing* which is *out of the juriſdiction* of the court, or is to undergo an aliud examen, there pleading in the words of the condition is good. Arg. Holt's Rep. 207. in S. C.

60. If a condition be *to ſave* one *harmleſs from all actions pending*, you may plead there are *no actions pending* being general; per Holt Ch. J. Holt's Rep. 203. pl. 10. Mich. 5 Annæ in caſe of Hackett v. Tilly.

61. *But* if the condition be to ſave you *from a certain action pending*, there you are *eſtopped* to ſay, that ſuch an action is not pending, being particular; per Holt Ch. J. Holt's Rep. 203. in S. C.

11 Mod. 145. S. C. but there the bond was likewiſe *to render an account*; defendant *pleaded that he had exhibited an inventory, but that he was never cited to account.*

62. In debt on bond *to exhibit an inventory* into the Eccleſiaſtical Court *before ſuch a day*, it is *not enough to plead that no court was held, but muſt plead alſo that he was there ready*, &c. For he muſt ſhew that he has done all that could be done on his ſide towards a performance. 1 Salk. 172. pl. 5. Mich. 6 Annæ, B. R. Canterbury (archbiſhop) v. Willis.

The court was clear, that the bar was naught, and that he was bound to account before the laſt day in the condition, without citation, at his peril.

[338] 63. Where the condition *refers to a multitude of particulars which may never be brought to iſſue by the parties*, there *it is ſufficient for the defendant to plead in general, and it lies on the plaintiff, by way of replication, to aſſign a breach*; becauſe for the defendant in his plea to deſcend to that variety of particulars, would overcharge the record to no purpoſe, and would tend to intangle the defendant who would fail if he miſtook in pleading any of them; whereas the plaintiff, by chuſing out of that variety that ſingular matter by which the condition is broken, brings it to one proper ſingle iſſue; and therefore in this caſe the modern lawyers have relaxed the ancient rules of pleading, which required the bar to be ſufficient and ſubſtantive, and in ſuch caſes have only required the defendant to follow the generality of the words of the condition, without deſcending to particulars. Gilb. Equ. Rep. 252. in caſe of Fitzpatrick v. Strong.

64. In *debt upon a bond*, the *defendant craves over of the condition* which *was, that if we the above bounden J. S. and P. S. or either of us*, any or either of our heirs, executors or adminiſtrators, *do well and truly pay to the above named L. F. his executors, adminiſtrators and aſſigns, all ſum or ſums of money which ſhall appear to be due* upon a fair account ſtated on account of rent, or arrears of rent, due *the firſt day of May laſt, at or before the firſt day of November*

November next enſuing the date hereof, *then the above obligation to be void.* The *defendants plead, that* on the firſt day of November then next enſuing the date of the obligation, viz. 4to die Nov. 1709, at Dublin, in the pariſh of St. Michael, in the ward of St. Michael, *they paid to the defendant all ſuch ſum and ſums of money which then appeared to be due* on a juſt account ſtated, on the account of rent, or arrears of rent, due *the firſt day of May in the year aforeſaid.* To this the plaintiff demurs, and ſhews for ſpecial cauſe, that the defendants had *not ſhewn any particular or certain ſum of money that they had paid* to the plaintiff, nor what was the value of the rent, or arrears of rent due the firſt of May. The defendants join in demurrer, & judicium pro quer. for there is no proper iſſue for the jury to try; and therefore ſaying, that at ſuch a time and ſuch a place he paid all ſums, is ſhewing nothing in certain on which the plaintiff can deſcend to iſſue; and therefore the obligation ſtands confeſſed, ſince the defendant does not ſhew to the court that it is properly avoided by the alleging the payment of any other ſum, than by the condition is to be paid in diſcharge of the obligation, and conſequently the plaintiff's declaration ſtands good, and judgment for the plaintiff. Gilb. Equ. Rep. caſes in the Exchequer in Ireland, 251. to 254, 255. Fitzpatrick v. Strong & al'.

(Z. d) Condition. Qualified. And relieved in Equity.

1. THE plaintiff leaſed to the defendant rendring 3l. a year rent, and to re-enter on default of payment in twenty days. *Bond by leſſor* that leſſee ſhall *quietly enjoy*, and for performance of covenants. Leſſee fails in payment of his rent. *Leſſor enters for non-payment.* Leſſee ſues the bond and gets judgment and recovers 21 l. at law. But this court ordered repayment. Chan. Rep. 95. 12 Car. 1. Pope v. Day. [339]

2. Lands were deviſed to the heir at law after the death of the deviſor's wife, but ſubject to *pay debts and legacies* within two months after the wife's deceaſe. The heir at law dies, and his heir at law (during the life of the wife) ſells the reverſion. The wife dies. The purchaſor pays debts and legacies, but *does not pay all.* The heir at law enters for the forfeiture; but the purchaſor was relieved againſt it. Chan. Rep. 161. 1649. Underwood v. Swain. Per Vaughan Ch. J. S. P. Mod. 311. in caſe of Fry v. Porter.

3. Covenant in a leaſe was, that *if leſſee ſhould, without licence, leaſe for more than three years, unleſs to his wife or children*, the leaſe ſhould be void. The executor aliened it without licence, but the alienee was relieved, it being *ſold for payment of debts.* Chan. Rep. 170. 1656. Cox v. Brown.

4. In caſe of a *bond for performance of covenants* the obligee ſhall have no more than he is really damnified, and ſhall recover in a trial at law. Chan. Rep. 199. 12 Car. 2. in caſe of Davenport v. Longville.

5. A ſet-

5. A settlement was with *proviſo*, that the heir at law ſhould *not attempt to impeach it*. There were ſeveral doubts and *ambiguities* in it. The court directed a trial at law, and that the trial ſhould be no forfeiture. 2 Chan. Rep. 75. 14 Car. 2. Sterling v. Levingſtone.

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6. When a man *takes a ſecurity by a penalty* he ſets up his reſt there, and makes himſelf judge of what he would have, and he ought to have no more. Arg. Chan. Caſes. 24. Trin. 15 Car. 2. in caſe of Criſp v. Blake.

Neſſ. Chan. Rep. 96. S. C. & S. P. held accordingly.—— S. P. inſiſted upon Arg. Chan. caſes, 310 Trin. 20 Car. 2.

7. Mortgagee by will remits part of the mortgage-money and all the intereſt, *if* the arrears are paid in three years. The mortgagee, *failing to pay within the time*, loſes the benefit of the requeſt; admitted by ſerjeant Fountaine. Chan. Caſes. 52. Paſch. 16 Car. 2. in caſe of Glover v. Portington.

——So of an *eſtate* not performed within the time limited, it was ſet aſide. Finch's Rep. 22. Mich. 25 Car. 2. Ewes and Reeve v. Blackwall.

8. Money payable according to the condition of a bond was moderated, in regard that the *office out of which* it was to iſſue was *taken away* for ſome part of the time; and decreed the obligor to pay for ſo many years only as the office continued, and thereupon the bond to be delivered up. Chan. Caſes. 72. Hill. 17 & 18 Car. 2. Lawrence v. Braſier.

9. A *leſs ſum*, due by ſpecialty, was *agreed to be accepted inſtead of a greater ſum due, if paid at ſuch a day certain*. The queſtion was, if the debtor fails of payment at the day, whether he ſhall loſe the benefit of ſuch agreement or not. It was order'd to be made a caſe; and the reporter ſays it is to be obſerved that part of the conſideration of the agreement was, that one who was not bound by any former ſecurity had paid the creditor 70l. and undertook to pay him 40l. more, and ſo the ſecurity was better'd. Chan. Caſes. 110, 111. Trin. 20 Car. 2. Delamere v. Smith.

See Tit. Marriage (K) pl. 4. Farmer v. Compton.

10. If condition be *to have conſent in writing*, and the conſent is had *without writing*, this court will help in that caſe. Arg. Chan. Caſes. 141. Mich. 21 Car. 2. in the caſe of Fry v. Porter.

11. Condition of a *recognizance* was qualified in equity according to the equity of the matter before the recognizance was given. Chan. Caſes. 191. Mich. 21 Car. 2. Holt v. Holt.

12. As where H. a citizen of London, ſeiſed and *poſſeſſed of ſeveral houſes in London and elſewhere, of a publick title, deviſed* 10,000 *l. to his daughters*, being *his only children and orphans, to be paid out of his real and perſonal eſtate before any other ſhould have benefit of his lands*, &c. and made A. his nephew and others his executors, and died in 1658. A. and others, as his ſureties, entred into a *recognizance to the chamberlain of London for payment thereof*. By the reſtoration the *houſes being of a publick title reverted to the right owners*, and *by the fire in London the other houſes were burnt down*, ſo that it was to be *doubted the whole eſtate would not amount to the* 10,000 *l.* and becauſe if the chamber of London had taken the eſtate into their own hands, it would have been in no better plight than now it is, and the intention of the ſecurity was only

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that

that the executors ſhould not miſemploy nor waſte the eſtate, which they had not done, lord keeper, aſſiſted by 4 judges, decreed that the recognizance ſhould be made uſe of no further than to make good the value of the teſtator's eſtate over and above the ſaid loſſes. Chan. Caſes. 190. Mich. 22 Car. 2. Holt v. Holt.

13. A. grants an *office to B. for* 6 *months*, and M. and N. by bond, reciting the ſaid grant, are obliged for his *faithful performance during all the time*; this extends no further than to the 6 months recited in the condition. 2 Saund. 411, 414. Paſch. 24 Car. 2. Lord Arlington v. Meyrick.

14. *Vendor* of lands *takes a leaſe* of them at ſuch a rent, with condition of *re-entry*, and gives *collateral ſecurity* for the payment of the rent. The rent is arrear. Vendee re-enters. Vendor can have no relief againſt the collateral ſecurity without payment of the arrears of the rent due before the re-entry as well as after the re-entry. The lands ſold were affirmed to be 250 l. per Ann. but were worth but 160l. Chan. Caſes. 261. Trin. 27 Car. 2. Anon.

15. 500 l. was *deviſed* to the plaintiff's wife, *if ſhe married with the conſent of certain truſtees, and in caſe ſhe did not, then* 20 *l. per ann. for her life*; ſhe married the plaintiff without the conſent of the truſtees, and he preferred his bill here for the 500 l. and it was argued on the behalf of the defendant, that this did differ from the common caſe of a deviſe upon condition in terrorem; for it has always been held that where there is a deviſe over to a 3d perſon for non-performance of the condition, there if the party marry without conſent, &c. all ſhall go to the 3d perſon, becauſe he hath a conditional intereſt by the will, and if there be no deviſe over, then it is eſteemed only in terrorem, and the party ſhall have the legacy notwithſtanding the breach of the condition; but here this is tantamount, or as ſtrong as a deviſe over, when the party himſelf ſaith, that if ſhe marrieth without conſent, ſhe ſhall have but 20 l. per ann. But to that it was anſwered by the lord chancellor, that *this differed not from the reaſon of the common caſe of a deviſe in terrorem*, and the reaſon he ſaid he had from my Ld. Ch. J. Hale, who (when it was objected in another caſe in this court, that this court will not make men's wills for them, and give their eſtates quite contrary to their intents) anſwered, that this court holds plea of legacies, and judges of them *by the rules of the civil law*, and by that law *any condition added to reſtrain marriage is void*; ſo that *where an intereſt doth not accrue to a 3d perſon by the breach of the condition*, ſuch a condition is void, and only *in terrorem*, and ſo the 500 l. was decreed to the plaintiff. But if it had appeared that any *ſurpriſe or bribes*, &c. had been uſed in obtaining a young maid to marry unſuitably, perhaps this court would order it otherwiſe. 2 Freem. Rep. 41, 42. pl. 45. Mich. 1678. Hicks v. Pendarvis. 2 Lev. 176. S. C. is a D. P. And ſo is Freem. Rep. 442. pl. 598.

16. *Bond to pay the final condemnation of the court of* Dover if judgment be in that court againſt the obligor, and he appeals properly, and the ſentence be *repealed*, the obligor ſhall be eaſed of the bond. Chan. Caſes. 306. Hill. 29 & 30 Car. 2. Stock v. Denew. Ibid. It is ſaid there in a nota that it is admitted at law and in equity.

17. A feme

17. A feme covert, having power by will to deviſe lands, deviſes them to her executors *to pay* 500*l.* out of them *to her ſon, provided, that if the ſon's father gives not a ſufficient releaſe of goods in ſuch a houſe to her executors, that then the deviſe of the* 500*l. ſhould be void, and go to the executors.* After her death a releaſe was tendred to *the father*, and he *refuſed*; *but on a bill* brought by the ſon againſt the executors and the father, the father *anſwered that he was now ready to releaſe*, tho' for ſome reaſons he had before refuſed; whereupon the lord chancellor decreed the payment of the 500*l.* and ſaid it was the ſtanding rule of the court, that a forfeiture ſhould not bind where a thing may be done after, or a compenſation made for it; as where the condition is to pay money, &c., and though it is generally binding where there is a deviſe over, yet in this caſe, the will ſaying that it ſhall go to the executors, it is no more than what the law implied. 2 Vent. 352. Paſch. 33 Car. 2. in chancery. Cage v. Ruſſel.

18. Where there is an *agreement to do a thing upon a penalty*, the penalty can never be demanded in equity, if the party performs that for the not doing whereof the ſecurity or penalty is given. Arg. 2. Chan. Caſes 88. Paſch. 34 Car. 2. in caſe of Hele v. Hele.

The reporter adds a quære, if he would at all relieve againſt the forfeiture, if A. had not made ſuch offer by his anſwer, ſo as he might be paid the 200*l.* Ibid.

19. M. poſſeſſed of a leaſe for years aſſigns it to D. on *condition not to alien without licence.* M. without licence mortgaged the leaſe, and then becomes a *bankrupt.* Aſſignee of the commiſſioners prays relief againſt the forfeiture; M. by anſwer waves the advantage, if the 200*l.* which was the conſideration of his aſſignment, may be repaid him. It was inſiſted that M. had taken bond of D. and alſo that M. had actually come in as a creditor before the commiſſioners, and paid his contribution money. But lord chancellor would not relieve againſt the forfeiture without payment of the 200*l.* 2 Chan. Caſes 127. Mich. 34 Car. 2. Davis v. Moreton.

20. The baron of leſſee, after his wife's death, *aſſigned two leaſes*, in conſideration whereof the *aſſignee gave bond of* 300*l. to pay the baron* 20*l. per ann. for life, and all the rent to the leſſor*; the aſſignee brought a bill to be relieved againſt this bond, for that the *leaſes were forfeited for non-payment of the rent. But* having *had the full benefit* of the leaſes, notwithſtanding the forfeiture, *he afterwards re-entring on payment of the arrears*, the court decreed the plaintiff to pay the defendant, the leſſee, all the arrears of the 20*l.* a year, and to continue the payment thereof as it grows due; but it being ſuggeſted in the bill that the wife, before her marriage with the defendant, had aſſigned the leaſes to truſtees for the uſe of her children by her former huſband, it was order'd that the defendant ſhould firſt give ſecurity to be approved by the maſter to indemnify the plaintiff againſt the ſaid children. Fin. Rep. 49. Hill. 25 Car. 2. Powell v. Morgan.

21. A. *deviſed* to C. his younger ſon, lands called S. *Proviſo if C. be hinder'd enjoying thoſe lands, he ſhall have his lands in B.* C.

is

is evicted of a moiety by a ſtranger, without the privity of the heir at law. The lands in B. are of much greater value than thoſe called S. Per North K. this is a condition that lies in *compenſation*, and decreed C. to have only a ſatisfaction pro tanto out of B. and decreed accordingly. Vern. Rep. 270. pl. 265. Mich. 1684. Tyle v. Tyle.

22. An *inſurance* was made to farmers of the duty on ſea-coal, to pay money if the duty ſhould determine before ſuch a time. The duty in ſtrictneſs might perhaps be ſaid to determine, yet the duty being enjoy'd by the inſured, or they having made ſome compoſition touching the ſame, and ſo *not damnified*, their plea that the duty determined before the time agreed on was over-ruled, and they ordered to anſwer. 2 Vern. Rep. 10. pl. 6. Mich. 1686. [342] Knightley, alias Robinſon v. Burdett.

32. A. the father makes a *voluntary ſettlement upon B. his eldeſt ſon in tail male*, remainder *to C. a ſecond ſon*, &c. in which is a *proviſo, that if B did not pay to C. 600 l. at his age of 21, then the eſtate of B. both in law and equity, ſhould ceaſe.* *A.* having afterwards married a 2d wife, *by deed taking notice of the former ſettlement, and that B. had not paid the money* according to the proviſo, *conveys the ſame lands to the uſe of his children by his laſt wife.* The plaintiff's bill was, to be relieved againſt the forfeiture for non-payment at the preciſe day; but in regard the conveyance was purely voluntary, and the father might have put what conditions or reſtrictions upon his ſon he thought fit, and the proviſo being ſpecial, that for non-payment at the day the ſon's eſtate both in law and equity ſhould ceaſe, the court refuſed to relieve the plaintiff, and diſmiſſed the bill; and the rather for that the plaintiff had ſet up a releaſe againſt his father, which was obtained by ſurpriſe; and the deed in law was defective, and amounted only to a declaration of truſt. Vern. 456, 457. pl. 431. Paſch. 1687. Longdale v. Longdale.

33. A legacy was given on condition, that *legatee ſhan't diſpute or interrupt her will*; the legatee conteſts the validity of the will. Per Cur. There was *probabilis cauſa litigandi* and 'twas not a forfeiture of the legacy. Per maſter of the rolls. 2 Vern. 91. pl. 86. Mich. 1688. Powell v. Morgan. Fin. R. 49. Powell v. Morgan is not S. C.

34. A. having 5 daughters and ſeiſs'd of land in fee of 10,000 l. value, ſettles it ſo that in caſe his eldeſt daughter ſhould *within 6 months after his deceaſe pay 6000 l. among his other 4 daughters, then the eldeſt to have the land*; no payment was made in the 6 months, but within that time application was made by her to the truſtees to join in a mortgage or ſale to raiſe the money, but that not taking effect ſhe brought her bill and aſſigned her intereſt to the plaintiff. In caſe of default by the eldeſt daughter the land was *deviſed over on the like condition.* Per commiſſioners; this being a power coupled with an intereſt is relievable, and the court may enlarge the time, and hath uſually done it even in caſe of a *condition precedent.* 2 Vern. 166. pl. 153. Trin. 1690. and ibid. 222. pl. 202. Paſch. 1691. Woodman v. Blake.

35. When

A. *deviſed to his ſon, paying his daughter 500 l. and in default thereof to the ſaid daughter, and her heirs.*

35. When the perſon, that is to receive benefit, by practice, or *contrivance prevents the performance* of a condition, equity will relieve. Admitted per lord Somers. 2 Vern. R. 344. Hill. 1697. in caſe of Carie v. Bertie.

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The ſon deviſed it to his mother for life, and afterwards to an infant and his heirs. The mother and daughter combine together, and the mother refuſed to pay the 500 l. by which means the eſtate would be forfeited to the daughter, and the infant defeated. Decreed that the mother pay one third part of the 500 l. and that if ſhe refuſe, then the infant paying the whole, ſhall have it to him and his heirs againſt them both. But if the mother pays one third, then ſhe to enjoy for her life. Fin. Rep. 231. Trin. 27 Car. 2. Hayes v. Hayes.

36. A. *deviſed land to J. S. paying to A's daughter* (who is heir at law to A.) 1000 *l.* J. S. makes default. The daughter recovers in *ejectment*. The heir of J. S. had relief on payment of principal and intereſt, though in favour of a voluntary deviſee, and to the *diſheriſon of the heir*. 2 Vern. 366. pl. 328. Mich. 1699. Barnardiſton v. Fane.

37. 400 *l.* was *left in a purchaſor's hands* for 2 years without intereſt, and *if the wife* of A. the vendor *releaſed dower in that time*, then B. the vendee was *to pay* the 400 l. *elſe to retain it abſolutely*. A. died, his widow did not releaſe within the 2 years, but brought her writ of dower though ſhe died before the recovery of it. But 'twas inſiſted that this was not in the nature of a penalty, but the
[343] terms of an agreement, and the *meaſure of the ſatisfaction* for the contingent incumbrance of dower, and the court would not have relieved had ſhe *releaſed after* 2 *years*, and decreed accordingly by lord Sommers. Ch. Prec. 102. Mich. 1699. Small v. lord Fitzwilliams.

2 Vern. 594. pl. 533. S. C.—— * Where the party might be put in as good a plight as if the condition itſelf had been literally performed

38. Lands were *deviſed to J. S. paying the heir* 20,000 *l.* within 20 years, at 1000 l. per ann. The heir entered for non-payment as for a forfeiture, and though it was urged that chancery ought not to aid in diſheriſon of an heir, yet lord C. Cowper chancellor ſaid, that the entry of the heir in this caſe was only to enforce the payment of the money. As where a mortgagee enters the court can give him intereſt from the time it became payable, and * where ever the court can give ſatisfaction or *compenſation* for a breach of condition they can relieve. 1 Salk. 156. pl. 7. in chancery 1707. Grimſton v. lord Bruce and Ux'.

chancery will relieve, though the letter was not ſtrictly performed as payment of money, &c. But where the condition was *collateral and no recompence* or value *could be put on the breach* of it, there no relief could be had for the breach of it. Arg. by Sir Robert Raymond ac-counſel. Ch. Prec. 487. ſaid 'twas laid down as a rule per lord Somers and cites 3 Ch. caſes [135] Bertie v. Falkland.—— S. P. and C. 12 Mod. 184 per lord Somers.

39. Bill to be relieved againſt the condition of a *bottomree bond*, &c. it being *not performed in ſome ſmall circumſtances*, but denied per Cowper C. it being a *voluntary undertaking of the obligor, and no contract* or conſideration that might incline the court to interpoſe. Mich. 3 Geo. Canc. Anon.

40. *Leaſe* for life or years *on condition of re-entry* for a forfeiture, or that the leaſe ſhould be void if leſſee aliens or *aſſigns without licence*. In caſe of forfeiture, chancery will not relieve becauſe

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'tis unknown what ſhall be the meaſure of the damages, for that is only where there can be a *compenſation* in damages. 9 Mod. 112. Mich. 11 Geo. Waſer v. Macato.

41. J. S. charged his real eſtate with 500 l. to be paid his ſiſter Alice Herne, within one month after her marriage, but ſo never-theleſs as ſhe married with the approbation of his brother Joſeph Herne (if living) and in caſe ſhe married without his conſent, the 500 l. was not to be raiſed. Alice Herne married in the life-time of Joſeph Herne, and without his conſent, and the queſtion was, whether ſhe was entitled to the 500 l. or not; for here it was ſaid that this was a condition only *in terrorem*, and that the conſtruction of ſuch conditions has always been, that where there is no deviſe over ſuch condition is void, otherwiſe were limited over, and here it is not.

E contra it was argued that this is a condition precedent, and nothing ariſes or becomes due but upon the marrying with conſent, and that this being a deviſe of money out of land, or of a charge upon the land, it is to be conſidered as a deviſe of land, &c. and governed by the ſame rules, and then being a plain condition precedent nothing does ariſe, &c. and for this was cited the caſes of Fry v. Porter. Berlie and Faulkland, &c.

The maſter of the rolls ſaid, that the civil law makes no diſtinction in *perſonal* legacies, between conditions precedent and ſubſequent, neither does this court as to meer perſonal legacies given upon condition of marrying, &c. with conſent, &c. But *this court differs from the civil law in this, that* whereas *by that law all conditions in reſtraint of marriage are void, but this court ſays they are not void where the legacy is given over and another perſon particularly ſubſtituted by the teſtator to have the benefit of it in caſe the condition be not complied with*, but this *muſt be a ſpecial nomination as a legatee*, and therefore *a reſiduary legatee or executor ſhould not have the benefit of ſuch non-performance*, and remembered a caſe to this purpoſe, that where a legacy given upon ſuch condition of marrying with conſent, and if not *that it ſhould ſink into the reſidue of teſtator's eſtate which he gave to J. S. &c.* It was held that though the marriage was without the conſent, yet the legacy was not loſt becauſe it would have been the ſame if teſtator had ſaid nothing about its ſinking into the reſiduum, and therefore was conſtrued only in terrorem. *So* it is *in the caſe of a truſt of a term limited of lands for raiſing portions with ſuch reſtriction*, this court governing itſelf by the ſame rules as in caſe of a deviſe of a legacy with ſuch condition, becauſe though the term be a legal eſtate and intereſt, yet the *truſt of the term is a creature of equity only*, &c. [344]

But it is otherwiſe *in caſe of a deviſe of lands*, there *conditions precedent, and ſubſequent take place*, &c. and this was Fry and Porter's caſe of an infant bound by condition, relating to her marriage being a condition precedent, and held that the preſent caſe being *a charge upon land is to be governed by the ſame rule, and is to be conſidered as land*, the will muſt be atteſted in the ſame manner, &c. and this being plainly a condition precedent, and nothing veſted (as is in caſe of a truſt term where the term is veſted and the truſt only left

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open) it is too hard for this court to charge the land contrary to the expreſs will of the teſtator, and to ſay the money ſhould be raiſed when the teſtator has ſaid it ſhall not, &c. and held that a charge on the land can't ariſe, &c. otherwiſe than as a deviſe of the land itſelf, wherefore the bill was diſmiſſed as to this point; for Alice the legatee were cited Saliſbury v. Bennet, 2 Vern. 1 Ch. Ca. 22. Bellaſis v. Ermin, and ibid. 58. Fleming v. Waldgrave. But as to this it was ſaid by Mr. Attorney General, and agreed by his honour, that the legacy there veſted immediately, it being given upon her not marrying without conſent, &c. and his honour remembered a like caſe in time of Wright S. C. where the condition being if ſhe did not marry with conſent, &c. and the legacy was decreed her immediately, and ſhe to enter into a recognizance to refund in caſe ſhe marryed without conſent, &c. Ms. Rep. Mich. 4 Geo. 2. Chanc. Reves v. Herne.

[*For more of Conditions in general, ſee* Accord, Actions of Aſſumpſit, Apportionment, Arbitrement, Covenant, Deviſe, Entry, Grants, Heir, Mortgage, Notice, Obligation, Pleadings, Policy of Inſurance, Rent, Reſervation, Tender, Tout Temps Priſt, *and other proper titles.*

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Confeſſion.

(A) What ſhall amount to it Actions of which Advantage ſhall be taken. And in what Caſes, and how the Confeſſion muſt be, or may be.

1. IN *waſt.* Per Marten, if the *defendant confeſſes waſt in his proteſtation and pleads no waſte done*, the plaintiff ſhall have advantage of the confeſſion contained in the proteſtation quod non negatur. By which he pleaded no waſt done, and ouſted the proteſtation out of the plea. Br. Confeſſion, pl. 60. cites 11 H. 6. 1.

2. In *detinue of a cheſt of charters and of a charter ſpecial*, if the plaintiff will confeſs the action, he *ought to confeſs it as the plaintiff has counted.* Br. Confeſſion, pl. 56. cites 11 H. 6. 29. and Fitzh. Detinue, 11. [345]

3. If *iſſue is join'd*, and after the defendant or tenant *pleads releaſe of the plaintiff after the laſt continuance*, and he *ſays that not his deed after the laſt continuance*, or that he made it before and not after, this by ſome is a confeſſion of the deed. Br. Confeſſion, pl. 42. cites 21 H. 6. 9. Br. Traverſe per &c. pl. 366. cites S. C. — In *treſpaſs*, the defendant pleaded *not guilty* and *ſo to iſſue, and day given till another term*, and meſne between theſe the *plaintiff releaſed to the defendant*, &c. and *at the day other continuance was taken, at which day the defendant ſaid that the plaintiff by the deed bearing date before the laſt continuance, and primo deliberat' to him after the laſt continuance releaſed to him*, &c. and the *plaintiff ſaid that the delivery was when it bore date* abſque hoc *that it was delivered after the laſt continuance*, and per tot Cur. the plaintiff ſhall be barr'd by confeſſion of the releaſe after the action brought and after the treſpaſs done, but per Cur. the *plaintiff might have ſaid that he did not deliver the deed after the laſt continuance without ſaying more.* Br. Negativa, &c. pl. 43. cites 16 E. 4. 5.

4. The *defendant juſtified that the beaſts eſcaped* into the land of the plaintiff and ſpoiled his graſs, *and he freſhly re-took*, and no plea, but is a *confeſſion of the treſpaſs*, by which he *preſcribed in the eſcape.* Br. Treſpaſs, pl. 155. cites 22 H. 6. 36.

5. In debt the *defendant pleaded releaſe*, and at the day of Ven. fac. *made default*, the plaintiff prayed judgment upon the obligation, and by the opinion of the court he ſhall have it; for this is a confeſſion of the obligation as he had *pleaded acquittance.* Br. judgment, pl. 79. cites 5 E. 4. 7.

6. In *treſpaſs the defendant juſtified the taking by licence of the plaintiff to detain in pledge for* 1*cl.* which the plaintiff owed him, and the *defendant demurred*; by this the debt is confeſſed. Br. Confeſſion, pl. 65. cites 5 H. 7. 1.

7. *Contra* it ſeems, *if he had taken the debts by proteſtation and demurred upon the bar.* Ibid.

Br. Eſtoppel, pl. 152. cites 5 H. 7. 23. S. P. [and ſo are all the editions, but it ſeems miſprinted for 5 H. 7. 2. 3. pl. 4.] Nota per Brian, if a man pleads

8. In *formedon*, per omnes except Huſſey, if the *tenant pleads warranty with aſſets, which is found for the demandant upon traverſe of the aſſets*, by this the demandant has confeſſed the warranty, and ſhall not ſay not his deed after, for he cannot deny the aſſets without confeſſing the warranty as it is ſaid there in a nota; but Brooke ſays it ſeems to him, that in this caſe the demandant may ſay *pro teſtando, that the deed is not the deed of his anceſtor, and pro placito nothing by deſcent*; and if this plea be found for him he ſhall plead non eſt factum after. Br. Confeſſion, pl. 62. cites 5 H. 7. 2. 3.

eins paſſa by the debt, he cannot give in evidence, that non eſt factum; becauſe by the pleading that deed is confeſſed; quod nota & quære. Br. General Iſſue, &c. pl. 79. cites 9 H. 7. 3.

9. *Not guilty is no confeſſion* of the tenure; *contra of* pleading *riens arrear.* Br. Verdict, pl. 56. cites 9 H. 7. 3.

Brownl. 89. S. C.

10. Debt upon an *obligation to perform an arbitrement*, the defendant pleads the plaintiff's *releaſe*; iſſue is joined upon it, and found with the plaintiff. He has judgment. Affirmed in error; although the plaintiff did not alledge any part of the arbitrement and a breach of it in the defendant. The law requires that when it is pleaded, that no arbitrement was made, not where the arbitrement and breach of it are confeſſed, as in this caſe is impliedly done. Jenk. 280. pl. 4. cites Mich. 3 Jac. Jeffery v. Grey.

Brownl. 89. S. C.

11. *So* of a bond *for performance of covenants*, and the defendant pleads a releaſe, and iſſue is joined upon it; *for the plaintiff is forced* by the defendants plea *to anſwer to the releaſe*, and has no occaſion to ſhew any breach of covenant for the reaſon aforeſaid. Jenk. 280. pl. 4. cites Mich. 3 Jac. Jeffery v. Grey.

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12. *So* in an *aſſiſe*, where the tenant pleads a releaſe, the diſſeiſin is impliedly confeſſed. This is the reaſon that where not guilty is pleaded in treſpaſs, a releaſe cannot be given in evidence; for ſuch evidence and the defendant's plea are contrary. A releaſe *implies a confeſſion* of the treſpaſs, *and a diſcharge* of it by the releaſe. Jenk. 280. pl. 4.

13. There is a great *difference* between a *direct confeſſion* of the party *by a bene & verum*, &c. *and a nient dedire, or a demurrer*; that is, between a *direct confeſſion of the party againſt himſelf*, and an admittance *by implication, or a verdict finding it*, or the like; as in 2 H. 7. 16. if a man bring an action of *treſpaſs againſt A. quod ipſe ſimul cum B. & C. did the treſpaſs, and does not ſue them all*, his writ ſhall abate; and if he bring his action againſt A. and he plead the treſpaſs done by him, and B. and that the plaintiff releaſed to B. and the plaintiff traverſes the releaſe, yet his actions ſhall not abate; So 9 H. 7. 3. if a man avow for two rents, and the one of his own ſhewing appears not due, the whole avowry is vicious; otherwiſe if it were ſo found by verdict; Per Hobart Ch. J. Hob. 164. Mich. 10 Jac. in caſe of Colt and Glover v. Coventry and Litchfield (Biſhop of.)

14. Proof

14. Proof upon the condition of an *obligation of an apprentice* by confeſſion or otherwiſe, *touching the embezling his maſter's goods*; a voluntary confeſſion is good. Jenk. 300. pl. 63. Hob. 91. pl. 126. Gould v. Death, S. P. and ſeems to be S. C.

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15. If *in trover* and converſion, the defendant pleads a ſpecial plea he *muſt confeſs a converſion*; per Holt Ch. J. 2 Salk. 654. pl. 2. Mich. 10 W. 3. B. R. in caſe of Hartford v. Jones.

16. *Account againſt the defendants as bailiffs, &c. for* 132 *buſhels of wheat* to the value of 20l. the defendant *pleaded*, that *plene computavit, de præd.* 132 *buſhels*; the plaintiff *replied, that non computavit*, upon which they were at iſſue, and the plaintiff had a verdict and *judgment that the defendant computet*, and he appearing upon the capias ad computandum, there were *auditors aſſigned*, who afterwards *delivered in the account, (viz.) that the defendant had confeſſed to them the receiving* 120 *buſhels of light wheat ad merchandizandum; but that he, at the requeſt of the plaintiff, had mingled ten buſhels with it to make it fit for ſale, and craved allowance* of it, and of ſeveral other particulars in Engliſh; and upon demurrer the plaintiff had judgment to recover for the 132 buſhels of wheat, for which he had declared, and not ad valorem; becauſe by this plea of plene computavit, the defendant confeſſed he had received 132 buſhels, but that he had fully accounted for ſo much, when before the auditors he had only accounted for 120 Buſhels, which muſt be an imperfect account, and that is the ſame thing as if he had refuſed to account; and the reporter adds a nota, that in ſuch caſes, if the judgment had been quod recuperet ad valorem, it had been wrong. Lutw. 58. 63. Mich. 11 W. 3. Pierce v. Clerke.

(B) By Attorney or Baily, in what Caſes.

1. IN *aſſiſe* the *bailiff of the tenant* cannot confeſs the diſſeiſin. Br. Confeſſion, pl. 47. cites 22 Aſſ. 45.

Fitzh. Attorney, pl. 45. cites S. C.——Br. Attorney, pl. 29. cites S. C. accordingly, but ſays, quod mirum!

2. In *treſpaſs* the *defendant alledged, that the plaintiff was his villein*, and becauſe the *plaintiff's attorney could not deny it*, the court awarded that the plaintiff take nothing by his writ. The reporter ſays, that when this conuſance of villeinage was received by attorney, all the juſtices* of the one bench and the other were preſent; quod mirum! ideo quære &c. Hill. 44 E. 3. fol. 2. b. pl. 9. Chateway v. the biſhop of Wincheſter.

——Fitzh. Villeinage, pl. 40. cites Hill. 13 H. 4. S. P.——Keilw. 135. a. b. pl. 118. S. P. and cites S. C.——Jenk. 52. pl. 100. cites S. C. But ſays that the attorney has his warrant ad perdendum & lucrandum; and though this reſolution was in the preſence of the judges of both benches, yet it was not their reſolution; for the power of an attorney relates to the matter in demand, as appears by his warrant; but that if a *nativo habendo* be brought, ſuch a confeſſion may be received.——Jenk. 283. pl. 12. S. P. as to villeinage; for it is a final bar, as a retraxit, which requires a perſonal acknowledgement.

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3. In *debt*, if a man is condemned, the *attorney of the plaintiff cannot confeſs the gree* [ſatisfaction] *of his maſter after the year*; for after the year his warrant is expired as to confeſſing gree [ſatisfaction,] and he ought to have a new warrant. Br. Satisfaction, pl. 39. H. 6. 49.

(C) The Force and Effect of a Confeſſion, and where it is contrary to a Verdict.

Br. Confeſſion, pl. 48. cites S. C. accordingly, but that it would be contra if it had come by verdict; note the diverſity.

1. TReſpaſs *done anno* 17 The *defendant pleaded a releaſe of all actions anno the* 16 *and to any treſpaſs after, not guilty*; the *plaintiff ſaid, that the releaſe was by dureſs* and ill; for by this he *confeſſes* that it was done anno the 16 and ſo his action falſe, and ſo of his confeſſion it *ſhall abate*. Br. Treſpaſs, pl. 243. cites 22 Aſſ. 86.

2. In *aſſiſe the tenant pleaded in bar, and confeſſed an ouſter*; the *plaintiff made title, and found for him, and that he was neither ſeiſed or diſſeiſed*, and yet the plaintiff recovered. The reaſon ſeems to be, in as much as the defendant has confeſſed an ouſter, which proves that they were ſeiſed and diſſeiſed, when the title is found for them; For confeſſion is ſtronger than verdict. Br. Confeſſion, pl. 49. cites 44 Aſſ. 6.

Br. Verdict, pl. 3. cites S. C.—Br. Non eſt factum, pl. 4. cites S. C.—Jenk. 312. pl. 99. cites S. C.

3. In debt it was agreed, that if *a man makes an obligation*, and *delivers it as a deed to a third perſon, to the intent that when the obligee has delivered to him an indenture*, &c. *then to deliver it to the obligee*, and the *obligee gets it before the indenture delivered*, and ſo non eſt factum, and upon the iſſue thereof it is *found that it is not his deed*, yet the plaintiff ſhall recover, becauſe he has confeſſed in pleading

pleading that it is his deed; for he has confeſſed delivery as a deed. Br. Confeſſion, pl. 38. cites 9 H. 6. 37.

4. But *otherwiſe* it is as if he had *ſaid, that he had delivered it in as an eſcrole upon condition* as above, *and after this performed to deliver it to the obligee as his deed*; note the diverſity; confeſſion and verdict, and the one contrary to the other; the confeſſion ſhall bind, and the verdict ſhall be void. Ibid.

5. Where a *man brings a joint action, and in pleading* by replication or otherwiſe, *after ſeveral bars pleaded, he confeſſes that his action is ſeveral*, the writ ſhall abate; quære, where ſuch matter is found by verdict, there the plaintiff ſhall recover, and ſhall be amerced alſo; and ſo ſee that confeſſion is ſtronger than verdict. Br. Confeſſion, pl. 22. cites 36 H. 6. 30. Br. Frief, pl. 245. cites 36 H. 6. 27. S. C.

6. Where it is *confeſſed upon examination of the ſheriff, that he has returned a man outlawed contrary to a ſuperſedeas, and has returned the copies of the exigents, and not the writs themſelves*, there he ſhall be amerced, and there needs no indictment thereof againſt the ſheriff to bring him to anſwer, and this by reaſon of his confeſſion; quod nota. Br. Confeſſion, pl. 32. cites 5 E. 4. 5. per Markham and other juſtices. [348]

7. Confeſſio facta in judicio *omne probatione major eſt.* Jenk. 102. pl. 99.

8. At *common law*, where the defendant or tenant confeſſed the action, he *might have a writ of error notwithſtanding*; for the record conſiſts of ſeveral things. Upon an indictment of felony, and a confeſſion upon it, a writ of error lies if the error be apparent; but the error ought to be allowed by the court before the writ of error be allowed. Jenk. 134. pl. 73.

(D) Judgment. In what Caſes Judgment ſhall be given upon the Confeſſion; and at what Time.

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1. IN aſſiſe it was ſaid for law, that if a *thing be confeſſed in pleading*, and the *verdict found contrary*, yet judgment ſhall be upon the confeſſion, &c. Br. Confeſſion, pl. 29. cites 28 Aſſ. 17.

2. *But if* a thing be confeſſed in pleading, and *after the iſſue is taken in aſſiſe in point of the aſſiſe, or in another action the general iſſue is taken, ſo that the other matter is expulſed from the pleading, or is not entered*, there the confeſſion is waived, and the verdict only ſhall take effect. Ibid.

3. In aſſiſe the *tenant pleaded in bar and confeſſed an oufter*; the *plaintiff made title, which* title *was found, and that the plaintiff was not ſeiſed*, yet the plaintiff recovered by reaſon of the confeſſion of the ouſter before, for he cannot be ouſted if he was not ſeiſed; for the countance ſhall take effect though the contrary be found by verdict. Br. Confeſſion, pl. 27. cites 28 Aſſ. 34.

Br. Replender, pl. 36, cites S. C.

4. Where it is *confeſſed by implication in pleading, that the defendant in treſpaſs vi & armis is a lord*, there, though the defendant pleads to iſſue, and the verdict paſſes for the plaintiff, he ſhall not recover, becauſe it appears by the pleading that the action does not lie vi & armis againſt the lord. Br. Confeſſion, pl. 34. cites 10 E. 4. 7.

5. *In præcipe* quod reddat *againſt four, three confeſſed the action, and the fourth ſaid, that he held jointly with the two, abſque hoc that the third any thing had*; judgment ſhall not be given upon the confeſſion till the iſſue be tried; for this goes to the whole writ; quod nota. Br. Confeſſion, pl. 1. cites 27 H. 8. 30.

Brownl. 198. Glaſsbrook v. Linſey, S. C. ſays the plaintiff denied to receive the confeſſion, he having taken out his venire, and that thoſe errors which had eſcaped in the proceedings by that confeſſion, were not holden as they are after trial. The matter was much controverted by the court, and they were of ſeveral opinions, but becauſe the plaintiff always prays for the confeſſion, it ſeems he might refuſe it; and afterwards it was *adjudg'd that it ſhould not be received, it appearing* to the court *to be only a practice to leſſen the plaintiff's damages.* ——Noy 31. Liveſay v. Glaſsbrook, S. C. ruled accordingly.

6. In *aſſault and battery* the defendant *pleaded not guilty*, which was entered, and now he would confeſs the action, which the plaintiff was unwilling to accept, becauſe the defendant had ſome influence over the ſheriff before whom the inquiry of damages ſhould be. The prothonotaries all ſaid, they had never known a *confeſſion* refuſed if *offered before the niſi prius ſealed*; but however, the court in their diſcretion refuſed it, as well becauſe the wounding was grievous as to avoid error. Hob. 220. pl. 292. Paſch. 16 Jac. Claſebrooke v. Liveſay.

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7. In *debt for an eſcape* of one in execution, the defendant pleaded nil debet, and *after iſſue joined* thereupon, the *defendant offered to confeſs the action with relicta verificatione*, and upon motion the court reſolved that he cannot do it without the conſent of the plaintiff, becauſe many defects are aided by a verdict. 2 Jo. 156. Trin. 33 Car. 2. B. R. Cooling (the marſhal's) caſe.

8. *Treſpaſs*

8. *Treſpaſs for taking his cattle in A.* defendant *juſtified a taking in B. by proceſs with an impoſſible teſte* virtute cujus he took them and traverſed the taking in A. Upon this traverſe iſſue was joined, and found for the plaintiff, and damages aſſeſſed. It *was objected*, in arreſt of judgment, *that this iſſue was immaterial; for it is all one where the defendant took them ſince he took them without warrant*, the proceſs being void, quod fuit conceſſum. It was moved then for a re-pleader, and per Holt Ch. J. a *re-pleader cannot be where there is a treſpaſs confeſſed*, and the verdict was ſet aſide, and a writ of inquiry, becauſe the iſſue being immaterial, the jury had no power to inquire of damages, and judgment was entered for the plaintiff on the confeſſion, and not upon the verdict, 1 Salk. 173. pl. 1. Trin. 8 W. 2. B. R. Jones v. Bodinham.

9. Judgment was confeſſed in *ejectment, after not guilty pleaded.* Ld. Raym. Rep. 345. Trin. 10 W. 3. Anon.

10. Where the defendant *pleads an ill plea, but the matter, if well pleaded, might have amounted to a good bar or juſtification*, judgment can never be given againſt the defendant, as by confeſſion; *but where* the matter, *though never ſo well pleaded, could ſignify nothing*, judgment may in ſuch caſe be given, as by confeſſion; as if in caſe for calling him thief the defendant ſhould juſtify, for that he received a thief. Per Holt Ch. J. 1 Salk. 173. pl. 2. Trin. 2 Ann. B. R. Staple v. Haydon.

11. 4 *Ann. cap.* 17. *ſ.* 2. *All the ſtatute of jeofails ſhall be extended to judgment entred upon confeſſion, nihil dicit, or non ſum informatus, in any court of record; and no ſuch judgment ſhall be reverſed, nor any judgment upon any writ of inquiry of damages executed thereon be ſtayed or reverſed for any thing which would have been aided by the ſtatutes of jeofails in caſe a verdict had been given in the action, ſo as there be an original writ or bill, and warrants of attorney duly filed.*

(E) Of one, in what Caſes it ſhall bind another. Succeſſor, &c.

1. IN error, Shard ſaid that he ſaw in the eyre of Northampton, that *an abbot confeſſed a deed*, and by this *his ſucceſſor was charged for ever*. Br. Confeſſion, pl. 29. cites 34 Aſſ. 7.

2. *And* per Wich. if *an abbot* or prior be *brought into court by proceſs* of law *in præcipe quod reddat, and he* comes and *confeſſes the action*, this *ſhall bind the ſucceſſor, not by reaſon of the confeſſion only, but becauſe he, by this, is to execute the demand of the action, and* the *ſucceſſor may have writ of right*. Ibid.

If an abbot confeſſes the action in writ of annuity, his ſucceſſor ſhall be bound for ever; quod nota; and *no falſifying ſhall ſerve*; per Cur. Br. Confeſſion, pl. 2. cites 9 H. 6. 2, 3.

3. *Contra* of ſuch confeſſion *in writ of annuity*; for this goes to the perſon, and there does not lie writ of right, and therefore there the confeſſion ſhall not bind the ſucceſſor. But as to this point they were in doubt, and ſo as to this they adjourned. Br. Confeſſion, pl. 29. cites 34 Aſſ. 7.

[350] 4. *So* it is *of warranty confeſſed upon voucher, where an abbot comes by proceſs*, and if he there confeſſes the deed to be the deed of the warranty of the abbot or convent, which is not ſo, yet the ſucceſſion is bound by this confeſſion. Br. Confeſſion, pl. 29. cites 34 Aſſ. 7.

5. *But* confeſſion of the *baron, or of the tenant in tail*, ſhall not bind the feme, or iſſue in tail; For per Finch. the iſſue is in a manner purchaſor, and they were adjourn'd in *doubt* of the caſe *of the annuity*. Ibid.

Br. Error, pl. 129. cites S. C.

6. The confeſſion of an *abbot*, who comes and *confeſſes before the juſtices, without original pending, and without day in court*, and proceſs of the law ſhall not bind the ſucceſſor; contra where he comes by proceſs and confeſſes. Br. Confeſſion, pl. 30. cites 37 Aſſ. 17.

7. *Dower againſt three*, the *one diſclaim'd in the tenancy*, and *another was ready to render dower*, and *the third made default* and the *render was not accepted becauſe the one made default*; for it may be that he may come and take the entire tenancy, by which grand cape was awarded againſt him who made default. Br. Confeſſion, pl. 10. cites 2 H. 4. 14.

8. If *debt* be brought *againſt two as executors*, where the *one is not executor, nor ever adminiſtred*, and the *executor makes default*, and the *other confeſſes the action*, the executor has no remedy but action of deceit againſt him who confeſſed; for he is party to the judgment; per Littleton. Br. Confeſſion, pl. 43. cites 9 E. 4. 13.

9. In replevin it was agreed, that if an *abbot confeſſes* action, the *ſucceſſor* ſhall be bound, and *ſhall not falſify*. Br. Confeſſion, pl. 53. cites 10 E. 4. 2.

10. If a *quare impedit* were brought *againſt a common patron and his clerk*, and the *patron ſet forth his title* to the advowſon, *and confeſſed no plenarty* of this preſentation, and *the clerk on the other ſide would*

would plead that he [was] *inducted*, &c. *which were falſe*, yet no doubt the patron ſhould have a writ to the biſhop; for the falſe plea of another ſhall not conclude him, the rather becauſe the patron could not properly contradict his co-defendant's plea in that point. Per Cur. Hob. 193. pl. 245. in caſe of Winchcomb v. Pulleſtone.

(F) As to one, in what Caſes it ſhall aid another.

1. IN *waſte*, a man *may confeſs* waſte *againſt a ſtranger, and bar the plaintiff* or *confeſs diſſeiſin to a ſtranger, and bar the plaintiff*, and well: for the confeſſion againſt a ſtranger is *no matter to the plaintiff*. Br. Confeſſion, pl. 52. cites 5 E. 4. 7.

(G) By what Perſons. Baron and Feme, &c.

1. *DOWER by baron and feme*, the *tenant pleaded ne unques ſeiſe que dower* &c. and the *demandants confeſſed it*, and were not ſuffered by reaſon that the feme was covert, by which they acknowledged by fine, and the feme was examined; quod nota. Quære upon confeſſion; note the diverſity. Br. Confeſſion, pl. 5. cites 44 E. 3. 12. Br. Baron and Feme, pl. 20. cites 44 E. 3. 10. S. C.

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2. Confeſſion *of baron and feme covert* was taken *of a deed without impeachment of waſte*. Br. Confeſſion, pl. 59. cites 45 E. 3. 11. Br. Quid Juris clamat, pl. 5. cites S. C.

3. If the *defendant prays aid*, and the *prayant* [*prayee*] comes and *offers to join*, the *defendant cannot* waive the aid and plead alone; but he *may confeſs the action in ſpight of the prayee*. Br. Confeſſion, pl. 57. cites 4 E. 4. 28, 29. per Danby.

4. If *præcepe quod* reddat be brought *againſt baron and feme by the king*, it ſhall be intended that they are ſeiſed in jure uxoris, and there, if the baron confeſſes the action, the feme has no remedy; per Cateſby quod Markam J. conceſſit. Br. Confeſſion, pl. 33. cites 7 E. 4. 17.

5. *But* where *tenant for life is impleaded or makes default, and the baron is ſeiſed in jure uxoris, who has the reverſion*, there he ſhall not be permitted to confeſs the action; for *receipt is to defend the right, and not to confeſs*, &c. Ibid.

6. If *an infant* confeſſes the action, the confeſſion ſhall not be accepted, becauſe he is an infant. Br. Confeſſion, pl. 36. cites 9 E. 4. 34. Per Moyle and Dandby. S. C. Br. Confeſſion, pl. 55. cites 43 E. 3. 5.

(H) Puniſhed

(H) Puniſhed or favoured. How far.

Br. Fines per Contempt, pl. 3. cites S. C. —Br. Imprisonment, pl. 1. cites S. C.

1. *Where a man denies his own deed which is found againſt him by verdict*, he ſhall make fine and ſhall be impriſoned; ſo if he pleads a falſe deed or releaſe, but if he *confeſſes the matter before verdict, ſo that judgment is had upon his confeſſion*, in this caſe he ſhall only be amerced, and ſhall *not* make *fine or* be *impriſoned*; and ſo ſee that in ſome caſe a man's confeſſion ſhall not be as ſtrong againſt a man as a verdict, nota. Br. Confeſſion, pl. 3. cites 33 H. 6. 54.

2. In *treſpaſs they were at iſſue*, and now came the defendant and *relicta verificatione per ipſum ſuperius pretenſ'* and *confeſſed the action*, and upon this the *plaintiff relinquiſhed the damages, and that he would not further proſecute* writ of inquiry of the damages, and it was prayed that he ſhall make fine, and did not. Br. Confeſſion, pl. 4. cites 34 H. 6. 43.

(I) Admitted or inforced, in what Caſes or Actions.

1. IN *attaint*, the *tenant would have rendred the action*, and the court would not receive it without taking the jury for the *advantage of the king*, and alſo land is not in demand by this writ. Br. Confeſſion, pl. 23. cites 6 Aſſ. 2.

2. *And* it was ſaid, that *in Mortdanceſtor render has been accepted.* Herle ſaid no, unleſs the tenant *acknowledged the points of the writ.* Ibid.

3. In *aſſiſe jointenancy was pleaded for part and bar for the reſt*, and the *plaintiff, becauſe he would not be delayed of the reſt, confeſſed the jointenancy and prayed the aſſiſe of the reſt*, and had it quod nota, and the writ was not abated in all by the confeſſion of the plea to part, quod nota. Br. Confeſſion, pl. 25. cites 19 Aſſ. 14.

4. A man *recovered damages* againſt another, and after the *plaintiff came and would have confeſſed his gree, and prayed to go quit.* Belk. ſaid, *you have no day in court, and therefore we cannot tell if you be the ſame perſon*; and therefore the other, if he has releaſe, may have ſcire facias upon it, or you may ſue ſcire facias of the damages, and then you will have day in court, and ſo be aided by the day in court. Br. Confeſſion, pl. 9. cites 50 E. 3. 18.

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Br. Jours, pl. 22. cites S. C.

5. In *appeal* the *defendant was convicted, and afterwards pleaded pardon of the king*, and the *plaintiff* came *in perſon* and *confeſſed that he would ſue no further, by which the charter was allowed without day in court* by proceſs or otherwiſe *given to the plaintiff to come and confeſs*; quod mirum! that ſcire facias had not been awarded. Br. Confeſſion, pl. 12. cites 11 H. 4. 16.

6. The *defendant was outlawed and taken by cap. utlag. in account and pleaded miſnomer*, the plaintiff was not ſuffered to confeſs it by reaſon of the advantage which the king ſhall have by the outlawry. Br. Confeſſion, pl. 17. cites 21 H. 6. 21, 22.

7. In

7. In *præcipe quod* reddat *againſt baron and feme*, if the *baron will confeſs* the action it may be admitted, but if the feme will confeſs the action, her confeſſion ſhall not be accepted. Br. Confeſſion, pl. 21. cites 15 E. 4. 28. per Brian.

8. In *account* as receiver by the hands of the plaintiff himſelf, and of others. The *defendant* pleaded never his receiver, &c. and *offered to make his law*, and as to the reſidue he pleaded to the country, and *at the day given he would have confeſſed the action for part and made his law for the reſidue*. The queſtion was, if he could do it without the plaintiff's aſſent, and the court doubted much, but at length all held, præter Harper, that the confeſſion could not be allowed. D. 265. pl. 2. Mich. 9 & 10 Eliz. Anon.

9. When an *action* is brought *for a thing certain as debt*, &c. there the defendant may confeſs the action *without the plaintiff's conſent*; but *otherwiſe* if it be *for* a thing uncertain, as *treſpaſs or battery*; per Warburton J. Noy. 31. Paſch. 16 Jac. C. B. in caſe of Liveſly v. Glaſbrook.

10. If in an *ejectione firmæ* the *plaintiff will not indemnify the tenant*, the court will ſuffer him to confeſs the action, otherwiſe not. L. P. R. tit. Confeſſion cites 12 Nov. 1650. B. S.

11. In *ejectment*, the *demiſe* by the leſſor of the plaintiff to the plaintiff *was laid to be the 27th of April* 1697, *which time was not come at the time of the trial*; but the *tenant had entered into the common rule to confeſs leaſe, entry and ouſter*. And the court compelled the defendant to confeſs the leaſe, entry and ouſter; otherwiſe the plaintiff would have been nonſuit, and then he would have had judgment againſt the caſual ejector; although it was objected, that the plaintiff could not have judgment, though the verdict were found for him: Ruled by the court of B. R. upon a trial at Bar. Ld. Raym. Rep. 728, 729. Mich. 8 Will. 3. B. R. Anon.

(K) Writ

(K) Writ abated by Confeſſion or Surmiſe. In what Caſes and where in Part or in All.

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1. IN *cui in vita*, the *demandant acknowledged that the tenant entred into parcel by another, and not by him by whom his entry is ſuppoſed by the writ*, and yet the writ was adjudged good for the reſt. Thel. Dig. 219. lib. 16. cap. 4. ſ. 1. cites Mich. 19 E. 2. Brief. 841.

2. In *replevin de averiis ſuis captis*, *if* it appears to the court by the *confeſſion of the plaintiff that the defendant has taken only one ox*, [353] all the writ ſhall abate; per Herle. Thel. Dig. 219. lib. 16. cap. 4. S. 3. cites Paſch. 7 E. 3. 314.

3. In *aſſiſe of rent of* 10*l.* the *defendant pleaded release of* 3*l. thereof*, and the *plaintiff confeſſed it*, and yet the whole plaint was not abated, for it ſeems to be in bar of this part. Br. Confeſſion, pl. 45. cites 8 Aſſ. 37.

And ſays that Parninge reports in this plea, that he had ſeen an *aſſiſe abated becauſe the plaintiff had confeſſed that one named* in the writ *had not diſſeiſed him.*

4. In *writ againſt Jo. Curſon and one J. S. Jo. made default, &c. J. S. took the entire tenancy and vouched this ſame Jo. Curſon to warranty*, and the *demandant counter-pleaded it* by the ſtatute, &c. and was received thereto without abating his writ, inaſmuch as he *had not expreſsly acknowledged that Jo. Curſon was not tenant the day of the writ purchaſed*, notwithſtanding that he had by his writ ſuppoſed Jo. to be tenant. Thel. Dig. 219. lib. 16. cap. 4. ſ. 4. cites Hill. 8 E. 3. 376. Ibid. And ſays ſee 11 Aſſ. 9. agreeing.

5. In *treſpaſs of trées cut and carried away vi & armis*, the defendant *juſtified for eſtovers to take at his will*, &c. To which the *plaintiff ſaid that the defendant had reaſonable eſtovers to take there by view and livery of the bailiff* &c. Upon which the defendant demanded judgment of the writ with vi et armis, inaſmuch as the plaintiff has confeſſed that the defendant has right to take the trees &c. Sed non allocatur becauſe they were not agreed upon the manner of the taking. Thel. Dig. 219. Lib. 16. cap. 4. ſ. 5. cites Mich. 8 E. 3. 422. and ſays, See 5 E. 3. 235.

Thel. Dig. 219. lib. 16. cap. 4. S. 6. cites S. C.

6. In *aſſiſe*, the *diſſeiſor pleads releaſe of the plaintiff of all the right, and of all actions real and perſonal*, and the *plaintiff confeſſes it*, the aſſiſe ſhall abate againſt all. Br. Confeſſion, pl. 44. cites 11 Aſſ. 9.

7. *So* if he *confeſſes that any named in the writ is not a diſſeiſor*, *or* that any of them *was at another time acquitted.* Ibid.

Fitzh. Brief, pl. 272. cites S. C. the court were of opinion, that if the demandant would confeſs, that part of his

8. In *formedon* the *tenant would have confeſſed parcel to be given*, and the *demandant would have confeſſed that parcel was not given*; by which judgment was given, firſt that the demandant ſhould *recover the parcel confeſſed*, &c. and afterwards he confeſſed that the other was not given, &c. for otherwiſe all the writ had abated. Thel. Dig. 221. lib. 16. cap. 4. ſ. 30. cites Paſch. 14 E. 3. Br. 272.

demand

demand was not given, all the writ ſhould abate; but it being moved, that the parties were agreed, and conſented that judgment might be given as above, it was adjudged accordingly.

9. But Paſch. 41 E. 3. 19. the demandant *confeſſed an exception taken to the writ for parcel*, and yet it ſtood for the reſt. Thel. Dig. 221. lib. 16. cap. 4. ſ. 31.

10. In *aſſiſe*, the *tenant as to parcel pleaded jointenancy*, and the *plaintiff confeſſed it*, yet he had the aſſiſe of the reſt. Thel. Dig. 219. lib. 16. cap. 4. ſ. 7. cites 14 Aſſ. 8. Paſch. 14 E. 3. Br. 273. and 19 Aſſ. 14. 21 Aſſ. 21. and 22 Aſſ. 6. and that *ſo* is the law *in ſcire facias*. Hill. 7 R. 2. Jointenancy 8.

In *aſſiſe*, the *tenant pleaded jointenancy made by himſelf, pending the writ*, and the *plaintiff confeſſed it and demurr'd*, and yet the writ was abated, notwithſtanding that it was pending the writ. Brooke ſays, it ſeems that it is not law. Br. Confeſſion, pl. 46. cites 18 Aſſ. 6.

11. *Præcipe quod* reddat *againſt two*, the *one diſclaimed*, and the *other took the entire tenancy and vouched him who diſclaimed*, and the *demandant confeſſed that he who diſclaimed had nothing and counterpleaded the voucher*, and by his confeſſion the writ was abated by award. Br. Confeſſions, pl. 40. cites 21 E. 3. 33.

12. It is ſaid, that in *treſpaſs ſuppoſed to be done at a certain year and day*, if the *plaintiff afterwards* in pleading *confeſſes the treſpaſs* to be *done at another year and day*, his writ ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 8. cites 22 Aſſ. 86.

13. Where the *writ* is *of tenements in divers vills*, if the *demandant confeſſes that none of the tenements is in one of the vills*, the writ ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 10. cites Paſch. 25 E. 3. 41. but ſays the contrary is held Paſch. 29 E. 2. 39. [354]

14. In *treſpaſs of a cloſe broken, and of oxen taken vi & armis & contra pacem*, the defendant *juſtified by commiſſion of the king out of the Exchequer for a tax* granted to the king, &c. And the *plaintiff ſaid that the place where, &c. is parcel of his parſonage, and ſo within ſanctuary, &c.* But becauſe the plaintiff had confeſſed that the defendant came by warrant of the king, the writ with vi & armis was abated; for he ought to ſue by replevin. Thel. Dig. 220. lib. 16. cap. 4. ſ. 11. cites Mich. 26 E. 3. 70. & 27 Aſſ. 66. & Mich. 28 E. 3. 97.

15. In *aſſiſe* it was *pleaded that the plaintiff himſelf was ſeiſed*, &c. And the *plaintiff maintained his writ by the ſouvent diſtreſs of the tenant in claiming ſeigniory*, &c. to which the *tenant ſaid that the land was held of him by fealty and divers other ſervices, &c. and that he diſtrained for the fealty arrear*, &c. And the *plaintiff ſaid that the land was not held of him*, &c. Upon which confeſſion of the plaintiff it was held that the plaintiff had abated his own writ, becauſe aſſiſe does not lie for ſouvent diſtreſs, * but [where the] lord [diſtrains]. Thel. Dig. 220. lib. 16. cap. 4. ſ. 9. cites 27 Aſſ. 51. Quære.

* Br. Diſſeiſin, pl. 46. cites S. C. ſays it is no diſſeiſin, but where the lord diſtrains; for if a ſtranger diſtrains, the tenant may make reſcous, ut videtur, as Brooke ſays, and adds a quære; for that the plaintiff dared not demur. ——— Br. Diſtreſs, pl. 33. cites S. C. accordingly.

16. In

16. In *writ* brought *againſt Jo. Hammond of Cambridge*, one *Jo. Hammond of Cambridge came*, but the *plaintiff ſaid* that he, who appeared, is not the ſame perſon whom he ſued, &c. and *that he ſued againſt one Jo. Hammond of South-Cambridge*, by which the writ was abated. Thel. Dig. 220. lib. 16. cap. 4. ſ. 13. cites Hill. 39 E. 3. 6.

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17. *Treſpaſs for a horſe taken*; the defendant *juſtified a diſtreſs for amercement for default in court baron*, &c. and the *plaintiff ſaid that the taking was in the high ſtreet*, &c. upon which it was held that the writ ſhould abate, becauſe he ought to have a ſpecial writ. Thel. Dig. 220. lib. 16. cap. 4. ſ. 14. cites Mich. 43 E. 3. 30.

18. In *treſpaſs of goods* taken, if it *appears by the confeſſion of the plaintiff that the defendant took as lord within his fee, for* any *ſervice, notwithſtanding that no ſervice be arrear*, yet the writ ſhall abate. *But if* the defendant takes them *for other cauſe, as claiming property, &c. which does not ariſe from the ſeigniory*, the writ ſhall not abate, notwithſtanding that the defendant be lord. Thel. Dig. 220. lib. 16. cap. 4. ſ. 15. cites Paſch. 44 E. 3. 13.

19. In *reſcous*, the defendant *ſaid that the place where*, &c. *was out of the fee of the plaintiff*, and the *plaintiff ſaid that he would have taken them within his fee, and the defendant reſcued them, and chaſed them to the place where*, &c. the defendant ſaid to be hors de ſon fee, *and he freſhly purſued them there*, &c. *and the defendant made reſcous*, &c. and held a good replication. Thel. Dig. 220. lib. 16. cap. 4. ſ. 16. cites Trin. 44 E. 3. 20.

20. In *aſſiſe* the *tenant pleaded ſeveral pleas*, and the *plaintiff confeſſed the one and abridg'd his plaint thereof*, and the writ did not abate for the reſt, but had aſſiſe for the reſidue. Br. Confeſſion, pl. 50. cites 45 Aſſ. 13.

21. In *debt againſt two executors*, the *one pleaded* that *ne unques adminiſtred*, and the *plaintiff confeſſed it*; yet the other was put to anſwer. Thel. Dig. 219. lib. 16. cap. 4. ſ. 2. cites Mich. 34 E. 1. Brief. 856. but cites Paſch. 46 E. 3. 9. contra.

[355] 22. In *replevin*, if the defendant *juſtifies that the defendant recover'd in ſuch a county a certain ſum of money againſt the plaintiff, and the defendant as bailiff took the beaſts in execution, and ſold them*, and delivered them to the buyer, and delivered the money to him who recover'd the ſame, &c. the plaintiff may well plead matter in avoidance of the recovery, notwithſtanding that he did not deny the property ſuppoſed by the defendant to be in the buyer of the beaſts, &c. Thel. Dig. 220. lib. 16. cap. 4. ſ. 17. cites Mich. 7 H. 4. 27. and ſays ſee Mich. 47 E. 3. 12.

23. In *treſpaſs of his ſervant taken* out of his ſervice *vi & armis*, the *plaintiff confeſſed* by his replication, *that the defendant had only procured the ſervant to go out of the ſervice of the plaintiff*, by which confeſſion it was held that the writ ſhould abate, and that the plaintiff ought to take writ upon the ſtatute of labourers. Thel. Dig. 220. lib. 16. cap. 4. ſ. 18. cites Mich. 11 H. 4. 23. but ſays that ſome held the contrary, and adds quære.

24. In *debt* or *treſpaſs*, if the *plaintiff confeſſes parcel of his writ to be falſe*, all ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 19. cites 11 H. 4. 56. & 1. H. 5. 7.

25. In

25. In *præcipe quod reddat againſt* 2, if the *demandant acknowledges that the one has nothing*, all the writ ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 21. cites Hill. 12 H. 4. 15.

26. Where the *writ* is of *tenements in three vills*, if the *demandant confeſſes that one is neither vill nor hamlet*, all ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 22. cites Trin. 1 H. 5. 7.

27. In treſpaſs of *battery brought within the county of Middleſex*, it appeared by the *confeſſion of the plaintiff that the treſpaſs was done within the palace of Weſtminſter*, and ſo out of the juriſdiction of the ſheriff of Middleſex, by which it was held that the writ ſhould abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 23. cites Paſch. 2 H. 6. 8.

28. In *debt* of 10l. the defendant, *as to parcel, pleaded acquittance of the plaintiff, and confeſſed the reſt*, and the plaintiff pray'd judgment of that which is confeſſed, and had it, and ſaid nothing to the acquittance; for if he had confeſſed the acquittance, all had abated. Thel. Dig. 221. lib. 16. cap. 4. ſ. 32, cites Trin. 3 H. 6. 49. Brief. 20. Fitzh. Brief. pl. 20. cites* Trin. 3 H. 6. 47. S. P. and plaintiff releaſed his damages. —Br. Confeſſion, pl. 37. cites 3 H. 6. 48. S. C. ——— Br. Debt, pl. 5. cites S. C.

* [This caſe is Trin. 3 H. 6. fol. 48. a. b. pl. 6. Panton v. Archer.

29. Confeſſion *in præcipe quod* reddat *againſt two*, that the one has nothing where the *one appears and takes the entire tenancy and pleads in bar*, and the *other makes default, or appears, and ſays nothing*, there if the *demandant confeſſes that the one has nothing* his writ ſhall abate. Br. Confeſſion, pl. 19. cites 8 H. 6. 13. *But* if he *anſwers to the bar, and ſays nothing to this*, nor does not deny it, the writ is good, per Jenney; ſo note a diverſity between confeſſion and nient dedire. Br. Confeſſion, pl. 19. cites 8 H. 6. 13.

30. In *aſſiſe*, if he *confeſſes all to be in one of the vills* the writ ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 22. cites 8 H. 6. 13.

31. It was ſaid by June, that *writ falſe in part ſhall not abate by the nient dedire of the demandant*, as it ſhould do by his confeſſion. Thel. Dig. 220. lib. 16. cap. 4. ſ. 24. cites Mich. 8 H. 6. 13.

32. If the demandant *confeſſes non-tenure of parcel pleaded by the tenant* the writ ſhall abate for all. Thel. Dig. 220. lib. 16. cap. 4. ſ. 25. cites Paſch. 18 H. 6. 5.

33. And ſo in *writ againſt two*, if the *one accepts the entire tenancy*, and the *other ſays that he has nothing*, the demandant may anſwer to the bar of the tenant without ſaying any thing to the other; but if he *confeſſes that the other has nothing* all ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 25. cites 18 H. 6, 7. and 37 H. 6. 18. and Mich. 5 E. 4. 126. [356]

34. *Waſte in a houſe, and breaking of a wall or pale*, where *it appears that waſte does not lie for the wall or pale unleſs it was cover'd*, the writ ſhall not abate in all, as if the party had *confeſſed that his writ had not lain in part*; for otherwiſe it is where it comes by *ſurmiſe or writ or declaration*; and ſo ſee a diverſity between a confeſſion of the plaintiff, and where the thing comes of the ſurmiſe of the plaintiff in his writ or declaration. Br. Confeſſion, pl. 18. cites 22 H. 6. 24.

35. In *treſpaſs of a cloſe broken* againſt one who *pleaded*, *that the place where, &c. was the franktenement of an abbot, &c. and that he*

as ſervant, &c. to which the plaintiff *replied, that he was ſeiſed, till by the defendant diſſeiſed to the uſe of the abbot, to which diſſeiſin the abbot agreed,* &c. And it was held that the writ ſhould abate, becauſe the plaintiff had confeſſed that he had cauſe of action againſt the abbot, who is not named, &c. Thel. Dig. 221. lib. 16. cap. 4. ſ. 27. cites Mich. 33 H. 6. 37. quære.

36. In *debt* it was ſaid, that if the *plaintiff confeſſes the receipt of parcel before or after the writ purchaſed,* all the writ ſhall abate. Thel. Dig. 221. lib. 16. cap. 4. ſ. 28. cites Mich. 34 H. 6. 2. 6 E. 4. 7.

37. In *maintenance againſt three,* if the plaintiff in his replication *confeſſes that they ſeverally made ſeveral maintenances,* all the writ ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 26. cites 36 H. 6. 29.

38. And *ſo* it is *in treſpaſs of goods taken, or* of a *cloſe broken againſt ſeveral,* if the plaintiff in his replication *confeſſes that the one did parcel of the treſpaſs, and another another parcel,* the writ ſhall abate; and ſo it is in forger of falſe deed; but it is *otherwiſe if* ſuch matter be *upon the general iſſue found by verdict.* Thel. Dig. 220. lib. 16. cap. 4. ſ. 26. cites 36 H. 6. 29. 31. and ſays ſee 11 H. 7. 7.

39. Where a *man brings action by joint title,* and *in pleading confeſſes, that it is by ſeveral titles,* the writ ſhall abate; *contra if it be found by verdict and not confeſſed;* note the diverſity. Br. Confeſſion, pl. 51. cites 36 H. 6. 28. per Moile, Priſot, and others.

40. In *treſpaſs,* if it *appears by the title of the plaintiff that another has cauſe of action with him,* the writ ſhall abate by his confeſſion. Thel. Dig. 221. lib. 16. cap. 4. ſ. 29. cites Paſch. 10 E. 4. 7.

[*For more of Confeſſion in general, ſee* Abatement, Evidence, Nient-Dedire, Traverſe, *and other proper Titles.*]

Confirmation.

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(A) What it is, and the ſeveral Sorts.

1. A Confirmation is a conveyance of an eſtate or right in eſſe whereby a *voidable eſtate is made ſure* and unavoidable, or whereby a *particular eſtate is increaſed.* Co. Litt. 295. b. Confirmation *is* the approbation or aſſent to an eſtate already created, which, as far as is in the confirmer's power, makes it good and valid, ſo that the confirmation doth *not regularly create an eſtate*, but yet ſuch words may be mingled in the * confirmation, as may create and enlarge an eſtate, but that is by the force of ſuch words that are foreign to the buſineſs of confirmation, and by their own force and power tend to create the eſtate. Gilb. Treat. Ten. 69.

2. Every confirmation is either *perfecting*, *enlarging*, or *diminiſhing*. *Perfecting*; as if feoffee on condition makes a feoffment over, and the feoffor confirms the eſtate of the ſecond feoffee to him and his heirs; for this does not make tranſmutation of the eſtate, but corroborates and perfects it, and makes it ſimple and abſolute where it was conditional before, and with this accords 7 H. 6. 7. b. So if diſſeiſee confirms the eſtate of the diſſeiſor, or of his feoffee, this perfects and corroborates his eſtate; for this makes indefeaſible, where before it was defeaſible. 2dly, *Enlarging*; as when it enlarges the eſtate of him to whom the confirmation is made, as by enlarging an eſtate at will to an eſtate for years, &c. or if it be to an eſtate for years to encreaſe it for life, or to an eſtate for life to enlarge it to an eſtate tail, and ſo from a tail to a fee. 3dly, *Diminiſhing*; as where the lord confirms the eſtate of his tenant by knight-ſervice to hold in ſocage, or by a leſs rent, or for a tenant in ancient demeſne to hold at common-law; for thereby the cuſtoms of the manor are leſſened; per Cur. 9 Rep. 142. a. Paſch. 10 Jac. in the Court of Wards, in Beaumont's caſe. *[357] Co. Litt. 295. b. S. P. ad finem.—S. C. cited per Hobart Ch. J. Hob. 257.

†[A. 2] The *Acceptance of whom* ſhall affirm the Leaſe, [&c.]

Fol. 475.

† This in Roll is (A).

[1. IF *baron and feme leaſe by deed*, and after the *baron dies*, and ſhe takes a *ſecond huſband*, who *accepts the rent*, this affirms the leaſe againſt the feme perpetually, for ſhe hath ‡ put her agreement into the mouth of her huſband. D. 4, 5. Ma. 159. 36.] But Ibid. Brooke J. held e contra; and the reporter ſays, ideo quære.

——S. C. cited 2 Roll. Rep. 132. —— D. 156. Marg. pl. 36. cites Paſch. 22 Eliz. Rot. 1587. that it was held per Cur. that by the acceptance of the ſecond baron ſhe is concluded during the term. —— See tit. Baron and Feme (Z) and (E. a. 10).

‡ The book is, that she had resigned and assigned to the second baron her power of avoiding the term; as if she in her widowhood had told the termor, that she is content to accept the rent if the second baron agrees to it.

A. devised to M. his wife, until P. his daughter came to the age of 19 years, and afterwards to B. in tail; and farther *if B. failed to pay after* 19 *years* 12 *l. to M. the wife, in recompence of her dower, that she should have the land for her life.* M. brought dower and recovered. After B. came to the age of 19 years, M. the wife entered for non-payment of the 12 l. It was adjudged, that *she having recovered the third part of her dower, should not have the* 12 *l. by the will,* and the acceptance of the one is a waiver of the other Cro. E. 128. pl. 3. Hill. 31 Eliz. B. R. Gosling v. Warburton —— Ow. 154, 155. Goodridge v Warburton, S. C. adjudged. —— Le. 136. pl. 187. Geslin v. Warburton, S. C. adjudged.

[2. If the *baron seised in fee makes a feoffment, reserving* 100 *marks rent yearly for* 20 *years next ensuing to him and his wife, and dies,* and his *wife accepts the rent,* yet *this shall not* make any *bar* in a writ of *dower,* because she demands a freehold, and that of the third part only. Tempore 1 E. 6. 5. adjudged.]

3. Mortdanceſtor; the *tenant pleaded a recovery in ceſſavit against J. and the eſtate of the anceſtor of the demandant meſne between the purchaſe of the writ and the judgment,* and the *demandant ſaid that* [358] *pending the writ J. aliened to his anceſtor, and the demandant accepted the rent and the homage of his anceſtor pending the writ,* and ſo abated his writ, and by the beſt opinion it is a good replication; quære, for it was not pleaded before judgment in ceſſavit. Br. Barre, pl. 20. cites 21 E. 3. 18.

4. If an *ebator marries with the right heir,* and has iſſue by her, and *makes a leaſe for life, rendering rent,* and he and his wife die, in this caſe *the iſſue* has the mere right on the part of his mother, and yet if he *accepts the rent, and makes an acquittance,* this ſhall eſtop him and his heirs to avoid the ſaid leaſe, becauſe he accepted the recompence. 8 Rep. 54. b. Mich. 6 Jac. and ſays, that with this agrees 39 H. 6. 27.

Where *tenant in tail makes leaſe,* reſerving rent, *and died without iſſue,* he in remainder cannot by acceptance make it good, which caſe was agreed to be law; for the *rent* reſerved, which is the recompence, *cannot go to him in remainder for want of privity,* and ſo it cannot be ſuppoſed for his advantage to have power to affirm the leaſe. Arg. 12 Mod. 363. Paſch. 12 W. 3. in caſe of Pullen v. Purbeck.

5. *Tenant in tail,* the remainder over, *leaſes for years, rendering rent, and dies without iſſue,* and he in *remainder accepts the rent,* this ſhall not bind him; the reaſon ſeems to be, becauſe when the tail is determined, all that is compriſed within it is determined, and ſo the leaſe void, and he in remainder does not claim by the leſſor. Br. Acceptance, pl. 19. cites 1 E. 6.

In the caſe of *tenant at will* the leaſe is at will of both parties, and by conſequence muſt neceſſarily determine upon either parties ceaſing to have a will of continuing it. Arg. 12 Mod. 363. Paſch. 12 W. 3. in caſe of Pullen v. Purbeck.

Br. N. C. pl. 16. 22 H. 8. S. C. Br. Leaſes, pl. 19. cites 24 H. 8. Br. N. C — 24 H. 8. pl. 54. S. P.

6. If *tenant in dower leaſes* for years, rendering rent, *and dies,* the leaſe is void, and acceptance by the heir of the rent will not make the leaſe good; for it was void before; contra of voidable leaſes, per Fitz-James and Engleſield J. Br. Acceptance, pl. 14. cites 22 H. 8.

7. If a *diſſeiſor makes a leaſe* for life, reſerving rent, and afterwards *grants the reverſion to the diſſeiſee, and he accepts the rent* of the

the leſſee, he ſhall not ouſt the leſſee, quod fuit conceſſum per quoſdam. Hill. 28 H. 8. D. 30. b. pl. 207. Canc. in caſe of Compton v. Brent.

8. If *tenant in tail* leaſes his land *for* 20 *years, rendering rent, and dies*, and the *leſſee leaſes it over to another for* 10 *years*, and the *iſſue accepts the rent of the ſecond leſſee*, this is no affirmation of the leaſe, for there is *no privity* between the ſecond leſſee and him; contra if he *pays it as bailiff of the firſt leſſee*, and if the *firſt leſſee had leaſed over all his term in parcel* of the land leaſed, *and the aſſignee pay the rent* to the iſſue in tail, it ſeems that this affirms the entire leaſe; for rent upon a leaſe for years is not apportionable. Br. Acceptance, pl. 13. cites 32 H. 8. Br. N. C. 32 H. 8. pl. 166. S. C.

9. *Tenant in tail* by gift of the king *made a leaſe* for years and died, his ſon and heir *accepted the rent, and afterwards was attainted* of treaſon, *and executed, leaving a ſon*. It was adjudged, that the acceptance of the rent did not make the leaſe good, for that the eſtate tail was determined by the attainder. D. 115. a. b. pl. 65, 66. Paſch. 2 & 3 P. & M. Sir Thomas Wiat's caſe.

10. A leaſe for years was made *by the provoſt of W.* and *confirmed by the dean and chapter*, but *not by the patron*. Afterwards the *deanry was diſſolved, and a new one erected, to which the provoſtſhip was united, quandocunque vacare contingeret*. The *provoſt died*, and the *dean accepted the rent, and* afterwards *made a leaſe for years to another*, which was *confirmed by the biſhop, dean, and chapter*. It was adjudged, that the firſt leaſe is void by the death of the provoſt, and ſo not helped * by the acceptance of the rent. D. 239. pl. 40, &c. Trin. 7 Eliz. Hodgeſkins v. Tucker. The reaſon why the leaſe was void notwithſtanding the acceptance of the rent by the new dean, was becauſe he was a new grantee by act of parliament, and not ſucceſſor. Bendl. 80, 81. pl. 126. Mich. 2 & 3 Eliz. S. C. —— S. C. cited Arg. 3 Le. 153. in pl. 205.

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11. *Tenant in tail leaſed for years rendering* 20 *s. rent*, and afterwards *releaſed* 19s. thereof and died, and *his iſſue accepted the* 12 *d.* The queſtion was, whether he might diſtrain for the 19 s.? The court were equally divided in their opinions, and the book leaves it a quære. D. 304. pl. 53. Mich. 13 & 14 Eliz. Anon.

12. *Lands* were *given to a parſon and his ſucceſſors to find lights*, &c. The *parſon made a leaſe* thereof *for life, reſerving a rent*, and *after the diſſolution of chanteries*, &c. *he accepted the rent*. Afterwards the *queen granted the lands* to another. The *parſon died*, and the *patentee entered*. The court were of opinion the entry was lawful, and that the acceptance of the rent by the parſon was void, becauſe he then had no reverſion in him. D. 337. b. pl. 38. Trin. 16 Eliz. Anon.

13. Acceptance of *rent before the leaſe commences*, and ſo *before any rent is due*, is no acceptance. Finch. 8vo. 68. Br. Acceptance. pl. 18. cites 1 E. 6. S. P.

14. The *maſter and fellows of M. college granted lands* to the queen, *rendering rent, upon condition to grant them* over to B. and his heirs, which was done, and B. the *grantee levied a fine, and afterwards granted them to another*. The maſter died, and his ſucceſſors Roll. Rep. 151 to 172. Warren v. Smith, S. C. adjudged. —— 2 Bulſ. 146.

S. C. but S. P. does not appear. ——Cro. J. 364. pl. 2. is a memorandum of S. C. but S. P. does not appear.

ceſſors received the rent, and made an acquittance without ſeal to the laſt grantee, and after that re-entered. It was reſolved, that this acceptance of the rent, eſpecially as it was without ſeal, did not bar the college of their re-entry, being a body aggregate, and not to be diveſted of their right by the maſter's ſingle act. 11 Rep. 66. b. to 79. Paſch. 13 Jac. Magdalen College's caſe.

15. Acceptance of *rent by a ſucceſſor dean*, or other head of a body aggregate, will not make good a demiſe made by the predeceſſor, and which was not otherwiſe good, eſpecially where the acceptance is without deed. 11 Rep. 79. a. Paſch. 13 Jac. in Magdalen College's caſe.

(B) *What Acts* ſhall be a Confirmation of a Leaſe.

3 Rep. 64. b. Trin. 38 Eliz. B. R. Harvy v. Oſwald, alias Pennant's caſe, S. P. reſolved accordingly; for after the leaſe is determined he cannot diſtrain, and cites 14 Aſſ. 11. accordingly. ——Co. Litt. 211. b. S. P. —— Pl. C. 133. b. Arg. cites 14 Aſſ. S. P. for by the diſtreſs he affirms the continuance of the term. And Ibid. 136. a. S. C. cited on the other ſide and admitted.

[1. IF a man *leaſes for life, reſerving rent, upon a condition of re-entry*, if after the condition is broke by non-payment of the rent, the *leſſor diſtrains for the ſaid rent*, this act ſhall be a confirmation of the leaſe, ſo that he cannot enter for the condition broke. 14 E. 3. Entry Congeable, 41. Iſſue upon it, and adjudged.]

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[2. *So* if the rent be *arrear for two years, being demanded, and after the leſſor diſtrains for the rent of the firſt year*, this hath affirmed the leaſe, for the taking of the diſtreſs affirms the leaſe to have continuance at the time of the diſtreſs taken; for otherwiſe he could not diſtrain. Contra 14 E. 3. Entry Congeable, 41. admitted by the iſſue.]

Cro. E. 220. pl. 10. in the Exchequer S. C. and all the barons agreed that the leaſe was void immediately upon the non-payment, and judgment for the plaintiff. A nota is added, that a writ of error was brought in Cam. Scacc. and error aſſigned in the matter of law, and the judgment was affirmed, Mich. 36 & 37 Eliz. —— And. 303. pl. 314. S. C. and reſolved by the greater part of the judges that the proviſo tends to the limitation of the leaſe, and that it cannot be made good before entry or office, whether it be in the caſe of the king or a common perſon, whereupon the two chief juſtices delivered the opinion accordingly to the lord keeper and lord treaſurer, and they affirmed the judgment in Mich. 36 & 37 Eliz. —— Mo. 291. pl. 440. S. C. adjudged in the Exchequer, and affirmed in error; but ſays the judges differed much in opinion a long time; but at laſt, by the reſolution of the greater part, after the death of Manwood and Gent (who joined in the judgment before) the judgment was affirmed.

[3. If *leſſee for years, rendering rent, upon condition of non-payment to be void*; if the *rent be demanded at the day, and not paid*, the leaſe is abſolutely void, ſo that it cannot be confirmed by acceptance of rent after. M. 32, 33 El. B. R. between SIR MOIL FINCH AND THROGMORTON, adjudged.]

Cro. E. 220, 221. S. C. adjudged, and judg-

[4. *So* if the king, *after ſuch forfeiture, being leſſor, accepts the rent* from the leſſee *of record in the receipt of the Exchequer*, yet this ſhall not confirm the leaſe, this being void before. M. 32, 33 El.

33 El. B. R. between Sir Moil Finch and Throgmorton, adjudged.] ment affirmed. And Manwood said that the patentee immediately upon the non-payment was no longer a termor, nor tenant at will, nor at ſufferance, but only as a bailiff or pernor of the profits de ſon tort, and then all the acceptance after cannot make a void leaſe good. ——— And. 303. pl. 314. S. C. adjudged, and judgment affirmed; and reſolved by the greater part of the judges that this proviſo tended to the limitation of the leaſe, and by breach thereof in this caſe of the queen, without demand, office, or other circumſtance, the leaſe and eſtate is ſo determined, that it cannot by acceptance of the rent, before entry or office, be made good, be it in the caſe of the king or a common perſons ——— Poph. 25 to 30. Finch v. Riſley. S. C. argued. And Ibid. 53. S. C. adjudged; for the proviſo ſhall be taken as a limitation to determine the eſtate, and not as a condition to undo [defeat] the eſtate, which cannot be defeated in caſe of a common perſon but by entry, and in the king's caſe but by office; and this judgment affirmed. ——— 2 Le. 134 to 146. S. C.

5. If *tenant for life grants a rent, and* after *ſurrenders*, and then the *leſſor confirms the grant in the life of the tenant*, who ſurrendered, and after the tenant dies, the rent remains by reaſon of the confirmation; per Seton. Br. Grants, pl. 73. cites 26 Aſſ. 38.

6. If a *mortgagee leaſes for years*, and the *mortgagor confirms it*, and after the condition is performed, the leaſe ſhall not be avoided. 7 Rep. 14. a. Mich. 33 & 34 Eliz. in Scacc. Englefield's caſe.

7. *Leaſe* for years, with *condition upon non-payment* of rent at a day certain *to be void*, no ſubſequent acceptance will make ſuch a leaſe good; for there leſſor has made his *election by demanding his rent*, without which the leaſe had not been void; and ſince by his own act, viz. the demand, he has made the leaſe void, there is no reaſon, that after, by another contrary act, he ſhould make it good. Arg. 12 Mod. 363. in caſe of Pullen v. Purbeck, cites 3 Rep. Penant's caſe, which he ſaid he agreed.

8. If the *leſſor brings aſſiſe for the rent*, he waives the benefit of his re-entry, though it be for rent due at the ſame day; but if he *re-enters firſt, then he may have action of debt* for the rent arrear; per the reporter, 3 Rep. 65. a. in a nota, and ſays, this appears by Littleton, tit. Conditions, fol. 79. a. Litt. f. 341. Co. Litt. 211. b. S. P.

(C) In what Caſes an *Acceptance* of Rent or Service ſhall be a Confirmation. [After Forfeiture, &c.] [361]

[1. IF a copy*holder commits a forfeiture* in cutting down of trees, and after the *lord, not having notice* thereof, *accepts the rent* from him, yet this ſhall not affirm the leaſe, but he may well after avoid it. 5 Jac. B. R. between Mantell and Wachington, per Curiam, agreed.] Cro. J. 166. pl. 4. S. C. but no reſolution was given therein. ——— S. P. by Crooke J. held accordingly. Arg. Bulſt. 190. ——— Godb. 47. pl. 58. Mich. 28 & 29 Eliz. B. R. the S. P. was in queſtion, and Coke ſaid the lord was not concluded by this acceptance; for it is not as the caſe 45 E. 3. where a *leaſe* is made *upon condition that the leſſee ſhall not do waſte*, and *he commits waſte*, and then the *leſſor accepts the rent*, there he cannot enter; but otherwiſe it is of a copyhold, for there is a *condition in law*, and here *en fait*; and a condition en fait may ſave the land by an acceptance, but a condition in law cannot; for by the condition in law broken, the eſtate of the copyholder is merely void; and the court agreed that when ſuch a forfeiture is preſented, it is not to intitle the lord, but to give him notice; for the copyhold is in him by the forfeiture preſently, without any preſentment.

Fol. 476.

[2. If a man *leases for years*, rendering rent, upon *condition* that *if the lessee assigns* it *without licence* of the lessor, the *lease shall be void*; and after the *lessee assigns* the term *to B. from whom the lessor accepts rent after due, having knowledge of the assignment*, yet this does not make the lease good, in as much as the lease, by the assignment, was absolutely void, and not voidable only. M. 14 Car. B. R. between OMULCOURY AND AIRES, adjudged, per Curiam, in a writ of error upon a judgment in Ireland, upon a special verdict there, and the judgment given to the contrary reversed accordingly. Intratur, M. 13 Car. Rot. 334.]

Cro. C. 511. pl. 6. Mulcarry v. Eyres, S. C. the condition was, that if the lessee should lease only part for more than three years, the lease (which was for 21 years) should be void, and the lessor to re-enter. The lessee leased for 3 years, and so from 3 years to 3 years, during the term of 21 years, if he so long lived. The lessor accepted the rent of the assignee, and afterwards re-entered. Resolved, that it was a plain breach of the condition, and that the acceptance after could not dispense therewith, the condition being that it should be void, and that so it was absolutely determined; and so the judgment in Ireland was reversed.

Br. Incumbent, pl. 18. cites S. C. —— S. P. Br. Acceptance, pl. 26. cites S. S. —— S. C. cited per Doderidge J. 2 Buls. 47. and said that the difference is between a lease for years and a lease for life. —— Br. Leases, pl. 19. cites 24 H. 8. by Fitz-James Ch. J. Englefield J. and several others, that a lease for years in such case is void; but Brooke says, it seems, that contracts of a lease for life made by parson, rendering rent, and the successor accepts the rent, this affirms the lease for life, but contrary of a lease for years; for when this is void by death of the lessor, it cannot be perfected by any acceptance. —— Br. N. C. pl. 54. Anno 24 H. 8 S. C. accordingly. —— S. P. as to a lease for years by parson who dies. Br. Acceptance, pl. 14. cites M. 2 H. 4. 5 —— S. C. of a prebendary's lease. Ibid. cites 11 H. 4. 5. —— S. P. as to a lease for years by parson, vicar, or prebend; but contra of such lease by bishop, abbot, &c. because it was voidable only. 3 Rep. 65. a. and same cases cited per Cur. But the reporter says, "Nota, Reader, it seems to me, that in case of a *lease for life*, if the *lessor accepts the same rent which was demanded*, he thereby affirms the lease; for he cannot receive it as due upon any contract, as in case of a lease for years, but he must receive it as his rent, and then he has affirmed the lease to continue; for when he has accepted the rent, he cannot have action of debt for it, but his remedy then is by assise, if he had seisin, or by distress; and so he says it seems to him in such case, that the acceptance of the rent will bar him of his re-entry.

3. If a *parson leases for life, rendering rent*, and dies, and the *successor receives fealty*, the lease is affirmed; per Stone; and he charged the jury of it for law. Br. Acceptance, pl. 15. cites 11 E. 3. Fitzh. Abbe, 9. & Juris Utrum, 3.

4. *And* in juris utrum the defendant pleaded *a lease for life by R. S. predecessor of the plaintiff*, rendering rent, and that the *plaintiff had accepted the rent*, and a good plea by the opinion of the court; and it does not appear in the book whether the lessor was parson, vicar, or prebendary, but it is all one as it seems, and agreed with F. N. B. 50. Br. Acceptance, pl. 15. cites 11 E. 3. Fitzh. Abbe, 9. & Juris Utrum, 3.

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Br. Acceptance, pl. 23. S. P. per Markham J. to which it was not answered, cites 21 H. 6. 25.

5. If the *lord avows in a court of record*, and the *tenant disclaims*, the lord may have writ of right upon disclaimer; but if he accepts the rent after, he shall be concluded in a writ of right upon disclaimer. Br. Barre, pl. 27. cites 21 H. 6. 24.

S. P. of a prior, and so of an abbot; per Cur. Br. Abbe, pl. 20. cites 37 H. 6. 4.

6. Acceptance of a rent by *successor of prior*, who leased for years, affirms and perfects the lease; *contra where a parson leases* for years, rendering rent, and dies, and the successor receives the rent. Br. Acceptance, pl. 9. cites 37 H. 6. 3, 4.

7. In

7. In waſte, a man *leaſed land at will*, rendering rent, and died; the *heir accepted the rent*; this does not make the leaſe good, becauſe acceptance cannot make a *void leaſe* good, *nor* make a leaſe *determined by a re-entry*, &c. to be good; per Rowe Serjeant; quod non negatur. Br. Acceptance, pl. 7. cites 14 H. 8. 11.

But if a leaſe for years be with *condition not to commit waſte*, and the leſſor *accepts of the rent for the quarter in which the waſte is done*, this ſhall not bar his entry; *but if he accepts of a ſecond payment*, then it is otherwiſe. Godb. 47. pl. 58. Mich. 28 & 29 Eliz. Anon.——But if the leaſe be upon condition that *the eſtate ſhall not ceaſe on waſte done*, there no acceptance of the rent by the leſſor can make it good. Ibid.

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8. A man feiſed in fee *leaſed for* 10 *years, and took a feme, and* thereof *conveyed eſtate to him and his feme, and to the heirs of the baron*, and *after the baron and feme leaſed to another for* 20 *years, rendering rent.* The *baron died*, the *feme accepted the rent during the* 10 *years*, and by this the 2d leaſe for 20 years is not affirmed; but after the 10 years ended ſhe may enter; for *acceptance before the leaſe commenced cannot make it perfect.* Br. Acceptance, pl. 18. cites 1 E. 6.

9. A *leaſe for years* was made for ten years *rendering rent upon condition* of re-entry, *if the leſſee, &c. granted or* aſſigned the ſame or any part thereof *without aſſent of the leſſor*, &c. The *leſſee granted part of term without his aſſent*, and afterwards the leſſor accepted all the rent from the leſſee, but did not then know that the condition was broken; and adjudged on demurrer for the plaintiff, that the condition being collateral, the acceptance of the rent ſhould not make the re-entry void; for notice in this caſe is material. 3 Rep. 64. a. Trin. 38 Eliz. B. R. Pennant's caſe.

Mo. 456. pl. 626. Harvey v. Oſwold S.C. accordingly; but if he had notice, the acceptance, it ſeems, would be a bar, though the condition was collateral; per Gawdy and Popham.——Cro. E. 553. pl. 4. Paſch. 39 Eliz. S. C. and Clench and Popham being only in court, Clench held the entry not congeable, but Popham e contra; but Popham ſaid, that *if the condition be of ſuch a nature that the performance or non-performance thereof lies in the conuſance as well of the leſſor as of the leſſee, it is otherwiſe*; et adjornatur.——Ibid. 572. pl. 12. Trin. 39 Eliz. S. C. adjudged for the plaintiff by Fenner, Gawdy, and Popham; but Fenner ſaid, *if the leſſor had accepted rent from the alienee, that would have affirmed the leaſe*, for thereby he took notice of the alienation.——S. C. cited Mo. 626. in pl. 594.——S. C. cited by the name of Harvey v. Tanner, 2 And. 90. in pl. 54.——But Godb. 47. pl. 58. Mich. 28 & 29 Eliz. B. R. it was ſaid [per Cur. as it ſeems] that a man made a leaſe for years upon condition that he ſhould not aſſign over his leaſe, and it was reſerving rent; and after he did aſſign, and then the leſſor accepted the rent, there he ſhall not enter for the condition broken.——Where the *leſſor accepted* rent *by the hands of the executrix of the aſſignee*, all the court held that this acceptance ſhall bar him of his entry; for it being accepted by his own hands, it ſhall be intended that he had notice ſhe was to pay it, and the *allegation by the executrix by way of ſciens* is ſufficient; and if the leſſor had no notice, the leſſor ought to ſhew it on his part; and judgment accordingly. Cro. J. 398. pl. 4. Paſch. * 14 Jac. B. R. Whitchcot v. Fox.——Roll. Rep. 70. pl. 12. Mich. 12 Jac. Hitcheock v. Fox, S. C. Coke thought *ſciens* not to be iſſuable, and therefore not well alleged, but perhaps the other had confeſſed it, and ſo made the plea good; adjornatur.——Ibid. 350. pl. 10. Trin. 14 Jac. ſaid by the counſel Arg. that this was in a manner over-ruled by the court at a day before, that ſciens was good, and therefore he did not rely upon it.——2 Bulſt. 290. S. C. adjudged.

* [363]

10. *But* per Cur. there is a *difference between a leaſe for life and for years*; for in the firſt caſe, if the concluſion of a conditioned annexed to the rent (or the collateral act) be, that then the leaſe ſhall be void, there, (becauſe the eſtate of freehold being created by livery cannot be determined before entry,) the acceptance of rent due at a day after ſhall bar the leſſor of his entry;

for this voidable leaſe may well be affirmed by acceptance of the rent. 3 Rep. 64. b. 65. a. Trin. 38 Eliz. B. R. in Pennant's caſe,

2 And. 42. pl. 28. S.C. two judges held the entry was gone and determined, but one was of a contrary opinion.—2 And. 90. pl. 54. S.C. ſays, that

11. A leaſe for years of a meſſuage and 20 acres of land, with a *proviſo that the leſſee ſhould not parcel out any of the lands from the houſe.* Afterwards the leſſee demiſed the houſe and 10 acres for a year, and at the next rent-day the leſſee *accepted the rent, and after that entered for the condition broken.* It was held by Anderſon and Beaumont, contrary to Walmſley J. that the acceptance of the rent had barred the leſſor's entry, for thereby he had ſhewn his election to continue the leaſe and to waive the entry. Mo. 425. pl. 594. Hill. 28 Eliz. Marſh v. Curteis.

three judges held that this acceptance ſhould not hinder, but that he might enter and avoid the leaſe; for it might be that the leſſor had no notice of the breach of the condition, and if ſo it would be hard to conclude him, and by ſuch means any man might be defrauded of the benefit of his condition. —— Cro. E. 528. pl. 57. S. C. that Anderſon and Beaumont held the acceptance ſhould bar him of his entry, for he accepted it as rent due to him by the leaſe, which cannot be if the eſtate be undone by an act precedent, but Walmſley J. contra; it was afterwards adjudged for the plaintiff (the leſſor).——— Brownl. 78. S. C.———3 Rep. 65. a. cites S. C. as adjudged by Anderſon Ch. J. and Walmſley J. and all the court, that though the leſſor accepted the rent of the leſſee, yet as he had no notice of the aſſignment the acceptance ſhould not conclude him of his entry.———Noy, 7. S.C. and the entry adjudged lawful; and that the acceptance does not take it away; for the condition is for a collateral thing; but otherwiſe it is of a condition to re-enter for non-payment of rent, according to Pennant's caſe in Coke's Reports.

Mo. 600. pl. 829. S. C. adjudged by all the juſtices, that the plaintiff ſhall be barred.———

12. Debt againſt an *adminiſtrator* for rent, who pleaded, that before it incurred he had *aſſigned the term to a ſtranger*, and *of whom the leſſor had accepted rent, knowing of the aſſignment*; it was held clearly, that by the acceptance the adminiſtrator was not chargeable afterwards. Cro. E. 715. pl. 39. Mich. 41 and 42 Eliz. B. R. Marrow v. Turpin.

2 And. 133. pl. 79. S. C. adjudged that the action does not lie.——3 Rep. 24. a. b. S. C. cited as adjudged accordingly.

13. If *one enters into my land and claims for* 20 *years*, though he is a diſſeiſor and cannot qualify his own wrong, yet the *diſſeiſee may admit him to be tenant for years if he accepts the rent or brings waſte*, as Carret ſaid, 14 H. 4. But has only for years in reſpect of his claim; but by accepting the rent, or bringing the action of waſte, he is concluded; per Yelverton. Godb. 384, 385. pl. 472. Paſch. 3 Car. B. R.

[364] (D) *What* ſhall be a *ſufficient Acceptance* to make a Confirmation. [And by whom. Succeſſor, &c.]

Cro. C. 95, 96. S. C. cited as adjudged in C. B. and Crooke ſays, that the copy

[1. IF a *biſhop leaſes for life* certain land parcel of the manor of D. reſerving rent, *and dies*, and *another biſhop is made*, and the *bailiff of the manor comes* to him, *and ſhews him in a general manner, that there are certain rents of the ſaid manor arrear*; upon which the *biſhop commands him to receive the ſaid rents*, and he receives

ceives them accordingly, and amongſt them *receives the ſaid rent reſerved upon the ſaid leaſe, and* after *delivers over all the ſaid rents to the biſhop, without giving him notice of the ſaid leaſe.* This is a confirmation of the ſaid leaſe; for the biſhop of himſelf ought to take notice of the leaſes made by his predeceſſor. Hill. 5 Jac. between WHEELER AND DANBY, per Curiam, adjudged.] of the record was brought to him, whereby he ſaw that judgment was given upon the verdict for the defendant; but he makes a quære, whether it was for this cauſe alleged, or for that the plaintiff's leaſe, by which he claimed from the biſhop, and whereupon he brought ejectment, was not warranted by the ſtatute of Eliz.

2. If *lands* are given *to baron and feme and the heirs of the body of the baron*, and the *baron leaſes for forty years*, and dies, and the *iſſue in tail accepts the rent in the life of the feme*, &c. This is no confirmation ſo as to bind the iſſue after the death of the feme; for at the time of the acceptance no rent was in eſſe, or due to him. 3 Co. 64. b. per Curiam, Trin. 38 Eliz. B. R. cites Br. Acceptance [pl. 13.], 32 H. 8.

3. A *biſhop made a leaſe for years to H. and G. which was not confirmed, and afterwards* he made *another leaſe to G. which was confirmed* by the dean and chapter, *and died;* it was held by ſeveral, that the firſt leaſe was void, and yet they agreed the abbot or biſhop, or ſuch as have eſtate of inheritance, may make leaſe for years rendering rent, and by their death the leaſe is only voidable at the pleaſure of the *ſucceſſors*, for if they accept the rent the leaſe is good; but that here the power of the ſucceſſor, to make the firſt leaſe good by acceptance of the rent, is reſtrained by the leaſe made by the predeceſſor and the chapter. The caſe was moved in Bank. And the juſtices doubted; for ſome ſaid, that the leaſe was ſurrendered for the moiety, and remained only for the reſidue; but the reporter ſays, quære legem bene, for the parties ſubmitted it to an arbitrement. D. 46. a. b. Mich. 32 H. 8. Herreyong v. Goddard.

4. G. leaſed for years rendering rent, with clauſe of re-entry; the *rent due at Lady-day* was behind, being *demanded at the day*, which rent the *leſſor afterwards accepted*, and then entered for the condition broken, and his entry holden lawful; for the rent was due before the condition broken; but if the leſſor *accepts the next quarter's rent*, then he hath loſt the benefit of re-entry; for thereby he admits the leſſee to be his tenant. And if the *leſſor diſtrains* for rent due at the ſaid feaſt of Annunciation after the forfeiture, he cannot afterwards re-enter for the ſaid forfeiture; for by his diſtreſs he hath affirmed the poſſeſſion of the leſſee; ſo if he makes an *acquittance for the rent as a rent*, contrary if the acquittance be but for a ſum of money, and not expreſsly for the rent, all which tota Curia conceſſit. Le. 202. pl. 348. 18 Eliz. B. R. Greene's caſe. Cro. E. 3. pl. 6. Hill. 24 Eliz. B. R. the S. C. that two days after the demand the leſſor received the rent and made the leſſee an acquittance by the name of his farmer; and it was clearly reſolved, that the bare receipt of the rent after the day was no bar, for it was a duty to him; but a diſtreſs for the rent, or a receipt of the rent due at another day, was a bar, for thoſe acts do * affirm the leſſee to have lawful poſſeſſion; ſo if he maketh him an acquittance with a recital that he is his tenant, and in this caſe by calling him his farmer, this is a full declaration of his meaning to continue him his tenant; and it was adjudged, that the entry was not lawful.

5. Acceptance

Br. Acceptance, pl. 11. cites 19 Aſſ. 9. S. P. but e contra

5. Acceptance of *rent on a void leaſe* ſhall not bind the ſucceſſor where the leaſe is void *on the ſtatute*, but *otherwiſe at common law*. Cro. J. 173. pl. 14. Trin. 5 Jac. B. R. Rickman v. Garth.

upon a leaſe voidable. —— S. P. by Bridgman Ch. J. Cart. 16. Mich. 16 Car. 2. C. B. in the Dean and Chapter of Weſtminſter's caſe.

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S. P. Br. Acceptance, pl. 10 cites 21 H. 7. 38. *So if tenant in tail* leaſes

6. Bargain and ſale by *baron and feme* of the wife's land reſerving a rent; if after the death of the baron the *feme accepts the rent*, it will bar her of her entry; agreed by counſel. Roll. Rep. 154. Paſch. 13 Jac. B. R.

by land and dies, and the *iſſue* in tail *accepts the rent*, the leaſe is affirmed good.

(E) *What* ſhall be *a Leaſe* or Grant *confirmable*. [And *what* ſhall be a *ſufficient Confirmation* in reſpect of the Perſons making it. Things Spiritual.]

The parſon, without the patron and ordinary, cannot bind his ſucceſſor.

[1. *TO make a parſonage chargeable*, three things are neceſſary, viz. that the charge be made *by the parſon, patron, and ordinary*. 14 H. 4. 18. b.]

Br. Dean and Chapter, &c. pl. 6. cites S. C. —— If parſon leaſes for years, or charges the church, and the patron or ordinary confirms it, this ſhall bind the ſucceſſor. Br. Leaſes, pl. 64. cites 33 H. 8.

Br. Dean and Chapter, &c. pl. 6. cites S. C. but neither Brooke, nor the Year-book, takes notice of

[2. [*As*] If upon a *ſuit for tithes* by a parſon, which he claims by preſcription, the parties *ſubmit* themſelves *to the award of the commiſſary, who awards*, that the defendant ſhall pay *an annuity* to the parſon for the tithes, which award is *confirmed by the ordinary, but not by the patron*; this ſhall not bind the ſucceſſor. 14 H. 4. 18. b.]

any confirmation by the ordinary, or any other; and there it is held, that arbitrement cannot give franktenement without deed.

Br. Confirmation, pl. 15. cites S. C. that it is good during the time

[3. If a *parſon grants* an *annuity in fee*, though this is determinable by his death, yet if the *patron and ordinary confirm it*, it ſhall bind perpetually. * 26 Aſſ. 38. per Norton, 16 E. 3. 24. admitted.]

limited by the parſon, if the patron and ordinary confirm it. —— Br. Grants, pl. 73. cites S. C. and S. P. by Norton.

4. Confirmation *of a rent or ſeigniory* is not good, but in reſpect of a former eſtate or deed; and therefore if the *firſt deed be loſt, or* be *before time of memory*, the confirmation is not good; per Hull & Skrene, & non negatur. Br. Confirmation, pl. 24. cites 12 H. 4. 23.

5. If a *biſhop grants fee to the ſteward for term of life, or leaſes land* for term of life, *and dies*, and the *ſucceſſor confirms it*, this is good; for the leaſe was not void, but voidable; per Danby Ch. J. but per Moyle and Choke J. it is void by the death of the biſhop, leſſor,

for, quod contrarium eſt, as it ſeems; for biſhop, dean, and prebend have fee; but contra of a parſon, for there the fee is in abeyance. Br. Confirmation, pl. 17. cites 5 E. 4. 105.

6. A *parſon makes a leaſe* for years, or grants a rent-charge *to begin after his death*. The patron and ordinary confirmed it. It ſeems good to bind the ſucceſſor, becauſe it is granted and *charged immediately*, although it take not effect in the life of the grantor; but Mountague doubted of the caſe. D. 69. pl. 30. Paſch. 5 E. 6. Anon.

Ibid. Marg. ſays this caſe was urged, and affirmed for good law by Gawdy, and that the other juſtices in a manner affirmed it, 44 Eliz. B. R.

7. In treſpaſs, the defendant pleaded in bar, that the *plaintiff within age made a feoffment* in fee of the lands *to the father of the defendant* rendering rent, and that afterwards the plaintiff confirmed the premiſes to the defendant's father, habendum to him and his heirs, and that his ſaid father died ſeiſed, and the lands deſcended to him as ſon and heir, but judgment for the plaintiff; for it was *not averred in fact that his father was ſeiſed in fee at the time of the confirmation*, and if he was not then the confirmation is void, and in this caſe the land could not paſs by the confirmation, unleſs it enured upon a privity by way of enlargement of eſtate. D. 108. b. 109. a. b. Mich. 1 & 2 P. & M. Rugway v. Wolcott.

8. A *biſhop made a leaſe* for years, which was *confirmed by the dean and chapter*, and afterwards he *let the ſame land to another for* 20 *years, to commence after the firſt* 20 *years*, and then, *before any confirmation of it, he let the ſame lands to a third perſon for* 60 *years*, to commence immediately. The *laſt leaſe was firſt confirmed*, and after the leaſe in reverſion was confirmed alſo. Reſolved by 3 juſtices, contra Browne, that that leaſe was good, and the confirmation good, notwithſtanding the laſt leaſe was firſt confirmed, for the leaſe is not to have any intereſt by the confirmation, but only to make it perdurable and effectual. Mo. 66. pl. 180. Trin. 6 Eliz. Anon.

S. C. cited Show. 381.

9. *A. B. and C. were leſſees at will. A. died.* Afterwards the *leſſor*, reciting A.'s death and the former leaſe, and that B. and C. had ſurrendered the leaſe, *granted them a new eſtate, habendum eis & hæredibus ſuis, but* there was *no warrant of attorney to make livery*. The court were of opinion, that the eſtate at will was determined, ſo that the ſecond grant could not enure as a confirmation to give a fee-ſimple to B. and C. as it might have done if they had been tenants at will. D. 269. b. pl. 20. Hill. 10 Eliz.

Ibid. a quære is added, whether the tenancy at will was not determined by the death of A. one of the leſſees; becauſe nothing ſurvives by his death.

10. The grant of an *annuity* made *by a prebendary before his inſtallation* and induction is void to charge the prebend; by the opinion of all the juſtices. Pl. C. 429. b. Trin. 20 Eliz. Hare v. Bickley.

(F) *Who* ſhall be a *ſufficient Perſon* to make a Confirmation.

[Or, what ſhall be a Leaſe or Grant confirmable in reſpect of the Leſſor or Grantor.]

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Cro. E. 775. pl. 5. Coſtard v. Winder, S. C. accordingly by Popham and Fenner, but Gawdy e contra, and they reſolved to have it adjudged accordingly, Gawdy aſſenting, and Clench abſente; but for other defects the judgment was ſtayed. ——— Mo. 606. pl. 836. Coſtard v. Wingate, S. C. agreed, that a parſon being a lay-man ought to be deprived, or otherwiſe all his acts ſhall be good as lawful parſon till deprivation.

[1. IF a *layman be preſented, inſtituted, and inducted* to a benefice, and *before the ſtatute of the* 13 *Eliz. makes a leaſe for years of his* **benefice*, which is *confirmed by the patron and ordinary*, and after the incumbent is *deprived, becauſe he was a mere lay perſon*, yet the leaſe is good; for he was *parſon de facto* for the time, and ſo the leaſe not void, and therefore well enough confirmed. Trin. 42 Eliz. B. R. between CUSTOR AND WINDATE adjudged, which intratur Paſch. 42 Eliz. Rot. 127.]

* [367]

Br. Non eſt Factum, pl. 3. cites 9 H. † Fol. 477. 6. 32. where it was held, that the grant of ſuch a parſon or abbot ſhall bind, becauſe he was abbot or parſon in poſſeſſion. [But mentions nothing of the confirmation, which ſeems admitted.] ——— Br. Abbot, pl. 19. cites S. C. that the grant of ſuch is good. ——— Biſhops not conſecrated are not biſhops, and therefore a leaſe for years by ſuch, and confirmed by the dean and chapter, ſhall not bind the ſucceſſor, becauſe they never were biſhops; but e contra of biſhops deprived, who were biſhops de facto at the time of the leaſe and confirmation made. Note the diverſity. Br. Leaſes, pl. 68. cites 2 M. 1. ——— Br. N. C. 2 M. pl. 463. S. C.

[2. If a *parſon makes a leaſe* or grant, or ſuch like, and this is *confirmed by the patron and ordinary, and* after the parſon *is deprived for a pre-contract*, (this was when prieſts could not marry,) yet the † grant ſhall be good. 9 H. 6. 33. b. for he was a lawful parſon at the confirmation.]

Br. Non eſt Factum, pl. 3. cites 9 H. 6. 32. S. C. that the grant of ſuch is not good.

[3. If the *church* be *full* of a parſon, and after *another is made parſon, and inducted* by the ordinary, *and he makes a grant*, which is *confirmed by the patron and ordinary*, yet the grant is void, becauſe he was *not parſon at the time* of the grant. 9 H. 6. 34.]

‡ Br. Non eſt Factum, pl. 3. cites 9 H. 6. 32. S. C. that the grant of ſuch is not good.

[4. If a *church* be *void*, and *one enters and occupies of his own wrong*, without any preſentation or inſtitution, and occupies it *as parſon*, and makes a grant. which is confirmed by the patron and ordinary, yet this is void, becauſe the grantor was not parſon. ‡ 9 H. 6. 34. Curia. One cannot be parſon *without a preſentation or collation.* § 10 H. 6. 11.]

§ Br. Dean and Chapter, pl. 23. cites S. C. that by his entry he cannot be vicar; but e contra by preſentation and induction, and that the perſon of the vicar is charged. ——— Fitzh. Brief, pl. 65. cites 10 H. 6. 10. S. C.

5. Where the *biſhop de facto made a leaſe*, which was *confirmed by the dean and chapter*, and after the *biſhop de jure died in the life of the*

biſhop de facto. It was reſolved, that he not being lawful biſhop, and this leaſe being to charge the poſſeſſions of the biſhoprick, it is void, although all *judicial acts*, as admiſſions, inſtitutions, certificates, &c. ſhall be good; but not ſuch voluntary acts as tend to the depauperation of the ſucceſſor, and ſo affirmed a judgment given in B. R. in Ireland. Cro. J. 552. 554. pl. 15. Mich. 17 Jac. B. R. Rouan Obrian & al' v. Knivan.

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6. A *parſon made a leaſe* of his rectory *for* 60 *years*, which was *confirmed by the ſucceeding biſhop, and the ſucceeding patron*, neither of them being biſhop or patron at the time when the leaſe was made, yet adjudged per tot. Cur. that it was good. Cro. C. 38. pl. 3. Trin. 2 Car. C. B. Baniſter's caſe.

(G) In what *Caſes* the *Confirmation* of the Patron and Ordinary is *neceſſary*. [368]

[1. IF a *prior and a parſon, upon a debate* of the patronage of the parſonage, *ſubmit themſelves to the ordinary, who ordains, that the prior ſhall give to the parſon certain tithes, and the parſon grants to the prior an annuity, with the aſſent of the ordinary*, and after the *parſon dies*, and the *ſucceſſor takes the tithes*, he may be charged with the annuity, though *the patron never confirmed it*; for in as much as he is ſeiſed of the tithes, he hath quid pro quo. 16 Ed. 3. 24. adjudged.]

2. If a *parſon charges with leave of the patron and ordinary*, this is not good after the death of the parſon; for there ought to have been a confirmation of the patron and ordinary; per Hill, but Rickhill contra, by which Rickhill awarded the party to anſwer to ſuch grant made by the parſon with leave of the patron and ordinary; but Brooke makes a quære of this award. Br. Confirmation, pl. 30. cites 7 H. 4. 15, 16.

For in the time of H. 8. *the biſhop of London granted the ſtewardſhip of his lands to Aldred Fitz-James, by aſſent of the dean and chapter*, and died, by which the grantee loſt his office, as it is ſaid, becauſe the dean and chapter had not confirmed it; quod nota; and yet per Littleton, in the end of the chapter of Diſcontinuance, a parſon may charge by aſſent of the patron and ordinary; for the writ of entry upon ſuch diſcontinuance is *brief de entre ſine aſſenſu capituli, or* ſine aſſenſu *confratrum & ſororum*, but thoſe ſeem to be all in one and the ſame corporation, but more was in the grant of the biſhop of London, as miſnoſmer, &c. for the ſaid Aldred Fitz-James was named Etheldredus, where it ſhould be Aldredus, and ſo was miſnamed, and alſo the deed was, quod ſigillum noſtrum appoſuimus, which may be referred to the biſhop only, and not to the biſhop, dean, and chapter; and therefore by ſeveral, at this day, the grant was avoided for thoſe cauſes, and not for the other cauſe, and ſo *a grant with aſſent of the dean and chapter with all perfections is good.* Br. Confirmation, pl. 30. cites 7 H. 4. 15, 16. —— S. C. cited Lane, 38.

3. If *parſon or vicar makes a leaſe for* 3 *lives, or* 21 *years, of lands accuſtomably letten, reſerving the accuſtomed rent*, it muſt be alſo confirmed by the patron and ordinary, becauſe it is excepted out of the 32 H. 8. and not reſtrained by the ſtat. 13 Eliz. Co. Litt. 44. b.

4. There is a *diverſity* between a *ſole corporation, as parſon, prebendary, vicar*, and the like, *that have not the abſolute fee* in them, for to their grants the patron muſt give his conſent. But if there be a *corporation aggregate* of many, as dean and chapter, maſter, fellows, and ſcholars of a college, abbot, or prior and covent, and the like,

or

or any ſole corporation that has the abſolute fee, as a biſhop with conſent of the dean and chapter, they may by the common law make any grant of or out of their poſſeſſions, without their founder or patron, albeit the abbot or prior, &c. were preſentable; and ſo it is of a biſhop, becauſe the whole eſtate and right of the land was in them, and they may reſpectively maintain a writ of right. Co. Litt. 300. b.

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[369] (H) *By* the *Dean and Chapter* [or others] of the Grant of the Biſhop.

[1. BY the *feodal law*, the biſhop non poteſt dare in feodum, a thing that had uſed to be given in feodum, without the aſſent of the chapter. Antonii Contii methodus, 52. It is there ſaid that this is a great queſtion.]

[2. By the law *of Scotland*, epiſcopi nec abbates poſſunt de terris ſuis aliquam partem donare ad remanentiam ſine aſſenſu & confirmatione domini regis quia eorum baroniæ ſunt de eleemoſyna domini regis, & anteceſſorum ſuorum. Skene Regiam Majeſtatem, 48. 1, 2.]

[3. A *grant by* the *biſhop* of Meath in Ireland *by the aſſent of his clergy, he not having any dean and chapter*, is a good grant without other confirmation. Davies's caſe of Proxies, 1. admitted.]

Co. Litt. 301. a. in principio. S. P.—— * S. C. cited by Coke, Arg. Le. 234. in pl. 317. for both are but one chapter in reſpect of the biſhop; for if the biſhop is choſen by both chapters, there a confirmation muſt be by both.——Fitzh. Grants, pl. 104. cites S. C.

[4. If a *biſhop hath two chapters which uſed to confirm grants* made by him, *as* the biſhop of Coventry and Litchfield had, *the prior and convent of Coventry, and the dean and chapter of Litchfield*, and a grant of the biſhop is confirmed by the prior and convent only, and not by the dean and chapter, this is no good confirmation to bind the ſucceſſor. Temp. * R. 2. fol. 104. D. 11 El. 282. 27. Statham. Aff. 50 Ed. 3. but it is not in the book in print.]

D. 282. b. pl. 26. the Archbiſhop of Dublin v. Bruerton.—— S. C. cited by Coke, Arg. Le. 234. in pl. 317. and admitted, becauſe the ſurrender was by act of parliament, and ſo one ſole chapter remained. ——Co. Litt. 301. a. in principio, S. P.

[5. If the *dean and chapter of Chriſt-church and St. Patrick uſed a tempore, &c. to confirm the grants made by the archbiſhop of Dublin*, and yet Chriſt-church is known to be the eldeſt chapter to the ſee, and the dean and chapter of *St. Patrick*, by their chapter-ſeal, give and *ſurrender to the king in fee* all their ſaid church, houſe, lands, and poſſeſſions, but without the licence, will, or conſent of their biſhop, being their chief ordinary, and patron, for the moſt part, of all the prebends; *and after a leaſe made by the biſhop is confirmed only by the dean and chapter of Chriſt-church*; this confirmation ſhall bind the ſucceſſor biſhop, becauſe the corporation and chapter of St. Patrick, which was the other chapter, was diſſolved, and determined lawfully, and without the conſent of the archbiſhop. D. 11 El. 283. 27.]

[6. If

[6. If the *prior of Bath, and dean and chapter of Wells*, have *uſed* (*) *de tempore, &c. to confirm grants made by the biſhop of Bath and Wells;* and after *by the ſtatute of the* 31 *H.* 8. *the priory of Bath is diſſolved, and a leaſe* made *by the biſhop is confirmed by the dean and chapter of Wells only*, the other chapter being diſſolved by the ſtatute; it ſeems this confirmation ſhall bind the ſucceſſor biſhop. D. 37 H. 8. 58. 7. Quære; but 34 H. 8. cap. 15. an act of parliament is recited, that it was a great doubt whether it was a good confirmation, and therefore it is enacted, that all the ſaid confirmations, and all after to be made by the dean and chapter, ſhould be good in law.] * Fol. 478.

[7. If a *biſhop makes a leaſe for years to the king*, and *before involment* of the leaſe *the dean and chapter confirms it*, and after the †leaſe is inrolled, this is a good confirmation, though the leaſe is not in eſſe at the time of the confirmation; for this is but an *aſſent*, which may as well be before the leaſe as after. Trin. 8 Jac. Scaccario. SIR EDWARD DIMMOCK'S CASE.] Lane, 31. S. C. argued Ibid. 35. S. C. argued Ibid. 60. S. C. argued by the court, and S. P. agreed

by all the barons, and judgment againſt the king as to the meſne profits. ——— Co. Litt. 301. a. S. P. ——If a biſhop makes a leaſe the 2d of May, and the dean and chapter confirm it the 1ſt of May, this is a good leaſe after the biſhop's death; per Catlin and Southcote. Wray aſked how a leaſe could be confirmed before it was made; to which Catlin and Southcote replied, that the aſſent before is a good confirmation after. Ow. 33. Hill. 8 Eliz. Anon.

† [370]

8. If the *chapter confirms the grant of the biſhop after his death* it is void; for it ought to have perfection in the biſhop's life. Arg. Godb. 25. cites 31 E. 3. pl. 20. & 33 E. 3. Confirmation, 20.

9. If the *chapter confirms the leaſe of the biſhop after his death*, in time of vacation, this confirmation ſhall not bar the ſucceſſor. Fitzh. Confirmation, pl. 22. cites Hill. 33 E. 3. S. C. cited Arg. Godb. 25. in pl. 35. for it ought to

have perfection in the life of the biſhop, otherwiſe it is void. ——— Biſhop made a leaſe for 21 years, and another leaſe of the ſame land being in being not expired by 4 years, and *died, in time of vacation dean and chapter confirmed it*; per Clench it is a good confirmation. 4 Le. 78. pl. 166. 28 Eliz. C. B. Griſdall Archbiſhop's caſe.

10. If the *biſhop be patron and ordinary, and confirms* [a leaſe for years], there muſt be the confirmation of the dean and chapter alſo; for the biſhop, as ordinary, does nothing by his confirmation but a judicial act, and as patron he has the inheritance thereof in jure eccleſiæ, which he cannot bind againſt his ſucceſſor without confirmation by the dean and chapter. Br. Leaſes, pl. 64. cites 33 H. 8.

11. In debt the plaintiff declared that the predeceſſor of the biſhop granted to him the *office of keeper of the biſhop's manſion-houſe* of D. *for the term of his life, with the fee of* 2*d. per diem to be iſſuing and paid out of the profits of the rents and farm of D.* by the receiver of the biſhop, *and alſo an yearly robe*, which grant was confirmed by the dean and chapter, that the biſhop died, and the defendant was elected biſhop, and *for arrearages of the money and robes for* 8 *years the plaintiff brought his action againſt the ſucceſſor* biſhop, who pleaded that the plaintiff did not exerciſe the ſaid office. The jury found for the plaintiff, and he had judgment to recover the robes and Bendl. 182. pl. 226. S. C. adjudged.

and annuity, and the arrearages incurred as well before as after the bringing the original. Mo. 88. pl. 220. Hill. 10 Eliz. Howſe v. Ely (Biſhop of).

10 Rep. 61. b. cites S.C. —Ley, 72. Yelverton J. ſaid, he remembered the caſe of Boulton v. the Biſhop of Chicheſter, upon which he collected that the biſhop had uſually granted to 2 counſellors at law 40 s. a year to each, whereas now he

12. The *biſhop* of Cheſter, *after the ſtatute* 1 *Eliz. did grant* to G. B. *an annuity* of 5 marks per annum *pro conſilio impenſo & impendendo*, which was *confirmed by the dean and chapter*; and then the *biſhop died*, and B. brought a writ of annuity againſt the ſucceſſor, and in his count did aver, that the predeceſſors of the ſaid biſhop had granted reaſonable fees (but did not aver that this fee had been granted before), and did aver that he was homo conſiliarius and in lege peritus; and the opinion of the court was againſt the plaintiff, but there it was reſolved, that *although the ſaid biſhoprick was founded but of late times*, to wit, in the time of H. 8. *yet a grant of an office of neceſſity to one in poſſeſſion, with reaſonable fees* (the reaſonableneſs whereof is to be decided by the court of juſtice, wherein the ſame doth depend) *is good*, and is reſtrained out of the general words of the ſaid act. Bridgm. 31. cites Trin. 30 Eliz. Boulton v. the Biſhop of Cheſter.

granted 4 l. a year to one, though this be not in diminution of the revenue, nor more chargeable to the ſucceſſor, yet becauſe it is a great prejudice to him, in another degree it is void; for he cannot by any intendment be ſo well adviſed by one as by two; but if the biſhop had granted a counſellor 40 s. and by the laſt clauſe had granted to him another 40 s. it is void for the laſt, and good for the firſt; and this difference he grounded upon 2 E. 2. * Feoffments, 94. But Boulton in this caſe did not prevail, becauſe he did not aver that it was the ancient fee.

* [371]

13. The *dean and chapter* of Fernes in Ireland *conſiſted of* 11 *perſons and the dean*; and 3 *of theſe, with the commiſſory or proctor of the dean, confirm*, &c. and *afterwards* 3 *other of the prebendaries ſubſcribed* their names to the confirmation *at ſeveral days*, and the leaſe was held void becauſe the dean could not make a ſubſtitute, and the major part of the corporation ought to be conſenting to this, and that ſimul & ſemel, and not ſcatteringly; but they are not confined to the chapter-houſe, but they may aſſemble and do their acts elſewhere. Dav. 47, 48. Paſch. 5 Jac. B. R. The Dean and Chapter of Fernes's caſe.

Palm. 457. S. C. adjudged; but ſays it was reſolved by all, that a mere commendatory cannot confirm. —— Lat. 233. S. C. in totidem verbis. —— Noy, 93. S. C. adjudged accordingly as to the principal point.

14. If a *dean of Y.* be *made a biſhop of L. and by a diſpenſation is continued dean as before, with a power facere omnia quæ ad decanum pertinent* in tam amplis modo & forma, as if he was not promoted to the ſaid biſhoprick *non obſtante any ſtatute, canon* general or local to the contrary, and *afterwards is made biſhop of B. but before his confirmation the king makes another diſpenſation to retain the deanry as before, and meſne between the two diſpenſations the biſhop of Y. made a leaſe for* 21 *years, which the dean confirmed.* Per tot. Cur. the diſpenſations continued him dean as before per vim prioris tituli to all purpoſes, ſo that he may confirm, make leaſes, or do any act as dean, as if he never had been biſhop. And all agreed that the 2d diſpenſation on his election to B. was made in time convenient, and that he continued dean by force thereof. But Jones J. held that had he been a mere *commendatory dean only*, the confirmation had not been good, to which Hide aſſented, but Doderidge ſeemed

e contra,

& contra, and Whitlock J. said nothing. Jo. 158. Trin. 3 Car. B. R. Evans v. Askwith. ——Watts, Comp. Incumb. 8vo. 855. cap. 44. has a quære, who confirms bishop's grants and leases, where there is a mere commendatory dean, if not the clergy of the diocese, as in case where there is no dean and chapter.

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(I) *By* the *Bishop, Dean and Chapter, what* shall be said a *good Confirmation.*

[1. 8 E. 1. ROtulo Cartarum. M. 8. Part. 46. *release of the bishop* of London *ex assensu & consensu Decani totius Capituli.*]

2. C. a *prebendary* of the cathedral church of Chichester, *made lease by indenture, that he with the assent of R. bishop* of Chichester, *and of the Dean and Chapter* of the same church, *without naming the names of the dean,* and the deed concluded thus, viz. In witness whereof the said parties to these present indentures have interchangeably set their seals, and *the seal and name of the prebendary, and the seal of the bishop and the chapter was put to it;* quære, *if without any words of confirmation or assent* mentioned by them, if this be a good lease to bind the successor. D. 106. b. pl. 21. 1 & 2 P. & M. Champion's case.

(K) Confirmation *of the Grant of the Dean. What* shall be *a good* Confirmation. [372]

[1. IF a *dean leases* any of his *possessions, of which he is sole seised, with the assent of the chapter,* this is a good confirmation, because the dean only had the estate. D. 29 H. 8. 46. b. 72. and the writ de fine assensu Capituli will prove, that there needs but one assent.] D. 40. b. pl. 1. Chasin's case, S. C.

[2. [*So*] *if* a Dean is sole seised, and not with the Chapter, of certain possessions, and *leases* it *by such words* in the deed, *quod Decanus ex assensu totius Capituli dimisit,* and the *seal of the Chapter is annexed* to the deed; this is a good confirmation, for it is a good assent. D. 29 H. 8. 40. b. 72.] D. 40. b. pl. 1. Chasin's case. See (O) pl. 1.

[3. *So* if an *abbot* leases with the assent of the covent, and annexes their seal to the deed, this is a good confirmation, because the abbot hath all the estate, and there requires only the assent of the covent, which passes nothing. D. 29 H. 8. 40. 72.] S. P. by Ayliffe and Clench J. for the monks and friars being dead persons in law, cannot be parties to the lease. 4 Le. 11. pl. 44. Trin. 26 Eliz. B. R. obiter in Clark's case. ——S. P. obiter D. 40. b. Mill. 29. H. 8. pl. 1. ——S. P. Br. Faits, pl. 45. cites 14 H. 6. 16. See (O) pl. 1. and the notes there.

[4. [*But*] if a *dean and chapter* are *jointly seised,* and the dean leases with the *assent of the chapter,* and annexes the seal of the chapter to the deed, this is void, and shall not bind the chapter, because they have an estate in them, as well as the dean hath in him, D. 40. b. pl. 1. Chasin's case.—S. P. because the chapter are

parcel of the corporation, and ſeiſed with the dean, him, and may make a grant. D. 29 H. 8. 40. b. 72. Paſch. 10 Jac. B. between TOMLINSON AND CROKE, agreed.] and ſhall implead and be impleaded with him. Br. Faits, pl. 45. cites 14 H. 6. 16.

D. 273. b. pl. 38. Paſch. 10 Eliz. Wilford v. Pollard. See (R) pl. 2. S. C.

[5. The *dean of Wells may paſs his poſſeſſions with the aſſent of the chapter without* any confirmation of *the biſhop*, and after *this deanry is* ſurrendered and *diſſolved*, and this diſſolution confirmed by parliament, *and a new deanry executed* by the act, *and the nomination by letters patents of the new dean and his ſucceſſors given to the king* and his ſucceſſors; *and* it is *enacted* alſo, *that the new dean, and his ſucceſſors, may grant, demiſe*, and depart with their poſſeſſions, *in the ſame manner and form as the ancient deans might and uſed to do*; in this caſe there needs no confirmation from the biſhop of the grant made by the new dean, becauſe his confirmation was not neceſſary to the grants of the old dean; nor is the confirmation of the king of the grant of the new dean neceſſary, becauſe this is *not a mere donative, but* is made *of the ſame nature as the old dean was*. D. 10 Eliz. 273. 37. per Curiam.]

6. Dean ſeiſed in right of himſelf and his chapter makes leaſe for years. *Chapter by themſelves confirm it*; it is not good, becauſe their deeds being ſevered are to no purpoſe, it being a *body entire*, otherwiſe if after the leaſe they *both confirm*, becauſe it amounts to a new leaſe. D. 40. b. 1. in Marg. cites 14 H. 6. 16. [But I do not obſerve this very point in that caſe in the Year-book.]

7. An *archdeacon* having a *parſonage appertaining* to his archdeaconry, *made a leaſe* of the parſonage *before the ſtatute* 13 *Eliz. for forty years, and which was confirmed* after the ſtatute, adjudged a good leaſe and confirmation for the forty years. Mo. 459. pl. 636. Mich. 38 & 39 Eliz. Arkingſall v. Denny.

[373] Fol. 479.

(L) Confirmations *by Parſon, Patron, and Ordinary.* What ſhall be ſaid *ſufficient.*

Cro. E. 587. pl. 18. Mich. 39 & 40 Eliz. B. R. Herbert v. Munday, S. P. and ſeems to have been upon the ſame parſonage, and Popham ſaid, that this was in his time a great queſtion, but that it had been in two or three

[1. IF the *biſhop of Sarum* be *patron of the church preſentative* of S. *which lies within his dioceſe, and this is the body of a prebendary in the church of Sarum, and* the biſhop of Sarum *is patron alſo of the church of D. which is alſo preſentative, and* this *lies in the dioceſe of the biſhop of Winton*, and after the *church of D. is annexed* and united lawfully, *by the aſſent of the biſhops, deans and chapters of both dioceſes, to the prebend of S.* and after the *biſhop of Sarum collates J. S. to the ſaid prebend, which now by the union conſiſts of both churches, and inſtals him in the cathedral of the church of Sarum*; and after the *prebendary makes a leaſe* for years *before the ſtatute of the* 13 *Eliz. and not warrantable by the ſtatute of the* 32 *H.* 8. *and this is confirmed by the biſhop, dean and chapter of Sarum*, and *not by the biſhop of Winton*; yet this is a good confirmation; for by the union the *biſhop of Winton* hath annexed it to the prebend of S. and ſo *hath ouſted himſelf of his power of confirmation* as ordinary; for after the union, the prebendary is inveſted

veſted in both churches by his inſtalment without any other preſentation, admiſſion, inſtitution, or induction, in the church of D. or S. Paſch. 10 Jac. B. R. between LEIGH AND HELLIER; reſolved per Curiam, upon evidence upon a trial at bar for part of the poſſeſſions of the church of Huſband-Tarant, in the county of Southampton, which was annexed to the prebend of Burbage in the county of Wilts, this being a prebend in the cathedral church of Sarum.]

cases since reſolved, that it is well enough; and to this all the other juſtices agreed.

2. A parſon made a leaſe for years, P. who was the *patron in the reverſion before the ſtatute.* 13 *Eliz. confirmed it; and after the ſtatute, viz. the* 14 *Eliz. the ordinary confirmed it, and* 23 *Eliz. he which had the patronage for life confirmed it.* It was the opinion of the juſtices, that all the confirmations by the ordinary and patrons were good; for the ſtatute ſpeaks of alienations by incumbents, but doth not make void confirmations made before the ſtatute. Cro. E. 18. pl. 5. Paſch. 25 Eliz. C. B. Higgins v. Grant.

3. A *prebendary of Saliſbury,* anno 4 E. 6. *made a leaſe to P. for* 99 *years of the rectories, and of K. and Y. in com. Devon, to commence after a leaſe then in being,* which laſt *leaſe was confirmed by the biſhop of Sarum and dean and chapter there* and enjoyed accordingly. The court held this a good leaſe, though *not confirmed by the biſhop of Exeter in whoſe dioceſe theſe rectories were;* for though they are not within the dioceſe of Saliſbury, yet becauſe by grant of H. 2. and of the biſhop of Exeter, they are annexed to the canonry of Saliſbury and made parcel of the prebend there, therefore though they are inducted by the biſhop of Exeter, yet they are inſtituted by the biſhop of Saliſbury, and take an oath of canonical obedience to him, and lapſe, &c. ſhall not incur to the biſhop of Exeter. Sid. 75. pl. 6. Paſch. 14 Car. 2. B. R. Gie v. Rider.

2 Keb. 280. pl. 80. Jay v. Rider, S. C. ſays it was doubted whether the leaſe confirmed by dean and chapter and biſhop, who is patron of lands lying in another dioceſe, whereof D. is ordinary, be good without confirmation by D. but that afterwards it was ruled to be good.

4. If there be a *compoſition* confirmed between a parſon and his pariſhioner, by which the pariſhioner is to pay 5 l. in lieu of his tithes for 10 years, and afterwards *another* compoſition is made, whereby the pariſhioner agrees to pay 6 l. for the ſame 10 years; this 2d is good without a confirmation, becauſe it is an *enlargement of the former,* and more * for the parſon's advantage than the firſt was. Arg. Hard. 385. Mich. 16 Car. 2. in caſe of Ingoldſby v. Wivell and Ullithorne.

But by the judgment in the principal caſe it ſeems, that ſuch ſecond compoſition will not affect the ſucceſſors of the parſon, and therefore the pariſhioner not bound by it. See ibid. 387.

* [374]

(M) Confirmation by the *Patron* and Ordinary. Patron.

Who ſhall be *ſufficient* to make it.*

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* Br. Dean and Chapter, &c. pl. 6. cites S. C. that preſident or commiſſary of dean have

[1. IF a *Dean and Chapter are patron*, a *confirmation by* the preſident or *commiſſary* (who is a deputy) is not good without the confirmation of the dean, becauſe the preſident can do nothing to charge the church. * 11 H. 4. 84. b. Davis, 1. 48. b. [47. b.]

authority to hear and determine ſpiritual or other cauſes, but not to ſeal a confirmation for the dean or the chapter in the name of the dean and chapter, ſo as to bind him and his ſucceſſors.—The power of the commiſſary is only to diſcuſs cauſes, and not to ſeal deeds; and though in this caſe the deed was *ſealed by the chapter as well as the dean's commiſſary*, it was held not good to bind the ſucceſſor. Br. Corporations, pl. 17. cites S. C. but Brooke adds a *quære*, if there was a *cuſtom* that the commiſſary ſeal for the dean.——A dean cannot make a deputy to confirm leaſes; per Noy. Palm. 461.——Lat. 35. S. P. accordingly.——Ibid. 237. S. P.

Cro. J. 458. pl. 5. Smith v. Bole, S. C. but S. P. does not appear.—3 Bulſt. 290. S. C. which ſee at

[2. If a *biſhop* be *patron of a prebendary*, and he *confirms a leaſe* made *by the prebend*, this is not good without the confirmation of the *dean and chapter*; for this patronage is part of the poſſeſſions of the biſhopric, of which he cannot bind his ſucceſſor without the dean and chapter. P. & Tr. 15 Jac. B. R. between SMITH AND BOWLES, this was ſo agreed.]

pl. 3. in the notes there.——Co. Litt. 300. b. S. P. of an advowſon, that if he be a patron he cannot confirm alone, but the dean and chapter muſt confirm alſo for the reaſon given in Roll.——See pl. 3. and the notes there.——See (P) pl. 1, 2. S. C.

3 Bulſt. 290. S. C. ſays it was urged and agreed by all that this confirma-

[3. *But* it ſeems that ſuch a confirmation made by the biſhop *ſhall bind the biſhop himſelf* during his time, *and all thoſe who come under him*; for the confirmation of the dean and chapter is requiſite, that the biſhop may not prejudice his ſucceſſor. Paſch. & Trin. 15 Jac. SMITH AND BOWLES it was a queſtion.]

tion by the archbiſhop patron, without the dean and chapter, is good, and ſhall bind the ſucceſſor; and for this was cited 33 H. 8. Brook's Caſes, fol. 46. pl. 202. Pl. C. 528. in caſe of Hare v. Brickley, and 19 Eliz. D. 357.——Cro. J. 458. pl. 5. S. C. but S. P. does not appear.——But Br. N. C. fol. 46. pl. 202. is viz. if a *biſhop be patron*, and the *parſon makes a leaſe, or grant by deed*, there the *biſhop patron and the ordinary*, *and the dean and chapter ought to confirm*, if the grant or leaſe ſhall be ſure. *Contra where a layman is patron in fee*, and *he and the ordinary confirm*, this ſuffices without the dean and chapter. *For in the firſt caſe the biſhop* patron *has intereſt in the inheritance* to the biſhopric, *but on the other* caſe *he has only a judicial power*, therefore it ſuffices that he who has the power at the time, &c. confirm; for this is a judicial act, but in the other caſe it binds the inheritance, which he has in jure eccleſiæ, which he cannot do againſt his ſucceſſor, without confirmation by the dean and chapter.——Br. Confirmation, pl. 1. cites S. C. in totidem verbis.——Br. Leaſes, pl. 64. cites S. C. and S. P. accordingly, and for the ſame reaſons.——Br. Charge, pl. 40. cites 11 H. 6. 9. S. P. and cites 33 H. 8. accordingly.

The caſe in Dyer is, viz. A *parſon* of a church *made a leaſe for 40 years*, the *biſhop of London being patron and ordinary*, *confirmed it without the dean and chapter*; the *incumbent died*, the *biſhop collated another, who made a new leaſe which is well confirmed*; the *biſhop is tranſlated*; the reſolution of the juſtices was certified to the counſel, that the firſt leaſe ſtood good, and not the ſecond, during both lives of the biſhop and ſucceſſor incumbent, who found the church charged. D. 367. pl. 42. Paſch. 19 Eliz. Anon.——S. C. cited Le. 235. in pl. 317.——S. P. admitted, as to binding the biſhop during his own time. Co. Litt. 300. b.

†[375]

Ibid. Marg. ſays it was adjudged in

† 4. A *biſhop* ſeiſed of land in right of his biſhopric made leaſe for years, *leſſee entered*, and afterwards *leſſor by indenture dedit, conceſſit*

conceſſit & confirmavit the land to the leſſee in fee, rendering to the biſhop and his ſucceſſors 10 *l. rent*, with a letter of attorney to make livery, and delivered the deed himſelf to the leſſee, and *livery was made* accordingly; and all this *was confirmed by the dean and chapter in the life of the biſhop, the dean being abſent in remotis, but the preſident of the dean was preſent* whom the dean had conſtituted by parol only locum tenentem ſuum, & tradidit claves ſuas una cum auctoritate vocis & aſſenſus decani, and this was entered in the regiſter according to ancient cuſtom. Afterwards the ſame biſhop alſo granted and releaſed the ſame rent to the leſſee and his heirs, and this alſo confirmed as above, both dean and preſident being abſent, but the ſubſtitute or deputy of the preſident being only preſent; and whether the ſucceſſor might avoid theſe alienations or either of them was moved before the juſtices at Serjeant's-inn by command of the Ld. Chancellor. D. 145. b. pl. 65. Paſch. 3 & 4 P. & M. Litchfield (Biſhop) v. Fiſher.

the caſe of the dean and chapter of Fernes, Dav. Rep. 47. that the *ſubſtitute* cannot charge the poſſeſſion, and ſo the quære in Dyer reſolved. —— Dav. Rep. 47. b. in S. C. accordingly. — Palm. 462. cites Dav. Rep. 47. that if *commiſſary* confirms the leaſe of the biſhop, it is good; whereupon Jones J. ſaid that Davis's Reports are not canonical; and Doderidge J. added, that they were made for the meridian of Ireland only, and ſaid that D. 145. it is a quære. —— Ibid. 479. S. C. cited accordingly by Doderidge. —— Lat. 238. by Jones and Doderidge, S. P.

5. A. *parſon of D. is patron of the church of S.* as belonging to his church, and *preſents B. who by conſent of A. and of the ordinary grants a rent-charge* out of the glebe; this is not good to make the rent-charge perpetual, without the *aſſent of the patron of A.* no more than the aſſent of the biſhop who is patron without the dean and chapter, or no more than the aſſent of the patron being tenant in tail or for life, as Littleton ſays. Co. Litt. 300. b.

(N) Who in reſpect of his Eſtate [*may confirm a Grant. Things Spiritual.*]

[1. IF *baron and feme* are *patrons in the right of the feme*, if they *confirm* by deed the leaſe of the parſon, this is not *good* againſt the feme and her heirs, but *only during coverture*; for the deed of the feme is void. Vide for this, D. 3, 4. Ma. 133. 1.]

D. 133. pl. 1. Is that the baron and feme and ordinary confirmed the leaſe, and that the incumbent leſſor was deprived for marriage, and the baron and his wife having granted the next avoidance before the deprivation, the grantee preſented his clerk, who entered upon the leſſee to avoid the leaſe. The reporter ſays, quære; becauſe it ſeems the entry congeable. But nothing is ſaid as to binding the feme and her heirs during the coverture only.

[2. If *tenant in tail of an advowſon confirms a leaſe* made *by the parſon*; this ſhall *not bind the preſentee of the iſſue* after the death of the confirmer, but he ſhall avoid it. My Reports, 14 Jac. MAUND AGAINST FRENCH.]

Fol. 480. Roll. Rep. 361. pl. 14. S.C. & S.P. agreed by Coke Ch. J. and Doderidge. —— 2 Roll. Rep. 8. S. C. adjornatur. —— Bridgm. 92. to 100. Mande v. French, S. C. argued, and it was inſiſted among other things, that the confirmation was utterly defeated and avoided by the remitter. —— And Paſch. 16 Jac. without any argument by the judges, it was agreed for the plaintiff, and thereupon judgment was given accordingly for the plaintiff. —— Le. 234 in pl. 317. Coke Arg. cites 31 E. 3. Grants, 61. that ſuch act of the patron ſhall bind only according to the eſtate of the patron, as if tenant in tail confirm the ſame it ſhall not bind the preſentee of the iſſue. —— Litt. ſ. 528. and Co. Litt. 300. b. S. P. But if the patron is tenant in tail, and diſcontinues the eſtate tail, the leaſe ſhall ſtand good during the diſcontinuance; or if the eſtate be barred, it ſhall ſtand good for ever.

[3. [*So*] if the *chaplain of a chantery* or free chapel, which is a *donative*, *makes a leaſe* for years *before the* 32 *H.* 8. and the *patron of the chapel being ſeiſed of the patronage in tail confirms it*; this ſhall not bind the chaplain of the iſſue. D. 8 El. 252. 95. admitted. But there the queſtion was, the patronage came to the king by the ſtatute of chanteries, before any gift by the iſſue and donor and his heirs excepted * [ſaving the leaſes and intereſts of all other, except the patrons and donors, and their heirs], and yet it was held the king ſhould avoid it; but after it appeared, that the donor had levied a fine after the confirmation, by which the iſſue was barred to avoid it, and then the king might not avoid it.]

* The words in the crotchet are not in the original, but ſeem neceſſary.

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An uſurper, who uſurps before inſtallation or induction, or preſentation, where another abbot or parſon is rightfully in poſſeſſion, or if one enters and occupies in time of vacation without any election or preſentation, the deed of ſuch is not good. Br. Non eſt factum, pl. 3. cites 9 H. 6. 32.

[4. If the *incumbent of an uſurper makes a grant*, and this is *confirmed by the uſurper and ordinary*; and after in a quare impedit the *true patron recovers*, and removes the incumbent. The grant by this is defeated, becauſe here was never any parſon and patron in right. 9 Hen. 6. 33.]

Cro. C. 582. pl. 7. Plowden v. Oldford, S. C. and was in error of a judgment, C. B. and Jones and Barkley J. in B. R.. (the Chief J. and Crooke being abſent in chancery) gave rule for affirmance of the judgment. And this being reported to Bramſton Ch. J. of B. R. and Littleton Ch. J. of C. B. and to Davenport Ch. B. and Crooke J. they all agreed to that judgment. And afterwards, on a motion for a further day to ſpeak in arreſt of judgment, the court denied it, and the judgment was affirmed. ——— Jo. 454. pl. 1. Oldfield v. Plowden, S. P. adjudged and affirmed. ——— 7 Rep. 8. a. Mich. 28 and 29 Eliz. in the Earl of Bedford's caſe. S. P. obiter held accordingly, per Cur. ——— Hob. 7. pl. 15. Trin. 11 Jac. Spendlows v. Bucket. S. P. held accordingly, and cites 7 Rep. 8. ——— Co. Litt. 46. a. S. P. ——— S. P. as to the grant of an annuity by the incumbent. Per Brown J. Mo. 67. in pl. 180.

[5. If *A.* be *ſeiſed of an advowſon in fee*, which is *full of B.* the incumbent, and after A. *grants the next avoidance to C.* and after *B. grants a leaſe* of the rectory for years, and this is *confirmed by A. and the ordinary before the ſtatute of* 13 *Eliz.* and after *B. dies*, and *C. preſents E. who is* inſtituted and *inducted, and enters* into the rectory, *and* after *dies*, and *A. preſents F. who is* inſtituted and *inducted*; F. ſhall hold this church diſcharged of the leaſe, becauſe *this leaſe was totally avoided by the entry of E.* who came in by the preſentation of C. which was not ſubject to the confirmation of A. the patron in fee; for E. by his inſtitution and induction was ſeiſed of the fee in the right of his church, as fully as any could be. Paſch. 16 Car. B. R. between SIR EDMUND PLOWDEN AND OLDFIELD, adjudged, per totam Curiam, in a writ of error upon ſuch judgment in Banco, upon a ſpecial verdict for land, parcel of the rectory of l'Aſſam in the county of Southampton. Intratur in B. R. Mich. 15 Car. Rot. 86. and the judgment affirmed accordingly.]

Ibid. Marg. pl. 5. cites Paſch. 41 Eliz. where patron granted the next avoidance to B. and the par-

6. A. a *parſon made a leaſe for* 40 *years*, which was *confirmed by the treaſurer of York cathedral, who was patron as in right of his treaſurerſhip*, and after the *patron and the biſhop of Winton, who was ordinary, confirmed the leaſe in the life of the leſſor*, and *before the confirmation the treaſurer granted the next avoidance* to another pro illa vice. *A. died.* He that had the next avoidance preſented

B,

B. who *was admitted and inducted*, and then the ſaid *treaſurer, with aſſent of the biſhop of York, and the dean and chapter, aliened the patronage in fee.* The queſtion was, *whether the new incumbent ſhall avoid the reſidue of the term?* Quære; and note, the alienation was after the death of the leſſor; ideo quære bene. D. 72. b. pl. 5. Mich. 6 E. 6. Anon.

ſon made a leaſe for years, which is confirmed by the patron and ordinary, and afterwards the parſon dies, and B. preſents C. he ſhall avoid this leaſe.——The *patron* of the church of D. *grants the next avoidance to J. S.* and afterwards, *before the ſtatute* 13 *Eliz. the parſon, patron, and ordinary, make a leaſe* for years rendering rent, and the *parſon dies*, * and *J. S. preſents W. R.* who is admitted, inſtituted, and inducted, and dies, ſuch leaſe was avoided in toto abſolutely, and therefore cannot ſtand againſt the ſecond ſucceſſor. Per Cur. 7 Rep. 8. a. Mich. 28 and 29 Eliz. in the Court of Wards, in the Earl of Bedford's caſe.——Co. Litt. 46. a. S. P. and becauſe the laſt incumbent, who had the whole eſtate in him, avoided the leaſe, it ſhall not revive again.

* [377]

7. A. ſeiſed of advowſon in fee, grants to B. and his heirs, that at whatever time the church becomes void, that B. and his heirs ſhall *nominate a clerk to A. and his heirs, and that A. and his heirs ſhall preſent him over to the ordinary;* if the parſon makes leaſe or grant of rent-charge, this ought to be confirmed by *both*, but in writ of annuity aid is only grantable of him that has the preſentation, for this is in the right. Mo. 49. pl. 147. Paſch. 5 Eliz. Anon. Dal. 48. pl. 10. S. C. in totidem verbis.

8. *Parſon makes a leaſe* for years, which is *confirmed by the ordinary and by one of the patrons* (there being two patrons of this church). The parſon dies; the ordinary collates by lapſe; adjudged that this was well confirmed, and that the collatee ſhall not avoid this leaſe. D. 72. b. Marg. pl. 5. ſays, the caſe was long and well argued. Trin. 33 Eliz. B. R. Lancaſter v. Lucas. S. C. argued, but adjourned for further argument. Le. 233. pl. 316. Mich. 32 & 33 Eliz.

9. *Recuſant* though diſabled to preſent yet ſhall be patron to confirm the leaſe of the incumbent. Per Jones J. Arg. Jo. 22. Hill. 18 Jac. C. B.

(O) Confirmation by the Patron and Ordinary. *What Act [is ſufficient.]*

[1. IF an abbot makes a deed by ſuch words, *ſciant præſentes me abbatem* of ſuch a place, *ex aſſenſu conventus dediſſe*, or *dimiſiſſe*. This is good, though the covent did not grant, but aſſent. 14 H. 6. 17.] Br. Faits, pl. 45. cites 14 H. 6. 16. S. C. and Brooke ſays that the reaſon ſeems to be, that the covent are dead perſons in law, and are not ſeiſed, nor ſhall they implead or be impleaded, but the abbot only.——See (K) pl. 3. S. P. and the notes there.

[2. If the *patron and ordinary* give licence [*by deed*, as it ſeems to be intended] to *the parſon, to grant an annuity*, &c. this is a ſufficient confirmation by them. 7 H. 4. 16. the parſon granting it accordingly.] *Grant* made *by a parſon by leave of the patron and ordinary*, is good to charge the church, by which Rickhil awarded it good, and the defendant to anſwer over, quod nota bene. Br. Dean and Chapter, pl. 32. cites 7 H. 4. 15.——Co. Litt. 300. b. ſays it was held that a *licence* by patron and ordinary to the parſon by deed, *to grant a rent-charge* out of the glebe is good, and that ſuch grant ſhall bind the ſucceſſor, *though* there be *no confirmation ſubſequent*.——Parſon leaſes for years or charges the church, and the patron and ordinary confirm it, this ſhall bind the ſucceſſor. Br.

Leaſes, pl. 64. cites 33 H. 8:——Bridgm. 94. Hill. 13 Jac. in the caſe of Mande v. French, it is ſaid that the aſſent of the patron ought to be by deed, otherwiſe it cannot be good.

S. P. by Ayliff and Clench J. admittted; for there the parſon is the principal grantor, and the others have not any expreſs intereſt in the land charged.

[3. * Lit. 144. If the *parſon grants a rent with the aſſent of the patron and ordinary*, this is a good confirmation.]

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* Hobart ſays, that though Littleton ſeems to be of opinion that the parſon has not the right of fee-ſimple, he expounds himſelf as to the bringing a writ of right [See Litt. ſ. 645. at the end], but otherwiſe the act of the parſon is it which charges or gives; and it ſuffices that the patron or ordinary do either licen e or aſſent, Hob. 7. pl. 15.

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† Br. Faits, pl. 28. cites S. C. that it is good by the ſecond delivery, becauſe it took no effect by the firſt delivery; as where one *grants a rent-charge out of the manor of C. and has nothing in it at the time*, &c. and after he *purchaſes* the ſame manor, and then re-takes the deed, and re-delivers it to the grantee, this is good.

[4. If the *confirmation* be *made and delivered before the grant of the parſon*, this is no good confirmation, though the grant be after made by the parſon. †8 H. 6. 6. Vide Trin. 8 Jac. Scaccario.]

Br. Faits, pl. 28. cites S. C.—— See the note at pl. 4. ſupra.

[5. *So* in this caſe, *if after the grant the confirmation be delivered again*, yet it is no good confirmation, becauſe by the firſt delivery it is a deed, and this ſecond delivery will *not amount to an aſſent, becauſe* the aſſent *ought to be by deed.* Contra 8 H. 6. 6. b, becauſe the firſt delivery was void.]

Fol. 481. 5 Rep. 15. a. cites it as Trin. 30 Eliz. in the Exchequer, HODGES v. NEWCOMEN.——Lane, 38. Arg. cites S. C. that the acceptance of the patron is good enough to make a confirmation. [But it ſeems miſtaken.]

[6. If the *patron accepts a leaſe for years from the parſon*, this is not any confirmation by the patron. Co. 5. Newcomen, 15. admitted.]

‡ 5 Rep. 15. a. HODGES v. NEWCOMEN, S. C. & S. P. reſolved.——Co. Lit. 301. b. 302. a. S. P. § S. P. by Coke and Doderidge. Roll. Rep. 361. pl. 14. in S. C.

[7. *But* if the patron *after acceptance grants it over*, this is a good confirmation. Co. 5. ‡ Newcomen, 15. § My Reports, 14 Jac. MAUND AGAINST FRENCH.]

But if the patron, after his taking ſuch leaſe, takes the profits to the uſe of his ſon, being within age, this is not any confirmation of the leaſe; for though the aſſent of the patron be ſufficient, yet it ought to be by deed, otherwiſe it cannot be good. Bridgm. 94. in caſe of MANDE v. FRENCH; in a long argument there, but non conſtat by whom.

8. A *dean ſeiſed in the right of him and his chapter makes a leaſe* for years, and the *chapter by themſelves confirm the* ſaid leaſe; this is not good; for their deeds being ſevered have no effect, becauſe they are all but one intire body; but otherwiſe it is *if after the leaſe they both confirm*, becauſe *this amounts to a new leaſe.* D. 40. b. Marg. pl. 1. and refers to 14 H. 6. 16. [b. 17. a. which is only a ſimilar point.]

Cro. C. 38. pl. 3. Trin. 2 Car. C. B. Baniſter's caſe, ſeems to be S. C. though S. P. does not appear there exactly, and it ſeems that (2 Jac. in D.) ſhould be (2 Car.).

9. If a *parſon makes a leaſe* for years, and the *patron and ordinary put their hands and ſeals to it*, this is a good leaſe to bind the ſucceſſor. D. 40. b. Marg. pl. 1. cites it as adjudged 2 Jac. Baniſter's caſe.

(P) Confirmation *by the Biſhop and Chapter. In what Caſes* it is *requiſite.*

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[1. IF a *prebendary or parſon leaſes parcel* of his prebend or parſonage, and the *biſhop who is patron confirms it*, yet this ſhall not bind the ſucceſſor biſhop, *without the confirmation of the dean and chapter*, becauſe the patronage is parcel of the poſſeſſions of the biſhopric. P. & Tr. 15 Jac. B. R. between * SMITH AND BOWLES agreed by the counſel at the bar. 33 H. 8. Brook, Leaſes Placito, 64. D. 19 Eliz. 357. admitted, 1, 2 Ma. 106. admitted. D. 5 Eliz. 221. 18. Com. 528. pleaded. So per 33 H. 8. Brook, Confirmation, 21. 30.] [379]

* See (M) pl. 2, 3. S. C. and the notes there.

[2. *But* this *ſhall bind the biſhop, and all* thoſe *prebendaries who come under him.* Paſch. & Trin. 15 Jac. B. R. between SMITH AND BOWLES clearly held by the better opinion, becauſe the *confirmation of the dean is required only*, for *that the poſſeſſions ſhall not be aliened in prejudice of the ſucceſſor.* D. 19 Eliz. 357.]

See (M) pl. 3. and the notes there.

[3. If a *prebendary leaſes* for years, and the *dean and chapter confirm it without the biſhop*, this ſhall not bind the ſucceſſor, becauſe the biſhop is patron and ordinary thereof. D. 36 H. 8. 61. Quære.]

Of common right the biſhop is patron of all the prebends, becauſe their poſſeſſions are derived from him. 3 Rep. 75. b. Mich. 40 & 41 Eliz. cites 25 Aſſ. 8. 17 E. 3. 40. 10 E. 3. 10. 50 E. 3. 16.——Per Coke, Cro. E. 79. pl. 40. Mich. 29 & 30 Eliz. S. P. as to the poſſeſſions, and cites 7 E. 3. 5. 30 E. 3. 26.

(Q) Confirmation *by* the *Biſhop, Dean, and Chapter.* In what Caſes it is *neceſſary.*

[1. IF an *appropriation* be made *to an abbot, patron* of the church, *by the aſſent of the king and biſhop*, this is ſufficient, *without the confirmation of the dean and chapter*, and this ſhall bind the ſucceſſor biſhop; for the biſhop gives nothing by his aſſent, nor hath any right as patron, but only as ordinary. Contra, 46 Aſſ. 4. Brooke, Dean and Chapter, 18.]

Br. Appropriation, pl. 4. cites S.C. that in aſſiſe of darrein preſentment, an appropriation of the advowſon was pleaded in the time of H. 3. by licence of the king, and of the biſhop, and dean and chapter, and of the pope, and he himſelf who appropriated was patron, as he ought always to be upon appropriation; and Brooke ſays, that ſo it ſeems here that the licence of the biſhop is not but for his own time without the dean and chapter, and that concordat 19 E. 3. tit. Judgment, in Fitzh. 124.

[2. If a *parſon grants a rent*, the *confirmation of the patron and biſhop* is ſufficient *without the dean and chapter*, and ſhall be good againſt the ſucceſſor biſhop, for he makes this confirmation but as ordinary, and the biſhop only is compleat ordinary. Ergo.]

3. *Treaſurer of a cathedral church* brought aſſiſe of his poſſeſſion ſevered from the chapter; releaſe of the dean and chapter is no plea;

A leaſe by treaſurer of a church

shall bind his ſucceſſor; per Fenner J. ſaid to have been ſo adjudged. E. 350.

plea; for it is his ſeveral right, and that he cannot *make leaſe* but for his own time without confirmation of the dean and chapter. Br. Dean, &c. pl. 15. cites 17 Aſſ. 29.]

Cro. E. 350. pl. 27. —— Lev. 112. in a nota, cites it as ſo ſaid by Fenner in Cro.

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Adjudged on a ſpecial verdict, that a leaſe by a prebendary is good; for he is not excepted by the ſtat. 32 H. 8. but only parſons and vicars, and being not excepted, he is as biſhops. And Popham ſaid, that in Dr. Dale's case, for a houſe near Paul's it was ſo adjudged, and that it had been ſo twice adjudged in his experience. Cro. E. 350. pl. 27. Mich. 36 & 37 Eliz. B. R. Watkinſon v. * Man. —— S. C. cited in a nota, Lev. 112. but cites Co. Litt. 300. b. [301. b.] where prebendary is taken as parſon or vicar not to have all the fee in him.

4. A *prebendary* made a *leaſe* for years *of part of his prebend*, and this was *confirmed by the dean and chapter*. It ſeemed to divers, that this ſhould not bind the ſucceſſor without the aſſent of the biſhop, becauſe the biſhop is patron and ordinary of every prebend. But the reporter ſays, quære; for the common uſage is to the contrary. D. 61. b. pl. 30. Paſch. 38 H. 8. Anon.

* [380]

Sid. 158. pl. 11. Biſh v. Holt, S. C. held accordingly. —— Keb. 576. pl. 37. Bill v. Holt, S. C. and per Cur. this being an impropriation cannot be annexed as appendant to the office of chancellor, but only in right of his prebendary, and therefore his leaſe is good againſt the ſucceſſor without confirmation of the dean and chapter.

5. A *leaſe by chancellor of a cathedral church* ſhall bind without confirmation; per tot. Cur. for he is a prebendary and more; for he has a prebend, and beſides this a dignity, and is ſeiſed in fee in right of his church within the words of the ſtat. 32 H. 8. and they would not permit it to be found ſpecially, though deſired by the attorney-general; for they ſaid they would not have it made a doubt. Lev. 112. Mich. 15 Car. 2. B. R. Biſco, Leſſor of Strode, v. Holt.

(R) Confirmations of Grants *of Donatives.*

See Co. Litt. 301. a. b. the notes upon Litt. ſ. 530. that at the common law the charge of the chaplain and patron had been good.

[1. THE grants made by donatives *ought to be confirmed by the patrons* of them, or otherwiſe they are not good againſt their ſucceſſors. D. 19 Eliz. 273.]

See (K) pl. 5. S. C.

† Fol. 482.

[2. The *deanry of Wells was ſurrendered* and diſſolved, and this diſſolution confirmed by parliament, *and a new dean erected* by the act, and the *nomination of the new dean and his ſucceſſors by letters patent given to the king and his ſucceſſors; and* it is further *enacted, that they ſhall paſs their poſſeſſions in the ſame manner as the ancient deans might*; the *new dean may* (†) *grant* his poſſeſſions as the old dean might *with the aſſent of the chapter, without the confirmation of the king*, though he comes in by the letters patents of the king, for the ſpecial words of the ſtatute. D. 10 Eliz. 273. 37.]

Who may confirm *in reſpect of his Eſtate.*

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E can confirm *unleſs he hath a right at the time.* Per Markham, in the RECTOR
T. 6. 62.] made by the

quod nemo negavit; and therefore it ſeems that confirmation
he time of the father, is not good againſt the ſon after the death of the father.
cites S. C.

an advowſon and his ſon and heir apparent Hob. 45.
voidance, and after *tenant in tail dies*, pl. 48. Wivel's caſe.
his can be no confirmation by him, S. C. adjudged; becauſe the
t the time of the grant. M. 12 Jac. ſon had nothing in the
DE, plaintiffs, AND EUBANK AND advowſon,
.] nor in actual poſſibility at the time of the grant; * hereupon a writ of
.gned only in a diſcontinuance; for the judgment was given on a demurrer.
Wivel v. the Biſhop of Cheſter, S. C. adjudged that the grant is void.

* [381]

. *aſſiſe*, where the *father granted a rent-charge for life*, and
ſon confirmed it, and the *father died*, and the *grantee brought aſſiſe of the rent*, and the *iſſue was taken upon the ſeiſin of the ſon, at the time of the confirmation made*; and ſo it ſeems that he who *confirms without warranty, where he had nothing at the time of the confirmation made*, as the ſon in the life of the father, &c. that in this caſe the confirmation ſhall not bind the ſon after the death of the father, but he *may ſay that he had nothing at the time* of the confirmation. Br. Confirmation, pl. 14. cites 14 Aſſ. 14.

4. *Where my entry is lawful* there my *confirmation is good.* Br. Confirmation, pl. 32. cites 11 H. 7. 28. S. C. cited Arg. 1 Rep. 147. a. and ibid. per Cur. 148. a.

5. *As* if my *diſſeiſor grants a rent-charge, and I confirm it*, this is good. Ibid. ——Co. Litt. 300. a. S. P.

6. *And* if I *infeoff another upon condition*, and after the *condition is broken*, and I confirm his eſtate, this is a good confirmation. Ibid. —— Kelw. 103. a. pl. 3. S. P. argued; and ibid. 121.

7. *But* if the confirmation had been made *before the condition had been broken*, nihil operatur. Ibid.

b. pl. 73. Caſus incerti temporis. ——S. C. cited Arg. 1 Rep. 146. b. 147. a. b.

8. *Non valet* confirmatio *niſi ille, qui confirmat, ſit in poſſeſſione rei, vel juris*, unde fieri debet confirmatio. Co. Litt. 295. b.

9. If a man *grants a rent-charge* out of his land to another *for term of his life*, and after he *confirms his eſtate in the ſaid rent*, to have and to hold to him *in fee tail or* in fee *ſimple*, this confirmation is void as to enlarge his eſtate, becauſe he that confirmeth has not any reverſion in the rent. Litt. ſ. 548. Co. Litt. 308. a. ſays that the *diverſity* is apparent between a *rent newly created* and a rent *in eſſe*; but ſays it is to be obſerved that Littleton intends his deed of confirmation not to contain any clauſe of diſtreſs; for otherwiſe as to the confirmation the deed is void, but the *clauſe of diſtreſs amounts to a new grant.*

10. But

Co. Litt. 308. b. says it is to be observed that Littleton here puts an attornment, because it is requisite;

10. But if *a man be seised in fee of a rent*-service or rent-charge, and he *grants the rent to another for life*, and the *tenant attorns*, and after he *confirms the estate of the grantee in fee tail, or* in fee *simple*, this confirmation is good, so as to enlarge his estate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reversion of the rent. Litt. s. 549.

but to the confirmation of the grantee of the rent to enlarge his estate, there is none necessary, and therefore he puts none.

Jo. 393, 394. pl. 3. Trin. 13 Car. Dixie v. Beaumont, the S. C. between other parties, Barkley argued with the resolution reported, and Crooke e contra, and on motion by the court before the argument of Jones and the Ch. Justice, the matter was compromised, and so their argument spared; but Jones held against the resolution; for admitting that the feme was tenant in tail, and her issues barred by fine of the baron, and that a descendible quality cannot be given to the said estate tail, yet the person of the feme was not disabled by the stat. 4 H. 7. and 32 H. 8. but only her estate, and consequently she, as well as a stranger, may take a new estate in remainder, which shall be descendible to her issues, and her issues shall make title upon this gift in remainder, and as issue of the donee in remainder, and not by the ancient and first estate tail which was barred by the fine, and he thought this a plain case.——Cro. C. 476. pl. 5. Baker v. Willis, S. C. according to Jo.

11. If *baron and feme* are *tenants in special tail, remainder to the baron and his heirs*, and the *baron levies a fine* with proclamations, *to the use of J. S. and his heirs, and dies*, and the *wife enters*; and *J. S.* reciting the gift in tail, and that the wife was seised in tail by force thereof, *confirms her estate habend' to her and the heirs of the body of her late husband and self*, &c. the confirmation is void, & nihil operatur. For if the remainder had been in a stranger, and the wife enters, nothing is left in the conusee but a possibility which does not pass by the confirmation, and though the conusee has the remainder by the fine, nothing can be extracted out of the fee by the confirmation; for the old estate tail is barred as to the issues, and cannot descend, but the feme is seised of the intire old estate, and no new estate is created by the confirmation, but only the old estate confirmed, and consequently cannot descend; nor can a confirmation add a descendible quality to * him who is disabled to take by descent. Adjudged. 9 Co. 138. &c. Pasch. 10 Jac. in the Court of Wards. Beaumont's case.

(T) Confirmation by way of *Enlargement*. *Who* may confirm *in reſpect of* his *Eſtate*. [In Temporal Matters.]

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[1. HE that hath *but a right in reverſion* cannot enlarge the eſtate of the leſſee. 3 H. 4. 10.]

2. If the *diſſeiſee and a ſtranger diſſeiſe the heir of the diſſeiſor*, and the *diſſeiſee confirms the eſtate of his companion*, this ſhall not extinguiſh his right that was ſuſpended; ſo as if the *heir of the diſſeiſor re-enters*, the right of the diſſeiſee is revived. Co. Litt. 298. b.

3. *So* it is if the *grantee of a rent-charge and an eſtranger diſſeiſes the tenant of the land*, and the *grantee confirms the eſtate of his companion*, the *tenant of the land re-enters*, the rent is revived; for the confirmation extended to the rent ſuſpended; *otherwiſe it is of a releaſe* in both caſes. Co. Litt. 298. b.

(U) *To whom* it may be. [In Temporal or Spiritual Matters.]

[1. A Confirmation *to leſſee for life, and a ſtranger, to have for their lives*, is void; for there is *no privity*. Contra 18 E. 3. 19. b. admitted.]

But where leſſor covenanted with *leſſee for years*, that he and a ſtranger ſhould have for life; and there becauſe the ſtranger could not take in poſſeſſion, the juſtices made ſuch conſtruction, that it ſhould enure as a confirmation of the leſſee's eſtate, and remainder over to the ſtranger for the benefit of the ſtranger. Palm. 31. cites it to have been reſolved 24 Eliz. at Hertford.

2. If a man *leaſes to J. N. for term of years*, and the *leſſor confirms to the leſſee and his feme for term of life*, they have franktenement by this. Br. Confirmation, pl. 26. cites 8 Aſſ. 20. per Wilby.

3. *And* by 2 E. 3. if the *baron be tenant by elegit*, and the *conuſor confirms to him and his feme for term of life*, that they have franktenement. Contra 40 E. 3. 23. and 18 Aſſ. 3.

4. One made *a leaſe to a man for term of his life*, and *took feme*, and the *leſſor granted and confirmed to the baron and feme for their lives*; and per Cur. this ſhall not extend to the feme, becauſe ſhe had nothing in the land at the time of the confirmation. Br. Confirmation, pl. 3. cites 40 E. 3. 23. [383]

5. A *chaplain enters into a benefice where the king is intitled to preſent*, and the *king confirms his eſtate*; this is a good bar in quare impedit brought by the king, if the chaplain be *in as incumbent*; but *contra if he be in as intruder in the life-time of the other incumbent*. Br. Confirmation, pl. 6. cites 7 H. 4. 30. Br. Quare Impedit, pl. 47. cites S. C.

6. *But* per Skrene, *if he enters as ſpolior* [*intruder*], *and after the incumbent upon whom he enters dies, and now the king confirms*, this is good. Quære inde. Ibid.

7. An

Le. 47. pl. 61. Anon. S. C. Anderſon Ch. J. thought the confirmation good, but the point was not determined.——

7. An *alien born purchaſed* lands *in fee*, and *before office found the queen*, by letters patents, *made him a denizen*, and *confirmed his eſtate*. The queſtion was, whether the confirmation was good? Anderſon thought it good, but Rhodes e contra; and Shuttleworth being afterwards aſked the queſtion by divers barriſters, he ſaid his opinion was, that the lands were not in the queen before office found, and that therefore the confirmation is good. Goldſb. 29. pl. 4. Mich. 28 & 29 Eliz. Anon.

4 Le. 82. pl. 175. S. C. in totidem verbis.

8. A. *leaſed to B. at will, and afterwards* leaſed to him *for years, remainder to J. S. in fee.* This is good, though *no livery be made*; for poſſeſſion countervails livery. D. 269. b. 20. in Marg. cites 38 Eliz. C. B. Cooper v. Callambil.

9. *Non valet confirmatio, niſi ille, cui* confirmatio fit, *ſit in poſſeſſione.* Co. Litt. 295. b.

But if the *leaſe* be *to commence at Michaelmas next*, the confirmation is void, becauſe the termor has only an intereſſe termini, and no eſtate in him whereupon a confirmation may enure. Co. Litt. 296. b.

10. If *diſſeiſor makes a leaſe* for years, and *diſſeiſee confirms* the eſtate, this is good and effectual. Litt. ſ. 518.

2 Keb. 432. pl. 68. Dunalſton v. Whitchcot, S. C. the court held the feoffment with future conveyances ſufficient, and both living together the entry ſhall be intended, and need not be ſpecially proved, whereupon the plaintiff was nonſuited.

11. A ſeiſed of land grants and *infeoffs B.* of the premiſes *by deed* ſealed and delivered, but *no livery and ſeiſin.* About *a year after A. grants and confirms the premiſes to B. at which time, and before, A. and B. lived together in the houſe upon it.* A. kept houſe, and paid pariſh duties. Per Cur. ſuch living together in the houſe is ſufficient entry and poſſeſſion to enable B. to take confirmation; for the law will adjudge the poſſeſſion in him that had the right, which was B. unleſs it had been proved that A. had determined his will after the feoffment, and before the confirmation. Sid. 385. pl. 16. Mich. 20 Car. 2. B. R. Lord Kinnoul v. Whitchcott.

(U. 2) At what Time it may be. [In Temporal or Spiritual Matters.]

1. CONfirmation *bore date before the date of the deed of grant*, and yet good, becauſe it was *averred to be primo deliberatum after the firſt deed*; quod nota. Br. Confirmation, pl. 25. cites 1 H. 6. 8.

[384] If a parſon changes his glebe, the confirmation muſt be in the life, and during the incumbency of the parſon, and ſo in the life of the biſhop, or of any other ſole corporation. Co. Litt. 301. a.

2. If a *parſon grants an annuity, and reſigns*, and the *patron and ordinary confirms it*, the annuity is determined, and the confirmation comes too late. Br. Annuity, pl. 26. cites 21 H. 7. 1. per Butler.

Co. Litt. 296. a. S. P. but with a

3. If *tenant for life leaſes to A. for years, and* afterwards leaſes the ſame lands *to B. for years*, and he in *reverſion confirms the laſt leaſe*,

leaſe, and *afterwards confirms the firſt leaſe*, yet this confirmation does not make it effectual, becauſe B. the ſecond leſſee had an intereſt before by the confirmation of him in the reverſion; per Dyer, Weſton, and Carus; but Brown ſeemed e contra. D. 67. in pl. 180. Trin. 6 Eliz.

little variation, viz. *leſſee for life made a leaſe for* 30 *years* to A. and afterwards

leſſor and leſſee for life joined in a leaſe for 60 *years to B. which leaſe for* 60 *years leſſor confirmed*, and afterwards he confirmed the leaſe for 30 years, and then within the 30 years leſſee for life died. It was adjudged, that the leaſe to A. for 30 years was determined by the death of leſſee for life, and that B. might enter; for though B.'s leaſe was later in time, yet it was of more force in law; becauſe the leſſor, who had power to confirm which he pleaſed, did *confirm the ſecond leaſe firſt*. Cites it as in the time of Q. Eliz. Uwell v. Lodge.

4. If a *biſhop makes a leaſe on the* 2*d of May*, and the *dean and chapter confirms it on the* 1*ſt of May*, this leaſe is good after the biſhop's death; per Catlin and Southcote. But Wray aſked, how a leaſe can be confirmed before it is made? To which Catlin and Southcote anſwered, that the *aſſent before* is a good confirmation after. Ow. 33. Hill. 8 Eliz. Anon.

Confirmation *of a biſhop's leaſe* by dean and chapter may be *before the leaſe* as well as after, becauſe the

dean and chapter have no intereſt in the land, but only a power to aſſent, and an aſſent paſſes no intereſt any more than an attornment; per Manwood Ch. B. Lane, 64. Trin. 7 Jac. in Sir Edward Dimmock's caſe.

5. Aſſent of dean and chapter to a *leaſe in reverſion* made *by the biſhop* is good *either before or after attornment*, but in caſe of a tranſlation of the biſhop to another biſhopric attornment after is void. 3 Le. 17. pl. 40. Mich. 14 Eliz. Anon.

Ibid. 61. pl. 90. S. C. in totidem verbis.—— 4 Le. 23. pl. 73. The Biſhop of Rocheſter's caſe, S. C. in totidem verbis.

6. *Prebendary grants a leaſe*; the *biſhop*, who was *patron as well as ordinary*, *grants the next avoidance* of the prebend to J. S. The *dean and chapter confirm the grant*. Then the biſhop and the dean and chapter confirmed the leaſe. This confirmation is too late, and not good againſt a ſucceſſor preſented by the grantee of the next avoidance. Hob. 7. pl. 15. Trin. 11 Jac. Spendlows v. Burket.

7. There is a *diverſity* between a confirmation *of an eſtate* and a confirmation *of a deed*: for if the *diſſeiſor makes a* charter of *feoffment to A. with a letter of attorney, and before livery the diſſeiſee confirms the eſtate of A. or the deed made to A.* this is clearly void. though livery be made after. Co. Litt. 301. a.

8. The like law is of a confirmation *of a deed of grant of a reverſion before attornment*. In the ſame manner it is if a *biſhop at the common law had granted lands to the king in fee by deed*, and the *dean and chapter* by their deed *confirm the deed* of the biſhop, and after the *deed of the biſhop is inrolled*, this is good albeit the confirmation of the dean and chapter be not inrolled, for the aſſent upon the matter is made to the biſhop. Co. Litt. 301. a.

9. *But* if a biſhop had made a charter of *feoffment with a letter of attorney*, and the dean and chapter before livery confirm the deed, this is a good confirmation and livery made afterwards is good, and ſo it has been adjudged. Co. Litt. 301. a.

(X) What *Conveyance* [*or Words in a Conveyance*] ſhall *enure to* a Confirmation.

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S. P. accordingly, and not by way of feoffment, per tot. Cur. Br. Confirmation, pl. 9. cites S. C. —— Fitzh. Confirmation, pl. 2. cites S. C. —— So by the words *dedi & conceſſi*, this is a good confirmation; quær. of the word *dimiſi*. Br. Confirmation, pl. 20. cites Litt. Confirmation, 123. —— So of dedi *or conceſſi*, but quære of the word dimiſi. Br. Confirmation, pl. 31. cites Litt. [ſ. 531.] This word *(dimiſi)* will amount to a Confirmation, Co. Litt. 301. b.

[1. IF a man makes a charter of *feoffment to a man* who is *ſeiſed of the freehold by* theſe words, *dedi conceſſi and confirmavi*, &c. this ſhall enure by way of confirmation. 19 H. 6. 45.]

Ow. 66. Knotts v. Evenhead, S. C. adjudged, that by the feoffment nihil operatur.

[2. If there be *leſſee for years*, the *reverſion for life*, the *reverſion in fee*, and he in the *reverſion in fee makes* a charter of *feoffment* in fee and livery *to leſſee for years*, admitting this to be void for the mean eſtate for life, this ſhall enure by way of confirmation to the leſſee to enlarge his eſtate. M. 40, 41 Eliz. B. R. between KNOTSFORD AND EEDES, per Curiam.]

Cro. J. 427. pl. 2. Dulton v. Ingram, S. C. and S. P. ſeems admitted.—Poph. 131. Gouldwell's caſe, S. C. agreed, and reſolved that by the granting the rent over this was a confirmation, and Montague ſaid, that it was a confirmation during the eſtate tail, and ſhall enure as a new grant afterwards.

[3. If there be *tenant in tail*, the *remainder in fee*, and *tenant in tail grants a rent in fee to* him in the *remainder*, and after he in the *remainder grants over reditum prædictum*; this ſhall be a confirmation of the rent, ſo that the remainder ſhall be charged with it after the death of tenant in tail without iſſue. M. 15 Jac. B. R. between DUTTON AND INGHAM, it was a queſtion, for Houghton inclined that it ſhould not be a confirmation, but Montague inclined the contra, and the others did not ſpeak to it upon their laſt argument.]

4. A. ſeiſed of land in fee, grants by deed *rent* out of this land *to B. for life*, the *remainder* of the ſaid rent *to C. for life*, and afterwards *by another deed releaſes to C. and his heirs* all the right which he has in the rent; and if it ſhall happen that the ſaid rent ſhall be in arrear, that it may be well and lawful to C. and his heirs *to diſtrain* for it in the ſaid land. Reſolved that this is a good remainder of a rent newly created, and that C. has a rent-charge in fee; for the *ſame* rent in this caſe, in conſtruction of law, ſignifies the *like* rent. Adjudged and affirmed in error. Jenk. 30. pl. 58. cites 26 Aſſ. pl. 38.

5. *So* A. grants a rent-charge out of his land *to B. for life*, and A. afterwards *confirms the eſtate of* the ſaid *B.* in the ſaid rent *to B. and his heirs*; B. has only an eſtate for life. The word of confirmation doth not amount to the word grant. *Proprietates verborum ſunt obſervandæ.* Jenk. 30. pl. 58. cites 26 Aſſ. pl. 38.

6. A man made *feoffment in fee upon condition to reinfeoff him in tail*, the *remainder over, and after re-entered claiming nothing of the one eſtate or of the other*, and the *next day the feoffee made feoffment to him, habend' ſibi & heredibus de corpore ſuo*, the *remainder over*

as above, and it was held a good gift and remainder, and not a confirmation; and yet he delivered the deed to him without livery, and a good gift in tail, and a good remainder. *It seems that it was upon the land, and then the re-entry of the feoffee remitted him*, and by the livery of the deed upon the land this shall enure as a gift within the view, and then it *amounts to a livery*. Br. Confirmation, pl. 27. cites 40 Ass. 10.

7. Avowry *because his father was seised in fee, and gave in tail to* [386] *J. and E. his feme, rendering* 22 *years* 8 *s. and afterwards* 40 *s. per ann. and shewed deed indented thereof, and* shewed *that the* 22 *years are past, and conveyed the tail to the plaintiff by descent, and for* 4 *l. for two years avowed* upon the plaintiff *as upon his tenant by the manner*. Norton said, you yourselves confirmed the estate to us, habendum to us and our heirs by the deed which here is, tenendum by 8 s. after the 22 years passed, and demanded judgment if for more services may he avow. Skrene said, at the time of the confirmation you had nothing in the land, and demanded judgment and prayed return, and after the court would not record that the plaintiff pleaded it by way of confirmation, but by way of grant to hold by less rent; for the deed willed noveritis me, the avowant, concessisse & confirmasse omnia terras & tenementa to the plaintiff, hæredibus & assignatis suis imperpetuum reddendo inde annuatim mihi, & hæredibus meis 8 s. for 42 years pro omnibus redditibus, &c. and well to plead it by way of grant; for *confirmation of estate is not good but to him who is in possession*. Br. Avowry, pl. 48. cites 14 H. 4. 37, 38.

8. If two *jointenants* are seised of certain land, the one cannot infeoff the other, for he cannot make livery by reason that the other is seised; but such *feoffment shall enure by way of confirmation*. Br. Confirmation, pl. 11. cites 22 H. 6. 42, 43. Pl. C. 156. b. cites S.C. & Fitzh. tit. Feoffment, pl. 11. & 102.—

S. C. cited Arg. 4 Mod. 150. S. P. and says it must be pleaded as a confirmation and not literally as the deed is worded.

9. If one *coparcenor infeoffs his companion by deed by dedi & concessi*, this shall enure by confirmation without livery; for it countervails remisi & confirmavi, per Littleton. Br. Confirmation, pl. 18. cites 10 E. 4. 3.

10. A. leases to B. for years, and after A. by deed indented *bargains and sells* the same lands to B. and his heirs, without any word of *give* or *grant* expressed in the deed; per omnes just. nothing passes by the deed without inrolment, and it is no confirmation. Mo. 34. pl. 113. Trin. 4 Eliz. C. B. Anon. Dal. 37. pl. 3. S. C. in totidem verbis.

11. Tenant in tail leases for years, and after *lessor covenants and grants* to lessee that he *shall* have and *hold* the land *to him and others during the life of lessor*. By the opinion of 3 justices, this is neither surrender nor confirmation to enlarge his estate, and is only a covenant notwithstanding the word grant; but Weston J. seemed e contra, by reason of the word grant. D. 272. pl. 34. Pasch. 10 Eliz. Cardinal v. Sackford.

And. 23. pl. 46. S.C. & S. P.— Bendl. 199. pl. 237.

12. A *grant and demiſe* of the land to tenant at will to hold for life rendering the ancient rent is a confirmation; per Cur. 3 Le. 15. pl. 35. Mich. 14 Eliz. Anon.

S. C. held accordingly. ——— D. 269. b. at the end of pl. 20. the reporter ſays, the opinion of a grant made by the leſſor to leſſee at will for term of life was confirmed Hill. 14 Eliz. for a good confirmation to enlarge the eſtate without livery. ——— Ow. 1. S. C. adjudged.

Agreed by all the juſtices, that he may take it the one way or the other; and that the law ſuſpends and expects till he has declared his pleaſure.

13. A. ſeiſed made a *leaſe for years to J. S.* the defendant, and afterwards, *by* his deed, containing *dedi, conceſſi & confirmavi, gave it to J. S. and his heirs, with a letter of attorney to make livery.* It was objected that this was not a feoffment, but a confirmation only, becauſe of the word confirmavi; but Anderſon Ch. J. ſaid, that the leſſee may take it *either as a feoffment or a confirmation;* and the court held it a feoffment. Goldſb. 25. pl. 6. Trin. 28 Eliz. Lennard's caſe.

Godb. 139. pl. 170. Leonard v. Stephens, S. C. ——— 3 Le. 128. pl. 180. S. C. adjudged.

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14. *A.* by indenture, *in conſideration of love* which he bare *to his ſon*, and for natural affection unto him, *bargained and ſold, gave, granted, and confirmed* certain lands unto him and his heirs. This deed was *inrolled;* the queſtion was, whether this land ſhould paſs, and it was held it ſhould not, unleſs *money* had been paid, or ſtate were executed; for the *uſe ſhall not paſs;* but becauſe the *ſon was then in poſſeſſion*, it was held to enure by way of confirmation. Cro. J. 127. pl. 17. Trin. 4 Jac. B. R. Oſborne and Bradſhaw v. Churchman.

If I only uſe the words dedi and conceſſi, that is as ſtrong as the word confirmavi; for it amounts to a grant of the right, to the perſon in poſſeſſion; and if he has my right, I can never after impeach his eſtate. Gilb. Treat. Ten. 73.

15. In ſome caſe this verb *dedi* or *conceſſi* ſhall enure to the ſame intent, as this verb *confirmavi;* as if I be diſſeiſed of a carve of land, and I make ſuch a deed *Sciant præſentes, &c.* or *Quod conceſſi* to the diſſeiſor the ſaid carve, &c. and I deliver only the deed to him, without any livery of ſeiſin of the land, this is a good confirmation, and as ſtrong in law as if there had been in the deed this verb *confirmavi.* Litt. ſ. 531.

16. Leaſe to A. for years, and after by his deed the leſſor voluit quod haberet & teneret terram pro termino vitæ ſuæ, this is adjudged by this verb *(volo)* to be a good confirmation for term of his life. Co. Litt. 301. b.

4 Mod. 150. Arg. cites S. C. and ſays that this ſhews that the pleading muſt be as the deed doth enure and operate, and not as the words are in the deed itſelf.

17. He to whom ſuch a deed, comprehending *dedi*, &c. is made, may plead it as a grant, as a releaſe, or as a confirmation at his election. Co. Litt. 301. b.

Here the heir of the diſſeiſor grants the right of poſſeſſion, and the diſſeiſee the right of propriety; for every one grants what he lawfully may. Gilb. Treat. Ten. 73.

18. If the *diſſeiſee and the heir of the diſſeiſor join in a feoffment by deed*, this is the feoffment of the heir, and the confirmation of the diſſeiſee; for the lands always paſs from him that has the eſtate in him. Litt. ſ. 334. as abridged by Hawk. 395, 396.

(X. 2) What amounts to a Grant, and to a Confirmation too at the ſame Time.

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1. IN aſſiſe it was ſaid if *tenant for life grants a rent-charge in fee, and dies*, and he in reverſion enters and confirms the charge, with *clauſe of diſtreſs*, this is good, and the reaſon ſeems to be becauſe of the *clauſe of diſtreſs*, which *makes it to be as a new rent*; for clearly by the tenant for life and entry of him in reverſion, the firſt charge is determined, which was granted by the tenant for life. Br. Grants, pl. 67. cites 14 Aſſ. 14.

So if the father grants a rent, with clauſe of diſtreſs for life, and dies, and after the ſon confirms the ſame grant, with clauſe of diſtreſs, it is good. Br. Charge, pl. 44. cites S. C.——*And* if there be *lord and tenant*, the *tenant holds by fealty and* 10 *s. rent*, and the *lord grants* 2 *s. of the rent to a ſtranger*, and the *tenant confirms the ſame grant with clauſe of diſtreſs*, it is good. Br. Charge, pl. 44. cites S. C.

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2. The *abbot and covent* of York *leaſed to J. S.* certain lands *at will*; and afterwards *by deed indented under their covent ſeal, reciting* that whereas J. S. held of them certain lands at will, *they granted* and demiſed that land to the ſaid J. S. *to hold for life*, rendering the ancient rent; *and by the ſame indenture granted the reverſion* of the ſame land *to a ſtranger for life*. It was holden by the court clearly, that an eſtate for life accrueth unto J. S. by way of confirmation, and the remainder unto the ſtranger, depending upon the eſtate created by the confirmation. 3 Le. 15. pl. 35. Mich. 14 Eliz. C. B. Anon.

And. 23. pl. 46. S. C. adjudged accordingly; but that it is no grant of the reverſion, and ſo it ſeems that the rent remains to the abbot during the life of J. S. quære.

——Bendl. 190. pl. 237. S. C. and that it is a grant of an eſtate to J. S. for life, but that it is no grant of the reverſion to the ſtranger.

3. A *deed of one and the ſame thing by one and the ſame perſon to one and the ſame perſon, and at one and the ſame time*, ſhall enure to 2 ſeveral purpoſes, viz. to a grant of the intereſt to leſſee, and to a confirmation of the ſame intereſt as patron. 5 Rep. 15. a. cites Trin. 30 Eliz. in the Exchequer. Hodges v. Newcomen.

As if *perſon* [* & ordinary] *makes a leaſe for years to the patron*, and afterwards the *patron grants over the ſame* to J. S. this grant over by the patron of the ſaid leaſe imports in itſelf as well a grant of the term as a confirmation of the ſame term. 5 Rep. 15. a. cites Trin. 30 Eliz. in the Exchequer. Hodges v. Newcomen.——S. C. cited by Coke Ch. J. and Doderidge, Roll. Rep. 361.

* Co. Litt. 301. b. 302. a. S. P.

4. So if *tenant for life grants a rent-charge to him in reverſion in fee*, and the *reverſioner by deed grants it over* to another, this is a good grant and confirmation alſo to make the rent good for ever. 5 Rep. 15. a. in caſe of Hodges & Newcomen cited there.

5. B. tenant for life of C. and he in the remainder or reverſion in fee, having ſeveral eſtates in the one and the ſame land, join in a leaſe for years by deed indented, this demiſe ſhall work in this ſort, viz. during the life of C. it is the leaſe of B. and confirmation of him in the reverſion or remainder, and after the deceaſe of C. it is the leaſe of him in the reverſion or remainder, and the confirmation of B. For ſeeing the *leſſors have ſeveral eſtates, the*

6 Rep. 14. b. 15. a. Mich. 36 & 37 Eliz. B. R. Treport's caſe adjudged.—S. C. cited Jo. 305.

law ſhall conſtrue the leaſe to move out of both their eſtates reſpectively, and every one to let that which he lawfully may let, and not to be the leaſe only of tenant for life, and the confirmation of him in the remainder or reverſion. Co. Litt. 45. a.

6. If the *diſſeiſor grants a rent to the diſſeiſee, and he* by his deed *grants it over*, and after re-enters, one and the ſame words do amount both to a grant and to a confirmation in judgment in law of one and the ſame thing, *ne res pereat*. Co. Litt. 302. a.

5 Rep. 15. a. S. P. per Curiam.

7. If a *diſſeiſor makes a leaſe for life, or* a gift *in tail*, the *remainder to the diſſeiſee in fee*, and the *diſſeiſee* by his deed *grants over the remainder*, and the particular *tenant attorns*, the diſſeiſee ſhall not enter upon the tenant for life or in tail, for then he ſhould avoid his own grant, which amounts to a grant of the eſtate and a confirmation. Co. Litt. 302. a.

If the confirmation had been to the huſband and wife, to hold to them two and their heirs, they had been jointenants to the fee-ſimple, and the huſband ſeiſed in her right for her life, becauſe they cannot take by moieties during the coverture. Co. Litt. 299. b.

8. If I *leaſe to a feme ſole for life, who takes huſband*, and I *confirm the eſtate of the huſband and wife*, habend' *for their two lives*, they do not hold jointly, but he holds in her right for her life, yet it ſhall enure to him for his life by way of remainder if he ſurvives her. Litt. ſ. 525.

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And ſo note a *diverſity between a leaſe for life, and* a leaſe *for years to a feme covert*; for her eſtate of freehold cannot be altered by the confirmation made to her huſband and her, as the term for years may, whereof her huſband may make diſpoſition at his pleaſure. Co. Litt. 300. a.——In either caſe of leaſe for years or life to her, this amounts to a new grant of the term for the life of the huſband; for I cannot confirm the old term, but erect a new one, ſince the words import more than a confirmation of the old term; for in that the huſband has nothing in his own right. Gilb. Treat. Ten. 73. cites Litt. ſ. 525, 526.

9. *But* if the *leaſe to her* had been *for years*, then by ſuch confirmation they would have a joint-eſtate in the freehold of the land, becauſe the wife had no franktenement before, &c. Litt. ſ. 526.

10. If a man hath *common of paſture in other land*, if he *confirms the eſtate* of the tenant of the land, nothing ſhall paſs from him of his common; but notwithſtanding this, the common ſhall remain to him as it was before. Litt. ſ. 537.

11. If a jointenant *confirms the land to the other*, this *makes no alteration*, for he confirms the eſtate in the ſame manner as it is; *but* if it be *to have and to hold ſuch lands to ſuch jointenant only* he has a ſole eſtate; for then he expreſſes a deſign of confirming the poſſeſſion to him alone, ſo that *the confirmation goes to the poſſeſſion itſelf by the explanatory words in the habendum*, and not to the manner of poſſeſſing, and the words of the habendum make the confirmation *enure as a new grant* of ſuch his moiety. Gilb. Treat. Ten. 72.

(Y) *In what Caſes* it ſhall be *good.* Confirmation of a *void Thing.*

Fol. 483.

[1. IF a man be *attainted of treaſon*, and the *king reverſes it by his letters patents*, this *is void*, becauſe he cannot do it without a legal proceeding; and *after the parliament, reciting the patent, ratifies, confirms*, and approves it, *and that he ſhall be reſtored to his land*, &c. *this act* of parliament is a ſufficient reverſal of the judgment, becauſe it recites the patent, and ſo *gives life to the patent which was void.* 29 E. 3. 25. adjudged.]

Fitzh. Grant, pl. 100. cites S. C.——If the *king grants to W. N. the land of J. S.* this is a void grant, and yet if it be *confirmed by parliament*, it is a good grant. Brooke ſays, quod mirum! for there was ſuch a grant. Br. Confirmation, pl. 13. cites 38 H. 6. 34. 37.——*But* per Priſot, where the *king grants a manor to hold with an advowſon which is in groſs*, the grant is void as to the advowſon, and there if this be confirmed by parliament the confirmation does not make the grant good, becauſe the *advowſon was not expreſſed in the grant, but in the habendum*, and therefore a confirmation of the grant cannot make it good of that which is not contained in the grant.——Brooke ſays, *quære* if he had *confirmed all that which is contained in the patent*, it ſeems all one; for confirmation cannot make a void thing good. Ibid.

2. If *tenant in tail grants a rent-charge and dies*, and the *iſſue* in tail enters and pays the rent, and after ratifies and *confirms the ſame rent*, this is good, and the grantee ſhall have aſſiſe; per Norton, which Brooke ſays is not law; for the *grant was void* by the death of the tenant in tail, and the entry of the iſſue; and then the confirmation of a void rent is alſo void. Br. Grants, pl. 73. cites 26 Aſſ. 38.

3. The *incumbent pleaded, that he entered by the proviſion of the pope, and* after the *king confirmed his eſtate in the prebend*; judgment. The *king ſaid, that he entered by ſpoliation* [*intruſion*] *in the time of another incumbent, and he confirmed, and ſo the confirmation void*, in as much as he was in as ſpolior, [intruder,] and not as incumbent, and ſo to iſſue. Br. Quære Impedit, pl. 47. cites 7 H. 4. 25. 37.

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4. If a *man takes away my villein in groſs*, and *I confirm his eſtate in the villein*, the confirmation is void; for *of the perſon of a man there can be no poſſeſſion without a right*; but I may give him by the words dedi & conceſſi to him that took him away, or to any other, notwithſtanding ſuch wrongful taking; per Hobart Ch. J. Hob. 99. Trin. 7 Jac. cites Litt.

Litt. ſ. 541, 542. S. P.——If I confirm a villein to another that has him in poſſeſſion, this paſſes nothing; becauſe *this is an incorporeal right*, which cannot be diveſted out of me, and the mere confirmation, where a man has no right, is really nothing; for that which is not, cannot be confirmed; but if there are the words dedi & conceſſi, it paſſes the right. Gilb. Treat. Ten. 74, 75.——Co. Litt. 306. b. 307. a.

5. A confirmation may *make a voidable* or defeaſible eſtate *good*, but it *cannot ſtrengthen a void eſtate.* Co. Litt. 295. b.

Though it be a rule, that *things ipſo facto void* cannot be made good by acceptance, yet it is not without exception; as *tenant in tail makes a leaſe to commence in futuro*, and dies before the day; the leſſor [leſſee] enters, iſſue in tail may have treſpaſs againſt him, or he may by acceptance make it good; per Holt Ch. J. 12 Mod. 361. Paſch. 12 W. 3. in caſe of Pullen v. Purbeck.

6. *Tenant in tail makes a leaſe* to commence in futuro, and *after makes a feoffment in fee*, and leaſe commences, *feoffee* may avoid it, or make it good by acceptance; per Holt Ch. J. 12 Mod. 361. in caſe of Pullen v. Purbeck.

(Z) Every Confirmation ought to *enure upon a Thing in Eſſe.*

In *quare impedit*, the incumbent pleaded collation to the prebend by the biſhop, by which he was inducted, and the king confirmed to him for term of his life, and the king ſaid, that he was not inducted at the time of the confirmation, and ſo to iſſue; and ſo note, that he had not poſſeſſion before induction, and *confirmation is not good without the poſſeſſion*; quod nota. Br. Confirmation, pl. 7. cites 11 H. 4. 9. S. C.——Fitzh. Confirmation, pl. 16. cites S. C. & S. P. by Hank. and other juſtices.

[1. IF a *biſhop collates to a prebend, and dies before induction*, and after the *king before induction confirms to him for his life*, yet this is not good, becauſe he hath not any poſſeſſion upon which the confirmation may enure at the time of the confirmation. 11 H. 4. 7. Com. 528. b. [S. C. cited by Manwood.]

2. Confirmation *of rent or ſeigniory* is not good but in reſpect of a former eſtate or deed, and therefore if the *firſt deed* be *loſt, or* be *before time of memory*, the confirmation is not good; per Huls, and Skrene, & non negatur. Br. Confirmation, pl. 24. cites 12 H. 4. 23.

Br. Avowry, pl. 48. cites S. C.

3. If *lord and tenant are*, and the *tenant is diſſeiſed*, and the *lord confirms the eſtate of the diſſeiſee to hold by leſs ſervices*, this is not good; for confirmation is not good, unleſs he to whom the confirmation is made has the poſſeſſion or ſeiſin at the time of the making of the confirmation. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

Br. Avowry, pl. 48. cites S. C.

4. But *contra of releaſe or grant*; for *thoſe are good in reſpect of the ſeigniory, becauſe he is tenant as to the avowry*. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

Br. Avowry, pl. 48. cites S. C.

5. *So where tenant in tail diſcontinues and dies*, and the *donor releaſes*, or grants *to the iſſue in tail to hold quit, or by leſs ſervices*, though he has not poſſeſſion at the time of the making, &c. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

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Br. Avowry, pl. 48. cites S. C.

6. But *contra as to the reverſion of the land*, and ſo note *a diverſity between releaſe of the ſeigniory and of the land*, and between grant and releaſe, and confirmation. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

7. *But* where there is *lord, meſne, and tenant*, and the *lord confirms the eſtate of the meſne to hold by leſs ſervices*, this is good; for he is tenant in poſſeſſion of meſnalty, and there is no other poſſeſſion; note the diverſity. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

8. *In quare impedit by the king*, the *defendant pleaded confirmation made to him by the king by* theſe words, *dedimus et confirmavimus to him then tenant of the land, and advowſon appendant to it*, &c. and therefore well and not double; and ſo it ſeems that he who pleads confirmation ought to plead it *made to him then tenant of the land*, for otherwiſe a confirmation or a releaſe cannot enure. Br. Confirmation, pl. 2. cites 9 H. 6. 22.

9. If a *parſon grants an annuity in fee, and reſigns*, and after the *patron and ordinary confirm the grant*, the confirmation is not good; for

for the annuity was void before by the reſignation which was before the confirmation. Br. Confirmation, pl. 12. cites 21 H. 7. 1.

10. A. *uſurped upon the patronage of one of the king's churches divers times*, and had *ſeveral clerks ſucceſſively admitted*, inſtituted and inducted, *and for many years* reſpectively they *were incumbents* of this church; A. has not gained the patronage by it; the king may grant this patronage to any one, for he is in poſſeſſion, and the patronage is in him. *The king confirms this patronage to this A.* it is void, for *A. has not any patronage.* If the king confirms to the incumbent of A.'s preſentation his incumbency is good, for he is incumbent de facto, and the king cannot remove him without a quare impedit by the ſtatutes of 25 E. 3. and 13 R. 2. Judged and affirmed in error. The king can neither do wrong, nor ſuffer wrong. Jenk. 132. pl. 96. cites Cro. J. 123. Trin. 4 Jac. The King v. Matthew. Cro. J. 123. pl. 8. Trin. 4 Jac. B.R. The King v. Champion. S. P. and ſeems to be S. C. adjudged accordingly, and ſo a judgment in C. B. reverſed, Fenner conſentiente, ſed hæſitanter. —Yelv. 90.

The King v. Matthew. S. C. and judgment in C. B. reverſed by 4 juſtices, but Fenner e contra.—Brownl. 166. S. C. but ſeems to be only a tranſlation of Yelv.

11. If a diſſeiſor make a leaſe for years to begin at Michaelmas, and the diſſeiſee confirms his eſtate, this is void becauſe he has but *intereſſe termini* and no eſtate in him, whereupon a confirmation may enure. Co. Litt. 296. b.

12. *Tenant for life of* 20 *acres grants his eſtate in one acre to J. S.* and he in reverſion confirms the eſtate of tenant for life to him and his heirs in all the 20 acres, this is a confirmation but of 19 acres, and though J. S. attorn, yet his acre ſhall not paſs by way of grant of the reverſion. Arg. Litt. R. 248. Paſch. 5 Car. C. B.

(A. a) [In what Caſes] A Confirmation ſhall [or ſhall not] *enlarge* an Eſtate.

[1. IF *leſſee for life grants a rent to another for his life*, and the *leſſor confirms it*, this ſhall make the rent good for the life of the grantee, though before by limitation of law it ought to have determined by the death of the leſſee. 45 Aſſ. 13.] Br. Confirmation, pl. 16. cites S. C.—Br. Rent, pl. 25. cites S. C. that a man was ſeiſed of a carve of land, and leaſed two parts, thereof to a feme for life; ſhe * took baron; the baron granted 10 s. rent out of it to W. N. for life; the leſſor afterwards confirmed the ſaid grant by deed, and by a clauſe therein granted further 10 s. rent of his own third part in his own hands. The baron and feme died, and the grantee brought aſſiſe of 20 s. rent. Dubitatur, whether the deed of confirmation ſhall be taken as of a new rent, or only of the firſt rent; quære, for non adjudicatur.

* [392]

[2. *So* if leſſee for life *grants a rent in fee* to another, and he in the *reverſion confirms it*, this is a good *indefeaſible* rent in fee.] Litt. ſ. 529. S. P. —Co. Litt. 301. ſays that here a diverſity is to be obſerved, where the determination of the rent is expreſſed in the deed, and when it is implied in law; for when *tenant for life grants a rent in fee*, this by law is determined by his death, *and yet a* confirmation of the grant by him in the reverſion makes that grant good for ever, without words of enlargement, or clauſe of diſtreſs, which would amount to a new grant. But † if the tenant for life had granted a rent *to another and his heirs*, by expreſs words, *during the life*

of the grantor, and the leſſor had confirmed that grant; that grant ſhould determine by the death of tenant for life. Co. Litt. 301. a.

† 1 Rep. 147. b. S. P. Arg. cites Litt. and 26 Aſſ. 38. and 45 Aſſ. 13. accordingly.

S. P. if he in reverſion confirms it in the life of the leſſee. Br. Confirmation, pl. 15. cites S. C.——Br. Grants, pl. 73. cites S. C.

[3. [*So*] If leſſee for life grants a rent *for life or in fee* to another, *and after ſurrenders to him in the reverſion, and* after *he confirms it*, this hath made the rent indefeaſible. 26 Aſſ. per Welby.]

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Br. Grants, 73. cites S. C.

4. Confirmation *may enlarge rent*, as where *a man leaſes land rendering rent, and* the *leſſor grants the rent to a ſtranger*, and after *confirms the eſtate of grantee, and grants over by the ſame deed, that if the rent be arrear he may diſtrain*, and the *tenant for term of life dies*, yet the rent remains. Br. Confirmation, pl. 15. cites 26 Aſſ. 38.

5. *Contra* it ſhould be *if the confirmation with clauſe of diſtreſs had not been.* Ibid.

6. *Leaſe for life rendering rent*, the *leſſor granted the rent over*, and the *tenant attorned*, and after the *grantor confirmed the grant to the grantee, and that if the rent be arrear that the grantee may diſtrain*, the *tenant for life died*, and yet the *rent remained*; for it was inlarged by the diſtreſs and confirmation, quod nota. Br. Rents, pl. 14. cites 26 Aſſ. 38 Quintin's caſe.

7. If a man *leaſes for life rendering rent*, and the *leſſor confirms to the tenant in fee or in tail rendering the rent*, this enlarges the eſtate of the rent, and yet at the commencement the rent was determinable upon the death of the leſſee. Br. Rents, pl. 14. cites 26 Aſſ. 38. Quintin's caſe.

8. If a man *leaſes* his land *to J. S. for* term of *life, rendering 2 s. per annum, and after grants to another 2 s. out of the land which J. S. holds of him for term of life, to the grantee and his heirs during the life of the grantor*, this ſhall be taken a grant of a new rent by him in reverſion, and the *grantee ſhall have the rent though J. S. die*; per Shard and Fiſher. Br. Rents, pl. 24. cites 34 Aſſ. 4.

9. *Tenant for life grants a rent to W. N. for life*, if he in *reverſion confirms* the grant, and the tenant for life dies; yet the *rent ſhall remain during the life of W. N.* by reaſon of the confirmation, contrary if there was no confirmation. Br. Grant, pl. 80. cites 45 Aſſ. 13.

10. When the *eſtate of him* to whom confirmation is made is *upon an expreſs condition*, there the *confirmation* made to him *will not take away the condition. But if ſuch a feoffee upon condition makes a feoffment over*, ſo that his eſtate is only ſubject to a condition contained in another conveyance, *but no condition is expreſſed or annexed by the feoffor to his eſtate*, there the confirmation of his eſtate, which he had by abſolute words, ſhall extinguiſh the condition which was annexed to the eſtate of the firſt feoffee. 1 Rep. 147. a. b. Arg. Hill. 35 Eliz. in Anne Mayow's caſe.

[393] 11. If a *leaſe* be made *to A. for the life of J. S.* and this is afterwards *confirmed to him for his own life*; this is good to him now for his

his own life, becauſe that his own life is greater; *but* if the *leaſe* were made unto him *for his own life, and afterwards confirmed to him for the life of another*, this confirmation is merely void, by Crooke J. Bulſt. 136. Trin. 9 Jac. in caſe of Bowles v. Poore.

12. If a man *leaſes land to J. S. for life*, and after *confirms his eſtate to hold to him and his heirs*, this confirmation as to his heirs is void; for his heirs cannot have his eſtate which was not but for life. *But* if he confirms his eſtate by theſe words, *to have the ſame land to him and his heirs*, this confirmation maketh a fee-ſimple; for the words to have and to hold, &c. goeth to the land and not to the eſtate. Litt. ſ. 524.

Gilb. Treat. of Ten. 72, 73. cites S. C. and ſays, that by the words to have to him and his heirs, there appears to be a farther intent than merely to confirm the eſtate, viz. to enlarge it to him and his heirs; and taking the grant ſtrongeſt againſt the grantor, it muſt paſs away the fee-ſimple.——Jenk. 30. pl. 58. the word confirmation does not amount to a grant.

13. If I *let land for years*, by force whereof leſſee is in poſſeſſion; &c. and after I make a deed to him, &c. *quod dedi & conceſſi, &c.* the ſaid land to have *for his life*, and I deliver him the deed, &c. preſently he hath an eſtate in the land for his life. Litt. ſ. 532.

The words dedi & conceſſi are as ſtrong as the word confirmavi. Litt. ſ. 531.

——Gilb. Treat. of Ten. 73. cites S. C. & S. P. becauſe it amounts to a grant of the right to the perſon in poſſeſſion; and if he has my right I can never impeach him afterwards.

14. *And* if I ſay in the deed to have and *to hold to him and to his heirs of his body ingendered*, he hath an eſtate in fee-tail. And if I ſay in the deed, to have and to hold to him and to his heirs, he hath an eſtate in fee-ſimple, for this ſhall enure to him by force of the confirmation to *enlarge* his eſtate. Litt. 533.

15. If a man be *ſeiſed in fee* of a rent-ſervice, or rent-charge, *grants the rent* to another *for life*, and the tenant attorns, and after he *confirms the eſtate* of the grantee *in fee-tail*, or in fee-ſimple, this confirmation is good as to enlarge his eſtate according to the words of the confirmation, becauſe he who confirmed at the time of the confirmation had a *reverſion* of the rent. Litt. ſ. 549.

16. *But* where he grants a rent-charge to another for life, if he wills that the grantee ſhould have an eſtate in tail, or fee, *the deed of grant* of the rent-charge for life muſt *be ſurrendered or cancelled, and* then to *make a new deed* of the like rent-charge, to have and perceive to the grantee in tail or in fee. Litt. ſ. 550.

By *cancelling of the deed*, the rent which lies only in grant, ceaſeth as well as by the ſurrender; and the reaſon why the deed ſhould be ſurrendered or cancelled is, *leſt the grantor ſhould be doubly charged*, viz. with the old grant for life, or with the new grant in fee. Co. Litt. 308. b.

17. If a *man grants a rent-charge* iſſuing out of his land to another *for term of his life*, and after he *confirms his eſtate in the ſaid rent, to have and to hold to him in fee*-tail, or in fee-ſimple, this confirmation is void as to enlarge his eſtate, becauſe he that confirmeth hath not any reverſion in the rent. Litt. ſ. 548.

Here the diverſity is apparent between a rent *newly created*, and a rent *in eſſe*.

But, note, Littleton intends his deed of confirmation not to contain any *clauſe of diſtreſs*; for otherwiſe, as to the confirmation, the deed is void, but the clauſe of diſtreſs amounts to a new grant. Co. Litt. 308. a.

14. *J. B. and his wife* being *ſeiſed in ſpecial tail*, remainder *to J. B. in fee, he alone levied a fine to E. 6. in fee*, which eſtate came to the earl of Huntington in fee. *B. having iſſue died.* His *wife entered.* The earl of Huntington *confirmed the eſtate in the wife, habendum to her and the heirs of the body of her and her huſband*; and it was ruled, that the confirmation wrought nothing, becauſe ſhe had as great an eſtate before; and alſo, the iſſues could not be made inheritable which were before barred by their father's fine, and the eſtate tail as againſt them lawfully given to another; per Hobart Ch J. Hob. 257. in pl. 340. Trin. 15 Jac. cites 9 Rep. 140. Beaumont's caſe.

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* Litt. ſ. 527. † Litt. ſ. 529.

15. If my * *diſſeiſor*, *or* my † *tenant for life, charge the land with a rent-charge in fee*, and I confirm it, I ſhall for ever afterwards hold it charged, becauſe I have aſſented to the eſtate which has a being from ſuch diſſeiſor tenant for life, and therefore I cannot afterwards deſtroy it. Gilb. Treat. Ten. 73.

[396] (C. a) Where a Confirmation to one ſhall enure to another.

1. IF *baron makes a gift in tail of his wife's land, rendering rent*, and afterwards they *both grant the reverſion by fine*, this bars the feme of the whole; but if they had granted the rent only by the fine, then the feme might enter after the baron's death; per Caril; as Brown and Walmſley vouched it. Mo. 91. pl. 224. Trin. 10 Eliz. Anon.

Le. 243. pl. 329. Geoffries v. Coites, S.C. it was conceived that the acceptance of the rent of J. S. the leſſee for life, affirms the leaſe alſo in remainder, cites Litt. ſ. 521. and ſays, that ſuch was the opinion of Gawdy and Fenner J.

2. A. *tenant for life*, the *remainder to B. in tail, join in a leaſe to J. S. for life, the remainder to J. D. for life. A. dies. B. accepts the rent of J. S. and dies.* The *iſſue of B. accepts the rent of J. S. and after enters, and levies a fine to J. N. J. S. re-enters and dies. J. D. as in his remainder enters.* The point was, if J. N. the purchaſor might avoid this leaſe in the remainder, or if the acceptance of the rent from A. made the leaſe good to J. D. in the remainder? It was adjudged, that the eſtate in remainder was good, and not to be avoided by J. N. the purchaſor. Cro. E. 252. pl. 22. Mich. 33 & 34 Eliz. B. R. Jeffrey v. Coytes.

3. If a *leaſe* be made *to two*, and the *iſſue in tail accepts the rent of one* of them, *and ſaith he will accept him only for his tenant*, yet it is good for both; per Gawdy. Cro. E. 253. pl. 22. Mich. 33 & 34 Eliz. B. R. in caſe of Jeffrey v. Coyte.

If a man *releaſes to tenant for life all his right*, this *enures to him in the*

4. If the diſſeiſor *infeoffs A. and B.* and the heirs of B. and the diſſeiſee confirms the *eſtate of B. for his life*, this ſhall not only extend to his companion, but to his whole fee-ſimple; becauſe to many purpoſes he had the whole fee-ſimple in him, and the

confirmation ſhall be taken moſt ſtrong againſt him that made it. Co. Litt. 297. b.

remainder, becauſe he parts with his whole; and he that has but an eſtate for life, by the feudal conveyance cannot have the whole fee, as is ſaid; but if a man confirms the eſtate for life, it is an approbation and aſſent to that eſtate only, and therefore the aſſent being no farther than to the eſtate for life, it cannot be carried to ſtrengthen the remainder; but if he had *confirmed the remainder, that had confirmed the eſtate for life by implication*, becauſe the remainder cannot be without the particular eſtate to ſupport it, therefore the confirmation of the remainder muſt imply an aſſent to all means neceſſary to ſupport it. Gilb. Treat. Ten. 71.

5. If the *diſſeiſor makes a leaſe for life to A. and B.* and the *diſſeiſee confirms the eſtate of A.* B. ſhall take advantage thereof; for the eſtate of A. which was confirmed was joint with B. and in that caſe the diſſeiſee ſhall not enter into the land and deveſt the moiety of B. Co. Litt. 297. a. b.

6. So if there be *two diſſeiſors*, and the *diſſeiſee confirms the eſtate of the one* without more ſaying in the deed, ſome ſay that he ſhall not hold his companion out, but ſhall hold jointly with him, for that nothing was confirmed but his eſtate, which was joint, &c. Litt. ſ. 522.

If a man confirms the eſtate to one of the diſſeiſors, *he only has the eſtate as he formerly had it*, which was *jointly* with the other diſſeiſor; *but if he confirms the eſtate of one* diſſeiſor in the lands, *to have and to hold the lands, or his right to him and to his heirs*, then ſuch diſſeiſor *ſhall hold out his companion*; for ſuch habendum explains the manner of his confirmation, viz. that he ſhould not hold the eſtate merely as it is, but in a manner more beneficial for him, that is, that he ſhould hold the poſſeſſion that he has per my & per tout to him only; for the habendum explains the aſſent, viz. that he ſhould hold the poſſeſſion ſole, ſo that the poſſeſſion in the whole being confirmed to him only, he has the total right to ſuch poſſeſſion, and therefore may hold out his companion. Gilb. Treat. Ten. 71, 72.

7. If a diſſeiſor *make a leaſe* for life, reſerving the reverſion to himſelf, and the *diſſeiſee confirms the eſtate of the diſſeiſor*, by the confirmation made to him in the reverſion, all the right of him that confirms is gone, as well as when he makes it to him in remainder, and he cannot by his entry avoid the eſtate of the leſſee for life without avoiding the eſtate of the leſſor, which againſt his own confirmation he cannot do; and it has been adjudged that *if a diſſeiſor make a leaſe for life*, and after *levy a fine of the reverſion*, with proclamations, and the 5 years paſs, ſo as the diſſeiſee is for the reverſion barred, he ſhall not enter upon the leſſee for life. Co. Litt. 298. a.

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(D. a) Where a Confirmation of Part of the Eſtate ſhall be a good Confirmation of the Whole.

1. A Parſon made a *leaſe* of his rectory *for* 40 *years*. The patron and ordinary *confirmed the ſame for* 20 *years immediately enſuing the commencement of the term*, and annexed the ſame in a ſchedule to the indenture. Some held this good, but more e contra. D. 52. b. pl. 4. Trin. 34 H. 8.

Winch. 95. Trin. 22 Jac. C. B. Hutton J. cites S. C. as agreed that this confirmation ſhall ſtretch for the whole time.

2. A *prebendary made a leaſe for* 70 *years*, and the biſhop patron of the ſaid prebendary, and the *dean and chapter*, by their ſeveral inſtruments

Cro. E. 447. pl. 12. Telford v.

Foord. S.C. Mich. 37 & 38 Eliz. C. B. Anderſon and the other juſtices held ſtrongly that the leaſe was not good but for 51 years only, for they might

inſtruments under their common ſeal (reciting the ſaid leaſe) *confirmed dimiſſionem prædictam in forma prædicta factam for the term of 51 years, et non ultra.* Adjudged that the confirmation, as this caſe is, extended to the whole term, and the words (for 51 years & non ultra) came too late, after ſuch confirmation as aforeſaid; and the demiſe being for 70 years, it is *repugnant* to confirm dimiſſionem prædictam for 51 years, it being all one as if they had confirmed the demiſe and term of 70 years for 51 years. 5 Rep. 81. a. Paſch. 37 Eliz. C. B. Foord's caſe.

confirm for all or part, and the confirmation ſhall not be taken larger than they have made it; but *had they confirmed the demiſe, and not ſhewn for what time, it ſhould be the entire term*; but when they ſay for 51 years & non ultra, that very well qualifies what goes before, and it ſhall not be conſtrued larger; ſed adjornatur.——Ibid. 472. (bis) pl. 34. Paſch. 38 Eliz. C. B. Betford v. Ford, S. C. reſolved that the confirmation goes to the whole term, and cannot be abridged by the following words, and judgment accordingly.——And. 47. pl. 119. cites S. C. & S. P. as adjudged accordingly by all the juſtices.——Bendl. 238. pl. 265. S. C. Paſch. 16 Eliz. where it was adjudged that the confirmations were good for 51 years at leaſt, and not void, becauſe the ſaid biſhop and dean and chapter might ſo make their ſeveral confirmations at their will ſpecially. A prebendary of Sarum's caſe.——And. 47. pl. 119. S. C. adjudged good confirmations, and that they may ſeverally confirm, and for parcel of the ſaid term.——D. 338. b. 339. a. pl. 43. Mich. 16 & 17 Eliz. S C. adjudged good as to the 51 years, but as to the reſidue the court doubted, but Geffrey thought the confirmation clearly void in toto.——Het. 75. Hill. 3 Car. C. B. Tomlinſon's caſe. Hutton J. thought the confirmation good only for the leſſer number of years, but Richardſon held e contra.

Same difference taken by Richardſon, Hutt. 75. Hill. 3 Car. C.B.

3. *But if* the biſhop and dean and chapter, reciting the leaſe, *had confirmed the land* to the leſſee *for* 51 *years*, this had been good enough; for then there would not be any ſuch repugnancy in the confirmation. 5 Rep. 81. a. Paſch. 37 Eliz. in Foord's caſe.

in Tomlinſon's caſe, and agreed by Crooke and all the ſerjeants at the bar, and Hutton ſaid it was a good caſe to be conſidered and to be moved again.

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4. *So* if a *leaſe* be made *of* 20 *acres*, they may *confirm as to part* of the land, viz. as for one or more acres. 5 Rep. 81. b. Paſch. 37 Eliz. in Foord's caſe.

5. *So* they *may confirm part or all upon condition.* 5 Rep. 81. b. Paſch. 37 Eliz. in Foord's caſe.

Co. Litt. 297. a. S.P.

6. And as to the points above, nota a *diverſity* between a *naked aſſent, without any right or intereſt*; for there the tenant who is to perfect a grant by his attornment cannot aſſent for a time, nor upon condition, nor for part of the thing granted, but it ſhall enure to the whole abſolutely, becauſe there is only a naked aſſent, which cannot be qualified or apportioned; but the biſhop, who is patron, and the dean and chapter have *an intereſt* in the prebend and every part thereof; for the patron has jus conferendi, and a releaſe to the patron of an annuity in the time of vacation is good. 5 Rep. 81. a. b. Paſch. 37 Eliz. in Foord's caſe.

An eſtate of *freehold* cannot be confirmed for part of the eſtate, for that the eſtate is entire, and not

7. Another *diverſity* was taken *between a leaſe for years and a* leaſe *for life*; gift *in tail, or* feoffment in *fee.* For if prebendary makes leaſe for years, confirmation may be of the land (as before is ſaid) for a leſs number of years, becauſe the years are ſeveral, though the demiſe or term is one. But if he makes leaſe for life, or gift in tail, or feoffment in fee, and confirmation is made of the land to the leſſee, donee, or feoffee, for an hour, it is good

for ever; for eſtate of franktenement or inheritance is intire. 5 Rep. 81. b. Paſch. 37 Eliz. in Foord's caſe.

ſeveral as years be. Co. Litt. 297. a.

8. And therefore if *he who has* franktenement or *inheritance be diſſeiſed*, and *confirms the eſtate* to the diſſeiſor *for an hour*, it is good for ever. 5 Rep. 81. b. Paſch. 37 Eliz. in Foord's caſe.

Litt. ſ. 520. S. P.—— Cro. E. 472. (bis) pl. 34. Betford v. Ford. S. C. & S. P.

9. If *diſſeiſor makes leaſe for years, of* 20 *acres*, the diſſeiſee *may confirm all or any part* of the land to the leſſee, *for all or ſome of the years, and that upon or without condition*; for though the term or demiſe be one, and therefore if the term or demiſe be confirmed for an hour, it is good for ever, yet the years and acres are ſeveral, and therefore the confirmation may extend to part of them; pari ratione if my tenant for life makes a leaſe for years, I may confirm the land for fewer years. 5 Rep. 81. b. 82. a. Paſch. 37 Eliz. in Foord's caſe.

S. P. but then it muſt be *by apt words*, for he muſt not confirm the leaſe, or demiſe, or eſtate of the leſſee; for then the addition for parcel of the

term ſhould be repugnant when the whole was confirmed before, but *the confirmation muſt be of the land for part of the term*; ſo the confirmation may be of part of the land, as if it be of 40 acres he may confirm 20, &c. So if tenant for life make a leaſe for 100 years, the leſſor may confirm either for part of the term, or for part of the land. Co. Litt. 297. a.

If he confirm the term of the leſſee of the diſſeiſor for ſome part of the years, he cannot defeat it during the whole term, becauſe the term is confirmed; and the laſt words being derogatory from his own grant, muſt be rejected; but if he *confirms the land to the termor for part of the term and no longer*, this is good, becauſe the party that had right did not totally aſſent by expreſs words, as he did in the two former caſes; for if he did, no derogatory clauſes from ſuch aſſent could be admitted; but his aſſent was originally but partial, and not to the whole eſtate, and therefore it cannot, contrary to the expreſs words, be carried any farther. Gilb. Treat. Ten. 70.

10. So if *tenant in tail makes a leaſe for* 40 *years* and dies, *the iſſue* in tail *may confirm all* the term *or part*, &c. *for fewer years*. And the ſame law of a feme after the coverture. 5 Rep. 82. a. Paſch. 37 Eliz. in Foord's caſe.

11. When the *eſtate is divided*, as if an eſtate be *for life, remainder over*, the confirmation may be to either of them. So if leſſee of diſſeiſor for 20 years makes a leaſe for 10 years, the diſſeiſee may confirm it to either of them, and not to the other. Per Walmſley. Cro. E. 472. (bis) pl. 34. Paſch. 38 Eliz. C. B. in caſe of Betford v. Ford.

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12. If the diſſeiſor make a *gift in tail*, and the diſſeiſee confirms the eſtate of the donee *for the life of the donee*, this confirmation enures to the whole eſtate tail; for a confirmation can make no fraction of any eſtate to extend but to part of the eſtate only. Co. Litt. 296. b.

S. P. *ſo of a leaſe for life*, if the diſſeiſee confirms the land to the leſſee or donee for an hour, this will confirm their whole eſtate, but ſhall not enure to the remainder or reverſion, becauſe he confirms the land to the leſſee or donee only, and the eſtate for life or in tail, and the remainder or reverſion are ſeveral diſtinct eſtates. 5 Rep 81. b. in Foord's caſe.——Litt. ſ. 520.

13. If a *diſſeiſee* makes a confirmation to the diſſeiſor *in tail*, or *for any particular eſtate*, this is a good confirmation for ever; for the diſſeiſee had a fee-ſimple, and the confirmation cannot make a *fraction* of his eſtate ſo as to extend *to part* of it only. Co. Litt. 296. b.

14. If

14. If the *parſon makes a leaſe for* 100 *years*, the patron and ordinary may *confirm* 50 *of the years*, for they have an intereſt and may charge in time of vacation. Co. Litt. 297. a.

15. If the *diſſeiſor makes a gift in tail*, the *remainder to the right heirs of tenant in tail*, if the *diſſeiſee confirm the eſtate in tail*, it *ſhall not extend to the fee-ſimple*. Co. Litt. 297. a.

16. So if the diſſeiſor had made a gift in tail, the *remainder for life, the remainder to the right heirs of tenant in tail*, this *extends only to the eſtate tail* and not to the remainder for life, nor to the remainder in fee. Co. Litt. 297. a.

2 Litt. f. 519, 520. 17. If a man *confirms the diſſeiſor's eſtate for an hour*, this paſſes the fee even *without the words heirs*, becauſe the diſſeiſor has the fee; and when that eſtate is aſſented to, the diſſeiſee can never afterwards deſtroy it. Gilb. Treat. Ten. 70.

(E. a) Where a Privity is requiſite in a Confirmation.

1. CONfirmation of eſtate is *not good but to him who is in poſſeſſion*. Br. Avowry, pl. 48. cites 14 H. 4. 37, 38.

Co. Litt. 305. a. S.P. 2. Where a confirmation ſhall *enlarge an eſtate*, there privity is required, as well as in the caſe of the releaſe. Co. Litt. 296.

——— And where it abridges ſervices, privity is requiſite regularly. Co. Litt. 305. b.

But where there is lord, meſne, and tenant, and *lord confirms the eſtate of the meſne* to hold 3. If there are *lord, meſne, and tenant*, the lord cannot confirm the *eſtate of tenant to hold of him by leſs ſervices*, becauſe there is no privity between them, and a confirmation cannot make ſuch an alteration of tenures. Co. Litt. 305. b.

by leſs ſervices, this is good; for he is in poſſeſſion of the meſnalty, and there is no other poſſeſſion. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

4. If *tenant in tail makes a feoffment in fee* to the uſe of *himſelf in fee*, and after *leaſes it for years* rendering rent and *dies*, the *iſſue being remitted by the deſcent* of the reverſion before entry, the eſtate [400] for years is alſo changed into a tenancy at ſufferance, becauſe there is not any privity *between this eſtate and the leaſe*, and therefore no *acceptance of the rent* can confirm it. See 2 Roll. Remitter (K) pl. 8. and the notes there.

(F. a) In what Caſes it ſhall alter the Tenures or Services.

1. IF I *leaſe land for life*, and after *confirm the eſtate to the tenant in fee*, or in tail, *rendering the ſame rent*, now the eſtate in the rent is enlarged, becauſe the eſtate in the land is enlarged to the tenant. Per Thorp J. Br. Grants, pl. 73. cites 26 Aſſ. 38.

(2.) The *lord may* diminiſh and *abridge his ſervices by confirmation made to his tenant, but* he can *not increaſe a rent or ſervice, or reſerve new by confirmation*. Br. Confirmation, pl. 1. cites 9 H. 6. 9. per Babbington and Paſton.

3. *And*

3. *And* by them, if a man *holds* 10 *acres* of his lord *by* 12 *d. and one acre by* 1 *d. by ſeveral tenures*, and he *confirms the eſtate of the tenant in both to hold by* 4 *d.* this *cannot make one and the ſame joint entire tenure*, which was two tenures before; and if it ſhall enure, it ſhall be by gift of 2d. out of the 10 acres, and 2d. out of the one acre, out of which only iſſued 1d. before, therefore quære inde; and quære if it cannot enure to have 1d. out of the one acre, and 3 d. or the whole 4 d. out of the other 10 acres. Ibid.

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4. If the *lord confirms the eſtate which the tenant has* in the tenements, yet the ſeigniory remains entire to the lord as it was before. Litt. ſ. 535. The lord by confirming the eſtate doth not paſs his right

to the ſeigniory, becauſe the confirmation or aſſent to that eſtate cannot be interpreted to paſs that other *diſtinct right* which is in him, ſince the aſſent to one eſtate is no reaſon to conclude that he has parted with the other; but if he had releaſed all his right, he had extinguiſhed his ſeigniory, becauſe by ſuch remitting his right, he could not have demanded any thing. Gilb. Treat. Ten. 74.

5. By confirmation of the tenants eſtate, a *rent-charge iſſuing out of the land or common* of paſture *in other land remain* as before. Litt. ſ. 536, 537. Co. Litt. 305. a. ſays that ſome do infer from theſe 2 ſections and the next following, that a man cannot abridge a rent-charge or common of paſture by a confirmation, as he may do a rent ſervice in reſpect of the privity between the lord and tenant, ſo as (they ſay) a tenure may be abridged by a confirmation, but not a rent-charge or common.

6. If *tenant holds* of the lord *by fealty, and* 20 *s. rent*, and the *lord by deed confirms* the eſtate of the tenant *to hold by* 12 *d.* or 1 d., &c. the tenant is hereby diſcharged of all other ſervices. Litt. ſ. 538. 9 Rep. 142. a. S. P. in Beaumont's caſe.

7. The lord upon a confirmation to the tenant cannot reſerve *new ſervices*, as a hawk inſtead of rent, or rent in lieu of a hawk, & ſic de ſimilibus. 9 Rep. 142. a. b. Paſch. 10 Jac. in the Court of Wards, per Cur. in Beaumont's caſe. Litt. ſ. 539. S. P.—— Co. Litt. 305. a. S. P. accordingly, that he can-

not reſerve new ſervices upon the confirmation, ſo long as the former eſtate in the tenancy continues.— The *lord may abridge* the ſervices of his tenant by his confirmation, *but he cannot enlarge* them, *or create new* ſervices; for when he has confirmed the eſtate by leſſer ſervices, he has granted to the tenant the ſervices that are over and above what was ſpecified in the confirmation; * becauſe *confirming the eſtate to hold by leſſer ſervices is, by implication, a grant or releaſe of rent*; for he could not hold by leſſer ſervices, unleſs the reſt were releaſed; but if he confirms to hold by greater or new ſervices, this is void, becauſe this doth not amount to a new grant from the lord. Gilb. Treat. Ten. 74. cites Litt. ſ. 538, 539, 540.

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For more of Confirmation in general, ſee **Baron and Feme, Eſtopple, Exchange, Tayle**, (D), and other proper titles.

Conqueſt.

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(A) The Effect thereof.

1. *Franchiſes* are *extinguiſhed* immediately on the conqueſt, but not the laws of the land without proclamation; and ſo William the Conqueror extinguiſhed all franchiſes in England but of churches, which the Pope would not permit him to take, for which reaſon they ſtand as before the conqueſt. Arg. Mo. 670. pl. 918. Mich. 43 & 44 Eliz. B. R.

In the caſe of an *infidel country*, their *laws* by conqueſt *do not entirely ceaſe, but only ſuch as are againſt the laws of God*, and in ſuch caſe, where the laws are rejected or ſilent, the conquered country ſhall be governed according to the rule of natural equity; held per Cur. 2 Salk. 412. pl. 1. Trin. 5 W. & M. in B. R. Blankard v. Gandy.

2. It was agreed, that according to CALVIN'S CASE, 7 Rep. 17. upon the conqueſt of an *infidel country*, all the *old laws are abrogated ex inſtanti*, and *the king impoſes what laws he pleaſes*; and in caſe of the conqueſt *of a chriſtian country, he may change them at pleaſure*, and appoint ſuch as he thinks fit; though Coke quotes no authority for it, yet it was agreed, that this might be conſonant to reaſon. Show. Parl. Caſes, 31. in caſe of Howell v. Dutton.

3. Where the king of England conquers a country, it is of a different conſideration from a new and uninhabited country being found out by Engliſh ſubjects; for in the firſt caſe the conqueror, *by ſaving the lives of the people conquered, gains a right and property in ſuch people*, and conſequently may impoſe upon them what laws he pleaſes. 2 Wms.'s Rep. 75. cites it as ſaid by the maſter of the rolls, 9 Auguſt, 1722, to have been ſo determined by the lords of the privy council, upon appeal from the foreign plantations.

4. *But till ſuch laws given* by the conquering prince, *the laws* and cuſtoms *of the conquered country ſhall hold place, unleſs* where theſe are *contrary to our religion, or enact any thing that is malum in ſe*, or are ſilent; for in all ſuch caſes the laws of the conquering country ſhall prevail. Ibid.

For more of Conqueſt in general, ſee other proper titles.

Conſent.

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(A) The Force thereof.

1. IN all caſes when any *thing executory* is created by *deed*, it may, by conſent of all perſons that were parties to the creation of it by their deed, be *defeated* and annulled, and therefore it was ſaid, that *warranties, recognizances, rents, charges, annuities, covenants, leaſes for years, uſes at common law*, &c. may, by a *defeaſance* made with the mutual conſent of all that were parties to the creation of them by deed, be annulled, diſcharged, and defeated. 1 Rep. 113. Hill. 28 Eliz. in Albany's caſe.

2. A conſent *ex poſt facto* is not of any ſignification; for it cannot be had for things which cannot be otherwiſe; per Vaughan Ch. J. Mod. 312. Paſch. 22 Car. 2. in Canc. in caſe of Fry v. Porter.

3. The conſent of the *heir* makes good a *void deviſe*. Chan. Caſes, 209. Trin. 23 Car. 2. Ld. Cornbury v. Middleton.

But though it binds himſelf, it ſhall not bind, or put a bargain on *another*. Arg. Ibid.

4. Conſent of remainder-man for life, though but *verbal*, is binding, and decreed to confirm building leaſes accordingly. 2 Chan. Caſes, 28. Paſch. 32 Car. 2. Sidney v. the Earl of Leiceſter.

But whether *remainder-man in tail* on ſuch conſent ſhould be decreed to confirm, lord chancellor would adviſe. Ibid.

5. Conſent *to a trial* of a title to land *in another county than where the land lies* will not help, it being an error, though ſuch conſent be of record; agreed per Cur. 2 Show. 98. pl. 97. Paſch. 32 Car. 2. B. R. Ld. Clare v. Reach.

But Raym. 372. Lord Clare v. Linch, S.C. reſolved by all, that the trial was well had.

6. A *burgeſs of a corporation conſenting to be turned out* from his burgeſs's place, and the common council of the corporation removing him accordingly, does not amount to a reſignation, and a preremptory mandamus was granted to reſtore him. Holt's Rep. 450. Hill. 8 Annæ B. R. The Queen v. Mayor of Glouceſter.

For more of Conſent in general, ſee **Authority, Conditions, Powers, Trial**, (S. a. 2), and other proper titles; and ſee **MAXIMS**, beginning with the word CONSENSUS.

Conſequential Loſſes or Damages.

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(A) Actions. In what Caſes Actions lie for conſequential Loſſes or Damages.

A man may lawfully *make a dam* on his own ground; but if by making it the water overflows his neighbour's ground, an action on the caſe lies againſt him; per Curiam. 8 Mod. 275. Trin. 10 Geo. 1. in caſe of Reynolds v. Clerk.

1. IF I have a *pond*, I cannot ſo let it out that it ſhall *drown my neighbour's land*. Arg. Het. 119. cites 6 E. 4. 6.

In this caſe the ſtranger is the treſpaſſor, and not I that am the owner; ſo *if* I am *carried by force* into the land of B. I am not the treſpaſſor, but he that carried me; per Roll J. Sti. 65. Mich. 16 Car. B. R. Smith v. Stone.

2. If a ſtranger *drives my cattle upon your land, whereby they are diſtrained* by you, I ſhall recover againſt the ſtranger for this diſtreſs by you; per Baron Altham. Arg. Lane, 67. cites 9 E. 4. 4.

Cro. J. 324. in pl. 2. Mich. 11 Jac. B. R. the S. C. cited per Cur.

3. Action lies for *calling one baſtard* whoſe grandfather had lands in tail, though the plaintiff was *youngeſt ſon* of the father; yet being offered a ſum of money by a purchaſor to join in the ſale, and afterwards the purchaſor refuſing to give him any thing by reaſon of thoſe words. It was held, though he has no preſent title, yet it appears he is, by a poſſibility, inheritable to thoſe lands, and being offered money for that poſſibility to join in the aſſurance, but it being afterwards refuſed to be given him by reaſon of thoſe words, is a preſent damage, and *he may receive prejudice thereby in futuro* in caſe he were to *claim any land by deſcent*. Affirmed in error. Cro. J. 213. pl. 6. Mich. 6 Jac. B. R. Vaughan v. Ellis.

S. P. per Coke Ch. J. Roll. Rep. 124. in S. C.

4. A *ſmith pricks the horſe* of a ſervant being on his journey to pay money for his maſter to ſave the penalty of a bond, both the maſter and ſervant may have their ſeveral actions on the caſe for the ſeveral wrongs they have thereby ſuſtained; per Coke Ch. J. 2 Bulſ. 334. Hill. 12 Jac. in caſe of Everard v. Hopkins.

5. Where one is *party to a fraud*, all which follows by reaſon of that fraud, ſhall be ſaid as done by him. Arg. Cro. J. 469. Hill. 15 Jac. B. R. in caſe of Southern v. How.

6. Action lies *for threatening workmen* to maim and proſecute them, whereby the maſter loſt the ſelling of his goods, the men not daring to go on with their work. Cro. J. 567. pl. 4. Paſch. 18 Jac. B. R. Garret v. Taylor.

7. A. *contracts with B. to make an eſtate of Bl. Acre at Mich. to B.* If *C. enters into* Bl. Acre, A. may have an action on the caſe againſt C. for the ſpecial damage which may happen to him

by

by reaſon that he is *diſabled to perform* his contract, by reaſon of C.'s entry, and he ſhall declare contra pacem, but not vi & armis. Per Doderidge J. Godb. 426. pl. 492. Trin. 21 Jac. B. R.

*8. A. *breaks the fence* of B. by which *cattle get into* C.'s ground, C. ſhall have caſe againſt A. but not treſpaſs. Per Roll. Sty. 131. Mich. 24 Car. B. R. in the caſe of Sir A. A. Cowper v. St. John.

9. Though a man does a lawful thing, yet if any damage do thereby befall another, he ſhall anſwer *if he could have avoided it*; and this holds *in all civil caſes*. As if a man *lops a tree* and the boughs fall upon another ipſo invito, yet an action lies. So if a man *ſhoot at butts* and hurt another unawares. So if I have land through which a river runs to your mill, and I lop the ſallows growing on the river ſide, which accidentally *ſtop the water* ſo as your *mill is hindered*. So if I am building my own houſe, and *a piece of timber falls on my neighbour's houſe* and breaks part of it. So if a man aſſaults me, and I *lift up my ſtaff to defend myſelf, and ſtrike another* in lifting it up; but it is otherwiſe *in criminal caſes*, for there actus non facit reum niſi mens ſit rea. Per Raymond J. Arg. Raym. 422, 423. Hill. 33 & 34 Car. 2. B. R. Raym. 467, 468. Trin. 34 Car. 2. S.C. & S.P. in totidem verbis.

10. If A. *beats my horſe by which he runs on B.* A. is the treſpaſſor and not I. 2 Salk. 638. per Cur. Paſch. 7 W. 3. B. R. in caſe of Gibbon v. Pepper. S.C. & S.P. per tot. Cur. Ld. Raym. Rep. 38, 39.

11. He that makes a *fire in his field* muſt ſee that it does no harm, and anſwer the damage if it does; but if a ſudden ſtorm had riſen which he could not ſtop, it was matter of evidence, and he ſhould have ſhewed it. 1 Salk. 13. pl. 4. Mich. 9 W. 3. B. R. Turbervil v. Stamp. 12 Mod. 151. S. C. & S. P. by 3 judges accordingly.—Carth. 425. S. C. adjudged.—Ld. Raym. Rep. 364. S. C. adjudged by 3 juſtices contra Turton.

12. A. contracted with B. to bring timber in A.'s cart and deliver it in B.'s yard, it was brought in a cold day; B. refuſed to come and unload it, whereby the *horſes got cold and 2 died*; A. brought action but could not obtain judgment; cited per Holt Ch. J. Cumb. 481. 10 W. 3. B. R. as in the caſe of Bertue v. Bourn.

13. If a *conſtable places a dragoon* where it is *unlawful* for him ſo to do, he muſt make ſatisfaction for the conſequential damages, as letting drink about the cellar, &c. For ſince the placing him there is unlawful, it ſhall be taken as if the conſtable had put him there on purpoſe to do an unlawful act. Per Holt Ch. J. 5 Mod. 430. Hill. 10 W. 3. in caſe of Parkhouſe v. Foſter. At common law, if a man does an unlawful act he ſhall be anſwerable for the conſequences of it eſpecially, whereas in the principal caſe the act is done with intent that conſequential damages ſhall be done; per Holt Ch. J. Ld. Raym. Rep. 480. Trin. 11 W. 3. in caſe of Parkhurſt v. Foſter, S. C.—12 Mod. 254, 255. Parker v. Flint, S. C. reſolved that the conſtable ſhall be anſwerable for all damage done by the dragoon.

14. Action on caſe *for ſtopping a way* leading to his colliery, by which he loſt his cuſtomers, lies not without ſpecial damages. Cumb. 480. Trin. 10 W. 3. B. R. Iveſon v. Moor. See tit. Actions (N. b) pl. 19.

15. *After a recovery of damages in aſſault, battery*, &c. no action will lie for conſequential damages, as that he was afterwards For it is to be ſuppoſed that when a

man recovers damages, it is according to the damages received by him, and that the jury gave intire ſatisfaction for the battery. Ibid. 543. per Cur.

forced to be trepanned, and had a bone taken out of his ſkull. 12 Mod. 542. Trin. 13 W. 3. Fitter v. Veal.

16. If A. enters into my grounds, and *breaks* down *my wall, which keeps out the ſea*; and I bring my treſpaſs, and *recover damages*, and I *re-build* my wall, but *by reaſon of the newneſs* thereof *it is broke down by a new ſtorm*, which the old wall would have reſiſted. Per Cur. the plaintiff ſhall recover for the overflowing of
[405] his lands, and to re-build his wall; and the danger of the new wall, if there be any thing in that too, may be conſidered; but this *muſt be all at once*. Arg. 12 Mo. 543. Trin. 13 W. 3. in the caſe of Fitter v. Veal.

17. It is a *fundamental principle* in law and reaſon, that he that does the firſt wrong ſhall anſwer for all conſequential damages. 12 Mod. 639. per Cur. Hill. 13 W. 3. in caſe of Roſwell v. Prior.

18. If *one takes* another *priſoner by wrong*, and then *turns him over to another* officer, *who detains him*, the firſt taker ſhall anſwer for all the conſequential damages. Per Cur. 12 Mod. 640. Hill. 13 W. 3. in the caſe of Roſwell v. Prior.

19 He that *keeps goods by wrong* muſt anſwer for them at his peril at all events, for his deteiner is the reaſon of the *loſs*. 2 Salk. 523. per Holt Ch. J. Trin. 2 Ann. B. R. in caſe of Coggs v. Bernard.

6 Mod. 179. Trin. 3 Ann. B. R. per Cur. S.P. in S.C.

20. If A. *wrongfully impriſons B.* and the *gaoler detains him till ſo much is paid*, in this caſe he who was the priſoner ſhall have an action of falſe impriſonment againſt A. for impriſoning, and detaining him until he paid ſo much money; and this is a taking by A. and it muſt be illegal to uſe any unlawful means to oppreſs another, and A. is guilty of the oppreſſion and extortion committed by the gaoler. 3 Salk. 193. in caſe of the Queen v. Tracy.

21. A. has a market and toll, and B. is coming with *goods to the market*, for which, if ſold, *toll* would be due, and C. *hinders B. coming to the market*; the lord of the market may have action becauſe of the *poſſibility of* damages; per Powell J. 6 Mod. 49. Mich. 2 Annæ B. R. in caſe of Aſhby v. White.

But if ſuch damage *could not be avoided*, it

22. Where a man does a *lawful act*, and a damage *reſults from* ſuch act, an action of *caſe* lies, and not an action of *treſpaſs*. 8 Mod. 272. Trin. 10 Geo. 1. Reynolds v Clerk.

ſeems no action lies. See Raym. 483. —— So where J. S. erected a *mill-dam, part on his own land, and part on land of A.* and A. pulled down the dam on his land, by which all the dam fell down and the water ran out. This was held juſtifiable. Cro. E. 269. pl. 10. Hill. 34 Eliz. B. R. Wigford v. Gill. —— So if A. *erects a wall*, part on his own and part on B.'s land, and B. pulls down the wall upon his land, and ſo all the wall falls down, this is lawful. Ibid.

23. If a man keeps a *beaſt of a ſavage nature*, as a lion, &c. it is at his peril to keep him up, and he is anſwerable for all the conſequences of his *getting looſe*; per Raymond Ch. J. Gibb. 187. Mich. 4 Geo. 2. B. R. in the caſe of the King v. Huggins.

For more of Conſequential Loſſes or Damages in general, ſee **Actions**, (B), &c. and (H), &c. and other proper titles.

Conſideration.

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(A) What it is; and where neceſſary.

See Action [of Aſſumpſit] (U) to (Z).—Uſes (G. 4).

1. A Conſideration *is* a cauſe or occaſion meritorious, requiring a mutual recompence in deed or in law. Arg. See D. 336. b. Trin. 16 Eliz. in Calthorp's caſe.

2. An *uſe declared on a ſtate executed* needs no conſideration; per Cur. Mo. 102. pl. 247. Mich. 16 & 17 Eliz. [406]

3. A conſideration is neceſſary *to create a debt*, otherwiſe it is nudum pactum. Jenk. 290. in pl. 27.

4. Where *debt* is brought *for money due, without any circumſtance of forbearance of ſuit* by the plaintiff for a time, a *particular conſideration ought to be ſhewn* in the declaration. Jenk. 292. pl. 37.

But a promiſe to forbear a ſuit paululum temporis is no conſideration to maintain an aſſumpſit, for it may be the next minute; but promiſe to forbear for a reaſonable time is a good conſideration, for it is left to the court to judge of it. Jenk. 301. pl. 71.—An indebitatus aſſumpſit generally for 20 l. to pay the ſaid 20 l. will not maintain an aſſumpſit without ſhewing ſome conſideration. Jenk. 330. pl. 61.

5. A *bond implies a* conſideration in itſelf, and therefore it was held by the court, that a man was not bound to diſcover what was the conſideration. Hard. 200. Trin. 13 Car. 2. in the Exchequer, Turner v. Binion.

And baron Atkins ſaid, it had been ſo ruled in chancery. Ibid.——

But ſee tit. Nudum Pactum (A), pl. 7. Negus v. Fettiplace.

6. Nudum pactum will not *raiſe an uſe*, nor can a uſe be raiſed without a conſideration; agreed. Arg. Cart. 141. Mich. 18 Car. 2. C. B.

See tit. Uſes (Y) per totum.

7. If *leſſee for life or years aſſigns his eſtate*, there needs no conſideration, becauſe the aſſignee is ſubject to the ancient forfeitures and to payment of the rent, and that a loan is ſufficient to veſt an uſe in him; but otherwiſe in caſe of a fee-ſimple; per North Ch. J. Mod. 263. pl. 15. Trin. 29 Car. 2. C. B. in the caſe of Barker v. Keate.

8. A *leaſe for a year* upon no other conſideration than *reſerving a pepper-corn, if it be demanded*, is a ſufficient conſideration to raiſe a uſe, and ſhall operate as a bargain and ſale, and ſo make the leſſee capable of a releaſe. 2 Vent. 35. Paſch. 32 Car. 2. C. B. Barker v. Keate.

2 Mod. 249. S. C. adjudged accordingly per tot. Cur.

9. A *voluntary ſettlement may be ſurrendered* without conſideration, and ſuch ſurrender may be aided in a court of equity, and an agreement ſo to do will be decreed; per Lord Sommers. Ch. Prec. 69. pl. 62. Hill. 1696. Wentworth v. Deverginy.

(B) Good and Valuable.

1. BArgain and ſale, *proviſo you pay to me at a future day* 100 *l.* This, though ſet down in form of a condition, is as effectual as if formally expreſſed in the uſual terms. Arg. Le. 6. pl. 10. Mich. 25 & 26 Eliz. B. R. in caſe of Stonely v. Bracebridge.

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2. *Love* is not a conſideration on which an action may be grounded on a promiſe to pay money, and the ſame of *friendſhip*; per Cur. 2 Le. 30. pl. 35. Trin. 30 Eliz. B. R. Harford v. Gardiner.

Mo. 569. pl. 777. Trin. 41 Eliz. B. R. Fiſher v. Smith, all the court were clear, that if one pleads a bargain and ſale in which no conſideration of money is expreſſed, there he ought to ſupply it by averment that it was for money, and the words (for divers conſiderations) ſhall not be intended for money without averment; but if the deed expreſſes for a competent ſum of money, it is ſufficient without ſhewing the certainty of the ſum, and none ſhall ſay that no money was paid; for againſt this expreſs mention in the deed, no averment nor evidence ſhall be admitted to ſay that no money was paid; and judgment accordingly. ——— D. 90. b. pl. 8. Marg. cites it as adjudged 8 Jac. to be good, without alleging pro quadam pecuniæ ſumma, and cites 40 Eliz. that if bargain and ſale is found by verdict, conſideration is intendable. ——— Bargain and ſale is not good if *no conſideration* be. Raym. 201. Mich. 22 Car. 2. B. R. Guilliams v. Muningt n.

3. A *bargain and ſale was pleaded* of land, *without ſaying pro quadam pecuniæ ſumma*, and exception being taken thereto the court doubted of it, and demanded of the prothonotaries what is their form of pleading; and by Nelſon Ch. Prothonotary theſe words pro quadam pecuniæ ſumma ought to be in the pleading. Scot prothonotary contra. Anderſon conceived it was either way good, but pro quadam pecuniæ ſumma is the beſt; and ſo Leonard cuſtos brevium conceived. And the opinion of the juſtices was, that a bargain and ſale *for divers cauſes and conſiderations* is not good without a ſum of money. And by Windham bargain and ſale pro quadam pecuniæ ſumma, although no money be * paid, is enough, for the payment or not payment is not traverſable; and by Periam, if pro quadam pecuniæ ſumma be not in the indenture of bargain and ſale, yet the *payment thereof is averrable*; and for this exception the judgment was ſtaid. Le. 170. in pl. 237. Mich. 30 & 31 Eliz. C. B. in caſe of Smith v. Lane.

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Arg. Cart. 138. cites 1 Rep. 176. Mildmay's caſe.

4. *Other conſiderations* being but general parlance imply nothing except expreſs conſiderations were ſhewn; for otherwiſe none ſhall be intended; per Cur. Cro. E. 344. Mich. 36 & 37 Eliz. B. R. in caſe of Lacy v. Whetſtone.

5. An *uſe* is well raiſed upon conſideration of blood, but the *conſideration of blood will not create a debt*, though a deed will, without mentioning any conſideration. An *aſſumpſit to pay A. his couſin* 100*l.* is void if there be no other conſideration; the reaſon of the difference is, the land goes to the blood, but ſo do not the debts. Jenk. 81, 82. in pl. 60.

6. A leſs conſideration will ſerve to *raiſe an uſe* than to *deſtroy* an uſe; per Bacon C. 2 Roll. Rep. 106. Trin. 17 Jac. in Canc. in caſe of Reynolds v. Peacock.

7. The plaintiff intitled himſelf by a *bargain and ſale in conſideration of certain articles of agreement*, and does not ſay for money; and

and for that reaſon judgment was reverſed. Freem. Rep. 344. pl. 427. cites Sty. 188. 204. [Hill. 1649. Watts v. Dixey.]

8. A bargain and ſale was pro diverſis conſiderationibus generally, and this was admitted in evidence to prove money really paid, and if it be *paid by one of the bargainees* it is ſufficient for all to raiſe the uſe to all. Vide if it is paid *to one of the bargainees* if that be not good alſo. Clayt. 145. pl. 263. Mich. 1650. Harley v. Thompſon.

9. *Conuſee of a ſtatute* extended the land, and in conſideration of 3000l. received by the conuſor, (which was the *money due on the ſtatute,)* the conuſor conveyed part of the lands abſolutely, and this *debt being ſatisfied* by ſuch conveyance, the conuſee aſſigned the reſt of the lands to the conuſor, this is a good and valuable conſideration, and is as effectual as if he had been a purchaſor with money. N. Ch. R. 91. 15 Car. 2. Churchill v. Grove. Chan. Caſes, 35. S. C. 2 Freem. Rep. 176. pl. 237. S. C. accordingly.

10. Five ſhillings is a *valuable*, but yet no *equitable* conſideration for a purchaſe of lands. Arg. Chan. Caſes, 34. Mich. 15 Car. 2. in caſe of Moore v. Mayhow. 2 Freem. Rep. 175. pl. 235. S.C. & S.P. Arg.

11. *Loſs* is as good a conſideration for a promiſe as benefit or profit. Chan. Caſes, 78. Mich. 18 Car. 2. in caſe of Underwood v. Staney.

12. *Marriage* is a good conſideration to make a feme a purchaſor; per Cur. Chan. Caſes 100. Hill. 19 & 20 Car. 2. Douglas v. Wood. S. P. and will avoid a ſecret *truſt*. 2 Roll. Rep. 106. per Bacon C. Trin. 17 Jac. in Canc. in caſe of Reynell v. Peacock. ——— See tit. Uſes (E) pl. 2. S. C. and the notes there. —— Or a *voluntary conveyance*, though with notice, as the Court inclined, but perſuaded the parties to agree, being near relations. N. Ch. R. 161. Hill. 1 W. & M. Watkins v. Stevens. ——— And ſo it is though the wife has no portion, and be the ſettlement ever ſo unequal, and in favour of the wife; becauſe it cannot put her in ſtatu quo, or unmarry the parties. 2 Wms.'s Rep. (618) Trin. 1731. by the maſter of the rolls, in the caſe of North v. Anſell.

13. In conſideration *that one was bound for him for money owing, he did bargain and ſell;* this is no good conſideration. But per Hale Ch. J. if there be a *covenant in conſideration of money to convey, and a bargain and ſale purſuant to that covenant*, that will be a good conſideration. Freem. Rep. 344. pl. 427. Trin. 1673. B. R. Tutthill v. Roberts. [408]

14. In *purchaſes* the queſtion is not, whether the conſideration be *adequate*, but whether it is *valuable;* for if it be ſuch a conſideration as will make a defendant a purchaſor within the ſtatute of queen Eliz. and bring him within the protection of that law, he ought not to be impeached in equity; per Finch K. Fin. Rep. 104. Hill. 25 Car. 2. in caſe of Baſſet v. Noſworthy.

15. If one ſeals a *releaſe*, or other aſſurance, *to one in poſſeſſion* for never ſo *unequal conſideration*, it ſhall not be relieved becauſe of a *new title diſcovered*, unleſs there be ſome ſpecial fraud; per Ld. Keeper. 2 Chan. Caſes, 161. Paſch. 22 Car. 2. Hobert v. Hobert.

16. A *pepper corn* (in a leaſe for a year) if demanded, is conſideration ſufficient for a bargain and ſale to make the leſſee capable of a releaſe, and ſuch reſervation is ſufficient conſideration to *raiſe a uſe*, S. C. argued, Mod. 262. —— S. C. ad-

judged. 2 Mod. 249. ——Freem. Rep. 250. pl. 266. S. C. held accordingly.

a uſe, as by bargain and ſale. 2 Vent. 35. Paſch. 32 Car. 2. C. B. Barker v. Keate.

17. Where there are *ſeveral* conſiderations, and *one is good*, that *will ſupport the whole deed at law*; but it is not ſo in chancery. Arg. Ch. Prec. 105, 106. Mich. 1699.

18. If an *annuity* is *granted* by one to his *houſe-keeper*, *with a bond for payment* of it, and the *bond is loſt*, equity will decree payment of the annuity; for *ſervice is a conſideration*, and *no turpis contractus* ſhall be preſumed, unleſs proved. Abr. Equ. Caſes, 24. pl. 7. Hill. 1700. Lightbone v. Weedon.

Gilb. Equ. Rep. 139. S. C. in totidem verbis, and ſeems (with many

19. Though a ſum of *money is mentioned* in a deed as the conſideration of the grant, a court of equity will *not ſupply any defect* in ſuch, if *no money was paid* or ſecured. See Ch. Prec. 475. pl. 298. Mich. 1717. Furſaker v. Robinſon.

others) to be taken from a manuſcript copy of thoſe reports of that great man Mr. Pooley, which are publiſhed under the title of Precedents in Chancery.

20. Bill for diſcovery of the conſideration *of a promiſſory note for* 275 *l.* ſuggeſting that it was given ex turpi cauſa to ſmother and make up a felony, &c. Defendant by his anſwer *ſays that he loſt ſuch a ſum of money, and verily believes that it came to the plaintiff's hands, and that was the real conſideration of giving the note*, &c. Per Cowper C. the bill muſt be diſmiſſed, for there is no equity againſt the defendant, ſince he has ſworn, and it is not diſproved, that he loſt ſuch a ſum of money, and verily believes that it came to the plaintiff's hands, that is a ſufficient conſideration to ſupport the note. Bill diſmiſſed with coſts. MS. Rep. Mich. 4 Geo. in Canc. Guiborn v. Fellows & al'.

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(C) To what it ſhall extend.

Hard. 395. S. C. in the Exchequer. ——Chan. Rep. 275. S. C.—— Lev. 237. S. C. Paſch. 20 Car. 2. in chancery, decreed accordingly.——S. P. by Lord C. Macclesfield. And he ſaid that the reaſon is, becauſe it may be very well *intended that the huſband or his parents would not have come into this ſettlement, unleſs all the parties thereto had agreed to the limitation to the brother.* 2 Wms.'s Rep. 175. Trin. 1723. in caſe of Edwards v. Lady Warwick.

1. Conſideration upon one marriage extended to the *iſſue of another marriage.* Lev. 150. Mich. 16 Car. 2. in the Exchequer. Jenkins v. Keymis.

2. Covenant in conſideration of *marriage of his eldeſt ſon, and a marriage portion*, to ſettle on him in tail the *remainder to the 2d ſon*. The conſideration extends to the remainder to the 2d ſon, and the conveyance as to the 2d ſon is not fraudulent againſt *creditors*. 2 Lev. 105. Trin. 26 Car. 2. B. R. White v. Stringer.

Where there is a marriage portion and a ſettlement, that part of the ſettlement only which belongs to the wife, and children by that wife can be eſteemed to be founded upon the conſideration of that marriage; for it is abſurd to imagine that the friends of the wife ſhould be ſuppoſed as at all concerned about the remote uſes of the ſettlement upon perſons to whom they are entire ſtrangers; and as for the caſe of Jenkins v. Kemis, the meaning thereof is no more than this, that a father, when he makes a marriage ſettlement upon one ſon, has ſuch a proper, fair, and juſtifiable opportunity offered him of providing for his other children, as that if he thinks fit to lay hold upon it, by inſerting in the ſettlement

ſment proviſions for them, ſuch proviſion ſhall never be eſteemed as fraudulent, and as ſuch ſet aſide in favour of creditors Per Parker C. 10 Mod. 534, 535. Mich. 11 Geo. 1. in caſe of Oſgood and Stroud.——And his lordſhip cited the caſe of Jenkins v. Keymis, and ſaid, it could not well be intended to have been made to cheat a creditor, unleſs the perſon making it was *then in debt*, and that the very remoteneſs of the limitation to a brother, or to the iſſue of an after-taken wife, was evident that ſuch limitation was not intended to cheat creditors. 2 Wms.'s Rep. 253. S. C.

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3. The wife joins in *opening her jointure* to let in an incumbrance, and bar the eſtate tail to their heirs male by fine, and declare the uſes for ſecuring the money borrowed, then to the huſband for life, then to the wife for her jointure, then to the ſons of them two in tail, then *to the daughters in tail.* Per Ld. Somers, the conſideration *of the mother's joining to bar her jointure, and letting in an incumbrance*, might have extended to the daughters and made them purchaſors, had it been *ſo expreſſed in the deed*; but for want of that, it is only a voluntary gift of the wife to the huſband, and the eſtate to the daughters voluntary, and ſo a judgment creditor be let in before them. Ch. Prec. 113. Trin. 1700. Ball v. Burnford.

4. In a marriage *ſettlement* made by the father *on the marriage of B. his eldeſt ſon*, the ſame was limited to be to the eldeſt ſon, *and the heirs of his body, in conſideration of the marriage* * [*and marriage portion*] remainder *to C. the 2d ſon and the heirs of his body*, remainder over. This conſideration extends not to the 2d ſon to make him a purchaſor. Chan. Prec. 224. pl. 183. Trin. 1703. Staplehill v. Bully.

* So it is in the margin. Ibid.

5. A. *ceſty que truſt of lands in fee*, on a treaty of marriage between C. then eldeſt ſon of A. (B. the firſt ſon being dead) and M. in conſideration of the ſaid intended marriage, and 600 l. *articled to convey the ſame to ſecure 60 l. a year to M. for her life*, and 50 l. a year to A. for his life, and *ſubject thereto to* the uſe of *C. for life*, remainder *to his 1ſt, &c. ſon of that marriage in tail male*, then to provide portions for daughters, remainder *to D. a grandſon of A.* and ſon of another deceaſed ſon of A. *in tail male* (ſince dead) without iſſue, remainder *to E. another grandſon* in tail male, remainder *to his own right heirs.* M. and B. died without iſſue. On a bill by E. to compel a conveyance purſuant to the articles, all the precedent eſtates being determined, Lord C. Macclesfield held that *if A. had the whole intereſt in the eſtate, and C. B. had nothing*, he did not ſee with whom he could contract unleſs with M. and her friends, which would only make a good conſideration for B. and M. the huſband and wife, and their iſſue, but if *each had an intereſt*, ſo that the one could not make a ſettlement without the other, and that the above limitations were made upon an agreement on the conſideration, and ſo A. was induced to join therein, equity ought to decree a performance; but ſaid he would give no coſts. 2 Wms.'s Rep. 245. 256. Mich. 1724. Oſgood v. Strode.

This cauſe was reheard, and affirmed by Ld. C. King, Dec. 1725. Ibid. 257. —10 Mod. 533. S. C. accordingly by Ld. C. Macclesfield.

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6. Where a ſettlement is made by the father or other *lineal anceſtor*, in conſideration of the *marriage of his ſon*, in ſuch caſe all the remainders limited to his children and their poſterity are within the conſideration of the ſettlement; but when it is made by a brother,

Gilb. Law of Uſes, 337. S. C. ——*But* where a marr age

ſettlement is covenanted to be made by the father on his eldeſt ſon's marriage, *to the ſon for life*, and then *to the wife for life*, then *to the iſſue of that marriage in tail, remainder to the fourth ſon of the huſband's father*, but the eſtate tail is ſpent by death of the huſband and wife without iſſue; upon a bill by the heir at law of the fourth ſon, Parker C. decreed a ſettlement purſuant to the articles. But then he did not look upon the plaintiff as a meer *volunteer*, which he ſaid he muſt be if there was nothing more in the caſe than the conſideration of the marriage and marriage portion. But he ſaid he went *upon a ſuppoſition that the eſtate was neither all in the father, nor all in the ſon*, ſo that neither could without the other have made this ſettlement; then it might be very natural to ſuppoſe, that this part of the ſettlement under which the plaintiff claims *might be founded on an agreement between father and ſon*; for the father might naturally tell the ſon, "I muſt provide for my other children as "well as you, and therefore unleſs you will conſent to this, I will not join with you in making this ſet-"tlement." And in ſuch caſe the plaintiff muſt not be conſidered as a volunteer, but as one claiming under the conſideration of the father's doing what he was not bound to do. And this he took to be the ſtate of the caſe from the evidence, viz. that the father had a power to charge 1300 l. on the eſtate, which he might depart from upon his eldeſt ſon's conſent to that part of the ſettlement under which the plaintiff claims. 10 Mod. 535. Oſgood v. Stroud.——2 Wms.'s Rep. 256, 257. Mich. 1724. S. C. & S. P.

brother, or other *collateral anceſtor on his marriage*, there after the limitations to his own iſſue, all the *remainders limited* to his collateral kindred are voluntary, and not within the conſiderations of the marriage ſettlement. Per Lord Chan. 9 Mod. 132. Hill. 11 Geo. in Canc. in caſe of Reeves v. Reeves.

7. A. had 4 ſons, B. C. D. and E.—B. died, and by will *bequeathed* 10,000 *l. to C.* and *in caſe he died without heirs male of his body* then *to D. and E. to be equally divided* between them. Afterwards *by marriage articles between C. and M. it was agreed that M. ſhould convey the inheritance of lands in S. to C. and M. for life*, remainder *to the 1ſt, &c. ſon in tail male*, remainder *to C. in fee.* In conſideration whereof *C. covenanted to purchaſe and ſettle 250 l. a year on himſelf and M. for life*, remainder *to the firſt, &c. ſon in tail male, &c.* remainder *to D. for life*, remainder *to the 1ſt, &c. ſon of D.* remainder *to E.* as before to D. The marriage took effect. C. died without iſſue male, and without having made any ſettlement, and deviſed all his real and perſonal eſtate to M. (whom he made executor), charging the ſame with portions for his daughters. On a bill by D. and E. for a ſpecifick execution, Lord C. King decreed the ſame, there being no creditor to be hurt, and aſſets being admitted, and would not put them to bring covenant in the truſtees names for recovery of damages, it being uncertain who would be the perſon intitled to them. And his lordſhip obſerved that C. might be induced to covenant as before, to make amends to D. and E. for what was intended them by B.'s will, but could not take place, being a void limitation. 2 Wms.'s Rep. (594.) Trin. [1730] 1731. Vernon v. Vernon.

8. A. in conſideration of 6000 l. portion with M. by marriage articles, *covenanted with truſtees to lay out within one year after the marriage the ſaid 6000 l. and to make it up 30,000 l. in the purchaſe of lands to be ſettled on A. for life*, remainder to truſtees to preſerve, &c. remainder *for ſo much as would amount to 8000 l. a year to M.* [411] *for a jointure*, remainder *of the whole to the firſt, &c. ſon of the marriage in tail male*, &c. remainder *to truſtees for 500 years to raiſe daughters portions*, remainder *to A. his heirs and aſſigns for ever. But if no daughters, then the term to ceaſe for the benefit of A. his heirs and aſſigns for ever.* It was inſiſted for defendant, that plaintiff was *not privy to any of the conſiderations in the covenant*, and ſo could not

not compel M. to lay the 30,000l. out for his benefit. But if he could, that the 1800l. a year *lands deſcended* to him, ought to *be taken as a* full *ſatisfaction*. But this point was decreed at the rolls for the plaintiff; and Lord C. Talbot, upon the cauſe coming on before him, ſaid that the intent ſeemed to be, that the 30,000 l. ſhould at all events be laid out in land, the produce whereof was to be ſecured to the iſſue of the marriage, who in this caſe muſt have taken as purchaſors; but as to the remainder in fee he did not think that the looking upon A. either as a purchaſor of it or not will vary the caſe; ſince, had the covenant been ſilent, the remainder muſt have returned to the perſon from whom the eſtate moved, and thought it quite the ſame whether he is conſidered as a purchaſor or as a volunteer, the *diſpute not being between the heir and a 3d perſon, but between the two repreſentatives of A.* the one *of his real, and* the other *of his perſonal eſtate*, the heir's being but a volunteer, in regard to his anceſtor, will not exclude him from the aid of this court. And decreed the 30,000 *l.* to be as real eſtate, and the plaintiff, though only a collateral heir, to have the benefit of it. Sel. Ch. Caſes, in Ld. Talbot's time. 80. 89, 90. Paſch. 1735. Lechmere v. Lady Lechmere.

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(D) Where there are ſeveral which ſhall be preferred.

1. A Covenant to ſtand ſeiſed was in conſideration of *marriage and money*, the conſideration of marriage ſhall be *preferred*; per Plowden. Mo. 93. in pl. 231. Paſch. 12 Eliz. cites it as ſaid by Plowden to have been adjudged in Villers's caſe, but ſaid it was per Ignem. D. 146. a. pl. 68. Paſch. 4 & 5 P. & M. Villers v. Beaumont, S. C.——

Bendl. 39. pl. 72. S. C.——If an uſe be declared on a covenant to ſtand ſeiſed on conſideration of marriage and money, no uſe ſhall ariſe without marriage, though the money was paid, becauſe the marriage is the principal conſideration in the intention of the parties, and the money is acceſſary only which attends the marriage; per Cur. Mo. 102. pl. 247. Mich. 16 & 17 Eliz.——Cro. J. 624. pl. 7. Mich. 19 Jac. B. R. Arg. S. P. & Ibid. 625. cites a caſe ſo reſolved, and decree made accordingly in the Court of Wards, 36 Eliz. in a caſe of Smith and Littleton.

2. *Where* there are two conſiderations, *and one is good and one is not good; if that which is good be proved* it is ſufficient, and though he fails in the proof of the other it is not material, becauſe it was in vain to allege it, and it is as if it had not been alleged. Cro. J. 127. pl. 19. Trin. 1 Jac. B. R. Criſp v. Gamel.

3. If there be a *double* conſideration alleged for a promiſe, if *one is good and the other not*, yet an action will lie on the promiſe that is broken which was grounded upon theſe conſiderations. Sty. 280. Trin. 1651. B. R. in caſe of Shan v. Bilby.

For more of Conſideration in general, ſee Actions, (Q) (U. 2) to (X), Uſes, (G. 4), &c. and other proper titles.

Conſpiracy.

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(A) What is.

F. N. B. 116. (L) a man ſhall not have a writ of conſpiracy for indicting him of felony againſt huſband and wife, becauſe they are but one perſon; but againſt huſband and wife and a third perſon it well lies.——The Engliſh editions cite S. C. and the new edition cites Stamf. 174.

1. CONſpiracy *againſt baron and feme and a third perſon*, becauſe they by conſpiracy *cauſed N. T. to bring writ againſt him, becauſe he would not infeoff them of his land*, by which he was taken and impriſoned, and acquitted; and becauſe this matter is no conſpiracy (for then every *man of the law who gives counſel* ſhould be a conſpirator, and alſo *it is doubted if the baron and feme may conſpire)* the writ was abated. Br. Conſpiracy, pl. 14. cites 38 E. 3. 3.

Br. Challenge, pl. 134. cites S. C.—— Fitzh. Challenge, pl. 158. cites S. C.

2. In *aſſiſe againſt two* who *pleaded ſeverally*, *the one* took the tenancy of one parcel to himſelf, and *challenged a juror*, and his challenge found and he ouſted; and the *other ſaid, that he did not challenge him*, and prayed that he might be ſworn, and the court refuſed it; for by this means they ſhall take divers aſſiſes upon one original, which they cannot; per Stouffe, if *he who challenges and the plaintiff are of one aſſent to ouſt the other of his advantages*, this might be in caſe adjudged a conſpiracy; quære How, &c. 39 Aſſ. 41.

Conſpiracy *againſt two* who *pleaded not guilty*, and the jury *found the one guilty and acquitted the other*, by which the Court adviſed them to go together again and to be better adviſed, and ſo they did; for *one only cannot conſpire*, and then they found both guilty, quod nota. Br. Conſpiracy, pl. 13. cites 11 H. 4. a.

3. *One only cannot be a conſpirator;* per Gaſcoign clearly in the written book. Bro. Conſpiracy, pl. 12. cites 8 H. 4. 12, 13.

Br. Juſtification, pl. 1. cites S. C. —F. N. B. 115. (B) S. P. But Ibid. (C) if he conſpires afterwards, he may be charged for the ſame in a writ of conſpiracy.

4. Conſpiracy *againſt two*, that they the Monday, &c conſpired *to indict the plaintiff*, by which he was indicted and arraigned and *lawfully acquitted*, &c. and the *one ſaid that the Wedneſday*, &c. *he was juror at the ſeſſions to enquire for the king, and informed his company that the plaintiff had done felony, and after, before verdict, he was removed ab eis, and they proceeded and indicted the plaintiff*, &c. judgment ſi actio, &c. For conſpiracy does not lie againſt the indictors, but againſt the procurors, and the beſt opinion was that it was a good plea; for though he was diſcharged before verdict, yet it was well to inform the company, and the *act of the court ſhall not prejudice* the party, and alſo he need not to traverſe the day as above. Br. Conſpiracy, pl. 1. cites 20 H. 6. 5.

He who comes into court and

5. Conſpiracy *againſt two* by which the *plaintiff was indicted of the murder of J. N.* the *one of the defendants ſaid*, that *he ſaw the*

plaintiff kill the ſaid J. N. ſuch a day; and after the ſame day that the conſpiracy is ſuppoſed, the *defendant came to E. where the ſeſſions of the peace was held, and informed ſuch a juſtice of the peace of the matter, and becauſe he was lay he required ſuch a clerk to write his information, who did it; which* information *is the ſame conſpiracy*, &c. judgment ſi actio, and held no plea, becauſe it was pleaded by one, where the *conſpiracy ſuppoſed by two cannot be a conſpiracy by one only*, nor e contra, by which he pleaded it for both the defendants; and the beſt opinion was, that the * plea is not good, for it is no conſpiracy, for he did but his duty; for men are ſworn to the king in leets to diſcover felonies and treaſons, and in every ſeſſions proclamation is made to make information of felonies and treaſons, and alſo conſpiracy *is by communication between two at leaſt* of the matter *to have the party indicted which is of a will prepenſed*; and here was not any ſuch communication, but information made to the juſtices. Br. Conſpiracy, pl. 4. cites 35 H. 6. 14. 19.

diſcovers felonies, and is ſworn to give evidence to the jury, is not chargeable in conſpiracy, F.N.B. 115.(E) and in the notes there (d) cites 27 Aſſ. 12. 37 Aſſ. 12. 27 H. 8. 2. & 35 H. 8. 15.

*[413]

6. Conſpiracy *is a conſultation and agreement between two or more to appeal or indict an innocent falſly* and maliciouſly of felony, *whom accordingly they cauſe to be indicted* or appealed; and afterward the *party is lawfully acquitted* by the verdict of twelve men. 3 Inſt. 143.

Hawk. Pl. C. 189. cap. 72. cites 3 Inſt. 143. but ſays he cannot but queſtion the accuracy of that deſcription of conſpiracy, and gives his reaſons to the contrary.

7. A conſpiracy ought to be *falſo & malitioſe*, otherwiſe it will not be a conſpiracy, and ſuch malice ought to be proved; for if A. *travelling* on the highway *be robbed by B. and he knows not B.* if afterwards *A. accuſes J. S.* who is found not guilty, action of conſpiracy will not lie againſt A. For though J. S. was falſely accuſed he was not maliciouſly accuſed, and it may be he took J. S. to be the robber, becauſe he was like B. Per Coke Ch. J. and the Lord Chancellor. Godb. 206. pl. 293. Mich. 11 Jac. in the Star-Chamber, Miller v. Reynolds and Baſſet.

8. Conſpiracy *(to ſpeak properly) lies only* for procuring a man to be indicted of treaſon or felony, *where life was in danger*; per Holt Ch. J. Ld. Raym. Rep. 379. Mich. 10 W. 3. in caſe of Savil v. Roberts.

Ibid. ſays, that Treby Ch. J. was of the ſame opinion in C. B.

9. Several people *may* lawfully meet and *conſult to proſecute a guilty perſon; otherwiſe*, if two charge *one that is innocent, right or wrong*, for that is indictable, and *though nothing be done in proſecution of it*, it is a compleat and conſummate offence of itſelf; *and whether* the conſpiracy be to charge *a temporal or eccleſiaſtical offence* on an innocent perſon, it is the ſame thing; agreed per Cur. 1 Salk. 174. Trin. 3 Annæ B. R. The Queen v. Beſt & al'.

3 Mod. 137. S. C. and per Cur. the gift is the falſa, conſpiring to charge falſely, and indictment lies for the falſehood before the party is acquitted of it; but caſe lies not till acquittal, and the indictment in that caſe being for charging with a baſtard-child, the court ſaid that it was an offence too frequent to be quaſhed upon a motion, and that they would no more quaſh it than they would for barretry or keeping a bawdy-houſe.

(B) In what Caſes it lies.

Bridgm. 131. Arg. Mich. 15 Jac. in caſe of Agard v. White, cites S. C.

1. IF two or more conſpire againſt another, and afterwards the *conſpirators are ſworn upon the jury, and they, with others, find a bill againſt him againſt whom they conſpired;* no writ of conſpiracy lies againſt them, becauſe it cannot be intended malicious, becauſe they do it upon their oaths and that with others beſides themſelves. Stamford Pleas of the Crown, 173. a. (B) lib. 3. cap. 12. cites Paſch. 21 E. 3. 18. Mich. 7 H. 4. 27. Mich. 8 H. 4. 6. & 27 Aſſ. Fitzh. Conſpiracy, 15.

2. J. and T. were *indicted*, becauſe *that they by falſe alliance and conſpiracy* between them *procured divers perſons to indict H. of the death of W. and were thereof arraigned*, and the *one ſaid, that this H. who killed W. juſtified the laſt term and went quit*, and the ſaid J. and T. who were indicted and arraigned went quit by judgment, notwithſtanding that H. juſtified; for there *it appeared* [414] *that H. did the fact*, viz. *killed W. and it is not for J. and T. to know if it was lawfully done or not, otherwiſe* it is *where the party is acquitted that he did not do the fact;* but otherwiſe it is here, quod nota. Br. Conſpiracy, pl. 26. cites 22 Aſſ. 77.

3. And alſo where *a man kills another ſe defendendo it ſhall not be inquired of the abettors;* for it was lawful to procure him to be indicted, for *he did the fact.* Ibid.

4. And ſo ſee where a man *kills a man ſe defendendo, and is ſo acquitted, or* kills the *thief in arreſting him, and juſtifies it upon arraignment upon indictment*, and ſo goes quit, ſuch perſon ſhall not have writ of conſpiracy; for *he did the act*, and it is not incumbent on the other to confeſs in judgment, if it be felony or not; but where the party is acquitted, that he did not do the act, there conſpiracy lies, and ſo ſee a *diverſity* where he *did the act and where not.* Ibid.

5. A man ſhall not have writ of conſpiracy *againſt huſband and wife* for indicting him of felony, becauſe they are but one perſon; but againſt huſband and wife *and a third perſon* it well lies. F. N. B. 116. (L) cites Stamf. 174. and 38 E. 3. 3.

Br. Action ſur le Caſe, pl. 23. cites S. C. —— F.N.B.116. (H) cites S. C.

6. Conſpiracy was brought, becauſe the *defendant ſuch a day, year and place, by conſpiration, cauſed certain jurors to preſent, that* 20 *acres were given to the plaintiff, prior of S. and his ſucceſſors, to find a prieſt to chaunt in ſuch a place, which they did not do, by which the land was ſeiſed into the hands of the king by the eſcheator* ſuch a day and year, *and remained in his hands till the plaintiff ſued it out, &c. to the damage of* 300 *l.* the *defendant demanded oyer of the record of the indictment*, & non allocatur. And there it was ſaid, that it is *a good plea to ſay that the manor was not ſeiſed*, &c. and there by the beſt opinion this is no cauſe for the king to ſeiſe; for it is not found that it is held of the king, and alſo the donor may have ceſſavit, and nothing is mentioned there of mortmain; for it may be before the ſtatute, and there by the beſt opinion becauſe the king had ſeiſed without cauſe, this action does not lie. Br. Conſpiracy, pl. 8. cites 47 E. 3. 15.

7. Where

7. Where the *plaintiff is non-ſuited after declaration in appeal*, the defendant ſhall be arraigned upon the appeal, and therefore there if he be acquitted he ſhall not have conſpiracy; for there the acquittal was upon the appeal, and not upon the indictment. Br. Conſpiracy, pl. 2. cites 33 H. 6. [1] & 34 H. 6. 9. F. N. B. 114. (E) in the Engliſh edit. Marg. cites S. C. & the Marg. of the Engliſh editions, ſays, Note, that this caſe proves that conſpiracy lies as well upon appeal as an indictment, for he is arraigned upon the appeal, cites Stamford, 172. vis. indicted at the king's ſuit, 19 E. Fitzh. Conſpiracy, 12. 5 E. 3. Fitzh. ibid. 22.

8. *But where* he is nonſuited *before declaration*, there the party ſhall be arraigned upon the indictment, and therefore there if he be acquitted he ſhall have conſpiracy; note the diverſity. Br. Conſpiracy, pl. 2. cites 33 H. 6. [1] & 34 H. 6. 9. F. N. B. 114. (E) S. P.

9. *And* by the beſt opinion, *where the defendant betakes himſelf to his clergy after the inqueſt charged and before the verdict*, or betakes him to his clergy *at the commencement*, he ſhall not have conſpiracy; for mention of the clergy ſhall be made in the record, and then he does not ſuffer verdict upon his arraignment; by the beſt opinion, and therefore it ſeems that conſpiracy does *not lie but where verdict has been given upon the principal*; and it was held that the writ was not good, becauſe there is no *mention that the principal was impriſoned*, quod nota. Br. Conſpiracy, pl. 2. cites 33 H. 6. [1] and 34 H. 6. 9.

10. *In divers caſes a man ſhall make another to be indicted*, and *yet conſpiracy does not lie*. Br. Conſpiracy, pl. 4. cites 35 H. 6. 14. per Priſot.

11. *As where a man is robbed*, and the *vill adjoining*, *by reaſon of the hue and cry*, *makes purſuit and takes a man*, *and carries him to gaol*, *by which he is indicted*, conſpiracy does not lie. Br. Conſpiracy, pl. 4. cites 35 H. 6. 14. per Priſot. [415]

12. So where *a coroner ſits ſuper viſum corporis*, & *it cannot be found who killed the man*, there *it ſhall be inquired of the firſt finders*, and they ſhall be taken by it, and if *they ſay that I. N. did the murder*, *by which he is indicted and after acquitted*, conſpiracy does not lie; for thoſe perſons were compelled by the law, quære inde. Ibid. Conſpiracy does not lie againſt a juror or indictor, but againſt a witneſs, reſolved in the Star-chamber. 12 Rep. 23. Paſch. 5 Jac. Loyd v. Barker.

13. If *two conſpire to indict me*, and do not indict me, action of conſpiracy does not lie. Br. Champerty, pl. 9. cites 9 H. 7. 18. per Keble.

14. If a *felon* be *pardoned by parliament*, and he *pleads not guilty*, he ſhall not have writ of conſpiracy; for the *felony was gone* before *by the pardon*. Br. Corone, pl. 204. cites F. N. B. Conſpiracy. F. N. B. 115. (G).

15. A writ of conſpiracy lieth where 2, 3, or more perſons of malice and covin do conſpire and deviſe to indict any perſon falſely, and afterwards *he who is ſo indicted is acquitted*, now he ſhall have this writ of conſpiracy againſt them who ſo indicted him. F. N. B. (D). 3 Inſt. 143. cap. 66. in principio, S. P. if the party is lawfully acquitted by the verdict of 12 men. ——— But Serjeant Hawkins, in his Pleas of the Crown, 1 lib. 189, 190. cap. 72. very much queſtions its being requiſite that there be a lawful acquittal, and ſays that it is certain

tain that an *acquittal by verdict is not always neceſſary to maintain ſuch a writ*, for it appears by the Regiſter itſelf, that where one brought ſuch a writ in the uſual form, having it in the words quouſque acquietatus fuiſſet, &c. againſt one who had been nonſuited in a malicious appeal of felony brought againſt him, his writ was abated becauſe ſuch a *nonſuit would not make good the words quouſque acquietatus fuiſſet*, and yet he afterwards *brought a new writ, wherein he uſed the words quietus receſſit, inſtead of acquietatus fuiſſet*, and recovered; and why may not a new writ as well be formed in any other caſe, which is as much within the miſchief of the ſtatute as this? Hawk. Pl. C. 190. cap. 72. ſ. 2.

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But where A. and B. falſely and maliciouſly *procured* J. S. to be indicted of felony, reſolved, an action upon the *caſe well lies againſt one* of them; although it was ſaid that for conſpiracy the action ought to be brought againſt two, for one cannot conſpire. Cro. C. 239. pl. 22. Mich. 7 Car. in B. R. Mills v. Mills.

16. But the writ lieth *againſt two perſons at the leaſt* who do ſo conſpire; for if one perſon of malice and falſe imagination do labour, and cauſe another falſely to be indicted, the party who is ſo indicted ſhall not have a writ of conſpiracy, &c. but an action upon the caſe againſt him who ſo cauſed him falſely to be indicted. F. N. B. 114. (D).

Ibid. in the marg. of the Engliſh editions, cites 5 E. 3. Conſpiracy, 22. and 13 E. 3. Conſpiracy, 25. and ſays that the *abetters ſhall not be inquired of, but where the abetment is found by inqueſt*. 19 H. 6. 19. and 4 H. 6. 23. *Nul tiel record* is a good reply in conſpiracy.

17. If two conſpire *to cauſe a man to ſue an appeal* againſt another *of felony or murder, without any indictment taken or found* thereof, and *afterwards the defendant is acquitted by verdict*, he ſhall not have a writ of conſpiracy againſt thoſe who conſpire to appeal him; becauſe that by the *ſtatute Weſtm. 2. cap. 12.* quia multi per malitiam, &c. it ſhall be inquired of abettors, if he be not indicted thereof; and if they be found he ſhall have ſcire facias againſt them out of the ſame court where he is acquitted, to anſwer him his damages. F. N. B. 114. (F).

Nor ſhall one have conſpiracy if he be indicted or appealed, and arraigned and *acquitted on the appeal*. 33 H. 6. 2. Yet note, a *monk was appealed of robbery and acquitted*; he and his abbot ſhall have a writ of conſpiracy, though he was acquitted by * verdict, &c. 24 E. 3. 73. The reaſon is, for though the abbot, though not party, ſhall have a ſcire facias for the default of the party on the original. F. N. B. 114. (F) in the new notes there (a).—Ibid. in the new notes there (b) ſays, ſee 13 E. 3. Conſpiracy, 25. 17 E. 2. Ibid. 26. Ratio, becauſe the writ is given on a nonſuit in appeal, and for that there is an inquiry of the abettors.

18. And ſo if he be *nonſuited in* any ſuch *appeal, where there is not any indictment*, the defendant ſhall have a writ of conſpiracy after the nonſuit or after the acquittal. F. N. B. 114. (G).

* [416]

19. If the action be brought againſt divers, and *all but one are acquitted*, the action fails. 28 Aſſ. 12. So if all but one are diſcharged *by matter in law*. F. N. B. 114. (D) in the marg.

Ibid. in the new notes there (d) cites 27 Aſſ. 12. 27 H. 8. 2. 37 Aſſ. 12. and 35 H. 8. 15.

20. He who comes into court, and diſcovers felonies, and is *ſworn to give evidence* to the jury, is not chargeable in conſpiracy. F. N. B. 115. (E).

Ibid. in the new notes there (a) ſays ſee 27 H. 8.

21. A man ſhall have a writ of conſpiracy *upon an indictment before any mayor, bailiff of any city or borough*, who have gaol delivery within the city or borough, if he be acquitted before them, &c.

For

For that acquittal diſcharges him * of the felony. But a writ of conſpiracy does not lie againſt the indictors [themſelves], &c. F. N. B. 115. (B), (C). 2. 12 E. 4. 17. 7 H. 4. 1. 21 E. 3. 47. 21 E.

4. 1. and 8 H. 4. ——— * [So is the French edition.]

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22. Conſpiracy *againſt two, one is attainted*, the *other makes default*, judgment ſhall be againſt him. 24 E. 3. 34. but quære by Stamford, 174. for, 27 E. 3. it is holden that one ſhall not anſwer without the other. F. N. B. 115. (F) Marg.

23. The juſtices of gaol delivery *arraigned a priſoner within the year, where an appeal is depending* againſt the ſame priſoner for the ſame murder, *which* they know [*is ſhewn to them*], *and yet they proceed and acquit him*, he ſhall have conſpiracy, although he was not acquitted nor diſcharged of the appeal. F. N. B. 115. (H). It ſeems ſufficient if the writ be delivered to the ſheriff, who opens it and reads it to the juſtices; but if they have no notice, it is clearly no plea. Ibid. in the new notes there (b).

24. If a man be *indicted or appealed of treaſon or felony, or a treſpaſs done in a foreign county*, &c. if he be acquit thereof, he ſhall have a conſpiracy againſt him who procured him to be indicted or appealed, and ſhall *recover treble damages* by the writ *upon* the ſtatute of 8 H. 6. cap. 10. F. N. B. 115. (I). Kelw. 21. a. b. pl. 7. Hill. 12 H. 7. Bigot v. J. S. the S. C. the Court held, that he who would have advantage upon this ſtatute, ought to have action on his caſe on the ſame ſtatute; for ſuch action is expreſsly given thereby.

25. If a man be *indicted of felony or treaſon where there is not any ſuch place within the county*, he ſhall have conſpiracy, and *recover his damages* againſt the abettors, or procurors, or conſpirators, by the ſtatute of 18 H. 6. cap. 12. F. N. B. 115. (K).

26. There are *divers writs* of conſpiracy *grounded upon deceit, and treſpaſs* done unto the party, *which are properly actions of treſpaſs upon the caſe*; as if two men do conſpire to indict another man becauſe he did not arreſt a felon who paſſed by the town of N. and [for this] they cauſed him to be indicted and amerced in the leet of R. and F. and took and impriſoned him for that amercement until he be acquitted in the ſaid leet. F. N. B. 116. (A). Finch. 306. cap. 15. S. P.

27. And if men ſay and affirm unto A. that he has right unto ſuch land, and procure him to ſue againſt B. who is tenant of that land, &c. by which B. is compelled to ſell other lands for the defence of this land, &c. now he ſhall have an action againſt thoſe who procured or conſpired to cauſe A. to bring his action, &c. F. N. B. 116. (B). Finch. 306. cap. 15. S. P. —F. N. B. 116. (B) in the new notes there (a) ſays, ſee contra 38 E. 3. 3. and that he ought to ſhew in his writ who ſued the action.

28. And if 2 men *procure one to be indicted for hunting in another's park*, for which he is taken, impriſoned, and put to charges, until he has acquitted himſelf of the treſpaſs, he ſhall have a conſpiracy againſt them. F. N. B. 116. (C). [417] Finch. 306. cap. 15. S. P.

29. Conſpiracy ſhall be maintainable againſt thoſe who conſpire *to forge falſe deeds*, which are given in evidence, *by which his land is loſt*. F. N. B. 116. (D).

30. Conſpiracy ſhall be maintainable againſt thoſe who conſpire *to bring an aſſiſe in the name of the plaintiff* againſt a defendant, *and to make one attorney for the plaintiff, in which aſſiſe the plaintiff was found villain*, &c. now he may bring his writ of conſpiracy. F. N. B. 116. (E).

This is wrong tranſlated, and ſhould be [*made a preſentation in the name of the plaintiff to an advowſon, and thereby preſented one unto the biſhop*, &c.].

31. Conſpiracy ſhall be maintainable, becauſe the defendant made one to preſent in the name of the plaintiff unto an advowſon, and for that preſenting unto the biſhop who is admitted and inſtituted, &c. F. N. B. 116. (G).

32 A writ of conſpiracy *for indicting him of felony does not lie but againſt two* perſons at the leaſt, *but* a writ of conſpiracy *for indicting one of treſpaſs*, or other falſity made, as in the caſes aforeſaid, *lies againſt one* perſon only. F. N. B. 116. (K).

9 Rep. 55. b. S. C. ſtates it as a combination among the poulterers to charge S. (who had married the widow of a poulterer in Grace-church-ſtreet) with a robbery, and the defendants were ſentenced by fine and impriſonment.

33. *W. being robbed, accuſed Stone, a poulterer*, to be the party who robbed him, but *afterwards withdrew his accuſation*, ſaying that he was miſtaken; for one man may be like another. *Stone* not ſatisfied therewith, *brought an action upon the caſe againſt W.* whereupon *W. accuſed him again of the felony*, and he was bound over to the aſſiſes, where *W. ſwore directly that S. was the party who robbed him*, and *ſeveral poulterers in the time of the trial, and in the hearing of the judges, declared at the bar, whither they accompanied W. that W. was an honeſt man.* The jury found an *ignoramus*; ſo as S. was never indicted, and ſo could not be lawfully acquitted, yet for this conſpiracy to accuſe him *W. was pilloried, and his confederates the poulterers were all fined*; and in this caſe it was holden by the juſtices, that ſuch conſpirators were puniſhable by indictment, although an action upon the caſe did not lie for the party. Mo. 813. pl. 1101. Mich. 8 Jac. in the Star-chamber, Stone v. Walters.

But in this caſe *three things are to be obſerved*, 1ſt, That a *felony be done*. 2dly, That he that doth arreſt, hath ſuſpicion upon *probable cauſe*, which may be pleaded, and is traverſable. 3dly, That he *himſelf, who hath the ſuſpicion, arreſt the party*; for he cannot command another to do it; becauſe ſuſpicion is a thing individual * and perſonal, and cannot extend to another than to him that hath it. 12 Rep. 91. Mich. 9 Jac. Sir Anthony Aſhley's caſe.

34. If *felony be done*, and one hath ſuſpicion upon *probable matter* that B. is guilty of it, becauſe that he *had part of the goods, and is indigent and of evil fame*, or if the party *be indicted*, or if a *murder* be committed, and one is *ſeen near the place*, or coming *with a ſword, &c. bloody*; or that he was in company of felons, or hath *carried the goods ſtolen to obſcure places*, &c. theſe are good cauſes of ſuſpicion, and by reaſon thereof he may arreſt the party ſo ſuſpected, to the end that he may ſubject him to juſtice. 12 Rep. 91. Mich. 9 Jac. in Sir Anthony Aſhley's caſe.

* S. P. by Coke Ch. J. Mo. 817. pl. 1115. in a nota at the end of S. C.

And per Crooke J. Ibid. 151. If a man indicts another upon probabilities, and

35. If you will charge one *merely upon ſuſpicion*, without other probabilities to warrant it, this is a clear conſpiracy; but otherwiſe where there are good and *ſeeming probabilities*; they ſhould not *ſay that he is the ſame party*, for if it prove not ſo, then it is plain malice; or if the *juſtice of peace*, upon his examination,

finds

finds not ſuch matter upon which to *commit him, notwithſtanding which the party proſecutes an indictment* againſt him, and he is acquitted, an action of conſpiracy lies, for it is malice apparent; per Fleming Ch. J. Bulſ. 150. Trin. 9 Jac. in caſe of Wale v. Hill. relies upon the probabilities, and the party indicted be acquitted, an action of conſpiracy will not lie; the *ſuſpicion muſt be his own*, and not the ſuſpicion of others; but judgment was not given, becauſe the court was not full, and the parties were upon agreeing. Ibid. Wale v. Hill.

36. *Articles* were entered into *between A. and C. in truſt for J. S. wherein C. covenanted to procure witneſſes to convict A. of having poiſoned one R. 16 years before, and that C. ſhould have a ſixth part of what ſhould be forfeited by A.* and the *reſt was to be in truſt for J. S. and the widow of the ſaid R. who were to ſwear, that he, being A.'s ſervant, ſaw him put poiſon in a cup of liquor, and commanded the ſaid J. S. to carry it to R. which he did, and that R. drank it, and died immediately;* and it was proved, that B. offered J. S. to get his pardon, if he would accuſe A. and himſelf alſo, &c. and for this conſpiracy B. was fined 1000 l. and impriſoned, and ſome of the defendants were ſentenced to the pillory, and to be burnt in each cheek with the letters F. and C. ſignifying a falſe conſpirator, and ſome were fined, pilloried, and impriſoned, and the lord chancellor cited ſeveral precedents of cenſures, and ſaid, that the malice and corruption in theſe accuſations ought to be apparent, and though an ignoramus is found, yet the party is finable for ſuch conſpiracies, and ſo he is if the bill is found, though the defendant be legitime acquietatus. Mo. 816. pl. 1105. Mich. 9 Jac. in the Star-chamber, Sir Anthony Aſhley's caſe. 12 Rep. 90. S. C.

37. A *bare conſpiracy* to do a *lawful act to an unlawful end* is a crime, though no act was done in conſequence thereof; per Cur. 8 Mod. 321. Mich. 11 Geo. 1. The King v. Edwards.

(C) Actions for it.

1. A Man cannot have action upon the ſtatute of procurement of falſe indictments till he be *legitimo modo acquietatus* by the ſtatute of *Weſtm. 2. cap.* 36. which ſpeaks of procurements of ſuch indictments againſt a man who dwells in another county for vexation. Br. Action ſur le Statute, pl. 44. cites 8 E. 4. 5. 2 Inſt. 445. Ld. Coke, in his commentary upon the words of this ſtatute, viz. that ſuch plaints were moved againſt the party maliciouſly by the ſolicitation or procurement of the ſheriffs, or other bailiffs, or lords, the replication ſhall be admitted, &c. ſays it is to be obſerved, that the procurement is the ſubſtance, and implies that it was done maliciouſly, and therefore if the jury find the procurement, and that it was not done maliciouſly, yet the court ſhall adjudge it done maliciouſly, becauſe it appears ſo to them judicially.

2. Conſpiracy *againſt two for cauſing the plaintiff to be falſely indicted in a foreign county* contrary to the ſtatute of 8 *H.* 6. [10.] And per Fairfax J. this action upon this ſtatute may be brought againſt one alone, and ſo of writ of conſpiracy founded upon writ of treſpaſs; but upon indictment of felony conſpiracy ſhall be brought againſt two at leaſt, for this is an action founded at common law. Br. Conſpiracy, pl. 38. cites 11 H. 7. 25.

3. Where two conſpire *to indict one falſely*, and the party is not indicted, becauſe the jury had not ſufficient evidence, but returned an *ignoramus* upon the bill, no conſpiracy lies, becauſe he never was indicted * nor acquitted, yet he may be indicted upon conſpiracy at the common law; ſo if any commit perjury, which is not puniſhable by the ſtatute of 5 Eliz. yet he may well be indicted thereof, and puniſhed by fine and impriſonment. Cro. J. 8. pl. 9. cited by Popham as reſolved by all the juſtices 16 Eliz. Sydenham v. Keilaway.

4. Action upon the caſe in nature of a conſpiracy lies not againſt any who *prefers an indictment and ſwears it to be true*; for it is for the king and the commonwealth, and if it ſhould be allowed no indictment would be preferred. Cro. E. 724. pl. 19. Mich. 41 & 42 Eliz. B. R. Sherington v. Ward.

Mo. 813. pl. 1101. S. C. in the Star-chamber, but S. P. does not appear. —Mo. 817. at the end of pl. 1105. Mich. 9 Jac. in the Star-chamber, ſays, Nota, 1ſt, That in theſe accuſations there ought to appear apparent malice or corruption. 2dly, That though an ignoramus be found, yet the conſpiracy is finable here. 3dly, That though he be legitime acquietatus, yet he is finable in the Star-chamber.

5. Conſpiracies puniſhable by law *before they are executed* muſt have four incidents; 1ſt, They muſt be *declared* by ſome manner of proſecution, or by making bonds or promiſes to one another. 2dly, They muſt be malicious, as for unjuſt revenge, &c. 3dly, They muſt be *falſe* againſt an innocent perſon. 4thly, They muſt be out of court *voluntarily*; in a nota of the reporter. 9 Rep. 57. a. Mich. 8 Jac. in the Poulterer's caſe, alias Stone v. Walters & al'.

6. A conſpiracy of any kind is illegal, though the *matter about which* they conſpired, might have been *lawful* for them to do *if they had not conſpired* to do it. 8 Mod. 11. Mich. 7 Geo. in caſe of the King v. Journeymen Taylors of Cambridge.

(D) Conſpiracy. In what Caſes Acceſſary ſhall have Conſpiracy.

F. N. B. 115. (A) S. P. and that the acceſſary ſhall have a writ of conſpiracy.

1. TWO were *indicted*, the *one as principal the other as acceſſary*, and the *principal was* arraigned and *acquitted*, by which the *acceſſary brought writ of conſpiracy*, and it was doubted if he ſhall recover, becauſe his life *was never in jeopardy*; for by the acquittal of the principal the acceſſary is acquitted and ſhall not be arraigned; but becauſe he is *legitimo modo acquietatus by the acquittal of the principal*, therefore he ſhall recover his damages, quod nota per judicium; for his life was in jeopardy in this manner. For if the principal had been found guilty they ought to have inquired further of the acceſſary if he had appeared. Br. Conſpiracy, pl. 2. cites 33 H. 6. [1] & 34 H. 6. 9.

F. N. B. 115. (A) in marg. S. P. —Ibid. (F) S. P.

2. *But if the principal dies before he be attainted or outlawed, or gets a charter of pardon before his attainder*, the acceſſary ſhall not have conſpiracy, for his life was never in jeopardy; for his principal was never arraigned. Ibid.

3. If

3. If a man cauſe one as principal to be appealed of felony or murder, and another as acceſſary to him, and afterwards is *nonſuit in his appeal*, the acceſſary ſhall have a writ of conſpiracy as well as the principal. F. N. B. 115. (A).

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* (E) Writ and Count.

1. IN writ of conſpiracy brought againſt defendants for *forging of a falſe releaſe, by cauſe of which releaſe given in evidence, a verdict paſſed againſt the plaintiff, ſo that he loſt a ward*, &c. but he *did not ſuppoſe by the writ that judgment was given againſt him* upon this verdict, *but* he *ſhewed it in his count*; yet the writ abated. Thel. Dig. 87. lib. 9. cap. 7. ſ. 26. cites Paſch. 39 E. 3. 16.

2. In conſpiracy *againſt baron and feme and others*, notwithſtanding that the feme cannot conſpire with her baron, and that *the writ* ought to abate for this cauſe againſt them, yet it *ſhall ſtand againſt the others*. Thel. Dig. 236. lib. 16. cap. 10. ſ. 26. cites Paſch. 40 E. 3. 19. Quære.

3. In conſpiracy the *writ was, that the defendants procured one W. to ouſt the plaintiff of his land, and to infeoff one B. thereof, againſt whom one E. ought to have ſued a ſcire facias*, &c. and held good enough, and purſuant, notwithſtanding that it comprehended quaſi two procurements. Thel. Dig. 106. lib. 10. cap. 15. ſ. 11. cites Hill. 43 E. 3. 10.

4. And a man may have *ſeveral matters in writ of conſpiracy*. Thel. Dig. 106. lib. 10. cap. 15. ſ. 11. cites 47 E. 3. 15.

5. In writ of conſpiracy, for that the defendant cauſed by conſpiracy *a preſentment* to be made *that certain land was given to find a chaplain to chaunt in ſuch a chapel* annually, *which had not been done by ten years*, &c. where *the record of the preſentment was to find a perpetual chauntery*, &c. yet the writ was adjudged good. Thel. Dig. 77. lib. 9. cap. 1. ſ. 9. cites Mich. 47 E. 3. 15.

Fitzh. Conſpiracy, pl. 18. cites S. C. —— Br. Action ſur le Caſe, pl. 23. cites S. C. that by ſuch falſe

office, the plaintiff's manor was ſeiſed into the king's hands, and that he ſued it out ad damnum 400 l. and ſays it ſeems there that action on the caſe lies for ſuch offence. ——— Br. Conſpiracy, pl. 8. cites S. C. by the beſt opinion, becauſe the manor was not found held of the king, and nothing is ſaid of mortmain (for it might be before the ſtatute), and the donor might have had ceſſavit, and ſo the king had ſeiſed without cauſe, it was held that this action did not lie.

6. Though *ſeveral matters* are in writ of conſpiracy, and *one of them be falſe*, yet the writ is good enough for the others. Thel. Dig. 238. lib. 16. cap. 10. ſ. 66. cites Mich. 47 E. 3. 15.

7. In conſpiracy [the plaintiff] *declared that the defendants conſpired ſuch a day in C. and S.* and the defendants were awarded to anſwer; for a man may conſpire *in two vills at one and the ſame day*, by which the defendants were compelled to anſwer. Br. Conſpiracy, pl. 20. cites 22 H. 6. 49.

8. In conſpiracy *by the acceſſary, where the principal was acquitted, no mention was made in the writ that the principal was impriſoned*, and held a good exception. Thel. Dig. 95. lib. 10. cap. 6. ſ. 18. cites Hill. 33 H. 6. 2.

Thel. Dig. 100. lib. 10. cap. 9. ſ. 24. cites S. C.

9. Conſpiracy that the plaintiff was *indicted and acquitted at D. before ſuch juſtices;* the defendant pleaded to the writ, becauſe he did *not ſay at D. in the ſame county*, & non allocatur; for it ſhall be *intended* to be in the ſame county, unleſs the contrary be ſhewn. And in treſpaſs quare clauſum fregit apud D. he need not ſay apud D. in the ſame county; for it ſhall be intended to be in the ſame county. Br. Conſpiracy, pl. 37. cites 35 H. 6. 46.

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Ibid. 114. (G) S. P. but where the conſpiracy is founded upon a *non-ſuit* of the plaintiff, the writ in the end ſhall ſay, *Quouſque idem querens per conſiderationem Curiæ noſtræ inde quietus receſſit.*

10. If the *principal and* one, who is *acceſſary*, be *indicted of felony*, and be taken and arreſted, the *principal is indicted and acquitted*, now by that the acceſſary is diſcharged, and the acceſſary thereupon ſhall have a writ of conſpiracy againſt thoſe who conſpired to indict him, and * the writ in the end ſhall ſay *quouſque idem (the principal) ſecund' leg', &c. acquietat' fuiſſet & idem (the acceſſary) quietus receſſit.* F. N. B. 115. (A).

*[421]

11. If a writ of conſpiracy be brought *againſt two*, then *it ſhall be ſaid properly a writ of conſpiracy; but if* it be brought *againſt one* perſon only, then *it is but an action upon the caſe* upon the falſity and deceit done; becauſe one perſon cannot conſpire with himſelf, F. N. B. 116. (L).

12. The writ ought to be *brought in the county where the conſpiracy was* made, and not where the indictment was, or where the deed was done, &c. F. N. B. 116. (M).

13. In conſpiracy the matter muſt be *laid to be* falſely & maliciouſe; per Richardſon Ch. J. Godb. 445. pl. 511. Mich. 4 Car. in the Star-Chamber. Taylor v. Towlin.

(F) Pleadings.

F. N. B. 115. (E) in the new notes there (b) has the ſame quære, and cites 47 E. 3. 16. 12 E. 4. 4. 67. that they ſhall not, 27 Aſſ. 12. ——And another quære, if the jurors procure themſelves to be impanelled. Ibid. cites 9 H. 4. fol. ult.

1. IF *two conſpire to indict* another, and *after they are of the jurors, and indict him;* it is a good *plea* in conſpiracy *that they were two of his indictors;* and per Green it is a good *replication that they conſpired before, and afterwards were of the inqueſt by their own procurement, and indicted him.* Quære, for it was not adjudged. Br. Conſpiracy, pl. 15. cites 21 E. 3. 17.

S. P. in Maintenance, Heath's Max. 107. cap. 5. cites S. C.—— S. P. Br. Traverſe per, &c. pl. 171. cites 7 Aſſ. 12. [but it ſhould be 27 Aſſ. 12. and ſo are the other editions].——F. N. B. 115. (E) S. P. and the new notes there (d) cites S. C.

2. Conſpiracy *againſt ſeveral*, where the plaintiff was by their labour indicted of felony, &c. and after was acquitted, *one ſaid that he was juſtice by commiſſion, and informed the inqueſt, abſque hoc that he was guilty before*, and *another ſaid that he was one of his indictors*, and a good plea *without traverſe*, and *another ſaid that he was ſworn to inform the inqueſt*, and to indict him, and no plea. Br. Conſpiracy, pl. 27. cites 27 Aſſ. 12.

3. Con-

3. Conſpiracy *againſt four, three pleaded to iſſue*, and the *fourth pleaded matter in law*, and after *the three were acquitted*, by which the fourth prayed to go quit, becauſe one alone cannot conſpire, by which he went quit; quod nota. Br. Conſpiracy, pl. 29. cites 28 Aſſ. 12.

4. In writ of conſpiracy it is a good *plea that the defendants were indictors of the plaintiff, and that which they did was by force of their oath*; judgment, &c. And if this be found by the record of the indictment they ſhall go quit; quod nota. Br. Conſpiracy, pl. 30. cites 30 Aſſ. 21. F. N. B. 115. (E) S. P.

5. Conſpiracy *againſt three, ſuppoſing that the three procured one of the three to ouſt the plaintiff, and the defendant R. againſt whom B. ſhould ſue ſcire facias of a prior right, ſo that the plaintiff ſhould loſe his warranty*. Belk. demanded judgment of the writ; for it is that the three procured one of them, and yet non allocatur; for the two may procure the third, and ſo well, by which he pleaded not guilty. Br. Conſpiracy, pl. 5. cites 42 E. 3. 1. [422]

6. And ſee 43 E. 3. 9. that the procuring to ouſt the plaintiff and the defendant R. and that B. ſhould ſue ſcire facias, &c. which are *two matters*, is not vicious; for *the one is not cauſe alone by itſelf*, and the one is acceſſary to the other, by which he pleaded to the writ, becauſe though he loſt in ſcire facias, yet he may have a writ of right, therefore judgment of the writ, & non allocatur. But quære if the writ lies, becauſe *though the defendant procured* as above, *yet if the act was not done* the action does not lie. Br. Conſpiracy, pl. 5. cites 42 E. 3. 1.

7. Conſpiracy *againſt three*, becauſe they conſpired *to indict the plaintiff of a rape* of N. P. *and taking her goods to the value of* 10 *l. till he was acquitted*, &c. Tanks, demanded judgment of the writ, becauſe he *did not ſhew what goods they were*, & non allocatur; for it was according to the indictment, and *as to one he ſaid that he was one of the indictors, and to another that he was hundredor* of the hundred, and before him the indictment was taken, and ſo *as judge* & non allocatur, unleſs he was *judge by commiſſion*. Belk. ſaid they conſpired before the indictment, and yet held that it does not lie againſt them; quære. Br. Conſpiracy, pl. 9. cites 47 E. 3. 16.

8. Conſpiracy *againſt ſeveral, one juſtified as bailiff to return pannel, and after was ſworn to ſay what he knew of the matter*; judgment, &c. and the *others ſaid that they were ſworn upon the indictment*, and held that the juror is excuſed though the plea of the bailiff be not good, yet *one only cannot be a conſpirator*; per Gaſcoigne clearly in the written book. Br. Conſpiracy, pl. 12. cites 8 H. 4. 12, 13.

9. In conſpiracy the *defendant ſaid that he was one of the plaintiff's indictors, and ſworn before the juſtices of peace, and ſhewed whom*, &c. before whom he was indicted, &c. Judgment ſi actio, and a good plea, by which the *other ſaid that no ſuch record*, and the defendant failed of the record at the day, &c. Br. Conſpiracy, pl. 22. cites 4 H. 6. 23. Br. Failer de Record, pl. 3. cites S.C.

10. Conſpiracy *againſt three for indicting the plaintiff*, Gorſe ſaid the *day, year and place, in the declaration, the inqueſt was charged before*

fore the juſtices for the king, and E. D. Defendant was there with his eye out, and his tongue cut, and the juſtices ſwore him to give evidence for the king, and he demanded counſel of the other two what to do, and they counſelled him to do according to the command of the juſtices, and he did it, which is the ſame conſpiracy, &c. Judgment, &c. Quære. Br. Conſpiracy, pl. 16. cites 7 H. 6. 13.

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11. It was agreed, that in conſpiracy of an indictment, it is a good plea that *nul tiel record* of indictment quod nota. Br. Conſpiracy, pl. 36. cites 9 H. 6. 26.

12. In conſpiracy it is a good *plea* that the defendant *was one of his indictors*, and pleads certain, judgment ſi actio; and a good *replication* that *no ſuch record*. Br. Conſpiracy, pl. 17. cites 19 H. 6. 19.

13. In conſpiracy the *writ was cepit* for *cepiſſet*, and yet well. Br. Conſpiracy, pl. 18. cites 19 H. 6. 34.

14. *And* if one *writ* of conſpiracy be *purchaſed pending another writ of the ſame conſpiracy*, yet it ſhall not abate; for ſeveral conſpiracies may be in one and the ſame day, and therefore he pleaded not guilty. Br. Ibid.

15. In conſpiracy the *defendant juſtified at another day*, and the opinion was, that he ſhall ſay, *abſque hoc that he is guilty of any conſpiracy before or after;* but it was not adjudged. Br. Traverſe per, &c. pl. 315. cites 20 H. 6. 5. 33.

S. P. by Newton, becauſe they do not agree in the day. Br. Traverſe per, &c. pl. 361. cites S. C.——Heath's Max. 106. cap. 5. cites S. C.——But in 12 E. 4. 18. the defendant juſtified as a juſtice of the peace, and inſtructed the jury at another day abſque hoc that he was guilty before. Br. Traverſe per, &c. pl. 315.

[423] 16. If a man be *indicted*, and the *party ſues appeal*, and he is arraigned upon the appeal, and the *defendant is acquitted*, he ſhall not have conſpiracy, nor ſhall recover any damages againſt the plaintiff; becauſe where the defendant is indicted the jury upon the appeal ſhall not inquire of abettors, per Danby, quod tota Curia conceſſit; for the acquittal was upon the appeal and not upon the indictment. Br. Conſpiracy, pl. 2. cites 33 H. 6. & 34 H. 6. 9.

17. In conſpiracy, the *one pleaded not guilty and the other juſtified*, and traverſed *abſque hoc*, that he was *guilty after ſuch a day*, nota. Br. Conſpiracy, pl. 3. cites 34 H. 6. 14.

18. It was agreed, that *to ſay* that *he who was killed was his couſin or ſervant, or* that the *common fame was that the plaintiff killed him, are good matters of plea in conſpiracy*. Br. Conſpiracy, pl. 4. cites 35 H. 6. 14.

19. Conſpiracy in B. R. *the one of the defendants demanded judgment of the writ;* for he *ſaid, that where the plaintiff has ſuppoſed that he conſpired to indict him of certain felony*, he ſaid, *that there is a record of indictment in which the plaintiff and R. D. and J. C. are indicted of the ſaid felony*, abſque hoc *that there is any record* of indictment which ſuppoſes *that the plaintiff only did the felony*, and yet the writ was awarded good; for it was ſaid, that *felony is ſeveral* and not joint, *and the indictment is* in itſelf a *ſeveral* indictment againſt every one of them. Br. Conſpiracy, pl. 32. cites 6 E. 4. 4.

20. Where

20. Where a man is indicted and the *indictment is inſufficient*, and *he does not take advantage of it, but pleads not guilty and is acquitted*, and brings writ of conſpiracy, it is a good bar to *ſay that the indictment was not ſufficient*, ſo that he *was not duly arraigned*. Br. Conſpiracy, pl. 23. cites 9 E. 4. 12. Per Littleton, quod non negatur.

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21. If *twenty are indicted*, and *one of them brings writ of conſpiracy, ſuppoſing that the defendants conſpired to indict him*, it is no *plea that there is a record that he and others are indicted, and not that he only is indicted;* quod nota. Br. Conſpiracy, pl. 24. cites 9 E. 4. 23.

22. Conſpiracy *againſt J. Jenny and others of conſpiracy made the firſt day of Auguſt, by which he was indicted the 4th day of Auguſt, before J. Jenny and other juſtices of peace; and* that after he *was acquitted*, and for J. Jenny it was *ſaid, that this ſame J. Jenny defendant, and J. Jenny juſtice of peace, was one perſon and not divers.* And, per Billing, you ought to *ſhew how he meddled as juſtice of peace;* by which he ſaid, that the bill was delivered to him, and he read it to the jury, and commanded them, if it be true, to find it, and otherwiſe not, abſque hoc that he is guilty of any conſpiracy before the ſaid 4th day of Auguſt, & adjornatur. Br. Conſpiracy, pl. 33. cites 12 E. 4. 18.

23. Conſpiracy *againſt two*, the *one came and pleaded the death of the other pending the writ*, and no plea per Cur. for it may be found that he and the other conſpired, and then well. Br. Conſpiracy, pl. 34. cites 18 E. 4. 1.

24. In a conſpiracy *againſt two, one pleaded to the writ*, and *the other matter in law, which is adjudged for him*, and the *plea unto the the writ found by verdict againſt him who pleaded unto the writ*, the plaintiff ſhall have judgment againſt him who pleaded to the writ. F. N. B. 115. (E).

Ibid. in the new notes there (e) ſays ſee 14 H. 6. 15. accordant, for it may be a conſpiracy.

25. *But if both had pleaded not guilty, and one had been found guilty and the other not*, there the plaintiff ſhall not recover, for then he did not conſpire as is ſuppoſed by the writ. But it may be that they did conſpire in the caſe aforeſaid, although the matter in law be adjudged for the defendant. F. N. B. 115. (E).

Ibid. in the new notes there (f) ſays, ſee accordant 33 H. 6. 1. 8 E. 3. 17. 8 H. 6. 1.

28 Aſſ. 12. 11 H. 4. 2. But *if one be found guilty, and the other makes default*, 24 E. 3. 73. *or be dead*, 18 E. 4. 1. there he ſhall have judgment againſt the one, though he had releaſed to the other. 22 R. 2. Brief, 838.

26. Conſpiracy; the defendant *pleaded his goods were feloniouſly ſtolen, and he found them in the poſſeſſion of the plaintiff, for which he indicted him, and gave evidence againſt him*, and upon the trial the plaintiff was acquitted, and *traverſed that he conſpired* aliter vel alio modo. Adjudged a good juſtification, becauſe the finding of the goods in his poſſeſſion was a ſufficient cauſe of ſuſpicion. Mo. 600. pl. 828. Paſch. 36 Eliz. Varrel v. Wilſon. [424]

27. In an action upon the *caſe in the nature of a conſpiracy* for procuring him to be indicted for ſuppoſed robbing of him, the *defendant*

fendant juſtified, *and* in this his juſtification *ſhewed how that he was robbed by perſons to him unknown, and that one of them was upon a brown horſe, and had a white cloke, and was like unto the plaintiff, and upon this he complained unto Gawdy J. who upon his examination finding cauſe to ſuſpect him, did commit him* and bind him over, &c. *and he did likewiſe bind the defendant for to proſecute* againſt him, the which he accordingly did, and the jury did acquit him, and ſo juſtified. To this juſtification the plaintiff demurred in law, and this was ruled to be a good juſtification. Bulſt. 150. Arg. cites 42 Eliz. B. R. Paine v. Rocheſter.

28. S. C. thus, viz. Two perſons *were robbed*, and afterward one of them ſeeing J. S. ſuſpected him to be one of the robbers who was on a brown mare, and upon acquainting the other of it he ſuſpected him alſo, and thereupon *got a warrant* to bring J. S. and examine him, but he hearing of it *abſented himſelf*, but afterwards was taken and committed to gaol by juſtice Gawdy, who adviſed them to indict J. S. of the robbery; J. S. was indicted and acquitted, and brought action of conſpiracy againſt the two; but the court held that the cauſes of ſuſpicion and J. S. his abſenting himſelf are cauſes ſufficient. Cro. E. 871. pl. 7. Hill. 44 Eliz. B. R. Paine and Rocheſter v. Whitfield.

(G) Where the Indictee, &c. ſhall be ſaid Legitimo modo Acquietatus.

1. H. B. brought writ of conſpiracy againſt the Id. of T. E. D. and others, *becauſe they conſpired to indict him at B. in the county of W. of the death of J. P. by which he was indicted of it at H. in the county of H.* before certain juſtices, &c. *by which he was taken and impriſoned till he was* arraigned upon it and *lawfully acquitted* at H. in the county of H. before certain juſtices, &c. and the *defendant proteſtando that he did not conſpire, pro placito dicit*, that *the ſame day that the plaintiff was arraigned* upon the ſame indictment, *A. who was the feme of this ſame J. P. came before A. B. juſtices of gaol delivery, before whom the plaintiff was arraigned within the year after the death of her baron, and delivered to one B. ſheriff of the ſame county, writ of appeal* brought by her of the death *of her huſband, which R. notified and read the writ to the ſame juſtices, and notwithſtanding this, the ſaid plaintiff was arraigned and acquitted*, judgment &c. and there it was agreed, that by the delivery of habeas corpus, certiorari or ſuperſedeas, the court ſhall ſurceaſe. And per Newton and Paſton juſtices, this is not *ſufficient notice*; for the writ is directed to the ſheriff, and he broke it, and ſhewed it to the juſtices, and they did not ſee it ſealed, ſo that it is not but an eſcrow to them, and therefore they did well to arraign the defendant; but if they had ſufficient notice, they ought not to have arraigned him at the ſuit of the king pending the appeal, contra where they have not notice; and then no plea; by which the defendant pleaded not guilty. Br. Conſpiracy, pl. 19. H. 6, 28.

(H) Indictment, or Information.

1. H. *Killed W. in taking him in arreſt for felony*, becauſe W. ſtood to his defence, and would not render himſelf to the peace, and *I. and T. procured H. to be indicted of the death of the ſame W.* by which *he was apprehended and arraigned of it*, and juſtified as above and went quit, but the ſaid I. and T. who cauſed him to be indicted, *ſhall not be puniſhed as conſpirators, becauſe H. did the act*, viz. killed W. and it is not as to I. and T. adjudged if this be felony or not, quod nota. Br. Corone, pl. 89. cites 22 Aſſ. 77.

2. Indictment of conſpiracy wanted the *year, day, and place where it was done*, and was *of impriſonment of certain perſons till they ſhould make fine*, &c. where this *ſounds in oppreſſion* and not in conſpiracy, and becauſe they condemned him it was reverſed by writ of error. Br. Office del, &c. pl. 5. cites 24 E. 3. 74.

3. If an indictment of conſpiracy be laid for a *rape*, it muſt be laid that there was *recens proſecutio* of it, otherwiſe it will argue *a conſent*, and becauſe the rape was concealed for half a year, an indictment brought afterwards is *falſe and malicious*. Per Richardſon Ch. J. Godb. 444. pl. 511. Mich. 4 Car. in the Star-Chamber. Tailor v. Towlin.

4. An indictment for conſpiring *to charge another with being the father of a baſtard child* is good. For per Cur. though the offence (as was objected) is ſpiritual, yet this court has cognizance of every unlawful act, by which damages may happen to the party as here they may by his being liable to maintain the child. Sid. 68. pl. 3. Hill. 13 and 14 Car. 2. B. R. Timberley v. Child.

Lev. 62. Paſch. 14 Car. 2. B. R. The King v. Kimberty and Mary North, S. C. and held the indictment lies for the bare conſpiracy, without indictment or any other act done. ——— Keb. 203. pl. 7. Child v. North and Timberley. S. C. adjudged for the plaintiff, niſi. ——— Ibid. 254. pl. 25. The King v. Timberley, S. C. adjudged pro rege. ——— S. C. cited Arg. 8 Mod. 320. ——— S. C. cited Arg. 2 Ld. Raym. Rep. 1169. ——— S. P. Vent. 304. Hill. 28 and 29 Car. 2. B. R. The King v. Armſtrong & al'. ——— S. C. cited 2 Ld. Raym. Rep. Arg. 1169. ——— 6 Mod. 100. Hill. 2 Ann. B. R. Holt Ch. J. agreed that a conſpiracy to charge one with a baſtard-child is indictable; but the adviſing another to do it without more is not. ——— S. P. adjudged, 2 Ld. Raym. Rep. 1167. Trin. 4 Ann. The Queen v. Beſt. ——— 1 Salk. 174. S. C. ——— 6 Mod. 185. S. C. adjudged. ——— 11 Mod. 55. pl. 31. The Queen v. Baſs, S. C.

5. Indictment againſt the defendant at the ſeſſions for the county of Devon, for that he being an evil man, &c. and conſpiring to aggrieve one Laud, *pretended he had broke his arm, and accordingly counterfeited the ſame; and upon that pretence refuſed to ſeek his living by any labour, and exhibited a complaint againſt him to the juſtices of the peace*, &c. and it was quaſhed upon motion, as a matter not indictable. 2 Show. 456. pl. 421. Mich. 1 Jac. 2. B. R. The King v. Salter.

6. A conſpiracy *that none* [*of them*] *ſhould buy coffee of B.* was ſaid Arg. not to be indictable if nothing more be done; but Holt Ch. J. denied it. 6 Mod. 99. Hill. 2 Ann. B. R.

7. And ſo it was ſaid Arg. that a confederacy *to way-lay a man and kill him or rob him*, would not bear an indictment; but Holt Ch. J. denied it. 6 Mod. 99. Hill. 2 Ann. B. R.

8. A confederacy falſely *to charge* another *with a thing that is a crime by any law* is indictable, and the confederacy is the giſt of the indictment. Per tot. Cur. 6 Mod. 187. Trin. 3 Ann. B. R.

9. Several *journey-men taylors* were indicted for a conſpiracy among themſelves *to raiſe their wages*. The court held that this indictment need not conclude *contra formam ſtatuti*, though by ſtat. 7 Geo. 1. cap. 13. journey-men taylors are prohibited to enter into any ſuch contract or agreement, becauſe the indictment was for
[426] a *conſpiracy*, which *is an offence at common law*; it is true the *indictment ſet forth that they refuſed to work under ſuch wages as they demanded*; but though this might be more than directed by the ſtatute, yet it is not for the denial, &c. but for the conſpiracy that they were indicted, which in itſelf is illegal whether the matter be lawful or not. And judgment confirmed per tot. Cur. 8 Mod. 10. Mich. 7 Geo. 1. The King v. the Journey-men Taylors of Cambridge.

But if a *fault in the indictment* is *plain* and apparent, it is quaſhed for that reaſon, and the party ſhall not be put to the trouble to plead or demur. Ibid.

10. Indictments for conſpiracy *are never quaſhed*. Per Cur. Mod. 321. Mich. 11 Geo. 1. The King v. Edwards.

11. A conſpiracy *to let lands of* 10 *l. per ann. value to a poor man, in order to get him a ſettlement*, or *to make a certificate man a pariſh officer*, or a conſpiracy *to ſend a woman big of a baſtard child into another pariſh to be delivered there*, and ſo to charge that pariſh with the child; certainly theſe are crimes indictable. 8 Mod. 321. Mich. 11 Geo. The King v. Edwards & al'.

12. The defendants were indicted, for that they per conſpirationem inter eos habitam, *gave the huſband money to marry a poor helpleſs woman, who was an inhabitant in the pariſh of B.* and incapable of marriage, on purpoſe *to gain a ſettlement* for her in the pariſh of A. where the man was ſettled; and now it was moved to quaſh this indictment, becauſe it is no crime to marry a woman and give her a portion, and the juſtices are not proper judges what woman is capable of a huſband; judgment was given for the defendant, becauſe it was *not averred in the indictment, that the woman was laſt legally ſettled in the pariſh* of B. but only that ſhe was an inhabitant there. 8 Mod. 320. Mich. 11 Geo. The King v. Edwards & al'.

13. *Seſſions have juriſdiction* of conſpiracies; per Cur. 8 Mod. 321. Mich. 11 Geo. in caſe of the King v. Edwards.

(I) Judgment. Error.

S. P. Br. Verdict, pl. 38. cites 24 E. 3. 73.

1. IN conſpiracy *againſt ſeveral, one appeared and pleaded not guilty*, and was *found guilty with another who did not appear*, and the *plaintiff recovered* by judgment, and he *brought error becauſe he was condemned and none of the others, and one only cannot conſpire*, and yet the judgment was affirmed; for it is found that he and another conſpired,

conſpired, therefore it ſhall bind the defendant; but it ſhall not bind the other who did not appear and plead, but it is ſufficient againſt the defendant; quod nota. Br. Conſpiracy, pl. 21. cites 24 E. 3. 34.

2. *Two* men were *attainted of conſpiracy by verdict*, by which it was awarded that they *loſe their free law, to the intent that they ſhould not afterwards be put in juries, nor in aſſiſe, nor otherwiſe in teſtimony of the truth*, and if they have to do in the king's court, that they ſhould make their attorney, *and that their lands, goods, and chattles ſhould be ſeiſed into the hands of the king*, and waſted if they could not have better grace, and their *trees grubbed up*, and *their bodies to priſon*. Br. Conſpiracy, pl. 28. cites 27 Aſſ. 59. S. P. Br. Conſpiracy, pl. 31. cites 46 Aſſ. 11.

*[427] One may be *indicted* of a conſpiracy *at the ſuit of the king*, and then he *ſhall have a villainous judgment*. 24 E. 3. 34. 73. 43 E. 3. 33. But *at the ſuit of the party, it ſhall be only a capiatur*. 27 Aſſ. 59. Judgment on indictment of conſpiracy as in attaint. cites 4 H. 5. Judgment, 220. F. N. B. 114. (D) in the new notes there (a).

3. An abbot, and A. his monk, bring a writ of *conſpiracy againſt B. C. and D.* and the *writ ſays, that B. falſely and maliciouſly conſpiravit cum C. and D. & conſpiratione præ-antea habita procured the ſaid A. to be appealed of a robbery*, for which the ſaid *A. was* taken and committed to *Newgate, and *indicted, and* thereof *acquitted*. B. pleads not guilty, and is found guilty, and judgment is given that the abbot ſhall recover damages, although *none of the other defendants were afterwards attainted* of this conſpiracy, nor any proceſs, after judgment had againſt C. or D. judgment was affirmed in B. R. The reaſon is, the procurement was only laid in B. and after iſſue and judgment B. was ſevered from the others, viz. C. and D. and the ſuit was determined as to B. The abbot had *judgment only to recover his damages and coſts, and* the defendant in this caſe had *not the villainous judgment*: that is never to be a witneſs, never to approach the king's palace, to be impriſoned for life, his houſes to be pulled down, his wife and children being firſt caſt out of them, his trees cut down, his meadows plowed up, and his lands, goods, chattels, and writings ſeiſed into the king's hands. Jenk. 31. pl. 62. cites 27 Aſſ. 43 E. 3. 4 H. 5. Stam. 115.

† 2 Inſt. 384. S. P. ——— 3 Inſt. 143. cap. 66. S. P. ——— Ibid. 222. cap. 101. S. P. But by Shard, *ſuch villainous judgment is only given where the ſuit is by the king*, but at the ſuit of the party it is not ſo, but is only that he ſhall recover damages. Mich. 24 E. 3. 34. b. pl. 34. the Abbot of Hide v. Moſchelden & al'. ——— Hawk. Pl. C. 193. cap. 72. S. P. ſays, that a villainous judgment is given by the common law, and not by any ſtatute, and is ſaid generally, in ſome books, to be the proper judgment upon every conviction of conſpiracy at the ſuit of the king, without any reſtriction, to ſuch as endangered the life of the party; but he does not find this point any where ſettled.

4. In conſpiracy upon an indictment of *treſpaſs* the *defendant ſaid that they were impannelled before juſtices of the peace in N. and that which they did was upon their oath*; judgment ſi actio, and *the plaintiff replied* that *no ſuch record*, and *writ awarded to the juſtices of peace to certify it*, and at the day the parties appeared, and the *juſtices did not return the writ*, and they had day over, and then the defendant made default, and the plaintiff had writ of inquiry of damages which returned 40 l. and there it was agreed, that conſpiracy *lies well upon indictment of treſpaſs as of felony*; and becauſe the damages were too high, the plaintiff re- S. P. Br. Conſpiracy, pl. 25. cites 3 Aſſ. 13.

releaſed 20 l. and had judgment of the reſt; for the court ſaid, if he would not releaſe part, they would abridge. Br. Conſpiracy, pl. 11. cites 7 H. 4. 31.

For more of Conſpiracy in general, ſee Actions on the Caſe, (P. c) (Q. c) (R. c), Indictment (E), Information, and other proper titles.

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* Conſtable.

(A) His Antiquity. And how conſidered.

* Decennarius *prima facie is the ſame with a conſtable*, and differed little in the execution of that office, concerning keeping the peace, yet Hale ſaid, he was not the ſame officer. Vent. 170. per Cur. Mich. 23 Car. 2. B. R. in caſe of Waldron v. Ruſcarrit.—In ſome places they have tithingmen † and no conſtables. Per Hale Ch. J. and Lambard, 14. being cited, that the conſtable and tithingman are all one, Hale ſaid that ſo it is in ſome places; that præpoſitus is the proper word for a conſtable, and decennarius for a tithingman. Mod. 78. pl. 38. Mich. 22 Car. 2. B. R. in S. C.—*High-conſtable* was an officer at common law before the ſtatute of Winton as well as a petit-conſtable, and they are officers to the juſtices of peace; per Cur. 1 Salk. 175. in the caſe of the Queen v. Wyatt.—2 Ld. Raym. 1192, 1193. Trin. 4 Ann. in caſe of the Queen v. Wyatt, Powell J. ſays, that my Ld. Coke, 4 Inſt. 267. ſays, that a conſtable of a hundred was not an officer at common law, but created by the ſtatute of Wincheſter; but Powell J. held, that he was an officer at common law, and the ſtatute of Wincheſter only enlarged his authority in ſome particulars; and ſo it was held by my Ld. Ch. J. Hale, in the caſe of THE KING v. KING, and the caſe of THE KING v. SAMOIS, Hill. 16 & 17 Jac. cited for it; and the new authority which was given them by the ſtatute of Wincheſter was what occaſioned the miſtake; and ſo they are officers of the peace, and officers to the juſtices of peace, where no particular officer is named.

† [428]

1. THE *conſtable is the keeper of the peace*, that is to ſay, the *high-conſtable for the hundred*, and the *petty-conſtable in the town*. Kitch. of Courts, 97. cites 12 H. 7. fol. 38.

2. *At common law*, before the making of the ſtatutes, by which juſtices of the peace were ordained to keep the peace, *the Ch. J. of England was appointed by* the king, and he had authority, and was ordained to determine matters touching the crown, and *for conſervation of the peace throughout the realm*, and he thereby is the Ch. J. of peace. *Alſo* by the common law, before there was any juſtice of the peace, *conſtables of every town* were keepers of the peace within their towns. Kitch. of Courts, 96.

S. C. cited by Holt Ch. J. 2 Ld. Raym. Rep. 1195. and ſays, that this point has been contradicted in my Ld. Hale's time, Mich. 25 Car. 2. and ſays, that it has been held, that a high-conſtable was an officer at common law, and had power to do all things which a petty-conſtable can do.——3 Keb. 231. in pl. 47. Mich. 25 Car. 2. P. by Hale Ch. J.——2 Hawk. Pl. C. 33. cap. 8. ſ. 6. S. P.

3. An *high-conſtable* is not ſuch an officer or conſervator of the peace whereof the common law takes any notice; for he is not mentioned in any book; per Anderſon. Cro. E. 375. pl. 25. Hill. 37 Eliz. in caſe of Sharrock v. Hannamer.

4. *High-conſtables* were not ab origine, but *came in with juſtices of the peace*; per Twiſden J. Mod. 13. pl. 26. Mich. 21 Car. 2. B. R. 3 Keb. 231 pl. 47. Mich. 25 Car. 2. B. R in the caſe of THE KING v. KING, Hale Ch. J. ſaid, that contrary to 4 Inſt. it hath been held, that a high-conſtable was an officer at common law.

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5. As to the *antiquity* of the office of a conſtable, it ſeems to be the better opinion, that both conſtables of hundreds, which are commonly called *high-conſtables, and alſo* conſtables of tithings, which are at this day commonly called *petit-conſtables, or tithing-men*, and *were anciently* called chief pledges, *were by the common law, and not firſt ordained by the ſtatute of Wincheſter, cap.* 6. as it is holden by ſome that they were; for that ſtatute does not ſay there ſhall be ſuch officers conſtituted, but clearly ſeems to ſuppoſe that there were ſuch before the making of it. 2 Hawk. Pl. C. 61. cap. 10. ſ. 33.

(B) By whom made, *and removed.*

1. NOTE, that a *ſheriff, conſtable, and headborough*, were conſervators of the peace at common law, and yet are conſervators of the peace. Br. Peace, pl. 13. cites 12 H. 7. 17. per Fineux Ch. J.

2. A *writ of reſtitution* does not lie to reſtore a conſtable, but an order by the rule of court was made for the reſtoring, placing, and ſettling him in his place again, he being choſe by the vill, and approved by the lord, and ſworn; in which caſe the *juſtices* of peace had no power; per Williams J. to which the whole court agreed. Bulſt. 174. Trin. 9 Jac. the Conſtable of Stepney's caſe. [429] But the lord who approved of the choice of him may again, for juſt cauſe, remove him; per tot. Cur. agreed. Ibid. —— 2 Hawk. Pl. C. 63. cap. 10. ſ. 38. ſays, it ſeems clear, that the ſheriff or ſteward having power to place a conſtable in his office, have by conſequence a power to remove him.

3. Conſtable elected at the leet was diſcharged at the *ſeſſions*, becauſe he *was a maſter of arts*, &c. He was not ſworn, but they elect and ſwear another. The *King's Bench* may, upon complaint, grant a writ to diſcharge the laſt, and ſwear the other; for the election of a conſtable belongs properly to the leet, unleſs a reaſonable cauſe be to the contrary. See Courts (I. a), pl. 1. and the notes there. And (U. a), pl. 5. 10 Car. B. R. Herſon's caſe.

4. 13 & 14 *Car.* 2. *cap.* 12. *ſ.* 15. *If conſtables, headboroughs, or tithingmen die, or go out of a pariſh, two juſtices of peace may ſwear new ones, till the lord of the manor hold a* court-leet, *or till the next quarter ſeſſions, who ſhall approve of them, or appoint others; and if any officers* continue above a year, *the* juſtices of peace, at their quarter-ſeſſions, *may diſcharge them, and put in others, till the lord of the manor hold a court.*

5. Johnſon prayed *certiorari to remove an order of ſeſſions to remove a gentleman choſen conſtable in the leet by ſpleen*, which the court granted; but whether the juſtices may or not, they will here remove ſuch perſon being unfitting, as in Alderman ABDYE's CASE. And if the new one be not duly choſen, the old one muſt ſerve. Keb. 439. pl. 27. Hill. 14 & 15 Car. 2. B. R. The King v. Wright.

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6. The book of *Villarum* in the Exchequer ſets out all the vills, and there cannot be a conſtablewick created at this day; per Moreton. Mod. 13. pl. 36. Mich. 21 Car. 2. B. R. Anon.

7. On a motion to quaſh an order of the juſtices for one to ſerve as conſtable of H. Moreton J. ſaid, if a *leet neglects to chooſe a conſtable*, upon complaint to the *juſtices of peace*, they *ſhall by the ſtatute appoint a* conſtable. And Twiſden J. ſaid, that in this caſe there are *affidavits that there never was any conſtable there*; and he cannot tell whether or no the juſtices of peace can erect a conſtablewick where never any was before; if he will not be ſworn, let them indict him for not executing the office, and let him traverſe that there never was any ſuch office there. Keeling bid him go and be ſworn, or if the juſtices of peace commit you, bring your action of falſe impriſonment. Mod. 13. pl. 36. Mich. 21 Car. 2. B. R. Anon.

8. *If there be a court-leet that has the choice of a petty conſtable*, the juſtices of peace cannot chooſe there; and if it be in the hundred, Twiſden J. ſaid, he doubted whether the juſtices of peace can make *more conſtables than were before*. Mod. 13. in pl. 36. Mich. 21 Car. 2. B. R. Anon.

* [430] And an information was brought againſt King for refuſing the office of conſtable of Norton-ferris, within which was an ancient borough that had a leet, viz. Wincaunton, and he *pleaded, that* he *being within, and refiant in the leet of the borough, ought not to do the office of conſtable of the hundred*, but judgment was given againſt him; and it was ſaid that if there were a ſpecial cuſtom to be diſcharged, it might be good. 3 Keb. 197. 230, 231. Trin. & Mich. 25 Car. 2. B. R. The King v. King.

9. Information againſt K. for *refuſing to take the oath* of a conſtable of the hundred being choſen in the leet. The defendant *pleads that W. is an ancient borough, and that they have a leet there, and uſed to chooſe their own officers*, &c. within the borough. The queſtion was, *whether the living within* the juriſdiction of *an inferior leet ſhould exempt* a man *from being choſe high conſtable in the leet of the hundred?* Hale Ch. J. ſaid, the caſe will be very *different* if this be really a *borough*, and if it be an *upland town*; for formerly in England every hundred uſed to ſend their jury, and every borough uſed to ſend 4 men of their own, and conſtables were before the ſtatute, but that gives them view of armour; and he ſaid that the ſuperior leet ſhall not meddle in the inferior of matters inquirable there, unleſs it be in caſe of omiſſion; but he ſaid, a conſtable of an hundred was an article that the inferior court could not meddle in, becauſe it is an office that extends beyond their juriſdiction; and ſo judgment was againſt the defendant niſi. Freem. Rep. 348, 349. pl. 433. Mich. 1675. Keene's caſe.

A ſpecial verdict found, that within the manor of the hundred of Farnham there are ſeveral other manors belonging to divers lords, the inhabitants whereof uſed to be elected for the ſaid hundred; they find alſo, that there is the *manor of the town of Farnham within the manor of the ſaid hundred*, in which there is a court-leet, and that the *defendant is an inhabitant within the ſaid town of Farnham, & non alibi*; *and that no inhabitant of the town* of Farnham *ever ſerved* as high-conſtable *for the hundred* of Farnham. The queſtion ariſing upon the ſpecial verdict was, whether *the defendant, being in a particular*

a particular leet, is *excuſed* from *ſerving* as high-conſtable *of the hundred?* And on debate the court held, that he is not excuſed. 11 Mod. 215. pl. 3. Paſch. 8 Ann. B. R. The Queen v. Jennings.——1 Salk. 383. pl. 33. The Queen v. Jennings, is a different caſe.

10. S. *was preſented conſtable by the homage* of a leet in Eſſex, the *ſteward refuſed to ſwear him, and nominated and ſwore in his place one R.* The juſtices of peace at the quarter *ſeſſions, upon an examination* into this matter, *ordered that S. ſhould ſerve the office, and ſwear him* accordingly; this order was removed by a certiorari, and exception was taken to it, that the juſtices had intermeddled in a matter of which they had no conuſance; for the appointment and ſwearing of a conſtable did properly belong to the lord of the leet. Per Cur. the election of a conſtable properly belongs to the homage, and though the juſtices of the peace have not originally the making of a conſtable, yet *this is a matter of the peace within their general juriſdiction*, and they have power to examine this matter at the ſeſſions, and as to the ſwearing of a conſtable, any ſingle juſtice of the peace may do it; and the order was confirmed. 2 Jones, 212. Trin. 34 Car. 2. B. R. The King v. Stephens.

Though before the 13 & 1 Car. 2. the juſtices of peace could not make conſtables, yet they could ſwear them. Per Holt Ch. J. 12 Mod. 88. Hill. 7 W. 3. in caſe of Fletcher v. Ingram.

11. Seſſions may chuſe a conſtable, and the order here appointing him to take the oaths is an *election* of him, &c. Per tot. Cur. he may be a perſon not living within any leet. And per Holloway J. they might have compelled him to take the oaths by increaſing his fine. Cumb. 20. Trin. 2 Jac. B. R. Anon.

If there is *no leet* at all then you *muſt go to the ſheriff's torn*. How can juſtices of peace make a conſtable who *is an officer at common law*, and *they only by ſtatute?* only there may have been ſuch an uſage from the neglect of thoſe to whom it properly belonged; perhaps there may have been ſome old ſtatute for it, which is loſt. Per Holt. 12 Mod. 180. Hill. 9 W. 3. The King v. Hewſon.

12. The *ſteward of the leet* uſually certifies under his hand what perſon is choſe, which *certificate* is carried to a juſtice of peace, and if the party refuſe, the *juſtice ſends his warrant* to compel him, but ſteward may, during the court, ſwear the conſtable as well as a juſtice of peace after. 5 Mod. 128. Mich. 7 W. 3. in caſe of Fletcher v. Ingram.

But *after adjournment* the ſteward has no authority. 12 Mod. 88. S. C.—— Ld. Raym. Rep. 70.

S. C. & S. P.——Comb. 351. S. C. & S. P. per Holt Ch. J.

13. At common law all conſtables were choſen at the leet, and where there is *no leet*, at the *tourn*, but * whether by the ſteward or the homage has been a great queſtion; but without queſtion a *corporation* of common right cannot *chuſe* a conſtable; by *cuſtom* they may, but then they muſt *preſcribe* for it. Per Holt. 2 Salk. 502. pl. 2. Mich. 8 W. 3. B. R. The King v. Barnard.

12 Mod. 115. S. C. accordingly. —— Skinn. 669. pl. 6. S. C. the Court ſeemed accordingly, ſed adjornatur.

——Ld. Raym. Rep. 70. S. C. & S. P. per Cur.——Where there is no leet, † he muſt be choſe at the tourn, yet his *power* would be *reſtrained to the particular hundred*. Per Holt Ch. J. 12 Mod. 215. Paſch. 8 Ann. B. R. in caſe of the Queen v. Jennings.

* S. P. by Holt Ch. J. 12 Mod. 88. Hill. 7 W. 3. in caſe of Fletcher v. Ingram.

† [431]

14. The *village of C. having no conſtable*, the juſtices by order of *ſeſſions appointed one* to ſerve there; and per Holt Ch. J. the

12 Mod. 180, 181. Hill. 9 W. 3.

The King v. Hewſon, S. C. Holt Ch. J. ſaid his opinion was, that the juſtices of peace could not create a conſtable where none was before, though he had heard it ſaid in Ld. Ch. J. Keiling's time, that if a town be newly built, and they want a conſtable, that the juſtices of peace may; and it being in this caſe conteſted whether there was a conſtable before, it was ordered to be tried.

juſtices have all along exerciſed this power, and the court will intend they have a ſufficient authority for it; but the 13 & 14 Car. 2. cap. 12. gives them authority to do it only in particular caſes. 1 Salk. 175, 176. pl. 2. Trin. 11 W. 3. B. R. The Village of Chorley's caſe.

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S. P. of the conſtable of the hundred, or high-conſtable, that are choſen by them, if there be good cauſe of removal. Bulſt. 174. Trin. 9 Jac. in the Conſtable of Stepney's caſe. —— But if it be in a manor, and the conſtable is choſen and ſworn in the court-leet, the juſtices of peace have no power or authority to diſcharge him. Ibid.

15. High conſtables are removeable as well as petty conſtables, and the *juſtices* of peace at ſeſſions are the beſt judges of that matter; per Cur. 1 Salk. 150. pl. 19. Paſch. 4 Ann. B. R. in caſe of the Queen v. White.

16. The mayor of A. ſet up a *cuſtom that the court-leet there ought to make a liſt every year of 5 perſons to be preſented to the mayor, and that he ought to chuſe one out of them for conſtable, and* that *the jury ſhould chuſe the other out of the remaining 4*; now this year the *jury had made no liſt*, but the *pariſhioners choſe the conſtables themſelves*. Upon the mayor's applying to the *ſeſſions, they made an order of diſcharge of one* of the conſtables, *and that the mayor's conſtable, whom he nominated in default of the jury's giving him a liſt, ſhould be confirmed*. The court now quaſhed this order; for they ſaid the only ſtatute that gives the juſtices power at all in relation to conſtables, is the ſtatute of 13 & 14 *Car. 2. cap. 12.* [ſ.] 15. and that act only gives juſtices power to put in conſtables in default of the court-leet; but does not impower them to diſcharge conſtables already put in. Accordingly the order was quaſhed. Barnard. Rep. in B. R. 51. Paſch. 1 Geo. 2. The King v. Burden and Wakeford.

(C) Puniſhed for refuſing the Office; and who may be choſen Conſtable.

1. A *Maſter of arts* may be elected conſtable, and this is no cauſe to diſcharge him See Court (I. a), pl. 1. Herſon's caſe.

This is to be granted by reaſon of their attendance in the public courts. Mod. 22. in pl. 59. ——— 2 Hawk. Pl. C. 63. cap. 10. ſ. 39. S. P. and ſays, that they ſhall have this privilege even when they are *choſen by a particular cuſtom, in reſpect of their eſtates or otherwiſe*; for that no ſuch cuſtom ſhall be intended more ancient than the uſages of thoſe courts, and therefore ſhall give way to them; and that upon the like reaſons he finds it taken for granted that *practiſing barriſters at law* have the ſame privilege, but he knows not of any reſolution to this purpoſe.

2. An *attorney* ſhall have a writ of privilege for all offices that require his perſonal attendance, as conſtable, &c. Agreed per tot. Cur. Mar. 30. pl. 65. Trin. 15 Car. Anon.

3. If a man be choſen a headborough at a leet, he may be *indicted for not taking his oath*, but then he ought to be *warned to go before a juſtice of peace* to take his oath, &c. And upon a motion a writ was granted, directed to one Prig, who was choſen an headborough, commanding him to go before ſome juſtice to take his oath, &c. Allen, 78, 79. Trin. 24 Car. B. R. Prig's caſe. N. B. The indictment was quaſhed, becauſe it did not appear how he was choſen. Ibid.

4. *Cuſtom* that *every watchman of the Cuſtom-houſe* ſhould be free from ſerving was diſallowed; becauſe there being ſeveral watchmen in that pariſh there might be a failure of perſons to perform the office, and ſo a judgment was affirmed. Sid. 272. pl. 28. Trin. 17 Car. 2. B. R. The King v. Clark, Keb. 933. pl. 43. S. C. He did not ſhew that watchman was an ancient officer, nor aver that there are ſufficient beſides to ſerve, and therefore judgment for the king. ——2 Hawk. Pl. C. 63. cap. 10. ſ. 41. ſays, it ſeems that even a cuſtom cannot exempt fitting perſons from ſerving the office of a conſtable where there are not ſufficient beſides them to execute it; but ſays, that this point ſeems not to be ſettled, as appears by the various opinions in the books concerning this matter, which are very differently reported.

5. A *cuſtom* in a vill is good, where there are ſeveral houſes, *that every one ſhall be conſtable in turn*; for though it ſhall happen to the turn of a *widow*, ſhe may hire one to ſerve, and then he who ſo ſerves is ſworn, and he is the conſtable and not a deputy; agreed. 1 Syd. 355. Hill. 19 & 20 Car. 2. in Vane's caſe.

6. A *practiſing phyſician in London* was choſen conſtable in a pariſh, and on a motion for a writ of privilege it was denied, and a difference made between an *attorney or barriſter at law* and a phyſician; that the privilege of the former is, becauſe of their attendance in public courts and not on account of any private buſineſs in their chambers; but a phyſician is a private calling, and therefore they would not introduce new precedents. Mod. 22. pl. 59. Mich. 21 Car. 2. B. R. Dr. Pordage's caſe. 2 Keb. 578. pl. 104. S. C. the court ordered to ſhew cauſe why he ſhould not be exempted, but inclined that it lay not. ——Sid. 431. pl. 19. the King v. Pordich, S. C. it was ruled, that he ſhould be diſcharged of the office, niſi, &c. ——2 Hawk. Pl. C. 63. cap. 10. ſ. 41. ſays he has no remedy for his diſcharge; for there are no precedents of this kind, and his calling is private; but ſays he thinks, that if there are ſufficient perſons beſides in the place to execute the office, and no ſpecial cuſtom concerning it, he may perhaps be relieved in B. R.

7. The privilege of exemption from being ſworn conſtable extends to a *parliament man's ſervant*; agreed and admitted by Twiſden J. but he ſaid he did not think it extended to his tenant. Mod. 13. pl. 36. Mich. 21 Car. 2. B. R. Anon.

8. A. was actually *conſtable of the hundred of B.* and lived at W. within the hundred of B. *in Eſſex*, and being *choſen collector for the poor in Cornhill in London* where he firſt lived, a writ of privilege was moved for and granted. 3 Keb. 627. pl. 16. Paſch. 28 Car. 2. B. R. The King v. Rice. 2 Jo. 46. Price's caſe, S. C. and he was diſcharged till his office of conſtable ſhould expire.

9. A *tenant in ancient demeſne* is liable to the office of conſtable; held per Cur. Vent. 344. Mich. 31 Car. 2. B. R. Anon. 2 Show. 75. pl. 59. Trin. 31 Car. 2. B. R. the King v. Betteſworth, ſeems to be S. C. and judgment pro rege.

10. Replevin; the defendant juſtified as bailiff, &c. in a court-leet, by *a cuſtom* there *to chuſe a conſtable and impoſe a penalty* of 40 s. Comb. 350. S. C. adjudged. ——

upon him *if he refuſed.* The jury *elected the plaintiff under the penalty, & inde notitiam habuit*, but did not execute the office, which being preſented at the next court, &c. the defendant diſtrained. Per Holt, fines and amerciaments being by common right may be levied by diſtreſs, but this is a *cuſtomary penalty contrary to common right*; for it is taxed * before refuſal, and ſo not to be diſtrained for, without alleging a cuſtom for ſo doing, and the notitiam habuit is too general; for it *ought to have been ſhewn that he was ſummoned within a convenient time* to take the oath before a juſtice of peace as uſually done; and, per Rookby, the defendant has failed in not alleging a cuſtom for the diſtreſs; judicium pro quer. 12 Mod. 87. Hill. 7 W. 3. Fletcher v. Ingram.

Skinn. 635. S. C. adjudged. —— 5 Mod. 127. S. C. adjudged. —— Ld. Raym. Rep. 69. S. C. adjudged.

Suppoſe of common right the ſteward ought to elect the conſtable, and by cuſtom the homage do, *if the perſon thus elected by the homage by cuſtom, where of common right his election belonged to the ſteward, refuſes in court*, yet the ſteward may impoſe a fine upon him if preſent; per Holt Ch. J. 12 Mod. 88. S. C. —— Comb. 350. S. C. adjudged. —— Skinn. 635. S. C. adjudged. —— Ld. Raym. Rep. 69. S. C. adjudged. —— 2 Hawk. Pl. C. 64. cap. 10. ſ. 46. S. P. and ſays, that it alſo ſeems that in either caſe he may be indicted, either in the ſeſſions of the peace, or before juſtices of oyer and terminer.

11. *Steward of a leet* may impoſe a *fine* upon a perſon elected by the homage and *refuſing* to be ſworn, if he be preſent in court; but if not preſent the ſteward cannot fine him, but he may be *amerced*, which muſt be preſented at the next court and affeered, and after the court a juſtice of peace may give him the oath. But the party ought to be *ſummoned, and time and place* appointed under a penalty when and where he ſhall come, and before whom, to take the *oath*, and it is not enough to ſay *notitiam habuit* generally, per Cur. 5 Mod. 130. Mich. 7 W. 3. Fletcher v. Ingram.

12. The lord or *ſteward of a leet* may *refuſe a conſtable* for good cauſe, and the *juſtices* of peace *have done the ſame;* Arg. Ld. Raym. Rep. 138. Hill. 8 & 9 W. 3.

13. An order for making a conſtable was quaſhed abſente Holt, for that it did not appear by the order that he was *an inhabitant of the liberty though of the pariſh.* 12 Mod. 256. Mich. 10 W. 3. Anon.

14. The late conſtable is *not diſcharged till the new is ſworn*, becauſe the pariſh cannot be without an officer. 12 Mod. 156. Mich. 10 W. 3. Anon.

15. No man that *keeps a publick houſe* ought to be a conſtable; per Holt Ch. J. 6 Mod. 42. Mich. 2 Annæ B. R. Anon.

16. The *ſurgeons of London* are exempt from bearing the office of conſtable by ſtat. 5 H. 6. cap. 6. and the act likewiſe extends to *barber-ſurgeons approved* and admitted according to the ſtatute of 3 H. 8. cap. 11. ſo that they exceed not the number of twelve perſons.

2 Hawk. Pl. C. 64. cap. 10. ſ. 43. ſays it ſeems that by the equity of this ſtatute, and the ancient cuſtom of the realm, all ſurgeons have been allowed the like privilege. —— A ſurgeon was indicted for refuſing to ſerve the office of conſtable, whereupon a noli proſequi was moved for, and granted niſi; and the reporter ſays, that no cauſe was ſhewn, as ever he heard. Comyns's Rep. 312. pl. 161. Mich. 5 Geo. 1. B. R. the King v. Pond.

17. Where a conſtable is *choſen at a leet and refuſes to act*, whether he is *indictable at ſeſſions*, or amerciable only at the leet,

The ſeſſions cannot *impriſon* for re-

ſeveral caſes were cited againſt the power of the ſeſſions, and time was given to the counſel of the other ſide to anſwer the objections. Gibb. 192. Hill. 4 Geo. 2. B. R. The King v. Lone.

fuſal, but he ought to be indicted; quod curia conceſſit.

12 Mod. 180. Hill. 9 W. 3. The King v. Newton.

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(D) Favoured or puniſhed.

1. C. Was indicted for that a *burglary was committed in the night by perſons unknown*, and J. S. *gave notice* to him being conſtable, *and required him to make hue and cry*, and he refuſed, but becauſe he did *not ſhew the place of notice* the party was diſcharged. Cro. E. 654. pl. 16. Hill. 41 Eliz. B. R. Crowther's caſe.

2. Another exception was taken to the matter of the indictment, becauſe it has been adjudged, that an hundred ſhall not be charged with a robbery *committed in the night*, for they be not bound to give attendance; no more ought a conſtable to do it in the night. But all the court held the indictment to be good notwithſtanding; for it is not like to the caſe of an hundred; becauſe it is the *conſtable's duty, upon notice given* unto him, *preſently to purſue*. Cro. E. 16, 17. pl. 16. Hill. 41 Eliz. Crouther's caſe. [434]

3. Several conſtables were indicted for *refuſing to execute the warrant of a juſtice of peace directed to them to apprehend one for a contempt*, and the indictment was allowed. 2 Roll. Rep. 78. Hill. 16 Jac. B. R. Coleman's caſe.

4. A conſtable is not *ſuable out of the county* for what he does in execution of his office. Held per Cur. Sty. 393. Mich. 1653. B. R. Anon.

5. The defendant being a conſtable, was *indicted for that he contemptuouſly and voluntarily neglected to execute diverſa præcepta et warranta directed to him* by juſtices of peace under their hands and ſeals; but it was quaſhed, becauſe it did *not ſet forth the nature and tenor of the warrants*, for unleſs the defendant can know what particularly he is charged with, he cannot tell how to make his defence. Vent. 305. Hill. 28 and 29 Car. 2. B. R. Burrough's caſe.

6. In an *habeas corpus* and *certiorari* for the body of J. S. who had been impriſoned for not paying of a fine of 20l. ſet at the quarter ſeſſions, the return was, that he, being conſtable and demanded by the Court to preſent an *highway*, which was ſworn before him by two witneſſes to be *out of repair*, ſaid in contempt of the Court, that he *would not preſent it*; for which, and certain other contemptuous words, a fine was ſet on him. The Court were of opinion, that the fine was not well ſet; for conſtables are to preſent upon their own knowledge, and the two witneſſes ſhould have been carried to the grand jury; for the conſtable was not obliged to preſent upon their teſtimony. Vent. 336. Paſch. 31 Car. 2. B. R. Anon.

7. Moved to quaſh an indictment *againſt diverſe inhabitans* in Derby, *for refuſing to meet and make a rate upon the ſeveral pariſhes* in Derby

2 Salk. 609. pl. 1. the King, &c.

v. Barlow. S. C. where a ſtatute directs the doing a thing for the ſake of juſtice or the public good, the word (may) is the ſame with the word (ſhall), per Cur.

Derby *to pay the conſtable's tax*; firſt, becauſe they are not compellable, but the ſtatute only ſays that they may, ſo they have their election, and no coertion ſhall be, ſed non allocatur; for *may* in the caſe of a publick officer is tantamount to *ſhall*, and if he does not do it, he ſhall be puniſhed upon an information, and though he may be commanded by a writ, this is but in aggravation of his contempt; but the court refuſed to quaſh it. Skin. 370. pl. 17. Mich. 5 W. and M. in B. R. The King v. the Inhabitants of Derby.

——Carth. 293. S. C. accordingly.

8. If a *juſtice of the peace adjudge that to be an offence which is no offence*, the inferior officer ſhall anſwer; as if one be adjudged the putative father of a baſtard, where after it appears to be born in matrimony, this is void, & coram non judice, &c. Per Holt Ch. J. Skin. 445. Trin. 6 W. and M. in B. R. in caſe of Crump v. Holford.

9. A leet may *ſet a fine* on a conſtable, but the ſeſſions cannot. 5 Mod. 96. Trin. 7 W. 3. in a nota at the end of the caſe of the King v. Harpur.

10. *Falſe impriſonment* againſt a conſtable *for executing a warrant of Sir James Butler, after he was out of the commiſſion* of the peace. Per Holt, conſtable at his peril is to *take notice* that his warrant is by one in commiſſion; but all the favour we can do is, ſince it was a warrant executed a day or two after Sir James was out of commiſſion, that if he has *behaved himſelf honeſtly and civilly*, to be mild to him; and he ſaid, the conſtable ought to ſhew the juſtice of peace's commiſſion, though heretofore it were held common reputation would be enough; and here the conſtable *coming out of his own pariſh to execute* the warrant, betrays his officiouſneſs. 12 Mod. 347. Mich. 11 W. 3. Normand v. Mills.

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11 Mod. 53. pl. 30. Paſch. 4 Ann. B. R. the S. C. exception was taken that there ought to have been a *time and place, when and where the conſtable ſhould have returned his warrant* to the juſtices; for he is not bound to travel over England to find them. But judgment was

11. A conſtable was indicted, for that one Naſh was convicted of *deer ſtealing*, upon the ſtatute 3 and 4 Will. 3. cap. 10. and that the defendant being a conſtable, *the juſtice directed his warrant* to him *to levy the penalty*, which he did, but had *not returned the warrant, or made any certificate thereof*, he was found guilty; and it being removed by certiorari, it was reſolved that though the conſtable is not named in the ſtatute, yet the juſtices may command him to execute the warrant, becauſe, as at common law a conſtable was ſubordinate officer to the conſervators of the peace, ſo he is now a proper officer to the juſtices; and that where an officer neglects a duty incumbent upon him, either by the common law, or ſtatute, he is indictable, and further that the conſtable *need not return the warrant itſelf*; becauſe it may be neceſſary for him to keep it in his own defence; *but he muſt either return that or certify* what he has done upon it; for otherwiſe the proſecutor cannot attain the end of his proſecution, and the defendant cannot be diſcharged. 1 Salk. 380. pl. 28. 2 Ann. B. R. The Queen v. Wyatt.

given againſt the defendant, diſſentiente Holt Ch. J. not but that he ſaid it was an offence; but he ſaid that

that in all proceſs there ought to be a place and time for the return.——2 Ld. Raym. Rep. 1189. S. C. adjudged for the queen by 3 juſtices.——If an officer be negligent in doing of his office, it is an offence at common law, and upon the 4th and 5th W. and M. cap. 10. an high conſtable was indicted for not returning his warrant, and theſe points were reſolved, that a conſtable was an officer at common law, and per Powell, ſo was an high conſtable, contra to the opinion of Coke in his 4th Inſtitutes, and he is a ſubordinate officer to a juſtice of peace, and whenever a juſtice of peace is commanded to do any thing, he is the perſon who is to put this in execution, for the juſtice cannot command the ſheriff, or the party, unleſs there be expreſs words of an act of parliament for it, and matters being left ſo indifferent, if the conſtable doth not do his duty, he is puniſhable at common law. 2 That the indictment reciting the record of conviction, need not to conclude paret per recordum, for this is but matter of inducement, and where nul tiel record cannot be pleaded, there needs not proof per recordum. 3dly, Here is a great offence, for the warrant ſays, that the officer ought to return the warrant, becauſe by the act the juſtice is to do ſome other thing afterwards, in caſe there be not goods out of which the penalty can be levied; and *though no place is mentioned where the warrant is to be returned*, it is well enough, for the officer is to find out the juſtice, and to give him an account what he has done upon his warrant, as the juſtice may require him to do; and upon not guilty pleaded, the officer may prove that he went to ſeek the juſtice but could not find him, and this will be a good excuſe. Per three juſtices, as to this laſt point, againſt the Ch. Juſtice, who thought that both a place where, and the time when the return ſhould be, ought to be mentioned. 4thly, If the offender have but 50 l. worth of goods, and the ſum to be levied is 100 l. the officer cannot levy the 50 l only. The act doth not require that the juſtices muſt diſtribute the money themſelves, but the officer may well do it as the act directs. If there be three ſeveral convictions, and the offender hath no more goods than will anſwer two of thoſe convictions, he may pay the two, and ſtand in the pillory for the other; the money cannot be levied by parcels. So it is in caſe there be but two convictions, and the offender hath only goods to anſwer one of them, he may be pilloried for the other. 5thly, That though the indictment were, that he did never return the warrant, nor cauſe it to be returned, yet this was well enough, for the neglect was the offence. 6thly, That the juſtice muſt make a warrant to levy the penalty, and that the juſtice cannot do this himſelf. The Queen v. Wyatt.

12. Conſtable is the proper officer to the juſtice of peace, and *indictable for neglecting duty required by common law or ſtatute*. 1 Salk. 330. pl. 28. 2 Ann. B. R. The Queen v. Wyatt.

13. An indictment againſt P. for *not executing a warrant* of a juſtice of peace *upon a common baker*, for exerciſing *his trade on a Sunday*, contrary to the act. Exception was to the indictment, that it does *not appear the conviction was within* 10 *days* after the fact, which is the time limited by the act; the indictment ſaid *only debito modo convictus*. Holt Ch. J. was of opinion, that ſince it was ſaid that he was convicted, it ſhall be taken for a good conviction in all reſpects, and the defendant ſhould have taken [436] advantage of the contrary, by *ſhewing it in evidence* upon the trial. 11 Mod. 114. Paſch. 6 Ann. B. R. The Queen v. Pawlett.

14. In falſe impriſonment, the caſe was that the *Ld. Ch. J. of B. R.* having in the late reign *ſigned a warrant for apprehending the plaintiff*; the defendant being *a conſtable arreſted him upon the ſame after the late king's demiſe*, and thereupon the juſtices of *ſeſſions granted a warrant for his commitment*; et per Eyre Ch. J. the warant of the Ld. Ch. J. became ineffectual and void by his late majeſty's demiſe, ſo that the impriſonment having been upon a void proceſs the action lies. Gibb. 80. Trin. 2 and 3 Geo. 2. at niſi prius in Middleſex. Anon.

See tit. Treſpaſs (E. a), pl. 16. Beale v. Carter, and the notes there.

(E) His Power and Authority as Conſtable without a Warrant.

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1. IF *any be threatened* upon complaint to the conſtable, he may *inforce the party to put in a ſurety*, and if he do not he may *commit him* to priſon till he has found a ſurety. Kitch. of Courts, 96. cites 4 E. 3. Bar. 102.

Br. Peace, pl. 2. cites S. C. and ſays, note, that the conſtable has power *to take a man and make him find ſurety of peace*, but upon no pain, and if he will not, he has power to *imprifon him till* he has found ſurety, quod nota, and this ſurety ſeems to be *by obligation*, for he can *not* take *recognizance*.

2. Treſpaſs of aſſault and impriſonment, the *defendant ſaid that he was conſtable, and the plaintiff would have broke the peace, and the defendant took, arreſted, and impriſoned him till he found ſurety of the peace*, and the opinion of all the juſtices was that the conſtable *may take ſurety of the peace*, but *upon no pain*. Quære in what manner ſuch ſurety ſhall be, it ſeems to be *by obligation*, which cannot be but in ſome ſum certain. Br. Surety, pl. 23. cites 3 H. 4. 9.

3. Conſtable may arreſt one *to find ſurety of the peace*, and if he will not obey he may take power to enforce him, and one may juſtify that comes in aid of the conſtable, to arreſt one that makes an *aſſault*. Kitch. of Courts, 96. cites 3 H. 4. fol. 10.

4. Conſtable may *ſearch for ſuſpicious perſons*, and may *arreſt night-walkers*. Kitch. of Courts, 98. cites 2 E. 4. fol. 9.

Br. Faux Impriſonment, pl. 24. cites 10 E. 4. 17. S. P.

5. In treſpaſs it was touched that conſtable was ordained *to keep the peace and apprehend felons, and* that conſtable *may take ſurety of the peace by obligation, if he finds one making an affray*. Br. Surety, pl. 26. cites 10 E. 4. 18.

6. Conſtable may arreſt one which *makes a fray*, and carry him to the next gaol till he finds ſurety for the peace; but not impriſon him in his houſe, or put him in the ſtocks, unleſs it be in the night, that he cannot carry him to the gaol [or] for any other reaſonable cauſe. Kitch. of Courts, 98. cites 22 E. 4. fol. 35. Per Bryan.

Kitch. of Courts, 96. cites S. C. —— Arg. 2 Bulſt. 329. cites S. C. —— S. C. & S. P. cited by Coke Ch. J. Roll. Rep. 238. Mich. 13 Jac. B. R.

7. If a man *makes aſſault upon the conſtable, he may juſtify to arreſt him who made the aſſault*, and to carry him to gaol for breaking the peace, though *he himſelf be party*, viz. the conſtable upon whom the aſſault was made; quod nota. Br. Faux Impriſonment, pl. 41. cites 5 H. 7. 6.

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8. Conſtable may *ſearch for ſuſpicious bawdy-houſes* where women of ill fame are, and may *arreſt ſuſpected perſons which walk in the night*, and ſleep in the day, *or keep ſuſpicious company*, and if he be not of power to arreſt them, he may have *aid of his neighbours* by the law, 3 H. 7. fo. 10. that he may have aid. Kitch. of Courts, 98. cites 13 H. 7. fol. 10. title Recognizance, 14 Brooke.

9. A conſtable or ſheriff may *let to bail by bond* one arreſted for ſuch *felony* for which he is bailable, but not by recognizance. Dal. 11. pl. 9. Paſch. 7 E. 6. Anon.

The conſtables or petty-conſtables may take ſurety of the peace by obligation. 4 Inſt. 265. in cap. 54. ad finem. ——— Gilb. Hiſt. View of the Exchequer, 102. cites Dal. 11. and ſays that no recognizances were taken to the king by the ancient conſervators of the peace, nor by the ſheriff, nor conſtables; but in caſes where the defendants were bailable, the ſheriff or conſtable took an obligation in his own name, but not any recognizance to the king; but the ſheriff himſelf bailed to appear at his own torn, and the conſtable to appear at the view of frankpledge. But thoſe obligations taken by the conſtables are not now in uſe, and the juſtices now take bail by recognizance to the king.

10. *If any be ſtruck, and in peril of death,* the conſtable *ought* to arreſt the offender, and *to keep him in priſon till it be known if he will live or die, or till he have found ſureties* to appear before the juſtices at the gaol delivery. Kitch. of Courts, 96.

11. 38 H. 8. tit. Falſe Impriſonment, 6. it is ſaid that one can *not arreſt for a fray after it is done,* without a warrant; but before it be done, or whilſt it is doing, he may. Kitch. of Courts, 98.

12. 3 H. 7. fol. 1. it is held there, that the conſtable may *take the power of the county where there is a fray, and* ſpecially *to take felons.* Kitch. of Courts, 98.

13. A conſtable, going about his ſervice, is met, and aſſaulted and *abuſed with diverſe opprobrious words, and his ſervice impeded; the conſtable ſeizes the man and carries him to the counter* in Wood-ſtreet, to be puniſhed for his aſſault and ill geſture. It was held that he could not juſtify this; for the conſtable cannot carry one to priſon, but muſt firſt carry him before a juſtice of peace; for a conſtable *cannot commit any one but to the ſtocks, and that only for a breach of the peace committed in his preſence.* Savil. 97, 98. Trin. 31 Eliz. Fulwood v. Gaſcoigne.

14. He may *impriſon a man* in the ſtocks *that refuſeth to watch,* being an inhabitant, and no ſtranger; per Wray, but Gawdy e contra. Cro. E. 204. pl. 37. Mich. 32 & 33 Eliz. B. R. in caſe of Stretton v. Brown.

15. B. brought a *child of* 2 *months* old, and *laid it in the pariſh church-yard* of A. to the intent to have deſtroyed it, or to charge the pariſh with the keeping of it; and the *conſtable arreſted him, and put him in the ſtocks,* and this was held a good juſtification, for it is an ill practice, and is good cauſe to ſtay the plaintiff, and impriſon him, and judgment accordingly. Cro. E. 287. pl. 1. Mich. 34 & 35 Eliz. B. R. Beal v. Charter.

Le. 327. pl. 462. Trin. 31 Eliz. S. C. ſays that all the juſtices were of opinion againſt the plea, but would not give judgment by reaſon of the ill example, but left the parties to compound the matter. Gawdy J. ſaid it was a great offence in the plaintiff, but the ſame ought to be puniſhed according to law; but that the conſtable cannot impriſon but only to ſtay him, and bring him before a juſtice to be examined. And by Wray, if the defendant had pleaded that he ſtayed the plaintiff upon that matter to have brought him before a juſtice of peace, it had been a good plea; and Fenner ſaid that the juſtification had been good, if the defendant had pleaded that the plaintiff refuſed to carry away the child. ——— Ow. 98. Hill. 31 Eliz. S. C. reported according to Le. 327. ——— Mo. 284. pl. 436. Keale v. Carter. Hill. 32 Eliz. S. C. the defendant impriſoned the plaintiff till he agreed to re-take the child, and the juſtification adjudged good. ——— Poph. 12. Hil. 35 Eliz. Anon. but S. C. Fenner held that what the conſtable did was lawful, and Popham Ch. J. of the ſame opinion, and it was agreed that the plaintiff take nothing by his writ.

Ow. 105. 35 Eliz. Scarret v. Tanner, S. C. adjornatur.

16. A conſtable *after an affray is over* cannot *take ſureties* of the peace, becauſe J. S. ſtood in fear of his life, and for want thereof to * commit; adjudged. Cro. E. 375. pl. 25. Hill. 37 Eliz. B. R. Sharrock v. Hanſemer.

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Ow. 105, 106. C. B. Scarret v. Tanner. S. C. Anderſon ſaid that the conſtable cannot take ſecurity, nor recognizance, nor bail; and if he does take a bond, he made a quære how he ſhould certify it, and into what court. But Walmſley e contra, who ſaid that the conſtable might take ſecurity by bond, though not by recognizance or bail; and Owen ſaid that the taking the ſurety is good. Sed adjornatur.

17. But a conſtable *may commit a man for a breach of the peace in his view*, but not if done out of his ſight. He cannot take an obligation for the peace, if broken out of his view; per Anderſon. But Walmſley ſaid a petty conſtable may do it, if out of his ſight, upon information that one intends to make a battery and diſturb the peace; for by preventing the occaſion of the breach of the peace it ſhall be well preſerved. So 44 E. 3. tit. Barre, he may do it if information be given of a breach of the peace, or that he comes where an aſſembly is to break it. But he may not *take ſureties* by recognizance entered, becauſe he is not a judge or officer of record; but *by obligation* he may. But this obligation muſt be *in his own name, and not in the queen's* name, and *ſhall be certified at the ſeſſions of the peace*, and he cannot take an obligation but upon view of the peace broken, or tumult made. But by Owen he may take ſureties before as well as after, for otherwiſe it would be too late. Cro. E. 375, 376. pl. 25. Hill. 37 Eliz. Sharrock v. Hannemer.

S. P. by Beaumont, and admitted by Owen. Ow. 106.

18. Neither the high or petit conſtable can *take any man's oath that he is in fear of his life*; per Anderſon Ch. J. Cro. E. 375. pl. 25. Hill. 37 Eliz.

19. Common fame is enough to apprehend any man; but if you *arreſt a man poſſeſſed of money*, and he dies, you are *chargeable* with the money; per Williams J. cites 2 H. 7. and where in the principal caſe the conſtable took from the felon the money of which he had robbed the party, and was afterwards robbed of it himſelf, trover and converſion lies for the party againſt the conſtable for the money, but not treſpaſs. Ow. 121. Mich. 3 Jac. Walgrave v. Skinner.

20. A. was poſſeſſed of corn at S. and *W. the ſervant of B. by command of B. carried away the corn.* A. prayed the conſtable to *detain W. till he could procure a warrant from a juſtice of peace*, which he did; but held, that a conſtable *cannot detain any perſon but for felony.* Brownl. 198. Mich. 11 Jac. Ringhall v. Wolſey.

21. An action of *falſe impriſonment* brought againſt a conſtable, who pleaded not guilty, and ſhewed in evidence, that he *came to ſearch in time of the plague for lodgers* in the town, *and found a ſtranger, and queſtioned him*, which way he came into the town? who anſwered, over the bridge; and the judge conceived this to be a ſcornful anſwer to an officer, *and becauſe he had no paſs*, but travelled without one, *and gave* ſuch a *ſcornful anſwer*, the *defendant did offer to apprehend him*, and the *plaintiff thereupon, being preſent, ſaid to the defendant, he ſhall not go to priſon, but* yet *offered to paſs his word for his forth-coming, upon which the defendant did commit*

mit the plaintiff, and it was ruled upon evidence, that there was good cauſe to commit the plaintiff *for oppoſing the conſtable, though but verbally, in his office*, who is ſo ancient an officer of the commonwealth. Clayt. 10. pl. 19. before Davenport Ch. B. Mich. 8 Car. Sheffield's caſe.

22. *A. loſes goods, and charges B.* with the ſtealing them. The conſtable *ſearches B.'s houſe, but finds none* of the goods, yet upon the charge of A. and at his requeſt, the *conſtable may arreſt B.* though he may in diſcretion refuſe, he having found no cauſe of ſuſpicion on his ſearch. Clayt. 44. pl. 69. Auguſt 1636. coram Barkley J. Ward's caſe.

23. In treſpaſs for *taking ſalmon*, the defendant *juſtified by the ſtat.* 1 *Eliz. cap.* 17. *for that* he was a conſtable, and that *the ſalmon were caught at an undue ſeaſon.* Upon a demurrer the plea was adjudged ill, becauſe he *did not ſhew a warrant*; for a conſtable cannot intermeddle without a warrant, nor the leet without a preſentment. 1 Salk. 407. pl. 1. Mich. 2 W. & M. in B. R. Atkinſon v. Crouch. [439]

24. Conſtable has no *power* to require aſſiſtance of whom he pleaſes in ſearching for *nets* and other engines to take conies, &c. Comb. 309. Mich. 6 W. & M. in B. R. The King v. Wildbore.

25. Whenever a conſtable may take up any perſon, it muſt be either an *actual breach of the peace, or upon good grounds of ſuſpicion*, and the *cauſe* of his ſuſpicion *muſt be ſhewn*, becauſe it is traverſable; and in caſe of ſuſpicion, where there is a *felony done*, there is no difference between a public and a private perſon; agreed. 11 Mod. 248. Mich. 1709. 8 Ann. B. R. in caſe of the Queen v. Tooly.

(F) His Authority. By Virtue of General Warrants.

1. IF a *conſtable by warrant of the peace from a juſtice of peace arreſts the party, and brings him to the juſtice*, who does not put him to find ſurety, action does not lie againſt the conſtable. Br. Faux Impriſonment, pl. 12. cites 21 H. 7. 22.

2. Conſtable on a *general warrant* againſt a perſon *may carry* him *before what juſtice he pleaſe*. 5 Rep. 59. b. Hill. 32 Eliz. B. R. Foſter's caſe.

3. Conſtables, by virtue of a general warrant, cannot *break open a houſe* to take a perſon unleſs in caſe of treaſon or felony. 1 Bulſt. 146. Trin. 9 Jac. Foſter v. Hill.

They may enter a houſe for caſe of felony or treaſon; per tot. Cur. Brownl. 211. Monrey v. Johaſon.

4. Aſſault and battery by huſband and wife againſt the defendant, a conſtable, and two others. The defendant juſtified, that the *wife was preſented in the leet to be a common ſcold*, and the *ſteward made a warrant to the conſtable, to puniſh her according to the*

the law, and the defendants went to the plaintiff's houſe to execute the warrant, and the *wife aſſaulted the conſtable*, wherefore *he commanded the other defendants to lay hands upon her*, which they did molliter. It was held by the juſtices to be a good juſtification, although they neither ſhew the day when the leet was holden, nor that the plaintiff's houſe was within the juriſdiction of the leet, nor ſhewed the warrants of the ſtewards, for that theſe were all but inducements to the juſtification. Mo. 847. pl. 1147. Hill. 13 Jac. B. R. Curtye's caſe.

3 Bulſt. 77, 78. S. C. & S. P. agreed per tot. Cur.

5. In falſe impriſonment, the defendant *juſtified as deputy to a conſtable*, to whom a juſtice of peace had directed his warrant, &c. and alſo pleaded the 7 Jac. cap. 5. and reſolved that he may plead the general iſſue. Mo. 845. pl. 1141. Mich. 13 Jac. Phelps v. Winchcombe.

6. *Juſtices of peace make a warrant to levy a poor's rate upon J. S.* which was *directed to the conſtables of the pariſh of A.* J. S. *had lands in A. upon which he had no chattels, but his houſe ſtood in the adjoining pariſh of B. in the ſame county in which J. S. had goods.* The *conſtables of A. levied theſe goods* by virtue of the ſaid warrant, and Holt Ch. J. ruled, upon evidence at the trial, at Hertford [440] ſummer aſſiſes, 1698, that the goods were well levied. Ex relatione. Ld. Raym. Rep. 735. Hampton v. Lammas.

7. It was ruled by Holt Ch. J. at Weſtminſter, 14 Feb. 1698, that a *conſtable may execute* the *warrant* of a juſtice of peace, &c. *out of his liberty, but* he *is not compellable* to execute it there. Ld. Raym. Rep. 736. .... v. Norman & al'.

8. A conſtable is an officer but for his own particular vill, and though he may *execute warrants in any other part of the county* (as any other perſon may) yet he is not compellable to do it, though the contrary is practiſed in London by cuſtom; per Holt Ch. J. Cumb. 446. Trin. 9 W. 3. B. R. Anon.

12 Mod. 180. Hill. 9 W. 3. the King v. Hewſon, S. P. and ſeems to be S. C. ——3 Salk. 98. pl. 1. S. C.

9. If a warrant be directed to a conſtable *by name*, he may execute it * *out of his precinct*; per Holt Ch. J. 1 Salk. 176. Trin. 11 W. 3. B. R. in caſe of Chorly Vill's caſe.

* Any where within the juriſdiction of the juſtice of peace. Arg. 11 Mod. 246. cites King v. Chandler. ——2 Ld. Raym Rep. 1299. Holt Ch. J. cites it as a point ſettled, Hill. 11 W. 3. in caſe of the King v. Chandler. ——2 Hawk. Pl. C. 86. cap. 13. ſ. 30. S. P.

On a warrant directed to all conſtables, it is the ſame as if directed to each particular conſtable, and *every one is bound to execute it in his own particular juriſdiction*; but if one conſtable returns, that he has *no diſtreſs in the county* at large, it is ill; per Holt Ch. J. Mich. 11 W. 3. 12 Mod. 316. The King v. Chaloner. ——2 Hawk. Pl. C. 86. cap. 13. ſ. 30. S. P. —— 12 Mod. 180. S. P. in caſe of the King v. Hewſon.

10. *But* if a warrant is directed *to all conſtables generally*, ſuch warrant cannot be executed by any conſtable out of the precincts of his own pariſh, for he is a conſtable no where elſe. Carth. 508. Hill. 11 W. 3. B. R. in caſe of the King v. Chandler.

11. One might take a warrant to *ſearch a ſuſpicious houſe upon a felony committed*, but it is at his peril to *execute it in due time, and at ſuſpected houſes only*, and though a conſtable may by virtue of ſuch warrant ſearch the houſe, and do all other things that his warrant

rant doth authorize him to do; yet if he *goes beyond his warrant*, by which any body is damaged, he is anſwerable for it; per Holt. 12 Mod. 344. Mich. 11 W. 3. at niſi prius.

12. When a conſtable *has a warrant*, he is tied up to that warrant to *act only as that directs*. 11 Mod. 248. Mich. 1709. in caſe of the Queen v. Tooly.

13. It ſeems that a conſtable both may and *ought to execute a general warrant to bring a perſon before the juſtice of peace, to anſwer ſuch matters as ſhall be objected againſt him on the part of the king*; for that the officer ought to preſume, that the juſtice has a juriſdiction of the matter which he takes conuſance of, unleſs the contrary appear, and it may often endanger the eſcape of the party to make known the crime he is accuſed of; *but* it ſeems to be very queſtionable, whether a conſtable can juſtify the execution of a general warrant *to ſearch for felons or ſtolen goods*, becauſe ſuch warrant *ſeems to be illegal* in the very face of it; for that it would be extremely hard to leave it to the diſcretion of a common officer, to arreſt what perſons, and to ſearch what houſes he thinks fit; and if a juſtice cannot legally grant a *blank warrant* for the arreſt of a ſingle perſon, leaving it to the party to fill it up, ſurely he cannot grant ſuch a general warrant which might have the effect of an hundred blank warrants. 2 Hawk. Pl. C. 81, 82. cap. 13. ſ. 10.

14. He cannot juſtify an *arreſt* by force of a juſtice's *warrant* for a *matter appearing to be out of his juriſdiction*. 2 Hawk. Pl. C. 81. cap. 13. ſ. 10.

15. He may juſtify by force of a *general warrant expreſſing no certain time*. 2 Hawk. Pl. C. 81. cap. 13. ſ. 10. [441]

16. It ſeems, that the *arreſt of an innocent perſon* may be juſtified by the warrant of a juſtice of peace particularly naming him. 2 Hawk. Pl. C. 82. cap. 13. ſ. 11.

(G) Pleadings.

1. FALSE impriſonment againſt R. who came vi & armis, and beat and impriſoned him; the *defendant ſaid that he was conſtable, and the plaintiff beat R. almoſt to death*, by which *hue and cry was levied, and the defendant would have arreſted him, and the plaintiff refuſed the arreſt, by which the conſtable took power to arreſt him, and the damage which he had was becauſe he diſturbed the arreſt; and* to the impriſonment he ſaid, that becauſe the plaintiff beat R. almoſt to death, *he impriſoned him by 4 days, till he perceived that R. would live, and then he let him at large*. Judgment, &c. and no more is thereof ſaid, and therefore it ſeems that it is a good plea. Br. Faux Impriſonment, pl. 6. cites 38 E. 3. 6. and ſee 38 H. 8. that a man cannot arreſt him after the affray is over without warrant; contra before the affray, and in the time of the affray, &c. and ſo of a juſtice of peace.

2. In falſe impriſonment the defendant *juſtified that he* was conſtable of B. and *appointed the plaintiff to watch* there, *and becauſe* 3 Le. 208. pl. 271. S.C. & S.P.

held accordingly by Wray Ch. J. — The conſtable cannot appoint any to watch at his pleaſure, but only in his turn; and in an action againſt him, he *ought to ſhew not only that he is an inhabitant* in the town, *but likewiſe that it was his turn* to watch; per Wray. 3 Le. 208, 209. pl. 271. Trin. 30 Eliz. S. C.

cauſe he refuſed he put him into the ſtocks; but upon demurrer, becauſe the defendant did *not ſhew that the plaintiff was an inhabitant there*, the court held clearly, that the plea was not good; for he cannot appoint a ſtranger to watch, neither by the ſtatute of Wincheſter, 13 E. 1. cap. 4. nor of 5 H. 4. cap. 3. and judgment for the plaintiff. Cro. E. 204. pl. 37. Mich. 32 & 33 Eliz. B. R. Stretton v. Brown.

3. B. was indicted, for that being conſtable of the hundred of H. he *arreſted one for burglary, and after at D. in the ſame county*, let him eſcape, and becauſe *no place was alleged where the arreſt was*, and if he ſhould plead not guilty, the venue ſhould be as well from the place where the arreſt was made as from the place of the eſcape, the indictment was held void, and the party was diſcharged. Cro. E. 200. pl. 25. Mich. 32 & 33 Eliz. B. R. Bouche's caſe.

4. P. was indicted, for that he being a conſtable *arreſted J. S. for felony, and voluntarily let him go at large.* Exception was taken to the indictment, becauſe he does *not ſhew when the felony was committed;* for the other may traverſe it, and cites 8 E. 4. 3. And alſo, he does *not ſhew when the felony was committed;* for it may be it was before the general pardon, and then the permitting him to go at large is no felony; wherefore for theſe reaſons the indictment was held to be inſufficient by Clench and Fenner, cæteris abſentibus. Cro. E. 752. pl. 10. Paſch. 42 Eliz. B. R. Plowman's caſe.

5. Exception to an *indictment for not ſerving as conſtable*, according to the order of the juſtices of ſeſſions, was *for not alleging any place where he was requeſted to take the oath*, and quaſhed, eſpecially being on order repealed by the juſtices of aſſiſe on appeal. Keb. 418. pl. 133. Mich. 14 Car. 2. B. R. The King v. Chute.

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6. In replevin, the defendant *avows for diſtreſs* for pain aſſeſſed in leet, *for not ſerving* there *as conſtable, nor finding ſufficient deputy, according to the cuſtom, that he that is choſen muſt ſerve per ſe, or another;* and the *preſentment is, that the plaintiff ſhould find a ſufficient perſon to ſerve for him*, not giving him liberty to ſerve himſelf, for which cauſe Jones for the plaintiff demurred. Judgment for the plaintiff, niſi. Keb. 416. pl. 127. Mich. 14 Car. 2. B. R. Eſcourt v. Stokes.

In all *actions concerning a fine or amercement for refuſing to ſerve the office* of conſtable, whereto he is appointed, it is adviſable, in all pleadings in any action concerning ſuch fine or amercement, and in all indictments for ſuch refuſal, ſpecially and *expreſsly to ſet forth the manner of every ſuch election*, appointment, notice, and refuſal, *and before whom the court was holden.* 2 Hawk. Pl. C. 64. cap. 10. ſ. 46.

7. It was moved to quaſh a preſentment, for refuſing to be ſworn conſtable of an hundred, becauſe it did *not mention before whom the ſeſſions was held;* and Twiſden ſaid, that the clerk of the peace ought to be fined for returning ſuch a preſentment, and the preſentment was quaſhed accordingly. 1 Mod. 24. pl. 63. Mich. 21 Car. 2. B. R. The King v. Vaws.

8. H. was *indicted, that he being* a fit perſon, &c. was tali die *elected to be conſtable*, and afterwards, &c. *had notice*, but from that day to the time of the indictment *non ſuſcepit*, &c. *ſed totaliter neglexit*, &c. Pemberton moved to quaſh the indictment, for that he was *not ſummoned to appear before a juſtice of the peace to take the oath*, &c. and cited BRIG's CASE, Allen, 78. Per Holt Ch. J. by the new ſtatute 13 & 14 Car. 2. two *juſtices* of the peace may make a conſtable in default of the leet, but then they ſhould *iſſue their warrant*, ſignifying that he was elected conſtable, and requiring him to take the oaths, &c. quaſhed niſi. Comb. 328. Trin. 7 W. 3. B. R. The King v. Halford. 5 Mod. 96. the King v. Harpur, ſeems to be S. C. but not ſaid whether quaſhed or not.

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For more of Conſtable in general, ſee Mandamus (K), Robbery (M), and other proper titles.

Contempt.

(A) What ſhall be ſaid a Contempt.

1. A Contempt *is a diſobedience to the court, or* an *oppoſing or deſpiſing the authority, juſtice or dignity thereof.* It commonly conſiſts in a party's *doing otherwiſe than he is enjoined* to do, or *not doing what he is commanded* or required by the proceſs, order, or decree of the court. Sometimes it ariſes by one or more, their oppoſing or *diſturbing the execution* or ſervice *of the proceſs* of the court, or uſing force to the party that ſerves it. Sometimes *by uſing words importing ſcorn*, reproach, or diminution of the court, its proceſs, orders, officers or miniſters, upon executing or ſerving ſuch proceſs or orders. It is alſo a contempt to *abuſe* [443] *the proceſs* of the court, by wilfully doing any wrong in executing it, or *making uſe of it as a handle to do wrong*; or to do any thing under colour or pretence of proceſs or authority of this court, without ſuch proceſs or authority. Pr. Reg. in Canc. 99, 100.

2. *T. of F. went armed in the palace*, which was ſhewn to the counſel of the king, by which he was taken and diſarmed before Juſtice Shard, and *committed to the priſon of the Marſhalſea, and could not be bailed till the king had ſent his will*; and yet it was ſhewn that the lord of P. menaced and aſſaulted him the night before, and it was at Paul's, & non allocatur; for he ſhall have ſurety againſt him, and the lord of T. was made to appear, and

commanded that he ſhould not meddle, who promiſed it; quod nota. Br. Contempts, pl. 6. cites 24 E. 3. 33.

3. If *attorney does not put in his warrant of attorney till judgment or verdict*, this is a contempt, and therefore he was impriſoned. Br. Contempts, pl. 21. cites 38 E. 3. 8. & 41 E. 3. 1.

4. In *quare impedit, if writ is directed to the biſhop*, who *will not receive the preſentee*, this is a contempt to the king, and the plaintiff ſhall recover damages againſt him, per Thorp. Br. Contempts, pl. 5. cites 38 E. 3. 12.

5. Proceſs of contempt iſſued *againſt a prior for not admitting the valet of the king to a corody*, and he came and *traverſed the patronage of the king*, which was *found againſt him*, and his temporalties were ſeiſed into the hands of the king for the contempt. Br. Contempts, pl. 18. cites 38 Aſſ. 22.

6. A *man was purſuing his buſineſs before the juſtices of aſſiſe*, and one *R. aſſaulted him in the preſence of the juſtices*, in diſturbance of his ſuit, *and by force and arms took his feme from him, and carried her away with his goods and chattels*, and was found guilty of all, and was committed to the ward of the ſheriff; and of the fine, and of the reſt of the puniſhment, the court would have advice of the counſel of the king, if he ſhould loſe his hand or not, quære ideo. Br. Contempts, pl. 9. cites 39 Aſſ. 1.

7. *Steward of a leet took indictment of robbery in a leet done at D. where there is no ſuch vill in this county, but in another county, and* alſo *indictment of the death of a man which does not belong to the leet*, and the party rendered himſelf, and had writ of the Chancery to remove the indictments into the Chancery, and from thence into B. R. and the lord of the leet ſent the indictment, and becauſe he had taken indictment without warrant, and alſo of the death of a man, which does not belong to the leet, and ſo purpriſed upon the king, capias iſſued againſt the lord to attach him to make fine to the king for him and his ſteward for the contempt, inaſmuch as he was attainted by his own return of the indictment, and he came and made fine to 40 s. quod nota. Br. Contempts, pl. 12. cites 41 Aſſ. 30.

Br. Parliament, pl. 35. cites S. C.

8. *Office* was *found that H. of H. was aiding to O. M. enemy of the king, and was ſeiſed of ſuch land*, &c. and after *H. came into parliament and denied that he was aiding*, &c. *and had reſtitution, and writ to N. to make livery*, who *returned that T. S. was diſturbed & ſicut alias & pluries & cauſam*, &c. and writ to anſwer the king of the contempt, and he could not excuſe himſelf of the contempt, by which he made fine; and it is a good *plea that he had no notice of the contempt till ſuch a day, and then he avoided*; for by the juſtices he is excuſed before notice, and yet it was by act of parliament, by which *iſſue was taken for the king that he occupied after notice*, and he who had reſtitution prayed judgment of the iſſues & non allocatur; for *this is a writ of contempt for the king only*, and H. is not party here, but he ſhall ſue in the chancery, for this is matter. Br. Contempts, pl. 13. cites 43 Aſſ. 29.

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9. A *ſheriff returned* upon capias, that *he had taken the body, and put him into the caſtle of D. and the abbot of M. took him out of the caſtle*,

caſtle, and capias iſſued againſt the abbot; quod nota. Br. Contempts, pl. 16. cites 13 R. 2. & Fitzh. tit. Return, 74.

10. If a *man commences ſuit againſt me in bank, and after arreſts me in London*, &c. by which *I bring corpus cum cauſa; and am diſmiſſed*, if this matter may appear, he ſhall be impriſoned for the contempt. Br. Contempts, pl. 17. cites 9 H. 6. 55.

11. *If a juror appears and is challenged, and is tried indifferent, and* after *makes default when he ſhould be ſworn*, it is a contempt; and he ſhall make fine to the value of the land ſued for per annum. Br. Contempts, pl. 8. cites 36 H. 6. 27. Br. Fine pur Contempts, pl. 28. cites S. C.

12. *Non moleſtando iſſued to the mayor of Calice*, for the tenants of Mark and Oye there to go toll free, out of Chancery returnable in B. R. and *at the plur. nor cauſam ſignific. the mayor would not return the writ*; and by the opinion of the Court clearly, attachment ſhall iſſue againſt the mayor, directed to the lieutenant of Calice, and writ of error lies in B. R. of the judgment given in Calice. Br. Contempts, pl. 7. cites 21 H. 7. 31.

13. The attorney *was ordered to ſtay proceedings*, but the *defendant proceeded*; injunction to bring in the money levied, and to anſwer the contempt. Cary's Rep. 62. cites 2 Eliz. fol. 92. Sedgewick v. Redman.

14. Walter Jeames made oath, that he *hanged a ſubpœna on the door* of one Stacy Barry's widow; and that the *defendant uſed to reſort thither*, as he heard reported before that time, who hath not appeared; therefore an attachment was awarded. Cary's Rep. 79. cites 18 & 19 Eliz. James v. Morgan.

15. The defendant was *examined upon interrogatories* upon the breach of an order of this Court, and *departed without licence*, therefore an attachment. Cary's Rep. 148. cites 21 Eliz. Boyle & Hucks v. Vivean.

16. Attachment againſt *witneſſes ſerved to teſtify*. Cary's Rep. 161. cites 21 Eliz. Turner v. Warren.

17. Becauſe the defendant maketh *oath that he cannot anſwer without ſight of writings in the country, and then puts in a demurrer*, therefore an attachment is awarded againſt him. P. 21 Eliz. Toth. 77. Farmer v. Fox.

18. A. made oath for the ſerving of a ſubpœna on a *witneſs to teſtify* on the plaintiff's behalf before certain commiſſioners, who hath not ſo done; therefore an attachment is awarded againſt the defendant. Cary's Rep. 115. cites 21 & 22 Eliz. Middleton v. Speright.

19. A *commiſſion to anſwer*, he *returned a demurrer*, therefore attachment. Cary's Rep. 142. cites 22 Eliz. Paine & als' v. Carew. Cary's Rep. 158. S. P. Farmer v. Fox. 21 Eliz.

20. A. brought debt in the Exchequer in the court of Common Pleas there, and pending this action he *commenced other action in B. R. againſt the ſame party for the ſame cauſe*; per Shute this is no contempt, but Manwood and Fanſhaw contra, and ſhewed precedents. But when a plea is removed out of a *baſe court* by writ of privilege, and the party plaintiff in the baſe court counts in B. R. this is no contempt, and is at liberty to ſue where he pleaſe. Savil. 14. pl. 36. Paſch. 23 Eliz. Anon.

21. W. cauſed a leaſe to be made by a ſtranger to B. of a houſe for years, and then cauſed B. to bring ejectment againſt J. S. whom he alſo procured to anſwer to the action, and paid the fees to the attorneys of both ſides, and this was in order and with an intent to get W. R. out of poſſeſſion; and becauſe W. *refuſed to anſwer interrogatories* he was attached as for a contempt. It was [445] moved for W. that here was nothing executed, but all reſted in intent only; but Manwood Ch. B. held that there was more than intent, and *though there was no falſity to the party, yet it is an abuſe to the court*, viz. a practice to play all parts and to abuſe the officers, and Clench ſaid, it ought to be puniſhed ſeverely; whereupon W. was committed to the Fleet and fined, but as to pillory they would adviſe. Savil. 31. Mich. 24 & 25 Eliz. pl. 73. White's caſe.

22. When a *ſtatute impoſes a penalty* for a contempt, as the contempt is *perſonal*, ſo is the penalty. Arg. Lane, 107. Hill. 8 Jac.

23. *After an habere facias ſeiſinam* awarded, executed, returned, and *filed*, the *defendant re-entered and ouſted the plaintiff*; an attachment was awarded upon affidavit. 2 Brownl. 253. Paſch. 9 Jac. Gallop's caſe.

24. This Court directed a trial, and the defendant to avoid the order *procures an injunction out of the Exchequer*, the defendant was committed. Toth. 135. cites Tr. 14 Car. Symmes v. Plowden.

25. A man was committed for *terrifying a witneſs* who was to be examined at a commiſſion. Toth. 102, 103. cites Tr. 15 Car. Partridge v. Partridge.

26. If a *writ of error* to reverſe a judgment in this court is *brought and allowed, and notice given* of it to the attorney of the other ſide, *and bail put in*, and the *attorney does notwithſtanding ſue out execution*; this is a contempt to this Court. (Trin. 24 Car. B.R.) But it is no contempt if notice be not given to the attorney of the writ of error brought, and bail put in as the ſtatute requires. L. P. R. 306. cites Mich. 1649. B. S.

27. A man ſhall not be in contempt by *non-performance of any rule of court*, without an actual ſervice of it upon the party, or its being left at his houſe. Keb. 79. pl. 53. Trin. 13 Car. 2. B. R. Prittiman v. Dove.

28. No proceſs of contempt is to be taken out againſt a defendant *for diſobedience of an order*, unleſs he be *ſerved with a writ of execution of that order* under the ſeal of the Court. 3 Chan. Rep. 23. Hill. 1667. Moyſer v. Peacock.

29. Defendant cauſed the plaintiff to be *arreſted* 2 days before the commiſſion for examination of witneſſes and was in execution ordered to be diſcharged, and the defendant to pay coſts and be at the charge of a new commiſſion. 2 Chan. Rep. 22. 20 Car. 2. Smith v. Holman.

30. Where the original cauſe, on which the proceſs is grounded, is matter *of which the court has no cognizance*, there a *reſcous* can be no contempt. Vent. 1. Mich. 20 Car. 2. B. R. Sparkes v. Martin.

31. A man arreſted on a *latitat* gave a *warrant of attorney* to confeſs a judgment, and preſently after *ſnatched* it out of his hand, to whom it was delivered, and tore off the ſeal; the court ſeemed to incline, in regard it was to confeſs a judgment in this court (B. R.), it was a contempt on which an *attachment* might be granted. Vent. 3. Mich. 20 Car. 2. B. R. Anon.

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32. If a *witneſs will not appear* and be examined upon the return of the ſubpœna, the party may take an attachment againſt ſuch witneſs, and if examined on the other ſide ſuppreſs his depoſition. 3 Ch. Rep. 65. per Maſter of the Rolls, 1670. Anon.

33. One delivered a *copy of injunction* to the defendant, and ſhewed him the writ under ſeal, but defendant deſired to compare it with the original and ſee how far he was concerned in it, which being denied, defendant thereupon deliverd back the copy, but diſturbed the plaintiff's poſſeſſion. The ſerver of the copy ſwore he ſhewed it to the defendant under ſeal. Per Ld. Keeper, it is a *ſervice* ſufficient to ground a contempt, and that notwithſtanding it was *irregularly iſſued* it ought to be obeyed. 2 Chan. Caſes, 203. Mich. 26 Car. 2. Woodward v. King. [446]

34. *Proceſs was miſ-ſerved* by delivering the proceſs to a wrong perſon, as it appears upon commiſſion to examine the contempt complained of. Per Ld. Chan. there is no reaſon defendant ſhould loſe her liberty upon a miſtake of ſerving proceſs. 2 Chan. Caſes, 100. Paſch. 34 Car. 2. Hammond v. Shelly.

35. Though a *proceſs is irregularly iſſued* it may be a contempt to diſobey it. Prac. Reg. in Canc. 100.

36. Quarter ſeſſions committed Ld. Preſton for *refuſing* to be ſworn *to give evidence to the grand jury on a bill for high treaſon.* But on a habeas corpus the court bailed him. Per Holt it is a great contempt, and had he been there, he would have fined him, and committed him till he paid the fine. 1 Salk. 278. pl. 2. Mich. 3 and 4 W. and M. in B. R. The King v. Ld. Preſton.

37. *Upon a rule of reference* to *arbitrators* they *make an award* for the plaintiff, and a *ſtranger by contrivance defeats the party of the benefit* of this award. Per Cur. it is a contempt to the Court, and an attachment ſhall be granted, for it ſhall not lie in any one's power to defeat the rules of this Court, or render them ineffectual. 2 Salk. 596. pl. 1. Mich. 8 W. 3. B. R. Sir James Butler's caſe.

A ſubmiſſion to an arbitration was by rule of Court, and after the arbitrators had made ſome progreſs in the matter, the *party came and ſnatched away the papers, and ſo hindered farther proceedings*; and per Holt, there ought to be an attachment, if the party did not enlarge the rule and pay coſts. 7 Mod. 8. Paſch. 1 Ann. B. R. Davila v. Dalmanſer.

38. A *rule* was made *at niſi prius to refer a matter to the 3 foremen of the jury*, and that the plaintiff ſhall have a verdict for his ſecurity; after the award made, an attachment lies for *not obeying the rule* of Court. 1 Salk. 84. pl. 3. Mich. 11 W. 3. B. R. Hall v. Miſter.

39. An *infant brought appeal of murder*, and D. was admitted as prochein amy after the writ was ſued out and before it was returnable. The *under-ſheriff at the inſtance of the infant and other*

relations, but not of the prochein amy, delivered back the writ to the infant and his relations. This is a contempt in the ſheriff for which he was fined and committed, notwithſtanding his clerk in court offered to undertake for the fine. 1 Salk. 176, 177. 12 W. 3. B. R. Toler's caſe.

40. *Words* contra bonos mores *ſpoken of a magiſtrate in court* is a contempt, for which he may be fined. 2 Salk. 698. pl. 1. Hill. 2 Ann. B. R. in caſe of the Queen v. Langley.

41. A. *confeſſed* on interrogatories that a *copy of a writ* being ſerved upon him, and the writ ſhewed him, and *before he knew the contents* of it, or out of what court it was, he had ſpoke with contempt, this was adjudged a contempt. 6 Mod. 43. Mich. 2 Ann. B. R. The Queen v. Croſs.

S. C. cited 3 Wms.'s Rep. 117.

42. An *infant was inveigled from her guardian* (though he was *not aſſigned by the court) and married to W.* yet both the ſaid *W. and the parſon, and the agents, were all committed* by the Maſter of the Rolls, and the order was afterwards confirmed by the Ld. Harcourt. Cited by the Lord Commiſſioner Jekyl, 2 Wms.'s Rep. 112. [and ſaid in Marg. to be 22 May, 12 Ann. Hannes v. Waugh].

43. A rule was made to ſhew cauſe why an *attachment* ſhould not be granted *for diſobeying a tolt.* 10 Mod. 349. Hill. 3 Geo. 1. B. R. Burgh v. Blunt.

44. The *inſerting an advertiſement in the news-papers, offering a reward of* 100 l., &c. *to any who will diſcover,* and make legal proof of a marriage in queſtion in the Court of Chancery, and which marriage had been before adjudged good in the Spiritual Court,
[447] and alſo in the Court of Delegates, and a verdict given at the bar of the C. B. in its favour, was by Ld. C. Parker held to be a reproach to the juſtice of the nation, and a thing inſufferable, and a contempt of the Court, and that in juſtice the inſerter muſt ſtand committed. Wms.'s Rep. 675. Mich. 1720. Pool v. Sacheverel.

45. *Suing the bail* below, while a writ of *error* is *pending in parliament,* is a contempt and breach of privilege. Wms.'s Rep. 685. Hill. 1720. in the Houſe of Lords, Throgmorton v. Church.

46. *Encouraging an infant ward of the Court of Chancery to go from his committees,* under whoſe care the Court had placed him, is a contempt. Wms.'s Rep. 697. Paſch. 1721. cites it as Dr. Yalden's caſe.

47. If in an *indictment the proſecutor and defendant enter into a rule by conſent, that the maſter ſhall take* 48 *out of the freeholder's book, and each party ſhall ſtrike out* 12 of them, *and that the ſheriff ſhall return the reſidue* of the 48 *to try the cauſe at the aſſiſes,* and at the trial the *defendant challenges the array for want of hundredors,* it is a contempt, and an attachment ſhall be granted. 2 Ld. Raym. Rep. 1364. Paſch. 10 Geo. B. R. The King v. Burridge.

48. *Marrying an infant ward of the Court* is a contempt, though the parties concerned in ſuch marriage had *no notice* that the infant was a ward of the Court. 3 Wms.'s Rep. 116. Trin. 1731. Herbert's caſe.

(B) Puniſhment thereof.

1. FOR contempt the *defendant ſhall be impriſoned*, and ſo it was adjudged there; quod nota. Br. Contempts, pl. 2. cites 44 E. 3. 24. Br. Corody, pl. 2. cites S. C. and 50 Aſſ. 6.

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2. The *original of commitment for contempt ſeems to be derived from* the *ſtatute Weſtm.* 2. *cap.* 39. for ſince where the ſheriff was to impriſon thoſe that reſiſted the proceſs, the judges that awarded ſuch proceſs muſt have the ſame authority to vindicate it; hence if any one offers any contempt to the proceſs, either by word or deed, he is ſubject to commitment during pleaſure, viz. a qua non deliberentur ſine ſpeciali præcepto domini regis; ſo that notwithſtanding the ſtatute of magna charta, that none are to be impriſoned, niſi per legale judicium parium ſuorum, vel per legem terræ, this is one part of the law of the land to commit for contempts, and confirmed by this ſtatute. Gilb. Hiſt. of C. B. 20, 21.

3. Upon information that the defendant diſobeyed a writ of ſubpœna brought to be ſerved againſt her, and that they which ſhould have ſerved the ſaid writ were *beaten and wounded*, therefore an attachment was granted againſt the defendant, and a ſubpœna againſt him, who made the aſſault returnable immediate. Cary's Rep. 54. cites 1 Eliz. fol. 90. & 97. Rove v. Weſt.

4. Attachment for *not performing a decree.* Cary's Rep. 75. cites 18 & 19 Eliz. Leake v. Marrow.

5. Holgate makes oath, he *left an injunction in the houſe of* the defendant, and that the defendant, Elizabeth White, Thomas Crimore, and Robert Watkins, have diſobeyed the ſame, therefore an attachment is awarded againſt them. Cary's Rep. 82. cites 19 Eliz. Holgate & Ux' v. Grantham.

6. The plaintiff *ſhewed the defendant a writ*, but did deliver him neither note of the day of his appearance, neither did the ſame appear unto him by the ſchedule, label, or any other paper, and the [448] *defendant appearing found no bill*; it is ordered the defendant be allowed good coſts, and an attachment againſt the plaintiff for ſuch ſerving. Cary's Rep. 83. cites 19 Eliz. Brightman v. Powtrell.

7. The *defendant* being *in priſon*, and not in the Fleet, *would not make a better anſwer*, though *two ſubpœna's were ſerved*; my Ld. Keeper ſaid, let that be depoſed, and he ſhould be *ſhut up cloſe priſoner in what priſon ſoever* he was. Toth. 70. 40 Eliz. Bicket v. Waller.

8. A judgment-creditor brought a *ſci. fa. againſt the principal after the death of the bail, who had paid the debt, and had a releaſe and ſatisfaction acknowledged*: the whole Court held, that theſe proceedings were undue, and in contempt of the Court, and therefore an attachment was granted againſt the creditor. 2 Bulſt. 68. Paſch. 11 Jac. Higgins v. Sommerland.

9. In *ejectment* to be tried at the bar, the defendant *pleaded infancy on purpoſe to put off the trial*, but it was found by ſufficient proofs, and by ſearching the regiſter, that the *party was* 63 *years old*,

old, and thereupon an attachment was granted againſt him. 2 Bulſt. 67. Mich. 11 Jac. Lord v. Thorneton.

10. *Libel* in the Spiritual Court *for tithes*, to which the defendant pleaded a modus, and thereupon a *prohibition* was granted, and afterwards the ſame perſon *libelled for tithes in the year following*. It was agreed by the whole Court, that if the libel had been for the ſame tithes after the prohibition granted, an attachment ſhould be againſt him for his contempt. 2 Bulſt. 289. Mich. 12 Jac. B. R. Downes v. Hackſeby.

11. About Mich. 9 Car. a *fine* was impoſed and parties *pilloryed and impriſoned* and laid *in irons* for abuſing a man for ſerving a ſubpœna in B. R. Toth. 167. Barker v. Shepherd.

12. The *plaintiff, after a verdict found for him, arreſted the defendant, to the intent that he might have him in cuſtody when the judgment was entered, and for no other cauſe;* and this appearing to the Court upon his own confeſſion an attachment was granted againſt him. Sty. 211. Paſch. 1649. B. R. Lamb v. Duff.

13. The defendant was *arreſted by a latitat directed to the ſheriff of Wilts, and thence carried to M. where he was arreſted again by a ſerjeant of that town by proceſs out of the corporation-court*, and the *plaintiff proceeded againſt him in that court, and not upon the latitat*, the court granted an attachment againſt him, niſi, &c. and an habeas corpus cum cauſa. Sty. 239. Mich. 1650. B. R. Brian v. Stone.

14. A rule was made to ſhew cauſe why an attachment ſhould not go *againſt a juſtice of peace who proceeded upon an indictment of forcible entry after a certiorari delivered, and fined the party;* upon ſhewing cauſe, the Court ordered that he ſhould be examined upon interrogatories, and return the certiorari and reſtore the fine. Sty. 359. Mich. 1652. B. R. Staple's caſe.

15. A *witneſs*, who *attended the court in a cauſe* there *to be tried, was arreſted*, whereupon a ſuperſedeas was granted to diſcharge him, and a rule to ſhew cauſe why there ſhould not be an attachment againſt the perſon who arreſted him. Sty. 395. Mich. 16. B. R. Cullen's caſe.

16. *Proceſs* of contempt is not *to be taken out* againſt a defendant for diſobedience of an order, unleſs he be ſerved with a writ of execution of that order under the ſeal of the court. 3 Ch. R. 23. Hill. 1667. 23. Anon.

17. Plaintiff told the defendant he was come to ſerve him with an *order from the maſter of the rolls;* whereupon the defendant ſaid, *the maſter of the rolls kiſs my* —. The maſter ordered an attachment for the familiarity, but ſaid he believed the Lord Keeper would have committed him. 3 Chan. Rep. 41. Hill. 22 Car. 2. Witham v. Witham.

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18. In action for falſe impriſonment it was adjudged, that an order of the court of chancery, without a writ of attachment, is not a ſufficient *warrant to take and impriſon* a perſon for a contempt, and in ſuch caſe the uſual courſe is to award a writ. 2 Saund. 182. Mich. 22 Car. 2. Furlong v. Bray.

2 Keb. 711. pl. 87. S.C. adjudged for the plaintiff. —— S. P. adjudged accordingly; it ſhould have been an attachment, and the defendant ſhould have pleaded quoddam breve de attachamento, &c. Mod. 272. pl. 24. Trin. 29 Car. 2. Anon.

19. *Examin-*

19. *Examination* ordered of one in contempt for ſuffering goods, ordered to be ſecured, to be carried away, he being there with others at the time. 2 Chan. Caſes, 82. Hill. 33 & 34 Car. 2. Harvey v. Harvey. 3 Chan. Rep. 87. S. C. but S. P. does not appear.

20. If the defendant *hath not appeared*, this Court cannot decree the *bill pro confeſſo*, but a *ſequeſtration* ſhall go againſt his real and perſonal eſtate until he clears his contempt. 2 Chan. R. 283. 35 Car. 2. Nodes v. Battle.

21. For any direct and poſitive contempt a party may not only be taken into cuſtody, but *committed to the Fleet* during the pleaſure of the Court. But for a bare contempt in not doing ſomewhat, then only till he obey and perform; for a contempt in doing ſomewhat againſt the order of the Court is accounted much greater than omitting to do ſomewhat commanded, ſeeing the one is wilful, the other not always ſo; and beſides what is only not done may be done, but what is once done cannot be undone, though its effects may often be made to ceaſe, or reparation may be made. Pr. Reg. in Canc. 100.

22. Where a defendant was taken or *brought in upon a commiſſion of rebellion*, he was forthwith committed; becauſe he had ſate out all the ordinary proceſs of contempt. Pr. Reg. in Canc. 101.

23. On a decree for payment of money after a writ of execution and attachment returned, the Court would not give leave for *defendant to be examined*, unleſs he gives *ſecurity* to abide the decree. 2 Vern. 91. pl. 87. Mich. 1688. Roper v. Roper.

24. When a man is fined for a contempt to a rule of Court, the *party grieved* can have but *a third part of the fine*, and it muſt be returned into the Exchequer, before a *levari facias*; per Holt. Ch. J. And though Sir Samuel Aſtrey ſaid he had known ſeveral precedents where a levari facias for a fine hath iſſued out of the Crown-Office, Holt ſaid that had been much queſtioned. Cumb. 250. Paſch. 6 W. & M. in B. R. The King v. Cudmore.

25. *Rule* was made to *put off a trial ſuper ſolutione cuſtag'* and the coſts not being paid, and the trial put off, the plaintiff moved for an attachment, but had it not; for the Court ſaid he ſhould have gone on. 1 Salk. 83. pl. 2. Mich. 10 W. 3. B. R. Anon.

26. Sheriff may take *bail* on an attachment of contempt, but the proſecutor may refuſe to accept it. 2 Salk. 608. 13 W. 3. B. R. The King v. Daws. 12 Mod. 579. S. C. ——On an attachment *in execution* after a decree, the ſheriff may inſiſt on ſecurity proportionable to the duty, but *in proceſs* it is only 40 l. penalty. Per Guidot Regiſter. Ch. Prec. 110. Paſch. 1700. Danby v. Lawſon.

27. Attachment was granted for *proceeding after a certiorari* delivered. 7 Mod. 38. Trin. 1 Ann. B. R. The Queen v. the Mayor of Carliſle.

28. On a motion for an attachment againſt the defendant, upon affidavit made, that he being ſerved with a rule of Court, to ſhew cauſe why an information ſhould not be filed againſt him, ſaid, *he did not care a fart for the rule of Court*; though it was inſiſted for him, that he ſhould be firſt heard to ſhew cauſe againſt it,

it, yet per totam Curiam he ſhall anſwer in cuſtody, for it is to no purpoſe to ſerve him with * a ſecond rule who had deſpiſed the firſt; ſo he was brought in and bound in a recognizance to anſwer interrogatories. 1 Salk. 84. pl. 4. Hill. 9 Ann. B. R. Anon.

29. The ſheriff cannot take a *bail bond upon an attachment* for a contempt; for it is not within the words or intent of the ſtat. 23 H. 6. and judgment accordingly. Comyns's Rep. 264. pl. 145. Mich. 4 Geo. C. B. Field v. Workhouſe.

30. A motion was made, that one committed for a contempt might be *bailed to anſwer interrogatories*, but the motion was not granted for default of ſureties. And Mr. Maſterman ſaid, that formerly the party's own recognizance uſed to be thought ſufficient, but *the Court of late years has always inſiſted upon ſureties*. 2 Barnard. Rep. in B. R. Mich. 6 Geo. 2. B. R. The King v. Clendon.

(C) Attachment ſtayed. In what Caſes.

1. THE plaintiff ſerved one Rolfe with a *ſubpœna ad teſtificandum*, and after he was ſerved, before he could be examined, Rolfe was *preſſed for a ſoldier*. Upon oath made hereof attachment was ſtayed. Cary's Rep. 58. cites Eliz. fol. 3. Humble v. Mabbe.

2. If defendant is in contempt *for not anſwering*, and on motion he *obtains time* to anſwer, yet if it be not expreſsly ordered, that all contempts ſhall be ſtaid, the plaintiff may go on, and *proſecute* the defendant for not anſwering. Vern. 104. pl. 91. Mich. 1682. Anon.

3. Upon a habeas corpus and certiorari to the ſeſſions, the return was, that it was for *contemptuous words*; but per Cur. it is ill, becauſe they ſhould be *expreſſed what*, and after filing the return there can be no amendment. Vent. 336. Paſch. 31 Car. 2. B. R. Anon.

4. Where a man is *arreſted* upon an attachment, the *contempt* ſhall hold good, though no affidavit be filed at the time of taking forth the attachment, if an *affidavit be filed* before the return of it. Vern. 172. pl. 166. Trin. 35 Car. 2. Anon.

5. After a *writ of execution* an *attachment* iſſued, and then an *injunction for poſſeſſion*, and afterwards when a *writ of aſſiſtance* was moved for, the defendant, upon debate, was *admitted to appear and be examined*. Arg. 2 Vern. 92. Mich. 1688. cites it as the Duke of Norfolk's caſe.

6. The queſtion was, whether defendant could be heard before he had cleared his contempts, though he offered to pay all plaintiff's demands, principal, intereſt, and coſts. Ordered, that the defendant *bring before the maſter all that is due for principal, intereſt, and coſts, and then to be at liberty to move to have his ſequeſtration diſcharged*, but the ſequeſtration not ſuſpended in the mean time. MS. Tab. Feb. 20. 1719. Lord W. v. Oſbaldiſton.

(D) Attachment and Contempt discharged; by what. And how.

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1. J. C. was *served* with a subpœna *by the name of R. C.* and J. W. made oath, that he served a subpœna upon R. C. and an attachment was served upon J. C. and ordered that he should be discharged thereof, and might exhibit his bill into this court against [451] the said J. W. and call him in by process to answer his perjury. Cary's Rep. 103. cites 20 Eliz. Clegge v. Warberton.

2. An attachment and other process of contempt issued out of this court, for not returning the defendant's answer by commission, is discharged, paying the ordinary fees, *because the plaintiff named one commissioner who refused to join* with one of the defendant's commissioners in taking the defendant's answer, and a new commission is granted to indifferent commissioners named by the defendants. Cary's Rep. 113. cites 21 & 22 Eliz. Marshall v. Harwood.

3. G. P. made oath, that where the plaintiff served a *subpœna* upon him *to appear before commissioners to testify* on the plaintiff's party, he the said plaintiff did *not give or tender* him the said G. *any money for his charges*, and also, that he *was sick* then, and not able to travel; therefore ordered the said G. be discharged of the process of contempt gotten out against him for not being examined. Cary's Rep. 141, 142. cites 22 Eliz. More v. Woreham.

4. The defendant took out a *commission* to take his *answer* in the country, and *returned a demurrer*, therefore the plaintiff took out an attachment, which this Court liked well, for that the defendant did not directly answer, yet in regard of an *oath made of the defendant's* impotency, a *new commission* is granted to take his answer, and discharged of the attachment, paying the ordinary fees. Cary's Rep. 142, 143. cites 22 Eliz. Pain & al' v. Carew.

5. A rule was made to shew cause why an attachment should not be granted against an attorney, who was mayor of N. for *issuing out an execution upon a judgment* obtained there *after a writ of error delivered to him and allowed*; but he proving that he was informed by counsel, that the record was not removed thence, by reason of a defect in the writ of error, he was discharged. Sty. 321. Hill. 1651. B. R. Mayor of Newbury's case.

6. Upon a motion for an attachment for that the defendant had *put one out of possession who was put in by virtue of an habere facias possessionem*; it was denied, because it was insisted on by the defendant, that he *came in by an elder judgment, and an extent upon it.* Sty. 318. Hill. 1651. B. R. Fortune v. Johnson.

7. 13 *Car.* 2. *st.* 2. *cap.* 2. *s.* 4. *Persons taken upon an attachment for contempt, not to be discharged without a lawful supersedeas.*

8. *Subpœna*

8. *Subpœna* in nature of a ſci. fa. *to revive a decree;* the *defendant does not anſwer,* but is *examined upon interrogatories* to clear his contempt. 2 Freem. Rep. 128. pl. 153. Trin. 1677. Anon.

9. Proceſs iſſued till *proclamation was returned;* then came the *general pardon.* The *defendant appeared and demurred.* The plaintiff moved to ſet aſide the demurrer; for though the contempt was pardoned, yet the delay was no leſs to the plaintiff. The lord keeper ſaid that as to the contempt, the defendant ſtands rectus in curia, and conſequently *all contempts are likewiſe pardoned,* and therefore ordered them to proceed on demurrer. Chan. Caſes, 238. Mich. 26 Car. 2. Anon.

10. An attachment after a decree for diſmiſſion is in nature of an execution at law, and *a general pardon may pardon the contempt, but not the debt.* Fin. Rep. 253. Trin. 28 Car. 2. Bartram v. Dannett.

But where an attachment was ſued out in the time of K. Charles the 2d, and *executed 3 days after the king's demiſe, but before notice of his death,* the Court on reading the caſe of * CREW v. VERNON, in Cro. C. 97. and a precedent in the Lord Keeper North's time, betwixt VAUGHAN v. BAMPFIELD, was of opinion that the attachment was well executed, and alſo well returned, and that the proceeding upon it ſince was good. Vern. 400. pl. 372. Paſch. 1686. Burch v. Maypowder.

11. Upon a motion for a ſerjeant at arms, on a *commiſſion of rebellion retorned,* the Court held that, *by the king's demiſe, all proceſs of contempt not executed is determined,* ſo that you muſt begin again at an attachment; but where any proceſs is executed, and a cepi corpus returned, there the proceſs ſtands good. Vern. 300. pl. 295. Hill. 1684. Anon.

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12. If one is *arreſted* upon an attachment *either in proceſs or in execution* after a decree, yet in both caſes on his *appearing before the regiſter,* he is to be *diſcharged,* and to anſwer the interrogatories at large, and not in cuſtody, and upon the regiſter's certificate, that the party has appeared, the ſheriff is to deliver up the bond. Ch. Prec. 110. Mich. 1699. Danby v. Lawſon.

13. If one brought in on contempt *denies all upon oath,* he is of courſe diſcharged of the contempt; but if he has forſworn himſelf he ſhall be proſecuted for the *perjury;* per Cur. 12 Mod. 511. Paſch. 13 W. 3. The King v. Sims.

14. Contempts for *acting againſt an order* of the Court diſcharged, the order *being erroneous.* MS. Tab. Jan. 28th, 1722. Stone v. Burn.

15. If one in contempt to a ſerjeant at arms for want of an anſwer, and then *puts in an anſwer,* and the clerk in court *accepts the coſts of the contempt,* this purges the contempt. 2 Wms.'s Rep. 481. Trin. 1728. at the Rolls. Anon.

16. Mr. Maſterman ſaid that by the practice of the Court *interrogatories* need not be filed againſt a man committed for a contempt till within 4 days after ſecurity given by the party to anſwer them; but the Court held the party's giving ſecurity not neceſſary as he is in cuſtody, and that 4 *days ſhould be computed from the time of the party's being ſworn to anſwer them.* 2 Barnard. Rep. in B. R. Trin. 5 Geo. 2. Anon.

(E) Where Proceſs muſt begin De Novo.

1. DEfendant was in contempt, and *pardoned*, and the plaintiff was compelled to ſerve a new ſubpœna to do that which was firſt ordered. Toth. 10. 3. cites Trin. 37 Eliz. Young v. Chamberlain.

2. If after proceſs of contempt the defendant puts in an *inſufficient anſwer*, and ſo reported, the plaintiff ſhould not begin as formerly with proceſs at the ſubpœna, but ſhall go on to the attachment with proclamation and other proceſs, as if the anſwer had not been but in. Per Lord Keeper. Chan. Caſes, 238. Mich. 26 Car. 2. Anon.

3. One in contempt *to a ſerjeant at arms for want of an anſwer*, puts in an inſufficient anſwer, and the clerk in court *accepts the coſts* of the contempt, and ſo purges it. In the proceſs of contempt for the *ſecond anſwer*, the plaintiff muſt begin again with an attachment, and not where he left off. But if neither the plaintiff nor his clerk in court accepts the coſts for want of the firſt anſwer, though tendered, and the *firſt anſwer be reported inſufficient*, the plaintiff may go on with the proceſs for the ſecond anſwer, where he left off at obtaining the firſt. And therefore it is uſual and proper for the clerk in court to refuſe the coſts for want of the firſt anſwer, till he is ſatisfied it is a full anſwer. 2 Wms.'s Rep. 481. pl. 152. Trin. 1728. at the Rolls. Anon.

Abr. Equ. Caſes, 351. pl. 7. S. P. and ſays this diſtinction was taken by the ſolicitor general, and agreed to by the Court as reaſonable and agreeable to the printed orders of the Court. Trin. 1728. between Halſtwell and Granger. [And ſeems to be S. C.]

(F) Pleadings. [453]

1. *ATtachment upon a prohibition for ſuing in the Spiritual Court, for tithes of great trees* againſt the ſtatute, he *ſaid that he ſued of tithes of ſilva cædua*, abſque hoc *that he ſued of other* than of ſilva cædua, and no plea, but *ſhall ſay abſque hoc that he ſued of great trees*. Br. Traverſe, per, &c. pl. 311. cites 5 E. 3. 10.

2. In *contempt for not admitting varlet of the king to a corody*, it was ſaid that it had been a good plea for the prior to the contempt to have *ſaid, that there came but one writ of contempt to his hands*, quod nullus negavit. Br. Contempts, pl. 18. cites 50 Aſſ. 6.

3. Attachment upon prohibition, that he *held plea contra to the prohibition of the king*, and did *not count that prohibition was delivered to the defendant*, and therefore ill, for the *form ſhall be obſerved in matters which are not traverſable* as here, and eſplees in formedon, &c. and yet they are not traverſable, and this default was pleaded to the count. Br. Count, pl. 11. cites 9 H. 6. 61.

4. *Certiorari* out of B. R. *to the mayor of Winton to certify*, &c. *who did not return the alias or the pluries*, by which attachment upon

upon contempt iſſued to the *ſheriff*, and he *returned* the writ *quod cepit corpus majoris*, who *prayed that the king count againſt him;* and becauſe the record and the writ made mention of the delivery of the writs, &c. therefore by the juſtices he need not count; for the record comprehends the day and place of the delivery of the writs, and all the matter, but by others he ſhall make count, and the * tales have a count in this action; for the mayor may traverſe that no writ was delivered to him quod fuit conceſſum. Br. Contempts, pl. 14. cites 2 E. 4. 1.

* In the year-book it is, viz. the fables give a count in this caſe, &c. Fitzh. Count, pl. 34. cites S. C. and there it is, viz. the declaration gives a count in this caſe, &c.

5. Bill of *attachment upon privilege* for goods carried away, was brought *by the warden of the Fleet*, who had the office in jure uxoris, the *defendant ſaid that he is guardian in jure uxoris*, and *is not ſo named in the writ*, judgment of the writ, and non allocatur; for he is officer, which is ſufficient to have the privilege, and the office itſelf is not here in debate, and therefore the writ awarded good. Br. Attachment, pl. 22. cites 9 E. 4. 40.

6. Debt upon the attachment, the ſheriff returned quod at tachiatus eſt per cattalla ad valenciam 40 s. and at this day the *defendant was eſſoigned, and* at the day which he had by the eſſoign he *made default*, and per tot. Cur. the eſſoign of the goods attached are ſaved, notwithſtanding the default *after*, quod nota. Per Judicium. Br. Forfeiture de Terres, pl. 67. cites 21 E. 4. 78.

7. Contempt ſhall be anſwered *in proper perſon* and not by attorney. Br. Contempts, pl. 15. cites 22 E. 4. 33, 34.

8. Attachment *upon a prohibition*, and counted that he delivered a prohibition to the defendant, and yet he proceeded in the Spiritual Court, the *delivery of the prohibition* is not traverſable, *but if he proceeded contrary to the prohibition of the king* or not. Br. Traverſes, per, &c. pl. 370. cites 1 H. 7. 18. in the end of the action debated there arguendo, in the Old Reports, and therefore quære.

For more of Contempt in general, ſee **Certiorari, Coſts, Evidence, Prohibition, Sequeſtration, Striking,** and other proper titles.

Continuance and Diſcontinuance.

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Fol. 484.

(A) [*Of Proceſs*] *To what Time* it may be.

See tit. Return, (T).

[1. *UPON an original*, a term, or *two, or three terms may be meſn between the teſte and the return*; and this ſhall be a good continuance, for the defendant is not at any prejudice by it, and the *plaintiff may give a day to the defendant beyond the common day* if he will. D. 2 Eliz. 175. 23.] Ibid. cites Trin. 15 E. 3. 5.

[2. A continuance *by capias ought to be* made *from term to term*, and there cannot be any meſn term, becauſe the defendant ought not to ſtay ſo long in priſon. * 8 E. 4. 13. Per Cumber. † D. 2 Eliz. 175. 23.] * Fitzh. Continuance, pl. 3. cites S. C. ——— Br. Continuance, pl. 48. cites S. C. ——— † Cro. E. 467. (bis) pl. 17. Hill. 38 Eliz. Arg. cites S. C. and 21 H. 7. 16. and 8 E. 4. 4. S. P.

[3. But *by diſtreſs* a continuance may be made with *more than a term meſn*. 8 E. 4. 13. per Cumber. D. 2 Eliz. 175. 23.] Fitzh. Continuance, pl. 3. cites S. C. ——— Br. Continuance, pl. 48. cites S. C. and S. P. as from Mich. to Eaſter.

[4. If a continuance be made *in* an *inferior court, ad proximam ibidem tenendam, without alleging any day to which* it is adjourned; yet if the *court* be to be *held by cuſtom, not at any certain day*, as every week, or de tribus in tres, &c. but die lunæ, *when the judges thereof pleaſe*; this is a good continuance. P. 8 Car. B. R. between LAXE AND JESSON adjudged, and a judgment given in Coventry affirmed in a writ of error; this being moved for error.] Cro. C. 254. pl. 6. JESSON v. LAXON. S. C. and judgment affirmed by three juſtices, Crooke dubitante. And Jones J. ſaid, that all their proceedings in Wales are adjourned till the next great ſeſſions, and none knows when the great ſeſſions ſhall be held. And it is ſaid that this error was aſſigned and overruled in the caſe of Bythel v. Parry.

[5. *In writs of execution* the *juſtices may give* a *day at* their *pleaſure*. 24 Ed. 3. 31. b.] Fitzh. Jour. pl. 9. cites S. C.

[6. *As* in a *ſcire facias to execute a fine*. 24 E. 3. 31. b.] Fitzh. Jour. pl. 9. cites S. C.

[7. If a continuance be in an *inferior court, that hath power to hold plea de tribus in tres, or any other certain time, and not otherwiſe*, there the *continuance ought to be ad proximam curiam, ſcilicet, and allege the day*, otherwiſe it is not good; and it is *not ſufficient to ſay, ad quam quidem proximam curiam, ſcilicet ſuch a day*, &c. becauſe the party ought to know the certain day upon which the entry of the continuance is. P. 8 Car. B. R. between LAXE AND JESSON, in a writ * Cro. C. 254, 255. pl. 6. JESSON v. LAXON. S. C. & S. P. ſeems to be admitted. — See pl. 4. S. C. & (C) pl. 2. S. C.

* This is miſprinted, and ſhould be D. 262. b. pl. 32, 33. Trin. 9 Eliz. a writ of error upon a judgment in Coventry, agreed per Curiam. * D. 9 Eliz. 252.] ——S. C. cited Cro. E. 105. pl. 16. Trin. 30 Eliz. B. R. in caſe of LEAT v. JENNINGS, in which caſe a judgment was reverſed in an inferior † court for error, becauſe the *diſtreſs was awarded returnable at the next court after ſerving the proceſs*, whereas every return ought to be at a day certain, and it may be the proceſs ſhall not be ſerved within a year, and the *defendant is to have day at every court*, otherwiſe the proceſs is diſcontinued, and therefore judgment was reverſed. ——S. C. cited 2 Bulſt. 37. Mich. 10 Jac. in caſe of JONES v. SMITH, which was that J. was arreſted on *proceſs to appear in placito tranſgreſſionis at the court of the Marſhalſea ad proximum curiam* there held, *without ſhewing the day certain* when the next court was to be held. Exception was taken that this is too general, for ſo he may be detained 40 years before any court may be held, and that the day when the court ſhould be held ſhould have been ſhewn certain; and though it was objected that proxima curia here appears well by their juriſdiction, which is to hold the court de die in diem, and that ſo the ſame had been uſed theſe 40 years, without ſhewing the day certain when the court was to be held, yet the whole Court was of opinion that the day ought to have been certainly ſhewn, and for default thereof the plea was held ill, and the party arreſted diſcharged. ——Cro. J. 314. pl. 15. Johns v. Smith, S. C. adjudged accordingly. ——S. C. and alſo D. 262. pl. 33. and Cro. E. Leat v. Jennings, 105. cited Raym. 205. Mich. 22 Car. 2. B. R. in the caſe of GIBBS v. STRATFORD. But Twiſden J. ſaid that the caſe of Dyer was good enough notwithſtanding that error, but the judgment was reverſed for other errors, as appears 1 Roll. Abr. 416. pl. 2. Jeſſon v. Laxen, ſed adjornatur. See Inf. (C) pl. 3. this caſe. ——Mod. 81. pl. 45. Mich. 22 Car. 2. B. R. Anon. Hale Ch. J. ſaid that when in an inferior court the venire facias is ad proximam curiam, it is naught; becauſe it is uncertain when the court will be kept; but *if it be at ſuch a day ad proximam curiam*, it is good. ——In falſe impriſonment, the defendant juſtified by proceſs out of an inferior court, which was to take the plaintiff and have him ad proximam curiam; exception was taken to this, and the Ch. Juſtice doubted that the exception was good, and ſo the plea ill, becauſe it ought to be on a day certain; but the other juſtices e contra, and judgment for the defendant. 2 Mod. 58, 59. Mich. 27 Car. 2. C. B. Crowder v. Goodwin.

[8. Continuance *of a plea* cannot be by one *term or more meſn, upon* the *prayer* of the defendant. M. 15 Jac. B. R. between SHOTBOLT AND LEECH, per Curiam agreed.]

§ S.C. cited by Roll Ch. J. as adjudged. Sty. 339.

[9. *But* the continuance of a plea, *upon advice of the Court*, by a term or more between, is not good. M. § 1 Car. at Reading-term, B. R. between NORRIS AND JOHNSON, in a writ of error upon a judgment given in Banco, it was adjudged to be a diſcontinuance, where the caſe was, that *in treſpaſs* in Banco the *defendant pleaded a ſpecial plea*, upon which the *plaintiff demurred*, and the *Court, upon an adviſare vult, gave day from Eaſter-term to Michaelmas-term, intermitting Trinity-term*, and therefore adjudged to be a diſcontinuance, and the judgment reverſed accordingly; becauſe if this ſhould be allowed, the Court might delay men perpetually, for as well as they might intermit one term, they might ‖ intermit one year, or twenty years. Contra M. 15 Jac. B. R. between SHOTBOLT AND LEACH, per Curiam.]

‖ Fol. 485.

Sty. 339. S. C. adjudged.

[10. If a man declares in an action upon the ſtatute of monopolies, as the king's patentee of ſoap, and after the *defendant in Eaſter-term pleads*, that the king did not make any ſuch letters patents, and *iſſue is joined* thereupon, and *day given to the plaintiff till Michaelmas-term, but* there is *no continuance between Eaſter and Trinity-term*, it is a diſcontinuance, for though the Court might give day to bring in the letters patents in Michaelmas-term, omitting Trinity-term, yet there ought to be a continuance between Eaſter and Trinity-term by a Curia adviſare vult, till Trinity-term, or otherwiſe it is a diſcontinuance. Tr. 1652. between FRIEND AND BAKER adjudged.]

11. The

11. The defendant being to go to the marches of Scotland with the king, to aid him in his war, the *king by writ commanded the juſtices to continue the plea till his (the king's) return.* The judges notwithſtanding proceeded to judgment againſt the defendant, and the judgment was affirmed in error; for *every continuance muſt be to a day certain*, whereas the king's return is uncertain. Jenk. 7. pl. 10. cites Mich. 3 E. 1. f. 29. [but it ſhould be f. or pl. 24.] Cteſſey's caſe.

12. *Attaint* in B. R. was not diſcontinued, becauſe he had a *longer day than the common day*; for this is the delay of the plaintiff himſelf. Br. Jours, pl. 43. cites 15 Aſſ. 6. and 6 E. 3. accordingly. Br. Diſcontinuance de Proceſs, pl. 28. cites S. C.

13. In *quare impedit*, they were *at iſſue upon traverſe of the preſentment, by which the plaintiff claimed*, and the *plaintiff prayed day by 12 weeks*, and the *defendant prayed day by 15 days*, and the longeſt day was given according to the prayer of the plaintiff; quod mirum! Br. Jours, pl. 43. cites 21 E. 3. 29. [456]

14. *In aſſiſe, writ* was awarded *to the biſhop to certify whether baſtard or mulier*, and the parol was not without day, but day given to the parties *ad proximam ſeſſionem & interim quod ſequatur breve epiſcopo ad certificand'*, at which day the biſhop did not certify, and *ſicut alias was awarded, and day was given over to the next ſeſſions.* Br. Jours, pl. 46. cites 38 Aſſ. 30.

15. In *treſpaſs*, they were at iſſue, and the *plaintiff took day by a year*, and the *other alleged it for diſcontinuance of proceſs*, and yet good by award; for the plaintiff may delay himſelf. Br. Jours, pl. 16. cites 46 E. 3. 16. S. P. Br. Diſcontinuance de Proceſs, pl. 7. cites 46 E. 3. 26.

16. *Treſpaſs againſt two*, the *one appeared and pleaded to iſſue*, and the *other made default*, and *day was given to him who pleaded by a year*, yet no diſcontinuance by award, by reaſon that the * plaintiff *may delay himſelf without offence*, by award. Br. Diſcontinuance de Proceſs, pl. 7. cites 46 E. 3. 26. * S. P. Ibid. pl. 23. cites 21 H. 7. 16. —— In *attaint*, it was no diſcontinuance in B. R. becauſe he *had longer day than the common day*; for this is the delay of the plaintiff himſelf. Ibid. pl. 28. cites 15 Aſſ. 6. and T. 6 E. 3. accordingly.

17. A man *outlawed ſued charter of pardon, and ſcire facias againſt the plaintiff*, who *pleaded to iſſue*, and after he who was outlawed *ſaid, that there were only two capiaſes before the exigent which appeared of record; and* by ſome, by the ſuit of the pardon he affirms the record, and cannot take advantage of diſcontinuance, and by ſome it is ill continuance; and after he found mainprize, and therefore it ſeems that it is admitted to be diſcontinuance. Br. Utlagary, pl. 62. cites 3 H. 4. 10.

18. If the plaintiff counts *in debt or treſpaſs*, and the *defendant pleads to the juriſdiction, or if continuance be taken to another term*, it ſhall be made upon the writ as if no continuance had been made, and *no continuance ſhall be entered*, and *at the next term the plaintiff ſhall count de novo*; per Babb. Br. Continuance, pl. 23. cites 8 H. 6. 18.

19. Note, per Cumberford prothonotary, that *capias*, nor *continuance by capias*, can have day only *from term to term, by reaſon*

of the impriſonment; but *contra of diſtreſs*, for this may over-paſs a term; as of iſſue in Mich. term returnable term. Paſch. Br. Jours, pl. 71. cites 8 E. 4. 14.

20. In *attaint*, the *grand jury appeared*, and the *Court by aſſent of the parties gave day to them, and to the petit-jury de termino Paſche in 15 Johannis in termino Trinit'*, that the parties may come to agreement in the mean time. Br. Jours, pl. 56. cites 21 E. 4. 23.

D. 258. a. b. pl. 16. Hill. 9 Eliz. S. C. but S. P. does not appear.

21. An *exigent* may be awarded *in Eaſter-term returnable in Michaelmas-term*; for the nature of the writ requires it; becauſe otherwiſe in the ſhort term 5 counties cannot be held, and therefore though a term meſne be left out, yet the *writ is good*, and well continued. Dal. 104. pl. 43. anno 15 Eliz. Pollard v. Paine.

22. So a *grand cape in a real action requires* 9 *returns*, and therefore if it be *awarded in Eaſter-term*, it ſhall be *returnable about Craſt' Animarum* in Mich. term, and though a term be left out, yet it is good enough, becauſe the return of the writ requires it. Dal. 104. in S. C.

[457]

23. A judgment in an inferior court was reverſed for error, becauſe the *diſtreſs* was awarded *returnable at the next court after the ſerving of the proceſs*; whereas every return is to be at a day certain; and it may be the proceſs ſhall not be ſerved within a year, and the defendant is to have day at every court, otherwiſe the proceſs is diſcontinued; and judgment was reverſed. Cro. E. 105. pl. 15. Trin. 30 Eliz. B. R. Leat v. Jennings.

S. C. cited Arg. 2 Mod. 59. which ſee in the notes at pl. 7. held contra by 3 juſtices, Hale dubitante.

24. Error of a judgment in the Court of H. the *judgment* being *in debt by nihil dicit*; the error aſſigned was, that after imparlance *day was given* to the parties *till the next court, and no day certain*, and for this cauſe it was holden a diſcontinuance, and the judgment reverſed. Cro. J. 571. pl. 12. Paſch. 18 Jac. B. R. Adams v. Flyth.

25. In treſpaſs in C. B. *after a plea, replication, and demurrer, the entry was, Curia adviſari vult from Hillary-term to Trinity-term*, leaving out Eaſter-term; it was inſiſted that this might well be done, becauſe it is the act of the Court, and they may take ſo much time to adviſe before they give their judgment. But per Doderidge J. though a particular continuance by dies datus may be by leaving out a year, becauſe the plaintiff may delay himſelf, yet a term cannot be left out, becauſe *it is in delay of juſtice*; ſo the plaintiff may purchaſe an original returnable 2 or 3 terms after, becauſe it is in his own delay; but if he was to purchaſe a capias it is otherwiſe, becauſe the other ſhould be impriſoned for all the time, and therefore he cannot leave out a term; to which Ley Ch. J. agreed, and ſaid that C. B. cannot give other than common day *where the ſuit is by original*, but *otherwiſe* in B. R. for the ſuit is *by bill*, but if in B. R. the ſuit be by original, yet we cannot give other than common day; and ſtaying a cauſe without giving a day when it ſhall be revived, or if we give a day too long, viz. omitting a term, this is in delay of juſtice; for it may

may be the Court ſhall be reſolved of their judgment before this day, and yet they cannot give it, and ſo this is againſt the ſtatute of magna charta. 2 Roll. Rep. 442. Trin. 21 Jac. B. R. Johnſon v. Norton.

26. A *latitat* may be *continued* from time to time *till the bill filed to prevent the ſtatute of limitations*, otherwiſe it is not good, which continuances may be made by attornies at their chambers; per Cur. and Twiſden J. ſaid, that he had known an action was continued by latitat 5 years before the bill filed; and Herne ſecondary ſaid, that a latitat *may be continued* 7 *years*. Sid. 53. Mich. 13 Car. 2. B. R. in caſe of Daſy v. Clinch.

27. Upon an *indictment of perjury*, it was ſaid per Cur. that at the ſame aſſizes the judges may adjourn to a day certain; but if there be a *continuance over to the next aſſizes*, there *muſt be no day expreſſed*. But inferior courts cannot make a continuance ad proximam curiam, but always to a day certain. Vent. 181. Hill. 23 and 24 Car. 2. B. R. The King v. Serjeant and Annis. * See pl. 7 and the notes there

28. Error aſſigned of a judgment from C. B. that there was a miſcontinuance, the continuance being *from one day to another in the ſame term*, which was urged could not be, the term being but one day in law; but over-ruled; another error was, that the time of *imparlance* was *to quind' Paſch'* inſtead of *die Paſch' in quindecim dies*, quod etiam fuit rejectum. Per Cur. 12 Mod. 703. Mich. 11 W. 3. Pierſon v. Hulls. 2 Lutw. 1638. PEARSON v. HULSE. S. C. ſays that the diſcontinuance inſiſted upon was, that the record was a record of Paſch. 11 W. 3. and it appears by the defendant's plea, that there was an imparlance to octabas Hillarii before, and it does not appear that there was any continuance from this term of Eaſter. But the Court being informed that the declaration was in Mich. term before, with an imparlance to octabas Hillarii, leave was given to amend the record, and to make it agree with the fact of the caſe.

(A. 2) Continuance and Diſcontinuance. In what Caſes; How, and When. [458] See (B).

1. IF a man *appears and imparles*, he ſhall not allege diſcontinuance of proceſs after. Br. Diſcontinuance de Proceſs, pl. 48. cites 38 E. 3. 2.

2. If *replevin* be *removed out of the county into Bank by recordare*, diſcontinuance of proceſs in the county is no plea in Bank; for nothing is removed into Bank, nor of record there, but the plaint only; quod nota. Per tot. Cur. Br. Diſcontinuance de Proceſs, pl. 45. cites 3 H. 6. 30.

3. If *pone comes to the ſheriff after the county paſt*, yet he may give day to the party, though it be not in full county; per Brian, to which Cateſby agreed, and that if the plaintiff ſhall be nonſuited in the county, it ſhall ſerve the *pone*; for it *is not in full county as recordare is*. Per Littleton, if the plaintiff appears it is no error, as where a man appears by capias in an action, in which capias does not lie, this is not error. Br. Jours, pl. 54. cites 12 E. 4. 11.

4. Note, that *after the tenant has vouched in præcipe quod reddat, and* the *vouchee has entered into the warranty*, no diſcontinuance ſhall be againſt the tenant, for he is out of court and the vouchee is in his place, to which vouchee day ſhall be given, and not to the tenant. Br. Diſcontinuance de Proceſs, pl. 40. cites 1 E. 5. 4.

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Though *a writ of error* is but a commiſſion to examine the errors, and may lodge in court 7 years without being diſcontinued,

5. A *writ of error* may ſleep ſeveral years without a diſcontinuance, for it is only a commiſſion to the judges to examine the record, and the *parties have no day in court till* the plaintiff in error ſues a *ſcire facias* ad audiendum errores, or the defendant in error ſues a ſcire facias quare executionem habere non debet. After ſuch ſcire facias the writ of error may be diſcontinued, and errors may be aſſigned upon either of thoſe ſcire faciaſes. Jenk. 25. pl. 48.

yet after the parties have once proceeded upon it, it may be diſcontinued as well as any other action. Per Popham. Yelv. 4. Trin. 44 Eliz. B. R. in caſe of Cromwell v. Andrews. —— Writs of error are *rarely diſcontinued, but ſometimes they may be*; per Holt Ch. J. and ordered the other ſide to ſhew cauſe why a writ of error brought to reverſe a fine ſhould not be diſcontinued. 5 Mod. 75. Mich. 7 W. 3. Winchurſt v. Maſely.

6. In a *qua. imp.* brought *by the queen*, ſhe did not proſecute the ſuit. Periam ſaid, that *after a year the defendant may have it diſcontinued*, but that the queen ſhall not be nonſuit. And in the caſe of a *common perſon* the plaintiff may diſcontinue it *within a year, but* the *defendant cannot* diſcontinue it *till after the year*. Gouldſb. 53. pl. 3. Trin. 29 Eliz. Anon.

A man may be nonſuit without leave of the Court, but he cannot diſcontinue his ſuit without

7. In a *replevin* the plaintiff cannot diſcontinue his ſuit without the privity of the Court; for the *entry is recordatur per Curiam*; and if he would diſcontinue without moving the Court, the defendant may enter the continuance if he will; agreed per tot. Cur. Le. 105. pl. 142. Mich. 30 Eliz. C. B. Bear v. Underwood.

their conſent; agreed, Mar. 24. pl. 54. Paſch. 15 Car. Utbart v. Parham.

Plaintiff prayed leave to diſcontinue paying coſts, though it was after demurrer argued, and the Court gave leave, though it was in an action of debt for an eſcape. Quod nota. Sid. 306. pl. 14.

8. In *debt on an obligation* againſt an executor, *demurrer was joined and argued, and rule* was given *to enter judgment for the defendant*; whereupon the plaintiff moved that there was not any continuance entered on the roll, and therefore prayed that it might be diſcontinued; but per Cur. the plaintiff cannot diſcontinue it without the Court's direction, and the defendant may well continue, it being for his advantage,* and ordered the continuances to be entered accordingly; for otherwiſe, in every caſe when a matter is argued on demurrer, the plaintiff ſeeing the opinion of the Court againſt him will cauſe a *diſcontinuance* to be entered, which *ought not to be in the ſame term it is argued*. Cro. J. 8. pl. 10. and 35. pl. 8. Trin. 2 Jac. B. R. Phillips v. Echard.

Mich. 18 Car. 2. B. R. Jones v. Pope. —— Lev. 191. S. C. accordingly; for the ſheriff ſhall not go unpuniſhed for the eſcape, for a fault in the declaration. Saund. 37. S. C. accordingly. —— It has been allowed after a joining in demurrer, but not after arguing ſuch demurrer; per Cur. 5 Mod. 208. Paſch. 8 W. 3. in caſe of Keat v. Barker.

9. The

9. The *prothonotaries ſaid*, that *in treſpaſs* the *plaintiff might diſcontinue* his action *within the year* if it be *before any plea pleaded; but the juſtices* held *e contra*, becauſe then coſts which are given by the ſtatute ſhould be loſt. Godb. 219. pl. 318. Mich. 11 Jac. C. B. Anon. In the caſe of a common perſon, the *plaintiff* may diſcontinue *within a year, but the defendant cannot* diſcontinue it *till after a year. And after a year it may* be diſcontinued *in caſe of the king where he is plaintiff*, but he cannot be nonſuited; per Periam. Gouldſb. 53. Trin. 29 Eliz. The Queen v. Leigh.

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10. In *debt on an obligation*, the *plaintiff did not ſufficiently allege the breaches*, whereupon the *defendant demurred*, and *rule* was given *to enter judgment for the defendant*; but afterwards the Court gave day to the next term and leave to the plaintiff to diſcontinue his ſuit, becauſe otherwiſe he ſhould be utterly barred of his bond. Cro. J. 488. pl. 8. Trin. 16 Jac. B. R. Lee v. Fydge. Like point, Cro. Car. 195. pl. 6. Trin. 6 Car. B. R. Harlow v. Wright.

11. In *debt on bond for quiet enjoyment* it was reſolved on a general demurrer, that the *defendant's plea was not well ſet forth*, but for a flaw in the plaintiff's *replication*, for that it *did not well allege the entry of the defendant* ſo as it did not appear that he was interrupted by him, the opinion of the Court was againſt the plaintiff; but the next term, by leave of the Court, he diſcontinued his action. All. 19, 20. Trin. 23 Car. B. R. Coleman v. Painter.

12. It was moved, that the plaintiff paying coſts, might have a rule to diſcontinue his action, becauſe ſuch a *traverſe was taken that the title of the land in queſtion could never come to be diſputed.* Roll Ch. J. ſaid they might do this by the courſe of the Court without motion; but he conceived the reaſon of the motion was becauſe there was a preremptory rule of Court to try the cauſe the next term, and ſo that the motion was to avoid the contempt he might fall into for diſobeying the rule if he ſhould not go on to trial; but ſaid, that *paying good coſts he ſhould diſcontinue* his action; quod nota. Sty. 366. Hill. 1652. Anon.

13. A man may not diſcontinue in action of *treſpaſs*; per Roll Ch. J. Sty. 382. Paſch. 1653. in caſe of Ayre v. Hawkſworth.

14. It was ſaid, that if in *debt or covenant, after a demurrer joined*, the Court ſees cauſe they will give *leave to diſcontinue*, if the plaintiff through his negligence is in danger of loſing his debt, and this ſeveral years after the action brought; *but after the demurrer argued*, they will *not* give leave to diſcontinue, *nor where he has brought another action for the ſame cauſe, and this is pleaded in abatement* of the firſt action. Sid. 84. pl. 11. Trin. 14 Car. 2. B. R. the Lord Howard's caſe.

15. Though diſcontinuances are permitted in caſe of *bonds for payment* of money, yet they never are in caſe of bonds *for performance of awards*, unleſs upon extraordinary occaſions. Lev. 139, 140. Mich. 16 Car. 2. B. R. in caſe of Bean v. Newbury.

16. In *debt on an obligation the defendant traverſed an immaterial traverſe of the plaintiff's*; the *plaintiff demurred*, whereupon there was a *rule for judgment for the defendant* niſi, &c. Whereupon the plaintiff prayed leave to diſcontinue, which the Court took time to conſider of, and afterwards becauſe the *defendant would not* Saund. 20. 23. S. C. and the Court gave the plaintiff liberty to diſcontinue

his action upon payment of coſts, though it was after they had delivered their judgment ——— 2 Keb. 64. pl. 16. S. C. adjornatur. ——— Ibid. 105. pl. 39. S. C. adjudged for the defendant, but the Court gave leave to diſcontinue.

agree to accept iſſue upon the traverſe, nor put in bail upon the original action, the Court gave leave to * the plaintiff to diſcontinue notwithſtanding the *demurrer had been argued*. Lev. 192. Mich. 18 Car. 2. B. R. Bennet v. Filkins.

Sid. 340. pl. 4. Heyman v. Gerard, S. C. but ſays nothing as to the diſcontinuance. — Saund. 108. Hayman v. Gerard, S. C. but nothing as to the diſcontinuance.

17. In debt on *bond to account and pay all monies which ſhould come to his hands*, the defendant *pleaded that no money came* to his hands; the plaintiff replied, that money came to his hands, but *did not ſay that he had not accounted or paid*, and therefore the Court held it inſufficient, and therefore judgment was ruled to be given againſt the plaintiff; but he then prayed leave to diſcontinue, which was granted, unleſs the parties would ſubmit the truth of the matter to their counſel to be determined by them. Lev. 226, 227. Mich. 19 Car. 2. C. B. Hegman v. Gerard.

18. In a quo warranto againſt the town of Farnham, for *uſing a fair and market, and taking toll, &c. iſſue was taken, whether they had toll by preſcription* or not, and it was found that they had; but it was moved in arreſt of judgment, that here was a *diſcontinuance, becauſe* there was *no iſſue as to the other liberties* claimed by them, *(viz.) a fair and market*, and this action is not helped by the ſtatute of jeofails, quod fuit conceſſum; but the Ch. Baron ſaid, that they were too ſoon to urge that, becauſe judgment was not yet given, and *before judgment there can be no diſcontinuance againſt the king*, becauſe the *attorney general may yet proceed, by the king's prerogative, to take iſſue upon the reſt, or* may *enter a nolle proſequi*, but if he will not proceed the Court may make a rule on him ad replicandum, and ſo there may be a ſpecial entry made of it; wherefore non allocatur. Hard. 504. Paſch. 21 Car. 2. in the Exchequer, Attorney General v. Farnham Town.

19. Keeling ſaid, that a man *may diſcontinue* his action *in B. R. before an action brought in C. B. But if he do begin in C. B. and then they plead another action depending in B. R. and then they diſcontinue*, he took it that the attorney ought to be committed for this practice. Mod. 41. pl. 90. Hill. 21 & 22 Car. 2. B. R. Anon.

Mod. 42. pl. 95. S. C.

20. In *debt on bond to perform an award*, but in the *replication* the plaintiff *miſtook the day of the tender of the award*, and *upon demurrer, rule was given for judgment for the plaintiff*; but upon exception taken the plaintiff prayed leave to diſcontinue on payment of coſts, and becauſe the miſpriſion was in ſo petit a matter, and the plaintiff had a juſt debt, the Court gave *leave to diſcontinue the action on payment of coſts*. Saund. 73. Paſch. 22 Car. 2. Roberts v. Marriot.

Sid. 465. pl. 11. S. C. but the point of diſcon-

21. In *aſſumpſit* for money due on account ſtated between merchants, the defendant *pleaded the ſtatute of limitations*, but upon argument it was doubted, whether it appeared ſufficiently upon the

the declaration that the account was ſtated; and after the plaintiff prayed leave to diſcontinue, and it was granted though *after argument*. Lev. 298. Mich. 22 Car. 2. B. R. Martin v. Delboe.

tinuance does not appear.—— Mod. 70. pl. 24. S. C. but nothing ſaid of the diſcontinuance.

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22. In *debt upon obligation for performance of covenants*, the Court permitted the plaintiff to diſcontinue *after argument*, and though the action was brought for the penalty. 2 Lev. 124. Hill. 26 & 27 Car. 2. Rea v. Barnes.

23. Court will not give leave to diſcontinue *after a verdict*, *unleſs* the verdict be ſet aſide as an *ill verdict*; but in the principal caſe the verdict was not blamed; however, for fuller ſatisfaction, a new trial was granted. Cumb. 233. Hill. 5 W. & M. in B. R. Broom v. Roberts.

After iſſue joined, or a verdict given, the plaintiff cannot diſcontinue without leave of the Court, which is never granted but upon payment of coſts. O. Hiſt. of C. B. 219.

24. After a *writ of inquiry returned* the plaintiff cannot have leave to diſcontinue; per Eyre J. abſente Holt. Comb. 261. Paſch. 6 W. & M. in B. R. Reeve v. Goldega. [461]

25. The plaintiff brought an *action for* 400l. for ſo much *money had and received* of him by the defendant, who *pleaded an attainder of high treaſon in abatement*; the plaintiff *replied, that* after the attainder, and *before the action brought, he was pardoned, unde petit judicium & damna ſua*; and upon demurrer per Cur. the replication is ill concluded, for the words damna ſua ſhould have been left out, and of that opinion was the Court, and therefore rule was made that he might diſcontinue without coſts. 3 Mod. 281. Paſch. 2 W. & M. in B. R. Biſſe v. Harecourt.

1 Salk. 177. pl. 1. S. C. held that there was a diſcontinuance by the miſconclu-ſion of the replication; for an ill prayer of judgment is as none.—

Show. 155. S. C. held per Cur. to be a diſcontinuance.—— Carth. 137, 138. S. C. reſolved that this improper concluſion of the replication made it ill; for all the pleading was diſcontinued, becauſe the plea was in diſability, and ſo concluded; and the replication was concluded as a plea in bar, and ſo no manner of anſwer to the plea, but a replication at large, and as none at all; ſo that all is diſcontinued for default of a replication. But if it had been concluded generally, viz. petit judicium ſi, &c. that might have been good. So the rule of Court was, that the plea was diſcontinued, and not that the bill ſhall abate; quod nota. —— S. C. cited Ld. Raym. Rep. 338, 339.

26. Diſcontinuance *by leave of the Court* may be after *ſpecial verdict*, but not after general verdict; for in the caſe of a general verdict it would be the having as many new trials as the plaintiff pleaſes; but a ſpecial verdict is not compleat and final; but even in that caſe it is a great favour. 1 Salk. 178. Paſch. 8 W. 3. B. R. Price v. Parker.

The Court doubted if they could give leave to diſcontinue after verdict. 2 Keb 695. pl. 38. Mich. 22 Car. 2. B. R. Holford v. Boord. —— After verdict the Court gave the plaintiff leave to diſcontinue, paying coſts. Raym. 389. cites Mich. 1653. B. R. Elſton v. Drake. —— See (D) pl. 1. —— It has been allowed after a *ſpecial verdict and an argument at bar*, per Cur. 5 Mod. 208. in caſe of Keat v. Barker. —— Comb. 363. Paſch. 8 W. 3. B. R. Eaton v. Barker. S. C. & S. P. accordingly.

27. In error, want of original was aſſigned for error, the *original* having been *loſt upon the death of plaintiff below's attorney*; upon *affidavit* of this fact the lord keeper granted them a *new original*, and that ſhould be certified, and a certiorari being brought,

Ld. Raym. Rep. 330, 331. S. C. but S. P. does not appear.——

Ibid. 695. Leving v. Calverly, S. C. and the case of NAYDEN v. WINTERBOTTOM was there cited; and as to the objection that the plaintiff in error would lose his costs if the judgment should be affirmed, Holt Ch. J. said, that if the lord keeper had been of opinion that the plaintiff ought to have had his costs, he would not have granted the liberty of filing an original before costs were paid by the defendant, and the motion was denied.

and the original being certified, now the defendant in error would bring on the matter, in order to have his judgment affirmed, and costs; and now it was moved that this would be very hard upon the plaintiff, who at the time of the writ of error brought had good cause, though that were now cured by a new original; and for this the case of NAYDON AND WINTERBOTTOM, about 3 years before, was cited. But per Cur. the plaintiff cannot discontinue his writ of error without leave of the Court; for if you do not assign error we will affirm the judgment, and the Court will make no rule. 12 Mod. 561. Mich. 13 W. 3. Sir Richard Leving v. Lady Calvry.

28. In *debt* the *declaration was of Michaelmas term*, and the *plea-roll of Easter term*, and no continuances entered; and upon demurrer this was shewn to the Court as a discontinuance, but they said that the *practice is never to enter continuances till the plea-roll is made up*, though the declaration be of 4 or 5 terms standing. 1 Salk. 179. pl. 7. Pasch. 2 Ann. B. R. Curluis v. Padley.

29. Plaintiff *cannot* discontinue *after rule* for judgment nisi, &c. and then a *peremptory rule for judgment* for the defendant. 1 Salk. 179. Pasch. 2 Ann. B. R. Turner v. Turner.

[462] 30. *After special demurrer*, plaintiff had leave to discontinue on payment of costs. 6 Mod. 82. Mich. 2 Ann. B. R. Williams v. Farrow.

31. An *original was* 7 *Geo.* and the *declaration was* 9 *Geo.* and no continuances entered between the one and the other. This being moved in error of judgment given for the plaintiff, it was answered that the continuances might be entered at any time, and that when entered, the plaintiff is entitled to his judgment. The Court was of opinion that the *attorney ought to be punished* for making up a second record, *but* that the *plaintiff must have his judgment*. 8 Mod. 243. Pasch. 10 Geo. 1. Hawker v. Hinton.

(A. 3) Continuance. In what Cases it must be; and how many Days must be given.

1. IN *attaint*, when the parties have *day in court upon verdict to hear their judgment*, the judgment shall not be given till the 4th day, and the attaint ought to bear teste after the 4th day of the judgment, and if not it shall abate. Br. Jours, pl. 42. cites 9 Ass. 21.

2. *Quod permittat* was brought of the plaintiff's own seisin in the debet & solet, and counted of being disturbed *of his way*, and the defendant demanded the view and had it; and upon the view he had *day as in plea of land, because it is to recover inheritance*; and after appearance, upon a default, a distringas shall be awarded in lieu of a petit cape, and thereupon he shall have days

as

as in plea of land. Adjudged, &c. Fitzh. tit. Jour, pl. 35. cites Trin. 30 H. 6. 8.

3. *Pone* was ſued *by the defendant in replevin, to remove*, &c. and the *writ was* et *dic. præfato querent' quod ſit hic tali die*, &c. and there *were not* 15 *days between the teſte and the return*, and therefore was challenged; per Littleton it is good; for *before the ſtatute of York, a man need not have* 15 *days in any caſe, and the ſtatute is in attachment and diſtreſs*, &c. and this pone is at the common law, and *(dic. querent') is only to give prefixion to the plaintiff; as in London* the *tenant vouched a foreigner*, and they gave day to them in Bank, this need not to have 15 days. Per Brian *(dic.) countervails a ſummons*, therefore ought to have 15 days; but *contra in writ of error*, there is no proceſs, but the proceſs ſhall be by ſcire facias after, and *(dic. quer') is to give garniſhment to the plaintiff, and is not like to foreign voucher*, which Chock agreed. Br. Jours, pl. 54. cites 12 E. 4. 11.

4. Per Jenney, *venire facias to be viewed againſt an infant* need not have 15 days. Ibid.

5. *And* in *aid-prayer by baron of the feme*, he need not have 15 days. Ibid.

6. *But pone* ſued *by the plaintiff* ought to have 15 days; for this has ſummons againſt the defendant and *others, when it is ſued by the defendant;* for then it is dic. quer', which was agreed by the clerks. Ibid.

7. If *aſſiſe* is brought *againſt* 4, *and judgment* is given *againſt them*, whereupon *all the* 4 *bring a writ of error*, and *upon a ſcire facias* quare executionem habere non debet *one of them only appears*, and the reſt make default, *and* he that appears *aſſigns errors by himſelf*, and the defendant in the writ of error pleads in nullo eſt erratum, the writ of error is diſcontinued; and in this caſe, he that appeared ought to have prayed proceſs ad ſequendum ſimul; and thereupon judgment of * ſeverance ought to have enſued; per Popham. Yelv. 3, 4. Trin. 44 Eliz. in caſe of Ld. Cromwell v. Andrews.

Cro. E. 891, 892. pl. 8. Andrews v. Lord Cromwell, S. C. and the Court held that this aſſignment by one only per ſe, without ſuing a ſummons and ſeverance of the others, is as null and void; and therefore, though the writ be good, yet they would award execution; for the writ of ſcire facias quare executionem habere non debet is as a ſpur to cauſe the plaintiffs to aſſign the errors; and when it is returned ſcire feci, and nothing done thereupon (for this aſſignment of errors by himſelf only is as if nothing had been done thereupon), execution ſhall therefore be awarded; and though there was now a year paſſed after the return, and at this time no judgment is, that there ſhall be execution, nor that any continuance was entered, yet it is not material, for there never ſhall need any other ſcire facias to be awarded, but execution ſhall be taken, when there is an apparent default in the plaintiff that he would not aſſign his errors; and therefore the writ was abated, and execution awarded.——Noy, 44. S. C. but S. P. does not appear.

* [463]

8. *Error* of a judgment in C. B. for that the defendant being then and now an *infant appeared by attorney*, and not by guardian; he was admitted by his guardian to aſſign that for error; it was moved that the writ of error was diſcontinued, becauſe the *entry is, ad quem diem prædict. Carre per attornatum ſuum infra ſcript.* where it ought to be *per cuſtodem ſuum*, &c. and three juſtices cæteris abſentibus were of that opinion; wherefore the plaintiff proſecuted a new writ of error. Cro. J. 250. pl. 2. Mich. 8 Jac. B. R. Carr v. Baker.

9. *Debt*

9. *Debt was brought upon four bonds* to pay money; *three of the actions were tried in London in Trinity term*, and the *fourth was tried at Lent aſſiſes afterwards*, and there was not any continuance from Trinity term to Lent aſſiſes, which was much inſiſted upon, yet judgment was given for the plaintiff. Cro. J. 529. in pl. 8. cites Paſch. 10 Jac. B. R. Rot. 104.

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10. It was ſaid by the prothonotaries, that if a *nihil dicit is entered in Trinity term*, and a writ of *enquiry of damages iſſues the ſame term*, that there needs not any continuance; but if it be *in another term* it is otherwiſe. The Court ſaid, if it were not the courſe of the court they would not allow of it, but they would not alter the courſe of the court. The words of continuance were, quia vicecomes non miſit breve. Godb. 195. pl. 280. Trin. 10 Jac. C. B. Wetherell v. Green.

11. An *elegit* taken out once may be *continued 7 years*; agreed per Cur. Keb. 159. pl. 110. Mich. 13 Car. 2. B. R. in Weldon's caſe.

(B) *What* ſhall be *a Diſcontinuance.*

The courſe of B. R. is, that the plaintiff or defendant may continue the plea after they have put themſelves on the judgment of the court upon demurrer; but this ought to be pending the plea; per Dodderidge J. and affirmed by others. 2 Roll. Rep. 111. Trin. 17 Jac. B. R. Anon.

[1. THE courſe of the court of *King's-Bench* is to *enter no continuance upon the roll after iſſue or demurrer, and then* to enter the continuance of *all upon the back before judgment.* Tr. 16 Jac. B. R. Sir GEORGE TRENCHER'S caſe, by the clerks, M. 31, 32 Eliz. B. R. between RUSSEL AND PRAT, by the clerks, and if it is not entered, it is error. See the principal caſe, P. 16 Jac. B. R.]

Mo. 403. pl. 537. S. C. by the defendant's claiming property the plaintiff may have writ de proprietate probanda, without continuance of the replevin, though it be 2 or 3 years after; becauſe by the claim of property the firſt ſuit is determined. ——— Cro. E. 468. (bis) pl. 26. S. C. but S. P. does not appear. ——— See tit. Default (E), pl. 1, 2. S. C.

[2. If a *pluries replevin* be *returned in Michaelmas term, that the defendant claimed property*, and after *nothing is done, nor any appearance nor continuance till Eaſter term* after, at which term they appeared and pleaded, and judgment was thereupon given; though no continuance was between Michaelmas and Eaſter, yet this is not any diſcontinuance, becauſe there is not any continuance *till* * *appearance*; for *the parties have not any expreſs day in court*, and where there is not any continuance, there cannot be any diſcontinuance. Tr. 38 Eliz. B. R. between GAWEN AND LUDLOW adjudged.]

* [464]

Cro. C. 236. pl. 17. Lakins v. Lamb, S.C. and judgment affirmed; for by the finding the verdict, that

[3. In a *quare impedit* in Banco *againſt two, one pleads to iſſue*, and the *other demurs*, and a *verdict* is given *againſt him who pleads to iſſue*, and after *ſeveral continuances are made upon the demurrer*, *but no continuance* is made *upon the verdict till judgment is given*, but *after judgment is given upon the verdict, and alſo upon the demurrer, for the plaintiff*, yet this is not any diſcontinuance, for it is *not the uſe to make any continuance after verdict till judgment.* M. 7 Car. B. R.

B. R. between Ekins and Sir John Lamee adjudged in a writ of error, which intratur Trin. 7 Car. Rot. 1165.]

defendant, againſt whom it was found, is out of court, and no day ſhall be given to a defendant againſt whom a verdict is found; becauſe he has no day in court to plead any thing; but in this caſe day is only given to him who is to plead to the demurrer.

[4. In an *electione firmæ*, if the *defendant at the day of niſi prius at the aſſiſes pleads, that* the *plaintiff entered into parcel* of the land, *pending the writ*, and the *juſtices* of niſi prius *accept the plea, and diſmiſs the jury*, though they do *not give any day to the parties in Banco*, yet this is not any diſcontinuance, although the plea is collateral; for the *day of niſi prius, and* the day *in Bank are but one day*; for the Court in Banco gave day to the jurors in Banco, niſi prius juſticiarii ad aſſiſas venerint, and to the parties day is given there abſolutely. M. 8 Jac. Scaccario, Sir Hugh Brown's case, adjudged.]

Lane, 81, 86. 89. S. C. adjudged, but by Tanfield Ch. B. *in ſome caſes a day ſhould be given by the judge of niſi prius, but* that *ſhall not* be *a new day*, but

only the day within contained, and that only in ſpecial caſes, viz. if the iſſue be joined, and *at the ſhewing the evidence there is a demurrer*, in this caſe the judge gives to the party the day within contained, as it appears 10 H. 8. Rot. 835. and Hill. 11 H. 8. accordingly, in C. B. but Hill. 36 Eliz. Rot. 448. upon *nonſuit* at the aſſizes no day given; ſo if the party *confeſs the action*; and ſo if there be a *bill of exceptions*, no day ſhall be given, cites Hill. 38 Eliz. Rot. 331. in B. R. But perhaps it will be ſaid, that theſe authorities do not match with the principal caſe, becauſe it is upon a material plea, yet he ſaid it is all one, and therefore in caſe of a *releaſe pleaded after the laſt continuance*, this is recorded, and yet no day is given, as appears Trin. 20 H. 8. Rot. 506. in C. B. and this was upon a new and collateral matter, as the principal caſe is, and cited Trin. 20 H. 8. Rot. 247. or 2447. upon an *arbitrement pleaded*, and divers other precedents upon the ſame point.

[5. If a man *recovers upon demurrer, or by default*, &c. and a *writ of inquiry of damages is awarded*, there *ought to be continuances all times between the firſt and ſecond judgment*, otherwiſe it will be a diſcontinuance; for the firſt is but an award, and not compleat till the ſecond judgment upon the return of the writ of inquiry of damages. Trin. 14 Jac. B. R. between Pipe and Agar, by the clerks. Tr. 23 Car. B. R. between Jennings and Sanders adjudged per Curiam upon demurrer.]

Roll. Rep. 508. pl. 46. Pipe v. Algar, S. C. Coke Ch. J. ſaid that, as he remembered, it had been reſolved, that

there was no need of any continuance, but Doderidge ſaid, that the plea is at an end by the firſt judgment, but the clerks ſaid, that they always uſed to make continuances after the firſt judgment, but ſome of the clerks ſaid, that after the writ of inquiry is ſerved, it is not uſual to make any continuance. —— 3 Bulſt. 208, 209. S. C. Coke Ch. J. ſaid, that it is good either way; and all the clerks of the court being demanded, anſwered, that there was no neceſſity to enter a continuance after the writ of inquiry awarded; and judgment affirmed accordingly.

[6. *But* he needs *not* in this caſe to make any continuance *after the ſecond judgment*. Tr. 14 Jac. B. R.] [465]

[7. If a *judgment* be given *upon nil dicit*, a *writ of inquiry* of damages *may iſſue the ſame term, in which the judgment is given without any continuance*, but not in another term. M. 10 Jac. B. per Curiam, and ſaid to be adjudged, and that the precedents are ſo. This is the courſe de B. R. *but in Banco* it is otherwiſe, for there the uſe is, that if *a writ of inquiry be awarded returnable the next term, no idem dies is given to the plaintiff*; but *otherwiſe* it is *in Banco Regis*. Paſch. 16 Car. B. R. between Leman and Mapowder, per Curiam adjudged in a writ of error, upon hearing the prothonotaries de Banco. Intratur Tr. 15 Car.]

Fol. 486.

* Godb. 195. pl. 280. Trin. 10 Jac. C. B. Wetherell v. Green, S. P. by the Prothonotaries, and ſeems to be S. C. and the Court

ſaid, that if it was not the courſe of the Court, they would not allow of it, but they would not alter the Court. The words of the continuance were, quia vicecomes non miſit breve.

[8. In an action of *debt in an inferior court*, if the *defendant acknowledges the action at one court*, and *no judgment is entered at this court, but at the next court judgment is given for the plaintiff*, if there be no continuance between the ſaid courts, this is a diſcontinuance. P. 11 Car. B. R. between THORNTON AND WADE, per Curiam adjudged, and a judgment given in York reverſed accordingly. Intratur M. 11 Car. Rot. 318.]

In writ of inquiry of damages on a judgment by default, no day ought to be given

[9. If a *judgment* be given *in treſpaſs, or other ſuch action by default, or upon demurrer*, and a *writ of inquiry* of damages *awarded returnable the next term*, no continuance per idem dies ſhall be given to the *defendant*, becauſe he *is out of court by his own default*. This is the conſtant courſe de Banco Regis.]

to the defendant, becauſe he is out of court, & fine die. Sid. 16. pl. 8. Mich. 12 Car. B. R. Burges v. Pierce. ——And ſo Twiſden ſaid it was adjudged, 5 Jac. Ibid. ——And Ibid. ſays, that according to this is the caſe of recovery in waſte by default, where upon the writ of inquiry the defendant had no day in court, and cites 17 E. 3. 58. b. pl. 50.

Cro. J. 445, 446. pl. 24. Mich. 25 Jac. B. R. but entered 20 Jac.

[10. If the *defendant* in an action *imparl till octabis Michaelis*, at which day the *term is adjourned to menſe Michaelis, to which day there is no continuance, but to octabis Hilarii after there is a continuance*, this is a diſcontinuance. H. 10 Jac. B. R. per Curiam, between HUNSLEY AND OSBAN.]

Anon. S. P. and ſeems to be S. C. ——Where the defendant has day by imparlance to octabis Michaelis, and nothing is done till octabis Martini, the plea ſhall not be hereby diſcontinued any time in the ſame term; per Frowike. Keilw. 56. b. 57. a. pl. 6. Mich. 20 H. 7.

11. If *tenant in præcipe* quod reddat *vouches M. who vouches over N. who comes by proceſs*, and *day is given upon eſſoign between the demandant, the tenant, and M.*, &c. *without mentioning of N.* this is diſcontinuance of proceſs againſt N. though he never entered into the warranty. Br. Diſcontinuance de Proceſs, pl. 39. cites 8 E. 3. 7. Fitzh. Voucher, 155.

12. *Præcipe quod* reddat, *at the petit cape the demandant prayed ſeiſin of the land*, and the *tenant alleged diſcontinuance of proceſs*, in as much as *in the original the tenant is named J. S. of C.* and *in the writ of view C. is left out*, by which the demandant counted againſt the tenant, for the fault appeared in the record; quod nota, the default ſaved ſeiſin of the land. Br. Diſcontinuance de proceſs, pl. 49. cites 38 E. 3. 22.

Br. Eſſoin, pl. 125. cites S. C.

13. *Coſinage* the *parties are at iſſue*, and the *tenant is by attorney*, and the *tenant himſelf is eſſoigned after the iſſue*, there this is diſcontinued; for the attorney ought to have been eſſoigned. Br. Diſcontinuance de Proceſs, pl. 5. cites 40 E. 3. 34.

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Br. Eſſoin, pl. 27. cites S. C.

14. In *debt* it was agreed, that if *he who has made attorney be eſſoigned*, and *his attorney not removed*, it is diſcontinuance of the proceſs; for the attorney ought to have been eſſoigned. Br. Diſcontinuance de Proceſs, pl. 6. cites 45 E. 3. 10.

15. If the *plaintiff in debt caſts eſſoign where he has attorney in court*, and *the eſſoign is adjudged and adjourned*, there the proceſs is diſcontinued. Br. Diſcontinuance de Proceſs, pl. 56. cites 45 E. 3. 10.

16. By

16. By the *caſting of a protection* the day is diſcontinued, and after the year and day, upon reſummons or reattachment, the plea ſhall be recontinued; but the plea may be revived by reſummons within the year upon the repeal of the protection. Jenk. 26, 27. in pl. 50. cites 3 H. 4. 10.

17. A *man had two attornies in formedon*, and the *one was eſſoigned after appearance*, and the *other not*, and *the eſſoign was adjudged and adjourned*, and after this matter was alleged for diſcontinuance; becauſe the one was not eſſoigned, and by the beſt opinion it is no diſcontinuance, and eſpecially becauſe the exception was taken before the eſſoin was adjudged and adjourned; but quære, for adjornatur. Br. Diſcontinuance de Proceſs, pl. 10. cites 11 H. 4. 53. Br. Eſſoin, pl. 38. cites S. C.

18. *Avowry* by one *in replevin againſt three*, and ſo to iſſue, and *the other two ſaid that they came in aid of the avowant*; now if *the two have not day and continuance by the roll from day to day* all is diſcontinued; nota. Br. Diſcontinuance de Proceſs, pl. 22. cites 21 H. 6. 23. In action againſt two, if day be given on the proceſs in the roll againſt one only, this is a diſcontinuance; and the ſame in treſpaſs againſt five; and the meſne proceſs is continued againſt five only; but it may be amended, becauſe it is the miſpriſion of the clerk; but otherwiſe if no day was given to either of them. Br. Diſcontinuance de Proceſs, pl. 38. cites 21 E. 4. 3.

19. *Certiorari came into Middleſex to remove appeals and indictments*, and an *appeal was remanded into Middleſex becauſe the defendant ought to have pleaded not guilty and challenged twenty, by which the jury remained for default of jurors and twenty-four tales awarded*, and this becauſe the proceſs ſhall not be diſcontinued, for nothing is recorded in Bank but the original; quod nota. Br. Diſcontinuance de Proceſs, pl. 52. cites 16 E. 4. 5.

20. *At the venire facias returned*, the *defendant is eſſoigned and adjourned*, the *habeas corpore juratorum ſhall have the ſame day as the eſſoin has by adjournment*; for otherwiſe it ſhall be diſcontinuance of proceſs againſt the jury. Br. Diſcontinuance de Proceſs, pl. 53. cites 21 E. 4. 20.

21. In writ of error it was in a manner agreed, that *where the parties are at iſſue and intratur*, quod *jurata inter illos ponitur in reſpectu hic uſque tali die*, &c. which it is not uſed to give, *& idem dies datus eſt partibus prædictis*, &c. and yet no diſcontinuance. Br. Diſcontinuance de Proceſs, pl. 41. cites 2 R. 3. 9.

22. In *aſſiſe* the *tenant appeared by bailiff*, and *day is given to the party aforeſaid, and not to the bailiff by name*, he may plead divers pleas, &c. and yet well by all the juſtices except Brian; and judgment given accordingly; for the tenant is always party, and may appear by another bailiff after, or by attorney or in perſon and plead. Br. Diſcontinuance de Proceſs, pl. 34. cites 6 H. 7. 15.

23. *In writ of error, if the errors are not aſſigned, and ſcire facias thereof ſued the ſame term*, this is diſcontinuance. Br. Diſcontinuance de Proceſs, pl. 44. cites F. N. B. S. P. Ibid. pl. 59. cites F. N. B.

24. No diſcontinuance ſhall be by the *death of a ſtranger to the original as* of the *prayee in aid*, *vouchee*, &c. viz. death of a ſtranger to

to the writ between diviſions of the writ. Br. Diſcontinuance de Proceſs, pl. 60.

25. In *aſſiſe* the *defendant appeared by bailiff, and pleaded*, and *continuance is taken, dies datus eſt partibus prædictis*, &c. & *non boltive*, and well, and no diſcontinuance. Br. Diſcontinuance de Proceſs, pl. 63.

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[467] Jenk. 59. in pl. 9. S. P.

26. In a *quare imp' againſt two* at the pone, the *ſheriff returns nihil as to one of them, and ſays nothing of the other*, this is a diſcontinuance of proceſs. Jenk. 57. in pl. 5.

S. P. as to the courſe of C. B. held accordingly, and the error aſſigned over-ruled. Cro. E. 75. pl. 33. Mich. 29 and 20 Eliz. B. R. in caſe of Preſton v. Tooley.——S. C. cited Roll. Rep. 31. by Coke Ch. J. that judgment was affirmed And the ſame difference between the courts of B. R. and C. B. was agreed by all the clerks in the principal caſe there. Trin. 12 Jac. B. R. Cobbe v. Heydon.——S. C. cited accordingly. 11 Rep. 6. b. in Sir John Heydon's caſe, which was an action of *treſpaſs againſt A. B. and C.—A. confeſſed judgment*, and *B. and C. ſeverally pleaded not guilty, and ſeveral venires* were awarded to try theſe iſſues, &c. but *no day was given to A.*

27. Error of a judgment in *ejectment* was aſſigned, that *no day was given* to the parties *in a writ of inquiry of damages*, ſed non allocatur; for the *defendant is not to have day*, and the *plaintiff is to attend at his peril*; and ſo is the courſe *in C. B. but it is otherwiſe in B. R.* Cro. E. 144. pl. 2. Mich. 31 & 32 Eliz. B. R. Matthew v. Haſſal.

28. *Proceſs* was *ſerved by a ſerjeant at mace within a franchiſe*; but becauſe he was *not an officer to B. R.* he cannot be examined, and conſequently there is a diſcontinuance of proceſs. Arg. Palm. 103. cites 41 Eliz. Willet v. Croſby.

29. After judgment in a Court of *Piepowders* in an action on the caſe for words, it was aſſigned for error, that a writ *of inquiry of damages was awarded, and no day given to the plaintiff*; and this was held to be error. Cro. E. 773. pl. 2. Mich. 42 & 43 Eliz. B. R. Howel v. Johns.

Noy, 120. Harrington's caſe. S. C. and judgment reverſed.

30. *Judgment* in trover in Shrewſbury court *by default*, and a writ of *inquiry of damages was returnable the next court*, at which day the *plaintiff appeared*, and the *writ was returned ſerved*; but *jurata ponitur in reſpectu uſque ad proximam curiam*, and the day expreſſed certainly; and *then* the plaintiff appeared again, and the *jurata ponitur in reſpectu to the 10th of June*, but the *plaintiff did not appear on that day, nor had any day over, and yet jurata ponitur in reſpectu again*, to ſuch a day, at which day the *jury appeared, and gave 20 l. damages*, for which the plaintiff had judgment, and likewiſe for his coſts. It was aſſigned for error, that the plaintiff not having day at the laſt adjournment over, all is diſcontinued; for by the firſt judgment the defendant is out of court, but the plaintiff attends de die in diem, his judgment not being perfect till the damages are inquired; ſo that the plaintiff having day to the 10th of June, and he then not appearing, the Court ex officio ought not without prayer of the plaintiff to make continuance of the jury, for this always ought to be at the prayer of the plaintiff; quod fuit conceſſum. Yelv. 97. Hill. 4 Jac. B. R. Harrington v. Launſdon.

31. *Another* diſcontinuance *was aſſigned*, becauſe the *jury was continued over by a ponitur in reſpectu*, which never ſhall be unleſs upon

upon an iſſue to be tried between the parties; for the jury upon a writ of inquiry of damages, is only an inqueſt of office, which has no other continuance than by a non miſit breve by the officer or the ſheriff; quod fuit conceſſum per tot Cur. and judgment reverſed. Ibid.

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32. *Want of an original* was aſſigned for error in Ireland; the defendant in error *pleaded that ſuch a day an original was filed and concluded to the country*, and thereupon the judgment was reverſed. But this judgment there was reverſed here becauſe the matter was diſcontinued; for the defendant concluding to the country where the matter of his *plea ſhould be tried by the record*, viz. whether the original writ was delivered or not (becauſe that appears of record) and then the *plaintiff in error not replying or demurring upon the plea* of the defendant, the whole was diſcontinued. Yelv. 117. Mich. 5 Jac. B. R. Seintjohn v. Commyn.

33. A *diſcontinuance can never be objected pendente placito before judgment*, for it may be continued at the pleaſure of the court; [468] but after judgment in another term it may be well rejected, and no continuance can then be entered; ſic dictum fuit. Cro. J. 211. in pl. 3. Mich. 6 Jac. B. R.

34. *Three executors recovered* in C. B. in debt by default. The defendant brought error, and aſſigned a *diſcontinuance*, viz. that the ſuit being by three executors, and *at the day*, which they had *by the roll* upon a continuance, *two only appeared*; and by the ſame roll, day was given to all three upon another roll. Per tot. Cur. this is a diſcontinuance, and cannot be amended; for credit ought to be given to the roll, and therefore non conſtat that more than two appeared, and that the third made default, which is a non-proſecution of the defendant at that day, and ſhall go to all three afterwards, and judgment was reverſed. Yelv. 155. Trin. 7 Jac. B. R. Paſton v. Luſher.

35. Error of a *judgment* in B. R. *in debt. A ſcire facias was awarded ad audiendum errores returnable* 11 *Maii*, 18 *Jac.* and there was *not any ſuch day of adjournment in the Exchequer-chamber*; therefore it was holden to be a diſcontinuance. Cro. J. 620. pl. 6. Mich. 19 Jac. B. R. Cave v. Polewheel.

36. When an *iſſue is found againſt the defendant*, it is not material whether he has day given him to appear or not; for he demands nothing but to diſcharge himſelf, though true it is that *ſometimes day has been given, but it is not neceſſary*; but the *plaintiff ought always to appear, and to have day by the record.* Palm. 333. Hill. 20 Jac. B. R. Rogers v. Allen.

37. After judgment by default in *action on the caſe*, writ of *inquiry of damages was awarded.* Error was aſſigned for that no day was given to the defendant; but adjudged that *no day ought to be given to the defendant* in ſuch caſe, becauſe by the judgment he was out of court, & ſine die. Sid. 16. pl. 8. Mich. 12 Car. 2. B. R. Burges v. Pierce.

Ibid. ſays, that according to this is the caſe of the recovery in waſte by default, where, upon the writ of inquiry, the defendant had not any day in court. 17 E. 3. 58.

38. It

38. It was aſſigned for error of a judgment in P. that *one day of continuance between the plaint and the iſſue was on a Sunday*, and ſo non dies juridicus; ſed non allocatur; for per Cur. it is void, and as no continuance, and ſo being after a verdict is aided, and judgment affirmed niſi. 2 Keb. 448. pl. 15. Hill. 20 & 21 Car. 2. B. R. Hele v. Davis.

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So where the continuance was *ad proximam curiam, viz. 26 die*, whereas the *court was not held till the 26th day*; yet judgment was reverſed.

39. Error to reverſe a judgment was aſſigned, that one of the continuances was *to a certain day of the month*, whereas it ought to be ad proximam curiam; and judgment was reverſed niſi. Sty. 70, 71. Mich. 23 Car. B. R. Knipe v. Johnſon.

Roll Ch. J. ſaid, that perhaps the viz. may be void, Sty. 97. Paſch. 24 Car. B. R. Pay v. Paxted.

40. A *ſci. fa.* iſſued againſt ſeveral tertenants; but the *parol demurred* for the infancy of one. After his age a *re-ſummons* iſſued, but before the return thereof *one of the tertenants died*, who was returned ſummoned both upon the ſci. fa. and upon the re-ſummons. By this all the proceedings on the ſci. fa. are diſcontinued, and the parties out of court, and the death of one tertenant puts the whole without day; and Holt Ch. J. cited Kelw. 69. & Fitzh. Abr. tit. Error, 7. Carth. 200, 201. Mich. 3 W. & M. in B. R. Blake & al' v. Gell.

41. *Appeal de morte viri* carried down to be tried by niſi prius; *appellant did not put in the record*; held neither nonſuit nor diſcontinuance, but appellant to pay coſts. 12 Mod. 65. Mich. 6 W. & M. Sutton v. Sparrow.

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42. In *debt* on a by-law in the Mayor's Court for refuſing to ſerve as ſheriff, the *plaint was levied on the 15th November*, and then the defendant gave *bail to appear the next day*, viz. the 16th, and inſtead of continuing from the 15th to the 16th, *day is given from the ſaid 15th day of November to a certain day in June*, and then the *entry is, that the cauſe was removed by hab. corp. to C. B. and ſent down by procedendo.* This was held to be a diſcontinuance, and not amendable, being upon a demurrer. 12 Mod. 669 to 690. Hill. 13 W. 3. City of London v. Wood.

43. *Capias of proceſs* muſt have continuance, and therefore muſt be from term to term; *but writs of execution* need none, and therefore you may have a longer return. Per Cur. 12 Mod. 506. Paſch. 13 W. 3. Walker v. Humphry.

44. In an *information for a libel* called the Obſervator, the *venire facias was teſted in Trin. term, returnable Die Lune the 1ſt day of Mich. term following*; but the *diſtringas bore teſte Die Martis the day following* (id eſt) the 24th of Nov. whereas it ought to have been the day of the return of the venire facias; and this was held to be a diſcontinuance and not amendable. Mich. 3 Ann. B. R. The Queen v. Tutchin.

45. *Appeal of murder* againſt B. he *demurs to the bill* of appeal *and pleads over to the felony*, upon which *iſſue is joined* and a *venire facias is awarded* with a *ceſſet proceſſus until the demurrer be determined.* It was objected that here was a diſcontinuance of the iſſue, the entry being quod ad triandum exitum prædictum ceſſet

proceſſus, &c. whereas the venire ſhould have been continued with a vicecomes non miſit breve. The Court held this no diſcontinuance, but that it was the moſt proper way; for it is vain to proceed to iſſue until the demurrer be determined; for if the bill abates there is an end. 11 Mod. 232, 233. Trin. 8 Ann. B. R. Smith v. Bowen.

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(B. 2) What a Diſcontinuance, and what a Miſcontinuance.

1. SECOND *deliverance* was brought *againſt an abbot and commoigne*, the *plaintiff did not come, they prayed return irrepleviable*; and the Court ſaw the original, which was abbot and cocanon, by which the Court ſaid that he ſhall commence again to this variance, and ſo ſee that this is miſcontinuance. Br. Diſcontinuance de Proceſs, pl. 17. cites 21 E. 3. 49.

2. If *capias* be *awarded where diſtreſs ought to be awarded*, and the *defendant is taken and ameſned*, he ſhall go quit, and the proceſs ſhall iſſue where it firſt iſſued out of courſe, and diſtreſs ſhall iſſue; for it is miſcontinuance and not diſcontinuance. Br. Diſcontinuance de Proceſs, pl. 57. cites 47 E. 3. 14.

3. *Debt againſt* 3 *executors, proceſs continued till the pluries capias ſerved*, and *they made default*, the *plaintiff ſued exigent againſt* 2, *and pluries capias againſt the* 2*d.* and the *one rendered himſelf at the exigent*, and *the others did not come.* Per Hull, *ſue new exigent againſt them all*, and *make amendment where the proceſs firſt iſſued out of court.* Per Hank, he ſhall anſwer, for *he, who comes in by one writ where he ought to come by another, ſhall anſwer.* Br. Diſcontinuance de Proceſs, pl. 11. cites 12 H. 4. 17.

4. And per Parning T. 10 E. 3. where *petit cape iſſued for grand cape*, the proceſs is not diſcontinued; and ſo it *ſeems only miſcontinuance becauſe they have day in court*, and therefore the executor [470] ſhall anſwer as it ſeems. Ibid.

5. *Præcipe quod* reddat *of* 120 *acres* of land, the *writ of view was of* 100 *acres* of land *omitting* 20, and therefore by award he ſued new writ of view; for the proceſs is not diſcontinued, but miſcontinued. Br. Diſcontinuance de Proceſs, pl. 18. cites 7 H. 6. 8.

6. *Detinue of charters, proceſs iſſued at the exigent*, which *was alleged for diſcontinuance of proceſs*: for exigent lies not in this action, and it was adjudged miſcontinuance, and not diſcontinuance, by which they commenced where the proceſs firſt iſſued out of courſe. Quod nota. Br. Diſcontinuance de Proceſs, pl. 50. cites 8 H. 6. 29.

7. *Detinue of a box with charters and muniments*, defendant came by the exigent, and the *plaintiff counted in ſpecial of a charter, by which J. infeoffed his father*, &c. and now becauſe it is of a charter of land, therefore exigent ought not to have iſſued, but this did not appear before the count, by which it was taken *miſcontinued*

tinued but *not miſcontinued*, and the *defendant* appeared, and *pleaded as if he had not come by exigent, by which he pleaded in bar.* Br. Exigent, pl. 26. cites 8 H. 6. 29.

8. Note, that if *exigent* be *awarded in a caſe where it does not lie, as in* action upon the *caſe before the ſtatute of it*, the proceſs is illy continued, but is no diſcontinuance. Br. Diſcontinuance de Proceſs, pl. 61. cites 10 H. 7. 21.

9. In *treſpaſs*, the *defendant joined* 2 *iſſues*, the *one in L.* and the *other in Middleſex*, and *venire facias iſſued to the ſheriff of Middleſex who tried both*; and by the beſt opinion, this was miſcontinuance of the other iſſue in L. and not diſcontinuance; for it *ſhall be intended that ſeveral venire facias's iſſued to try both.* Br. Diſcontinuance de Proceſs, pl. 62. cites 11 H. 7. 5.

10. In *præcipe quod reddat againſt baron and feme*, the *baron made default, and the feme* prayed to be and *was received and pleaded* in bar, and it was found with the demandant and he prayed his judgment. Per Wood J. this is a miſcontinuance, but per Vaviſor J. it is a diſcontinuance. Kelw. 35. a. b. &c. pl. 2. Trin. 13 H. 7.

So where it comes by one proceſs where it ought to come by another. Ibid.——

11. *Præcipe quod* reddat, *the venire facias was returned before the common day.* Per Frowick Ch. J. this is no diſcontinuance of proceſs, but miſcontinuance of it; for *they have day in court but not ſuch a day as they ought to have.* Br. Diſcontinuance de Proceſs, pl. 23. cites 21 H. 7. 16.

But if proceſs be awarded termino Trinit. returnable termino Hillarii, this is diſcontinuance of proceſs, becauſe one *term mi.ſue is omitted*; therefore this is diſcontinuance, per him. But Brooke ſays, *quære* inde; for the *plaintiff may delay himſelf.* Ibid.——*And if exigent be returnable at a month*, this is miſcontinuance, and not diſcontinuance, but he *ought to have* 5 *months*, and *allocatio comitatus ſhall be granted. Quære*, for it ſeems that the one and the other is error.——* Bulſt. 144. Arg. cites S. C.

* S.P. Ibid. pl. 47. cites 34 H. 6. 20. ——Br. N. C. 126. pl. 589. cites S. C.

12. There is a *diverſity between diſcontinuance and parol without day*, for the *diſcontinuance* * *puts the party to new original*, but *where the parcel is without day this may be revived by a reſummons or re-attachment*; for the original remains. Br. Diſcontinuance de Proceſs, pl. 43.

Jenk. 59. in pl. 11. S.P.

13. A *miſcontinuance* is where the continuance is *made by undue proceſs*; but a *diſcontinuance* is where *no continuance is made at all.* Jenk. 57. at the end of pl. 5.

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(C) Continuance *per Idem Dies.*

[1.] IN an action of *debt in a borough court*, if *proceſs iſſues to the ſerjeant, who returns his precept ſerved* againſt the defendant, and thereupon a *day is given till the next court for the plaintiff to declare* againſt the defendant, and it is *not entered, that idem dies datus eſt defendenti*, this is a diſcontinuance. P. 3 Car. between CALMADY AND VAUGHAN adjudged in a writ of error, and the judgment given for the plaintiff upon nil dicit in the borough court of Oakehampton in Devon. reverſed accordingly.]

[2. If

[2. If a *plaint* be *entered in an inferior court that holds plea by preſcription*, and there the *defendant imparls*, and thereupon a *day is given to the parties till the next court* there to be held, *without limiting any day when the court ſhall be held, but it is alleged after in the record, at which court, ſcilicet, ſuch a day, held ſecundum conſuetudinem*, &c. this is good, and no diſcontinuance, becauſe it may be, that they have not any certain day, but may hold a court when they will, as at the great ſeſſions in Wales; and it ſhall be ſo intended, when it is ſaid, that at the next court held ſecundum conſuetudinem, &c. Mich. 7 Car. B. R. between JESSON AND LAXE, per Curiam adjudged upon a writ of error upon a judgment given in Coventry Court, and the book of 9 Eliz. D. 252. denied, and ſaid that there were other apparent errors for which the judgment was reverſed.]

* Cro. C. 254, 255. pl. 6. S. C. adjudged by three juſtices, dubitante Crook J. but no mention is there of the court being held ſuch a day, ſecundum conſuetudinem.—S. C. cited by Twiſden J. Raym. 205.

[3. [*But*] if a plaint be entered in an inferior court, and the defendant being ſummoned appears, and the plaintiff declares, and thereupon the *defendant imparls till the next court, and then pleads in bar*, and thereupon the *plaintiff imparls to the next court to reply*, and there *no day is given to the defendant, but at the next court the plaintiff demurs*, this is a diſcontinuance, for *idem dies ought to have been given to the defendant*. Mich. 8 Car. B. R. between AUGWIN AND LORD ROBERTS adjudged in a writ of error, and the judgment given in the hundred court of Penwith in Cornwall reverſed. Intratur Mich. 7 Car. Rot. 96.]

[4. In a *ſcire facias upon a recognizance of the peace* againſt J. S. who was bound by it to keep the peace, the *defendant imparls* and *day is given to him, and idem dies* † *is not given to the plaintiff*, yet this is not any diſcontinuance, becauſe the king is party in it; and when the *king is party* no day is given to him, for he is always preſent in court. M. 10 Car. B. R. between THE KING AND GRIFFITH, per Curiam.]

† Fol. 487.

5. In *debt*, the *plaintiff and defendant both appeared* by their attornies, and *day was given to both the parties in ſtatu quo nunc, ſalvis partibus, &c. till* 8 *Hill.* at which time the *defendant made default*. Held that the plaintiff ſhould not have judgment, but he muſt ſue out further proceſs; becauſe dies datus is as ſtrong as an imparlance. Mo. 79. pl. 209. Mich. 8 & 9 Eliz. Stukely v. Thynn.

6. In a court of *Piepowders* the adjournment was entered *idem dies* datus eſt, where it ſhould be eadem hora, and yet held good. Mo. 459. pl. 637. Mich. 38 & 39 Eliz. Anon.

‡ [472]

7. In *error to reverſe a common recovery*, plaintiff brought a *ſci. fa. againſt the heir and the ter-tenants*. The *heir* appeared, but nihil dicit, and four ter-tenants being returned warned, *pleaded, that two of them were tenants of ſuch land with A. and B.* who were *not* warned nor ‡ *named, and demanded judgment of the writ*, &c. and thereupon the *plaintiff demurred*, and on pleading this plea in Mich. term. *dies datus eſt partibus prædictis* till Hill. term. It was moved, that this was a diſcontinuance of the whole; for the heir here nil dicit, and ſo nihil ought to be entered againſt him, and not any continuance, but that *the dies which is given partibus prædictis*,

Cro. E. 774. pl. 4. Mich. 42 & 43 Eliz. B. R. S. C. but S. P. does not appear.—Mo. 622. pl. 850. S. C. but S. P. does not appear.

dictis, *is* intended only to thoſe tenants on whoſe plea the demurrer was, and not to the heir, and that ſo all is diſcontinued; but it was anſwered, that it was *continued to the heir as well as to thoſe who pleaded*; for it is partibus prædictis inde, &c. and all the Court, præter Gawdy, held the continuance well enough. Cro. E. 739, 740. pl. 13. Hill. 42 Eliz. B. R. Holland v. Dauntzey.

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8. Action upon the *caſe* in the Court of S. The *defendant was eſſoigned, and had day by eſſoin*, and the *plaintiff had the ſame day*, at which day the *defendant*, being demanded, appeared not, but *made default, & habuit diem per default ſecundum conſuetudinem villæ prædict'* given by the Court, (viz. ſuch a day,) at which day *both parties appeared*, and judgment was given againſt the defendant by nihil dicit. Adjudged that no day could be given him when he was out of court, and the cuſtom alleged of giving day cannot help it; for no cuſtom can help that which is againſt common law and an apparent diſcontinuance, and therefore judgment was reverſed. Cro. J. 357. pl. 15. Trin. 12 Jac. B. R. Peplow v. Rowley.

Jo. 330, 331. pl. 4. Lort v. the Biſhop of St. David's, S. C. and the Court reſolved, that no dies datus can be to any but upon their appearance.

9. After *judgment* in the grand ſeſſions in Wales *in aſſiſe of darrein preſentment*, error was aſſigned that P. *one of the three defendants appeared, and caſt an eſſoin*, but that *the other two made default, whereupon re-ſummons iſſued againſt them returnable Die Martis next following*, and *at the next day they caſt an eſſoin, which was challenged and denied*, and becauſe there was not idem dies given to them two, as there was to the firſt when he appeared and was eſſoigned, and that there ought to have been one eſſoin allowed unto them, it was inſiſted to be error; ſed non allocatur; for *idem dies ſhall not be given when they make default*, and after once default and re-ſummons an eſſoin is not allowable, by the expreſs words of the ſtatute of 12 E. 2. Cro. C. 341. pl. 6. Hill. 9 Car. B. R. Cort v. Biſhop of St. David's.

S. P. and therefore where *three capiaſes and exigent are awarded*, and the *defendant appears upon the exigent, and has dies datus*, and after *makes default*, a diſtringas ſhall iſſue, and upon this returned nihil, there ſhall iſſue three other capiaſes and exigent; but otherwiſe it ſeems after imparlance. Br. Continuance and Imparlances, pl. 1. cites 19 H. 8. 6.

10. When *day is given before the count*, it is *called dies datus*; but when after the count it is called an imparlance. Hard. 365, 366. Paſch. 16 Car. 2. in the Exchequer.

11. It was moved for error of a judgment in Briſtol, that *in one of the continuances* (idem *dies datus eſt* partibus prædictis) it is *not ſaid per Cur.* But ruled to be well enough, it being all as one act, but it would be *otherwiſe in the verdict*. Comb. 285. Trin. 6 W. & M. in B. R. Hawkſworth v. Hawkſworth.

(C. 2) What Days ſhall be ſaid the ſame Day.

1. NOTE, that *every adjournment is a ſeveral day in aſſiſe*, but the *day of niſi prius*, *and* the day *in Bank*, *are all one day*, but *not to all intents*. Br. Jours, pl. 60. cites 47 E. 3. 1, 2.

2. Note,

2. Note, that the *firſt day of the niſi prius, and* the *fourth day after,* and *eight days after or more, which the juſtices take to be adviſed,* are but one and the ſame day, and when they give their *judgment, this ſhall have relation to the firſt day,* ſo that if *protection* ſhall be *caſt at the firſt day,* which is expired meſne, yet this ſhall ſerve, and ſhall be allowed. Br. Jours, pl. 83. cites 10 H. 6. 4.

3. *So of default recorded upon tenant for life, where he in reverſion prays to be received after.* Ibid.

4. *And* where a man *fails of his record at the day, and the failor is recorded,* and *after (but before judgment) he brings the record in,* this ſhall not ſerve when judgment is given; for this ſhall have a relation to the firſt day. Ibid.

5. The * *day of niſi prius and the day in Bank* is all one and the ſame day; for if protection be caſt out at the niſi prius, and repealed or expired by the day in Bank, yet it ſhall ſerve the defendant; for it was good at the firſt day, and the firſt day and the other day are all one day in law. Br. Jours, pl. 11. cites 35 H. 6. 58.

* S. P. to plead any plea meſne between the day of niſi prius and the day in Bank, but not to make good a ſecond writ purchaſed and teſted meſne between thoſe days. Br. Jours, pl. 13. cites 40 E. 3. 38. —— Br. Niſi prius, pl. 5. cites S. C. —— S. P. *ſo that a releaſe made meſne between theſe two days cannot be pleaded in Bank; but* it ſeems that a releaſe made *meſne between the day of venire facias returned, and the writ of niſi prius awarded, and the day of niſi prius, may be pleaded at the day of niſi prius.* Ibid. pl. 31. cites 21 H. 6. 10.

It *is not one and the ſame day to all intents*; for if a man caſts *protection at the day of niſi prius, which is repealed at the day in Bank,* yet this *ſhall have the default of the defendant at the day of niſi prius,* and if he appears at the day in Bank it ſuffices. Br. Jours, pl. 32. cites 21 H. 6. 20. —— S. P. Ibid. pl. 35. cites 4 H. 6. 9.

6. Theſe words *ab octab' Sanctæ Trinit'* ſhall be *intended ab 24to die octab' Sanctæ Trinit',* and ſo ſee that to this intent the *firſt day and the fourth day, and all days meſne ſhall be intended one and the ſame day.* Br. Jours, pl. 57. cites 21 E. 4. 43.

7. *All the parliament* is only one and the ſame day. Br. Jours, pl. 91.

(C. 3) How conſidered.

1. IN *debt* the *defendant was condemned,* and *ca' ſa' iſſued, and after exigent* thereupon, and *he came upon return of reddidit ſe, and pleaded a releaſe of the plaintiff made after the execution, and prayed ſcire facias* thereupon *againſt the plaintiff to confeſs or deny the deed,* and had it; quod nota, and ſo ſee that this is not day to plead, but upon the ſcire facias to confeſs deed, &c. Br. Jours, pl. 68. cites 22 Aſſ. 91.

2. *Error upon an indictment of treſpaſs,* which *ſuppoſes the treſpaſs Die Jovis proximo poſt diem Pentecoſtes,* and it was *aſſigned for error, in as much as all the week was Pentecoſt;* per Weſton, Pentecoſte dicitur a penta, quod eſt quinque & coſte, quod eſt decem, quod eſt quinquies decem dies poſt Paſcham, and this day is Dies Dominicus, wherefore plead over; quod nota, by which he pleaded no ſuch vill of B. without addition, &c. Br. Jours, pl. 27. cites 7 H. 6. 39.

3. Note where a man is *nonſuited* this is *referred to the day which he had in court*, and *not to the whole term*; quod nota. Br. Jours, pl. 67. cites 9 E. 4. 24.

4. See and note that the *vigil of the feaſt* is not part of the feaſt. Br. Jours, pl. 65. cites 15 H. 7. 2.

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[474] (C. 4) At what Time, and when the Parties ſhall be ſaid to have Day in Court.

1. IN *præcipe quod* reddat the *grand cape was returned tarde*, and the *tenant* came and *made defence and imparled, and after came and ſaid that the writ was not ſerved*, and was received to it, and therefore it ſeems that ſuch a day is not to appear; for if it ſhould, then the default ſhall go quit, which ſhall not be, but ought to be ſaved. Br. Jours, pl. 92. cites 22 E. 3. & Fitzh. Brief, pl. 393.

Br. Repleviare, &c. pl. 9. cites S. C.

2. Where the *ſheriff does nothing at the alias, nor at the pluries*, by which *iſſued writ to the coroners to make replevin and to attach the ſheriff to anſwer to the contempt and to the party*, and after *diſtreſs againſt the ſheriff; and becauſe no ſummons was awarded againſt the plaintiff to receive his beaſts*, therefore it is ſaid that he has no day in court, and if he comes at the day he cannot plead; by which when the *plaintiff* came at the day, he was not ſuffered to plead, but was *compelled to find pledges de proſequendo & de returno habendo ſi*, &c. *and to ſue writ to the coroner to make deliverance and to attach the party, and upon the return of thoſe writs he hath day in court*, and may plead, and not before. Br. Jours, pl. 14. cites 43 E. 3. 26.

3. In *replevin, at the pluries the ſheriff did nothing*, by which *iſſued proceſs of contempt to the coroners to attach the ſheriff to anſwer to the contempt, but mentioned nothing of ſummoning the defendant to anſwer*; and *they returned that the ſheriff is attached, and that they cannot have the view of the beaſts to make replevin*, by which *iſſued diſtreſs to the ſheriff and withernam de averiis def'*, and at the day the *defendant came and prayed that the plaintiff gave deliverance of the withernam, and ſaid that the beaſts of the plaintiff are dead in pound in default of the plaintiff*, & non allocatur, for he has no day in court; but the plaintiff was compelled to find ſurety de returno habendo ſi, &c. and pledges de proſequendo and writ to make deliverance of the firſt diſtreſs to the coroners. Br. Jours, pl. 70. cites 44 Aſſ. 15.

4. He who is *outlawed* and has *charter of pardon*, and the *plaintiff is ready in court, ſhall not be bound to anſwer immediately*, but ſhall have *ſcire facias againſt him to ſay why the charter ſhall not be allowed*; for neither the plaintiff or defendant have day in court till the ſcire facias be returned. Br. Jours, pl. 73. cites 46 E. 3. 15.

5. The party has no day *to anſwer upon* proceſs of *contempt* till the attachment. Br. Jours, pl. 22. cites 11 H. 4. 87.

6. In

6. In *replevin*, the *plaintiff prayed aid of A. R. who was ſeiſed in fee and leaſed to him for years*, there the *prayee may join in aid at the firſt day in perſon, and* not otherwiſe; but he may join *by his attorney at the day given by proceſs*; contra at the firſt day when the tenant prays. Br. Jours, pl. 58. cites 2 H. 6. 1. S. P. and ſo of vouchee. Br. Jours, pl. 79. cites 11 H. 4. 28.

7. *Replevin & alias & pluries*, and *after proceſs of contempt iſſued againſt the ſheriff*, and *he anſwered that he had ſerved this writ, and that no other writ came to him*, and the *defendant came and prayed that the plaintiff count againſt him*, & non allocatur; for the plaintiff has no day in court now, but *only the ſheriff has day in court to anſwer to the contempt*. Br. Jours, 82. cites 2 H. 7. 5.

8. *At the day that the ſheriff returned mandavimus ballivo*, &c. *quod nullum dedit reſponſum*, and yet the *defendant was permitted to appear to plead to iſſue*. Br. Jours, pl. 87. cites Fitzh. Proceſs, 13.

(C. 5) Day in Court. Neceſſary in what Caſes. [475]

1. NOTE per Luddington and Fitzjohn, if a man who is *debtor to the king of record* be *in perſon in the Exchequer*, he ſhall be compelled to *anſwer without proceſs or day in court*. Br. Jours, pl. 90. cites 40 Aſſ. 35.

2. *Contra* per Fitzjohn, *if it be upon ſurmiſe, and is not debtor of record*. Ibid.

3. In *debt* the *plaintiff recovered*, and he *was not ſuffered* to come after, and *confeſs his gree or ſatisfaction*; for he has no day in court. *Contra upon recognizance*, for this commences without original; but writ of debt has day in court, and therefore ſhall have *ſcire facias*. Br. Jours, pl. 77. cites 47 E. 3. 24.

4. *In writ of error* the *plaintiff cannot be nonſuited*, for he has no day in court upon it, but upon the ſcire facias; and *e contra in* writ of *falſe judgment*. Br. Jours, pl. 80. cites 20 H. 6. 18.

5. A man who is *outlawed cannot come gratis without day in court, and plead a plea in the diſcharge of the outlawry*. Br. Jours, pl. 80. cites 22 H. 6. 23.

6. *Debt by the king, which paſſed for him by niſi prius*, and *before the day in Bank the king pardoned him all debts, treſpaſſes*, &c. and after the *king at the day in Bank had judgment, and after ſued execution*, and the *defendant pleaded a releaſe*, and the *king was barred*; for the defendant had no day to plead it before, for the day of the niſi prius and the day in Bank are all one, and the *defendant cannot have audita querela, nor ſcire facias ad cognoſcend' factum againſt the king*, and he *ſhall have the plea without day in court when the execution ſued*, and therefore it ſeems that it was ſued by fieri facias or ca. ſa. Br. Jours, pl. 61. cites 34 H. 6. 3. 50.

7. *Homine replegiendo at the pluries*, and after *proceſs iſſued againſt the ſheriff to anſwer to the contempt*, and *no day given to the defendant*, and the *ſheriff returned quod corpus elongatur*, and yet the defendant appeared and pleaded, and good per Cur; for if he ſhould not be now received, his body ſhould be impriſoned by withernam. Br. Jours, pl. 81. cites 7 E. 4. 5.

Br. Jours, pl. 37. cites S, C.

8. *Appeal at the ſuit of the feme*, the *defendant was outlawed and taken, and it was demanded what he had to ſay why he ſhould not be hanged*, and he *ſaid that where he is named J. S. his name is J. F.* and the *feme prayed execution*, and *it was doubted whether ſhe may reply that he is the ſame perſon who killed*, &c. *without being warned by ſcire facias to have day in court*, and by the beſt opinion ſcire facias ſhall iſſue. Br. Scire Facias, pl. 132. cites 9 E. 4. 24.

9. For where a man is *condemned in damages*, the *plaintiff ſaid that he is in the hall, and prayed an officer to take him*, and the *Court granted it*, and *he is taken and confeſſes*, he ſhall remain in execution; *but if he ſays that he is not the ſame perſon*, the *plaintiff cannot reply that he is*; for he has no day in court, and there he ſhall be put to proceſs to have execution, but here there is no ſuch proceſs to be awarded. Ibid.

[476] (C. 6) Day in Court. What Day ſhall be given, common Day or other Day.

1. *PRæcipe* quod reddat, *conuſance of the plea was demanded by J. N.* and had it, and *day given in franchiſe*, and after *thoſe of the franchiſe erred*, by which *writ of error was brought*, and the *judgment reverſed in B. R.* and the Court was ready to have awarded ſeiſin of the land, by which came *M.* and *prayed to be received, and ſhewed cauſe, and was received and vouched*, and the *demand counterpleaded*, and they were *at iſſue*, and common day was given as in plea of land, and no ſuch day as ſhall be given in writ of error; for he is out of this court; quod nota. Br. Jours, pl. 26. cites 21 E. 3. 4. 6.

2. In *ſcire facias* the *Court may give what day they will*; for this is in nature of an execution; quod nota. Br. Jours, pl. 66. cites 24 E. 3. 31.

3. *Aſſiſe returnable in B. R. in oct. Martini*, the *plaintiff prayed day the next day*, and becauſe it was returnable at a day of the term, and not at a certain day of the week, he can have only common day of the term, viz. oct. Hill. Br. Jours, pl. 45. cites 27 Aſſ. 33.

4. *Per quæ ſervitia*, the *defendant was at iſſue*, and *prayed common day*, and could not have it, becauſe *it is a writ of execution*; quod nota bene. Br. Jours, pl. 38. cites 39 E. 3. 20.

5. In *treſpaſs*, if the *king grants to J. N. conuſance of pleas within his manor*, there the tenant ſhall not have day, but de tribus ſeptimanis in tres ſeptimanas; per Rolf. Contra per Marten; for the king may alter the place of juſtice, but not the day. But Brooke ſays, quære of the day, for the law is with Rolf as it ſeems. Br. Jours, pl. 30. cites 8 H. 6. 20.

6. In *formedon* the *parties demurred in judgment*, and *day was given* 15 *Trin. anno* 8. *and after from this in* 15 *Michaelis*, *and* from thence *in oct. Hill'*, *and* from thence *in* 15 *Paſchæ*, which are not common days in plea of land; and per tot. Cur. it ſhall not be amended; for after demurrer they may give day beyond the

the common day, and may give day within the common day, for they may give longer day or a very short day, for this lies in their discretion, and the *entry is quod justic. nondum avisantur*, &c. for *these are days of grace and not common days*. Br. Jours, pl. 52. cites 8 E. 4. 4.

7. *So of imparlance*. Ibid.

8. *And* the *statute* of common days in Bank is *intended only where they pend in process*, and it is agreed that this is a statute. Ibid.

9. If *in præcipe quod* reddat the *sheriff returns quod petens non invenit plegios de prosequendo*, &c. the *sicut alias shall not have common day*, but 15 days suffices, for this is as original, for he was not demandable at the first day. Per Danby. Br. Jours, pl. 36. cites 9 E. 4. 18.

10. Per Brian, if *grand cape or venire facias be returned tarde*, the *2d writ shall have common day*. Br. Jours, pl. 36. cites 9 E. 4. 18.

11. *But* they agreed with Danby in case that the *original* shall be *returned tarde*. Ibid.

12. *And* by all the clerks *scire facias shall have such day as writ of dower*, in favour of execution. Ibid.

13. In *assise of mortdancestor* common day may be given, viz. oct' Michaelis 15, &c. *But* in assise *of novel disseisin*, day certain shall be given, as Die Lune tali septimana, &c. or Die Martis 11 Die Aprilis, &c. apud Westm. &c. Br. Jours, pl. 75. cites F. N. B. fo. 177.

(C. 7) What shall be Day in Court, sufficient by the Roll. [477]

1. *IN præcipe* quod reddat the *tenant vouched*, and *at the day of the summons ad warrantizandum returned, the sheriff returned no writ*, and yet the *vouchee was received to plead*; quod nota; and the *tenant said that he is another person, and not the vouchee*. Br. Jours, pl. 88. cites 5 E. 3. and Fitzh. Voucher, 197. but cites Ibid. 256. contra.

2. In *replevin*, the *plaintiff after issue was nonsuited*, and *return awarded*, and the *plaintiff sued second deliverance*, and *at the pone* per vadios, *the writ was not served*, and the defendant prayed that the plaintiff might count against him, because he had day in court by roll though he had not day by writ, and if the plaintiff had deliverance he would not count against the defendant. And per Wilby, you *cannot sue to the sheriff to have the writ returned if the plaintiff will not*, and if the sheriff has made deliverance and not returned the writ, you shall have remedy against the sheriff, by which he was put to sue *sicut alias*, &c. Br. Averment, contra, &c. pl. 10. cites 21 E. 3. 43.

3. In *trespass*, *at the exigent the defendant appeared and the plaintiff not*, nor did the *sheriff return the writ*, yet the *plaintiff shall be demanded to be nonsuited at the day*; for he has day in court by the

the roll, though the writ be not returned. Br. Jours, pl. 64. cites 38 E. 3. 20.

4. *And* the ſame year fol. 25. in *quare impedit at the attachment the defendant and plaintiff appeared*, and the *ſheriff did not return the writ*, and yet by Thorp, clearly, the defendant may plead; for he has day by roll; quod nota. And concordat 21 E. 3. fol. 13. where the ſheriff returned no writ. Ibid.

5. *Contra* if he returns *nihil; nevertheleſs* it ſeems if nihil be *returned at ſuch day that the defendant is to be at a loſs, he ſhall be received.* Ibid.

6. *Audita querela upon a releaſe made after judgment in treſpaſs*, and *venire facias iſſued againſt him who releaſed*, and the *ſheriff did not return the writ*, and the *defendant prayed that the plaintiff be demanded*, & non allocatur, becauſe the writ is not returned ſerved, notwithſtanding that he has day in court. Br. Jours, pl. 51. cites 6 E. 4. 9.

7. *Contra* where a man is to have *corporal puniſhment*, as in capias or exigent, there it may appear by the roll where the writ is not returned; contra upon pone; quod nota. Per tot. Cur. Ibid.

8. Where *no writ is returned*, and the *jury appears*, they ſhall be taken, per Huſſey Ch. J. for they have day by the roll, which Townſend agreed; contra per Brian, Fairfax and Sulyard. Br. Jours, pl. 47. cites 3 H. 7. 16.

S. P. Br. Saver Default, pl. 1. cites 27 H. 6. 13. but it ſhould be H. 8. according to Br. Jours, pl. 1.

9. Note, per Fitzherbert and Shelly J. quod non negatur, that where the *grand cape in præcipe* quod reddat *is not returned*, yet at this day the *tenant* may appear and *gage his law of non ſummons*, for he has day *by the roll;* quod nota. Br. Jours, pl. 1. cites 27 H. 8. 14.

10. In caſe on an *indebitatus aſſumpſit* the plaintiff made an *ill replication*, and therefore Roll Ch. J. ſaid, that judgment ought to be given againſt him; but that by favour of the Court they can give him leave to diſcontinue his action. Sty. 309. Mich. 1651. Kymlock v. Bamfield.

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In Roll it is (Court) but by the plea it ſhould be (defendant).

(D) Diſcontinuance of Proceſs.

In what Caſes it cannot be without the *Aſſent of the* Court. [*Defendant.*]

S. P. by the juſtices, that a diſcontinuance cannot be after a verdict. Het. 3. Paſch.

[1. IN an action *after iſſue joined, and* a *verdict* found *for the plaintiff*, the plaintiff cannot diſcontinue the action without the conſent of the defendant; and if he will not enter the judgment, the defendant himſelf may enter it. Mich. 17 Car. and Hill. 17 Car. Banco, between THORP AND DAVENANT, in an action upon the caſe upon a promiſe, adjudged for the plaintiff upon the requeſt of the defendant, though the plaintiff would have

diſcontinued the ſuit, and have brought a new action to have had more damages.] 3 Car. C. B. Anon. —— S. P. by Roll Ch. J. Sty. 346. Mich. 1652. —— S. P. per Cur. Lev. 48. Mich. 13 Car. 2. B. R. Anon. —— Sid. 60. in caſe of Ellis v. Yarrow, S. P. and ſeems to be S. C. —— Mod. 13. Mich. 21 Car. 2. B. R. in caſe of Abbot v. Moore, S. P. —— Sid. 228. Mich. 16 Car. 2. B. R. in caſe of Bull v. Mayo, that diſcontinuance cannot be by rule of court after verdict, but by conſent it may. —— In ſuch caſe the defendant may enter judgment againſt himſelf; per Doderidge J. Sty. 216. Mich. 3 Car. Stokeland's caſe.

But after a *ſpecial verdict*, and argued at the bar, a diſcontinuance was entered by the plaintiff as it was agreed he might. Cro. C. 575. pl. 19. Hill. 15 Car. B. R. Oxford (Ld.) v. Waterhouſe. —— S. C. cited Arg. Show. 63.

2. The *plaintiff after a demurrer cannot* diſcontinue his ſuit *without the Court's licence*; and although the continuance be not entered, it may be entered at any time, and the *defendant by licence of the Court*, for his own advantage, *may enter the continuance*; per tot. Cur. Cro. J. 316, 317. pl. 2. Mich. 10 Jac. B. R. in caſe of Fox v. Jukes. Bulſt. 217. Fox v. Jux, S. C. ſays, it was a rule made by the Court, that the plaintiff cannot diſcontinue for

to ſave his payment of coſts thereby after a demurrer, when the cauſe is then by the demurrer in the judgment of the Court, and in their diſcretion either to confirm or diſcontinue the ſame, and it is *not* then *in the power of the plaintiff to diſcontinue without aſſent of the parties, and this aſſent* he *ought* to make *appear to the Court.* —— After a demurrer *on an arbitration bond*, it is not uſual to diſcontinue the action; per Cur. but ordered a nil capiat to be entered niſi cauſa. Sty. 134. Trin. 24 Car. Anon. —— 3 Lev. 440. cites 26 & 27 Car. 2. B R. that a diſcontinuance was permitted to be made by the plaintiff after demurrer and argument, by Ld. Ch. J. Hale, and the court of B. R. but that it is entered Mich. 26 Car. 2. B. R. Rot. 349. —— Leave was given to diſcontinue after demurrer. Raym. 64. Hill. 14 & 15 Car. 2. B. R. Palmer v. Richards.

3. *After iſſue* the plaintiff cannot diſcontinue without the aſſent of the defendant; per Curiam. Keb. 485. pl. 23. Paſch. 15 Car. 2. B. R. Butcher v. Erſefield.

4. *Debt upon a charter-party*, in which were ſeveral covenants, and at the end each bound himſelf to the other in 1000l. for the performance of covenants. The declaration was good till plaintiff came to the *aſſignment of the breach* in which were ſeveral faults; upon a demurrer to it the plaintiff deſired leave to diſcontinue, but it was not allowed, unleſs the defendant would conſent, the action being debt *for the penalty*; and for that the plaintiff is not without his remedy; for he may bring a new action upon the covenant. 2 Lev. 117, 118. Mich. 26 Car. 2. B. R. Rea v. Barnes. But afterwards, Hill. 26 & 27 Car. 2. B. R. he had leave to diſcontinue upon payment of coſts. 2 Lev. 184. S. C.

5. In *covenant* by the father of an apprentice *upon the indenture of apprenticeſhip*, there was *judgment by default* againſt the defendant (the maſter). Upon a writ of inquiry *very ſmall damages were given*, with which the plaintiff being not ſatisfied, moved for leave to diſcontinue the action; but the Court anſwered, that they had no power to give ſuch leave without the conſent of the defendant, which in this caſe he refuſed. But the plaintiff's counſel inſiſted, that the Court had power to give leave to diſcontinue without the conſent of the defendant, becauſe the award of the writ of inquiry on the roll is no other than a rule of Court, and no judgment. And it is clear, that after a ſpecial verdict found for the plaintiff he may diſcontinue; and this was laid down for a rule, (viz.) *wherever a writ is abateable by the death of the plaintiff*, there *he may diſcontinue without the aſſent of the defendant.* [479]

fendant. On the other ſide it was ſaid, that the award of the writ of inquiry on the roll was ſuch a judgment that afterwards the plaintiff could not diſcontinue, becauſe the defendant is out of court, and has no day in court, and therefore the ſuit is determined; and an action which is determined cannot be diſcontinued. Holt Ch. J. ſaid, it is certain that the action may be diſcontinued by ſuch aſſent of the defendant, and that even after verdict it may be diſcontinued by ſuch aſſent, and that there was *no difference (in reſpect to the diſcontinuance) between a verdict upon iſſue joined and* a verdict *upon a writ of inquiry;* and it was held, that the plaintiff could not by law diſcontinue without the aſſent of the defendant. Carth. 86, 87. Mich. 1 W. & M. in B. R. Stephens v. Etherick.

(E) In what Caſes the *Court* ought to have *given Conſent* to a Diſcontinuance.

[1. IF the *parties demur in law*, and after the *plea is not continued in the roll for a year*, and *one party prays a diſcontinuance*, if the *other does not pray the contrary*, the uſe is for the Court to grant the diſcontinuance. H. 37 Eliz. Banco, between FULLWOOD AND WARD, by the clerks.]

[2. *But if* the *other party prays a continuance* of the plea, the Courtin diſcretion hath uſed to continue it. H. 37. Eliz. B. between FULLWOOD AND WARD, adjudged.]

Ibid. 415. pl. 550. JENKINSON v. ALLSON. Mich. 1675. S. P. and ſeems to be S. C. and

III. In *debt on obligation to perform an award*, the plaintiff in his *replication had ill aſſigned a breach*, and therefore prayed leave to diſcontinue; but becauſe the *award was for the payment of money*, the Court would not give leave, for they ſaid he might have his action of debt upon the award. Freem. Rep. 410. pl. 541. Trin. 1675. Anon.

Twiſden ſaid, that he had known leave to diſcontinue denied where the award was for payment of money only, becauſe he might have action of debt; but here the plaintiff had leave to diſcontinue paying coſts. —— 3 Keb. 556. pl. 68. Mich. 27 Car. 2. B. R. S. C. ſays, that the award not being excepted to, and the breach for money, the Court granted leave to diſcontinue or amend, paying coſts, though there are other remedies by debt on the award.

IV. The *defendant appeared by attorney where he ought to appear by guardian*, and affidavit was made that the *attorney had notice of the infancy at the time* of his appearance, and afterwards bragged that he would arreſt the judgment for that reaſon, whereupon the Court gave the plaintiff leave to diſcontinue, &c. Comb. 63, 64. Mich. 3 Jac. 2. B. R. Peter's caſe.

[E. 2] [*In what Caſes the Defendant may enter the Continuance*].

[3. If the *plaintiff* be *nonſuit*, by which the defendant is to recover coſts if the *plaintiff will not enter his continuances on purpoſe to ſave the coſts*, the *defendant ſhall* be ſuffered to *enter them*, and ſo recover his coſts. P. 8 Jac. B. YEO's caſe, per Curiam.]

[E. 3] [*And how much ſhall be ſaid to be diſcontinued.*]

[4. If the *defendant in his demand leaves out parcel* of his demand *compriſed in the original* in his proceſs, all is diſcontinued. 18 E. 3. 42. b.]

[5. If a man *vouches for parcel*, and *as to the reſt makes no anſwer*, and the *demandant does not take advantage thereof by prayer of ſeiſin, but ſuffers the proceſs to be continued againſt the vouchee in right of the parcel*, all is diſcontinued. 18 E. 3. 40. b.]

[6. If the *tenant vouches for all the demand*, and the *proceſs* upon the voucher *is made for leſs than it is*, all is diſcontinued. 18 E. 3. 40. b.]

[7. *In* an action of *treſpaſs* a *diſcontinuance in parcel is* a diſcontinuance *in the whole.* 7 H. 6. 27.] S. P. for the *damages are intire.* Br. Diſcontinuance de Proceſs, pl. 20. cites S. C.

[8. *In treſpaſs if* the *diſcontinuance be after iſſue*, this ſhall be a diſcontinuance of the original and all. Contra 30 Aſſ. 36. adjudged, for the repleader ſhall be where the diſcontinuance began.] Br. Diſcontinuance de Proceſs, pl. 30. cites S. C. of treſpaſs againſt two, who pleaded ſeveral pleas to iſſue, and proceſs continued againſt the inqueſt, and in the proceſs mention only was made of him who firſt pleaded, without any mention of the other, and after it was found for the plaintiff, and the other alleged the diſcontinuance, whereupon they commenced where the firſt fault was, and quaſhed the reſidue, and then a new ven. fac. iſſued, making mention of both.——Br. Repleader, pl. 28. cites S. C.

[9. If an *aſſiſe* be *adjourned before themſelves at Weſtminſter, and after in Banco for difficulty*, and *at the day the record is not ſent, nor the parties demanded*, all is diſcontinued. 22 E. 3. 3. b.] Fitzh. Diſcontinuance, pl. 9. cites S. C. and though the record was ſent in the third after, yet they thought it a diſcontinuance, and ſo did nothing, &c.

X. In *debt*, the *defendant by attorney, to part, waged his law, and had day to perform it*, and *pleaded to the country for the reſt*, and *at the day of the law the defendant was eſſoigned*, and for the *reſt* it *paſſed for the plaintiff by niſi prius*, and he prayed judgment. Markham ſaid, the proceſs is diſcontinued; for *the attorney* was eſſoigned after the *ley gager*, where he *is out of court as to this*, in as much as the law ſhall be performed in perſon, and proceſs is entire. Br. Diſcontinuance de Proceſs, pl. 21. cites 19 H. 6. 30.

XI. *But* Brook ſays it ſeems, *becauſe he remained attorney for this part, which was pleaded to the country*, therefore it is diſcontinued for the other part, but not for this, therefore *quære.* Br. Diſcontinuance de Proceſs, pl. 21. cites 19 H. 6. 30.

XII. *Treſpaſs againſt three by the baron and feme de clauſo fracto, and of menacing his tenants*, and the *writ was tenentibus ſuis*, and the *count was tenentibus of the baron only*, and was made three terms ſince, by which, per Danby, Chock, and Needham, diſcontinuance *in parcel ſhall abate the writ in all.* Br. Diſcontinuance de Proceſs, pl. 37. cites 7 E. 4. 10.

XIII. *As in treſpaſs of trees cut, and goods carried away and no mention of goods carried away in the count*, there the count ſhall abate in all; for it is no warrant of the writ. Br. Diſcontinuance de Proceſs, pl. 37. cites 7 E. 4. 10.

XIV. *And* in *treſpaſs againſt two*, if the *proceſs againſt the one be diſcontinued*, the writ ſhall abate in all, per Danby Ch. J. *But* [481] becauſe *the roll was well*, therefore no more was thereof ſaid; for it was of the baron and feme. Br. Diſcontinuance de Proceſs, pl. 37. cites 7 E. 4. 10.

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[E. 4] [*In Pleading by anſwering to Part only.*]

2 Bulſt. 335. S. C. adjudged.

* Fol. 488.

Roll. Rep. 235. pl. 15. and 176, 177. pl. 15. S. C. adjudged againſt the plaintiff;

[10. In *treſpaſs for ſeveral things*, the *defendant pleads* a plea *in bar for part*, and *does not anſwer to the reſt*, and the *plaintiff demurs generally*, the plaintiff ſhall not have judgment againſt the defendant, * for the demurrer was by intendment upon the bar, and not for want of pleading to the reſidue; for he ought to have prayed judgment upon nil dicit for it; ſo all is diſcontinued. Co. 4. HERLAKENDEN'S CASE, 62. adjudged. My Reports, 13 Jac. ‡ WILSON AND DOD adjudged, Mich. 15 Jac. B. R. between CLEER AND ABIE adjudged. Contra, my Reports, 13 Jac. and 14 Jac.]

but Roll makes a quære, why judgment ſhould not be given againſt the defendant for not anſwering to all the matter in the declaration, and cites the caſes of † Bawle v. Norris, and 14 Jac. ‡ Denne's caſe.

† Roll. Rep. 216. pl. 12. S. C. adjudged againſt the defendant, becauſe no anſwer was given as to part.

‡ Roll. Rep. 406. pl. 38. S. C. and Henden ſaid, that if the plaintiff would have taken advantage of the not anſwering to part, he ought to have made a ſpecial demurrer for this cauſe, but Curia ſeemed e contra, viz. that he ſhould have advantage of the not anſwering to part by the demurrer, and that it ſhall not be diſcontinued; and judgment was given for the plaintiff. ——— S. C. cited Ld. Raym. Rep. 716.

Brownl. 192. S. C. ſeems only a tranſlation of Yely.

11. In *treſpaſs for breaking his houſe, and taking and carrying away his goods*, the *defendant juſtifies all the treſpaſs*. The *plaintiff quoad fractionem domus, and the taking the goods, nec non materia in ea contenta, demurs upon the defendant's bar*, and the *defendant joins* in demurrer thus, viz. *quia placitum prædictum quoad fractionem domus, and the taking the goods ſufficiens*, &c. and thereupon judgment is given in C. B. for the plaintiff, but reverſed in error in B. R. for in the *offer of the demurrer ex parte querentis, nothing is alleged ſpecially, but quoad the breaking the houſe and taking the goods*; and though the ſubſequent words, viz. nec non materia in ea contenta goes to all the matter in the bar, viz. the carrying away alſo, yet when the defendant joins in demurrer, he joins ſpecially only, viz. quoad the breaking the houſe and taking the goods, but ſays nothing as to carrying them away, and ſo as to that nothing is put in judgment of the Court, yet the writ to enquire of damages is for the whole, and the judgment alſo; and the carrying away being parcel of the matter, and for which greater damages are adjudged, and this not being put in judgment of the Court, by the demurrer, the judgment is erroneous; and as

to

to the carrying away (which is part of the matter), it is a diſcontinuance. Yelv. 5, 6. Trin. 44 Eliz. B. R. Johnſon v. Turner.

12. In *treſpaſs* vi & armis, the plaintiff declared of *entering into his warren, digging his land, and chaſing and taking his conies.* The defendant, *as to the digging and chaſing, he juſtifies for common there, but anſwers nothing as to the entering into the warren, neither by confeſſion nor traverſe*, and therefore Haughton J. held, that all was diſcontinued according to 4 Rep. HERLACKENDEN'S CASE, and to this the whole Court, abſente Fleming, agreed. Brownl. 227. Trin. 11 Jac. Carril v. Baker.

So in treſpaſs quare clauſum fregit pedibus ambulando, &c. & cum averiis depaſturat', conculcat', *with oxen, horſes, cows, ſheep, and hogs.* The defendant pleads, quoad venire vi & armis, nec non totam tranſgreſſionem prædict' præter pedibus ambulando, & præter the horſes, oxen, ſheep, and cows, not guilty; but *ſays nothing as to the hogs*; this is a diſcontinuance in pleading. Cart. 51. Hill. 17 & 18 Car. 2. * C. B. Ayre v. Gloſſam.——So in treſpaſs, *for taking ſeveral ſorts of grain*, the defendant *juſtified the taking* but *of part, and ſaid nothing of the reſidue*; this is a diſcontinuance, and the general words, quoad reſiduum tranſgreſſionis will not help, becauſe he goes to particulars afterwards, and does not enumerate all, and judgment accordingly. 2 Mod. 254. 259. Trin. 29 Car. 2. C. B. Walwin v. Awberry.

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13. The *defendant concluded his plea in diſability, and the plaintiff his replication in bar.* The whole is diſcontinued. Carth. 137. Paſch. 2 W. & M. in B. R. Biſſe v. Harcourt.

Indebitatus aſſumpſit. The *defendant pleaded an attainder of high-treaſon* in diſability. The plaintiff *replied a pardon*, prout per exemplificationem inde, &c. which was held good, *& petit judicium & damna ſua.* Upon demurrer it was held, that there was a diſcontinuance, by the miſconcluſion of the replication; for an ill prayer of judgment is as none. 1 Salk. 177. pl. 1. Paſch. 2 W. & M. in B. R. Biſſe v. Harecourt.——10 Mod. 112. S. P. Mich. 11 Ann. B. R. in caſe of Alice v. Gale.

14. In caſe, the defendant *concluded in abatement, and the plaintiff demurred as to a plea in bar*, and ſo concludes petit judicium & damna; per Cur. it is a diſcontinuance. Carth. 187. Paſch. 3 W. & M. in B. R. Carter v. Davis.

1 Salk. 218. pl. 2. S. C. held accordingly, but iſſue being joined on the other promiſe, the Court ſtayed proceedings on the demurrer, ſaying the diſcontinuance would be helped by the verdict.——2 Show. 255. S. C.——G. Hiſt. of C. B. 209. S. P. that it is a diſcontinuance, becauſe he does not maintain the writ.——1 New. Abr. 15. S. P. in totidem verbis.

15. *Demurrer to a demurrer*, is a diſcontinuance; per Holt Ch. J. Cumb. 323. Paſch. 7 W. 3. B. R. Saint-John v. Campbell.

1 Salk. 219. pl. 4. Trin. 6 W. & M. in B. R. S. C. and ſays that there is no difference between pleading over when iſſue is offered, and not joining in demurrer, but pleading over; that both are alike, and make a diſcontinuance.

16. If defendant *pleads as part, and ſays nothing as to the reſt*, it is a diſcontinuance, unleſs plaintiff will take judgment by nil dicit; per Cur. 12 Mod. 421. Mich. 12 W. 3. Morley v. ——

17. *Aſſumpſit upon three promiſes for 55 l. each.* The *defendant, as to the 55 l. in the firſt count, pleaded actio non, for that the three ſeveral promiſes in the count mentioned were for the ſame ſum of 55 l. which the defendant had paid to the plaintiff before the action brought*, judgment ſi actio. The defendant demurred. The Court held the whole diſcontinued by pleading only to the firſt of the promiſes

miſes, ſo that *plaintiff ſhould have taken judgment by nil dicit for two of them*, and by his not doing it the whole is diſcontinued; for the defendant had fixed his plea by the beginning to the firſt promiſe, and therefore the ſpecial matter following will not aid it.

But afterwards, this being all done in Mich. term, and no continuance entered on the roll, the plaintiff entered up judgment by nil dicit on the two promiſes, to which the defendant did not plead; and upon reference to a maſter the Court approved thereof, and judgment the next term was given for the plaintiff. Ld. Raym. Rep. 716. Hill. 13 W. 3. B. R. Vincent v. Beſton.

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Per Holt Ch. J. if a plea begin with an anſwer to part, the whole plea is naught, and the plaintiff may demur; but if a plea begins only as an anſwer to part, and is in truth but an anſwer to part, it is a diſcontinuance, and the plaintiff muſt not demur, but take his judgment for that as by nil dicit; * for if he demurs or pleads over, the whole action is diſcontinued. 1 Salk. 179. pl. 6. Mich. 13 W. 3. B. R. Weeks v. Peach. S. C.

18. *Replevin for taking cattle in quodam loco vocat' the brills & in quodam alio loco ibidem vocat' the boggs.* The defendant *avowed the taking in prædicto loco in quo*, &c. quia H. was ſeiſed in fee of the locus in quo, &c. The plaintiff demurred, becauſe here are two places alleged, and the avowant has only anſwered to the locus in quo, &c. which is but one of the two places; and per Cur. it is a diſcontinuance. 1 Salk. 94. pl. 5. Mich. 13 W. 2. B. R. Weeks v. Speed.

* [483]

11 Mod. 34. pl. 5. Mich. 3 Ann. Anon. S.C.

19. *Debt upon bond of* 500 *l.* the *defendant as to* 225 *l. part of it, pleads payment*, &c. The *plaintiff demurred*, and per Cur. this is only a plea to part; for in debt on a bond a man may have ſeveral pleas; as ſuppoſe a plaintiff ſues as executor, the defendant may plead the releaſe of the teſtator for part, and for the reſidue the releaſe of the plaintiff. So a man as to part may plead payment, and as to the reſt an acquittance, and ſo there being no anſwer to the reſidue, here is a diſcontinuance for the reſidue; and the plaintiff ſhould have taken judgment by nil dicit. 1 Salk. 180. pl. 9. Hill. 3 Ann. B. R. Market v. Johnſon.

20. If a man *juſtifies to the whole*, and his *plea goes but to part*, the plea is bad, becauſe the thing pleaded as to the whole, and going but to part, being an inſufficient anſwer to the whole, conſequently the plaintiff muſt have judgment; and if the *plaintiff on ſuch plea does not demur, but takes iſſue*, ſince he takes it on a bad bar, whether the iſſue be found for the plaintiff or defendant, the judgment ſhall be for the plaintiff, becauſe the bar is inſufficient; for though the iſſue ſhould be found for the defendant, yet that will not amend the bar, and make that go to the whole which goes to part only, and therefore here the iſſue is material. Gilb. Hiſt. of C. B. 126, 127.

See pl. 18. and the note there.

21. *But* if the defendant had pleaded a *bar to part*, and ſays *nothing to the reſidue*, there the plea is good as to the part to which it is pleaded, and nothing being ſaid as to the reſidue, the plaintiff ought to have judgment for want of a plea as to the reſidue; *if he does not take judgment it is a diſcontinuance of his action*, for the defendant having ſaid nothing, if that nihil dicit be not entered, there being no continuance of that part of the action by what the defendant

defendant hath ſaid to it; nor the plaintiff likewiſe having ſaid any thing to it to continue it in court, it is a diſcontinuance; and if any part of it be diſcontinued, it is a diſcontinuance in the whole; for *there is not the ſame demand ſubſiſting that the plaintiff had ſet forth in his declaration*; but if the plaintiff takes iſſue and obtains a verdict, the diſcontinuance is aided by the ſtatute of jeofails, which cures all diſcontinuances before verdict, for the iſſue is immaterial, becauſe the iſſue is not material to every thing to which the plea is pleaded, for being not material as to the whole, it was in that caſe an immaterial iſſue. Gilb. Hiſt. of C. B. 127.

22. Where the plaintiff *declares in Mich. term before Craſt' Animar' ſo as to have a plea to enter of that term*, and the *defendant gives him a plea to part only*, and the *plaintiff enters his plea as of Hill. term*, and upon *demurrer* in Hill. term the defendant objects the diſcontinuance, and deſires the plea may be entered as of the term in which it was pleaded, the Court would not interpoſe to make them enter their plea on the rolls of Mich. term, becauſe if the Court had done this, the plaintiff's action muſt have been diſcontinued by ſuch rule, whereas the plaintiff having given the defendant an imparlance when he needed not, it is not erroneous, or any wiſe prejudicial to the defendant, and the plaintiff has the whole Hill. term to take judgment for the part not pleaded to, and therefore there could be no diſcontinuance during Hill. term. Gilb. Hiſt. of C. B. 127, 128.

23. *But* if an action of *debt* be brought *againſt an executor* or adminiſtrator, and he *pleads ſeveral judgments* to cover the aſſets, and *as to ſome of the judgments the pleas are good, and as to ſome bad*, this is a diſcontinuance of the plaintiff's action, becauſe the plaintiff's demand remains the ſame, and is ſtill purſued; and ſince the judgments of ſome are avoided by a good plea, and all the judgments amounting but to one cover of the aſſets, if one of them be avoided the plaintiff muſt have judgment for the whole, becauſe there is not a ſufficient bar to his demand, ſince the whole avoidance of the plaintiff's demand to charge the aſſets amounts but to one bar. Gilb. Hiſt. of C. B. 128. [484]

24. *Treſpaſs* for going over the plaintiff's cloſe *with horſes, cows, and ſheep*; the *defendant juſtifies for* that he has *a way for horſes, cows and ſheep*, and *ſays that ſuch a day he went over with horſes*; and upon demurrer it was adjudged ill; for it is a juſtification only for horſes. Judgment for the plaintiff; but the reporter, a quære. 11 Mod. 219. pl. 8. Paſch. 1709. 8 Ann. B. R. Roberts v. Morgan. Holt's Rep. 568, 569. S. C. adjudged per Holt Ch. J. & Cur.

(E. 5) Entry of them; in what Caſes, and how and when.

1. R. Recovered in action of account againſt A. and capias ad computandum was awarded, and thereupon A. was taken and entered into the account before J. T. and R. L. who were

aſſigned auditors, and before them pleaded a releaſe of one J. B. by whoſe hands he received the money to bail over to R. Upon this plea R. demurred in law, and at the *day appointed for arguing a demurrer*, the defendant inſiſted that the cauſe is diſcontinued, becauſe there is *no continuance from Hill. term to Eaſter term*; but it was anſwered that in C. B. no diſcontinuance ſhall be entered but after the year. But afterwards it was held clearly to be in the diſcretion of the Court to enter it or not; and it was diſcontinued. Sav. 54. pl. 115. Paſch. 25 Eliz. Ronyan v. Atward.

2. In *debt upon a bond* there is *iſſue joined as to part and demurrer* joined *as to the reſt, both are continued for a long time by Curia adviſare vult*, &c. but at laſt a diſcontinuance is recorded, viz. *recordatur per Cur. ſuch a day* of May termino Paſchæ anno, &c. *quod illud placitum non habet diem ultra octabas Sancti Hillarii.* 1 Salk. 180. cites Co. Ent. 142.

3. If a *new ſcire facias* be *taken out every year*, one continuance may be entered at any time by the attorney in his chamber, otherwiſe not; quod Curia conceſſit. Keb. 159. pl. 110. Mich. 13 Car. 2. B. R. Weldon's caſe.

4. By the courſe of C. B. continuances may be entered *before the return*; agreed by all the clerks. Keb. 160. pl. 110. Mich. 13 Car. 2. B. R. in Weldon's caſe.

5. On *leave granted to diſcontinue after iſſue joined*, the Court held it *needleſs to enter the diſcontinuance; contra on a nolle proſequi*; but the clerks ſaid it is uſual to enter on the roll, ideo diſcontinuatur. But this being a rule of a former term, the defendant cannot cauſe the rule to be entered (if the plaintiff refuſes it) without motion. Keb. 574. pl. 33. Mich. 15 Car. 2. B. R. Baltinglaſs v. Temple.

6. Plaintiff had *judgment in Hill. term* 1722, *three years paſt*, which *was ſigned 14th February, two days after the term, execution bore teſte 12th Feb.* and the *warrant to the ſheriff was dated 28th March.* It was moved, that though this for the benefit of purchaſors for a valuable conſideration by the ſtat. 29 Car. 2. cap. 3. ſhall be judgment only from the ſigning and entry of the month and year upon the paper of record; yet in reſpect of the plaintiff and defendant, and as to all other purpoſes, it is a judgment of Hill. term 1722, by fiction of law; ſo that the teſte of the execution ought to be the firſt day of that term. And the Court denied leave to enter continuances, this being now a record of three [485] years ſtanding; neither would they give leave to enter the judgment as of the ſucceeding term, though in fines which are the agreements of parties it has been done, whereas judgments are in adverſary ſuits; therefore the judgment in the principal caſe muſt be of the firſt day of Hill. term; but as to quaſhing the execution the Court afterwards was divided. 8 Mod. 310. Mich. 11 Geo. 1. Graves v. King.

(F) Diſcontinuance of Proceſs. *In what Actions* a Diſcontinuance *againſt one* ſhall be a Diſcontinuance *againſt others.*

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[1. IN *treſpaſs againſt three*, a diſcontinuance of proceſs againſt one, is a diſcontinuance againſt all. 39 Ed. 3. 3. * 30 Aſſ. 30.]

* Br. Diſcontinuance de Proceſs, pl. 30. cites S. C.

Br. Repleader, pl. 28. cites S. C.——S. C. cited Ld. Raym. Rep. 599.——*Treſpaſs againſt two*, who *pleaded not guilty*, and after the *one died*, the writ ſhall not abate; but yet, per Marten, diſcontinuance of proceſs againſt the one in treſpaſs is diſcontinuance againſt both; and it appears there, that in this caſe the proceſs cannot be diſcontinued againſt the dead perſon, nor the proceſs which was againſt two cannot be continued againſt the one, therefore *new venire facias ſhall iſſue*. Br. Diſcontinuance de Proceſs, pl. 19. cites 7 H. 6. 21.

Treſpaſs againſt two, and *proceſs is continued againſt the one*, and *not againſt the other*, this is no diſcontinuance againſt the other, but *is miſpriſon and ſhall be amended*, and ſo it was. Br. Diſcontinuance de Proceſs, pl. 55. cites 22 E. 4. 3.——Br. Amendment, pl. 76. cites S. C.

[2. If a man brings a writ of *error upon an outlawry of felony*, and *aſſigns* for error, *that he was in priſon at the time*, and the *king maintains that he was at large* upon a venire facias iſſued, and proceſs againſt the *lords mediate and immediate*, the lords come and *allege, that his impriſonment was by his own covin*, upon which a *venire facias iſſues*; and after, *for default of jurors, a continuance is made between the king and the party, and no continuance between the lords and the party*, by which the proceſs is diſcontinued againſt the lords; this ſhall be a diſcontinuance of all. 38 Aſſ. 17. adjudged.]

Br. Diſcontinuance of Proceſs, pl. 32. cites S. C. and therefore a new venire facias iſſues; quod nota. Br. Utlary, pl. 40. cites S. C.

[3. If a *writ* be brought *againſt ſeveral tenants by ſeveral præcipes*, though the *proceſs is diſcontinued againſt one in a præcipe*, yet it is not any diſcontinuance againſt the other tenants. 27 E. 2. 87. b.]

[4. [*So*] If a man brings *debt againſt two by ſeveral præcipes*, if the proceſs be diſcontinued againſt one, it ſhall not be a diſcontinuance againſt the other alſo. 7 H. 6. 27. per Curiam.]

S. P. for the *damages are not intire*. Otherwiſe it is of a nonſuit. Br. Diſcontinuance de Proceſs, pl. 20. cites S. C.——Br. Nonſuit, pl. 19. cites S. C. & S. P.——In *debt againſt two by ſeveral counts and one præcipe*, a *nonſuit as to one is a nonſuit as to both*; for the writ is one, and the pledges de proſequendo are the ſame; *but a diſcontinuance againſt the one is not a diſcontinuance againſt the other*; for there are two ſeveral declarations againſt them, and the continuances are always after and purſuant to the count. Jenk. 309. in pl. 87.

5. It ſeems that in aſſiſe againſt ſeveral, the one pleads a foreign deed, the others *ſhall not have day in court till this iſſue be tried*. Br. Aſſiſe, pl. 234. cites 22 Aſſ. 11.

6. *Replevin againſt three of a taking in S.* the *one appeared and avowed for himſelf in B. and traverſed the taking in S. and made avowry to bad return*, which *paſſed for the plaintiff*, and he prayed judgment, and by the beſt opinion, becauſe *no proceſs was made againſt the other two they ſhall not appear nor anſwer*, and it is all diſcontinued. Br. Diſcontinuance de Proceſs, pl. 8. cites 49 E. 3. 24.

7. *But*, per Par. and Kirton, clearly, *if the avowry had been made for him and for the others*, proceſs ſhall not be made [illegible] the others. Ibid.

8. *But*, as *here* alſo, *it is not properly in nature of avowry, but is upon plea to the writ upon the view*, in which caſe all ought to appear and plead, or proceſs ſhall be made or continue againſt thoſe who make default, for otherwiſe it is diſcontinuance. Ibid.

9. And by 21 E. 3. fo. 20. in *replevin againſt two, one avowed for himſelf, and confeſſed for his companions*, and therefore the plaintiff could not have proceſs againſt the *others*; for he *is out of the court*. Ibid.

10. And in *replevin againſt two*, the *one avowed and the other juſtified who came in aid of him*, there if *proceſs be not continued againſt him who juſtified*, the writ ſhall abate; per Cur. for there he once pleaded, which varied from this caſe. Ibid. cites 21 H. 6. 23.

11. *Treſpaſs againſt two*, the *one came by diſtreſs and pleaded not guilty, and was found guilty*, and *the other is outlawed* upon exigent *where no pluries capias is returned*, it is held error by Radford, and the argument was becauſe they *were ſevered in proceſs*, whether one ſhall take advantage of the other's proceſs or not? and it is ſaid there, that the like point is 12 Ric. 2. where it is awarded that one ſhall have advantage *of ill proceſs continued againſt the other, though* they were *ſevered* in proceſs, ſo that the proceſs againſt one is not the proceſs againſt the other. Br. Error, pl. 54. cites 46 H. 5. 9.

12. *But* one ſhall not have advantage *of the other's count*, contra of *diſcontinuance of proceſs*. Br. Ibid. cites 46 E. 3. 25, 26.

13. *And* diſcontinuance of proceſs in treſpaſs againſt the one is diſcontinuance againſt both. Br. Ibid. cites 7 H. 6. 27.

14. *At the venire facias W. B. was returned, and in the habeas corpora J. B. and not W. B. and that the ſaid J. B. is dead*, and *in the diſtreſs W. B. was returned again*, which was ſhewn for diſcontinuance when the inqueſt was ready to paſs; and per Cur. this is diſcontinuance againſt [illegible] the jurors, and cannot be amended. Br. Diſcontinuance, pl. 47. cites 27 H. 6. 5.

15. *And* 34 H. 6. 20. *miſpriſion ſhall be amended*, but *diſcontinuance of proceſs ſhall put the party to new original*. Ibid.

16. None ſhall have advantage of diſcontinuance but *parties or privies to the record, and not ſtrangers, though the action was founded againſt him upon the ſame record*, by the beſt opinion. Br. Diſcontinuance de Proceſs, pl. 54. cites 21 E. 4. 33.

17. A. B. and C. executors, recovered by default. The defendant brought error, and aſſigned a diſcontinuance, viz. that the *ſuit being by three* executors, and at the day, which they had by the roll upon a continuance taken, *only two appeared*, and *by the ſame roll day was given to all three to another day*. Adjudged per tot. Cur. to be a diſcontinuance, and not amendable; for credit muſt be given to the roll, and non conſtat by that, but that two only appeared, and the third made default, which is a non-proſecution by him at that day, and goes to all the ſuit and time after; and cites * 21 E. 4. 3. Yelv. 155. Trin. 7 Jac. B. R. Paſton v. Luſher.

* This is miſprinted, and ſhould be 22 E. 4. 1.

(F. 2) In what Court it may be; and Pleading thereof in other Court.

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1. SCIRE *facias to repeal letters patents* of the king. The *defendant ſaid, that there was other ſcire facias of this matter brought by the plaintiff, which yet pends*, &c. The *plaintiff ſaid, that this is diſcontinuance, and* was *in the Chancery*; per Tirwit, in the Chancery is no diſcontinuance quod tota Curia negavit. Br. Diſcontinuance de Proceſs, pl. 9. cites 3 H. 4. 6.

2. It was admitted, that diſcontinuance may be *in the county or court baron*, and yet the plea may be removed; for if it be well continued, nothing ſhall be removed but the original, and therefore all is one. Br. Diſcontinuance, pl. 42. cites F. N. B.

(G) Diſcontinuance. By Death of the King.

1. SURETY *to keep the* * *peace, or* to keep a *day of payment*, are *diſcharged* by death of the king; contra of ſurety to ſue with effect in writ of account where the defendant is let to mainprife. Br. Prerogative, pl. 58. cites 1 H. 7. 2.

*Br. Surety, pl. 20. cites 1 H. 7. 1. S. C. and ſays it was affirmed for law. 1 M. 1.

2. In *appeal of the death of a man*, the writ was abated by the death of the king, and the appellant ſhould not have re-attachment if he did not ſue within the year as well as the original. Thel. Dig. 184. lib. 12. cap. 7. ſ. 1. cites Hill. 2 H. 7. 10.

3. Where a man is *outlawed upon indictment of felony*, if the *king be dead pending the exigent*, this outlawry is reverſable by error; for the exigent was abated by death of the king, but *he ſhall anſwer to the felony*; but *otherwiſe* it is *where ſuch voidable outlawry paſſes againſt one at the ſuit of the party*, for there if the outlawry be reverſed, he ſhall not be put to anſwer to the party. Thel. Dig. 184. lib. 12. cap. 7. ſ. 2. cites Mich. 7 H. 7. 5.

4. If a man be *indicted* of felony *in the time of H.* 8. and the king dies, he ſhall be arraigned thereof in the time of E. 6. per all the juſtices. But by ſome, this indictment ſhall be removed by certiorari from the old cuſtos rotulorum, and ſent to the new commiſſioners. Br. Corone, pl. 177. cites 1 E. 6.

Br. N. C. 79. b. cites S. C. —— If one be *indicted* in the time of one king, *and pleads to iſſue*, and after the *king dies*, he ſhall *plead de novo*. 7 Rep. 31. a. cited per Cur. as EDWARD SMITH'S CASE, who pleaded to iſſue upon an indictment of felony in Middleſex, in 3 & 4 P. & M. in B. R. and after the death of Queen Mary he re-pleaded in 3 & 4 Eliz. and was acquitted; and ſo in PALMER'S CASE, who was arraigned in B. R. on a nonſuit in appeal, at the ſuit of the Queen, Trin. 4 & 5 P. & M. and pleaded to iſſue, and Queen Mary died, and Mich. 1 & 2 Eliz. he repleaded. —— Jenk. 205. pl. 32. S. P. by all the juſtices. —— Cro. J. 14. pl. 18. S. P.

5. 1 *E.* 6. *cap.* 7. *ſ.* 1. *By the death of the king any action between party and party, in any courts of record, ſhall not be diſcontinued, but the proceſs in every action ſhall ſtand good, as if the king had lived, and all judicial proceſs ſhall be made in the name of the king that ſhall reign, and that variance between the names of the king ſhall not be material.*

At common law, upon the demiſe of the king, all ſuits depending in the king's courts were diſcontinued, ſo that the plaintiffs were obliged to commence new actions, or to have reſummons or re-attachment

re-attachment on the former proceſs to bring the defendant in; and therefore to prevent the expence and delay on theſe occaſions was this ſtatute made. Gilb. Hiſt. of C. B. 193, 194.——1 New Abr. 7. (E) S. P. Quibuſdam verbis.

6. S. 2. *Every aſſiſe of novel diſſeiſin, mortdanceſtor, juris utrum, and attaint, which ſhall be arraigned, or ſued before any juſtices of aſſiſe, ſhall not be diſcontinued by death, new commiſſion, aſſociation, or coming of the juſtices.*

See tit. Juſtices of Gaol Delivery, 27. pl. 12. and the notes there.

7. S. 5. *Where any perſon ſhall be found guilty of treaſon or felony, for which judgment of death ſhall enſue, and ſhall be reprieved to priſon without judgment given, thoſe perſons that at any time after ſhall by the king's letters patents be aſſigned juſtices to deliver the gaol where ſuch perſon ſhall remain, ſhall have power to give judgment of death againſt ſuch perſon.*

8. In a *popular action the king died after demurrer upon the evidence*, and before judgment, and the defendant pleaded de novo. 7 Rep. 31. a. cites 5 E. 6. Rot. 38.

* 7 Rep. 30. a. S. P. for the words of the ſtatute are, "depending in any court."——And. 44, 45. pl. 113. S. P. reſolved.——Bendl. 79. pl. 121. S. P. reſolved.——But a latitat is within the ſtatute 1 E. 6. and is not loſt by demiſe of the queen; for it is not any original writ, but is in nature of an execution grounded upon a record precedent; for every latitat is founded on a bill of Middleſex precedent, and ſuppoſes that the party cannot be taken by the ſheriff of Middleſex, quia latitat & diſcurrit in another county; ſo the latitat iſſues upon a ſuit or queritur ſuppoſed to be depending. Yelv. 52. Mich. 2 Jac. B. R. Everard v. Blach.

9. It was reſolved upon the ſtat. 1 E. 6. cap. 7. that an original writ not returned at the death of the king cannot be returned in time of the next king; but all proceſs made upon any * original pending in any court of record in time of the former king, may be executed and returned in time of the ſucceeding king, by the clauſe in the ſtatute to ſuch purpoſe. D. 165. pl. 1. Mich. 1 Eliz.

10. A writ of *extent upon a ſtatute was executed* in the time of Queen Mary, *returnable quindena Martini, before which the queen died*, yet it was returned, and a liberate granted Hillary following, being in the time of the next queen. It is left a quære in the book if the return of the extent was not without warrant, becauſe by demiſe of the queen the warrant to make executions ceaſed, and it is not remedied by ſtat. 1 E. 6. D. 205. 3 & 4 Eliz. in the caſe of Gery v. Smart.

Cro. J. 14. pl. 18. Paſch. 1 Jac. S. P. reſolved.——7 Rep. 31. a. S. P. reſolved.

11. *Quare impedit* brought *in name of the king* abates by his demiſe; for it concerns the king in individuo. Jenk. 205. pl. 33.

12. But *intruſion* into the lands of the king, or *information*, ſhall not abate by his demiſe, becauſe theſe concern publicum commodum, and profit of the king. Jenk. 205. pl. 33.

13. The ſtatute 1 E. 6. extends only to actions, ſuits, &c. between party and party, and conſequently *extends not to caſes where the king is party*. 7 Rep. 30. b. Trin. 1 Jac. in caſe of diſcontinuance of proceſs, &c.

And. 45. pl. 113. S. P. reſolved.——Bendl. 79. pl. 121. S. P. reſolved.

14. Since the ſtat. of 1 E. 6. if any *judicial writ* or proceſs in any court of record be awarded in one king's reign, it may be executed in the time of his ſucceſſor. 7 Rep. 30. a. Trin. 1 Jac. in the caſe of diſcontinuance of proceſs, &c.

15. So in *appeal of death*, if the writ be delivered to the ſheriff within the year, and before the return, or any thing done by the ſheriff, the king dies, this ſhall be remedied by the common law, viz. by certiorari returnable in B. R. and thereupon the plaintiff ſhall have re-attachment, though it comes not in by the return of the ſheriff, but by certiorari, and this for neceſſity; for otherwiſe the plaintiff, who lawfully purchaſed his writ within the year, ſhall loſe his appeal without any default, the year being now paſt; and therefore ſince by act in law the writ is diſcontinued, the law will give means to revive it, ſo as that the party ſhall not be without remedy. 7 Rep. 30. a. b. Trin. 1 Jac. the caſe of diſcontinuance of proceſs. [489]

16. *Informations for the king alone in any Latin court*, and likewiſe informations *tam pro parte quam pro domino rege*, do not abate upon the demiſe of the king, but ſhall be re-continued by *re-ſummons or re-attachment*, and the defendant ſhall plead to them de novo; and informations in Engliſh courts ſhall not abate, becauſe there are no continuances in them. Reſolved by the juſtices. Mo. 748. pl. 1027. anno primo Jac. 7 Rep. 30. b. 31. a. S. P. reſolved, that if an information be preferred, and the defendant pleads to iſſue, or demurrer be joined, and afterwards the king dies, all the proceedings ſhall abate, but the information ſhall ſtand. 7 Rep. 30. b. 31. a.——Cro. J. 14. pl. 18. S. P. reſolved.

In all caſes when the king is only party, or when the information is tam pro domino rege quam pro ſeipſo, and the king dies before the judgment, all the proceedings on the information are loſt, becauſe that king who was party is dead; but the information or indictment ſhall ſtand; for as there are ſeveral penal ſtatutes which are to be proſecuted within a limited time, which would be loſt if the information which was brought in due time were abated, the law will not permit that the act of God ſhould protect thoſe from being puniſhed who had broken the laws pro bono publico. Thus ſtood the law till * 7 Annæ, cap. 8. Gilb. Hiſt. of C. B. 194.

* This is miſprinted, and ſhould be 1 Annæ, cap. 8.

17. *At common law*, by demiſe of the king the plea was diſcontinued, and *the proceſs* which was *awarded, and not returned before the death of the king, was loſt*; for by the writ of the predeceſſor nothing can be executed in the time of the new king, unleſs in ſpecial caſes; becauſe by the king's death not only the juſtices of the one Bench or the other, and barons of the Exchequer, but likewiſe the ſheriffs and eſcheators, and all commiſſions of oyer and terminer, gaol-delivery, and juſtices of peace, are determined by the death of the predeceſſor who made them; and to remedy this the ſtat. 1 E. 6. was made; reſolved, 7 Rep. 30. a. Trin. 1 Jac. in caſe of diſcontinuance of proceſs.

18. *At common law, if a verdict had paſſed for the defendant, and before the day in Bank the king had died*, the plea is diſcontinued, and the defendant might by certiorari remove the record, and though the parties had never pleaded any plea, yet the defendant ought to ſue a ſci. fa. and thereupon to have judgment; but without ſci. fa. he ſhall not have judgment, becauſe the parties have no day in court, and the *ſci. fa. ſhall revive the record, and give day to the parties* againſt the opinion of Littleton, 10 E. 4. 13. b. though he ſaid it was ſo adjudged, that the defendant in ſuch caſe ſhould have judgment immediately; per Cur. 7 Rep. 30. a. Trin. 1 Jac. in caſe of diſcontinuance of proceſs.

19. If a man purchaſes a *formedon againſt the pernor of the profits within the year after the title accrued, and before the return of the writ the king dies*, the writ ſhall be removed into C. B. by certiorari, and thereupon he ſhall have re-ſummons becauſe of the miſchief, as it is held in 10 E. 4. 13. b. 14. a. 7 Rep. 30. b. Trin. 1 Jac.

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20. *Before the act of* 1 *E.* 6. cap. 7. if a man had been *indicted and convicted by verdict or confeſſion, before any commiſſioners, and before judgment the king had died*, in this caſe no judgment could have been given, becauſe the king, for whom judgment ſhould be given, is dead, and the authority of the judges who ſhould give the judgment is determined; reſolved, 7 Rep. 31. b. Trin. 1 Jac.

21. A *latitat* iſſued *in Q. Eliz.'s time*, and was *ſerved in time of King James*. The defendant reſcued himſelf, and the *ſheriff returned* the *reſcous*. It was moved, that the latitat was abated by the queen's death, and ſo the arreſt ill, and conſequently this was not a reſcous. But the Court held a *latitat* to be *within the* [490] *ſtat.* 1 *E.* 6. which is not loſt by the demiſe of the queen; for it is not any original writ, but *is in nature of an execution grounded upon a record precedent*, every latitat being founded on a bill of Middleſex precedent, and ſuppoſes that the party cannot be taken by the ſheriff of Middleſex, quia latitat & diſcurrit into another county, and ſo iſſues upon a ſuit or plaint ſuppoſed to be depending. Yelv. 52. Mich. 2 Jac. B. R. Everard v. Blach.

22. The death of the king is *called demiſe, becauſe* in law he never dies, but leaves his crown to another. Fin. Law, 8vo. 433.

23. A *writ of error* is a ſuit, and the plaintiff may be nonſuit in it, and if it be *returned*, it will not be diſcontinued by the demiſe of the king. Latch. 110. Hill. 1 Car. Cole's caſe.

Palm. 404. S. C. accordingly; for it is proceſs.

24. C. *recovered in quare impedit* againſt B. and now ſued a ſci. fa. againſt B. the *incumbent*, who *pleaded a releaſe*, which was found againſt B. Afterwards the king died, and it was moved, that it is diſcontinued by death of the king, as an extent, &c. ſed non allocatur. Lat. 72. Paſch. 1 Car. Cateſby v. Baker.

Palm. 422. Paſch. 1 Car. B.R. Dixey v. Brown, S.C. in totidem verbis.—Lat. 114. Watkins's caſe, Paſch. 2 Car. S.C. in totidem verbis.—

25. *Executor of an executor was ſued for legacies*, and *pleaded no aſſets, which was refuſed by the Spiritual Court*, and therefore *prohibition was awarded* out of B. R. in the time of King James; and upon debate the Court reſolved, that this was diſcontinued; and the *difference* taken was, *between a prohibition* awarded *out of B. R. and out of C. B.* for out of C. B. a prohibition ſhall not be awarded without ſuggeſtion firſt of record, and ſo it is there the ſuit of the party, but in B. R. it is otherwiſe, and is only prohibitory. D. 165. a. Marg. pl. 3. cites Paſch. 2 Car. B. R.

3 Bulſt. 314, 315. Dickes v. Brown, S. C.—Noy, 77. S. C. accordingly.

Palm. 422, 423. Dixey v. Brown. S. C. and Lat. 114. Watkins's,

26. Another difference is when a *prohibition* iſſues out of B. R. if no other proceſs be upon it, there it is diſcontinued by demiſe of the king; but if *attachment* iſſues and is returned, or if the party appears and puts in bail, then it is become the ſuit of the party,

party, and is not diſcontinued. D. 165. a. Marg. pl. 3. cites Paſch. 2 Car. B. R. caſe. S. C. in totidem verbis.

27. In action of *ſcandalum magnatum*, the Court is tam pro domino rege quam pro ſeipſo, this is not diſcontinued by demiſe of the king; for *the contempt to the king is collateral*, though *otherwiſe* it is *where the king ſhall recover part*; per Doderidge, D. 165. a. Marg. pl. 3. cites Paſch. 2 Car. B. R. Palm. 422, 423. Dixey v. Brown. S.C. & S.P. & Lat. 115. Watkins's caſe, S. C. & S. P. in totidem verbis.——3 Lev. 207. S. P. held accordingly.

28. In an action of debt, *qui tam*, &c. upon the 23 Eliz. *for recuſancy in not coming to church*, after demurrer by the defendant the king died. It was reſolved by all the judges at Serjeant's Inn, that this action was at the ſuit of the party, and that the king cannot diſcharge it, and therefore ſhall not abate. Hutt. 82. Trin. 2 Car. Farrington v. Arundel, Cro. E. 10. pl. 1. Farrington's caſe, S. C. reſolved accordingly. ——S. C. cited by the juſtices. 3 Lev. 207.

29. *Upon an outlawry and plea, and replication and demurrer to it, after extent the protector died*, and the Court was of opinion that all but the outlawry and the extent upon it was gone by the death of the protector, as in 7 Rep. the caſe of diſcontinuance of proceſs; et adjornatur. Hardr. 136. pl. 7. Mich. 1658. in Scac. The Protector v. St. Johns.

30. 4 & 5 *W. & M. cap.* 18. *Upon the demiſe of any king or queen of this realm, all pleas to information ſhall ſtand without calling the defendant to plead anew, unleſs the defendant requeſts the Court for that purpoſe within five months after ſuch demiſe.* [491]

31. 1 *Ann. ſtat.* 1. *cap.* 8. *ſ.* 4. *No writ, plea, or proceſs, upon any indictment or information for miſdemeanor; or any writ, proceſs, or proceeding, for any debt or account that ſhall be due to her majeſty, her heirs or ſucceſſors, for any lands or other revenue that ſhall be depending at the time of her majeſty's demiſe, or of any of her heirs or ſucceſſors, ſhall be diſcontinued or put without day, by reaſon of their deaths and demiſes.*

32. *S.* 5. *By the demiſe of her majeſty, or any king or queen of this realm, no commiſſion of aſſiſe, oyer and terminer, general gaol delivery, or of aſſociation, writ of admittance, writ of ſi non omnes, writ of aſſiſtance, or commiſſion of the peace, ſhall be determined, but ſhall continue for 6 months, unleſs ſuperſeded by the ſucceſſor; and no original writ, writ of niſi prius, commiſſion, or proceedings, in or iſſuing out of any court of equity, nor any proceſs upon any inquiſition, nor any certiorari or habeas corpus, nor any writ of attachment or proceſs for contempt, nor any commiſſion of delegacy or review for any matters eccleſiaſtical, teſtamentary, or maritime, or any proceſs thereupon, ſhall be diſcontinued by the demiſe of her majeſty, or any king or queen.*

33. The *king* was *ſole plaintiff in a writ of error* in the houſe of lords, and died; and the opinion of the lords and of all the judges, who attended on that occaſion, was, that the writ abated by his death. Gibb. 35, 36. Paſch. 1 Geo. 2. The King v. A. Biſhop of Ardmagh and Whaley.

34. The

34. The *lord chief juſtice's warrant* for apprehending a perſon is void by the king's demiſe, and the conſtable impriſoning the perſon by force thereof, is liable to an action. Gibb. 80. Trin. 2 and 3 Geo. 2. Anon. Coram Eyre Ch. J. at niſi prius in Middleſex.

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(H) By Alteration or not coming of the Juſtices.

1. *ASSISE is taken in B. R. in Suffolk*, and *pending the aſſiſe the Bank is removed to Weſtminſter*, yet the aſſiſe is not diſcontinued, notwithſtanding the ſtatute ſays, quod aſſiſæ capiantur in ſuis comitatibus; for this ſhall proceed and ſhall be tried in Suffolk by niſi prius. Br. Diſcontinuance, pl. 51. cites 19 Aſſ. 5.

2. *Aſſiſe in B. R. of land in the county where the Bank is*, and *pending the aſſiſe the Bank is removed into another county*; it is not denied but that by this the aſſiſe is diſcontinued. Br. Diſcontinuance de Proceſs, pl. 29. cites 25 Aſſ. 5.

3. *Aſſiſe* and *verdict for the plaintiff*, and the *parol was put without day by removal of the juſtices*, the *plaintiff may remove the record before the new juſtices to have re-attachment, and upon this to have judgment*; and ſo ſee that the *parol may be without day as well after verdict as before*; for the record is not determined till judgment. Br. Jours, pl. 69. cites 26 Aſſ. 20.

4. Note, per all the juſtices, that by *not coming of the juſtices in aſſiſe*, or by *death of the king, no writ is diſcontinued, but the parol put without day, and may be revived by re-attachment or reſummons*; and note, that when the *juſtices are changed*, all the old aſſiſes are without day by the not coming of the old juſtices; for the new ones cannot proceed by the aſſignment of the day made by their predeceſſor. Br. Diſcontinuance de Proceſs, pl. 2. cites 9 H. 6. 40.

[492] 5. 11 *H. 6. cap. 6. Suits and proceſs before juſtices of peace ſhall not be diſcontinued by new commiſſions of the peace, but the juſtices in the new commiſſions ſhall have power to continue the ſaid pleas and proceſſes.*

Br. Corone, pl. 200. cites S. C. —Br. Office and Officer, pl. 25. cites S. C.—* D. 165. a. pl. 2. Mich. 1 Eliz. S. P. reſolved by the juſtices, chief baron, attorney and ſolicitor, upon the ſtatute 1 E. 6. cap. 7.

6. Nota, that by demiſe of the king, all *commiſſions and patents of officers, judges*, &c. ceaſe. Contra of * office of *coroner*, for he is made judicially by writ and not patent. Br. Commiſſions, pl. 19. cites 4 E. 4. 44.

7. *Recognizance of mainprize* that a man ſhall anſwer in account, this recognizance is determined by demiſe of the king; for it is ad reſpondend' coram juſtic' noſtris, and this is taken by the juſtices of the old king, and the ſame of recognizance *of the peace* ad conſervand' pacem noſtram, which is the peace of that king who is then living; per Cur. Br. Commiſſions, pl. 21. cites 1 E. 5. 1.

8. *Before*

8. *Before the ſtatute of* 1 *E.* 6. cap. 7. *if the juſtices of aſſiſe had died before iſſue in aſſiſe*, all the pleading was loſt and the parties muſt plead de novo; and if after iſſue they had died, &c. yet all ſhould ſtand in force. Thel. Dig. 184. lib. 12. cap. 8. pl. 2. cites Hill. 4 H. 7. 8.

9. 1 *E.* 6. *cap.* 7. *ſ.* 6. *No proceſs or ſuit before juſtices of aſſiſe, gaol-delivery, oyer and terminer, juſtices of the peace or other the king's commiſſioners, ſhall be diſcontinued by the making any new commiſſion or aſſociation, or by altering of the names of the juſtices, but the new juſtices and commiſſioners may proceed as if the old commiſſions had remained.*

10. An *aſſiſe was arraigned before juſtices of aſſiſe*, and *adjourned to the ſecond Saturday of Mich. term to Serjeants-Inn*, and *day* being then *given to anſwer*, the *term was kept at Hartford, and day given to the ſecond Saturday of Hill. term.* It was held clearly, that the aſſiſe was diſcontinued by not coming of the juſtices the 1ſt day; and there muſt be a *re-ſummons againſt the jurors and a new attachment againſt the defendant*, and he muſt begin de novo to arraign his aſſiſe. Cro. E. 12. pl. 1. Hill. 25 Eliz. C. B. Foliamb's caſe.

11. *The* 1 *E. cap.* 7. *helps the non venire of the juſtices as to a diſcontinuance.* Jenk. 228. in pl. 95.

12. *Error* was brought in the *Exchequer-chamber* of a judgment in B. R. in *debt for rent*, which (and all other writs of error depending there) were diſcontinued by the not coming of the juſtices, the term being adjourned propter peſtilentiam in London; and the adjournment did not extend unto them. Now a new writ of error, quod coram vobis reſidet was brought, and for as much as this writ was brought after the ſtatute of 3 *Jac.* to ſtay execution in debt, it was prayed that according to the ſaid ſtatute he might have execution, or that the party ſhould put in ſureties to pay the condemnation; but upon conſideration of the ſtatute all the juſtices held that it was out of the ſtatute, becauſe it is *not an original writ of error, but* it is *in lieu of a former writ*, upon which the record was removed before the ſtatute, and it being diſcontinued *not through default of the party*, it is not reaſon he ſhould be prejudiced thereby; wherefore it was reſolved that this caſe was out of the ſtatute 3 Jac. cap. 8. Cro. J. 135. pl. 8. Mich. 4 Jac. B. R. Boſtock v. Snell.

13. S. and A. were *indicted of perjury* committed in their evidence given upon an indictment of barretry againſt N. (the record of which was recited in this judgment, and therein it appeared that *the venire was made returnable coram J. S. & J. N. juſticiariis prædictis*, and at a day certain) and judgment given, and *error* brought, and *aſſigned that the venire being returnable coram juſticiariis prædictis, none but the ſame juſtices could proceed, and not thoſe who ſat the next aſſiſes by virtue of a new commiſſion*; and therefore the proceeding before them were coram non judice, and ſo no perjury could be committed. Sed non allocatur; for the ſtatute of 1 & 2 E. 6. enables new commiſſioners of oyer and terminer to proceed where the former left off, before whom the matter commenced. Vent. 181. Hill. 23 & 24 Car. 2. B. R. The King v. Serjeant and Annis. [493]

14. Where

14. Where an *act of parliament aids* the *diſcontinuance of the term, yet when* the term is *continued* by the ſtatute, the party ought to *enter up his continuances;* and for default of it his action is diſcontinued, per Cur. Skin. 571, 572. pl. 15. Mich. 6 W. & M. in B. R. in caſe of Brook v. Ellis.

15. If after *juſtices* have ſat by virtue of a commiſſion, and *taken divers indictments, and awarded proceſs thereon,* they or *ſome of them* ſhall *die,* the king may grant a new commiſſion to thoſe who are living only, or to others commanding them to continue the proceedings begun, and to proceed upon ſuch proceſs, and to hear and determine all the offences in the former commiſſion; and thereupon the king ſhall ſend a writ unto the executors of the juſtices who are dead to ſend the rolls, records, and proceſſes touching the premiſes, before the new commiſſioners, &c. 2 Hawk. Pl. C. 19. cap. 5. ſ. 16.

(I) Pleadings after the laſt Continuance. What may be pleaded after the laſt Continuance.

1. A Man may plead a plea after the laſt continuance, *after iſſue joined, and in another term,* and therefore it ſeems that the parties have day in court as well after iſſue joined till verdict as before; *but* a man ſhall *not* have plea after the laſt continuance *meſne between the niſi prius and the day in Bank,* as it is ſaid elſewhere, *nor at the day of niſi prius,* nor be received by default of the baron, or tenant for life at the day in Bank after verdict of niſi prius. Br. Continuance, &c. pl. 77. cites 7 E. 3. Fitzh. tit. Inqueſt, 46.

If the plaintiff releaſe the defendant after the award of the niſi prius, if the jury remains propter defectum, the defendant may plead it at the day in Bank, becauſe the cauſe was not determined by the jury, and therefore he is at liberty to plead it at any other day of continuance, and it may be tried by the jury when they appear. Gilb. Hiſt. of C. B. 85.

2. *But if niſi prius remains for default of jurors,* he ſhall plead a plea after which happens after the laſt continuance; but contra after verdict, arguendo by Newton 22 H. 6. Fitzh. tit. Reſceipt, 63. & Ibid. tit. Continuance, 15. Br. Continuance, &c. pl. 77. cites 16 E. 4. 5. & 50 E. 3. 4.

3. In *account* the *defendant ſhewed tally of the plaintiff* of the receipt *of parcel* of the ſum, and the *plaintiff waged his law that it was not his tally, and had day* to perform it, and *at the day the defendant* came and *pleaded the releaſe of the plaintiff of all actions after the laſt continuance,* and he was received ſo to do, and the plaintiff compelled to anſwer; but after this the defendant ſhall not have any other new plea after the laſt continuance at any other day; quod nota. Br. Continuance, pl. 21, cites 21 E. 3. 49.

4. If parties *are at iſſue,* and the demandant *releaſes to the tenant,* and *afterwards he takes continuance by prece partium,* he ſhall not plead the releaſe. Br. Continuance, pl. 17. cites 14 H. 4. 12. by Perſay and Hammond. Brooke ſays & ſic vide that a man may plead plea after the laſt continuance, after iſſue,

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5. A

5. A man may plead *as many pleas by matter of record*, after the laſt continuance, *as he pleaſe; but upon matter of fact* a man ſhall have *but one plea* only after the laſt continuance; per Rolfe; but by Chaunter clearly a man ſhall not have more than one plea after the laſt continuance, be it by matter of record or matter en fait; quod Cheyney J.. conceſſit. Br. Continuance, pl. 5. cites 9 H. 6. 23.

6. At niſi prius a man may plead *releaſe* and the like after the laſt continuance. Br. Continuance, &c. pl. 53. cites 10 H. 6. 9. Fitzh. tit. Enquer, 14.

7. In *coſinage*, the parties were *at iſſue*, and at the day the *jury appeared*, and the tenant *pleaded the releaſe* of the plaintiff *after the laſt continuance*. Br. Continuance, &c. pl. 55. cites 10 H. 6. 9. & Fitzh. tit. Judgment, 13.

8. In *forger of falſe deeds* againſt ſeveral, they were at iſſue, and proceſs continued againſt the inqueſt tiſ the *jury appeared*, at which day the *defendant pleaded arbitrement after the laſt continuance*, and thereupon the inqueſt was diſcharged. Br. Continuance, pl. 25. cites 19 H. 6. 36.

9. A. brought *replevin* againſt B. who *avowed* on the plaintiff, &c. *for rent-ſervice in jure of the plaintiff's* [illegible] whereupon A. *prayed aid of his feme and had it*, and after iſſue *at the* [illegible] *juratores returned the plaintiff ſaid, that after the laſt continuance his feme was dead*; ſed non allocatur, inaſmuch as ſhe *was no party to the original*, and if the avowry had been upon a ſtranger, and the plaintiff had pleaded hors de ſon fee, and the avowant had died pending the iſſue, &c. yet the iſſue ſhould ſtand. Br. Continuance, &c. pl. 28. cites 21 H. 6. 23.

10. A *feme* was *received* to plead *that her baron died after the laſt continuance*, and iſſue taken that he did not die after the laſt continuance; and it was ſaid that if he died before, ſhe ſhould *not be admitted to plead as party, but as amicus curiæ*. Thel. Dig. 205. lib. 14. cap. 3. [illegible] cites Mich. 38 H. 6. 9. Quære.

11. In *debt*, per Moyle, the *defendant after iſſue may once plead a plea after the laſt continuance*, as *releaſe* and the like, *but not oftener* than once, for then it would be infinite, and [illegible] miſchievous. Br. Continuance, &c. pl. 41. cites 38 H. 6. 33. Br. Ibid. in pl. 59. cites 16 H. 7. 8. S. P.

12. In *detinue after garniſhment* prayed by the defendant, *and the ſcire facias awarded*, he ſhall *not plead that the plaintiff was outlawed* after the laſt continuance. Thel. Dig. 208. lib. 14. cap. 9. ſ. 1. cites Trin. 11 E. 4. 14.

13. It is ſaid by Littleton that a man *ſhall not plead after the laſt continuance, unleſs where a plea is pleaded before*, for if there be only an *imparlance* before, it *ſuffices to ſhew the day certain when the thing was done, which ſhall abate the writ*. Thel. Dig. 225. lib. 14. cap. 3. ſ. 10. Mich. 15 E. 4. 5.

14. In *aſſiſe* the tenant *pleaded as to* 10 *acres that C. was attainted of treaſon, and* that it was *found* by *ſpecial virtute brevis that he was thereof ſeiſed in fee at the time* of the attainder, and the *aſſiſe awarded of the reſt, which remained pro defectu juratorum*, and *at the day the tenant ſaid that it was found by quæ plura that C. was ſeiſed of more*

* This in the largeſt folio edition is (agreed) and ſo miſ-printed.—

more land specified in the assise at the time of the attainder, and demanded judgment si rege inconsulto; and upon examination of the escheator, the assise was adjourned to W. and afterwards into C. B. and at the day the tenant said that it was found before the same escheator virtute officii the same day that the quæ plura was found, that C. was seised of the land in the assise the day of the attainder, whereupon pending the assise, and before the day of adjournment in C. B. the escheator seised it into the hands of the king, and demanded judgment if rege inconsulto, and the plaintiff demurred; per Brudenel and Keble, the tenant shall not have the plea, for he shall have no more than one plea after the last continuance, and he shall have one plea after the continuance before, and shall not have another plea after the continuance again, as that one of the plaintiffs was dead or outlawed, nor other plea unless there be in the same court a record to ground it upon; quod Keble concessit, and that he shall not plead a release made after, nor shall he plead entry after, nor any other matter but what appears to the justices before them of record. Br. Continuance, &c. pl. 45. cites † 4 H. 7. 8.

† All the editions cite 4 M. 7. 8. but seem misprinted, there being no such point there, but it seems it should be 9 H. 7. 8. b. &c. pl. 5. & 16 H. 7. 11. b. &c. pl. 6. the case of Burnley v. Halewell. — Br. Aid del Roy, pl. 99. cites S. C. but not S. P.

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15. But in trespass, if one pleads release, and the other pleads arbitrement, and afterwards he who pleaded the release pleads another release after the last continuance, he shall have it, because this is the first plea pleaded after the last continuance, but if the arbitrement be found afterwards against the plaintiff, he shall have advantage thereof; because in trespass arbitrement is satisfaction, and satisfaction of one will excuse all. Br. Continuance, &c. pl. 45. cites * 4 H. 7. 8.

* See the 2d note at pl. 14. that the year seems to be misprinted.

16. And the same law of a certificate of bastardy for the one tenant, the other who pleads a plea after the last continuance shall have advantage thereof, because it appears of record before the same justices. Br. Continuance, &c. pl. 45. cites * 4 H. 7. 8.

17. And the same law of the verdict of the arbitrement, and he shall not have plea after plea as above in any other case. Some held that the plea should be suffered for the king's advantage, but non allocatur. Br. Continuance, &c. pl. 45. cites 4 H. 7. 8.

18. It was agreed arguendo, that a man shall not have but one plea after the last continuance, unless such pleas as were not in esse at the time of the first plea; for then it is not after the last continuance. Br. Continuance, &c. pl. 82. cites 9 H. 7. 8.

19. After plea in bar pleaded, a man shall not have but one plea after the last continuance, if it be not a thing which is apparent to the justices, or which is in advantage of the king, &c. Thel. Dig. 204. lib. 14. cap. 3. s. 12. cites Mich. 9 H. 7. 9. 16 H. 7. 11. & 3 E. 4. 4.

20. Where a prior brings an action, and pending the action he is deposed, the defendant ought to plead it immediately, and so of outlawry and release, and yet these go in bar, but if he does not plead it immediately, he shall not have them after the last continuance, ut patet per Vavasor & Curiam. Br. Continuance, &c. in pl. 79. cites 16 H. 7. 11.

21. If

21. If *inqueſt be taken by default*, the *defendant cannot plead a plea after the laſt continuance before judgment*; for he has not day in court; but is put to his writ of audita querela, unleſs in the caſe of the king; quod nota. Br. Jo[illegible] pl. 74. cites 21 H. 7. 33.

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22. It ſeems that *after inqueſt awarded to inquire of damages in* action of *treſpaſs* or the like, the defendant cannot plead any plea after the laſt continuance, becauſe he had *no day in court*. Br. Continuance, &c. pl. 61. Br. Continuance, &c. pl. 84. cites 1 H. 7. 21. S. P. accordingly.

If the plaintiff, after a writ of inquiry awarded, releaſe the defendant, he cannot plead this releaſe at the day in bank, becauſe there is no day given him, and judgment is already given. Gilb. Hiſt. of C. B. 85, 86.

23. *No more than one plea* after the laſt continuance can be received, to avoid infinity. Jenk. 160. in pl. 2.

24. There are 2 caſes wherein a man may plead, though it be after the laſt continuance, viz. *outlawry*, and the *death of the plaintiff*; as to the outlawry, it is upon the prerogative, that the debt itſelf is forfeited to the king, and by virtue of the prerogative * nullum tempus † occurrit regi; and therefore he may plead it though a continuance has happened after the outlawry; ſo he may plead the death of the plaintiff, becauſe though a continuance has been entered, yet that continuance is a nullity, becauſe there was no plaintiff in being when day could be given, ſo it may be pleaded if the *plaintiff died after the day at niſi prius and before the day in Bank*; and the reaſon is, that if there is no cauſe in court, no judgment can be given for a perſon that is not rerum natura, and if it be given it is erroneous; and if the plaintiff's attorney will traverſe that plea, he cannot ſay the plaintiff come per attorn', becauſe that would be to forejudge the matter in iſſue; but the attorney by his name, viz. I. S. venit pro magiſtro ſuo &c. dicit. Gilb. Hiſt. of C. B. 83, 84.

* Gilb. Hiſt. of C. B. 85. ſays that ſome have held that an outlawry may be pleaded after the laſt continuance becauſe nullum tempus occurrit regi; but ſays, quære whether the ſubject ſhall after plea of darrein continuance partake of the prerogative, or

whether it ſhall be preſumed after ſuch trifling, that it is frivolous and untrue, and therefore rejected. Gilb. Hiſt. of C. B. 86. S. P. but now by the ſtatute 8 W. 3. cap. 10. the executors, &c. may have a ſcire facias on ſuch an interlocutory judgment.

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25. In *debt upon an obligation*, the parties were at *iſſue upon tender at the day*, and afterwards the defendant *pleaded, that* after the darrain continuance, *the money was attached in his hands in London, at the ſuit of I. S.* The Court doubted if monies might be attached in London, a ſuit for it being depending in this court, but (if attachable) they held it might be well pleaded after the laſt continuance, for it goes in bar at another day. Cro. [illegible] pl. 7. Trin. 30 Eliz. B. R. Pell v. Pell.

26. In *debt againſt adminiſtrator*, after *demurrer* joined, the *adminiſtration was repealed, and granted to another*; the defendant would have pleaded this matter after the laſt continuance, but it was reſolved that he could not plead it after the demurrer, though after iſſue joined he might. Mo. 871. pl. 1210. Turner v. Gibbons. Hob. 81. [illegible]ce. STONE v. GIBSON. S. C. contra that he may plead a plea puis darrein continuance,

and agreed alſo, that if defendant or plaintiff take iſſue or demur upon this plea, yet the *Court muſt conſider of the firſt demurrer alſo*, for if upon that ſtanding confeſſed by demurrer, the plaintiff could not have

have his action, the Court cannot give judgment for him, howſoever the latter iſſue or demurrer paſs; but otherwiſe if the *firſt had been an iſſue*, for then nothing had been confeſſed to his prejudice, and then that had been utterly *relinquiſhed by a 2d iſſue or demurrer.*——S. C. cited per Cur. Trin. 24 Car. B. R. becauſe after iſſue joined no reſpondeas ouſter can be awarded; and ſays that with this agrees 1. 5. 24. 139. when in debt after iſſue joined, the defendant at the niſi prius pleaded payment of part after the laſt continuance in abridgment, and the jury being diſcharged, and the plea adjourned into Bank, the plaintiff had judgment to recover his debt, becauſe no place of payment was pleaded. Allen, 66. in caſe of Beaton v. Foreſt.

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27. *Ejectione firmæ, after verdict* at the niſi prius for the plaintiff, the *defendant at the day in Bank pleaded a releaſe* from the plaintiff, *betwixt the verdict and the day in Bank*, and ſhews it to the Court; and whether he ſhould be received thereto, was the queſtion; and reſolved that he had not any day to plead it, nor had he any remedy but by *audita querela*, if the plaintiff ſued execution; wherefore it was adjudged for the plaintiff. Cro. J. 646. pl. 10. Mich. 20 Jac. B. R. Stamp v. Parker.

A plea after the laſt continuance *waives the former plea*; for now the party relies upon this laſt plea, and it is a tacit waiver of the former plea, but not of a demurrer joined, for that lies in the power of the Court, and not of the parties. Jenk. 160. in pl. 2.

28. Pleading the plea puis darrein continuance, *is a relinquiſhing the former plea to which a demurrer was*, contrary to Hob. 81. 12 Mod. 539. Trin. 13 W. 3. in the caſe of Barber v. Palmer.

[497] (K) Pleas after the laſt Continuance. Proceedings and Pleadings, how to be in ſuch Caſes in general.

S. C. cited by Yelverton J. Yelv. 181.——S. C. cited Bulſt. 92.

1. *AT the niſi prius in plea of land, the tenant pleaded a releaſe after the laſt continuance*, ſed non allocatur; for this is not day to plead, and therefore the inqueſt was taken. Br. Inqueſt, pl. 102. cites 7 E. 3. 37.

——*Action non* was pleaded after the laſt continuance, and ſet forth for cauſe that *he had releaſed to the defendant* all actions and demands; per Williams J. this a good plea, the whole Court agreed. Bulſt. 205. Paſch. 10 Jac. Anon.

2. And *at the day in Bank, he would have pleaded the releaſe*; ſed non allocatur, but ſeiſin of the land awarded. Ibid.

3. *But at the day of return of the venire facias*, the plaintiff may plead after the laſt continuance, *and at all other days after and before the niſi prius.* Ibid.

4. In quare impedit by R. H. the *defendant ſaid that the plaintiff was made knight at D. after the laſt continuance*, to which the *plaintiff ſaid that he was made knight at D. ſuch a day before the continuance, abſque hoc* that he was made knight after the laſt continuance, priſt, and the other e contra, and it was admitted a good iſſue and found againſt the plaintiff, and the writ abated. Br. Negativa, &c. pl. 14. cites 7 H. 6. 14.

5. *And* it was agreed there that *not the deed of the plaintiff after the laſt continuance* is a good plea. Ibid.

6. *Falſe imprisonment by 3*, the *defendant ſaid that one of the parties died after the laſt continuance*, judgment of writ, and the *plaintiff ſaid that he did not die after the laſt continuance*, and per

June Ch. J. it is a negative *pregnant*. Br. Negative, &c. pl. 30. cites 14 H. 6. 9.

7. *So in formedon*, to ſay *that ne dona pas in the tail*, but *ſhall ſay ne dona pas modo & forma*. Ibid.

8. And per tot. Cur. where the *one alleges death*, it ſuffices for the *other to ſay priſt, that not*, and this is perfect iſſue, and after the iſſue was that *he did not die modo & forma*, quære therefore; for it ſeems that the iſſue is good there, but it ſeems if the party will ſay that *he did not die after the laſt continuance*, it is negative pregnant. Ibid.

9. In præcipe quod reddat they were at iſſue, and the *tenant pleaded* * *releaſe of the demandant, after the laſt continuance*; the *demandant ſaid that not his deed after the laſt continuance*, and no plea, for it is *pregnant*, by which he *ſaid that he made it before*, abſque hoc *that he made it after*, and no plea, but confeſſion of the action, by which he *ſaid that he made it before by dureſs*, &c. *abſque hoc that he made it after the laſt continuance*, and then well. Br. Traverſe, per, &c. pl. 366. cites 21 H. 6. 9.

Br. Negativa, &c. pl. 18. cites S. C. per Newton Ch. J. and Paſton J. but Aſcue J. dubitavit.—Br. Continuance, pl. 26. cites S. C.

* S. P. Br. Negativa, &c. pl. 38. cites 5 H. 7. 7.

10. In *falſe impriſonment by two*, the *defendant alleged the death of one after the laſt continuance*, judgment of the writ; the *plaintiff ſaid that he did not die after the laſt continuance*. This is a negative pregnant, whereupon he ſaid that he did *not die modo & forma*, and the iſſue was accepted. Br. Continuance, pl. 35. cites 36 H. 6. pl. 24.

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11. In *cui in vita* the *tenant after the view pleaded that the demandant had entered after the laſt continuance*, and the other e contra, and *ſo to iſſue, which was ſine die by the demiſe of the king*. The demandant afterwards brought *re-ſummons*, and the *tenant pleaded that after the laſt continuance the plaintiff brought aſſiſe againſt him of 2 acres in D. and* pleaded all in certain, and how *the demandant recovered and entered, and that the 2 acres are parcel of the land in demand*, judgment of all the writ, and by the demand he ſhall have but one plea only after the laſt continuance, whereas now he has taken two. Moyle J. held that in this caſe he might; for *where a plea is fully continued, he ſhall not plead but one falſe plea after the laſt continuance*; but here as to the firſt plea pleaded after the laſt continuance, the plea was ſine die, and ſo in effect determined, and upon the re-ſummons, he ſhall plead de novo, and therefore in the re-ſummons he ſhall have plea once after the laſt continuance. Quære; for afterwards they went to another matter, and ſo the caſe was not ruled in this point. Br. Continuance, &c. pl. 46. cites 1 E. 4. 3. & 2 E. 4. 10.

Br. Re-attachment, pl. 21. cites S. C. & S. P. by Moile, but Ch[illegible] J. e cont[illegible]d that he ſhall plead no plea which is contrariant to the plea he pleaded before; for if he had vouched before, he cannot now plead in bar, nor things diſcordant to nor variant from his firſt plea, but may plead other matter that is conſiſtent with it, &c. —— S. C. cited Arg. All. 66. Trin. 24 Car. B. R.

12. In debt, *after iſſue* joined, the defendant *at the niſi prius pleaded payment of part* after the laſt continuance in abatement, and the jury being diſcharged, and the plea adjourned into Bank, for that no place of payment was pleaded, the plaintiff had judgment to recover his debt. Arg. All. 66. Trin. 24 Car. B. R. cites Long, 5 E. 4. 139.

The pleas are twofold, viz. in abatement, and in bar; *if any thing happens pending the writ to abate it, this may be pleaded* poſt darrein continuance, *though there is a plea in bar*; for this can

can only waive all pleas in abatement that were in being at the time of the bar pleaded, but not ſubſequent matter; but though it be pleaded in abatement, yet after a bar is pleaded it is peremptory, as well on demurrer as on a trial, becauſe after bar pleaded he has anſwered in chief, and therefore can never have judgment to anſwer over. Gilb. Hiſt. of C. B. 84.——*So it may be pleaded in bar, but whether* it be pleaded in *abatement or in bar*, in the firſt place it muſt be pleaded *quod breve caſſetur*, and the other *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. Hiſt. of C. B. 84, 85.

13. In *aſſiſe* he that pleads the *death of one of the plaintiffs*, pending the aſſiſe and after the laſt continuance, ought to *ſhew that the aſſiſe was continued from ſuch a day to ſuch a day, and that after this day he died*; quod nota, per Curiam. Br. Continuance, &c. pl. 49. cites 18 E. 4. 13.

Br. Brief, pl. 2. cites S. C.

14. If tenant *enters pending præcipe quod reddat and before iſſue*, the entry ſhall be that he entered pending the writ; *but if* it was *after iſſue*, it ſhall be that he entered after the laſt continuance; per Jennor prothonotary; note the diverſity. Br. Continuance, pl. 2. cites 26 H. 8. 3.

S. C. cited 2 Lutw. 1143. by the reporter in his obſervations on the caſe of Campion v. Baker, and adds another nota, that in ſome precedents of pleas after the laſt continuance, it is pleaded quod quer' actionem ſuam prædictam ulterius manutenere ſeu ulterius habere non debet, and cites Raſt. Appeals in Mort. 4. Dett. en Releaſe, 7. tit. Attaint en Barr, 2. and ſays that this ſeems to be a proper way of pleading a collateral thing which happened after the action was pending; for he thereby admits that the action * was well brought, but that the plaintiff, by reaſon of this new matter, ought not to proceed further in it.

15. In *treſpaſs*, upon not guilty pleaded, the *jury appeared the firſt day of Hill. term*, the *defendant ſaid that the inqueſt ought not to be taken, for the plaintiff had releaſed* to the defendant *all actions after the laſt continuance*, but becauſe the *releaſe was after the eſſoin day of octab. Hill.* it was diſallowed, and the inqueſt taken; contra if the releaſe *had been made before the eſſoin day*; for in ſuch caſe he might plead it whether the jury appeared or not, becauſe he had no day to plead it before; but then alſo he ſhall ſay *actio non*, and *not that the inqueſt ſhall not be taken*. D. 361. a. pl. 10. Hill. 20 Eliz. Anon.

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16. Action for words, at niſi prius the *defendant pleaded concord after the laſt continuance, judic' ſi al enqueſt*, &c. and per Cur. it is no plea, but he *ought to have concluded judgment ſi actio*, and ſo in all pleas pleaded ſince the laſt continuance; and upon this judgment was given per quer' and no niſi prius granted, for it was a confeſſion of the matter in iſſue. Cro. E. 49. pl. 4. Trin. 28 Eliz. B. R. Cockain v. Witnam.

S. P. and reſolved that defendant could not plead this matter *after a demurrer*, but *otherwiſe after iſſue joined.*

17. *In debt* by one *as adminiſtrator*, the *defendant at* the *niſi prius pleaded that the plaintiff's letters of adminiſtration were revoked after the laſt continuance, judgment ſi ad captionem procedere debeat*; and good by Walmſley and Gawdy, but Anderſon and Beamond e contra. Quære. D. 361. a. Marg. pl. 10. cites Trin. 36 Eliz. C. B. Hutton v. Paramour.

Mo. 871. pl. 1210. Trin. 12 Jac. Stoner v. Gibbons.——Hob. 81. pl. 108. Stones v. Gibſon, S. C. agreed that upon adjournments and continuances of demurrers, the plaintiff might be nonſuit at the day in another term whereunto it was adjourned, and by the ſame reaſon he may plead a plea after the laſt continuance.

S. C. cited Arg. 5 Mod. 32.——

18. In pleading a thing after the laſt continuance, it is no good pleading to ſay, quod poſt ultimam continuationem ſuch a thing happened,

happened, but he *muſt allege preciſely the very day*, viz. from ſuch a day to ſuch a day; per Cur. Yelv. 141. Mich. 6 Jac. B. R. in caſe of Ewer v. Moyle.

He that pleads a plea in abatement, or after the laſt continuance, muſt plead certainly, and this is to be obſerved as a principle in law; per Mountague Ch. J. Pl. Com. 33. b. Paſch. 4 E. 6.

19. Such a plea can *not be taken at niſi prius*, the power of the juſtices of niſi prius being only to take the verdict of the jury. Bulſt. 92. Mich. 8 Jac. Moor v. Browne.

A plea after the laſt continuance is pleaded *at the niſi prius* or refuſe it.

the day of the niſi prius, it is in the diſcretion of the juſtices whether to receive it Jenk. 159. in pl. 2. ——Cro. J. 261. pl. 24. Mich. 8 Jac. B. R. Hawkins v. Moor. S. P. and ſeems to be S. C.——Yelv. 180, 181. Moor v. Hawkins. S C. accordingly.——Brownl. 145. S. C. but ſeems only a tranſlation of Yelv.——Lane, 81. Brown's caſe. S. C. accordingly.

20. And if there be any miſtake in *ſuch a plea* pleaded at the aſſiſes, it *cannot be amended after the commiſſion of the judges is determined*, neither by the judges themſelves, nor by the Court into which the plea is returned with the niſi prius record, as it ought to be; and therefore where at the trial of an ejectment a plea was put in before the jurors were ſworn, that ſince the laſt continuance, viz. ſuch a day term Trin. before the day of aſſiſes (viz.) 20 July (the aſſiſes being the 22 July) the plaintiff had entered into ſuch a cloſe by name, parcel of the premiſes in the declaration ſpecificat', which plea was received, and the next term it was moved that this plea might be amended in adding the vill, where the cloſe lay, and the Court would not. Yelv. 180, 181. Mich. 8 Jac. B. R. Moor v. Hawkins.

Bulſt. 92. Moor v. Brown, S.C. & S.P. accordingly. ——Cro. J. 261. pl. 24. Hawkins v. Moor, S.C. accordingly.

21. If a man *pleads an inſufficient plea after the laſt continuance*, there the *plaintiff ſhall have judgment*, as if the firſt iſſue had been tried for him; and for this he cited the New Book of Entries, fol. 575. Win. 90. Trin. 22 Jac. C. B. Per Hutton J. ſaid it was adjudged in Sir Hen. Brown's caſe.

22. *Time and place for the venue* muſt be laid in this as in all pleas. Gilb. Hiſt. of C. B. 84.

23. A plea after the laſt continuance *may be thus, viz.* And now at this day, &c. comes ſuch a one defendant by J. C. his counſel, and ſays, this action the plaintiff againſt the defendant ought not to maintain, for that after the quindena of the Holy Trinity laſt paſt, from which day until ſuch a day in Mich. term next, unleſs the juſtices of aſſiſes before come ſuch a day, &c. the action aforeſaid is continued, &c. the plaintiff by his deed dated, &c. did releaſe, &c. and ſhew the matter what it is, whether abatement in bar dilatory, or peremptory, as the caſe is, &c. and this he is ready to aver. Clayt. 155, 156.

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24. *Debt for rent*, the defendant pleads *nil debet*, and ſo iſſue joined, and at the day of niſi prius the defendant pleads quod puis darrein continuance, the plaintiff *releaſed* to him, and doth *not name any place where* he releaſed, ſo as no iſſue could be taken, and to this the plaintiff demurred; and it was adjudged a fault incurable. Freem. Rep. 112. pl. 132. Trin. 1673. Gardiner v. Bloxam.

Freem. Rep. 252. pl. 267. S. C. the defendant pleaded an accord without alleging ſatisfaction, whereupon plaintiff demurred, and *the plea being certified on the back of the poſtea, the plaintiff gave defendant a rule to join in demurrer*, but defendant refuſing, the plaintiff entered judgment, and took the defendant in execution. The Court held, 1ſt, That defendant refuſing to join, the plaintiff might lawfully enter up his judgment. 2dly, That he that offers a plea puis darrein continuance at the niſi prius, ought to prove it there; for *unleſs he makes it appear to the judge that it is a true plea, it is in his diſcretion whether he will allow it or not*, but may proceed to try the cauſe. 3dly, That *if the plea be found againſt the pleader, it is peremptory*. 4thly, That the *plaintiff* * *cannot reply to it before the judge of niſi prius*. 5thly, That the *plea could not be amended here*, but † might, during the aſſiſes, be amended before the judge of niſi prius.

25. In aſſault and battery the defendant pleaded not guilty, and at the aſſiſes he put in a plea puis darrein continuance, to which the *plaintiff demurred*. Per Cur. clearly, if the plea had been iſſuable, it could not have been then tried, neither could the *demurrer* be argued there, but *muſt be certified up hither by the judge of aſſiſe as part of the record of niſi prius*. 2 Mod. 307. Paſch. 30 Car. 2. C. B. Abbot v. Rugeley.

* Yelv. 181. Mich. 8 Jac. B. R. in caſe of Moore v. Hawkins, S. P. held by all the juſtices of Serjeant's-inn, in Fleet-ſtreet, accordingly.——Cro. J. 261. pl. 24. S. C. & S. P.

† *But after their commiſſion determined, the juſtices of aſſiſe have no power to amend* the plea. Yelv. 281. in S. C.——Cro. J. 261. pl. 24. S. C. & S. P.

26. In *treſpaſs againſt four* defendants, who appeared, and *after ſeveral continuances three of them pleaded the death of the fourth after the laſt continuance, & petunt judicium de brevi & quod breve illud caſſetur*. The plaintiff demurred. The plea was adjudged ill in the concluſion, which ought to be petit judicium, ſi Curia ulterius procedere vult, becauſe in fact the writ was abated before by the death of the party; whereupon a reſpondeas ouſter was awarded. 3 Lev. 120. Trin. 35 Car. 2. C. B. Hallowes v. Lucy.

27. In *debt upon a bond* the ſtatute of *uſury was pleaded*, and a *demurrer* was to the plea, and the paper book made up and delivered, and the *demurrer joined*, with a *blank left for the day of the Curia adviſare vult*. The defendant pleaded, that the *plaintiff died after the laſt continuance*, and thereupon the *plaintiff's attorney filled up the blank, and made it diem Sabbati prox' poſt quinden' Paſchæ, to which day the judgment ought to refer*, and if the *plaintiff was then living*, it would be good; and the attorney for the plaintiff was examined upon oath, whether he was then living or not? who ſwore that he ſaw him after the ſaid Saturday; whereupon the plea was rejected. L. P. R. 328. cites 8 W. 3. B. R. Moor v. Row.

28. In debt on a bond, defendant pleads in bar as to part, that *after the laſt continuance* he had *paid ſo much, which* the *plaintiff accepted*; to which the *plaintiff demurs*, and it being a *declaration of Michaelmas term*, it was adjudged the whole was diſcontinued; for the plaintiff's way had been to demur to the plea, ſo far as [501] it was pleaded, as he had cauſe to do, it being after laſt continuance, and *acquittance pleaded or produced*, and take *judgment by nil dicit as to the reſt*; per Cur. 12 Mod. 626. Hill. 13 W. 3. Crow v. Maſon.

29. *Debt upon a bond againſt two*, the *declaration is*, memorandum quod alias ſcilicet *de termino ſcilicet Mich.* An *imparlance is to die Mercur' prox' poſt octab' Hillar'*. The *9th December the plaintiff releaſed one of the defendants*. At the day of pleading one of the defendants

defendants *pleads this releaſe with an actio non.* The plaintiff demurs, and held to be the uſual form of pleading with an actio non, though ſome of the pleadings be with an *ulterius non vult proſequi*, this *is before iſſue is joined;* for when the party has two matters to plead, he may take one, and then he waives the other; but after he has pleaded a plea, and iſſue is joined upon it, then he is proper to plead an ulterius non vult proſequi; and therefore in all pleas puis darrein continuance a time muſt be mentioned, that it may appear that the party had not an opportunity to plead this matter before. When a man hath a matter that will bar the plaintiff of his action, he may plead this at the firſt day; ſo if the matter will abate the plaintiff's writ. Parker Ch. J. ſaid as to * Jenner's opinion, in 26 H. 8. 3. mentioned in Lutw. 1178. where a præcipe is brought, and the defendant enters, the tenant may plead that he entered pending the writ, (id eſt,) that he may plead this generally, without taking any notice of time, but when iſſue is joined in a cauſe, the Court hath nothing to do but to try the iſſue, and in the caſe here, it is not material when the leaſe was, becauſe it is the ſame thing as if it had been before the action commenced. As to Littleton's opinion in Ed. 4. that was after iſſue joined, the law doth allow but one plea, and therefore when you have pleaded one, you cannot come in and plead another, but every plea ought to be pleaded in the firſt inſtance, and you can have but one plea puis darrein continuance to avoid delaying the plaintiff, and † 3 Keb. 397. was denied, and when a plea puis darrein continuance is pleaded, he muſt ſhew why he did not plead it before, and ſhew the time particularly, as Yelv. 141. for when a man had pleaded before he had put himſelf upon that defence; but if a matter happen puis darrein continuance he muſt plead it, and the conſtant practice is to plead it ut ſupra, with an actio non; for where a man hath a bar to an action, why ſhould he not plead it as ſuch? Paſch. 9 Ann. B. R. Price v. Kendrick.

* See (L) pl. 17. in the notes there.

† See (L) pl. 16.

(L) Pleas after the laſt Continuance. Where the Matter pleaded muſt be expreſsly mentioned to have been done, or happened, after the laſt Continuance.

1. IF a man pleads the *death of the defendant, pending the writ*, he ſhall not plead it after the laſt continuance, becauſe the *writ* is thereby *abated* in fact; but contra of a plea which proves the writ *abateable* only; as taking of baron and the like. Br. Continuance, &c. pl. 50. cites 18 E. 3. 19.

Br. Briefs, pl. 379. (383.) S. P.

2. In *treſpaſs after iſſue*, the *defendant was received to plead that the plaintiff was outlawed of felony*, without ſaying after the laſt continuance. Thel. Dig. 204. lib. 14. cap. 3. ſ. 1. cites Mich. 20 E. 3. Utlawry 10. and 32 H. 6. 27.

3. A *feme reſceived* ſhall not plead in abatement of the writ a thing happening after the reſceipt, without *ſaying after the laſt continuance.*

continuance. Thel. Dig. 204. lib. 14. cap. 3. ſ. 2. cites Trin. 49 E. 3. 21.

*4. After iſſue the tenant ſhall not *plead that the demandant has entered,* &c. without ſaying after the laſt continuance, and it is not ſufficient to ſay that he entered after the pleading. Thel. Dig. 204. lib. 14. cap. 3. ſ. 3. cites Hill. 50 E. 3. 4. and 21 H. 6. 54. But ſays, that after continuance taken, ſuch plea was admitted. Trin. † 2 H. 6. 13. by ſaying that he entered pendente brevi.

† Br. Continuance, &c. pl. 3. cites S. C.

5. *Entry,* pending the writ, *nor acquittance* of debt, *pending the writ,* is no plea, unleſs it be ſaid that it was after the laſt continuance. Br. Continuance, pl. 16. cites 50 E. 3. 4.

6. It is ſaid, that the tenant ſhall not plead the *death of one of the demandants who is ſevered in formedon,* without ſaying after the laſt continuance. Thel. Dig. 204. lib. 14. cap. 3. ſ. 4. cites Mich. 19 R. 2. Br. 925. Quære.

7. In *præcipe quod reddat* the tenant cannot *plead that the demandant is outlawed in a perſonal action,* without ſaying that it was after the laſt continuance. Thel. Dig. 204. lib. 14. cap. 3. ſ. 5. cites Mich. 14 H. 4. 15.

8. A man ſhall not plead *excommunication* unleſs after the laſt continuance. Thel. Dig. 204. lib. 14. cap. 3. ſ. 6. cites Paſch. 20 H. 6. 27. and 36 H. 6. 19.

9. *Feme reſceived may ſay that the demandant has entered pending the writ,* without ſaying after the laſt continuance. *But* he who is *party to the writ cannot,* after any continuance, plead the death of one of the demandants, or of the tenants, or entry of the demandant, or that the demandant has taken baron, *without ſaying after the laſt continuance.* Thel. Dig. 205. lib. 14. cap. 3. ſ. 7. cites Trin. 21 H. 6. 54. and 32 H. 6. 12.

Br. Reſceit, pl. 62. cites S. C. —— Fitzh. Reſceipt, pl. 60. cites S. C.

10. *Præcipe quod reddat againſt baron and feme,* who make *default at the niſi prius,* and the *feme prayed to be received at the day of the petit cape returned, and ſaid that the demandant had entered into the land* in demand *pending the writ,* and did *not ſay after the laſt continuance* [*and well*]; *contrary if ſhe and her baron had pleaded this plea without reſceipt;* nor no other who remains party to the writ without reſceipt ſhall plead it, but ſhall ſay after the laſt continuance; but *tenant by reſceipt* may. The reaſon is, for that he *is tenant de novo,* and a new tenant, *and the demandant ſhall count de novo,* and all ancient pleas and matters are waived except the original, and therefore he ſhall plead it at large, and is not bound by any continuances before. Br. Continuance, &c. pl. 29. cites 21 H. 6. 48.

11. A man ſhall not *ſay that the plaintiff is made a biſhop* pending the writ, *or that the feme took baron pending the writ after a continuance, unleſs he pleads it after the laſt continuance;* per opinionem Curiæ, quod nota; but *contra of death, or* to ſay *that the feme was covert the day of the writ purchaſed,* note the diverſity; for this diſproves the writ in fact, whereas the other does not diſprove it but only in law. Br. Continuance, &c. pl. 57. cites 32 H. 6. 10.

12. A man ought to plead *that the biſhop is tranſlated* to another biſhoprick *after the laſt continuance*, if it be not pleaded at the firſt appearance. But in *writ by a feme, the defendant ſhall ſay that ſhe was covert of baron the day of the writ purchaſed.* Thel. Dig. 205. lib. 14. cap. 3. ſ. 8. cites 32 H. 6. 12.

13. In *dower* the *tenant pleaded that he himſelf diſſeiſed A. who re-entered the 10th day of October*, &c. Neale ſaid that the tenant ſhould ſay that he entered after the laſt continuance; but Littleton ſaid that a man ſhall *not plead after the laſt continuance unleſs where a plea was pleaded before*, whereas here is nothing but an imparlance; but Brooke ſays, tamen *quære* inde, for it ſeems the imparlance is a perfect continuance; but he that comes at the firſt day and pleads entry pending * the writ, this cannot be pleaded after the laſt continuance. Br. Continuance, &c. pl. 31. cites 15 E. 4. 4.

Gilb. Hiſt. of C. B. 84. cites S. C. and ſays that a releaſe as he conceives may be pleaded, though there has been an imparlance between; becauſe there is no continuance of a former plea pleaded, and by the libertas loquendi the defendant has time given him to plead what makes moſt for his advantage. ——— *But if the writ be only abateable*, as if the plaintiff be *made a knight*, or the plaintiff being *feme ſole, takes a huſband*, it muſt be pleaded after the laſt continuance; for otherwiſe he depends on his firſt plea, and waives the benefit of his new matter; but it cannot be pleaded between the day at niſi prius and the day in Bank, becauſe there has been trial in the ſame cauſe before. Gilb. Hiſt. of C. B. 84. ——— But if the leſſor of the plaintiff dies, this cannot be puis darrein continuance, becauſe the right is ſuppoſed in the leſſee. Ibid.

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14. In treſpaſs the *defendant pleaded not guilty, and ſo to iſſue, and day given till another term*, and *meſne between theſe, the plaintiff releaſed to the defendant*, &c. and *at the day other continuance* was taken, *at which day the defendant ſaid that the plaintiff by the deed bearing date before the laſt continuance, and primo deliberat' to him after the laſt continuance releaſed to him*, &c. and the *plaintiff ſaid that the delivery was when it bore date*, abſque hoc *that it was delivered after the laſt continuance*; and per tot. Cur. the plaintiff ſhall be barred by confeſſion of the releaſe after the action brought, and after the treſpaſs done; but per Cur. the *plaintiff might have ſaid that he did not deliver the deed after the laſt continuance without ſaying more.* Br. Negativa, pl. 43. cites 16 E. 4. 5. Traverſe, per, &c. pl. 247. S. P.

15. In *debt* the defendant cannot ſay that the plaintiff has *received parcel* of the debt pending the writ, without ſaying after the laſt continuance. Thel. Dig. 205. lib. 14. cap. 3. ſ. 11. cites Trin. 5 H. 7. fol. ultimo.

16. In action on the *caſe by 2 adminiſtrators* for money lent, the defendant pleaded the *releaſe of one generally after imparlance by actio non*, and did not plead it after the laſt continuance as he might, it being made ſince the action brought, and therefore the plaintiff demurred; the Court held that the plea ſhould have been after the laſt continuance, and the not pleading ſo loſes all the benefit of the releaſe, and judgment for the plaintiff. 3 Keb. 397. pl. 99. Mich. 26 Car. 2. B. R. Alderſon and Dowly v. Miller. S. C. cited Arg. 2 Lutw. 1177. ——— See (K) pl. 29.

17. In *replevin againſt* 4, the defendants *confeſs the taking, but plead in bar that the plaintiff 6 Feb. 1 Will. had releaſed* 2 of them, *without ſaying before the writ brought or pending the writ, or after the laſt continuance*; the plaintiff *replied, that he had declared againſt them* The reporter, Ibid. 1178. ſays, that it ſeems it may be collected by

the better authority of the books there cited [from the Year-books] that *if any thing happens pending the writ and before iſſue joined, which might be pleaded in bar* of the action, *or which proves that the writ is abated, and not abateable only thereby, it may be pleaded notwithſtanding a continuance after the thing happened, and need not be pleaded that it was after the laſt continuance*, &c. But then it ſeems by the opinion of * Jennor prothonotary of C. B. that in ſuch caſes the pleading ought to be, that ſuch a thing happened pending the writ; for in the 26th H. 8. 3. he ſays that in præcipe quod reddat, if the demandant enters before they are at iſſue, and the tenant pleads this entry in abatement, he ought to ſay that the demandant entered pending the writ; but if they are at iſſue, and then the † demandant enters, the tenant ſhall ſay that he entered after the laſt continuance, and not pending the writ; but ſays that the reporter makes a quære of it, and ſays that the 21 H. 6. is otherwiſe, but Serjeant Lutwich ſays, that upon ſearch throughout the year of 21 H. 6. no ſuch thing is to be found there, but rather the contrary; for in 21 H. 6. 48, 49, & 50. the feme tenant by reſceipt pleaded the entry of the demandant pending the writ, and nothing more, and the plea upon debate was allowed to be good; and ſays that Brooke, in his abridgment of the ſame book, tit. Brief, pl. 2. approve the diverſity there taken by Jennor, with a nota diverſitatem. But ſays, that in the principal caſe here of Rainbow v. Worrall, it is not ſaid that the releaſe was made either before the writ purchaſed, or pending the writ, or after the laſt continuance.

* See (K) pl. 29.

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them in Mich. term, 1 *Will. modo & forma prædict'*, *and that they imparled till Hill. term following*, *and ſo ſet forth continuances till Paſch. and Trin. terms*, and demanded *judgment if the defendants ſhall be admitted to plead this releaſe* after an imparlance; and upon demurrer it was inſiſted for the plaintiff, that by the imparlance the defendants had affirmed the action; and that if they would have any benefit of the releaſe they ſhould have pleaded, that it was made after the laſt continuance, which they could not do becauſe it was made before; all which was admitted to be true, if it had been after iſſue joined, for there is no occaſion of continuances before. The Court, viz. Powell and Rookby, on this firſt argument were of opinion that the plea was good, and gave judgment for the plaintiff, niſi, &c. But the caſe was argued again the ſame term, and in Mich. term, and ordered to be argued again, but no judgment is on the roll. 2 Lutw. 1174. Trin. 2 W. & M. in B. R. Rainbow v. Worrall.

5 Mod. 11. Green v. Moor. S.C. ordered to go over to the next term, becauſe it being a juſt action, the plaintiff may in the mean time reverſe the outlawry, and then may plead after the laſt continuance.

18. *Debt upon a judgment* was *brought in Trinity term*, the *defendant imparled to Michaelmas term*, and then *pleaded* in bar, *that the plaintiff die Lunæ prox' poſt feſtum Sancti Martini was outlawed*; and upon demurrer to this plea it was objected, that all matters which happen after the action brought, and which go in diſcharge thereof, ought to be pleaded puis darrein continuance; but adjudged, this is like a judgment confeſſed by an executor after an action brought which is never pleaded, puis darrein continuance, and in theſe caſes *the time of the outlawry and judgment appear in themſelves*. 1 Salk. 178. pl. 3. Mich. 6 W. & M. in B. R. Moor v. Green.

For more of Continuance and Diſcontinuance, in general, ſee Adjournment, Amendment, Appeal (N), Default, Error, Eſſoin, Protection, and other proper titles.

Contract and Agreement.

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(A) What is, and the Effect thereof.

1. A Contract *is* an agreement entered into by ſeveral perſons, inducing an obligation by its own nature, and the obligations ariſing from contracts *are divided and diſtinguiſhed* according as they are perfected, either by the ſole conſent of the contracters, or by the intervention or tradition of things, or laſtly by word or writing, and are either *ex re*, from a thing done; ex *verbis*, from words; ex *literis*, from writing; ex *conſenſu*, from conſent. But as all obligations cannot be bound up under general and regular names of contracts, the law allows ſome obligations to paſs under the name of *quaſi contractus*, becauſe they have ſome reſemblance, and are of the nature of contracts.

2. If A. *ſells a horſe to B. for* 10*l. and has no horſe*, yet A. ſhall have an action of debt for it; but if A. has a horſe, B. may take it, and ſo it may be a perfect contract, and yet there *is not quid pro quo*. Br. Contracts, pl. 17. cites 37 H. 6. 8.

3. *Leaſe for years rendering rent* is a contract. Br. Contract, pl. 43. Br. Joinder, pl. 90. cites it as admit. tpd. 7 H. 7. 4.

4. An agreement *concerning perſonal things* is a mutual aſſent of the parties, and *ought to be perfect*, full and compleat; for when it concerns perſonal things it is the mutual conſent of the parties, and ought to *be executed with a recompence, or* elſe to be ſo *certain as to give* an action or other *remedy* for a recompence, otherwiſe it is a naked communication without effect. Pl. C. 5. a. Hill. 4 E. 6. in caſe of Reniger v. Fogaſſa. Ibid. 11. b. Arg. S. P. [505]

5. *Recital* of * *whereas he was poſſeſſed of certain land*, he aſſigned the ſame, &c. *amounts to* an agreement. Le. 122. pl. 164. Trin. 30 Eliz. B. R. Severn v. Clark. * S. P. decreed. 2 Mod. 86, &c. Paſch. 28 Car. 2.

Canc. Hollis v. Carr.——So *exception in a leaſe* amounts to an agreement. Le. 117. pl. 158. Trin. 30 Eliz. B. R. Arg. in caſe of Cage v. Paxlin.

6. If one have wares purpoſing to ſell them, and another deſiring to buy them ſaith unto him, *do not ſell them away, but tarry till ſuch a day and I will pay you then for them*; this is a good promiſe and conſideration, for by this he is hindered in the interim from the ſale of them. Per Doderidge J. 3 Bulſt. 70. Trin. 13 Jac. B. R. in caſe of Copper v. Dickenſon.

7. If *I say the price of a cow is* 4 *l.* and *you say you will give me* 4 *l.* and do not pay me presently, you may not have her afterwards except I will, for it is no contract; but if you go presently to telling your money, if I sell her to another you shall have your action of the case against me. Noy's Max. 87.

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8. A *forced* agreement of the party *is* accounted to be *no agreement*, and therefore the Court will not compel him that did thus agree to perform his agreement (22 Car. 1. B. R.); for the law abhors all force and violence. L. P. R. 48.

9. Agreement of parties *cannot prevent* a court of equity of its *jurisdiction*; as in case of a mortgage, it cannot be agreed that this Court shall not give relief. Arg. Chan. Cases, 141. Mich. 21 Car. 2. in the case of Fry v. Porter.

10. *Delivery in consideration of being paid the value*, is a sale. 1 Salk. 25. pl. 11. Trin. 2 Annæ, B. R. in the case of Herbert v. Borstow.

11. If two men *submit to* the *award* of a third person, they two do also thereby promise expresly to abide by their determination, for *agreeing to refer is a promise* in itself. 6 Mod. 35. per Holt Ch. J. Mich. 2 Annæ, B. R. in case of Squire v. Grevell.

See tit. Deaf, Dumb, and Blind.

(B) Good or not in respect of the Contractor.

See tit. Enfant.

1. THE contract of an *infant* is void. Br. Contract, pl. 34. cites 39 E. 3.

But in what cases the husband shall be liable.

2. *So* the contract of a *feme covert* is void. Br. Contract, pl. 34. cites 19 H. 6. 9.

See tit. Baron and Feme (E. a) (E. a. 4)——And see tit. Feme sole Merchant.

3. Agreement made *with an infant* is not binding, because ex parte, and remedies not mutual. MS. Tab. Jan. 19. 1710. Conway v. Shrimpton.

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(C) Good or not, in respect of the Contract, and the Manner of it.

1. PAROL, or *promise to pay* 10 *l. without quid pro quo*, does not make a contract; for it is only nudum pactum unde non oritur actio. Br. Contract, pl. 34. cites 9 H. 5. 14.

2. Note, that a contract may *commence by condition*. Br. Contract, pl. 7. cites 33 H. 6. 43.

3. *As* if there is a bargain between two, that *if one shall deliver twenty cloths to another*, that *then he shall pay to him* 20 *l.* Ibid.

Winch. 85. Trin. 22 Jac. C. B. Arg. cites S. C.

4. In trespass, the defendant said, that a bargain was had between them at D. *that the defendant should go to S. and see the corn of the plaintiff, and if he liked it upon the view, and would give to the plaintiff* 40 *pence for every acre, that he should have it*, by which he went and viewed the land, and was pleased with it, and took it,

ſit, which is the ſame treſpaſs; and per Littleton, Choke, and Brian, juſtices, it is no plea, becauſe he *did not ſhew that he had paid*; but *contra if a day of payment had been agreed*; for if a man cheapens wares at a price certain, and the vendor agrees to the price, this is no bargain, nor ſhall he take the wares if he does not firſt pay, or has a day of payment given; and as to the notice to be given to the vendor here, Brooke ſays it ſeems to him, that when he took the corn it is notice in itſelf that he was pleaſed with the corn. Br. Contract, pl. 25. cites 17 E. 4. 1.

5. If a man *ſells* ſtuff for 40 l. *and delivers* the ſtuff, *and no money is paid, nor day appointed*, yet it is a good contract, and the other ſhall have action of debt, and warranty of the ſtuff is good. Br. Contract, pl. 36. cites 9 H. 7. 21.

6. If a man *buys a horſe of J. N. for his ox*, there *each may take* the thing, viz. the one the ox, and the other the horſe; per Yaxeley. Br. Contract, pl. 18. cites 21 H. 7. 6.

7. It was agreed, that a bargain *for* 10 *l. to be paid ſuch a day*, is good. Br. Contract, pl. 15. cites 14 H. 8. 19.

8. *And* that a *man may ſell* his ſtuff for 10 l. *upon condition that he ſhall re-have it when he comes to Paul's*; and by the performance, &c. the bargain ſhall be void. Ibid.

9. *And*, per Brudenel Ch. J. if a man ſells his horſe *for* 10 *l. and accepts* 1 *d. in earneſt*, it is a good contract, and the vendee ſhall have the horſe, and the other ſhall have an action for his money. Ibid.

10. A. ſells a horſe to B. *on condition to pay* 40 *s. for him at Chriſtmas*, and delivers him to B. Afterwards, before Chriſtmas, A. *re-ſells to C.* At Chriſtmas B. pays not the 40 s. ſo that A. *re-ſeiſes the horſe.* C. never ſhall have him; for at the time of the *ſecond contract*, A. had no intereſt, nor property, nor poſſeſſion of him, nor any thing but condition, which cannot enable A. to contract for the property and the poſſeſſion, and ſo the ſecond contract is merely *void*; Arg. Pl. C. 432. b. Paſch. 15 Eliz. in caſe of Smith v. Stapleton.

11. In contracts *every thing requiſite ought to concur*, as the conſideration of the one ſide, and the promiſe or ſale of the other ſide; per Periam J. Godb. 31. in pl. 40. 27 Eliz. C. B.

12. The *defendant ſold a commiſſioner's place in the king's troops for* 400 *l. to the plaintiff*, *who after* he had enjoyed the place 3 *years was turned out*, and another put in his room, and, as the bill ſuppoſed, by the defendant's means or procurement, without any fault of the plaintiff, which was not proved; *it was inſiſted on by* the defendant's counſel, *that this is not a cauſe proper for the* [507] *Court to relieve*; a contract of this nature being a bargain for a place or office of public truſt and concern, viz. to take muſters, and though being concerned in military affairs is out of the ſtatute, yet the king may be abuſed, and falſe muſters allowed. Lord Chancellor ſaid, he wiſhed a law were that ſuch bargains might not be, they occaſioning deceit to the king, &c. but ſeeing the king hath not diſallowed them, the plaintiff ſhall not loſe his money, and therefore *what the defendant hath received he ſhall repay.*

2 Chan.

2 Chan. Caſes, 82, 83. Hill. 33 & 34 Car. 2. Conyers v. Hammond.

13. A ſum vaſtly exceeding the allowance per *ſtat.* 21 *Jac.* 1. cap. 17. 12 *Car.* 2. cap. 13. of 5 s. per cent. brokage was promiſed *by a third perſon*, who was really to pay it, and neither the borrower was to pay or the lender to receive the money, and this was held not within the ſtatutes aforeſaid. Carth. 251. Mich. 4 W. & M. in B. R. Bartlett v. Vinor.

14. If a ſcrivener contracts for more than 5 s. for procuring the *loan of* 100 *l.* ſuch *contract is void*; per Holt Ch. J. Carth. 252. Mich. 4 W. & M. in B. R. in caſe of Bartlett v. Vinor.

15. Every contract made for or concerning any *thing prohibited*, and made unlawful *by any ſtatute*, *is void*, *though* the ſtatute itſelf does not mention that it ſhall be void, but only inflicts a *penalty on the offender*; becauſe a penalty implies a prohibition, though there are no prohibitory words in the ſtatute; as in the caſe of *ſimony*, and of contract for *more than* 5 *s. for loan of* 100 *l.* per Holt Ch. J. Carth. 252. Mich. 4 W. & M. in B. R. in caſe of Bartlett v. Vinor.

16. It was moved in arreſt of judgment in an action brought upon this promiſe, viz. *if you will procure* 15000 *l. to be paid into the Exchequer upon the aid of* 12 d. *in the pound, in any name, or in the name of ſuch perſon as I ſhall direct, I will give you* 600 l. and inſiſted that this was brokage, and a promiſe againſt law; but the Court declared, that nothing appears in the declaration againſt law; for the borrower does not pay brokage, nor the lender receive it, but the conſideration is wholly between perſons not intereſted in the money. Skin. 322. Mich. 2 W. & M. in B. R. Bartlett v. Vinor.

17. The law knows of no contract but what *are good or bad at the time of the contract made*, and not to be one or other according to a *ſubſequent contingency*; per Cur. 10 Mod. 67. Mich. 10 Ann. B. R. in caſe of Earle v. Peale.

Upon a rehearing before Ld. C. King, the Court was of opinion, that it was a fraudulent tranſaction, and that on the ſale, if ſuch there were, he ſhould have taken earneſt; for it has been determined here, that ſuch a bargain is within the ſtatute of frauds, and being

18. *D. ordered C. a broker, to ſell* 5000 l. S. S. *ſtock upon the* 18*th of March*, 1719-20. *Upon the* 19*th* (being Saturday) in the morning, *C. told D. that he had ſold* the ſaid 5000 l. ſtock *to T.* at 200 l. per cent. D. went to *T.* and aſked him if he had bought the ſaid 5000 l. ſtock of C. who *told him he had not bought the ſtock*, and thereupon D. went to C. and informed him what T. ſaid, and then C. ſaid it was a miſtake, and he had ſold 1000 l. part thereof to A. and the 4000 l. reſidue to B. to be transferred the Wedneſday following, and ſhewed D. his book, wherein he had made an entry thereof. The ſtock riſing very much every day from the ſaid 18th March, and *C. having prevaricated with D. and given him a wrong name of the purchaſor* of the ſtock; *began to ſuſpect that C. had not ſold the ſtock upon the ſaid* 18*th of March, but meant to take the advantage of the riſe to his own benefit, and refuſed to transfer* the ſtock upon the Wedneſday as required by C. and thereupon C. preſſed him extremely to transfer the ſtock, affirming, if it were not done his credit would be blown up in Exchange-alley, and he ſhould be ruined, and begged to have the matter referred, and

to

to have a meeting together, and bring each of them a friend in order to ſettle the matters between them; and at that meeting *it was agreed that D.* ſhould transfer the* 5000 *l. ſtock to ſuch perſons as C. ſhould appoint, upon payment of* 10000 *l.* being at the rate of 200 l. per cent. *but then C. ſhould depoſit* 4000 *l.* in Exchequer orders, *in the hands of J. S. and W. R. as a pledge and ſecurity for D. in caſe the arbitrators then choſen ſhould make an award for D. that C. did not ſell the ſtock upon the ſaid 18th of March, to anſwer the riſe of ſtock to D. between that day and the day on which the ſtock was delivered, being the Friday following;* and upon this agreement *D. did transfer the ſtock for* 10000 *l. and C. made the depoſit.* After this *one of the arbitrators died before any award* made, and then *C. brought a bill to have back his depoſit, and D.* brought *a croſs-bill to have the depoſit delivered over to him, upon a ſuggeſtion that C. had kept the ſtock for himſelf, and not ſold it at* 200 *l. per cent. as pretended.*

It appeared upon the pleading and proofs in the cauſe, that *C. did not ſell the* 1000 *l. ſtock* to A. nor the 4000 l. ſtock to B. though entered in his books, but the whole 5000 l. ſtock, or the greateſt part thereof, he did retain to himſelf.

Per Macclesfield C. *a broker*, or a perſon acting as a broker, (as C. was, and not ſo within the ſtatute which prohibits brokers from buying ſtock for themſelves,) *cannot retain the ſtock to himſelf, which his principal has ordered him to ſell*, for that is to make the ſame perſon both buyer and ſeller. The broker is intitled by his principal to ſell the ſtock to the beſt advantage, and if the broker ſhould be allowed to be buyer, in ſuch a caſe can it be ſuppoſed that he will have as great a regard to the intereſt of his principal, as to his own particular intereſt and gain? This would be a great inlet to fraud, and a ſtrong temptation to a breach of truſt, and ought not to be allowed; and although in the preſent caſe D. did agree to the pretended ſale of the 5000 l. ſtock, at 200 l. per cent. upon the information of C. that the ſtock was ſold at that price, yet that *ſubſequent conſent, founded upon a miſrepreſentation, ſhall not bind in favour of the broker who had deceived him*, and when in reality there was no ſale at all, but the broker kept the ſtock for himſelf, upon a proſpect of the riſe of ſtock; and though the broker might be bound to take the ſtock at the price he informed the principal the ſtock was ſold at, yet it does not follow that the principal ſhall be bound by his conſent, which was founded upon a *fraud and deceit in the broker.* A broker cannot retain the ſtock which his principal orders him to ſell, unleſs he expreſsly acquaints his principal therewith, and he gives his conſent thereto; for then it is not a ſale from the broker to himſelf, but he buys it of his principal himſelf, which he may as well do as of any other man. Decreed the depoſit to be delivered to D. with coſts. MS. Rep. Mich. 11 Geo. Crull v. Dodſon, & e contra.

N. B. This decree was re-heard, July 8, 1725, before King C. poſt term. Trin. 11 Geo. and the decree affirmed.

without earneſt, is only nudum pactum; that the decree ſhould have been to account for the 5000 l. and the produce of it; but as the plaintiff acquieſces under the decree, and it is re-heard on the petition of the defendant, the Court can do no more than affirm the decree. Select Caſes in Chancery in Ld. King's Time, 42 S. C.

(D) Agreement neceſſary to the veſting of Things. In what Caſes.

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1. WHERE an *eſtate* is *given* to one *by a lawful act*, it ſhall be adjudged in the party before agreement until it be diſagreed to. Arg. 2 Leon. pl. 97. Trin. 28 Eliz. B. R.

[509] Litt. Rep. 61. S. C. in totidem verbis.

2. *Aſſumpſit*, and declares that the defendant die Maii, anno Dom. 1625, *in conſideration that the plaintiff would permit the defendant to re-enter into a meſſuage and croft* in which the defendant had dwelt before, *promiſed to pay to him* 30 *s. yearly during the time that he enjoyed it, and that he permiſit ipſum reintrare*, and he enjoyed it 2 year and half, which ended at Mich. 1626, and becauſe he would not pay 45 s. he, &c. Upon non aſſumpſit it was found for the plaintiff. It was moved in arreſt of judgment, that the aſſumpſit being to pay 30 s. annuatim, before the year be determined, nothing is due, and the plaintiff cannot divide the rent, and cited 5 R. 2. Annuity, 21. Debitum judex non ſeperat. Then when it does not appear that the action lies for the 15 s. for the half year, and the jury aſſeſſed damages intirely, it is void, as 10 Rep. 130. OSBORNE'S CASE; and it appears, that by his computation of time, it is not a year and a half from the time of the aſſumpſit made. Richardſon ſaid, that it is not ſecundum ratam, for then he might divide the rent, and no day is limited for the payment of it; for if a leaſe be made for two years, or at will, paying annually at Michaelmas 30 s. and the leaſe is determined after half of the year, although it be by the leſſee himſelf, he cannot pay any rent; but Yelverton ſaid, that that is not a rent, but a collateral ſum, and debt does not lie for it; and in the declaration it is ſaid, quod permiſit ipſum reintrare, and does not ſay at what time, which was naught by all, but Hutton; and it ought to be alſo, that he did de facto re-enter. And per Hutton, if it had been ſaid, ſo long as you ſhall occupy the land, you ſhall pay annually, &c. that he may demand half of the year, but the whole Court againſt him, and judgment was ſtayed. Hetl. 53. Mich. 3 Car. C. B. Wentworth v. Abraham.

3. Upon an *aſſignment of a judgment*, the judgment immediately veſts in the aſſignee before his acceptance of it; Arg. cites Butler v. Baker. And. 348. Poph. 87. 3 Rep. 25. 10 Mod. 189, 190. Mich. 12 Ann. B. R. in caſe of Turner v. Goodwin.

4. A. ſent *goods out of the country to B.* and *B. apprehenſive that he ſhould ſoon be a bankrupt, delivers* a quantity of *goods, moſtly the ſame, to C. for the uſe of A.* but before A.'s acceptance B. became bankrupt. Reſolved by the judges of B. R. on a reference to them by Parker Ch. J. before whom the caſe was tried, that the property of the goods were ſo veſted in A. by the delivery of the goods to C. for the uſe of A. that they were not ſubject to the diſpoſal of the commiſſioners of bankruptcy. 10 Mod. 432. Mich. 5 Geo. 1. B. R. Atkins v. Berwick.

(E) Conſtruction and Extent thereof.

1. *WHERE there is a bargain* between E. and A. for 10 l. *that E. ſhall inſtruct A. in ſuch a ſcience, and the money is not paid*, and A. *dies within three weeks*, E. ſhall not have an action for the 10 l. for the cauſe is ceaſed. Br. Contract, pl. 12. cites 21 E. 3. 11.

So if the money had been actually paid, action would not lie to inforce E. to repay the money. Ibid. ——— Br. Dette, pl. 84. cites S. C.

2. He who *ſells trees* is not bound to ſuffer the other to take them if he does not pay the money. Br. Contract, pl. 26. cites 18 E. 4. 5.

3. If I *ſell my horſe* to you *for* 20 *l.* you ſhall not have the horſe *if you do not pay the money preſently*; for, though I am content that you ſhall have him for 20 l. yet if it is not paid preſently, *but another comes and gives me* 20 *l. for him, and I accept it*, there the ſecond ſhall have it, and not the firſt who did not pay me; per Carell Serjeant, which Fitzh. J. and Brudnel Ch. J. agreed. Br. Contract, pl. 15. cites 14 H. 8. 19. [510]

4. *But if a future day of payment be agreed*, then it is a good bargain, and the vendee has poſſeſſion immediately, and the vendor ſhall have action at the day; per Fitzh. Ibid.

5. *But* if you are in the market and offer me a piece of cloth for 20 s. and I agree, and *as I am telling the money another comes and gives you* 20 *s. for it, and you agree*, yet I ſhall have the cloth, for there is no default in me; per Brooke J. which Pollard J. agreed. Ibid.

6. *But if I depart, and before my return you ſell* the cloth to another, there I ſhall not have the cloth, becauſe I did not pay preſently, nor no day of payment was given between us; per Brooke J. which Pollard J. agreed; *but otherwiſe* it ſeems, *if vendor had agreed to ſtay till the vendee had fetched the money from his houſe*. Ibid.

7. *But if the vendor and vendee are agreed* for 20 s. *and the vendor delivers the cloth to the vendee*, and he accepts it, there this is a perfect bargain, and ſo ſee a *diverſity* between a *perfect bargain* and a *communication*; per Brooke J. Br. Contract, pl. 15. cites 14 H. 8. 19.

8. *But ſale* of ſtuff *for ſo much as J. N. ſhall arbitrate* is a good contract if he arbitrates what, &c. and if he will not arbitrate any ſum, then the bargain is void; per Pollard, to which Brudnel Ch. J. agreed, and by him *if J. N. was preſent and would not ſay* the bargain is void, but if he be *abſent* the bargain is good till J. N. *refuſes to ſay what ſhall be paid*, and the party ſhall have *reaſonable time* to move J. N. what he ſhall ſay, &c. having regard to the diſtance of the place where he dwells. Ibid.

9. *And* a *man may ſell* his ſtuff for 10 l. *upon condition that he ſhall have it again when he comes to Paul's*, and by the performance, &c. the bargain ſhall be void; per Pollard. Ibid.

10. *And*

10. *And* if a man ſells his horſe *for* 10 *l. and accepts* 1 *d. in earneſt*, it is a good contract, and the vendee ſhall have the horſe, and the other ſhall have an action for his money; per Brudnel Ch. J. Ibid.

11. In every agreement made between parties the *intent* is the chief thing to be conſidered, and *if*, *by* the act of God, or by *any* other *means not ariſing from the party himſelf, the agreement cannot be performed according to the words*, yet the party ſhall perform it as near the intent as may be. Pl. C. 290. b. Arg. Trin. 7 Eliz. in caſe of Chapman v. Dalton.

12. A contract may be *void in part* and good in part. Arg. Pl. C. 433. a. Paſch. 15 Eliz. in caſe of Smith v. Stapleton.

13. If a man *retains a ſervant generally*, without expreſſing any time, the *law ſhall conſtrue it to be for a year*, becauſe ſuch retainer is according to law. Co. Litt. 42. b.

14. In all contracts he that ſpeaketh *obſcurely or ambiguouſly* is ſaid to ſpeak at his own peril, and ſuch ſpeeches are to be *taken ſtrongly againſt himſelf*. Noy's Maxims, 91.

And ſee Sid. 270. Pleaſe v. Palfry, S. C. that if it had been on demurrer or ſpecial iſſue it had been ill.

15. *B.* agreed *to give A.* 2 *s. per ſeame for all the bark of the wood which A. ſhould cut*, and *B. promiſed to have articles ready ſuch a day containing the agreement, and a bond for performance*; but *no ſum was mentioned, nor to whom*; and therefore it was argued, that the agreement was void; but, per Cur. B. the defendant ought to have given a bond, and the ſum may be reduced to certainty according to the value of the bark, and ſhould not have pleaded non aſſumpſit. See Keb. 776. pl. 15. Mich. 16 Car. 2. B. R. Paltry v. Plees.

16. All agreements muſt be conſtrued *ſecundam ſubjectam materiam, if the matter will bear it*, and in moſt caſes are governed by the *intention of the parties and not to work a wrong*; and therefore if tenant in tail makes a leaſe for life, it ſhall be taken for his own life; and yet if before the ſtatute of entails he made [511] ſuch a leaſe, he being then tenant in fee ſimple, it had been an eſtate during the life of the leſſee; but when the ſtatute had made it unlawful for him to bind his heir, then the law conſtrues it to be for his own life, becauſe otherwiſe it would work a wrong. Arg. 2 Mod. 80, 81. Paſch. 22 Car. 2. C. B. in caſe of Richards v. Sly, cites Co. Litt. 42. [a. b.]

17. Every agreement muſt have ſome *reaſonable* conſtruction, which may be *conſiſtent with the intent of the parties*. 2 Vent. 278. Hill. 2 & 3 W. & M. in C. B. Target v. Floyd.

18. If a man *ſells* 2 *horſes for* 20 *l. one is his own and the other a ſtranger's* horſe, if the one be *defeated* he ſhall have an action for all the 20 l. becauſe it is an *entire* contract. Per Doderidge J. 3 Bulſt. 232. cites Br. Caſes, 9. pl. 52.—Where a man's contract has ſubjected him only to one action, it cannot be *divided* ſo as to ſubject him to two. 1 Salk. 65. pl. 2. Mich. 10 W. 3. B. R. Hawkins v. Cardee.

19. The conſtruction of *marriage articles*, where there appears to be an intent *that lands ſhall be ſettled upon the iſſue* of that marriage, is to make the father tenant for life, remainder to the firſt and

and every other ſon of A. in tail male. MS. Tab. March 6, 1726. Martin v. Martin.

20. A. *before marriage ſettled* 300 *l. a year on M. his wife, in bar of dower and thirds, and what ſhe might claim by the cuſtom, but not to extend to houſehold goods.* At the time of the ſettlement the *huſband was under a contract* with the commiſſioners of the navy *to take care of wounded ſailors, where he had great quantities of goods for that purpoſe.* Ld. C. King decreed for a ſhare of thoſe goods; but on appeal to the Lords this decree was reverſed. Sel. Caſes in Chan. in Ld. King's Time, 52. Mich. 11 Geo. Clerke v. Jackſon.

21. Marriage articles recite, that lands covenanted to be ſettled were 500 l. per ann. but there was *no expreſs covenant that they were* ſo, yet decreed that *the deficiencies ſhould be made up* out of other lands. MS. Tab. March 14th, 1728. Gleg v. Gleg.

22. Contracts are to be judged *according to the law of the place where* ſuch contracts are *made.* MS. Tab. May 23d, 1728. York-Buildings Company v. Meers.

(F) Performance. What is; and by whom, when, and how it muſt be.

1. IF a man *ſells a leaſe of land, and certain cloths for* 10 *l.* the contract is intire, and it cannot be ſevered. Br. Contract, pl. 35. cites 7 H. 7. 4.

2. *And if the one of them was by defeaſible title,* yet the vendor ſhall have the intire ſum, though the one part was deveſted from the vendee. Ibid.

For contract cannot be ſevered. Ibid. cites M. 24 H 8.

3. The law is, that no contract ſhall be *apportioned;* per Curiam. Owen, 10. cites Bendl. 14 H. 7.

4. Agreements may be ſaid performed *when the intent* is performed, *though* it be *not according to the words.* Pl. C. 291. a. b. in caſe of Chapman v. Dalton.

And ſo they may be ſaid *not* to be *performed where* the performance is *according to the words, but not according to the intent.* 291. b. Ibid.

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5. If a man comes to a ſhop to buy, he ought *inſtantly to pay;* otherwiſe it is no contract executed. Per Williams J. Yelv. 125. Paſch. 6 Jac.

And if the price is agreed upon, and then the buyer takes the goods away without payment or delivery of the owner, *treſpaſs* or *trover* lies, notwithſtanding the bargain. Mod. 137. per Hyde J. cites 21 H. 7. 6. ——— On contracts for chattels, if *no time is limited* for payment of the money, it muſt be paid preſently. Mo. 472. Obiter. ——— Adjudged D. 30. pl. 203. ——— 6 Mod. 162. Paſch. 3 Ann. per Holt Ch. J. S. P.

6. A. promiſes B. that *if he will grant him a leaſe for* 21 *years at* 10 *l. per ann.* that *he will give him an horſe.* B. grants a leaſe for 21 years, but to intitle himſelf to the horſe it muſt be at the *very rent* of 10 l. and ſo *a leaſe of* 60 *years would not intitle,* though 21 are contained in 60. 3 Bulſt. 35. Paſch. 13 Jac. Lea v. Adams.

7. A. bids B. *do an errand at York* and he will give him 40 s. *Afterwards A. says, do this errand for me at your house, and this shall suffice*; yet if B. goes not to York, and does his errand *according to that contract* on which the promise was grounded, he shall never have the 40 s. because he has not pursued the body of the contract. Per Coke Ch. J. 3 Bulst. 36. Pasch. 13 Jac. Lea v. Adams.

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8. If one contracts to pay another for any thing *tantum quantum meruit*, as for a quarter's *board*, if he will go away 2 or 3 days after, he shall pay for the residue. Per Coke Ch. J. 3 Bulst. 188. Trin. 14 Jac. in the case of Cotton v. Wescott.

9. A. promises B. 20 l. *on delivery of* 20 *quarters of corn* by him; B. delivers 10 quarters, B. shall not have action on the case for the promise before he has delivered all. Per Crew Ch. J. 3 Bulst. 325. Hill. 1 Car. B. R. in case of Hungerford v. Haviland.

10. The plaintiff had *agreed with two of the defendants to pave their streets in Putney*, and *they on the behalf of the parish agreed to pay him for them*, which *agreement was put into writing, and remains in the hands of the defendant W.* The work was done according to the agreement, and it came to 360 l. The plaintiff preferred his bill in equity against them with whom he had agreed, and against others of the parish who had agreed with the undertakers for the parish to pay their shares; and per Curiam the plaintiff must have relief against the undertakers, especially in this case, because the written agreement, which is his evidence, is in the hands of one of the defendants, and the undertakers must take their remedy against the rest of the parish. Hardr. 205. pl. 5. Mich. 13 Car. 2. in Scacc. Meriel v. Wymonsold & al'.

11. The *manner of performing* a contract is to be guided by *usage and custom*, as if a taylor is to make a suit, the cloth must be found for him, but a shoemaker is to find leather to make a pair of shoes; per Curiam. Lev. 93. Hill. 14 & 15 Car. 2. B. R. in the case of Oles v. Thornhill.

12. Agreement on marriage by *articles* to settle 1900 l. per ann. jointure, and 1500 *l. per ann. on the issue of the marriage*, the lands settled on the issue did not hold out to be 1500 l. per ann. and great part of that too in reversion. The husband devises his land unsettled for payment of his debts, the dispute was between the creditors and trustees of the infant son and widow. Per Cur. there is no covenant that the estate shall continue of the value in the articles, nor that it should be *of that value in present possession*, and therefore the settlement ought to stand, the articles being sufficiently performed. 2 Vern. R. 272. pl. 257. Trin. 1692. Whitchurch v. Lady Ann Bainton.

1 Salk. 172. Collonell v. Briggs. S. P.

13. A. covenants to *transfer stock on such a day* to B. his executors, or assignees, B. covenants that he or they shall accept in the usual manner upon the said day, and *eodem tempore solvent* the money; defendant pleads no transfer, so he could not accept; it was argued that according to the case of Carter v. Taylor adjudged

judged the laſt term, defendant ought to have tendered his money and demanded a transfer and judgment pro quer'. Show. 390. Paſch. 4 W. & M. Smith v. Cudworth.

14. A. bought of the defendant all his corn growing in ſuch a cloſe for 20l. before the reaping; the defendant in conſideration A. had paid 10l. in hand, and promiſed to pay ſo much more reſidue, &c. promiſed to deliver the corn. Reſolved in this caſe there needs no averment that he was ready, &c. For there is a *promiſe againſt a promiſe* which gives mutual remedy, but if it had been ſold *proinde* the money muſt have been firſt paid. Cumb. 256. Paſch. 6 W. & M. in B. R. Mansfield v. Stephen.

15. Every man's bargain ought to be performed as he *intended* it; when he relies on his remedy it is but juſt he ſhould be left to it according to his agreement, but on the contrary there is no reaſon a man ſhould be forced to truſt where he never meant it. 1 Salk. 171, 172. Paſch. 13 W. 3. Thorp v. Thorp.

16. If I ſell you my *horſe for* 10*l.* if you will have the horſe I muſt have the money, or if you will have money I muſt have the horſe. Per Holt Ch. J. 1 Salk. 113. pl. 1. Trin. 2 Ann. at niſi prius. The property is not altered till the money paid, and the owner may ſell him to another. Per North Ch. J. 2 Mod. 243. in caſe of Mires v. Solebay.

16. By *marriage articles* it was agreed that 6000*l.* *in the hands of the truſtees ſhould be laid out in the purchaſe of lands to be ſettled on the huſband for life, remainder to the wife for life* for her jointure, remainder *to the firſt and every other ſon* of that marriage *in tail male* ſucceſſively, *chargeable with* 2000*l.* *for younger children*, remainder *to the huſband in fee*; the *father by the ſame articles covenants after his deceaſe to ſettle other lands upon the huſband and the heirs males of his body*, remainder *to the heirs of the father*. One point was, the father of the huſband having made a ſettlement of the lands agreed to be ſettled by the marriage articles, on the huſband and the heirs males of his body, with remainder to himſelf in fee, if this is a good performance of the agreement, and if the limitation ought not to have been on the huſband for life, with remainder to his firſt, and every other ſon in tail male ſucceſſively in ſtrict ſettlement. Ld. C. King was of opinion, that the ſettlement made by the father, on the huſband and the heirs male of his body, was a good execution of the agreement; by the articles theſe lands were not intended to be ſettled as a proviſion for the children of that marriage, they were taken care of by the other part of the articles, by the truſt money, but for the ſupport and proviſion of the huſband; and it is not like the common caſe of articles for a ſetlement on the marriage where no other proviſion or care is taken for them, and the different manner of penning the articles in relation to the truſt money, and as to theſe lands, the one to be in ſtrict ſettlement to the firſt, and every other ſon of that marriage, the other limitation to the huſband, and the heirs males of his body generally and not tied up to the iſſue of that marriage, ſhews plainly the parties underſtood and had in contemplation the difference between a ſtrict ſettlement upon the Gibb. 127. S. C.

iſſue of that marriage and a general ſettlement upon the huſband and the heirs males of his body, and his lordſhip confirmed the ſettlement. MS. Rep. Trin. 3 Geo. 2. Canc. Chambers v. Chambers.

17. Bill was brought againſt defendants, being 3 of the truſtees of the Sun-fire Office, to make good a loſs by fire, &c. The caſe was, that plaintiff had a *policy* upon which he uſually paid 2 s. per quarter, and by the propoſals was *to pay on the quarter day, or within* 15 *days after*; and the *method of collecting* the money *was by the agents of the office calling at the perſons houſes, which they ſometimes did within the* 15 *days, and ſometimes a few days after*. Plaintiff's policy expired at Michaelmas 1727, and the 15 days were out, the 14th Oct. *the agent of the office did not call* for the 2 s. and on the 5th of Novem. following, plaintiff's houſe was burnt. A. B. the agent of the office examined for plaintiff, ſwore that if the fire had not happened he ſhould have called on plaintiff for his quarterage the 6th or 7th of the ſame Nov. For plaintiff it was inſiſted that this non-payment by the plaintiff was not by any default of his, but happened by the courſe and method of defendant's collecting, and the negligence and omiſſion of their ſervant or agent, &c. and therefore ought not to be turned to plaintiff's prejudice, &c. It was inſiſted for defendant, that there was one ſubſiſting contract between the office and plaintiff at the time the loſs happened, for by the payment only the contract is renewed. And as to the objection that this is but relieving in point of time or a day, it was anſwered that here no contract ariſes till the payment; for the inſurance is but from quarter to quarter, and every payment is a new contract, &c. Ld. Chan. ſaid that in law this policy is an agreement to inſure quarterly as long as the parties pleaſe. This inſurance was on books, and the party to pay quarterly; *the continuance, or not, depends* on the act of the party inſured, (viz.) *on his paying* 2 *s.* per quarter, and upon his paying *at the quarter, or within* 15 *days after*, the inſurers covenant to pay, &c. the loſs. And in a declaration at law the payment within the 15 days muſt be averred. As to equity, *if the office had* diſpenſed with the time and *taken the premium after*, this court would have held them to it, becauſe it was their own act. But here it was neither paid nor tendered; the office appointed a collector for the benefit and eaſe of the perſons paying, &c. and to prevent any miſunderſtanding there is a memorandum on the very receipts, that the payment after the 15 days was not to diſpenſe with the time, and the agent had no authority after the 15 days to take the money. The premium is the conſideration and is to precede, and if the 15 days be not the time, what ſhall be the time, &c. within which it ſhall be neceſſary to pay, &c.? Bill diſmiſſed. MS. Rep. Mich. 4. Geo. 2. Canc. Fiſher v. Brocas.

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(G) Agreement, &c. determined, extinguished, or discharged, by what and how.

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1. A Man made a contract *to serve for a year, for* 20*s. to be paid at* 2 *terms*, the *master died after the first term passed* and before the last term, and he was barred of the rest of the salary, for by the death of the master he could not serve him, and so the contract determined. Br. Contract, pl. 30. cites 27 E. 3. 84. and Fitzh. Dett. 143. Br. Apportionment, pl. 26. cites S. C.

2. *Debt* of 20 l. upon a contract, the *defendant said that the plaintiff after took an obligation of* 10 *parcel* thereof, and held a good plea to the whole contract, for a contract *determined in parcel is determined in all*, for it is intire, and issue was taken that the obligation was made for other matter. Contract, pl. 8. cites 3 H. 4. 17.

3. Contract shall be determined if the *debtor makes obligation to the creditor*, but one obligation does not determine another obligation nor record, as account made before auditors, but both remains. Br. Contract, pl. 33. cites 11 H. 4. 79. and 3 H. 4. accordingly, for otherwise it would be a double charge.

4. *And* by the opinion in 20 H. 6. 21. if a * *contract* is *made of the thing which comes to the use of the house by an abbot*, there if the *party takes obligation*, it shall determine the contract which at first might have charged the successor, and the obligation of the abbot alone will not charge the successor. Ibid. [515] * S. P. Contract, pl. 45. cites 10 H. 7. 21.

5. Note, it was almost agreed for law, that if a man *retains a servant for* 20*s. for a year, and* the master *discharges him within the year*, to which the *servant agrees*, that there the servant shall not have an action for any of his wages for service done before his discharge nor after, for the sum is not payable but in the end of the year, and the contract is intire and cannot be severed. Br. Contract, pl. 31. cites 10 H. 6. 23.

6. If an *abbot buys goods, which comes to the use of the house*, so that the house is charged in case the abbot dies, there if the *vendor takes obligation of the abbot alone* for the debt, this shall discharge the contract, and there if the abbot dies, the action is determined, and the debt is lost. Br. Abbe, pl. 20. cites 20 H. 6. 21.

7. A *contract* cannot be severed nor apportioned, therefore in *lease of a chamber and boarding* of the lessee, *rendering* for the chamber and boarding 6*s. by the week*, if in debt upon it he pleads quod non dimisit cameram, this goes to all, because contract is intire, and if it be destroyed in part it is destroyed in all. Br. Apportionment, pl. 7. cites 9 E. 4. 1.

8. If a man *recovers in debt upon contract, and does not take execution*, yet he cannot have a new action of debt upon the contract; for the contract is determined by the judgment of record. Br. Contract, pl. 39. cites 9 E. 4. 51.

9. If 2 *are agreed upon the price*, and the *buyer departs without tendering* the money, *and comes the next day and tenders*, the other

may refuſe, for he is not bound to wait upon him unleſs a day of payment was agreed between them. Br. Contract, pl. 26. cites 18 E. 4. 5.

10. In debt, if the bargain was *that the plaintiff ſhall give to the defendant* 10*l. for ſo much wood, if he likes it* upon the view of it; there, per Littleton, Brian, and Choke J. if the *plaintiff upon the view of it diſagrees to the bargain*, then it is a void bargain though he agrees to it after. Br. Contract, pl. 27. cites 18 E. 4. 15.

11. *And if he agrees to it* then it is a *perfect bargain* though he diſagrees after, for the *firſt act ſhall bind.* Per Littleton, Brian, and Choke, quod nemo negavit. Ibid.

12. A *man may ſell* his ſtuff for 10 l. *upon condition that he ſhall re-have it when he comes to Paul's*, and by the performance, &c. the bargain ſhall be void. Br. Contract, pl. 15. cites 14 H. 8. 19.

13. If a man be *indebted* to me *by contract*, and *after makes* to me *an obligation of the ſame* debt, the contract by this is determined, for in debt upon the contract it is a good plea that he has an obligation of the ſame debt. Br. Contract, pl. 29. cites 29 H. 8.

14. *But if a ſtranger* makes to me an obligation for the ſame debt, yet the contract remains, becauſe it is by another perſon, and both are now debtors. Ibid.

And upon that reaſon one PUDSEY's CASE was adjudged; where upon the contract, a ſtranger to the contract being preſent, promiſed to enter into a bond unto the party, &c. for the payment of the money agreed for upon the contract, and afterwards became bound accordingly; in that caſe the contract was determined, becauſe the obligation was purſuant to the contract.

15. A. was indebted to B. on ſimple contract, afterwards A. *procured J. S. to be bound to B. for the ſaid debt of A.* and A. gave J. S. a counter-bond; per Cur. the contract is not *determined* by the bond given by J. S. *But* if J. S. had given the *bond at the time of the contract*, that *had determined the contract, becauſe* the bond was *purſuant* to the contract. 2 Le. 110. pl. 143. Trin. 29 Eliz. C. B. Hooper's caſe.

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So of a *legacy*, and J. Doderidge's opinion in Gardiner's caſe, 2 Roll. denied. 8 Mod. 328. Mich. 11 Geo. 1. 1725. in caſe of Cuband v. Dewſbury.

16. Acceptance of *a bond* for money due on a contract is a *diſcharge of the contract.* Noy, 140. Oldfield's caſe.

17. An agreement made between the parties by *parol* only, may be diſcharged and made void, at any time *before it is broken*, by parol only without ſatisfaction; for eodem modo quo oritur, eodem modo diſſolvitur; *but* after it is broken it can *not* be diſcharged *without ſatisfaction* (22 Car. 1. B. R.); for by the breach there is a wrong done to the party, which the words cannot releaſe without ſatisfaction; but before the breach no injury was done to either party, nor any of them injured by ſuch a diſcharge. L. P. R. 48.

18. If an agreement made by *parol* to do any thing be afterwards *reduced into writing*, the parol agreement is thereby diſcharged; and if an action be brought for the non-performance of this agreement, it muſt be brought upon the agreement reduced

duced into writing, and not upon the parol agreement (Paſch. 22 Car. 1. B. R.); for both cannot ſtand together, becauſe it appears to be but one agreement, and that ſhall be taken which is the latter, and reduced to the greater certainty by writing; for vox emiſſa volat, litera ſcripta manet. L. P. R. 48.

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19. A parol agreement is *determined* by the giving of a *bond*. Chan. Caſes, 226. Paſch. 26 Car. 2. Davis v. Curtis.

20. *A. on the marriage of N. his ſon* with M. *made a ſettlement*, and *limited* 6000 *l. for daughters' portions*. There was *one daughter, who married J. S.* and *the* 6000 *l. being become due*, B. *entered into articles with J. S. to pay the* 6000 *l. within four years, and intereſt in the mean time*. On a bill for the 6000 l. it was inſiſted, that notwithſtanding ſuch deed of ſettlement, the plaintiff ought to reſort to the articles for relief; for that by thoſe articles the deed was made void, and not to reſort to the ſettlement and articles both as they had done. The Court decreed, that *the articles did not impeach or vacate the ſettlement*. Fin. Rep. 237. Mich. 27 Car. 2. in Canc. Briſcoe & Ux' v. Denbigh (Earl) & al'.

21. An *obligation* may be pleaded in bar of a *ſimple contract*. 2 Jo. 158. Trin. 33 Car. 2. B. R. Shelden v. Clipſham. Raym. 449. S. C. accordingly.

22. Bill to have agreement *in writing* executed in ſpecie; per North K. ſuch agreement may be *diſcharged by parol*, ſince the ſtatute of frauds. Vern. K. 240. Paſch. 1684. Goman v. Saliſbury.

23. Bill to have the benefit of an agreement, ſurmiſing that A. *agreed that on failure of iſſue male of his own body, the land ſhould remain to B.* the plaintiff, *and that A. and his heirs ſhould ſtand ſeiſed* of the premiſes *upon ſuch truſt* as aforeſaid. The Court ſuppoſed the deeds produced by the plaintiff purporting ſuch agreement to be forged; but in caſe there was any ſuch real agreement, yet it was well *barred by the ſubſequent agreement*. 2 Vern. 129. Hill. 1690. per Lords Commiſſioners. Ayneſley v. Vaughan.

24. Agreement *between lord and his tenants for incloſing a common*, that the tenants ſhould quit their right of common, and the lord ſhould releaſe them all quit-rents, *the incloſure was prevented by pulling down the fences, and the tenants continue to uſe the common*, this *is a waiver* of the agreement. MS. Tab. Jan. 2, 1719. Lady Laneſborough v. Ockſhot.

25. A. made a *purchaſe before a maſter* in Chancery *for* 10,050*l. and depoſited* 1000 *l.* Upon its being prayed that A. might compleat his purchaſe, he by his counſel offered to loſe his depoſit and not to proceed, which Lord C. Macclesfield decreed accordingly, and obſerved, that according to his apprehenſion, a court of equity ought to take notice under what a general deluſion the nation was at the time of this contract made (viz. in the S. S. year) when people put imaginary values on eſtates. Mich. 1721. Wms.'s Rep. 745. Savile v. Savile. Wms. Rep. 746. in a note at the bottom ſays, that the S. P. was determined ſome little time before in the caſe of MERRET v. BENNET, and alſo in the caſe of Dr. Tenniſon v. Lord Bulkley.

26. Where an agreement is *reduced into writing*, all *previous treaties are reſolved into that.* Sel. Caſes in Chan. in Lord King's Time, 20. Trin. 11 Geo. 1. Chriſtmaſs v. Chriſtmaſs.

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(H) Parol, what is; and made good, in what Caſes.

1. 29 *Car.* 2. *cap.* 3. *ſ.* 1. *ALL leaſes, eſtates, intereſts of freehold or terms of years, or any uncertain intereſts in or out of any lands, tenements or hereditaments, not put in writing and ſigned by the parties making them, or their agents authoriſed by writing, ſhall have no greater effect than as eſtates at will, except leaſes not exceeding three years, whereof the rent ſhall be two thirds of the full value.*

2. 29 *Car.* 2. *cap.* 3. *ſ.* 4. *No action ſhall be brought to charge any perſon on any agreement made upon conſideration of marriage, or upon any contract or ſale of lands, &c. or any intereſt in them, or upon any agreement* not to be performed within a year *after the making, unleſs ſuch agreement, or ſome note thereof, be* in writing, *and ſigned by the perſon to be charged, or ſome other by him authoriſed.*

The clauſe, viz. unleſs the agreement be to be performed within the ſpace of a year, extends not to any agreement *concerning lands or tenements*, admitted. Vern. 159. Paſch. 1683. in caſe of Deane v. Izard. —— ——Adjudged in *error*, that a contract *to aſſign over a term* is within the ſtat. as well as an *intereſt created de novo.* 1 Vent. 361. Anon. ——Payment of money binds only in contracts for goods, nor is *a general item or memorandum* ſufficient, though ſigned by the party; but it ought to ſpecify the terms, as the ſum to be paid, and the number of houſes to be ſold or diſpoſed of, and to whom and how. Paſch. 1721. Ch. Prec. 560. Seagood v. Meale and Leonard. —— An agreement was made, that *in conſideration of* 5 *l. paid by the plaintiff* to the *defendant*, he *promiſed to pay the plaintiff* 10 *l. on his day of marriage, which happened about nine years after this agreement*; adjudged that a memorandum in writing was not neceſſary in this caſe, becauſe the marriage might have happened within a year after the agreement made. 3 Salk. 9. * Smith v. Weſthail. —— Ld. Raym. Rep. 316. S. P. cited by Northey, and that it was held by the judges at Serjeant's Inn to be out of the intent of the ſtatute, and good, becauſe it might have been performed within a year; and Holt Ch. J. granted that it was ſo adjudged. ——Comyns's Rep. 50. S. P. cited as reſolved by the major part of the judges in B. R.

* The caſe of Smith v. Weſthall was upon the ſtatute of brokers, of 8 & 9 W. 3. for which ſee tit. Stocks (A), pl. 4. and the notes there.

3. *S.* 17. *No contract for the* ſale of goods, wares, or merchandiſes, for 10 *l. or upwards, ſhall be good, except the buyer actually receives part of them, or gives ſomething in earneſt, or ſome note thereof in writing be made and ſigned by the parties to be charged, or their agents.*

4. A verbal agreement, though *ſubſequent to a decree*, yet ſhall not ſtay the execution of it, but muſt bring an original bill. 2 Chan. Caſes, 8. Mich. 31 Car. 2. Wakelin v. Walthal.

† S.P. cited Ch. Prec. 561. to have been decreed per Maſter of the Rolls Mich. 1721. in caſe of Smith v. Turner.

5. A bill in Chancery was to have the execution of a parol agreement *for a leaſe of a houſe*, ſetting forth, that † in confidence of this agreement the plaintiff had laid out and expended very conſiderable ſums of money, &c. Defendant *pleaded the ſtatute of frauds* and perjuries, and the plea was allowed. But Lord K. was of opinion, that if the plaintiff had laid in his bill that it was *part of the agreement that the agreement ſhould be put in writing*, it would alter the caſe, and poſſibly require an anſwer. Vern. 151, pl. 141. Hill. 1682. Hollis v. Whiting.

6. *In*

6. *In ſuch caſe*, per North K. the leſſee ought to be repaid his conſideration-money if any, but for the money expended he directed a trial at law. Vern. 159. pl. 148. Paſch. 1683. Dean v. Izard.

7. *And* per North K. *though the act makes the eſtate void*, yet it *ſays not that the agreement ſhall be void*, and therefore the agreement may ſubſiſt, though the eſtate is void; ſo that damages may be recovered at law for the nonperformance, and if ſo he ſhould [518] not doubt to decree it in equity. Vern. 160. Paſch. 1683. Dean v. Izard.

8. *Leaſe for years* to A. in writing, but by parol agreed by him to be *in truſt for himſelf and B.* jointly, and B. paid a moiety of the rent; whether this is within the ſtatute of frauds? Vern. 108. pl. 97. Mich. 1682. Riddle v. Emerſon.

9. A. agreed to *aſſign a term* for years in his houſe *and plate*, and certain veſſels of beer, for 200 guineas to B. whereof *B. paid one guinea* in hand, as earneſt of the bargain, and three days after 19 guineas more; and *part of the bargain was, that it ſhould be executed by writings* by a certain day. A. pleaded the ſtatute of frauds, &c. and that it was a parol agreement, and none of the goods delivered by A. but confeſſed the receipt of the 20 guineas, and offered to repay them. North K. over-ruled the plea, it being charged that the *agreement was to be put in writing*. 2 Chan. Caſes, 135. Hill. 34 & 35 Car. 2. Leak v. Morriſe.

10. An *inſurance* was made, but there was a *parol agreement at the ſame time, that the policy ſhould not commence till* the ſhip came to ſuch a place, and it was held in the time of Pemberton Ch. J. that the *parol agreement ſhould avoid the writing*; cited per Holt Ch. J. at niſi prius at Guildhall. 2 Salk. 444.

11. A ſettlement of a jointure actually made and accepted, and the marriage thereupon had, is an evidence that all parol agreements before the marriage were *reſolved into the jointure*; but ordered defendants to anſwer, and to ſave the benefit of the plea to the hearing. Per Jefferies C. Vern. 369. pl. 362. Hill. 1685. Bellaſis v. Benſon.

12. Parol agreement *varied from* in a deed of *truſt* executed in order *to avoid a ſeiſure by the ſequeſtrators* in the life of Cromwell, decreed 3 ſeveral times by 3 ſeveral perſons to be made good, though contrary to the deed. 2 Chan. Caſes, 180. Mich. 2 Jac. 2. Harvey v. Harvey.

As to this caſe, Reynolds Ch. B. ſaid, that though generally no parol evidence is to be admitted againſt a deed, yet the *declaration in this caſe being previous to the deed, and the deſign of it plainly appearing* to be to protect the eſtate from a ſequeſtration, that reſolution is very right; but to admit parol evidence without ſuch a foundation would be a very dangerous precedent. L. P. Conv. 396. in caſe of Fitzgerald v. Ld. Faulconberg.——Gibb. 213. Hill. 4 Geo. B. R. the S. C. & S. P.

13. A. and B. being *joint leſſees of a building leaſe*, A. by parol agrees *to ſell* his intereſt to B. and *accepts a pair of compaſſes* in hand to bind the bargain; defendant pleads the ſtatute of frauds. The agreement being in ſome part executed, the Court ordered the defendant to anſwer, and ſave the benefit of the plea to the hearing. Vern. 472. pl. 460. Mich. 1687. Alſop v. Patten.

14. A

Tenant in tail being about to ſuffer a recovery, in order *to provide for his younger children*, and had been kept from it by the *promiſe of the iſſue* in tail to do it, the iſſue in tail after the father's death was decreed to provide for them. Per Keck. Com. Chan. Prec. 5. Hill. 1689. in caſe of Deveniſh v. Baines.

14. A ſon and heir apparent perſuades his father (who was about to make a will and proviſions for younger children) not to make any will, and *promiſes to make the like proviſions for them*, whereupon the father forbore making ſuch proviſions, and the heir was decreed to make them. Arg. Ch. Prec. 4. Hill. 1689. cites Chamberlain's caſe.

15. *A copyholder by his will intended to give the greateſt part of his eſtate to his godſon, and the other part to his wife;* the *wife perſuades him to nominate her to the whole, and that ſhe would give the godſon the part deſigned for him;* on a bill by the godſon for thoſe lands, it was decreed againſt the wife, notwithſtanding the ſtatute of frauds and perjuries. Chan. Prec. 3. pl. 3. Hill. 1689. Deveniſh v. Baines.

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Though the promiſe depends on a contingent, *which may not happen in a long time*, yet if the contingent *doth happen within a year*, the action ſhall be maintainable, and is not within the ſtatute. Per Holt Ch. J. upon evidence. Skin. 326. pl. 4. Mich. 4 W. & M. Francam v. Foſter.

16. A parol promiſe was made *to pay ſo much money upon the return of ſuch a ſhip*, which *ſhip happened not to return within two years after the promiſe made*, and whether this parol promiſe was void by the ſtatute of frauds was made a queſtion before all the judges; and they were of opinion that this was a good promiſe, and not within that clauſe of the ſtatute; for that *by poſſibility the ſhip might have returned within a year;* and though by accident it happens not to return ſo ſoon, yet, they ſaid, *that clauſe of the ſtatute extends only to ſuch promiſes, where, by the expreſs appointment of the party, the thing is not to be performed within a year.* This caſe was related by Treby Ch. J. 1 Salk. 280. pl. 5. Paſch. 5 W. & M. C. B. Anon.

See tit. Marriage (B. a), pl. 1. and the note there.

17. When *O. was going to be married to M.* the *wife's uncle promiſed that he would ſettle his freehold and copyhold upon his wife and her iſſue.* Though this was by parol only, yet Chancery decreed an execution of it; being in conſideration of marriage. 2 Freem. Rep. 199. pl. 274. Trin. 1694. cites it as Sir John Otway's caſe.

2 Vern. 322. pl. 309. S. C. but not ſo full.

18. The bill was *for a marriage portion of* 3000 *l.* upon the marriage of the plaintiff with the defendant's daughter, there being no note or agreement in writing ſigned by the defendant for the payment of it; but it appearing that a *letter was wrote to the plaintiff by a third perſon, offering ſo much portion*, which letter it appeared was wrote *by the conſent of the defendant, and that afterwards he* was acquainted with it, and *agreed to it*, and a *treaty was had for a ſettlement ſuitable to it* with the defendant, *but the treaty depending long, the young couple married;* and although it appeared that *the defendant, before they went to church, did declare he would give them nothing*, and the ſtatute of frauds and perjuries was inſiſted upon, yet decreed for the plaintiff, although his *wife is ſince dead*, and the plaintiff married to another. And the

Lord Keeper ſaid, as to his countermand when they were ready to go to church, he looked upon it as nothing, after the young people's affections were engaged; and for the ſtatute of frauds and perjuries, he cited two caſes, one of HART AND MORE, where a portion was decreed upon a letter wrote; and another caſe of MASQUILL, &c. where *writings were prepared and agreed, but being blotted, were ordered to be wrote fair, and were ſo, but before they were ſealed the party died*, and this Court charged the executor with the portion agreed to be paid. 2 Freem. Rep. 201. pl. 276. Mich. 1694. Wanckford v. Fotherley.

19. It was ſaid, that *before the ſtatute of frauds* and perjuries, *this Court would not execute a parol agreement, unleſs it had been executed in part of the one ſide or the other*, and then it would; becauſe it was but reaſon, when one party had performed of his part, that the other party ſhould be compelled to perform of his part; but if an agreement be under hand and ſeal, that is ſuppoſed to be made and tranſacted with greater caution and ſolemnity, and though there had been no execution of either ſide, yet this Court will compel the execution of it. 2 Freem. Rep. 216. pl. 289. Mich. 1697. Normandy (Marquis) v. Duke of Devonſhire.

20. It was ſaid by the attorney general, that ſince the ſtatute of frauds, &c. if *an agreement* be made, and *reduced into writing, and ſigned, but not ſealed*, that *this is* ſtill *but a parol agreement, and the writing is only an evidence of it.* 2 Freem. Rep. 217. pl. 289. Mich. 1697. Normandy (Marquis) v. Duke of Devonſhire.

21. A man *contracts to pay* 100 *l. upon the day of his marriage*; this needs not be put in writing, not being within the intent of the ſtatute of frauds, the words whereof are, that every contract to be performed within one year after the making ſhall be put into writing, ſo that the deſign of the ſtatute was, that only thoſe contracts that were impoſſible to be performed within that time, &c. Now this contract *depends upon a contingency, that may or may not be performed within the year*, and therefore is caſus omiſſus out of the ſtat. as was reſolved by moſt of the judges, by information of Holt Ch. J. Comb. 463. Mich. 9 W. 3. B. R. Anon. [520]

22. If a bill be brought for execution of a parol agreement which is in no part executed, if the *defendant by anſwer confeſſes the agreement* * *without inſiſting on the ſtatute* of frauds and perjuries, the Court will decree an execution of it; becauſe when defendant confeſſes it there is no danger of perjury, which was the only thing the ſtatute intended to prevent. Ch. Prec. 208. pl. 169. Mich. 1702, by the Maſter of the Rolls; Croyſton v. Banes.

* If the agreement be ſet forth in the bill, and confeſſed in the anſwer, Chancery will decree a ſpecific execution; per Cur. But it was ſaid, that in all caſes where the Court had decreed a ſpecific execution of a parol agreement, yet the ſame had been *ſupported*, and made out *by letters in writing, and the particular terms ſtipulated therein as a foundation for their decree*, otherwiſe it would never have decreed it. Ch. Prec. 374. pl. 260. Mich. 1713. Symondſon v. Tweed.——G. Equ. Rep. 35. Limondſon v. Sweed, S. C. in totidem verbis.

23. The plaintiff having a houſe in Monmouth-ſtreet, *agreed* with the defendant for a piece of ground adjoining, *to take a leaſe* of him for as long time as he had in his houſe, *and thereupon the plaintiff entered upon the ground, and built a wall, and made a vault, &c.* for conveniency of his houſe, and *when he had ſo done the defendant* Ibid. 281. pl. 352. cites S. P.

fendant refuſed to make him a leaſe, whereupon the plaintiff preferred his bill to have an execution of the agreement, that the defendant might make him a leaſe. The defendant pleaded the ſtatute of frauds and perjuries, the agreement being only by parol, and no agreement in writing. His plea was over-ruled by the Lord Keeper, and the cauſe coming now to hearing before the Maſter of the Rolls, he decreed the defendant to perform the agreement, and to pay coſts, and ſaid the ſtatute was not made to encourage frauds and cheats, and the plaintiff having laid out his money in purſuance of the agreement, and taken poſſeſſion of the land, the defendant ought to execute a leaſe for as long time as the plaintiff had his houſe. 2 Freem. Rep. 268. pl. 337. Mich. 1703. Floyd v. Buckland.

24. A parol agreement was decreed, *poſſeſſion being delivered* in purſuance of it. 2 Freem. Rep. 269. pl. 337. Mich. 1703. cites it as Butcher's caſe.

Ibid. 281. in pl. 352. cites S. P. decreed by Ld. Nottingham, becauſe there was apparent fraud. —— S. P. cited accordingly. Ibid. 285. in pl. 356.

25. A *deed was ſealed for ſecurity of money* borrowed, and *the deed being abſolute, the defendant promiſed to ſeal a defeaſance*, and afterwards refuſing, a bill was preferred to compel him, and though he inſiſted upon the ſtatute of frauds and perjuries, he was decreed to ſeal a defeaſance, though there was no agreement in writing for that purpoſe. 2 Freem. Rep. 269. pl. 337. Mich. 1703. cites it as a caſe decreed by Ld. Nottingham.

26. Sir Samuel Clarke being *ſeiſed in fee of the reverſion* of the lands in queſtion, *expectant upon the death of* Margaret Mumpford, who was *tenant for life, made a leaſe for* 500 *years by way of mortgage, to commence upon the death of* Margaret Mumpford. *Afterwards William Whitmore agrees with Sir Samuel Clarke for the purchaſe of the reverſion, and the term was aſſigned to the defendant William Whitmore, 16th May, and the fee was conveyed to William Whitmore, 17th May. In the conveyance of the fee the conſideration is mentioned to be paid by John and William*, but there was a concurrence of many other *circumſtances, whereby it plainly appeared that John Whitmore was only a truſtee for William, and that the term was intended to attend the inheritance, but no declaration of truſt in writing*; and the defendant having denied the truſt by his anſwer, the queſtion was, whether any decree could be made by reaſon of the ſtatute? In this caſe, though the Lord Keeper declared he was fully ſatisfied that it was intended a truſt, yet there being no writing to declare it, he was not ſatisfied to do it in oppoſition to the very letter of the ſtatute, unleſs they could ſhew him ſome precedents, and ſo took time to conſider. 2 Freem. Rep. 280. pl. 352. Paſch. 1705. Sket v. Whitmore.

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27. Though parol agreements are bound by the 29 *Car. 2. cap.* 3. and agreements are not to be *part parol and part in writing*, yet a *depoſit* or *collateral ſecurity* for the *performance of the written agreement* is not within the purview of the ſtatute, though there is no writing declaring ſuch depoſit to be a ſecurity; per Cowper C. 2 Vern. Rep. 617. pl. 555. Mich. 1708. Hales v. Vanderchem & Ux' and Cole.

28. A.

28. A. and B. being ſeverally in a treaty about the purchaſe of a houſe and ſome land of C. they agree by parol, *that A. ſhall deſiſt, and let B. purchaſe, and that B. ſhall let A. have ſuch a part of the land at a proportionable price.* A. deſiſted accordingly, and B. purchaſed, but refuſed to perform the agreement. Decreed at the Rolls for the agreement, as an agreement *executed in part* by A.'s deſiſting; but per Cowper C. reverſed, as being a parol agreement within the ſtatute 29 *Car.* 2. *cap.* 3. 2 Vern. R. 627. pl. 559. Mich. 1708. Lammas v. Baily.

29. *Executory* contract, as leaſe for one year, and ſo from year to year, *quamdiu*, &c. is not void by the ſtatute of frauds, though it be for more than 3 years, becauſe there is hereby no term for above two years ever ſubſiſting at the ſame time. 2 Salk. 414. pl. 6. Hill. 7 Ann. B. R. Legg v. Strudwick.

30. An agreement *to a precedent act*, by a *ſubſequent deed*, will be good, notwithſtanding the ſtatute of frauds and perjuries; per Powell J. Holt's Rep. 735. Mich. 7 Ann. in caſe of Buſhell v. Burland.

31. The *father purchaſes lands* to him and his heirs, and when he was *upon his death-bed ſends for his eldeſt ſon, and tells him that theſe lands were bought with his ſecond ſon's money, and that he intended to give them to him*, whereupon the *eldeſt ſon promiſed that he ſhould enjoy them accordingly.* The father dies. The Ld. Keeper Wright and the Maſter of the Rolls held, that the eldeſt ſon ought to have theſe lands, becauſe by the ſtatute of frauds and perjuries, there ought to have been a declaration of the uſe or truſt in writing; but Lord Chancellor Cowper was of another opinion, becauſe of the fraud in this caſe, in that the eldeſt ſon promiſed the father, upon his death-bed, that the other ſhould enjoy the lands, ſo he took this to be a caſe out of the ſtatute. Mich. 7 Ann. Canc. Sellack v. Harris.

32. *A.* enters *into treaty with C. about a parcel of land, and ſo did B. A. meets B.* and *tells him, that if he would deſiſt, and permit him to go on with his intended purchaſe he would let him a parcel* of ground *which he deſired;* accordingly to this B. agreed, and *A. afterwards compleated his purchaſe* with C. then B. comes to A. and deſires him that he would let him have the parcel of ground, to which A. anſwers, that now he could not, becauſe it would be more convenient to him; and, ſays he, though I intended to let you have it, as the circumſtances then were, yet my purpoſe, and my intentions, are now altered. B. brings a bill in Chancery to have a performance of this agreement. A. inſiſts that he made no abſolute promiſe, and ſets forth ſuch agreement as before, and alſo inſiſts upon the ſtatute, that there ought to have been an agreement in writing. At the hearing it was inſiſted, that for two reaſons this was out of the ſtatute: 1ſt, Becauſe the plaintiff had executed one part of the agreement. 2dly, Becauſe here was an agreement in writing, the *agreement being ſet forth in the defendant's anſwer.* Lord Chancellor ſaid, here is no abſolute and poſitive agreement, but the words are ambiguous and uncertain, and the *ſtatute intended to ouſt* as well [522]

all such *ambiguous agreements* as to prevent perjuries, &c. and this agreement will not bind unless it were in writing. Mich. 7 Ann. Anon.

Wms. Rep. 123. Trin. 1710. S. C. ——1 Vern. 218.

33. A marriage *settlement was explained by articles precedent.* 2 Vern. 658. pl. 584. Trin. 1710. Honour v. Honour.

Speke v. Speke, S. P. ——See tit. Marriage (E. a), per tot.

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34. A *father encourages the courtship of his son with another's daughter*, who *proposes by letter to give her* 500 *l. if the father would settle* 100 *l. per annum on the son, which is refused. The son and daughter marry privately, and after this letter is written; then he, that refused, consented; and he, that consented, refused.* On a bill for performance of this agreement it was objected, that these promises were within the statute of frauds, and that the letter being after the marriage should not bind; but decreed contra on circumstances of the father's privity and consent to the match and of the marriage, by afterwards approving of it. That it was out of the statute if no letter for *the agreement is admitted by the answer;* but this case doth not depend on parol evidence or admissions; for *the letter after marriage, considering the transactions before, is sufficient.* The offer to settle 100 l. per ann. shall be in tail, with a power to the husband to charge it with 500 l. for younger children, being the mother's portion, and decreed accordingly; per Harcourt Lord Keeper. 1712. Hodgson v. Hutchenson.

35. A *steward has a general authority to make contracts with the tenants*, &c. but this will *not bind the lord* without his consent and approbation, or *unless part of the bargain is actually executed;* per Lord C. Cowper. Pasch. 3 Geo.

Wms. Rep. 618. pl. 180. Pasch. 120. Lady Montacute v. Sir Geo. Maxwell, S. C. which see at tit. Marriage (W), pl. 11.

36. A *distinction* was taken and agreed by the Court, that where upon a treaty for *marriage*, or any other treaty, the parties come to an agreement, but the same is never reduced into writing, *nor any proposal made to reduce it into writing*, so that they rely wholly on their parol agreement, that if this be *not executed in part*, neither party can compel the other to a specific performance. But if there was *an agreement to reduce it into writing, but that is prevented by the fraud*, or practice *of the other party*, the Court will relieve. As where instructions are given and preparations made for the drawing of a marriage-settlement, and before it is completed, the woman is drawn in by the assurances and *promises of the man to perform it* to marry him; per Ld. Macclesfield. Ch. Prec. 526. pl. 323. Mich. 1719. Sir George Maxwell v. Lady Montague.

S. P. cited as decreed by Lord Nottingham, on the fraud after the statute.

37. A *feoffment* was made, and the *feoffee promised* to make *a defeasance*, which promise was *by parol* and not in writing, yet decreed a good promise within the statute; per North K. Skin. 143. cites it as ruled in Lord Chancellor Finche's time.

Chanc. Prec. Mich. 1719. in case of Sir Geo. Maxwell v. Lady Montague.

38. W. *leased an house to N. for eleven years, and was to allow* 20 *l. to be laid out in repairs;* the *agreement was reduced into writing*

writing ſigned and ſealed by both parties; *N. repaired* the houſe, *and finding it to take a much greater ſum than the 20 l. told W. of it, and that he would nevertheleſs go on, and lay out more money, if he would enlarge the term to twenty-one years*, or add fourteen, or as many as N. ſhould think fit. *W. replied*, * *that they would not fall out about that, and after declared, that he would enlarge the term, without mentioning any term in certain.* Quære, Whether this new agreement made by parol, which varied from the written agreement, ſhould be carried into execution notwithſtanding the ſtatute of frauds? Maſter of Rolls ſaid, that before the ſtatute written agreements could not be controuled by a parol agreement contrary to it, or altering it; but *this is a new agreement, and the laying out the money is a performance on one part, and ought to be carried into execution*, and built his decree upon theſe caſes: 1ſt, Where a *parol agreement was for a building leaſe, and before it was reduced into writing the leſſee began to build, and after differing on the terms of the leaſe, the leſſee brought a bill and the leſſor inſiſted on the ſtatute of frauds.* The Lord Keeper diſmiſſed the bill, but the *plaintiff was relieved in Dom. Proc.* and the ſecond was a caſe in Lord Jefferies's time. MS. Rep. Mich. 4 Geo. Canc.

39. A. *agrees with B.'s broker for* 5000 l. *South-Sea ſtock*, the *broker, according to uſage, made an entry of this agreement in his pocket-book.* The defendant pleaded ſtatute of frauds, that no contract can be good unleſs reduced into writing. Lord C. Cowper ſeemed of opinion that the plea was good, and ſaid that it had been ſo held in many other caſes; but on looking into the plea he found, that he had barely pleaded the ſtatute, without adding, that this agreement was not reduced into writing as he ſhould have done, and ſo had not brought his caſe within the ſtatute; and therefore the plea was over-ruled. Chan. Prec. 533. pl. 328. Trin. 1720. Muſſell v. Cook.

40. *Where the ſtatute of frauds has been uſed to cover a fraud, the Court has always relieved.* The 1ſt caſe in Lord Nottingham's time, where there was an *abſolute conveyance and a defeaſance, which defendant would not execute*, but inſiſted on the ſtatute, and it was over-ruled. Next in Lord Jeffrey's time, where *putting the party into poſſeſſion was ſuch an execution of the agreement in part as was good againſt a ſubſequent purchaſor*; ſo where *one ſtands by, and ſees the party lay out his money in building on the defendant's ground*, he was bound thereby. The bill here was *to have a leaſe according to the defendant's promiſe, plaintiff having laid out money in the premiſes*, and the defendant inſiſts on the ſtatute, there being no agreement in writing, nor any certain terms agreed upon, and ſays what plaintiff laid out was not on laſting improvements, but admits plaintiff built a ſtable which coſt him about 10 l. It was proved, that *defendant told the plaintiff his word was as good as his bond, and promiſed the plaintiff a leaſe when he ſhould have renewed his own from his landlord.* Lord Chancellor ſaid, that the defendant is guilty of a fraud, and ought to be puniſhed for it, and ſo decreed a leaſe to the plaintiff, though the terms were uncertain,

uncertain, it is in the plaintiff's election for what time he will hold it, and he doth elect to hold during the defendant's term, at the old rent, and plaintiff to pay costs. Mich. 5 Geo. Canc.

41. Where a man *on promise of a lease* to be made to him, *lays out money on improvements*, he shall oblige the lessor afterwards to execute the lease, because it was executed on the part of the lessee; besides the lessor shall not take advantage of his own fraud to run away with the improvements made by another; but *if no such expence had been on the lessee's part*, a bare promise of the lease, though accompanied with possession, as where a *lessee by parol agreed to take a lease for a term for years certain, and continued in possession on the credit thereof*, yet there being no writing to make out this agreement, it is directly within the statute. Chan. Prec. 561. pl. 344. cites it as held by the Master of the Rolls. Mich. 1720. in case of Smith v. Turner.

42. *A. agrees with B. for the purchase of nine houses*, which were *in mortgage to J. S.* and *pays him a guinea in earnest*. *B.* [524] *writes a note to J. S. and desires him to deliver up the writings he having disposed of them*, which *J. S. refused, unless the mortage-money was paid* him down, *and afterwards purchases them himself*: on a bill brought by A. for a specific execution of the agreement it was held, that neither the guinea paid down, nor the note (which was only an evidence of assent, but did not ascertain the terms of the agreement as to what sum was to be paid, nor to whom the houses were to be disposed of, nor whether by way of sale or assignment, or lease, and so all the danger of perjury, which the statute was to provide against, would be let in to ascertain this agreement) were sufficient to take it out of the statute of frauds and perjuries. Chan. Prec. 560. pl. 344. Pasch. 1721. Seagood v. Meal and Leonard.

43. Where there is a parol agreement for a lease, and the lessee by virtue of such agreement *enters and builds*; this Court will establish it on the foot of *fraud in the lessor*, notwithstanding the statute of frauds, &c. because contracts executed in part are not always within the statute; though *executory contracts* are. Per Cur. 9 Mod. 37. Trin. 9 Geo. in case of Savage v. Foster.

S. P. cited per Lord Macclesfield. Chan. Prec. 526. to have been decreed in Ld. Nottingham's time.

44. A. made an absolute mortgage to B. (which was the old way of mortgaging estates); B. the *mortgagee promised to make a defeasance*, and the Court decreed B. to make it, notwithstanding the statute of frauds. Cited Arg. 9 Mod. 88. Hill. 10 Geo. in Canc. in case of Hosier v. Read.

45. Appeal from the Rolls upon this case. Hendon enters into a *contract in writing with the plaintiff for the purchase of a college lease*; the *plaintiff agrees to renew the lease in the name of Hendon, or such person as he should nominate* and appoint. Hendon *directs the plaintiff to renew the lease in the name of Cox, and declares he bought it for him as his agent*; the plaintiff brings the bill against both for the residue of the purchase-money. Decree at the Rolls was against both defendants to pay the money, and in case Hendon

don ſhould pay it, then he to be at liberty to proſecute the decree in the name of the plaintiff againſt the other defendant Cox, who was the principal. The defendant Cox appeals, for that he did not give any authority in writing to the other defendant Hendon to buy it for him, and therefore per ſtat. 29 Car. 2. of frauds he ought not to be bound by the contract. Macclesfield C. affirmed the decree, for that the *authority to treat or buy* for him *may be good without writing, though the contract itſelf muſt be in writing*, by the ſtatute of frauds. MS. Rep. Mich. 10 Geo. in Canc. Waller v. Hendon & Cox.

46. It was made a queſtion, and laid before all the judges of England, whether a *contract for ſtock* be within the ſtatute of frauds, which mentions goods, wares and merchandizes ſo as to require the contract to be in writing, or money to be paid in earneſt, and they were equally divided thereupon; ſaid per Ld. C. King. 2 Wms.'s Rep. 308. Mich. 1725. in caſe of Colt v. Nettervill. Comyns's Rep. 354. Mich. 7 Geo. 1. PICKERING v. APPLEBY, S. P. on a trial before Ld. Ch. J. King, who doubting, it was argued before the court of C. B. and afterwards at Serjeant's Inn, before all the judges of England, but the judges being divided in opinion, it was adjourned. —— The Court ſaid, that it had been determined here, that bargains *relating to ſtock* are within the ſtatute of frauds, and if earneſt is not given, are nuda pacta. Sel. Caſes in Canc. in Ld. King's Time. 41 Trin. 12 Geo. Crull v. Dodſon.

47. Bill for a ſpecific performance of a *promiſe* by defendant *to procure plaintiff to be made deputy to defendant's ſon as clerk of the houſe of peers, or otherwiſe to provide for plaintiff in conſideration of plaintiff's inſiſting upon and ſoliciting in procuring a reverſionary grant of that place for defendant's ſon, which defendant now enjoyed*, &c. Defendant pleaded the ſtatute of frauds and perjuries, and that the promiſe was not in writing, nor to be performed within one year; and alſo the ſtatute of limitations, that the promiſe was made above ſix years before the bill filed. Per Cur. the plea allowed in both reſpects, and held, 1ſt, That a parol promiſe *to be performed upon a contingency which may or may not happen within a year after the making*, is void within the ſtatute of frauds. 2dly, And ſo, if made above ſix years before the bill or action brought, is barred by the ſtatute of limitations, though the contingency or time of performance happens within the ſix years. MS. Rep. Trin. 1726. in the Exchequer. Reynolds v. Spencer Cowper, Eſq. [525]

48. Bill was brought for ſpecific performance of covenants. The *plaintiff ſold the defendant a copyhold eſtate of the yearly value of* 16 *l.* (on which was timber to the value of 150 l.) for 630 l. *and covenanted to ſurrender on or before Michaelmas then next;* the *defendant paid* 10 *s. in part* of the purchaſe, *entered on the premiſes, cut down timber, ſtocked the land, and did every thing as owner.* The *plaintiff* proved he *gave notice in writing that he would ſurrender next court day, and attended accordingly.* On the defendant's part there were ſeveral proofs that he was diſordered in his ſenſes, and though there be proof that the timber was of the value of 150 l. yet as no cuſtom is alleged of the tenant's having power to cut it down, it muſt be according to the common

law, by which the tenant has no power over it, and therefore a plain impoſition. The Chancellor was of opinion it was a great *over value*, and that his cutting down of timber was a convincing proof of his folly, becauſe a direct forfeiture; but as it is, it is a matter merely at law; the covenant is to ſurrender at or before Michaelmas, you ſay you were ready at the next court, which does not appear to have been before Michaelmas; if ſurrender had been, action would have lain at law. Bill diſmiſſed. Sel. Caſes in Canc. in Ld. King's Time, 3. Mich. 11 Geo. Edwards v. Heather.

(I) Executed in Part. By 29 *Car.* 2. *cap.* 3.

1. A Parol agreement *for the ſale of a houſe, and* 20 *s. paid*, was decreed without further execution proved; and the Maſter of the Rolls ſaid, that *he ſhould have demurred on the bill*; but having now proceeded to proof, he would decree it, and ſo he did. 2 Freem. Rep. 128. pl. 154. Hill. 1670. Anon.

2. A. agreed with B. for the *purchaſe* of an houſe for 290 l. to be paid, and *paid* 20 *s. in hand*, and *tendered the reſt at the day*, and was relieved. 3 Chan. Rep. 28. Mich. 21 Car. 2. at the Rolls, Voll v. Smith.

3. Articles of agreement for a *purchaſe* being *performed in part*, decreed a ſpecific performance of the whole, the maſter to ſettle the conveyance, and the purchaſor to give ſecurity for the remainder of the purchaſe money. Fin. R. 20. Mich. 25 Car. 2. Foſter v. Elves & al'.

4. A. ſold houſes to B. for 2000 l. A *note* was made by A. of the agreement *ſigned by B. but not by A.* It was objected, that the note binds not A. who did not ſign it, and that by the ſtatute of frauds, &c. and therefore in equity cannot bind the other
[526] party; becauſe either both muſt be bound, or neither of them, in equity; but decreed the contrary. 2 Chan. Caſes, 164. Trin. 36 Car. 2. Hatton v. Grey.

5. A. by parol agrees to grant a *leaſe to B.* A leaſe is drawn and corrected by B.'s counſel, and afterwards ingroſſed and executed by *A.* B. pleaded the ſtatute of frauds, that he had ſigned no agreement in writing, the words of the act being, that it muſt be ſigned by the party that is to be bound by it. North K. ordered B. to anſwer, and to ſave the benefit of the plea to the hearing. Vern. R. 221. pl. 220. Hill. 1683. Lowther v. Carrill.

6. *Adminiſtrator and her two children* being intitled to a leaſe of a houſe, agree to make a *leaſe for* 10 *years*. The adminiſtrator, with the privity of the other two, executed the leaſe. The ſtatute of frauds is no plea for the other two; per Ld. K. North. Vern. 210. pl. 207. Mich. 1683. Heyter v. Sturman.

7. In a caſe where *no intereſt may paſs* by a parol agreement, yet *if the perſon enjoys according to ſuch agreement*, an action lies for

for the money upon the other's agreement, as in the case of an agreement for enjoyment of tithes for 6 years. Skin. 113. pl. 4. Trin. 35 Car. 2. B. R. Eaton v. Sherwin.

8. A *settlement* was made *on the wife* in marriage, *in pursuance of articles* in writing sealed; if it after appear to be *deficient*, it shall be made up by the heir; but if it had been *only upon a parol agreement*, or if at the time of the settlement the lands had been of full value, and after by accident had gone less, there had been no relief. Skin. 158. Hill. 35 & 36 Car. 2. Speak v. Pedley.

9. A parol agreement *for a purchase of land, and possession delivered*, decreed by Jefferies C. to be executed against a subsequent purchasor, with notice to whom a conveyance was made, and who had thereupon paid his money. Vern. R. 363. pl. 357. Hill. 1685. Butcher v. Stapely and Butcher.

In this case there was a *note in writing, but not signed* by either party, containing the heads of the agreement. Ibid.——An agreement, though not in writing, if executed on one part, has been always looked upon so far conclusive, as to induce the Court to decree an execution on the other part; per Ld. Macclesfield. Ch. Prec. 518. pl. 320. Trin. 1719. Lockey v. Lockey.

10. Articles for the *purchase of lands* were *signed, but not sealed*, but the plaintiff was put into *possession of some part*. The Court decreed an execution, and Ld. Commissioner Rawlinson said, that agreements in writing, though not sealed, have some better countenance since the statute of frauds and perjuries than they had before. Ch. Prec. 16. pl. 16. Hill. 1690. Wheeler v. Newton.

11. If A. says to B. *I will give so much for your horse*, and *B. agrees to take it*, if *nothing more passeth between them*, and no earnest is given, and they depart from one another, this in point of evidence is not to be taken but as a *naked communication*, and so is D. 30. [pl.] 203. & 14 H. 8. 22. Per Holt. Ch. J. in delivering the opinion of the Court. Lutw. 252. Hill. 8 W. 3. in the case of Thorpe v. Thorpe.

12. A. *at a public sale of estate, offered* 1250 *l. for the purchase*, which was accepted and agreed to, and conveyances directed to be made, and *possession actually delivered*, but disputes arose about settling the conveyances. Wright K. decreed A. to proceed in the purchase, in case he could have a good title, and for that purpose referred it to a master. 2 Vern. 455. pl. 417. Hill. 1703. Pyke v. Williams.

13. A. pursuant to a parol agreement for a *building lease* of Wild-House, proceeded to *pull down part, and build part*, but before any lease executed, the owner of the soil died. Defendant's representatives knew nothing of the matter, and insisted on the statute of frauds, &c. and the Lord Keeper dismissed the bill; but on appeal to the lords in parliament, that dismission was reversed, and a building lease decreed; * cited 2 Vern. 456. Hill. 1703. in case of Pyke v. Williams, as the case of † Foxcraft v. Lister.

*[527] Ibid. cites also the case of Burcher v. Butcher. ——S. P. per Cur. 9 Mod. 37. ——When the lessor was dying, he declared that he thought he was bound in conscience to have made a lease in writing, and the heir desiring him not to discompose himself, promised that he would supply it. S. C. cited G. Equ. Rep. 11. —— S. C. cited G. Equ. Rep. 4. †, S. C. cited Chan. Prec. 519. and 526.

1 Salk. 113. pl. 2. S. C. accordingly by Holt Ch. J. at nisi prius at Guildhall.

14. Earnest *is only to bind the bargain*, and a demand of goods without tender of the money is void, because it is not pursuant to the intent of the bargain. 6 Mod. 162. Pasch. 3 Ann. Langford v. Administrator of Tyler.

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1 Salk. 113. pl. 2. S. C. accordingly; by Holt Ch. J. at nisi prius at Guildhall.

15. *After earnest* given the vendor *cannot sell to another*, but if vendee does not come to pay and take the goods, vendor ought to request him to come and pay, and if he comes not in convenient time, the agreement is dissolved, and then he may sell. 6 Mod. 162. Pasch. 3 Ann. B. R. Langford v. Tyler.

1 Salk. 113. pl. 2. S. C. & S. P. by Holt Ch. J.

16. Notwithstanding the earnest the money must be paid upon fetching away the goods, unless there is express agreement that *payment is to be made at a certain time.* 6 Mod. 162. per Holt Ch. J. Langford v. Tyler.

17. The provost and scholars of King's College in Cambridge, being seised in fee of the tithes of Priors Quarter in Tiverton in com. Devon cum pertinentiis, did by a deed dated 15 July, 1699, demise the same to Eliz. Duck, widow, for 21 years under several other covenants and rents, &c. And afterwards the said Mrs. Duck, by articles dated the 23d June, 1704, between her of the one part, and Mr. Upcot of the other part, did covenant and promise to convey to the defendant Upcot, his executors, and assigns, the said portion of tithes cum pertinentiis, during her estate and interest therein unexpired at Michaelmas then next following, and there were several other covenants and reservations about the payment of the rents, and providing for the college-officers; and the said Upcot was to give in consideration of this 350l. The plaintiff, Coleman, who had formerly been in treaty with Mrs. Duck for these tithes, hearing the defendant had articled for them with her, applied himself to the defendant, and after several treaties, which proved to be ineffectual, the defendant sends his son, William Upcot, and Mr. Frost, and Mr. Barton, with *a letter* to the plaintiff's house, dated 20th September, 1704, *wherein the said defendant said, that if she parted with the said tithes, it should be on certain conditions* following, (viz.) *that the plaintiff should pay the defendant* 150*l. when he relinquished his right, and executed his agreement* with Mrs. Duck; *that the plaintiff should quit all pretences of tithes which the plaintiff or his son London should or might claim in the park lying within the* said quarter of Tiverton, *and pay no more than formerly per acre for the tithes, or venison*, and pay only 10s. per ann. in lieu of tithes or justment for his 8th part in West Barton, and that the defendant would have the plaintiff's right in the seat in the church where his son London's family sit, *and unless the plaintiff would take it upon these terms, he would not part with it*; and if the plaintiff parted with it, the defendant was to have the refusal, and would be obliged to take it within a year upon the same terms. This letter was directed to the plaintiff, and brought to his house by the defendant's son, who came thither with two other persons, and *as soon as the plaintiff had perused the letter, he accepted*

accepted of the terms in the ſaid letter; and the ſon went home and acquainted his father with it, and the next day ſent his attorney to acquaint the defendant with it, and to requeſt from him a copy of Mrs. Duck's articles (the original being lodged in the hands of a friend), *who accordingly delivered them to the ſaid attorney, and appointed a day for the executing the ſame, and the receiving of the* 150 *l.* but on ſome pretence he appointed the day after that, and on the Monday went to Mrs. Duck (who had alſo notice of the defendant's agreement with the plaintiff, by the plaintiff's order) and ſettled a conveyance from Mrs. Duck to himſelf.

N. B. The *letter was not ſubſcribed by Mr. Coleman, till* 3 *or* 4 *days after his accepting of the bargain*, and was afterwards ſtamped, paying the 5 l. penalty.

My Lord Keeper decreed the defendant to perform this agreement, for that it was directly within the ſtatute of frauds, as being an agreement ſigned by the party to be charged with the ſame, and there was no need of its being ſigned by both parties, and the plaintiff by his bill hath ſubmitted to perform what was required of his part to be performed. If *a man (being in company) makes offers of a bargain, and then writes them down, and ſigns them, and the other party takes them up, and prefers his bill, this ſhall be a good bargain*, and the party ſhall be compelled to a ſpecific performance of it. This, though it was not at firſt a contract, but conditionally only, if the other would accept of it, yet when the other had accepted of it, it was all one, and the defendant intended it ſo by his ſending his ſon with the letter, and two perſons beſides. MS. Rep. Hill. Vac. 5 Ann. Coleman v. Upcot.

18. Wherever a parol agreement is *begun to be put in execution, and intended to be continued*, there though there be no writing, yet this Court will inforce the execution thereof, notwithſtanding the ſtatute of frauds and perjuries; per Ld. Cowper. G. Equ. R. 4. Hill. 6 Ann. in Canc. in caſe of Ld. Guernſey v. Rodbridges.

19. A. bought goods of B. to the value of 500 l. but not having money ready to pay, *propoſed to mortgage land to ſecure the money*, and in order thereto, *A. left the title deeds with B. to get an aſſignment drawn*, who carried the deeds to an attorney to inſpect the title, and draw the aſſignment, and after ſome time the attorney died without drawing the mortgage. Then B. carried them to a ſcrivener for the ſame purpoſe, but *before the mortgage was perfected A. became a bankrupt*. Decreed the deeds to be delivered up by B. to the aſſignee of the bankrupt. Ch. Prec. 375. pl. 261. Mich. 1713. Brander v. Boles.

But note, no reaſon was given for this decree. Ibid.

20. *A.* the plaintiff *agreed to ſell B.* the defendant *a houſe for* 640 *l.* and *by conſent of A. and B. an attorney drew a conveyance, and ſent it to B. who made ſeveral alterations, and gave it back to be engroſſed*, whereupon a time was appointed for A. and B. to meet and for B. to pay the money. *A.* and the attorney *came to the place appointed, and executed the conveyance, and got the ſame regiſtered*, and then brought his bill to compel B. to pay the money.

It was infifted, that B.'s altering the draught with his own hand could not be called a ſigning, and that had he wrote over the whole deed with his own hand, without ſigning it, it had not been ſufficient, and cited the caſe of ITHEL v. POTTER, determined at the Rolls, Trin. 1719, on the very ſame point. And Lord Chancellor ſaid, that unleſs in ſome particular caſes where there has been an execution of the contract, by *entering upon and improving* the premiſes, the party's ſigning the agreement is abſolutely neceſſary for the completing it, and to put a different conſtruction upon the act, would be to repeal it; and as to the regiſtering the deeds, he thought it immaterial as to binding B. And his lordſhip laid great ſtreſs on what the defendant mentioned *in the anſwering part*, wherein *B. ſwore that it was agreed on*
[529] *between A. and him, that B. might be off at any time, on paying the charge of preparing the writing* which B. ſaid he was willing to do. Wms.'s Rep. 770. pl. 221. Mich. 1722. Hawkins v. Holmes.

21. An agreement, though *executed in part*, yet being afterwards *by an act of parliament rendered impoſſible to be performed*, ſhall not prejudice any perſon. 8 Mod. 51. Trin. 7 Geo. 1. Winnington v. Briſcoe.

22. *Some heads of a leaſe* agreed upon were taken by an attorney *in writing*, but upon proof that ſome *other were omitted* which were agreed upon between the parties at the ſame time, it was decreed that thoſe clauſes ſhould be put into the leaſe, notwithſtanding the ſtatute of frauds, which was ſtrongly infiſted upon; Arg. 9 Mod. 88. Hill. 10 Geo. 1. in Canc. in the caſe of Hoſier v. Read, cites it as the caſe of Jones v. Sheriff.

(K) Pleadings.

1. IN treſpaſs upon the caſe, the opinion of the Court was, that if a man *declares that the defendant took upon him to make a mill by a day, and did not*, the declaration is not good, becauſe it is not *declared what he ſhould have for his labour*, and the reaſon ſeems to be inaſmuch as otherwiſe it is *nudum pactum* unde non oritur actio; quod nota. Br. Contract, pl. 5. cites 3 H. 6. 36.

2. Notwithſtanding a contract may be *upon condition*, yet in debt the party *ſhall not traverſe the contract*, becauſe he *may wage his law*. Br. Contract, pl. 7. cites 33 H. 6. 43.

3. In *debt upon a contract*, if the *defendant ſays that it was made upon certain condition at another place in the ſame county*, the *plaintiff may ſay, that it was made ſimply without condition*, priſt, without traverſing the place, becauſe it is in one and the ſame county; but if the condition be made in another county, there he ſhall traverſe that it was not made ſimply where the plaintiff counted, and the like order ſhall be in detinue of chattels, ſaid by Needham that it was adjudged the laſt term, quod nemo negavit, and ſo ſee contract traverſable, which is in effect a meſne conveyance, where he might have waged his law. Br. Traverſe, per, &c. pl. 30. cites 34 H. 6. 42.

4. *Debt*

4. *Debt upon a retainer in husbandry for his salary* arrear; the *defendant said*, that *he did not retain him in husbandry*, and a good plea, by reason that he cannot wage his law in this case, and therefore he may *traverse* the contract; quod nota bene. Br. Contract, pl. 20. cites 38 H. 6. 22.

5. A *prior retained a servant who served the house*, the *prior died*. The successor shall be charged, though the salary was more than is warranted by the statute; and per Danby, his count is good, though he did *not say by whom he was retained, nor whether he did his service or not*. Quære of the retainer. Br. Contract, pl. 37. cites 3 E. 4. 21.

6. *Debt*, because the plaintiff had the feme and son of the defendant at *board*, and let to the defendant *a chamber* for the feme and son, rendering for the chamber and boarding 6 s. a week; and the *defendant said, that the plaintiff did not let the chamber*, and by the best opinion it is a good answer to all; for *destroying the contract in part*, is destroying it in all; for it is a thing intire. Br. Barre, pl. 39. cites 9 E. 4. 1.

7. *In debt against B. upon a contract* he *said, that the contract was made by him and one C. who is alive not named*; judgment of the writ; by which the *writ abated*. Br. Brief, pl. 217. cites 9 E. 4. 24. [530]

8. Action upon the *case of bargain* of certain land *for money paid before-hand, and after he infeoffed a stranger* contrary to his bargain; the *defendant said, that he sold to the plaintiff upon condition he should pay to him* 10 *l. such a day*, and per Cur. there he ought to traverse, *absque hoc that it was sold for so much money paid before-hand, prout*, &c. For when the plaintiff *falsely recites* his bargain, it suffices for the defendant to traverse it. Br. Traverse, per, &c. pl. 248. cites 16 E. 4. 9.

9. *But* Brooke says it seems, that if the bargain be *declared single*, the defendant may *shew that it was upon condition* without traverse. Br. Ibid.

10. Debt, and *counted of a lease of a chamber and certain beds* to the defendant, *and that he shall be at table with the plaintiff for a certain time, paying* 20 *s. by the week for all*, and counted that it amounted to 10 l. &c. The *defendant said, that as to the chamber and bed non dimisit*, and found for the plaintiff, and alleged in arrest of judgment, that this is jeofail, because he *did not answer to the boarding*; and upon good argument it was held that the *contract false in parcel is false in all*, and therefore the plea good, quod non dimisit parcellam, &c. and therefore the plaintiff recovered by award. But Brian was strongly against it, and the justices of B. R. in coming from Westminster said, that it was jeofail. And per Brian, *the issue ought to have been nihil debet prout*, &c. *and give his matter in evidence*; but all the other justices of C. B. were against Brian, and it seems to be good reason that it shall be a good plea; for otherwise the plaintiff, by false declarations, (where the contract was only for boarding) may, by the adding the lease of the chamber, oust the defendant of his law without just cause; quod nota. Br. Dette, pl. 170. cites 21 E. 4. 28.

11. In debt the defendant may *traverse part* of the contract of the thing *of which the defendant cannot wage his law.* Br. Contract, pl. 28. cites 21 E. 4. 28.

12. It was said arguendo, that *in debt*, if the *plaintiff counts of buying of a horse in the county of Middlesex* for 20 s. and the *defendant says, that he bought it in London upon condition, and shewed the condition performed*, absque hoc *that he bought it in the county of Middlesex*, prout, &c. and a good plea; quod omnes concesserunt. Br. Traverse, per, &c. pl. 261. cites 21 E. 4. 29.

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See tit. Apportionment.

13. If one *retains a servant to serve for a year, for a salary of* 20 s. there if the servant demands the 20 s. he ought to *shew that the time is past*, viz. that the year is expired, *and ought to plead it certainly*; because his action is given in respect of the year past, and of the thing done in time, and *the time* is parcel of the cause of the demand, and *precedes the demand.* Pl. C. 26. b. cites Mich. 20 H. 7. 12. by Rede J.

14. Action for *breach of covenant* in a deed; defendant *pleads parol agreement, afterwards in discharge of the former covenant*, but the Court held the plea not good, and took these differences; that a *parol agreement, before breach* of it, may be discharged by parol, and so pleaded; but *after breach* it cannot be pleaded in discharge without satisfaction also pleaded; but a discharge may be pleaded by deed, be the covenant by parol or by deed after a breach, and *without satisfaction.* Sty. 8. Hill. 22 Car. B. R. Fortescue v. Brograve.

15. He that will have the benefit of a *mutual agreement*, must *shew that he has done his part.* MS. Tab. March 28, 1727. Duchess of Hamilton v. Duke Hamilton.

(L) Decreed.

1. A Draught of an agreement *before commissioners* decreed, notwithstanding the defendant refused. 11 & 12 Eliz. Toth. 65. Pope v. Mason.

2. Though an *estate* cannot be created *by covenant* by law, yet it will be made good in equity. Toth. 147. cites June 40 Eliz. Prince v. Green.

3. The defendant *promised* and agreed *to assure leases in marriage with the plaintiff's daughters*, who would not perform it, but ordered. Toth. 260. cites Long v. Long. 40 Eliz. li. A. fo. 360 or 369.

4. A man *promised to assure lands in consideration of marriage*, but after the marriage refuseth, yet ordered. Toth. 260. cites Gerard's case in 2 Jac. li. A. fo. 202.

5. *Where the law cannot give* a lease, or *a thing promised, but damage*, there is some cause for the Court to compel the party to perform the thing promised. Toth. 259. cites Brown v. North, Waller v. Salter, Trin. 8 Jac. li. A.

6. The *defendant promised to sell the plaintiff land, whereof* 10 s. *was given him*, yet the defendant would not perform, yet he should.

ſhould. Toth. 260. cites Ferne v. Bullock. Mich. 9 Jac. li. A. fo. 274.

7. The *defendant promiſed his father, to aſſure certain copyhold lands to the plaintiff*, but the father dying before any ſurrender, he denied to aſſure the ſame, yet decreed he ſhould. Toth. 261. cites 21 Mail, 9 Jac. Paile v. Paile.

8. Upon *a promiſe* made by the defendant *to convey his lands unto the plaintiff, was the cauſe of his marriage*, but when the ſaid defendant came to be old, he conveyed away the ſame lands from the plaintiff, contrary to his promiſe. The plaintiff was relieved for part of the ſaid lands. Toth. 260. cites 13 Jul. 11 Ja. Otway v. Hibblethwaite.

9. A promiſe of 500 *l. to make himſelf a baronet*, but would not pay it. Toth. 261, 262. cites Ruſſel v. Read; yet decreed about 5 or 6 Car.

10. A. purchaſes land of B. at 4320 l. A. after agrees, that *on B.'s abatement of* 420 *l. of the* 4320 *l. he would re-convey* whenever the king, and dean and chapter were reſtored. B. made the abatement. Decreed againſt the ſon of A., A. being dead, though it was objected, that it was only in nature of a wager, and the conſideration unequal and penal; and that an action more properly lay. Chan. Caſes, 42. Hill. 14 Car. 2. on appeal from a decree at the Rolls. Parker v. Palmer.

11. *Promiſe to deliver up a bond* upon a condition, which was afterwards performed; decreed to deliver up the bond, though the thing done did not amount to the ſum due. N. Ch. R. 128. 21 Car. 2. Bootle v. Sanctry.

12. Sale of fourteen ſhares out of thirty-ſix ſhares in the New-River water, which thirty-ſix ſhares were charged with a rent of 500 l. per ann. to the crown in fee, and 100 l. per ann. to H. M. for life. And Sir Hugh in his agreement with B. had *covenanted to diſcharge the fourteen ſhares* he had agreed to ſell B. *from thoſe rents*. Decreed that the plaintiff ſhould enjoy the fourteen ſhares diſcharged of thoſe rents, and that the other twenty-two ſhares ſhould be ſubject to the plaintiff's indemnity therein, notwithſtanding it was inſiſted that Sir Hugh's covenant to diſcharge the fourteen ſhares of thoſe rents was merely perſonal, and did not nor could charge the whole rents upon the twenty-two ſhares. Chan. Caſes, 208. 212. Trin. 23 Car. 2. Lord Cornbury v. Middleton.

13. The remedy of an *agreement* ought to be *reciprocal*; per [532] Windham J. Chan. Caſes, 209. Trin. 23 Car. 2. Lord Cornbury v. Middleton.

14. A widow *agrees to accept* 100 *l.* per ann. for her *jointure*, when by marriage articles ſhe was to *have* 300 *l.* per ann. The Court decreed the agreement. Fin. R. 128. Mich. 26 Car. 2. Norcliff v. Worſeley.

15. A. having made *a bill of ſale, and confeſſed a judgment* to B. for ſecuring rent, agreed afterwards with B. *to deliver up* the bill, *and acknowledge ſatisfaction* on the judgment, if C. would be bound with B. to A. for payment, which was done accordingly,

but B. died before he had performed his part. Decreed that the adminiſtrator of B. deliver up the bill of ſale, and acknowledge ſatisfaction on the judgment. Fin. R. 300. Paſch. 29 Car. 2. Love v. Hawkes.

16. A *voluntary* agreement is not obliging in equity, unleſs the whole be performed. Chan. Caſes, 302. Mich. 29 Car. 2. Butcher v. Hinton & Short.

17. An agreement *between creditors of a bankrupt* decreed to be performed. Fin. R. 326. Mich. 29 Car. 2. Ebſworth and Manſell v. Kent & al'.

18. Leſſee of a term agrees in conſideration of money paid, and more to be paid, *to ſell his term to A., A. procuring a licence of leſſor and demiſing the land to B. for life.* A. inſtead of a licence took a new leaſe of the leſſor for the ſame lives, and by bill ſets forth that he is ready to make the demiſe to B. and pay the reſt of the money. Decreed the agreement to be performed, and the leaſe to be made to B. and B. to execute a counterpart. Fin. R. 420. Paſch. 31 Car. 2. Wallenger v. Greenfield & Norris.

19. In caſe of an *unreaſonable* agreement, though reduced into writing but not ſealed, as to give in marriage with one daughter more than would be remaining for the father, (who was in debt,) and two other daughters, and the mother. Ld. Chancellor would not decree the ſame, but if the plaintiffs could recover at law he would leave them to the remedy, and it was referred to the parties to agree amongſt themſelves, elſe to attend again. 2 Chan. Caſes, 17. Hill. 31 & 32 Car. 2. Anon.

20. A. agreed *to ſell land* to B. and *received* 210 *l. of the purchaſe money*, and the reſidue was to be paid on executing the conveyance ſuch a day. But at the day the writings were not ready though the money was; and A. telling B. he could have 100 *l.* more for the land if B. would *conſent to quit it to C.* and that then *A. would pay back to B. the* 210 *l.* with intereſt, to which B. conſented, and C. promiſed to become B.'s paymaſter, if B. could procure A.'s order for that purpoſe; but A. refuſing to give ſuch order, B. brought his bill to compel him. Decreed that C. pay the ſame. Fin. R. 456. Trin. 32 Car. 2. Farmer v. Marſton.

21. A. ſells part of a ſhip to B. and made a bill of ſale of it, and B. gave *bond for the money. A. ſnatches away the bill of ſale*, and ſaid he would keep it till B. had paid the money. B. requeſted a bill of ſale, but A. refuſed. However, *B. took poſſeſſion* of the ſhip, and went a voyage with her; at the return A. offered to give B. a bill of ſale, which B. then refuſed, and now *ſues to have up his bond*, though he had not paid the money. Finch C. decreed the bond to be delivered up to B. and B. to re-aſſign the part of the ſhip; becauſe when A. had ſecurity he ought on demand to have made aſſurance. 2 Ch. Caſes, 5. Mich. 32 Car. 2. Legate v. Hockwood.

22. If a man buys lands and ſecures the money, if he who ſells will *not make aſſurance* when reaſonably demanded, he ſhall loſe

loſe the bargain, and bond decreed to be delivered up. 2 Chan. Caſes, 6. Mich. 32 Car. 2. in caſe of Legate v. Hockwood.

23. A promiſe or agreement by *feme ſole* to avoid a law-ſuit, that if ſhe died without iſſue ſhe *would leave J. S. 500 l. or the land.* She marries and deviſes the land to her huſband, and dies. Decreed that the agreement be *executed.* Vern. R. 48. Paſch. 1682. Goilmere v. Battiſon.

24. Where firſt *purchaſor* pays not money according to articles, *a ſecond purchaſor* ſhall be admitted, though he had *notice.* 2 Chan. Caſes, 121. Trin. 34 Car. 2. Barebone v. Barnes. Fin. Rep. 332. Mich. 29 Car. 2. Howes v. Huntingdon & al' S. P.

25. Where a *parol agreement* is conſiſtent with, and does *not contradict the deed,* you may ſue at law; per Lord Keeper, and refuſed to grant relief. 2 Chan. Caſes, 143. Trin. 35 Car. 2. Foot v. Salway & al'.

26. A contract which carries an equity to have it decreed in ſpecie, *ought to be without all objection;* per Ld. K. North. Vern. 272. pl. 268. Mich. 1684. in caſe of Johnſon v. Nott.

27. A perſon indebted by bonds, and failing in the world, applies to the *ſcrivener* of the obligees, to know where they lived, to apply to them for a compoſition; but the ſcrivener not telling him, but pretending the obligees were abſolutely under his direction, *undertook to compound for 10 s. in the pound,* which was more than other creditors received. The debtor paid ſome money, and tendered the reſt according to the agreement, but the *obligees would not ſtand to the agreement.* The ſcrivener refuſed to deliver up the bonds. On a bill by the debtor it was decreed, that he pay to the obligees their principal, intereſt, and coſts, and that the ſcrivener ſhould repay what the plaintiff ſhould ſo pay, and *indemnify* the plaintiff according to the agreement; per Lds. Commiſſioners. 2 Vern. 127. pl. 126. Hill. 1690. Parrot v. Wells & Clerk.

28. A. makes *a voluntary ſettlement on B. who afterwards agrees to deliver it up without any conſideration.* This agreement will be decreed in equity; for by Ld. Keeper, a voluntary ſettlement may be ſurrendered without conſideration, and decreed a reconveyance. Chan. Prec. 69. pl. 62. Hill. 1696. Wentworth v. Deverginy.

29. Chancery will not *alter or amend* the agreement of the parties. Chan. Prec. 89. Hill. 1698. Warrington v. Langham.

30. *Bond to transfer* 300 l. Eaſt India ſtock *on or before* September 30 next. The ſtock was much riſen in value ſince the agreement, yet the defendant was decreed to transfer 300 l. ſtock in a fortnight, and account for all dividends ſince plaintiff ought to have transferred, and coſts at law, and here, or diſmiſs the bill with coſts. 2 Vern. 394. pl. 365. Mich. 1700. Gardner v. Pullen.

31. As a *beneficial bargain* will be decreed in equity, ſo if it happens to be a *loſing* one, it ought for the ſame reaſon to be decreed; per Wright K. 2 Vern. 423. Paſch. 1701. City of London v. Richmond & al'. Ch. Prec. 156. S. C. —Ch. Prec. 589. Beech v. Crull, S. P.

32. Equity

32. Equity will not carry *unreasonable* agreements into execution. MS. Tab. February 9th, 1721. Brain v. Woolly. July 11th, 1721. Caral v. Chamberlain. March 24th, 1720. Top v. Stanhope.

33. Equity will not decree *tenant for life to commit a forfeiture.* MS. Tab. February 1721. Brian v. Acton.

34. Nor where the *method of obtaining them* is *not strictly regular*, although executed in part. MS. Tab. May 22d, 1721. Rochford v. Creswick.

35. Nor where a person of *weak understanding* is drawn into it. MS. Tab. July 14th, 1721. Carol v. Chamberlyn.

36. *Earl Godolphin agrees with builders*, before the act made for
[534] building Blenheim at the expence of the crown; *and recites, that he made such agreements at the instance and desire of the Duke of Marlborough.* The duke is bound by such agreement, and as well liable to pay for the work done after the statute as before. MS. Tab. May 8th, 1721. Duchess of Marlborough v. Strong.

37. Whether an agreement *made with the committee of the vestry, but never made an act of the vestry*, shall be carried into execution? MS. Tab. November 23d, 1722. Bennet v. Perry.

38. Where a contract has *lain dormant for many years*, there shall be no specific performance decreed. MS. Tab. March 3, 1722. Wingfeild v. Whaley.

39. The plaintiff's house being so near the church, that the 5 o'clock bell rung in the morning disturbed the plaintiff. He came to an *agreement in writing with the churchwardens and inhabitants*, at a vestry, *that the plaintiff would erect a cupola and clock* at the church, *and in consideration thereof, the 5 o'clock bell should not be rung in the morning*; this is a good agreement, and decreed to be binding in equity. 2 Wms.'s Rep. 266. Hill. 1724. Martin & al' v. Nutkin & al'.

40. Private agreement *in derogation of marriage articles* set aside. MS. Tab. 1728. Morrison v. Arbuthnot.

41. A. treats for the *marriage* of his son, and in the *settlement on his son* there *is a power reserved to the father, to jointure any wife, whom he should marry, in* 200 *l. per annum, paying* 1000 *l. to the son.* The father treating about marrying a second wife, the *son agrees with the second wife's relations to release the* 1000 *l.* and does release it, *but takes a private bond from the father for the payment of this* 1000 *l.* Equity will not set aside this bond, because it would be injurious to *the first marriage*, which being prior in time *is to be preferred.* 3 Wms.'s Rep. 66. pl. 17. Trin. 1730. Roberts v. Roberts.

42. A. articled with B. *for the purchase of land devised to B. by J. S.* Afterwards B. sued A. to compel him to complete the purchase and pay the purchase money. B. answered, that he believed J. S. duly executed the said will, and devised the premises, as set forth, and admitted the articles, and that he was ready to proceed in his purchase, all proper parties joining. *The will was proved in Chancery to be duly executed; but the heir who was beyond sea, though made a party defendant, had not appeared to or answered the*

the ſaid bill. *B. had entered upon part* of the eſtate, but the other part being in a bad condition, he wanted to be diſcharged of his purchaſe. Ld. Chancellor King ſaid, that it appears the defendant who articled for the purchaſe, *knew at that time that the heir was beyond ſea, and* ſtill *accepted the title, without inſiſting that the heir ſhould join, or that the will ſhould be proved againſt the heir;* alſo the defendant admits by his anſwer, that the will was duly executed, and by entering upon great part of the eſtate, has himſelf executed the purchaſe, for which reaſon let him pay the reſt of the purchaſe money, with intereſt, according to the articles; and at the ſame time let the truſtees and mortgagees join in proper conveyances to the defendant the purchaſor. It ſeems in this caſe to have been a great help to the title, that the mortgage made by the teſtator, and prior to the will, was for the greateſt part of the purchaſe money, which muſt be kept on foot for the protection of the title. 3 Wms.'s Rep. 192, 193. Trin. 1733. Colt v. Wilſon & al'.

43. A bill in equity lies not to compel the performance of an *agreement to pay in conſideration of having ſtifled a proſecution for felony;* otherwiſe if *to ſtop a proſecution at law for a fraud.* 3 Wms.'s Rep. 279. Paſch. 1734. in caſe of Johnſon v. Ogilby & al'.

44. An agreement was *aſſigned by the parties, and by the conſent made an order of Court to ſubmit to ſuch decree as the Court ſhould make,* [535] and neither party to bring an appeal, yet the cauſe allowed to be re-heard. 3 Wms.'s Rep. 242. pl. 57. Hill. 1733. Buck v. Fawcett.

45. An *attorney,* for and *on behalf of his client* the defendant, *promiſes to pay* 500 *l.* This being done *by the conſent of the client,* the attorney is not liable, but only the client; otherwiſe if the attorney had no authority from his client to make this engagement. 3 Wms.'s Rep. 277. pl. 68. Hill. 1734. Johnſon v. Ogilby & al'.

46. A truſt *eſtate* was *decreed to be ſold* for the payment of debts and legacies, and to be ſold to the beſt purchaſor. *A. articles to buy the eſtate of the truſtees,* and brings a bill to compel them to perform the contract. The truſtees by their anſwer diſcloſe this matter. The Court will make no new decree, but will leave the former decree to be purſued. 3 Wms.'s Rep. 282. Trin. 1734. Anneſley v. Aſhurſt.

(M) Decreed in Specie.

1. *IF a man promiſes me to make me a houſe, which he does not do,* I ſhall have remedy by ſubpœna, and if my *feoffee of truſt will not perform my will,* I ſhall have ſubpœna againſt him; per Jenny; quod nota. Br. Conſcience, pl. 14. cites 8 E. 4. 4.

2. On producing precedents the Court found it warranted by them, and the conſtant practice of this Court, that where ſuch agreements have been made on which the party *can only recover damages* As upon covenant *that a jointure was and ſhould con-*

plaintiff preferred his bill to have the agreement executed, *that he might purchaſe the ſaid manor, and have an allowance of the* 1500*l.* It was held, that as it ſtood barely upon the deed, this Court would not execute this agreement in ſpecie, for *this Court* will not execute all agreements in ſpecie, but *will conſider upon circumſtances* relating to the ſaid agreement, *the reaſonableneſs and equitableneſs of executing the ſame*, and will in many caſes leave the party to his remedy at law to recover damages only for not performing the ſaid agreement; and the reaſon why they would not execute it in this caſe, was, becauſe, as it appeared upon the face of the ſaid agreement, it would not anſwer the intent of it, it being declared by the ſaid Sir R. B. in the ſaid agreement, that *it was intended that this manor ſhould go to the iſſue male* of Mr. Bromley, *and Mr. B. having been married* 22 *years, and having no iſſue male, it was plain the main end of the agreement would not be anſwered by an execution in ſpecie.* 2 Freem. Rep. 245, 246. pl. 313. Hill. 1700. Bromley v. Fettiplace.

was not bound to take it at any price; and it was obſerved, that as the covenant was worded, if the plaintiff had died in the life-time of Sir R. the covenant was of no effect; and it was ſaid, that if Sir R. afterwards had had a ſon, it ſhould have diſcharged the covenant.—— Chan. Prec. 138. pl. 121. S. C. and by the Maſter of the Rolls the will recites the ſettlement and revokes it, which is, by conſtruction, a defeating of the 1500*l.*

14. And it was ſaid by the Lord Keeper, for another reaſon, he could not be for executing it, becauſe he looked upon it as *impracticable for Mr. B. to have it at* 1500*l. leſs than the beſt purchaſor would give*, becauſe it was impoſſible to know what the purchaſor would give; for it could not be expoſed to ſale before a maſter to the beſt purchaſor, becauſe whoever ſhould bid for the eſtate was not to have it becauſe Mr. B. was to have it 1500*l.* cheaper. The plaintiff's bill was diſmiſſed as to the executing of the agreement in ſpecie, but was offered a decree for the 1500*l.* legacy, but then was to be enjoined from proceeding at law, and had time to conſider whether he would take it or not. 2 Freem. Rep. 245, 246, 247. pl. 313. Hill. 1700. Bromley v. Fettiplace.

but however, a court of equity is not obliged to decree a ſpecific execution of all covenants and agreements, be they on never ſo valuable conſiderations, but will conſider all circumſtances; and Sir R.'s circumſtances, and the condition of his fortune, being ſo much altered (he being much indebted at the time of making his ſettlement), and thereupon his purpoſe ſo much changed, that if a ſpecific execution of this covenant ſhould be decreed, the whole will would be defeated, and therefore he thought it ought not to be executed in this caſe; and of the ſame opinion was the Ld. Keeper, and diſmiſſed the bill.

15. It was ſaid, that *generally this Court will not execute* an agreement *in ſpecie, but when the agreement is ſuch that an action of law will lie for damages for nonperformance of it;* but in ſome caſes that will not hold; for if a *marriage agreement* ſhould be *ſo ill worded, that an action would not lie at law for the breach of it, yet this Court will decree a performance;* per Maſter of the Rolls. 2 Freem. Rep. 246. pl. 313. Hill. 1700. Bromley v. Fettiplace.

16. And ſometimes *ſubſequent accidents* diſcharge the execution of an agreement in ſpecie, and cited the caſe in Fitzh. Subpœna, 23. cited in SHELLEY'S CASE, * 1 Rep. 100. where a *man being ſick, directed his truſtees to convey to his daughter*, and *afterwards had a ſon born, and dies;* the truſtees ſhall convey to the ſon, and not to the daughter; per Maſter of the Rolls, 2 Freem. Rep. 246. pl. 313. Hill. 1700. Bromley v. Fettiplace.

* 2 Vern. 416. pl. 379. cites S. C.

17. On a *quarrel between baron and feme*, the baron agreed with the father of the wife that he would *return her portion to the father*, who

who ſhould keep his daughter, and indemnify the baron from debts; afterwards * the baron offering to *re-take his wife*, the baron refuſes payment of the portion back; but notwithſtanding, the payment was decreed on the father's giving ſecurity to indemnify the baron againſt the debts and maintenance of the wife and child. 2 Vern. 386. Mich. 1688. Seeling v. Crawley.

18. Where one *perſon hath trifled*, or ſhewn a backwardneſs *in performing his part* of the agreement, equity will not decree a ſpecific performance in his favour, eſpecially if circumſtances are altered. MS. Tab. Jan. 26th, 1702. Hayes v. Caryll.

19. Bill brought by a ſon to ſet aſide an *agreement with his father for releaſing his inheritance, being a truſt eſtate in tail for an annuity*, becauſe he was under the power of his father, was diſmiſſed, becauſe there being no fraud proved, and *the ſon having been extravagant*, but without prejudice to his heir. MS. Tab. January 25th, 1710. Green v. Green.

20. A party that enters into *articles in violation of a truſt* ſhall never take benefit by them. MS. Tab. Auguſt 17th, 1715. Daly v. Linch.

21. Bill for a ſpecific performance of an agreement to transfer ſtock. Caſe was, the *defendant agreed* with the plaintiff *to transfer* to him 1000 l. *S. S. ſtock* upon the 20th of November then next following, at the rate of 104 l. per cent. *and gave him a promiſſory note under his hand for ſo doing, and received two guineas* of the plaintiff *in part of the conſideration* money; but the *defendant in drawing the note had put in the uſual words (or pay the difference) which the plaintiff ſtruck out, and would not agree to*, and *then the defendant ſigned the note.* After the bargain made, and before the time of delivering the ſtock, the S. S. *ſtock did riſe conſiderably* in value, and the *defendant did not deliver the ſtock at the day, but a few days after offered to pay the difference*, and ſubmits ſo to do by his anſwer; but the *plaintiff inſiſts to have the ſtock actually transferred* to him, and refuſes to take the difference, &c. Sir Robert Raymond and Mr. Vernon for the defendant inſiſted, that buying of ſtock in this manner to be delivered at a future time, at a certain price, was in nature of a wager upon the riſe and fall of ſtock, and therefore paying the difference is a ſufficient performance of the contract; that a contract for ſale of ſtock differs from other contracts for ſale of an houſe, lands, &c. for in ſuch things there may be a particular conveniency or benefit to the buyer in this individual houſe, &c. but it is not ſo in ſtock; for one 1000 l. is as good as another 1000 l. ſtock, and is to be purchaſed daily in Exchange-alley; that the plaintiff has his remedy at law for the damages, viz. the difference, and that is the juſtice of the caſe between the parties; that it is diſcretionary in the Court to decree a ſpecific performance of an agreement, and that in many caſes the Court will leave the party to his remedy at law for breach of a contract, &c.

Sir Joſeph Jekill the Maſter of the Rolls ſaid, that this is a fair and reaſonable agreement, and he ſaw no reaſon why the Court ſhould not in this caſe, as well as others, decree a ſpecific per-

tinue of ſuch value. Abr. Equ. Caſes, 18. Hedges v. Everard.

damages at law to decree the thing to be performed *in ſpecie*, wherein this Court does not bind the intereſt of the lands, but enforces the party to perform his own agreement. Chan. Rep. 158, 21 Car. 1. Wiſeman v. Roper.

S. C. cited Arg. 2 Wms.'s Rep. 467. in caſe of Randall v. Randalh

3. B. having married without his father's privity, A. his uncle, in order to regain the good-will of the father to B. did, in conſideration of natural affection to B. as for regaining the good-will of the father to B. covenanted with the father, that *in caſe the manor of H. ſhould deſcend to him, he would ſettle it on himſelf for life, remainder to B. and his wife for life, remainder to B. and if ſuch deſcent ſhould be prevented by alienation*, then *he would aſſure other lands* which might deſcend to him of that value, and if no lands of that value deſcended, he would ſecure 4000 l. to be paid at his death. The manor did deſcend to A. and upon a bill by B. and his wife, the Court, upon ſearching and conſidering precedents, decreed a ſpecific performance, and that A. convey accordingly, though at the time of entering into the covenant B. had *no power over the lands to be ſettled.* Ch. Rep. 158. 21 Car. 1. Wiſeman v. Roper.

4. The vendor entered into articles with the vendee, *to convey* the eſtate *clear of all incumbrances*, and *ſome were to be paid out of the purchaſe money*, and the vendor entered into a recognizance for the performance of his part, and thereupon 700 l. part of the purchaſe money was paid, but *by the articles the vendee had liberty to be diſcharged* of the bargain *if he gave notice thereof before ſuch a time*, and then the vendor was to pay back 700 l. The *vendee liked, and afterwards diſliked, and gave notice thereof, and deſired to be diſcharged*, but the vendor exhibited a bill for ſpecific performance of the articles. Vendee objected incumbrances not diſcharged, and aſſigned, &c. Decreed the vendor to pay the 700 l. at Midſummer next, and intereſt from this time, and then the recognizance to be delivered up and vacated, or in default, that the bill be diſmiſſed, but without coſts. Fin. Rep. 12. Mich. 25 Car. 2. Hatton v. Long.

[536] 5. *Tenant for life* decreed to perform an agreement in ſpecie as far as he was capable, and from which he would have diſcharged himſelf by pretending that in ſo doing he was *ſubject to an action of waſte*; and damages decreed againſt him according to what plaintiff had ſuſtained by his not enjoying the premiſes according to his agreement. Fin. Rep. 164. Mich. 26 Car. 2. Cleaton v. Gower and Carleton.

6. A. ſeiſed of a conſiderable eſtate of lands, both free and copy, and of a good perſonal eſtate, in conſideration of 1500 l. agreed *to ſettle all his lands which he had or ſhould have* except Bl. Acre, and to *leave all his perſonal eſtate*, except 3000 l. ſo that *all ſhould come to B. after his death.* On a bill by B., A. was decreed to convey, and the writings to be delivered to the uſher of the Court. Fin. R. 230. Trin. 27 Car. 2. Coke v. Biſhop.

7. The *heir at law pretending a right to the land, threatens to eject the tenant in poſſeſſion*, who likewiſe claimed an intereſt in the fee, whereupon the *tenant promiſes* thus, viz. *if I die without iſſue of my body*,

26. *Marriage agreement was to ſurrender copyhold eſtate to uſe of the wife and her executors if ſhe ſurvived, and gave a bond for performance.* The wife ſurvives and dies. *The bond was put in ſuit, and recovery thereupon.* Then bill was brought for ſpecific performance and *ſurrender* of copyhold which *was decreed*, but deduction to be made of damages recovered. Decreed by Lord C. King. Mich. 1625. Dowding's caſe.

27. A. purchaſed land in B.'s name, and B. gave *bond of* 200*l. to convey it* to ſuch uſes as B. ſhould appoint, but did not. Though the penalty of the bond was recovered at law, and actually paid, yet the obligor is compellable in equity to convey the land, and account for the profits, but then he ſhall be allowed the 200 l. and intereſt; per Lord C. King. Mich. 1725. 2 Wms.'s Rep. 314. Moorecroft v. Dowding.

28. Bill for the execution of articles *for the ſale of lands againſt the executor and deviſees of land for life, and the infant heir of the vendor.*

Mr. Lutwich pro' quer'. Though theſe articles for the ſale of this eſtate were made and executed by the vendor after the making his will, which he thought was a revocation of the deviſe of thoſe lands in equity, yet the legal eſtate for life he apprehended was in the executor and deviſees, and therefore he prayed a conveyance from the deviſees, and an injunction for quiet enjoyment againſt the infant heir at law, &c. but did not pray an immediate conveyance from the infant heir, becauſe he did think him a truſtee within the meaning of ſtat. 7 Ann. cap. 19. ſo as to be able to make a good conveyance by virtue of that act; for though the vendor after a contract for ſale of his lands is conſidered in equity as a truſtee for the purchaſor, yet he is only a truſtee by implication, and not an expreſs truſtee; as where lands are conveyed to A. in truſt for B. and theſe expreſs truſts only are within ſtat. 7 Ann. cap. 19.

King C. *decreed, that the articles be carried into execution*, and the plaintiff Sikes, upon paying the purchaſe money to the executor, to be let into poſſeſſion at Lady-day next, *and the defendants, the executors, and deviſees, to make a conveyance to the plaintiff and his heirs* at the coſts of the plaintiff, and the plaintiff to hold and enjoy the premiſes againſt the infant heir, *and the heir when he comes of full age to convey to the plaintiff and his heirs, unleſs the* infant heir, within ſix months after he comes of full age, ſhews *cauſe* to the contrary. Per King C. MS. Rep. Hill. 12 Geo. in Canc. Sikes v. Liſter & al'.

29. A bill was to have execution of articles of agreement *for the purchaſe of copyhold land, ſetting forth the title, which appeared to be doubtful.* The Court ſaid it ſeemed to be a bill brought to know the opinion of the Court, whether the plaintiff had bought a good title or not; but Lord Chancellor would give no opinion as to that, or as to a doubtful cuſtom of barring entails in the manor mentioned likewiſe in the bill; but decreed in general a ſpecific performance of the articles, and decreed the lord (he being alſo a party) to admit the plaintiff accordingly. G. Equ. Rep. 189. Hill. 12 Geo. 1. Sayle v. Reeves. [542]

30. Bill lies to compel a ſpecific *performance of an award to convey an eſtate*, where the party ſubmitting has *received the money*, in conſideration whereof he is to convey the eſtate ſued for. 3 Wms.'s Rep. 187. pl. 45. Trin. 1733. Hall v. Hardy.

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(N) Decreed. Though there is no, or a very unequal, Conſideration.

1. A Greement on a *very unequal conſideration*, as where A. before the reſtoration of Charles 2d, ſold a leaſe held of a dean and chapter for three lives for 4320 l. Afterwards B. agreed with A. the plaintiff, that if A. would abate him 420 l. he would re-convey the leaſe when the king, and the dean and chapter were reſtored. The plaintiff thereupon abated the 420 l. and now after the reſtoration of the king, and dean, A. brought his bill for the leaſe againſt the ſon of B. and the ſame was decreed him by the Maſter of the Rolls. And the ſame was afterwards affirmed by the Lord Chancellor and Bridgman. Chan. Caſes, 42. Hill. 14 Car. 2. Parker v. Palmer.

2. *A. ſeiſed in tail of freehold* lands, with remainder to B. his elder brother, *and in fee of copyhold* lands, *deviſed the copyhold* lands to B. *and deviſed the freehold* lands *to C. the plaintiff*, his younger brother. B. the *defendant apprehending*, as C. had ſuggeſted to him, that *there had been a recovery ſuffered by the teſtator, agreed with the plaintiff without any conſideration, that each of them ſhould enjoy* the lands *according to the will*; but diſcovering afterwards that *no recovery had been ſuffered*, he brought his action to recover his freehold lands; and the plaintiff brought a bill to eſtabliſh *the agreement*; which was *decreed* accordingly. 1 Chan. Caſes, 84. Paſch. 19 Car. 2. Frank v. Frank.

3 Chan. Rep. 26. Mich. 20 Car. 2. and Trin. 21 Car. 2. Booth v. Sanky, S.C.

3. A. was indebted to B. by bond, and C. was indebted to A. C. gave judgment to B. for the debt which A. owed him. B. delivered up A.'s bond, and A. gave B. a new bond that A. would pay the money, if C. did not. Afterwards B. promiſed A. that *if A. at his own charge would extend C.'s land, B. would deliver up the new bond.* The promiſe was proved, and that A. at his own charge did extend C.'s lands. The bond was ordered to be delivered up, though the *extent would not ſatisfy the debt*, and C. became inſolvent. N. Ch. R. 128. 21 Car. 2. Booth v. Sanctry.

4. A *ſcrivener neglecting to inquire into a title for his client*, on which money was to be lent, and the money being lent, and the title proving bad, the ſcrivener *agrees to make ſatisfaction* another way, and reduces it into writing; and it was decreed in ſpecie, though it was inſiſted that there was no conſideration. Ch. Prec. 19. pl. 20. Hill. 1690. King v. Withers.

5. A *ſubſequent deliberate act confirming an unreaſonable bargain*, when the party is fully informed of every thing, and under no fraud nor ſurpriſe, ſhall make the bargain good. A. having 500 l.

500 l. given him by his uncle, in case he should survive the testator's wife, sells it for 100l. to be paid by 5 l. per ann. but that if the testator's wife should die before A. and the legacy become due, in such case the rest of the money to be paid within a year then next following. A. does survive the * testator's wife, and knows the legacy was become due to him, and being fully apprized of the whole, confirms the bargain; he shall be bound thereby. 3 Wms.'s Rep. 290. pl. 73. Trin. 1733. Cole v. Gibbons & al', and Martin v. Cole & al'.

(O) Not perfected, but decreed; and against whom, not Party thereto.

1. THE bill prayeth relief against the defendant as brother and heir, for that the *plaintiff paid to his brother deceased a fine of* 34 *l. for a lease*, who died before the same was made, and therefore desireth either to have the lease made by the heir, or his money again; thereupon it was ordered the defendant shall answer, and an injunction granted. Cary's Rep. 110. cites 21 & 22 Eliz. Keem, alias Mogge, v. Meere.

2. A man that *marries* the *executrix* of one that makes an agreement, shall be as far bound as he himself that made the agreement. Trin. Toth. 66. 40 Eliz. li. B. fo. 118. Smith v. Gouch.

3. A. agreed *to lease Bl. Acre to J. S. for ten years*, but *before A. made the lease* according to his promise *he infeoffed B. of Bl. Acre, for a valuable consideration, and B. had notice of this promise before the feoffment made to him.* B. is compellable in Chancery to make the lease to J. S. according to the promise, and by reason of the notice; cited by Tanfield Ch. B. as decreed in Chancery in the case of GORE v. MIGLESWORTH, and so the Court agreed in the principal case. Lane, 60. Trin. 7 Jac. in the Exchequer. Jackson's case.

4. Agreement *to convey lands in tail* though embezzled decreed to be performed according to the said articles. Toth. 66. Mich. 11 Jac. li. A. fo. 864. Bates v. Heard.

5. Bill to be relieved concerning a promise *to assure land of inheritance*, but because there was no execution thereof, but *only* 55 *s. paid in hand*, dismissed. Toth. 85. cites 30 Jac. Miller v. Blandist.

6. A promise *to make a lease in marriage* decreed against a purchasor. Toth. 262. cites Trin. 2 Car. Church v. Dom' Mordant.

7. An *agreement for a custom* shall bind a *purchasor or heir*. Toth. 67. 12 Car. Spicer v. Dockwray.

8. *Articles of purchase* were decreed to be performed against a *voluntary conveyance made before* the articles. Chan. Rep. 146. 16 Car. 1. Leach v. Dean. And also against a conveyance *for a valuable consideration made after*, the purchasor's agent having notice. N. Ch. R. 59. 13 Car. 2. Hollowell and Merry v. Abney.——Chan. Cases, 38. Merry v. Abney, S. C. but calls it only a contract, and that the notice was given to him that made the purchase for another.——Toth. 67. Mich. 2 Car. Wilkinson v. Dean.

9. A perſon that ſuffered a *recovery* was, in point of law, **only** *tenant for life*, but there had been an agreement precedent to the recovery by the anceſtor, that was dead, for the ſettling of the premiſes ſo as to have made the tenant for life tenant in tail; reſolved that the recovery ſhould be good in equity, and ſhould work upon the agreement. Chan. Caſes, 49. Paſch. 16 Car. 2. Goodrick v. Brown.

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Nelſ. Chan. Rep. 106. 17 Car. 2. S. C.

10. *Tenant per auter vie to him and his heirs articled for a ſale and died;* though this is ſuch an eſtate as is not aſſets to the *heir*, yet he *was decreed to execute* this agreement. 2 Freem. Rep. 199. in pl. 274. cites it as the caſe of Stephens v. Baily.

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So where *mortgage money* was paid, and the copyholder died before

11. Decreed that a *copyhold for life* ſhall be ſurrendered according to the agreement, the purchaſe money having been paid to the firſt life who was grantee, and died before his purchaſor's admittance. Chan. Rep. 272. 18 Car. 2. Greenwood v. Hare.

any ſurrender made, his heir, an infant, was decreed to ſurrender, unleſs cauſe ſhewn within ſix months after full age. Fin. R. 272. Mich. 28 Car. 2. Patteſon v. Thompſon & al'.

12. *Tenant in tail mortgages without levying a fine, and covenants for further aſſurance;* the *iſſue is not bound* in equity to make good this aſſurance. Lev. 238. Paſch. 20 Car. 2. in Canc. Jenkins v. Keymiſh.

Relief denied where the whole money was not paid at the day, and

13. Plaintiff agreed with defendant for the *purchaſe of* an houſe for 290 l. to be paid, and paid 20 *s. in hand*, and tendered the reſt at the day; and relieved. 3 Ch. R. 28. Mich. 21 Car. 2. at the Rolls. Voll v. Smith.

where there was the *face of fraud*. 2 Vern. R. 187. pl. 169. Mich. 1690. Whorwood v. Simſon.

14. *Tenant in tail* is bound by his agreement *to convey*, but the iſſue in tail is not bound by that agreement; but if *iſſue in tail accepts the ſatisfaction* which was agreed to be given to the tenant in tail, it now becomes his own agreement, and ſhall bind him. Chan. Caſes, 171. Trin. 22 Car. 2. Roſs v. Roſs.

15. An agreement *for incloſing lands*, which were exchanged, was *confirmed* by a decree *againſt ſeveral, whereof the parſon of the pariſh was one*, and he and his ſucceſſors bound as to the tithes. Fin. Rep. 18. Mich. 25 Car. 2. Edgerley v. Price & al'.

16. The queſtion was, whether the iſſue ſhall be bound by the agreement of his father, where it was an *entail in equity only*, and not in law, and no fine paſſed? Per Lord Keeper, where equity creates the eſtate it ſhall be guided by conſcience (and ſeemed to incline to make good the agreement). Chan. Caſes, 234. Mich. 26 Car. 2. Norclif v. Worſley.

17. A ſettlement agreed to be made on *marriage* was decreed, after the death of the father who made the agreement, to be executed, and the grandſon when of age to levy a fine. Fin. R. 170. Mich. 26 Car. 2. Foſter v. Foſter.

18. An *agent for a purchaſor* of lands entered into articles, and *died* before the purchaſe completed, and *ſo did the vendor*. But the

the heir was decreed to execute a conveyance, and to be indemnified from the heirs of the agent till a perfect releaſe or conveyance be procured from them. Fin. R. 201. Hill. 27 Car. 2. Earl of Bath v. Harvey.

19. *Leſſor covenants with leſſee* to take a new leaſe of a college, and then *to add three years more to the leaſe*, or anſwer the want thereof in damages, the leaſe being of coppice ground, and of no profit to the leſſee without ſuch addition of three years. Leſſor took a new leaſe, but *inſtead of adding three years ſold it to a third perſon*, who had *notice* of the covenant at the time. Decreed that the *vendee* perform the covenant. Fin. R. 212. Paſch. 27 Car. 2. Finch v. the Earl of Saliſbury and Hawtry.

20. Agreement for ſale of an annuity for years *by the baron of an executrix*, who dies, binds not the executrix. 2 Chan. Caſes, 17. Hill. 31 & 32 Car. 2. Elton v. Waite and Harriſon.

21. Contract for a copyhold eſtate. *Purchaſe money paid.* Bargainor *dies* before ſurrender. His heir decreed to ſurrender when he ſhould come of age, and the lord of the manor preſently to admit the plaintiff tenant of the premiſes. 2 Chan. Rep. 218. 33 Car. 2. Barker v. Hill.

N.Ch. Rep. 3. 3 Car. 1. by Ld. Coventry, Perriman v. Gorges, S. P. though the heir had ſold the reverſion before for a valuable conſideration.——But Toth. 169. pl. 80. 1584. * Weston v. Danvers, it was held, that the heir is not in equity bound to aſſure lands which his father bargained and took money for.

* [545]

22. The father and ſon within age *covenant to convey* lands on a valuable conſideration; the *ſon was infra ætatem*, but being now come of age, the father is decreed to procure the ſon to convey. 2 Chan. Caſes, 53. Trin. 33 Car. 2. Anon.

Agreement on *marriage*, and of a portion to *ſurrender copyhold* lands, a ſpecific execution decreed againſt the heir. 9 Mod. 106. Mich. 11 Geo. in Canc. Neeve v. Keck.

23. A. on a treaty of marriage between B. his brother and M. *bound himſelf, his heirs, &c.* by deed, to ſettle certain lands of 14 l. a year *on the ſaid B. and his heirs in caſe the ſaid A. ſhould die without iſſue.* Afterwards A. married, and ſettled the ſame lands on his wife as a jointure before marriage, and dying without iſſue deviſed the land to his ſaid wife in fee; but on a bill by B., Ld. C. Finch decreed the land to the plaintiff, becauſe it was proved, that the marriage with the plaintiff's wife was in expectation of the performance of this agreement, and he was obliged to have left the land to the plaintiff if he had had no iſſue. 2 Vent. 353. Mich. 33 Car. 2. Goilmer v. Paddiſton.

So where a *feme ſole gave bond to her intended huſband to convey lands to him in fee* in caſe the marriage take effect. The marriage took effect. The wife died, leaving one child, who died. The huſband brought a bill to compel a conveyance. Lord C. Macclesfield ſaid, that the impropriety of the ſecurity, or the inaccurate manner of wording ſuch bond, is not material; and the bond being a written evidence of the agreement, and this agreement being on a valuable conſideration, he ſaid it ſhould be executed in equity. But the bond being very ſtale, the Court ordered a trial at law, to ſee whether the bond was executed or not, and all other matters to be reſpited till after the trial. 2 Wms.'s Rep. 243. Mich. 1724. Cannel v. Buckle.

24. A. *covenants on marriage* with B. to purchaſe lands of 110 l. per ann. over and above what he had ſettled already, and ſettle it on his wife for life, remainder to his heirs. A. dies, no purchaſe and ſettlement made, and adminiſtration is granted to B.

The

The benefit was intended to B. and therefore a bill brought by the heir of A. to have ſuch purchaſe made for his benefit was diſmiſſed. 2 Chan. R. 271. 35 Car. 2. Langton v. North.

25. An *adminiſtrator de bonis non* of the conuſee of a ſtatute, had agreed with the conuſor *to aſſign it* in conſideration of a ſum of money which upon the ſaid agreement the conuſor had covenanted to pay him, his executors, or adminiſtrators. Adminiſtrator died. The money was decreed to be paid to the executors of the adminiſtrator, and not to the adminiſtrator de bonis non, though before the extent it could not be aſſigned at law; ſed nota that there were not debts of the firſt inteſtate appearing. 2 Vent. 362. Paſch. 35 Car. 2. in Canc. Anon.

2 Chan. Caſes, 30. S. C.

26. Tenant in tail, with power to make a jointure, *articles to make a jointure*, and dies without iſſue, and without making the jointure. The wife dies. Executor of the wife brings a bill for an account of profits of the land articled to be ſettled. Bill diſmiſſed; per Ld. Chancellor, there is a great difference between a *defective execution* of a power, and a *non-execution* of it. Vern. 406. pl. 380. Mich. 1686. Elliot v. Hele.

The heir decreed to perform ſuch contract of his anceſtor. Fin. R. 343. Hill. 30 Car. 2. Hodges v. Worſley by his guardian.

27. A. agrees with B. *to purchaſe* a *copyhold* for two lives, and *pays* 200 *l. in part*, and was to pay the remainder in three months, and then to name his lives, and take up his copy. A court is held. The *time expires*, and B. dies ſuddenly, and the manor comes to one who was not bound by this agreement. The executor of B. decreed to *refund* the 200 l. though it happened by the laches of the plaintiff. Vern. 472. pl. 459. Mich. 1687. Awbrey v. Keen.

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28. A. in conſideration of a *portion*, *articles to ſettle a jointure*, and dies before the portion paid or ſettlement made. The wife takes adminiſtration, and ſo becomes intitled to the money, and then brings a bill againſt the heir to have her jointure ſettled. Bill diſmiſſed, for that ſhe was not intitled to the *money and the jointure too*; but quære. Vern. 463. pl. 443. Trin. 1687. Meredith v. Jones.

29. If a *jointenant agrees to alien, and dies* before it is done, it would be a ſtrange decree to compel the ſurvivor to perform the agreement. 2 Vern. 63. pl. 56. Paſch. 1688. per Cur. in caſe of Muſgrove v. Daſhwood.

30. A. *covenants to ſettle land of ſuch a value*, or an annuity out of land; A. at the time of the covenant has no land, but *purchaſes afterwards*, and deviſes it to J. S. and dies. This land ſhall be liable to the covenant; per Lords Commiſſioners. 2 Vern. R. 97. pl. 90. Paſch. 1689. Took v. Haſtings.

31. A. lends 100 l. to B. and for ſecurity *takes a warrant of attorney to confeſs judgment in ejectment of three cloſes*, upon a feigned demiſe for 20 years. Per Lds. Commiſſioners, though the ſecurity is defective, yet it amounts to a good agreement in equity to charge the land, and decreed it accordingly againſt the heir. 2 Vern. 151. pl. 146. Trin. 1690. Dale v. Smithwick.

32. The

32. The *anceſtor* in his life-time *articled for the ſale of certain lands which he covenanted to convey, but* did *not* covenant *for him and his heirs.* The Court held, that the *heir was bound to perform this agreement,* inaſmuch as *his anceſtor, after ſealing the ſaid articles, was in nature of a truſtee for the plaintiff* of thoſe lands, which truſt, with the ſaid lands, deſcended to the heir; and decreed accordingly. 2 Freem. Rep. 199. pl. 274. Trin. 1694. in Canc. Gell v. Vermuden.

33. A. was bound as *ſurety in a recognizance* dated May 5th, 1660, with B. his father for 1500 l. portion with his ſiſter on her marriage. This recognizance was not confirmed by the convention act for confirmation of judicial proceedings, that act having relation to the firſt day of the ſeſſions, April 25, 1660, and confirmed only recognizances then taken; A. having no concern in the treaty of marriage, being only a ſurety, and having no allowance for what he did, and not making any promiſe, the Court would not bind him where he was not effectually bound before, but diſmiſſed the bill; per Wright K. 2 Vern. 393. pl. 364. Mich. 1700. Sheffield v. Ld. Caſtleton & Ux'.

34. A. was *aſſignee* of a *commiſſion of bankruptcy* iſſued out againſt one Boſvil, who had *contracted* with defendant *for goods to the value of* 244 *l.* but not having ready money to pay for them, offered to *mortgage* to him *an eſtate* he had *in poſſeſſion* as a ſecurity for the money, and for that purpoſe left with defendant the *title deeds* to get the *aſſignment* drawn. Defendant carried the deeds to an attorney to draw the aſſignment, who died without doing it; after that he carried them to a ſcrivener, but before the aſſignment was perfected, Boſvil became a bankrupt. A. now brought his bill *to have the deeds delivered up* for the ſelling of the eſtate to ſatisfy the creditors. Defendant's counſel urged, that this was more than a pledge of the deeds, for that an aſſignment was intended to be made; that if it had been made, the Court would not have taken it from him without payment of the money; that its not being made was owing to the death of the attorney, which was an *accident,* and this Court often relieves accidents, and therefore the deeds ought not to be delivered up without payment of the money. The Court decreed the deeds to be brought before the Maſter, and to be delivered by ſchedule to the plaintiff; but note, no reaſon was given for this decree. Ch. Prec. 375. pl. 261. Mich. 1713. Brander v. Boles.

35. Bill to compel the defendant and his wife to join in a fine [547] to the plaintiff, purſuant to his covenant in a conveyance, &c. The defendant and his wife, and H. their ſon and heir, ſet forth in their anſwer, that defendant H. is tenant for life, remainder to his wife for life, remainder to the heirs of the huſband begotten on the body of the wife, remainder to the heirs of the huſband, and inſiſts that nothing paſſed by the conveyance but an eſtate for life of the huſband, and that the wife did not ſeal the deed, &c.

Note, The *huſband and wife* were *parties to the deed, but the huſband only ſealed it,* though the covenant *was that the huſband and wife*

wife ſhould levy a fine; and a fine ſur conuſans de droit come ceo was levied by the huſband alone.

Where the *huſband for a valuable conſideration covenants that his wife ſhall join with him in a fine*, this Court will inforce a performance of ſuch covenant; per Maſter of the Rolls. 3 Wms.'s Rep. 18. Trin. 1733. in caſe of Hall v. Hardy.——Ibid. at the bottom, the reporter adds a note, and ſays, becauſe in all theſe caſes it is to be preſumed that the huſband, where he covenants that his wife ſhall levy a fine, has firſt gained her conſent for that purpoſe; ſo ſaid by the Maſter of the Rolls, in the caſe of WINTER v. D'EVEREUX, Trin. 1723; and that *the intereſt in ſuch covenant has been taken to be an inheritance deſcending to the heir of the covenantee.* But after all, if it can be made appear to have been impoſſible for the huſband to procure the concurrence of his wife (as ſuppoſe there are differences between them), ſurely the Court will not decree an impoſſibility, eſpecially where the huſband offers to return all the money, with intereſt and coſts, and to anſwer all the damages.

Decreed that the huſband (the defendant) ſhould procure his wife to join with him in a fine to the plaintiff according to his covenant, ſince he has taken upon him to do it, and the plaintiff hath paid the full value of the eſtate; per Cowper C. MS. Rep. Mich. 1 Geo. in Canc. Barrington v. Horn & al'.

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36. Marriage articles were, *that within a month after marriage* he would *ſurrender a copyhold to the wife for life, remainder to the iſſue, remainder to the heirs of the wife, and if he ſhould neglect* or refuſe to make ſuch ſurrender, *then he would leave the wife* 500 *l. at his death.* No ſurrender is made. The *huſband dies after the month without aſſets.* Parker C. *decreed, that the heir at law ſhould ſurrender* to the plaintiff and her heirs, and till ſurrendered he was a truſtee for her. Here was no election; if done after the month, the 500 l. was not to be paid; thoſe are two expreſs covenants, and it is not put in the alternative, and here is no purchaſor to be defeated; it is a charge in equity. Mich. 5 Geo. Canc. Wood v. Peſey.

37. Thoſe caſes, where the Court will *not compel the execution of powers*, are, where it would be *againſt the will of the donor* that they ſhould be executed; as in the caſe of *heir in tail*, this Court will not enforce him to ſuffer a common recovery, though his father was decreed ſo to do, and died in contempt for not doing it. 9 Mod. 16. Mich. 9 Geo. in Canc. cited in the caſe of Lady Coventry v. the Earl of Coventry.

38. *Money was deviſed to be laid out in land to* the uſe of *B. in tail, remainder to* the uſe of *C. in fee; B. (having no iſſue) agrees with C. by deed to divide the money*, and *before this agreement is executed B. dies.* This agreement ſhall bind in favour of his executors. Caſes in Equ. in Ld. Talbot's Time, 271. Paſch. 1733. Carter v. Carter.

39. *Brokers or factors* who act for their principals are *not liable in their own capacities*; per Ld. Chancellor. 3 Wms.'s Rep. 279. Paſch. 1734. in caſe of Johnſon v. Ogilby & al'.

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(P) Unreaſonable, ſet aſide.

1. A Brocage bargain *of an unreaſonable allowance* for aſſiſting to the purchaſe of an eſtate, has no equity in it, and a bill for making good ſuch a pretended agreement diſmiſſed. Fin. R. 32. Mich. 25 Car. 2. Gibſon v. Lewis.

2. No

2. No relief for a *ſale of land in the fens*, according to the ſtatute of draining, though ſold at an unreaſonable undervalue, as *for* 33 *l.* what was *worth* 400 *l.* For Finch C. ſaid, he could not relieve againſt an *act of parliament*. 2 Chan. Caſes, 249. Hill. 30 & 31 Car. 2. Brown v. Hammond.

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3. A. articles to ſell lands to B. for 15000 *l. to be paid in money, or ſo much land to be returned as would make up what he paid ſhort.* A. conveys part of the lands to B. and by his perſuaſion values that part at an under-value. B. ſells this part to C. and D. &c. amounting in all to about 4500 l. and would now return the reſt. Decreed, that the articles be ſet aſide as unreaſonable, but that the ſales to C. and D. ſhould ſtand. 2 Vern. 186. pl. 169. Mich. 1690. Broom Whorwood v. Simpſon.

4. Bill to have an *execution of articles for a leaſe* of lands in Norfolk, where the general cuſtom is for the landlords to repair; per Cur. the leſſee being plaintiff, and it being proved that the *rent reſerved is leſs than the value* of the land, decreed a leaſe, but that the *leſſee ſhould covenant to repair, and the rent to be ſubject to no deductions*, ſave only parliamentary taxes. 2 Vern. R. 231. pl. 210. Trin. 1691. Burrel v. Harriſon.

Chan. Prec. 95. pl. 27. Burwel v. Harriſon, S.C. but the Court thought that the caſe might have had a different conſtruction if the defendant had been plaintiff, to have inforced the leſſee to take a leaſe.

5. As a beneficial bargain will, ſo will a *loſing bargain, be decreed* in equity, and for the ſame reaſon; per Wright K. 2 Vern. R. 423. Paſch. 1701. City of London v. Richmond.

See 10 Mod. 503. Trin. 8 Geo. in caſe of Lewis v. Ld. Lechmere.——See Gilb. Equ. R. 155. Mich. Vac. 8 Geo. in Dom' Proc'. Keen v. Stukely.

6. A. had an inn in Newcaſtle deſcended to him, which was let at 69 *l. per ann.* but *ſubject to a ſmall mortgage*, and A. *being very poor, was inveigled to ſell it for* 80 *l.* and afterwards brought a bill to be relieved, but was diſmiſſed, Ld. Chancellor declaring, that though the bargain was not a fair one, yet no ſuch fraud appeared as to ſet it aſide. Chan. Prec. 206. pl. 166. Wood v. Fenwick.

7. An agreement for the *purchaſe* of the remainder of an eſtate after an eſtate tail *from a woman* 90 *years of age*, by an attorney, *for* 400 *l. neither paid nor ſecured*, but in the agreement (which imported a conveyance) mentioned to be paid, and ſeveral other ſuſpicious circumſtances appearing, Cowper C. would neither decree performance by the heir at law to the old woman (the eſtate being now fallen in, and worth 5000 l.), nor the writing to be delivered upon the croſs bill. 2 Vern. 632. Hill. 1708. Green v. Wood.

8. A proportionable *jointure* ſettled, and an agreement *to repay the portion too* on the huſband's dying without iſſue, decreed and affirmed on appeal. Parl. Caſes, 20. Whitfield v. Paylor.

See tit. Jointreſs (B), pl. 7. in the notes.

9. Contract *for S. S. ſtock at an unreaſonable price* ſet aſide. MS. Tab. Feb. 13th, 1721. Thompſon v. Harcourt.

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10. Upon a conteſt between *M. and T.* (who *had a joint undivided intereſt in an eſtate, and* who had *agreed to ſet a price upon each*

After an examination of ſeveral wit-

neſſes, &c. and publication, &c. a caſe was ſtated for the opinion of Mr. Vernon, who gave his opinion, that as it ſtands upon the articles and propoſal by T. in writing, and M.'s acceptance thereof, the price to be paid by M. to T. appears to be 700 l. over and above the 600 l. and intereſt, and if the bill be only for a ſpecific performance of the articles, he muſt either take it according to the articles, and pay not only the 700 l. but alſo the 600 l. and intereſt, or his bill will be diſmiſſed with coſts; but if the bill be alſo to explain the articles, and to have a miſtake therein, or in the propoſal, and his acceptance thereof rectified, inaſmuch as the 700 l. was to include the 600 l. and intereſt, he ought not to have demanded a ſpecific performance, but to have offered either to become a purchaſor on 700 l. or to have waived the benefit of the articles and agreement; and indeed he ought rather to have offered to accept 700 l. for his moiety, including the 530 l. paid by him, and ſince there is ſuch a contrariety of proof, not only as to the value, but of what the parties underſtood to be the meaning of the agreement, and a proof that Mr. M. himſelf declared he was to give, or would give 1300 l. the agreement in writing muſt be the meaſure between the parties, and the rather, becauſe M. himſelf offered to pay the intereſt of the 600 l. over and above the 700 l. ſo that Mr. M. muſt pay 1300 l. or ſuffer his bill to be diſmiſſed with coſts, unleſs he can get off upon an offer to accept 700 l. for his moiety, including his 530 l. It had been proper to have made H. a party, the ſaid eſtate having been in mortgage to him for the ſaid 600 l. and 530 l. and not yet aſſigned.

each the other's moiety) concerning the meaning of their *articles in writing, by which it was declared that T. ſhould ſet the price, and that upon payment of ſuch price, together with the repayment of 600 l. and intereſt paid by T. to H. he was to convey. T. ſets 700 l. for his right in writing, and M. accepts thereof*; then M. prefers a bill to have the agreement performed according to the true meaning of the parties, &c. T. inſiſts that he was to have 700 l. beſides the 600 l. and intereſt; but M. ſays that T. at the contract, valued his half but in 700 l. (and the whole eſtate in 1400 l.) and that it was the intent of all parties, that the 600l. ſhould be included in the 700 l. and not be taken at two different ſums, &c. This cauſe was firſt heard before the Maſter of the Rolls, but he put it off to be heard before the Ld. Chancellor, who upon hearing diſmiſſed the bill, it appearing that as the agreement was made in writing, it was *unequal and againſt reaſon*; for the 600 l. paid by T. was towards a mortgage to H. and M. had paid towards the ſame about 530 l. which was 70 l. ſhort of the payment by T. and though M. by anſwer offered to let his part go on payment of 700 l. including the 600 l. paid, yet the other had 70 l. advantage, and ſo unequal and unjuſt in T. to have 1300 l. for his moiety, which made the eſtate 2600 l. in value, but he excuſed the coſts on account of an impertinent examination on the part of M. MS. Rep. Mich. 8 Geo. 1. Triſtram v. Melhuiſh.

So though articles were entered into, but being *gained by fraud and circumvention*, yet though there was not full proof of fraud, yet it appearing to be an unreaſonable and ſhameful contract, as to grant a leaſe for 67 l. per ann. of lands which were leaſed out again for 167 l. without any hazard or expence, Lord C. Macclesfield would not decree a ſpecific execution, but diſmiſſed the bill, and left the plaintiff to recover what he could at law. Ch. Prec. 538. pl. 333. Mich. 1720. Young v. Clerk.

11. It was ſaid, that an *extravagant bargain* ought not to be carried into *execution* in equity. Arg. 9 Mod. 152. Trin. 11 Geo. 1. in caſe of Charles v. Andrews.

12. A written agreement being unreaſonable, the Court would not carry it into execution, but decreed that it be delivered to the party for whoſe benefit it was deſigned, that he may have an opportunity to *make the moſt of it at law*. MS. Tab. February 27th, 1726. Squire v. Baker.

13. A bargain being hard and unreaſonable is a reaſon ſufficient why Chancery will not give it aſſiſtance, as in the principal caſe, where a *young gentleman* that *has a remainder in tail expectant*

on

on the death of his uncle without iſſue, and expectant on the death of his father, of the value of 300 *l. a year, ſells this remainder for* 300 *l. Two manors are inſerted in the deed, and it was agreed on all hands that it was deſigned the defendant ſhould have but one of them.* The one did not know what he * ſold, and the other did not know what he bought; ſuch a contract never was aſſiſted, and there can be no ground to give relief to ſuch a purchaſor; per Ld. Chancellor. Barnardiſton's Chan. Rep. 341. Hill. 1740. Barnardiſton v. Lingwood.

(Q) Moderated.

1. A. Placed his ſon as clerk to B. an attorney, and gives with him 120 l. and B. by articles agrees with A. *to return* 60*l. of the money if B. died within a year.* B. was ſick at the time, and of that ſickneſs *died in three weeks* after ſealing the articles, and payment. Jeffries C. decreed 100 guineas to *be* paid back to A. Vern. 460. pl. 437. Trin. 1687. Newton v. Rowſe.

2. Though *by a deed* 5 *l. per cent. was directed to be allowed* until a purchaſe made, yet it *appearing that the money had been placed in the government funds which yielded but* 4 *l.* the Court reduced the intereſt to 4l. per cent. Decreed by Sir Joſeph Jekyl Maſter of the Rolls. 3 Wms.'s Rep. 227. Mich. 1733. in caſe of Lechmere v. Lord Carliſle.

(R) Not ſtrictly performed. Relieved; in what Caſes.

1. WHERE a *greater ſum is due by ſpecialty*, and a *leſs agreed to be taken for it, to be paid in certain ſums at certain days*, if the agreement be not ſtrictly purſued, and the monies paid preciſely at thoſe days, but *part of the money paid at other days*, a court of equity ought not to oblige him that made that agreement (in favour of the perſon failing to perform it) to ſtand to it upon payment of ſo much as will make up the money paid ſince the laſt agreement, with damages for the ſame from the reſpective times the ſame ſhould have been paid by that agreement to the times the ſame were paid, and damages for what remains unpaid till the ſame be paid. Arg. Chan. Caſes, 110. Trin. 20 Car. 2. in caſe of Delamere v. Smith.

If a creditor agrees with his debtor to take leſs than his debt, ſo that it be paid preciſely at ſuch a day, and the creditor fails of payment, he cannot be relieved; for per Lord Keeper, cujus eſt dare, ejus eſt diſponere. 1 Vern. 210. Mich. 1683. Sewell v. Maſon.

2. *Promiſe to deliver up a bond*, upon a condition which was afterwards performed; decreed to deliver up the bond, though the thing done did not amount to the ſum due. N. Ch. R. 128. 21 Car. 2. Booth v. Sanctry.

3. *One that could read* made an *agreement for a leaſe for* 21 *years*; the *leſſor* himſelf *drew the leaſe but for one year*, and *read it for* 21 *years*,

years, and after the expiration of a year ejected the leſſee; and he brought a bill in Chancery to be relieved upon all this matter which was in proof, but it was *diſmiſſed with coſts*, for it was within the ſtatute of frauds and perjuries, &c. and, being able to read, it was his own *folly*; otherwiſe if he had been *unlettered*. Skin. 159. pl. 6. Hill. 35 & 36 Car. 2. in Canc. Anon.

[551] 4. *Leſſee* for a long term of years *covenants to lay out* 200 *l. upon the premiſes within the firſt* 10 *years*; he fails to do it, and *after* 30 *years were expired leſſor brings* action of *covenant, and recovers* 150 *l. damages*. Ld. Keeper, I think that the jury dealt very hard with Mr. Barker, to give ſuch great damages, and to put him to make a preciſe proof that the whole 200 l. was laid out, when it ought rather to have been preſumed it was, the defendant having brought no action in 20 years time after the money ought to have been laid out, but the jury having thought fit to give ſuch damages, there is no ground for me to mitigate them, nor to decree the monies to be laid out on the premiſes; for if it had been laid out when there was 30 or 40 years to come in the leaſe, the leſſee would have taken care to have laid it out in laſting improvements, which it may be, now his leaſe is near out, he would not do, and therefore *diſmiſſed the bill*. Vern. 316, 317. pl. 313. Paſch. 1685. Barker v. Holder.

5. *Merchant hired a ſhip to freight at* 3 *l. per ton*; afterwards an *embargo for* 6 *weeks* was laid on all merchants' ſhips, after which the ſhip went the voyage, where the owner agreed with the merchant's factors at a double price, taking no notice of any agreement with the merchant; per Cur. the owner was *at liberty to make a new agreement*, becauſe the performance of the firſt was obſtructed by the embargo after laid on all merchants' ſhips. 2 Vern. R. 242. Mich. 1691. Draddy v. Deacon.

For more of Contract and Agreement in general, ſee **Actions, Covenant, Extinguiſhment, Fraud, Grants, Marriage, Mortgage, Vendor and Vendee**, and other proper titles.

(A) Contra Formam Statuti.

1. IF an *offence* be *at common law, and alſo prohibited by ſtatutes*, the indictment may conclude contra formam ſtatuti, or ſtatutorum; thus, in *barretry*, though there be no direct ſtatute againſt it by that name, yet the general tenor of the ſeveral acts running

running againſt it by circumlocutions, the indictment concluding contra formam ſtatuti, or diverſorum ſtatutorum, is good, and it is the uſual form. 2 Hale's Pl. C. 191. cap. 25. Mich. 31 and 32 Eliz. B. R. Croke, n. 14. * Burton's caſe. Hill. 9 Car. 1. B. R. † Chapman's caſe; but it muſt conclude alſo contra pacem. Mich. 6 Car. B. R. ‡ Periam's caſe.

* Cro. E. 148. pl. 14. † Cro. C. 340. ‡ 2 Roll. Abr. 82. pl. 5.

2. P. was indicted upon the ſtatute of 5 E. 6. cap. 4. for *drawing his dagger in the church* of B. againſt J. S. and does *not ſay* (according to the ſtatute) *to the intent to ſtrike him*; for this cauſe it was void; but then it was moved, if this were not good as for an aſſault, that he might be fined upon it; but per Curiam it is void in all; for being indicted upon the ſtatute, it is void as to an offence at the common law. Cro. E. 231. pl. 23. Paſch. 33 Eliz. B. R. Penhallo's caſe.

S. C. cited by Holt Ch. J. 1 Salk. 212. ——S. C. cited per Holt Ch. J. Comb. 421. —2 Hale's Pl. C. 171. cites S. C.

cap. 24.

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3. In an indictment on the ſtatute of 8 H. 6. the *ſtatute* was *miſrecited*, and the concluſion was contra formam ſtatuti, and therefore held inſufficient; but then it was moved, that though the indictment was void for the entry with force, yet it being that they with others riotoſe and routoſe entered, &c. it ſhould be good for the riot; but Curia contra; for the indictment beginning with the ſtatute of 8 H. 6. and concluding contra formam ſtatuti, this *can have no relation to any offence except upon this ſtatute*. Cro. E. 307. pl. 10. Mich. 35 & 36 Eliz. B. R. Hall v. Gawen & al'.

2 Hale's Pl. C. 171, 172. cites S. C.

4. *Information upon the ſtatute* 33 *H.* 8. *cap.* 16. *and* 1 *E.* 6. *cap.* 6. *for buying of worſted yarn, not* being a weaver, and the information concluded contra formam ſtatuti; it was ſaid it was not good, but it ought to be contra formam *ſtatutorum*; but the Court as to that held it good, but becauſe he did not ſhew in his information, that it was not yarn ſpun upon the rock (for otherwiſe it is not an offence), it was held the information was not good. Cro. E. 750. pl. 6. Paſch. 42 Eliz. B. R. Dingley v. Moore.

If *one ſtatute be relative to another*, as where the *former makes the offence, the latter adds a penalty*, as the ſtatutes of 1 & 23 Eliz. the indictment ought to conclude contra formam ſtatutorum. 2 Hale's Pl. C. 173. cap. 24. cites Paſch. 42 Eliz. B. R. Croke, n. 6. Dingly v. Moore.

5. Where there are *ſeveral ſtatutes*, and it does not appear on which the *information* is founded, the concluding contra formam ſtatuti is ill. Cro. J. 142. pl. 19. Mich. 4 Jac. B. R. Broughton v. Moor, cites it as adjudged in the caſe of Talbot & al'.

D. 347. pl. 9. contra. Topcliff v. Waller, cites 5 H. 7.— becauſe the beſt

If there are *divers ſtatutes* in the point of *information*, *contra formam ſtatuti* is good; ſhall be taken for the king; per Coke. Ow. 135. Trin. 9 Jac. cites New Book of Entries, 182. and 5 H. 7. 17. and 8 E. 3. 47. a.

6. Where *one act makes the offence, and another gives the penalty*, an information muſt be contra formam ſtatutorum, and cited 33 Eliz. Talbot v. Sheldon, who were indicted for recuſancy contra formam ſtatuti, 23 Eliz. and the judgment was reverſed becauſe the penalty was demanded; for the 10 Eliz. made the offence, and the 23d gave the penalty; but if the information be

for the offence only, it had been good; per Coke. Ow. 135. Trin. 9 Jac.

2 Hale's Pl. C. 191. cap. 25. ſays, that it is the uſual courſe at this day, to conclude ſuch an indictment contra formam ſtatuti, and that it has been ruled good accordingly; and cites this caſe of Bradley v. Banks, but ſays, that it is not there queſtioned but that it may be good without it, ſo that in theſe caſes, where clergy is ſpecially ouſted by an act of parliament, the indictment is good with this concluſion, or without it, but the *beſt way in theſe caſes is to follow what is moſt uſual.*

7. In *appeal of death*, the defendant pleaded that he was indicted and convicted, &c. and prayed his clergy. The appellant demurred, alleging that the conviction was not lawful, becauſe the *indictment was, that he ſtabbed him, having no weapon drawn, nor ſtriking him, and ſo killed him* contra formam ſtatuti, whereas there is *not any ſtatute which prohibits it, but only takes away the clergy* from ſuch offender; and the verdict finding that he was guilty of homicide againſt the ſtatute, is not good for that reaſon; ſed non allocatur; for the indictment being framed upon the ſtatute, the concluſion is good, and their *verdict is purſuant* thereof. Cro. J. 283. pl. 4. Trin. 9 Jac. B. R. Bradley v. Banks.

8. If the *former ſtatute* be *diſcontinued, and revived* by another ſtatute, the beſt way is to conclude contra formam ſtatutorum. Mich. 31 & 32 Eliz. MILL'S CASE; though there is good opinion that it is good enough to conclude contra formam of the firſt ſtatute, as in caſe of the ſtatute of 5 E. 6. of *ingroſſing*, 37 H. 8. [553] for *uſury*, and 5 Eliz. for *perjury*, which were diſcontinued and revived, yet indictments good concluding contra formam of the firſt ſtatute. 2 Hale's Pl. C. 173. cap. 24. cites Trin. 9 Jac. Rot. 124. C. B. Weſtwood's caſe.

9. If it be a *general ſtatute* it need not be recited, but if ſufficient to conclude contra formam ſtatuti in hujuſmodi caſu edit' & provis', for the Court ought to take notice of it; and all *penal ſtatutes that induce a forfeiture to the king, or make a felony or treaſon*, are general ſtatutes, becauſe it concerns the king; but if a general ſtatute be *recited in an indictment, and be miſrecited in a point material*, and concludes contra formam ſtatuti prædicti, it is fatal, and the indictment ſhall be quaſhed; but it ſeems, if it *concludes generally* contra formam ſtatuti in hujuſmodi caſu edit' & provis', it is good; for the Court takes notice of the true ſtatute, and will reject the miſrecital as ſurpluſage. 2 Hale's Pl. C. 172. cap. 23. cites Mich. 7 Car. B. R. Croke, n. 14.

* Cro. C. 232. pl. 14. * Barn's caſe in maintenance, and Mich. 8 Car. B. R. per Jones ſuper ſtat' de Cottages.

10. An indictment of *forcible detainer* concluded contra formam ſtatuti; exception was taken that it ought to be *ſtatutorum*; for the ſtatute of 8 *H.* 6. *cap.* 9. *is relative to the ſtatute of* 15 *R.* 2. *cap.* 2. *and recites it*; and then the words are joined thereto, the caſe of peaceable entry, and forcible detainer, and ſo this ſtatute is but *ſupplemental of the other*; but to this it was *anſwered, that this ſtatute firſt recounts the defects of the ſtatute of* 15 *R.* 2. *and then confirms it, and after provides for the caſe of peaceable entry and forcible detainer, to which the ſtatute of* 15 *R.* 2. *did not extend*, ſo that as to this clauſe it is a new diſtinct law, and conſequently the indictment good. But to that it was replied, that the ſta-

tute 8 H. 6. goes on and provides, that in caſe of forcible detainer, after complaint made to the juſtices of peace, they ſhall cauſe the ſtatute 15 R. 2. to be duly executed; by which ſtatute the offender is to be fined and impriſoned, ſo that *this ſtatute grants only reſtitution, and refers the puniſhment to the ſtatute of* 15 *R.* 2. So then upon this indictment contra formam ſtatuti, taking it to be that of 8 H. 6. as it muſt be, the offender cannot be puniſhed within that of 15 R. 2. and the king ſhould loſe his fine; and for this cauſe, after ſeveral debates, Roll held the indictment inſufficient, but Bacon e contra, becauſe the ancient precedents both of the indictments and actions upon the ſtatute did uſe to recite this ſtatute only, but now the courſe according to Lord Coke's advice, 4 Rep. 486. not to recite the ſtatute but conclude it contra formam ſtatuti; ſee Dalton, cap. 122. And he ſaid it would be very miſchievous to ſubvert ſo many precedents as have been this way, but the beſt way had been to have wrote it ſtatut' with a daſh, for then it would have ſtood by law as it ought. All. 49, 50. Hill. 23 Car. B. R. Simond's caſe.

11. *P. and H. and one J. S. were indicted* at the aſſiſes at Nottingham upon the ſtatute 1 Jac. cap. 8. *for ſtabbing* one W. R. and the *indictment was, that J. S. ſtabbed him, and P. and H. were preſent, abetting, &c.* and contra formam ſtatuti; the Court held the indictment need not conclude contra formam ſtatuti, becauſe *the ſtatute does not alter the nature of the offence, but only takes away the privilege which the common law allowed in ſuch caſe*, and therefore it is ſufficient that the circumſtances be expreſſed in the indictment, whereby it may appear that the offence is within the ſtatute; and the offenders had their clergy, and upon their reading were burnt in the hand in conſpectu Curiæ. All. 43, 44. Hill. 23 Car. B. R. Page and Harwood.

2 Hale's Pl. C. 190, 191. cites S. C.—S. C. cited by Holt Ch. J. 12 Mod. 122. Paſch. 9 W. 3.—5 Mod. 307, 308. S. C. cited, and that they were all found guilty, when it is plain that he only could be ſo that gave the ſtroke, yet that judgment was held good, becauſe they might have been found guilty at the common law upon the ſame indictment, for the ſtatute does not alter the nature of the offence, but takes away the privilege of the clergy allowed by law, and need not conclude contra formam ſtatuti.—S. C. cited by Holt Ch. J. Ld. Raym. * Rep. 150.—S. C. cited by Holt Ch. J. 1 Salk. 212, 213.—S. C. cited by Holt Ch. J. Comb. 421.—And an indictment on the ſtatute of ſtabbing need not conclude contra formam ſtatuti; per Holt Ch. J. Comb. 218. Mich. 5 W. & M. in B. R. Anon.—The ſtatute of ſtabbing does not make the offence, but only takes away the clergy from manſlaughter ſo circumſtantiated; yet the indictment may conclude contra formam ſtatuti; but it is good without ſuch concluſion; per Holt Ch. J. Comb. 371, 372. cites Hale's Pl. C. [8vo.] 58.

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12. If a man be indicted for an *offence which was at common law*, and concludes contra formam ſtatuti, but in truth is *not brought by the indictment within the ſtatute*, it ſhall be quaſhed, and the party ſhall not be put to anſwer it as an offence at common law. 2 Hale's Pl. C. 171. cap. 24.

13. If an *act* of parliament *making a felony* or other offence be but *temporary, and made perpetual by another* ſtatute, the indictment concluding contra formam ſtatuti is good. 2 Hale's Pl. C. 172. cap. 24.

14. If an *offence* be *newly enacted, or made* an offence *of an higher nature by act of parliament*, the indictment muſt conclude

contra formam ſtatuti, as an indictment of *buggery*, *tranſporting of wool*, &c. 2 Hale's Pl. C. 189. cap. 25.

15. *Rape*; though before the ſtatute of Weſtm. 2. it *was a treſpaſs*, yet being *made felony* by that ſtatute, the indictment ought to conclude contra formam ſtatuti. 2 Hale's Pl. C. 189. cap. 25.

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16. If an offence were high treaſon, &c. at the common law, and a declarative act of parliament declares it ſo, as the ſtatute of 25 E. 3. de proditionibus, the ſtatute of 3 H. 5. of *clipping the coin*, &c. till repealed by 1 Mar. the indictment is good with a concluſion contra formam ſtatuti, or without ſuch a concluſion. 2 Hale's Pl. C. 189. cap. 25.

17. But at this day the indictment for *clipping*, *waſhing*, &c. *of coin* enacted to be treaſon by the ſtatutes of 5 & 18 Eliz. muſt not only expreſs, as the ſtatute requires, that it was (cauſa lucri) but muſt conclude contra formam ſtatuti. 2 Hale's Pl. C. 189, 190. cap. 25.

18. If an offence were *felony at common law*, but a *ſpecial act of parliament ouſts the offender of ſome benefit (that the common law allowed him)* when certain circumſtances are in the fact, though the body of ſuch indictment muſt expreſs thoſe circumſtances according as they are preſcribed in the ſtatute, yet the indictment muſt not conclude contra formam ſtatuti. 2 Hale's Pl. C. 190. cap. 25.

19. *Thus* the ſtatute of 21 Jac. cap. 27. concerning *murdering of baſtard children* requires proof by one witneſs that the child was dead born, the indictment muſt ſhew that it was a baſtard child to bring the offender within that ſtatute, but concludes not contra formam ſtatuti. 2 Hale's Pl. C. 190. cap. 25.

20. By the ſtatute of 8 Eliz. cap. 4. in caſes of *pickpockets*, 39 Eliz. cap. 15. *breaking houſes in the day-time, and ſtealing to the value of 5 s.* the ſtatute of 23 H. 8. cap. 1. in caſes of *petit treaſon*, *wilful murder*, of malice prepenſe, *robbing in or near the highway*, 18 Eliz. cap. 7. in caſe of *burglary*, the ſtatute of 4 & 5 P. & M. cap. 4. in caſe of *malicious commanding*, &c. *any perſon to commit murder*, *robbery*, *wilful burning*, the *offenders are ouſted of their clergy*; the body of the indictment muſt bring them within the expreſs purview of the ſtatutes, or otherwiſe they ſhall have the benefit of clergy, but it need not conclude contra formam ſtatuti, neither is it uſual in ſuch caſes; for they were felonies before, and the ſtatutes do not give them a new puniſhment, nor make them to be crimes of another nature, but only in certain caſes take away clergy; but yet if they ſhould conclude in theſe caſes contra formam ſtatuti, it would not vitiate the indictment, but would be only ſurpluſage, for *though the ſta-*
[555] *tutes do not give a new penalty, yet they take away an old privilege*, when the caſe falls within the circumſtances mentioned by the act. 2 Hale's Pl. C. 190. cap. 25.

21. If an *offence be at common law*, and alſo *prohibited by ſtatute, with a corporal or other penalty*, yet it ſeems the party may be indicted at common law, and then though it concludes not contra formam

formam ſtatuti, it ſtands as an indictment at common law, and can receive only the penalty that the common law inflicts in that caſe. 2 Hale's Pl. C. 191. cap. 25.

22. Mich. 10 Jac. B. R. an indictment of *forcible entry* upon the ſtatute of 8 H. 6. cap. 9. *and* Mich. 9 Car. 1. B. R. an indictment *for forgery* quaſhed for not concluding contra formam ſtatuti, * SMITH'S CASE, yet *both theſe were offences at common law*, though reſtitution were not at common law in the firſt caſe, nor pillory and loſs of ears in the ſecond, but only fine and impriſonment, or at moſt ſtanding in the pillory, but without mutilation. 2 Hale's Pl. C. 192. cap. 25.

* See Indictment (O) pl. 2. S. C.

23. Regularly, if a *ſtatute* only *makes* an offence *or alters an offence from one crime to another*, *as* making *a bare miſdemeanor to become a felony*, the indictment for ſuch a new made offence, or new made felony muſt conclude contra formam ſtatuti, or otherwiſe it is inſufficient. 2 Hale's Pl. C. 192. cap. 25.

24. And on the other ſide, if an *offence* be *purely at common law*, if it conclude contra formam ſtatuti it is inſufficient, and ſhall be quaſhed except in the inſtance above given touching clergy; and therefore an indictment of *battery* concluding contra formam ſtatuti is inſufficient, and ſhall be quaſhed. 2 Hale's Pl. C. 192. cap. 25. cites Trin. 12 Car. B. R. Croke, n. 2. Cholmley's caſe.

Cro. C. 465 pl. 2.

25. There is a difference when an *information* or *action is grounded on an act of parliament*, and the concluſion is contra formam ſtatuti prædicti, there the information is not good if the ſtatute is *miſrecited*, but if the concluſion be contra formam ſtatuti *in hujuſmodi caſu editi & proviſi*, there it may be good, notwithſtanding the miſrecital, becauſe the Court can take notice of a good act of parliament to puniſh the offence mentioned; per Twiſden J. Raym. 192. Mich. 22 Car. 2. B. R. in caſe of the King v. Wild.

26. W. brought an *action* againſt H. R. *de uxore abducta, and keeping of her from him*, uſque ſuch a day, which was ſome time after the exhibiting of the bill, and concluded contra formam ſtatuti. After verdict for the plaintiff this was moved in arreſt of judgment, but the declaration was held good notwithſtanding the *impertinent concluſion* of contra formam ſtatuti, *there being no ſtatute in the caſe*. Vent. 103, 104. Mich. 22 Car. 2. B. R. Ward v. Rich.

27. Where a *ſtatute continued de tempore in tempus*, and was never diſcontinued nor determined, there it ſhall be ſaid contra formam ſtatuti; agreed. Ow. 135. and cites 35 Eliz. and 9 Eliz. Palmer's caſe.

28. Where a *ſtatute prohibits a thing without a penalty*, or *makes a new duty to an officer*, the indictment needs not conclude contra formam ſtatuti; per Eyre J. Comb. 205. Paſch. 5 W. & M. in B. R. The King and Queen v. Wiggot and Perry.

29. Where a *ſtatute makes an offence*, the concluſion muſt be contra formam ſtatuti. 5 Mod. 308. Mich. 8 W. 3. Bennet v. Talbot.

An indictment for a *riot* is good, though it conclude not contra formam ſtatuti, becauſe an

30. An indictment for a *riot* was moved to be quaſhed, becauſe it concluded contra formam *diverſorum ſtatutorum*, whereas there is but one ſtatute againſt riots, the reſt give penalties on ſheriffs, juries, &c. but held good. Comb. 371. Trin. 8 W. 3. B. R. The King v. Brane & al'.

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offence at common law, though prohibited alſo by acts of parliament under ſeverer penalties. 2 Hale's Pl. C. 190. cites Paſch. 5 Jac. B. R. Wormall's caſe.

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1 Salk. 212. pl. 2. Hil. 8 W. 3. B. R. the S. C. adjudged for the plaintiff.

31. If a declaration is contra formam ſtatuti, and *ſome things alleged* therein *are within the ſtatute* mentioned, *and others are not* within it, yet it is good; for as to thoſe which are not, it is ſurpluſage. 12 Mod. 121. Paſch. 9 W. 3. Bennet v. Talboys. ——5 Mod. 307, 308. Bennet v. Talbot. S. C. adjudged niſi. —— Carth. 382. S. C. and the action which was founded on the new ſtatute (there being other ſtatutes before) againſt hunting by inferior tradeſmen, the words contra formam ſtatuti ſhall be applied to that part of the treſpaſs which was grounded on the new ſtatute, which gives full coſts, though the damages are under 40 s. *And* per Holt Ch. J. it is ſufficient to lay in the declaration, that the defendant hunted in the plaintiff's ground, without concluding contra formam ſtatuti; for that ſhould come in evidence. —— Ld. Raym. Rep. 149, 150. S. C. adjudged niſi, and afterwards adjudged abſolutely for the plaintiff. —— Comb. 420. S. C. adjudged upon the reaſon given by Holt Ch. J. viz. that the concluſion ſhould refer only to that which would reaſonably bear it, and upon the authorities of All. 43. and Vent. 104.

1 Salk. 212. pl. 2. S. P. by Holt Ch. J. accordingly, and ſays this was Penallow's caſe.

32. If an *act of parliament* increaſes a penalty, or *deprives a man of any benefit which he had before at common law*, there if you count on the ſtatute, and do not bring yourſelf within it, and conclude contra formam ſtatuti, it is naught; per Holt Ch. J. 12 Mod. 122. Paſch. 9 W. 3. in caſe of Bennet v. Talbois. Cro. E. 231.

33. In caſe, plaintiff declared that he *diſtrained certain cocks of hay for arrears of rent, in order to ſell them ſecundum leges et ſtatuta regni Angliæ; and that the defendant, being conuſant of the premiſes, reſcued them*, &c. After verdict for the *plaintiff*, *he prayed his treble damages upon the ſtatute of* 2 *W.* & *M. cap.* 5. and inſiſted that though the plaintiff does not recite the ſtatute, nor conclude contra formam ſtatuti, yet it is well enough, becauſe it is a general ſtatute, and the diſtreſs is of ſuch a thing as was not diſtrainable for rent at common law, and therefore ſecundum leges et ſtatuta refers to this ſtatute of W. & M. ſed non allocatur; for per Curiam, the plaintiff does not bring himſelf within the compaſs of the ſtatute, for he does *not ſhew that the diſtreſs was appraiſed, nor conclude contra formam ſtatuti*; and when *ſecundum leges & ſtatuti is rather where a thing is proper by the common law, and confirmed by ſtatute*; and adjudged accordingly. Ex relatione m'ri Daly. Ld. Raym. Rep. 342. Paſch. 10 W. 3. Anon.

Nor will the concluding of the indictment contra formam ſtatuti,

34. Where a ſtatute *takes notice of a common offence, and adds a further penalty*, an indictment thereupon may well be laid contra formam ſtatuti; per Cur. 6 Mod. 17. Mich. 2 Ann. B. R. in the caſe of the Queen v. Bothell.

bar the party from ſupporting the *indictment by the common law, if it could be maintained upon the ſtatute.* 10 Mod. 336. Trin. 2 Geo. 1. B. R. in caſe of the King v. Dixon.

Wherever there was an *offence at common law*, and a *ſtatute makes a further* proviſion of *penalty*, an indictment for that offence may conclude contra formam ſtatuti, or leave it out at election; per Holt Ch. J. Paſch. 13 W. 3. in caſe of the King v. . . . . .

35. Where

35. Where a ſtatute introduces a *new law*, by giving an action where there was none before, or by giving a new action in an old caſe, the plaintiff need not conclude contra formam ſtatuti; but if a ſtatute gives the *ſame action with a difference of ſeveral circumſtances*, as double damages, &c. the plaintiff muſt either conclude contra formam ſtatuti, or make his caſe ſo particularly within the ſtatute that it may appear to be ſo; per Cur. 2 Salk. 504. pl. 3. Hill. 5 Ann. B. R. Coundell v. John.

Per Holt Ch. J. Holt's Rep. 634. Kendal v. Clerk, S. C. that where an act of parliament *gives a new remedy in an old caſe*, or an *old remedy in a new caſe*, you need not conclude contra formam ſtatuti.——If an act of parliament * increaſes a penalty, or *deprives* a man *of any benefit* which he had before at common law, then if you count on the ſtatute, and do not bring yourſelf within it, and conclude contra formam ſtatuti, it is naught; per Holt Ch. J. 12 Mod. 122. in caſe of Bennet v. Talboys.

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For more of Contra Formam Statuti in general, ſee **Indictment** (O), **Robbery** (S), and other proper titles.

(A) Contra Pacem.

1. WRIT of *reſcous* made againſt bailiffs in collecting toll, and *quod ſolvere tolnetum contradixerunt contra pacem*, and yet adjudged good. Thel. Dig. 114. lib. 10. cap. 24. ſ. 5. cites Mich. 30 E. 3. 20.

2. *Writ of attachment upon a prohibition for a ſuit in Court Chriſtian of a thing temporal* was contra pacem, and held good. Thel. Dig. 114. lib. 10. cap. 24. ſ. 9. cites Mich. 31 E. 3. Attachment upon a prohibition 8 E. but ſays the Regiſter is contra prohibitionem noſtram only, and adds quære.

3. A writ of prohibition to a ſuit in Court Chriſtian was ſerved on the now defendant, who flung it into the dirt, and trampled upon it, and afterwards proſecuted the ſuit in Court Chriſtian; the writ againſt the defendant was contra pacem. Regiſter, 95. a. b.

Thel. Dig. 114. lib. 10. cap. 24. ſ. 9. cites the Regiſter, and ſays it ſhall be contra pacem.

4. Writ upon the caſe for *not cleanſing and repairing a ditch*, &c. ſhall be without contra pacem. Thel. Dig. 114. lib. 10. cap. 24. ſ. 12. cites Trin. 45 E. 3. 17.

And becauſe the writ was contra pacem, it was abated. Br. Action ſur le Caſe, pl. 20. cites S. C.

5. And *ſo* it ſhall be *for every non-feaſance*. Thel. Dig. 114. lib. 10. cap. 24. ſ. 12. cites 12 H. 4. 3.

6. A man ſhall have writ of *treſpaſs contra pacem E. nuper regis Angliæ, & contra pacem noſtrum*. Thel. Dig. 115. lib. 10. cap. 24. ſ. 15. cites Hill. 11 H. 4. 15. Mich. 2 E. 4. 25.

7. Writ of *recaption* ſhall be contra pacem and againſt law and ſtatute, but not vi et armis; per Babington. Thel. Dig. 115. lib. 10. cap. 24. ſ. 17. cites Paſch. 9 H. 6. 1. But ſays, the form of the Regiſter 86 is, after reciting the fact, et quia hoc injuſtum eſt & manifeſte contra pacem noſtram, tibi præcipimus, &c. And other writs are in contemptum præceptorum noſtrorum, &c.

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2 Hale's Pl. C. 189. cites S. C. —2 Hawk. Pl. C. 245. cap. 25. ſ. 95. S. P. accordingly, and cites in Marg. S. C.

8. Indictment for *erecting a wear over the river Wye*, whereby the ſubjects were hindered of their paſſage with their boats, *laid* it *to be done* 43 *Eliz. with a continuance ad nocumentum of the ſubjects of King James*, and ſo *the jurors concluded that the wear was erected and continued contra pacem regis nunc*, &c. and adjudged void, becauſe it is as well contra pacem nuper reginæ, as contra pacem regis nunc; for the commencement * of the tort was in the queen's time, and this was an offence to the crown now; for though the parties might be indicted for the continuance only, without alleging expreſsly the commencement, yet the ſcope of this indictment is not to make the offences ſeveral, as in themſelves they are; for though the *jurors have concluded upon both, yet they have found the peace of this king only broken.* Yelv. 66. Trin. 3 Jac. B. R. Sir Edward Winter's caſe.

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9. *But* per Popham Ch. J. *if the concluſion of the jury had been upon the continuance of the tort only*, then *it ſhould be taken* in law *to be an indictment to this purpoſe only, and the other matter of the finding the erection* of the wear *to be only by way of information, how the thing was done; or* if the jurors had *found that the defendant in the queen's time had erected, &c. and continued it in the time of this king, contra pacem regis nunc*, it had been good; becauſe the expreſs matter found was only the continuance of the tort, and the other only a recital or introduction to the matter found; quod curia conceſſit. Yelv. 66. Trin. 3 Jac. B. R. in Winter's caſe.

10. An indictment of *forcible entry* was quaſhed, becauſe it did not conclude that it was contra pacem. 2 Bulſt. 258. Trin. 12 Jac. The King v. Cox.

Roll. Rep. 259. pl. 30. Cuddington v. Wilkins, S. C. adjudged accordingly, and Coke Ch. J. ſaid, that if *part of a treſpaſs it committed in the queen's time, and part in the king's time*, then it *ought to be alleged againſt the peace of both.*——3 Bulſt. 82. S. C. adjudged for the plaintiff accordingly, and ſame difference taken by Coke Ch. J.——2 Hale's Pl. C. 189. cap. 25. cites S. C. and ſays, that ſo it is in caſe of an indictment for an offence ſo alleged.

11. Treſpaſs was laid of *entering his cloſe* 10*th July*, 44 *Eliz. contra pacem dominæ reginæ, & domini regis nunc;* after verdict this was moved in arreſt of judgment, and held that the words *(domini regis nunc)* are but *ſurpluſage;* whereupon the plaintiff had judgment. Cro. J. 377. pl. 3. Mich. 13 Jac. B. R. Coddington v. Wilkin.

12. One was indicted of being a *common barretor*, but the indictment omitted the words contra pacem domini regis, vel contra formam ſtatuti, and therefore it was held to be inſufficient; for it is an eſſential part of the indictment, and therefore was reverſed. Cro. J. 527. pl. 4. Paſch. 17 Jac. B. R. Palfrey's caſe.

13. *Regularly*

13. *Regularly every indictment* ought to conclude contra pacem domini regis, for that is not taken away by the ſtatute of 37 H. 8. cap. 8. and therefore an indictment without concluding contra pacem, &c. is inſufficient, though it be but for *uſing a trade, not being an apprentice;* 2 Hale's Pl. C. 188. cap. 25. cites Hill. 21 Car. B. R. For every offence againſt a ſtatute is contra pacem, and ought to be ſo laid.

14. An indictment that *concludes contra pacem*, and *ſays not domini regis*, is ſufficient. 2 Hale's Pl. C. 188. cap. 25. cites Mich. 23 Car. 1. adjudged.

15. If A. be indicted for an *offence ſuppoſed to be committed in time of a former king*, and *concludes contra pacem domini regis nunc*, it is inſufficient; for it muſt be ſuppoſed to be done contra pacem of that king in whoſe time it was committed. 2 Hale's Pl. C. 188, 189. cap. 25.

16. But if a man be *indicted in the time of one king, contra pacem domini regis nunc*, he may be *arraigned for that offence in the time of his ſucceſſor*. 1 E. 6. Br. Corone, 178. Enditement, 44. Neither is the indictment itſelf diſcontinued by the demiſe of the king, though in ſome caſes the proceſs be. 2 Hale's Pl. C. 189. cap. 25. cites 7 Co. Rep. 30, 31.

17. Two indictments on the ſtat. 5 Eliz. cap. 4. for *uſing the trade of a tallow chandler* were quaſhed, becauſe they did not conclude contra pacem. Keb. 789. pl. 43. Mich. 16 Car. 2. B. R. The King v. Harris.

So for uſing the trade of *a barber*, without ſerving ſeven years, exception was taken to the indictment for omitting contra pacem. Holt Ch. J. thought it well * enough, becauſe it concluded contra formam ſtatuti; but by the other three juſtices it was quaſhed; for every breach of a law is againſt the peace, and ought to be ſo laid. 6 Mod. 128. Paſch. 3 Ann. B. R. The Queen v. Lane. ——— 3 Salk. 190. pl. 17. S. C. accordingly, and Holt Ch. J. ſaid, it would be hard to make a barber's ſhaving a man by conſent to be contra pacem. But the indictment was quaſhed.

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18. An *information* was brought *by a common informer* for exerciſing the trade of a barber; exception was taken, becauſe it did not ſay contra pacem; but per Curiam, that is never done in a ſuit by a common informer. Keb. 860. pl. 70. Hill. 16 & 17 Car. 2. Luſamoore's caſe.

2 Hawk. Pl. C. 343. cap. 25. ſ. 94. ſays it ſeems clear, from all the precedents, that neither an information qui tam on a penal ſtatute, nor an information by the king for an intruſion, or other wrong of civil nature done to his lands, goods, or revenues, need the words contra pacem.

19. An indictment of *battery* concluded only to the great diſturbance of the peace of our lord the king, but becauſe it did not ſay contra pacem it was quaſhed. 2 Keb. 36. pl. 72. Paſch. 18 Car. 2. B. R. The King v. Hooker.

20. An indictment for *retaining a ſervant without a teſtimonial from his laſt maſter*, wanted the words contra pacem, and it was quaſhed. Mod. 78. pl. 39. Mich. 22 Car. 2. B. R. Anon.

21. *Treſpaſs for breaking*, entering, *and depaſturing* 36 *Car.* 2. *continuando the depaſturing till the* 4 *Jac.* 2. *contra pacem domini regis nunc*, which was K. James the 2d. This was held naught; for that is no contra pacem to the treſpaſs tempore Caroli Secundi, but

Show. 27. S.C. & S.P. adjudged. — Comb. 166. S.C. & S.P. ruled ill;

for *contra pacem refers to the trefpaſs, and not to the continuando*, and then it is as if no contra pacem had been at all, which is ſubſtance, and *bad upon a general demurrer*; and that it is ſubſtance is proved by the 16 & 17 Car. 2. which by expreſs words aids it after verdict; ſo that it appears by this ſtatute, that it was not aided by verdict before that ſtatute, which it would have been if it had been but form. The common way is to conclude tam contra pacem dicti nuper regis quam domini regis nunc.

but it is omitted, and *contra pacem is ſubſtance.* 2 Salk. 636. pl. 1. Mich. 1 W. & M. in B. R. Incledon v. Burgeſs.

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22. *Treſpaſs quare vi & armis* 1 *Feb.* 1701. Clauſum ſuum fregit *contra pacem dominæ Annæ nunc reginæ*, &c. Adjudged on *demurrer* for the defendant; for K. William died 8 Mar. 1701, and ſo it was contra pacem regis, and not contra pacem reginæ; the *omiſſion of contra pacem had been only matter of form, but here it is repugnant;* for the Court muſt take notice of the demiſe of the king, that is, the deſcription of the treſpaſs, and a treſpaſs done contra pacem regis could not be given in evidence; but indeed a *verdict would have aided it.* 2 Salk. 640. pl. 11. Mich. 2 Ann. B. R. Day v. Muſkett.

2 Salk. 380. pl. 28. S. C. the Court held, that contra pacem was ſurpluſage, and could neither do good nor harm, becauſe it was a nonfeaſance.—11 Mod. 53. pl. 30. Paſch. 7 Ann. B. R. S. C. & S. P. accordingly.

23. A *conſtable was indicted for not returning the warrant of a juſtice of peace to levy the penalty on a conviction of deer-ſtealing.* Exception was taken that it was ſaid contra pacem of the late king, and that it ought to be contra pacem of the queen alſo; becauſe the neglect, though it began in the king's time, yet it continued in the queen's time alſo, the return being never made at all, and ſo was an offence againſt both the king and queen. But Holt Ch. J. ſaid, he ſuppoſed it would be neceſſary to ſay contra pacem of the queen as well as the king where that is neceſſary; but here the indictment being founded on an omiſſion, it is otherwiſe, and there you never conclude contra pacem at all. Forteſcue's Rep. 127. Trin. 3 Ann. B. R. The Queen v. Wyat.

[560] 24. Serjeant Hawkins ſays it ſeems to be a good *general rule, that no indictment or information for an offence*, capital or not capital, *againſt the common law or ſtatute can be good unleſs it expreſsly ſuppoſes ſuch offence to be done againſt the peace of the king or kings* in whoſe reign or reigns it was committed; and accordingly he ſays he finds, that every precedent of an indictment in Coke's Entries, whether for treaſon or felony, or inferior offences, expreſsly lays the offence againſt the peace of the king, *except* only in four inſtances, whereof one is of an indictment *for a nuſance* for *not repairing the highway*, which, if it may be maintained, ſeems to depend chiefly on this reaſon, viz. that the offence is of ſuch a nature, that a man may be as well guilty of it in his own ground as that of another, and therefore it has been held, that it need not be laid againſt the peace, becauſe the *laying it in ſuch a manner may ſeem to imply ſomewhat of force or treſpaſs againſt the perſons or poſſeſſions of another;* but it ſeems difficult to reconcile this opinion with thoſe many reſolutions taken notice of in the following part of this ſection, by which indictments for want of thoſe words contra pacem, have been adjudged inſufficient, where the

the offences could, on no other account, be ſaid to be againſt the peace, than as they were breaches of the law, as all nuſances certainly are.

And one other of the ſaid inſtances in Coke's Entries is of an indictment of *homicide by miſadventure*, and one other of an indictment of homicide in *ſelf-defence*; but theſe precedents, if they may be maintained, ſeem to depend chiefly on this reaſon, that ſuch offences are ſuppoſed to be *owing rather to the misfortune, than fault, of the party.*

And the 4th of the ſaid inſtances is of an indictment *of perjury on the ſtatute*, which concludes in contemptum reginæ, &c. & contra formam ſtatuti, without adding contra pacem.

But Raſtal's Precedents, both of indictments of felony, and of inferior offences, do as often omit the words contra pacem, as make uſe of them. However, certainly the much greater number of precedents expreſsly conclude contra pacem, and the authority of theſe is much ſtrengthened by thoſe many caſes in the reports, wherein indictments and informations appear to have been quaſhed for want of the words contra pacem; as indictments and informations for *barretry, forgery, retaining a ſervant without a teſtimonial* from his laſt maſter, *following a trade without having ſerved an apprenticeſhip, erecting a cottage, aſſault and battery*, &c. 2 Hawk. Pl. C. 243. cap. 25. ſ. 94. See the plea above.

For more of Contra Pacem in general, ſee Indictments, Treſpaſs (Q. a. 5), and other proper titles.

Contribution and Average. [561]

(A) In what Caſes. And how; in Proportion.

1. AVerage *is* commonly uſed by the law merchant for *that contribution which merchants* and others *make towards loſſes ſuſtained, where goods are caſt into the ſea, for the ſafeguard of the ſhip, or of the other goods, and lives of the perſons therein during the tempeſt*; and it is called average and contribution becauſe it is proportioned and allotted after the rate of every man's goods aboard. Law of Trade and Commerce, 112.

2. *All the parties intereſted are to bear the loſs by a general contribution, and a maſter or purſer* of a ſhip, *ſhall contribute* for the preſervation thereof; alſo the *paſſengers, for ſuch things as they have*

have in the ſhip, be they precious ſtones, pearls, or the like; and *where paſſengers have no goods* in the ſhip, in regard they are a burden to it, it is ſaid *an eſtimate ſhall be made of their apparel, rings, jewels*, &c. towards a contribution for the loſs; and generally money and jewels, clothes, and all things in the ſhip, (except the clothes which are upon a man's body, or victuals, &c. put on ſhipboard to be ſpent,) are liable to average and contribution; and the goods loſt ſhall be valued, and the goods and merchandize ſaved are to be eſtimated, which being known, a proportionable value ſhall be contributed by the goods ſaved, towards reparation of the goods caſt overboard; and if in the caſting over, or lightening of the ſhip, any of the remaining *goods* are *ſpoiled, or receive injury*, the ſame muſt come into the contribution for the damages received. Law of Trade and Commerce, 113. cites Molloy, 233. 236.

3. If a *man is bound in a recognizance and dies*, there, as long as the *heir has aſſets*, execution ſhall be againſt the heir only. Br. Suit, pl. 13. cites 17 E. 2. Fitzh. Execution, 139.

4. *But if the heir has not aſſets*, execution ſhall be upon all *the tertenants*, and every one ſhall be contributory to the other; but where execution is ſued againſt the heir who has aſſets, he ſhall not have contribution againſt the tertenants nor the feoffees. Br. Suit, pl. 13. cites 17 E. 2. Fitzh. Execution, 139.

5. If the *heir* be *vouched in ward of ſeveral*, and the *tenant loſes, and recovers in value againſt the heir*, every guardian ſhall be contributory to the render in value. Br. Suit, pl. 12. cites 48 E. 3. 5.

6. *So* where *feoffee of the conuſor upon a ſtatute merchant is in execution*, he *ſhall have contribution againſt every other feoffee of the ſame conuſor*. Br. Suit, pl. 12. cites 48 E. 3. 5.

7. And per Finchd. where the *conuſor* upon ſtatute merchant *aliens part of his land*, and the conuſee ſues execution againſt the conuſor, there the *conuſor ſhall not have any contribution from the feoffee*, as the feoffee might have of the other feoffee. Br. Suit, pl. 12. cites 48 E. 3. 5.

8. *But* if the *conuſor dies, and the conuſee ſues execution againſt the heir*, he ſhall have contribution of the feoffees. Br. Suit, pl. 12. cites 48 E. 3. 5.

[562] 9. *So* that *the feoffee ſhall have* contribution *from the heir*, if any of them be in execution, contra of the heir. Br. Suit, pl. 12. cites 48 E. 3. 5.

10. If a man *charges land tailed, and land of fee-ſimple, and dies*, the land tailed is diſcharged, and the fee-ſimple land remains charged with the whole; per Skrene, which none denied. Br. Charge, pl. 9. cites 12 H. 4. 17.

11. In *dower* if the *tenant vouches the heir in three ſeveral wards*, each of them ſhall be ſeverally charged. 3 Rep. 13. a. by the reporter, in Herbert's caſe, cites 11 H. 7. 22. & 48 E. 3. 5. a. b.

Br. Scire Facias, pl. 225. cites 17 E. 2. Fitzh. Execution, 139.

12. Contribution ſhall be had *by the tertenants* in ſcire facias *upon recognizance* by their feoffor. Br. Suit, pl. 18.

13. If

13. If *the king's tenant aliens to ſeveral* ſeverally, and the *king diſtrains the one for the whole*, he ſhall have contribution of the others. Br. Suit, pl. 19. Br. Apportionment, pl. 21. cites F. N. B. 234, 235.

14. The *writ* of contribution *lies where there are tenants in common, or who jointly hold a mill pro indiviſo*, and take the profits equally, and the mill falls into decay, and one of them will not repair the mill, now the other ſhall have a writ to compel him for to be contributory to the reparations. F. N. B. 161. (B).

15. And if there be three or four *coparceners* of land, and the *eldeſt ſiſter does the ſuit* to the lord, of whom the lands are holden, for all the coparceners, and the others will not allow her for her charges and loſſes, according to the rate for the ſame ſuit, that coparcener, who did the ſuit, may have writ of contribution. F. N. B. 161. (C).

16. *And if* there be many coparceners, and *the eldeſt does the ſuit, and the other coparceners agree with the eldeſt for a rate*, now the writ of contribution ſhall be brought againſt the others who would not contribute, &c. F. N. B. 161. (C).

17. And if *ſeveral be infeoffed of land, for which one ſuit ought to be done*, &c. now if they *agree* among themſelves, *that one* of them *ſhall do the ſuit, and that the others ſhall contribute* unto him, if he do the ſuit, and afterwards the others ſhall not allow him for that ſuit according to their rate, then he ſhall have the writ of contribution againſt them, and the writ ſhall mention the agreement, &c. F. N. B. 161. (C).

18. The plaintiff ſeeks relief by way of contribution, for that one of the defendants hath a *rent-charge out of his, the plaintiff's lands, and one other of the defendant's lands*, and ſeeks to lay the whole burthen of the rent-charge upon his, the plaintiff's lands; and becauſe the defendant would not anſwer, therefore an injunction is granted for ſtaying of the ſuits for the rent. Cary's Rep. 132. cites 22 Eliz. Dolman v. Vavaſor & al'. And. 125. pl. 173. S. C. but not S. P.—Mo. 191. pl. 341. S. C. but not S. P.

19. The Duke of Northumberland acknowledged a *recognizance* of 1000 marks to the Lord Cromwell, and after *granted certain lands to the defendant*; afterwards both the Duke and the Lord Cromwell were *attainted* of treaſon, whereby the recognizance came to the queen, and in her name was put in ſuit by one Lane, to whom her majeſty had granted the ſaid recognizance, who ſought to extend the defendant's ſaid lands alone, whereas there are divers *other lands* to a great value *in other men's hands* liable to the ſaid recognizanee, therefore it is ordered that no liberate go out upon the ſaid extent, until the Court order the ſame. Cary's Rep. 159. cites 21 Eliz. The Queen v. Colborne.

20. In the caſe of a common perſon, the *heir of the conuſor, or of him, againſt whom judgment is given in debt*, ſhall be only charged, and ſhall not have contribution againſt another tertenant in in ſome caſes, and in ſome caſes he ſhall have contribution, and ſhall not be ſolely charged; reſolved. 3 Rep. 12. b. Mich. 26 & 27 Eliz. in Scacc. Harbert's caſe. [563]

21. For if *a man* is *ſeiſed of three acres* of land, and *enters into a recognizance* or ſtatute, &c. *and infeoffs A. of one acre, and B. of another*,

another, and the third deſcends to his heir, in this caſe, if execution is ſued only againſt the *heir*, he *ſhall not have contribution*; for he comes to the land without conſideration, and the heir ſits in the ſeat of his anceſtor, & hæres eſt alter ipſe & filius eſt pars patris, and therefore ſhall not have contribution *againſt any purchaſor*, though in rei veritate the purchaſor comes to the land without any valuable conſideration; for the conſideration of the purchaſe is not material in ſuch caſe. Reſolved. 3 Rep. 12. b. Ibid. And ſays, that ſo it was lately reſolved in GAWDY'S CASE, late marſhall of B. R. that the heir may be only charged, and he ſhall not have contribution againſt purchaſors; for though in the caſe of recognizance, ſtatute, or judgment, the heir is charged as tertenant, and not as heir, as appears by 27 H. 6. Execution, 135. 15 E. 3. tit. Age, 95. becauſe by the recognizance or ſtatute the heir is not bound, but the conuſor grants quod dicta pecuniæ ſumma de terris, &c. levetur, yet he ſhall not have contribution againſt a purchaſor, contrary to the opinion of Finchden in 48 E. 3. fol. 5. b.

22. *But* yet *in ſome caſes the heir ſhall have contribution*, and ſhall not be ſolely charged; *as if a man is ſeiſed of two acres, the one of the nature of Borough-Engliſh, and binds himſelf in a ſtatute* or recognizance, *or if judgment in debt is given againſt him, and he dies, leaving iſſue two daughters, who make partition*, in this caſe if one only is charged, ſhe ſhall have contribution; for as one purchaſor ſhall have contribution againſt another, and againſt the heir of the conuſee alſo; ſo one heir ſhall have contribution againſt another heir; for they are in æquali jure, reſolved. 3 Rep. 12. b. in Herbert's caſe.

23. If there are *grandfather, father, and two daughters, and judgment is given for debt or damages againſt the grandfather*, and *he dies*, and the *father dies, one of the daughters being within age*, and the *other of full age*, and *partition is made*, the eldeſt daughter ſhall not be charged ſolely, but ſhall take advantage of the infancy of her ſiſter; for both heirs ſtand in the ſame degree. 3 Rep. 13. a. by the reporter in Herbert's caſe.

24. *So if one be bound in a recognizance*, and *has two daughters, and dies*, and *they make partition*, the one ſhall not be charged ſolely, but ſhall have contribution, and if the one is within age, the other ſhall take benefit thereof; becauſe in ſuch caſe, *though* ſhe is *charged as tertenant, yet ſhe ſhall have her age*. 3 Rep. 13. a. by the reporter, in Herbert's caſe.

25. If a man is bound in a *ſtatute or recognizance*, and after his death ſome of his *land deſcends to the heir of the part of the father, and ſome to the heir of the part of the mother*, one only ſhall not be charged, and if he is, he ſhall have contribution againſt the other. 3 Rep. 13. a. by the reporter, in Herbert's caſe.

26. A ſuit was for average of a *ſhip robbed* of certain goods, ſhipped at Briſtol to Galicia in Spain. Dr. Dale, Maſter of the Requeſts, ſaid, that *by the civil law average is not due unleſs the goods are loſt in ſuch a manner, that thereby the reſidue in the ſhip is ſaved*; as if goods of one of the merchants are *caſt into the ſea*

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havis evandi causa, then all the other merchants shall pay average, because thereby all the residue is saved; so if parcel is by *composition given to a pirate*, to save the residue; but not if a pirate takes parcel by violence; for in such case average shall not be paid for it. But in the principal case the merchants * having assented, after the ship was robbed, to pay average, it was decreed for the defendants. Mo. 297. pl. 442. Pasch. 32 Eliz. in the Court of Requests. Hicks v. Palington.

27. If a man grants a *rent-charge* out of all his lands, and afterwards *sells his lands by parcels to divers* persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasors only, he shall be eased in Chancery by a contribution from the rest of the purchasors, and the grantee shall be restrained by order to charge the same upon him only. Cary's Rep. 3.

28. Sir Edmund Morgan married the widow of Fortescue, he had his wife's lands distrained alone by the *grantee of a rent-charge* from her former husband, and therefore *sued the grantee* in Chancery, to *take a ratable part* of the rent, according to the lands he held subject to the distress, and notwithstanding the Ld. C. J. Popham's Report, who thought this reasonable, the Lord Chancellor Egerton would give him on this bill no relief, but *ordered that he* should *exhibit his bill against the rest of the tenants and grantee both*, the one to shew cause why they should not contribute, the other why he should not accept of the rent equally; otherwise it was no reason to take away the benefit of distress from the grantee, which the law gave him. Cary's Rep. 32, 33. cites 7 June 1603.

29. A *collector of a fifteenth may levy all the tax within one township, upon the goods of one inhabitant only* if he will, and that inhabitant shall have aid of the Court to make each other inhabitant contributory; per Tanfield Ch. B. which was granted by the Court, Bromley being absent. Lane, 65. Trin. 7 Jac. in the Exchequer. Anon.

30. If a *lighter, or a ship's boat, into which part of the cargo* aboard *is unladen for the lightening of the ship*, shall *perish, and the ship be preserved*, contribution is to be made; *but if the ship be cast away, and the lighter or boat preserved*, no average or contribution is recoverable; for *contribution may not be had in any case but where the ship arrives in safety*. Law of Trade and Commerce, 118, 119.

31. Where *passengers cast goods out of a ferry boat* in case of a tempest, which they may do *for preservation of their lives*, the owners shall have no remedy, unless the boatman surcharge the boat, when they may have their action against him. Law of Trade and Commerce, 119.

2 Bulst. 280. S. P. Bird v. Astcock. ——Roll. Rep. 79. pl. 23. The case of Gravesend barge, S. C. & S. P.

32. *Cousee of a statute comes to have part of the lands charged*, he cannot require contribution, though he grants over, and the lands of all other the feoffees are discharged, though such as are

or

or remain in the hands of the debtor himſelf are chargeable. Hob. 45, 46. pl. 50. Fleetwood v. Aſton.

33. *Heir* ſhall not have contribution but againſt the other heirs; per Jones J. 3 Bulſt. 320. and per Doderidge J. 321. Hill. 1 Car. B. R. in caſe of Boyer v. Rivett.

34. How far the Court will reſtrain a *lord to diſtrein for rent* where he pleaſeth, but for the preſent thinks fit that there ſhould be a contribution. Toth. 103. cites Mich. 3 Car. Hall v. Offley.

35. If *after liberate* a *feoffment* is made *of part to A. and part to B.* the one ſhall not have contribution againſt the other; per Jones J. Lat. 274. Mich. 3 Car.

36. If a *purchaſor* has cauſe of contribution, and makes feoffment, *his feoffee* ſhall not have it; per Jones J. Lat. 274. Mich. 3 Car.

37. In an Engliſh *bill againſt* the defendant, as *executrix* of her huſband, *to have contribution*, the caſe was, that the *plaintiff* in this cauſe, *and the teſtator, were ſheriffs of Middleſex, and* that *there* [565]. *had been a recovery againſt them for an eſcape in the teſtator's life-time, and* 500 *l. damages* recovered, *which the plaintiff* in this cauſe *had paid and ſatisfied*, to which the defendant ought to contribute, as the bill ſuggeſts. The *Court doubted* hereof, the caſe being primæ impreſſionis, and reſembled it to the caſe of two joint obligors; but what became of it non conſtat. Hardr. 164. pl. 4. Hill. 1695. in Scacc. Philips v. Biggs.

38. 16 & 17 *Car.* 2. *cap.* 5. *ſ.* 2. *When any judgment, ſtatute, or recognizance ſhall be extended, the ſame ſhall not be avoided or delayed by occaſion, that any part of the lands extendible are omitted out of ſuch extent, ſaving always to the parties, whoſe lands ſhall be extended, their remedy for contribution againſt ſuch perſons, whoſe lands ſhall be omitted.*

39. *S.* 3. *This act ſhall not give any extent or contribution againſt any heir within age, during minority of ſuch heir, in reſpect of any lands deſcended.*

40. *S.* 4. *Provided that this act extend only to ſtatutes for payment of monies, and to ſuch extent as ſhall be within twenty years after the ſtatute, recognizance, or judgment had.*

41. *This act ſhall continue for* 3 *years. Made perpetual by* 22 & 23 *Car.* 2.

And if deviſee for life *refuſe to pay his ſhare*, the remainder, paying the whole, to

42. *Deviſee for life, remainder in fee* of lands, charged with 500*l.* and for default of payment the ſame was limited to the perſon to whom the 500 *l.* was payable. Decreed one third to be paid by the deviſee for life, and two thirds by the remainder-man in fee. Fin. R. 231. Trin. 27 Car. 2. Hayes v. Hayes.

have the whole eſtate. Ibid. ——— Chan. Caſes, 223, 224. S. C. But if tenant for life can prove that it was the intention of the deviſor, that tenant for life ſhould pay nothing, it was admitted to be material. ——— Fin. Rep. 221. Trin. 27 Car. 2. S. P. as to the one third to be paid by tenant for life, and two thirds by him in remainder, in caſe of Corniſh v. New. ——— 3 Chan. Rep. 131. in caſe of Orby v. Mohun, S. P.

Or if E. ſhould pay the whole,

43. A. charges land with payment of 50 *l. a-piece to B. and C.* at their reſpective ages of *twenty-one*, and limits the land over on

default of payment, but *if either die before twenty-one, her legacy to go to D. to whom A. deviſed the lands.* D. *deviſed* the lands ſo charged *to E. for life, remainder to F. in fee,* and *made E. executor.* Decreed that F. ſhould contribute two thirds towards payment of the legacies of 50l. Fin. R. 304. Trin. 29 Car. 2. Peachy v. Colt.

his executors ſhould hold the lands againſt F. till they ſhould be ſatisfied. Ibid.

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44. Land is *mortgaged* to A., then to B., then to C. If A. *ſues to redeem,* and try his debt by decree, C. A. and B. ſhall be bound by the account which A. made in his ſuit, and pay, or contribute to the *charges of ſuit,* if made without fraud or colluſion. 2 Chan. Caſes, 32. Trin. 32 Car. 2. Williams v. Day.

45. If the *portion* of any one *lay on* or *out of Bl. Acre* or other particular fund by itſelf, and the others out of *Wh. Acre.* or any other fund, each muſt bear his own loſs; agreed at the bar. 2 Chan. Caſes, 132. Hill. 34 & 35 Car. 2. Tilley v. Throgmorton.

46. *Lands in mortgage* were *deviſed to A. for life,* remainder *to B. and his heirs. A.* enters and *takes an aſſignment* of the mortgage *in a truſtee's name.* A. *died within one year.* B. brought a bill againſt the executor of A. to redeem the mortgage, and his counſel inſiſted, that B. ought to pay only two thirds of what was due on the mortgage, and the other third to be allowed by A.'s executor, by reaſon that A. enjoyed the profits during his life. The Court ſaid, that had B. come to redeem in A.'s life-time, then A. ſhould have allowed a proportion of the money with reſpect to the value of their ſeveral eſtates; but A. being now dead, and having enjoyed the eſtate but one year only, the defendant muſt make an allowance only for the time that A. enjoyed the eſtate. Vern. 404. pl. 376. Trin. 1686. Clyat v. Battiſon.

47. A. on his marriage with B. agreed *and gave a bond to ſettle particular lands* on the wife, and the iſſue of the marriage, and afterwards *aliens part* of thoſe lands; A. dies. Finch C. decreed the jointreſs to have the deficiency of her jointure made good out of the inheritance of the lands remaining unſold. But Jeffries C. reverſed that decree, for the jointreſs and children are equally purchaſors, and they muſt bear the loſs in proportion. Vern. 440. in pl. 412. Hill. 1686. Carpenter v. Carpenter.

[566]

S. P. per Cur. the widow to pay one third, and the reverſioner in fee to pay two thirds. Chan. Rep. 218. 221. 13 Car. 2. in caſe of Rowell v. Walley.

48. *A. B. and C. were bound in a bond, A. being principal and B. and C. ſureties;* afterwards *J. S. becomes bound* to the obligee, *that if the other three did not pay* according to the condition of the bonds, *that he would* pay. A month after *B., one of the two ſureties, pays the money, and prefers his bill againſt the fourth now for contribution,* and the queſtion was, whether he ſhould be bound to contribute, he being but a ſupplemental ſecurity? and the Maſter of the Rolls ſeemed to think that he ſhould. 2 Freem. Rep. 97. pl. 107. Trin. 1686. Cooke's caſe.

49. A. *covenanted to ſettle* 100*l. a year annuity out of land* on B. *having no land at the time* of the covenant, but *afterwards purchaſes land in S. and D.* and then *deviſes S. to C.* and dies, without ſet-

tling the annuity. D. deſcends to the heir of A. Decreed that D. and S. ſhall both be liable to the annuity, but that C. ſhall be reimburſed out of D. which deſcended to the heir. 2 Vern. 97. pl. 90. Paſch. 1689. Took v. Haſtings.

50. A term was conveyed in truſt to raiſe 500 l. a-piece for B. C. and D. to be paid at their reſpective ages of 21 years, remainder *to G. for life*, remainder *to his firſt ſon in tail*, remainder over. Decreed that G. pay 700l. and thoſe in the remainders 800 l. and ſo G. be let into poſſeſſion, and whereas 500 l. only was now due, and the other not in ſeveral years, if the other 800l. ſhould become payable in the life of *G.* then G. ſhall pay it, but in ſuch caſe the term for 99 years ſhould ſtand his *ſecurity to reimburſe him* again. Ch. Prec. 21. pl. 23. Hill. 1690. Rives v. Rives.

2 Vern. 267. pl. 253. Humphreys v. Hales, S. C. decreed accordingly, and whereas the tenant for life had cut down timber without having any power to commit waſte, he was decreed to account for the timber, and that what he had raiſed thereby ſhould be taken as to much in part of what the remainder-man was to pay towards diſcharging the incumbrance.

51. If an *eſtate in mortgage* be *ſettled on A. for life*, and then *an B. in tail, or* in *fee;* tenant for life ſhall bear two fifths of the principal and intereſt, and the remainder-man three fifths. Chan. Prec. 44. pl. 43. Paſch. 1692. James v. Hales.

52. Upon an *order* for contribution to the *relief of a poor pariſh*, it was ruled, that the juſtice may either charge particular perſons, or the whole pariſh, and they levy it, but here a ſum in groſs was laid for a whole year, which (it was objected) was unreaſonable; for their ability might change; but the order was confirmed. Cumb. 309. Mich. 6 W. & M. in B. R. The King v. Knightley Pariſh in the Iſle of Wight.

53. An eſtate in *jointure* was *ſubject to a mortgage.* Reſolved that the jointreſs, and the reverſioner, muſt redeem in proportion, viz. the *jointreſs one third part, and the reverſioner two thirds*, and that hath been the proportion uſual in this court, to charge the eſtate for life with a third; but it ſeems hard, becauſe now an eſtate for life is worth nine or ten years purchaſe, whereas formerly it was worth but ſeven. 2 Freem. Rep. 210. pl. 284. Hill. 1696. Flud v. Flud.

[567] 54. And *ſo* it is if an *eſtate ſubject to a mortgage is deviſed to A. for life, remainder to B. in fee,* there they may redeem in proportion, viz. A. one third, and B. two thirds. Ibid.

55. *Two ſeveral eſtates,* one in the ſeiſin of A. for life, and one of B. for life, are ſubjected to the raiſing of 2000 l. for a *portion for a daughter*, by a term of 500 *years, to commence after the reſpective death of A. and B.* A. died firſt, and that eſtate by limitation of the ſettlement came to R. The daughter brought a bill for the 2000 l. againſt R. who paid it. Afterwards B. died, and the fee-ſimple of that eſtate *deſcended to the daughter.* R. ſhall have contribution out of the eſtate of B. deſcended to the daughter, *in proportion* to its value; A.'s eſtate to be valued as an eſtate in poſſeſſion, and B.'s eſtate as in reverſion; per Somers C. aſſiſted with

with Maſter of the Rolls. 2 Vern. R. 355. pl. 321. Hill. 1697. Henningham v. Henningham.

56. If a *manor* is *held by the ſervice of a bridge, every tenant* of the manor *is liable* to the whole charge, *and* are *contributory* among themſelves. 1 Salk. 358. pl. 5. Paſch. 3 Ann. B. R. The Queen v. Buckleugh (Ducheſs of). 6 Mod. 150, 151. S. C.

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57. *Reverſion expectant* on an eſtate for life was conveyed *to truſtees to be ſold for payment of ſpecific debts*, and if any ſurplus, to go to his heirs, executors, and adminiſtrators. A. married the heireſs, and *the huſband got a conveyance from the truſtees to him and his heirs*, and paid ſome of the debts. The *heir died without iſſue*, and her heir brought a bill for a reconveyance, ſurmiſing that ſufficient had been raiſed for payment of the debts out of the rents and profits. The huſband inſiſted that his wife was as tenant in fee-ſimple, and what rents he received were in her right, and he has a right to retain them; but decreed that he ought to have paid the *intereſt out of the profits*, and ſhall not ſuffer the debt to increaſe, and that he account accordingly. 2 Vern. 566. Mich. 1706. Brompton v. Alkis.

58. Some perſons *fitted out a privateer in the French war*, and by commiſſion by letter of *marque from the Duke of Savoy*, ſent her to cruize in the Mediterranean, where ſhe *took a French ſhip, in which were ſeveral Turks and Tripolins, and their effects*, but the captain ſet the perſons on ſhore, detaining ſome of their effects. The matter coming into the admiralty, the ſentence was, that the ſhip and goods were not well taken by an Engliſhman, and Engliſh veſſels, there being no commiſſion from the king, but only from the Duke of Savoy, and therefore if the caption was lawful, yet it was a perquiſite belonging to the Lord High Admiral; and alſo, becauſe the Tripolins being *in peace with England*, their goods and effects were not to be ſeiſed by Engliſh ſhips or men. After this ſentence, the captain having agreed the matter with the conſul of Tripoli, and having obtained a *grant of the ſhip and goods from K. William*, brought his bill and obtained a *decree for two thirds* of the value of the ſhip and goods, *each part-owner to pay according to the quantum of his intereſt, and if any were inſolvent, the loſs to be borne by ſuch as were ſolvent*, with intereſt and coſts. 2 Vern. 592. Mich. 1707. Walton v. Hanbury.

59. *A. ſeiſed* in fee *of the manors of B. and C. mortgages B. for* 4000 *l.* and *by will charges all his real eſtate with payment of his debts, and deviſes B. to J. S. and C. to W. R. and dies.* J. S. to whom A. deviſed B. ſhall compel W. R. to whom A. deviſed C. to contribute to the payment of the mortgage on B. *but in caſe the will ſhould prove void*, then there ſhall be no contribution. Wms.'s Rep. 505. pl. 146. Mich. 1718. Carter v. Barnardiſton.

60. By *marriage articles* it was agreed, that 6000 *l. in the hands of the truſtees ſhould be laid out in the purchaſe of lands, to be ſettled on the huſband for life, remainder to the wife for life* for her jointure, remainder *to the firſt and every other ſon* of that marriage *in tail male* ſucceſſively, *chargeable with* 2000 *l. for younger children*, Gibb. 127. S. C.

remainder *to the husband in fee.* The marriage took effect, and the 6000 l. being vested in lottery annuities in the year 1720, with the consent of the husband and wife, *was subscribed by the trustees into the S. S. Company, pursuant to the act of parliament,* which impowers and indemnifies trustees for so doing, upon which there happened a loss of near 3000 l.

Bill was brought by the only son of the marriage against the trustees, his father, and mother, and four infant sisters, for an execution of the trust.

One point was, how, and in what manner, and by whom, the loss in the trust money should be borne? Lord C. King was of opinion, that the loss upon the principal sum of 6000 l. ought to be borne in proportion, or average by all the children; *the loss happening under the direction of an act of parliament,* the trustees are not liable to make it good, and it is plain by the articles, that the parties intended two thirds for the eldest son, and one third for the younger children, but if the eldest son should bear the whole loss, it would be just the reverse, the eldest son would have but one third, and the younger children two thirds. And decreed that the *eldest son bear two thirds of the loss, and the younger children one third,* according to their several proportions in the money, and referred it to the Master to have a settlement made accordingly. MS. Rep. Trin. 3 Geo. 2. Canc. Chambers v. Chambers.

61. *Lease of a coal mine to A.* reserving a rent; *A.* the lessee *declares himself a trustee for five persons, to each a fifth. The five partners enter upon work, and take the profits* of *the mine,* which *afterwards becomes unprofitable, and the lessee insolvent;* the cestuy que trusts are not liable, but for the time during which they took the profits. 3 Wms.'s Rep. 402. Mich. 1735. Clavering v. Westley & al'.

3 Wms.'s Rep. 404. in a note of the reporter, says, that in Trin. term following, this cause came on by appeal before the Ld. Talbot, who decreed one R. the lessee (who made default) to pay the plaintiff the contribution monies he had received from each of the cestuy que trusts, towards working and carrying on the coal mine; and if that should prove not sufficient, the cestuy que trusts that were living, and the representatives of such as were dead, and who were all before the Court, to contribute each one fifth towards satisfying the plaintiff the arrears of rent that had incurred during the time they had concerned themselves in taking the profits. The plaintiff to have back the 10 l. deposit.

For more of Contribution and Average in general, see **Charge, Devise, Mortgage, Payment, Rent, Surety, Trade and Navigation, Trespass,** and other proper titles.

Conuſance of Pleas.

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(A) Franchiſe.
At what *Time* to be *demanded.*

[1. IF a franchiſe be *granted* to a vill, *that aſſiſes of land within the vill ſhall not be taken out of the vill;* if an *aſſiſe* be brought *out of the vill,* and the aſſiſe is *awarded for default of the tenant,** the bailiff of the vill ſhall not have the franchiſe if he demands it after. 20 Aſſ. 13.] Br. Conuſance, pl. 35. cites S. C. accordingly, by reaſon that the aſſiſe was awarded; and the *court ſeiſed before the demand.*——In *aſſiſe,* the bailiff of S. demanded conuſance, and could not have it, *becauſe the aſſiſe did not appear,* and there conuſance was not granted; but quære de rigore juris. Br. Aſſiſe, pl. 33. cites 12 Aſſ. 6.

* [569]

2. Where the *court is ſuffered to be ſeiſed, as by award of proceſs, or* by award of aſſiſe, or ſuch like, the lord of the franchiſe ſhall not have conuſance of the plea by reaſon of his laches. Br. Laches, pl. 1. cites 3 H. 6. 10.

3. If bailiffs, who have conuſance of pleas, *ſuffer aſſiſe* to paſs *without demanding the conuſance,* yet they may *have the conuſance in another aſſiſe.* Br. Laches, pl. 2. cites 3 H. 6. 14. 2 Inſt. 130. ad finem, S. P. and cites S. C.

4. And where *ſheriff returns mandavi ballivo libertatis,* &c. qui habet return' brevium & executiones eorundem *qui non mihi dedit reſponſum,* by which *non omittas iſſues,* yet in another action the bailiff ſhall have return and ſervice of the writ, notwithſtanding his laches in the other. Br. Laches, pl. 2. cites 3 H. 6. 14. 2 Inſt. 130. ad finem, S. P. and cites S. C.

5. The Id. was ouſted of his conuſance becauſe it was not demanded till *after imparlance;* reſolved; and though ſome have ſeemed to make a difference between plea pleaded to the juriſdiction by the defendant, and by a ſtranger, as in the principal caſe, yet it ſeems there is no difference, and that the lord cannot plead it after imparlance. Sid. 103. pl. 9. Hill. 14 & 15 Car. 2. B. R. The Biſhop of Ely's caſe. Lev. 89. S. C. and Twiſden J. held accordingly; but upon citing 40 E. 1. a. 11 H. 4. 41. b. 43. b. Mich. 6 H. 7. 6. Mich. 9 H. 7. 6. Trin. 6 H. 7. 17. that though the party cannot plead to the juriſdiction after imparlance, becauſe he has by his imparlance admitted it, yet the biſhop who is a ſtranger may demand it at any time; Windham J. inclined to be of that opinion; ſed adjornatur.——A claim made after imparlance is too late; per tot. Cur. 10 Mod. 129. Hill. 11 Ann. B. R. Cambridge (Univerſity's) caſe.——No claim can be made by the univerſity after imparlance; per Holt Ch. J. Show. 352. Trin. 4 W. & M. in caſe of Parker v. Edwards & al'.——S. P. per Cur. Barnard. Rep. in B. R. 66. Trin. 2 Geo. 2.——But in ſuch caſe privilege was allowed; per Cur. Godb. 404. pl. 485. Paſch. 3 Car. B. R. Fryer v. Dew.

(A. 2) The ſeveral Sorts of Conuſance of Pleas, and the Differences.

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12 Mod. 643. S. C. ——2 Lord Raym. Rep. 836. S. C. and ſame diviſions, by Holt Ch. J. —10 Mod. 126, 127. Hill. 11 Ann. B. R. Arg. In the caſe of the Univerſity of Cambridge, divides the courts in like manner, and cites Hardr. [505, &c. pl. 4. Paſch. 21 Car. in the Exchequer,] and ſays, the *difference between cognitio placitorum without exclusive words, and* when *with*, is not, that the laſt has * an exclusive juriſdiction, and the former not; for cognitio placitorum does, ex vi termini, exclude all other courts, and imports the words, et non alibi; but the firſt difference is, that *the former muſt be local*, confined to ſome place; *the latter may follow the perſon*, and be as to place univerſal. 2dly, *In the former, if the lord waive his privilege, there ſhall be re-ſummons*, and proceedings ſhall begin where they left off; but in the latter, *in caſe of waiver, or the like, the proceedings* in the court excluded by this juriſdiction *muſt begin de novo*. 3dly, The former is for the advantage of the lord only, and therefore the lord only can claim it, and not the party; but where there are excluſive words, the party may claim it as well as the lord. Says that in 9 H. 7. fol. 10, 11, 12. theſe differences are fully and clearly laid down.

1. THere are *three ſorts of inferior juriſdictions*; one whereof is *tenere placita*, and this is the loweſt ſort; for it is only a concurrent juriſdiction, and the party may ſue there, or in the king's courts if he will. The ſecond is *conuſance of pleas*, and by this a right is veſted in the lord of the franchiſe to hold the plea, and he is the only perſon who can take advantage of it. The third ſort is an *exempt juriſdiction*, as where the king grants to a great city, that the inhabitants thereof ſhall be ſued within their city, and not elſewhere, this grant may be pleaded to the juriſdiction of this Court, if there be a court within that city which can hold plea of the cauſe, and *no body can take advantage of this privilege but a defendant*, for if he will bring certiorari, that will remove the cauſe, *but he may waive it if he will*, ſo that the privilege is only for his benefit. 3 Salk. 79, 80. pl. 4. Hill. 1 Ann. B. R. Croſſe v. Smith.

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2. Conuſance of pleas *is* that one living within the juriſdiction, may implead another within it for a cauſe ariſing there; per Holt Ch. J. 12 Mod. 643. Hill. 13 W. 3. in caſe of Croſs v. Smith.

(B) Of what Actions Conuſance may be granted.

† Br. Conuſance, pl. 12. cites S. C. & S. P. by Kirton.

[1. THE grant of conuſance in a *quare impedit* is void, for the franchiſe *cannot* do right therein, ſcilicet, *ſend a writ to the biſhop*. † 44 E. 3. 29. b. 38. 14 H. 4. 20. b. 50. Aſſ. 9. per Kin. ‡ 26 Ed. 3. 73. b.]

‡ Fitzh. Conuſance, pl. 86. cites S. C. & S. P. by Thirn. ——Br. Conuſance, pl. 8. cites 40 E. 3. 2. S. P. ——Dal. 12. pl. 20. Paſch. 7 E. 6. Anon. S. P. ——Fitzh. Conuſance, pl. 41. cites Paſch. 15 E. 3. S. P. per Poole. ——Co. Litt. 134. b. in principio, S. P. ——4 Le. 237. pl. 377. Mich. 5 Jac. S. P. ——Jenk. 34. pl. 66. S. P. ——Gilb. Hiſt. of C. B. 156. S. P.

In a recordare, the bailiff of franchiſe demanded the conuſance;

[2. *At common law* conuſance might be granted in a *recordari* or *replevin*. 38 Ed. 3. 31.]

[3. But *otherwiſe* it is *now after the ſtatute, which provides, that if the plaintiff be nonſuit, a ſecond deliverance ſhall be granted*, and the franchiſe hath not power to grant it, therefore there would be

be a *failure of right* if he ſhould have conuſance. 38 Ed. 3. 31. Quære.]

ſaid, they could not have conuſance, becauſe ſecond deliverance is given by the ſtatute, which they cannot make upon nonſuit of the plaintiff, ſo that they cannot do right as the king's court can. But Knivet ſaid, that where they might have conuſance before the ſtatute, they ſhall have it now; for the ſtatute does not ouſt it. But per Thorp, they ſhall not have it, becauſe they cannot make the ſame proceſs which is given by the ſtatute; but Brooke ſays quære; for it ſeems, that where they had conuſance of the original before, the ſtatute extends to them to make new proceſs. Br. Conuſance, pl. 23. cites S. C. ——The original writ of repleg' is in nature of a juſticies, and is not returnable, and in a juſticies no conuſance can be demanded, becauſe none can demand conuſance, but he that hath a court of record, and of a plea in a court of record; but the county court, though the plea be holden therein by juſticies, the king's writ, yet it is no court of record, for of a judgment therein there lieth a writ of falſe judgment, and not a writ of error; alſo, if the ſheriff ſhould grant the conuſance, he could not award a re-ſummons, and the lord of the franchiſe can demand no conuſance in a replevin. 2 Inſt. 140.

Conuſance ſhall not be granted in replevin, becauſe if the plaintiff be nonſuited, a ſecond deliverance ſhall be granted, which the franchiſe cannot do. Gilb. Hiſt. of C. B. 156.

[4. It ſeems that conuſance may be granted *to levy fines* in a franchiſe; admitted 44 Ed. 3. 29. 38. if the grant had been *expreſsly*.]

Br. Conuſance, pl. 20. cites 44 E. 3. 28. S. C. and pl. 21. cites 44 E. 3. 37. S. P. in both which it ſeems that they cannot have conuſance of levying fines, without expreſs words in the grant. ——Fitzh. Conuſance, pl. 30. cites 44 E. 3. S. C. and ſays, that it ought to be ſpecially mentioned in the charter, if the franchiſe would take any advantage of it ——Br. Fines, pl. 22. cites S. C. ——See (E) pl. 2. S. C. ——A fine cannot be levied to have the force of a final concord by any that hath power tenere placita, but only before the juſtices of the * court of C. B. or before juſtices in eyre (whilſt they ſtood) and not elſewhere, ſaith this act, and therefore the king cannot grant power to hold plea for the levying of fines againſt this negative ſtatute. 2 Inſt. 515.

* [571]

[5. Conuſance cannot be granted to a lord *in ancient demeaſn of writs of waſte and re-diſſeiſin*, for there wants ſuch judge as ought to be in ſuch actions, ſcilicet, the ſheriff. 1 H. 4. 5.]

Conuſance ſhall not be granted in action of waſte, becauſe no court can award action of waſte but the king's court; per Cur. Dal. 12. pl. 20. Paſch. 7 E. 6. cites Trin. 4 E. 3. Fitzh. Conuſance, 69. —— Gilb. Hiſt. of C. B. 156. S. P.

In *rediſſeiſin* conuſance ſhall not be granted, becauſe the defendant cannot be awarded to priſon there. Dal. 12. pl. 20. Paſch. 7 E. 6. ——4 Le. 237. in pl. 377. Mich. 5 Jac. S. P. ſaid.

6. In *writ of right after battail joined*, a man ſhall not have conuſance; becauſe he cannot try the iſſue by battail; per Kirton. Br. Conuſance, pl. 12. cites 44 E. 3. 28.

7. In *admeaſurement of paſture* conuſance ſhall not be granted, becauſe no writ de ſecunda ſuperoneratione can be granted there. Dal. 12. pl. 20. Per Cur. Paſch. 7 E. 6.

Gilb. Hiſt. of C. B. 156. S. P.

8. In *attaint upon a verdict* in Norwich, upon the ſtat. 23 H. 8. againſt a citizen there, the corporation demanded conuſance by charter of E. 4. de omnibus placitis & attinctis, and the charter was confirmed by E. 6. but the conuſance was denied; for the words of the ſtatute are, that all attaints ſhall be taken in B. R. or C. B. and in no other court. D. 202. b. pl. 70. Trin. 3 Eliz. Clovil's caſe.

Bendl. 98, 99. pl. 144. S. C. accordingly; for the charter of E. 4. was confirmed by general words only in 3 E. 6. and there are no words of non obſtante aliquo ſtatuto, &c. and in the ſtatute of 23 H. 8. there is no proviſo for Norwich; and this ſtatute expired 7 E. 6. and was revived again, and a new one made 7 E. 6. and ſo this ſtatute was made after their confirmation. ——Bendl. in Keilw. 210. b. pl. 16. S. C.

9. Lord Anderſon, Ch. J. of C. B. brought *treſpaſs* by bill for breaking his houſe, in the *city of Worceſter*, againſt A. a citizen there.

there. The corporation *produced a charter granted them by E. 6.* and demanded conuſance of pleas; per tot. Cur. it ſhall not be granted; becauſe *the privilege of C. B. whereof the plaintiff is a principal member, is more ancient than the patent whereupon the conuſance is demanded*; for the juſtices, clerks, and attornies, ought to be here attending their offices belonging to them, and ſhall not be impleaded or compelled to implead others elſewhere than in this court; and this privilege was given to C. B. upon the original erection thereof; per tot. Cur. and the conuſance was denied. 3 Le. 149. pl. 198. Mich. 29 Eliz. C. B. The Lord Anderſon's caſe.

10. If the king grants conuſance of pleas, grantee ſhall not have cognizance of *aſſiſe, redisſeiſin, &c.* ſic dictum fuit. 4 Le. 237. pl. 377. Mich. 5 Jac.

But Bendl. 233, 234. pl. 262. Mich. 16 Eliz. Whoper, alias Hooper, v. Harewood, an attorney of C. B. in action of battery, the conuſance was granted to the biſhop of Bath and Wells.

11. K. H. 8. by *letters patent* of the 14th of his reign, and *confirmed by parliament, granted to the univerſity of Oxford conuſance of pleas, in which a ſcholar or ſervant of a college ſhould be party, ita quod juſticiarii de utroque Banco ſe non intromittant.* An *attorney of C. B. ſued a ſcholar in C. B. for battery*; per Cur. this general grant does not extend to take away the ſpecial privilege of any court without ſpecial words. Litt. Rep. 304. Mich. 5 Car. C. B. Oxford (Univerſity's) caſe.

12. If a *ſcholar* of Oxford, or Cambridge, be *ſued in Chancery for a ſpecial performance of a contract to leaſe lands in Middleſex*, the univerſity ſhall not have conuſance, becauſe they cannot ſequeſter [572] the lands. Gilb. Hiſt. of C. B. 157. cites 2 Vent. 363. [Hill. 35 & 36 Car. 2, in Canc. Draper v. Crowther.]

(C) *Againſt what Perſons* it ſhall be granted.

See S. C. at tit. Privilege. (F.) pl. 3.

[1. IF a *clerk of the King's Bench be ſued by bill* in Banco Regis, *for land in a place where another hath conuſance of pleas*, yet the conuſance ſhall not be granted, for otherwiſe the officers of this court ſhould be drawn to attend in inferior courts. Trin. 4 Jac. B. R. Butt's caſe, per Popham.]

But in that caſe, which was *battery againſt two, one of whom was a foreigner, but not the other*, and therefore becauſe the plaintiff might in this caſe of battery (though otherwiſe in *conſpiracy*) have brought the action againſt the other, and omitted the foreigner, who was made a party out of ſubtlety to ouſt the franchiſe of its conuſance; Thorp granted the conuſance. 22 Aſſ. 83.

2. If a *treſpaſs* be *brought within a franchiſe againſt a foreigner, who has nothing within the franchiſe*, conuſance ſhall not be granted; for they cannot oblige a ſtranger to anſwer, who has nothing within the franchiſe. Gilb. Hiſt. of C. B. 157. cites 22 Aſſ. 83.

The defendant being *in cuſtod' mar'* in B. R. or the plaintiff 's com-

3. *Bill of debt againſt accountant in the Exchequer*, and *counted* againſt him, and the *defendant made no defence, nor other thing, but prayed the Court to have day in the ſame term*, which was granted and entered, and *before this day came the abbot of Battel, and demanded*

manded conuſance of the plea; and per Hutton, *upon privilege of Exchequer, or bill of Middleſex in cuſtodia mariſchalli*, conuſance of plea ſhall not be granted; for this privilege, nor cuſtody, cannot be in another court; but the Court was againſt this clearly, and that the conuſance may be granted upon bill, but becauſe *day was taken, and entered to anſwer*, though no defence was made, therefore the conuſance was ouſted; per Cur.. Br. Conuſance, pl. 50. cites 6 H. 7. 9.

mencing a *ſuit in the Exchequer on a quo minus*, as debtor to the king, are not ſuch privileges as will ouſt an inferior juriſdiction,

for they are now grown the common way of ſuing in thoſe courts. Gilb. Hiſt. of C. B. 157. —— Gilb. New Abr. 562. S. P. in totidem verbis.

4. The king grants to the mayor, bailiffs, and jurats of the *cinque ports*, that they ſhall *not be impleaded* for land, or for any other cauſe ariſing there, *elſewhere than before the conſtable of Dover at Shepway*: this grant does *not bind the king* in a caſe where he is party; it does not bind the king as to his own caſe in a quo warranto, nor in a quare impedit. By all the judges of England. Jenk. 190. pl. 93. cites 22 H. 7.

Kelw. 88. b. 89. a. 90. a. b. S. C.

(D) Of *what Actions* Conuſance ſhall be ſaid to be granted *upon a general Grant.* [573]

[1. IF the king grants to a corporation *to hold plea of all actions*, yet they ſhall *not* have conuſance *of any plea out of another court, without ſpecial grant* of conuſance. 9 H. 6. 27. b.]

Br. Patents, pl. 4. cites S.C. & S.P. nor by the word placitum can a man have aſſiſe; for this is querela; per Vampage.

[2. *But* if the grant be, *that they ſhall have conuſance of all actions*, &c. they ſhall have conuſance out of other courts. 9 H. 6. 27. b.]

[3. If the king grants conuſance *of all manner of pleas*, yet the grantee ſhall *not* have conuſance *of appeals of felony*. 8 H. 6. 21.]

Br. Conuſance, pl. 27. cites 8 H. 6. 18. S. C. & S. P. by Strange.

[4. *Nor* of appeals *of mayhem*. 8 H. 6. 21.]

Br. Conuſance, pl. 27. cites 8 H. 6. 18. S. C. & S. P. by Strange, unleſs it be expreſſed in the charter.

[5. If conuſance be granted *of all pleas motis inquibuſcunque curiis*, &c. they ſhall have conuſance of *pleas motis in Banco*, or *Banco Regis*, without naming them ſpecially. 9 H. 6. 27. b.]

Fol. 490.

Br. Patents, pl. 4. cites S. C. —— If the king grants conuſance of pleas in quibuſcunque curiis ſuis, the grantee ſhall not have conuſance extra Bancum Regis, without ſpecial mention thereof, becauſe it is coram rege; per Babington. Br. Conuſance, pl. 27. cites 8 H. 6. 18.

[6. If the king grants conuſance *of all* manner of *pleas motis coram quibuſcunque juſticiariis*, yet he ſhall not by this have conuſance of pleas moved *in Banco Regis*, without ſpecial naming it. * 8 H. 6. 21. Contra † 9 H. 6. 27. b.]

* See ſupra, pl. 5. † Br. Patents, pl. 4. cites S. C. but S. P. does not clearly appear.

[7. If

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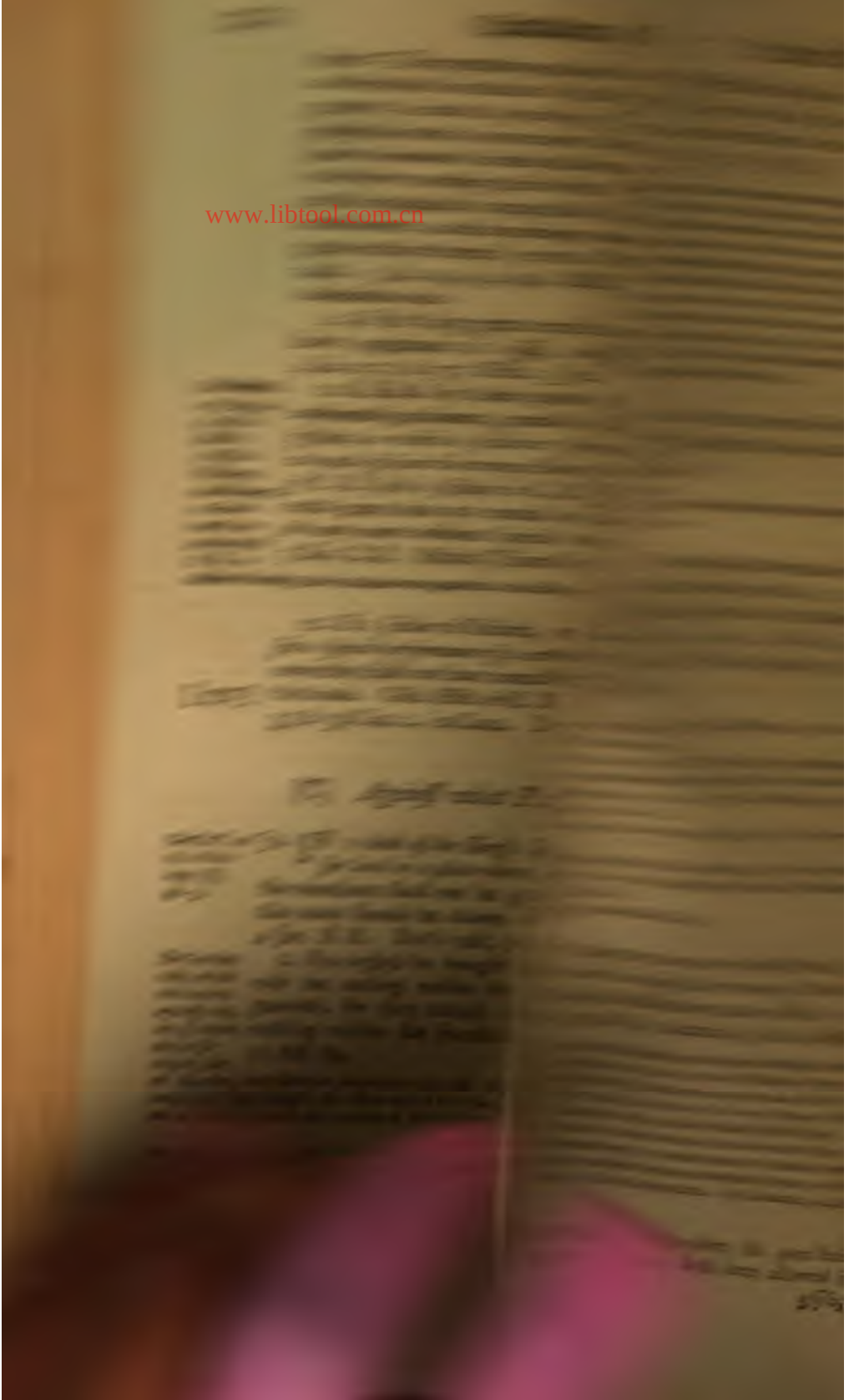

…iance of aſſiſes. 30 Aſſ. 31. adjudg- …ſays, that ſeveral allowances in …own, and ſo the conuſance was allowed; but Brooke ſays, quære …ly. —— Br. Conuſance, pl. 46. cites S. C. and Thorpe ſaid, …r than thoſe of cognitio omnium placitorum. —— Fitzh. Conuſ. …by Thorpe.

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…grant, if conuſance hath *not been al-* … Br. Conuſans, pl. 49. cites S. C. where in aſſiſe the bailiff of …there hath been a general allowance of …conuſance of aſſiſes. Contra 37 Aſſ. 6.

… ſhewed exemplification of their charter confirmed by this king, *per officio præpoſituræ villæ* de Beverley *curiam ſuam*, and ſhewed …ba, balliui villæ Beverley habeant libert' ſuam, and the Court was …e the bailiffs were not thoſe to whom the liberties were granted, but …the other juſtices upon adjournment, becauſe their court ſhall be …ard or bailiff, conuſance was granted. —— Fitzh. Conuſans, pl. 64. …ance ought to be pleaded to have been made before juſtices in eyre. …ir. 2. B. R.

…*ll pleas* be granted, they ſhall not have … * Br. Conuſans, pl. 21. cites S. C. —— Fitzh. Conuſans, …which were *not in eſſe at the time*, but … 14 H. 4. 2. * [20].

…uſans, pl. 56. cites 22 E. 4. 23. S. P. —— S. C. cited D. 85. a. …rjeant's caſe. —— Gilb. Hiſt. of C. B. 157. cites S. C.

[575]

…not have conuſance of a *writ of maintenance*, … Br. Conuſans, pl. 21. cites S. C. —— Fitzh. Conuſans, …ate after the grant made of all actions.

… Conuſans, pl. 56. cites 22 E. 4. 23. S. P. —— S. C. cited D. 85. …he Serjeant's caſe.

…w is of a *decies tantum*. 14 H. 4. 20. b.] Br. Conuſans, pl. 21. …ſans, pl. 22. cites S. C. —— Br. Conuſans, pl. 56. cites 22 E. 4. 23. S. P.

…law is of a *conſpiracy*. 14 H. 4. 20. b.] Br. Conuſans, pl. 21. … cites S. C. —— Fitzh. Conuſans, pl. 22. cites S. C.

…re the *action was at common law*, and is given † Br. Conuſans, pl. 21. cites S. C. —— Fitzh. Conuſans, pl. … cites …*by another name* than was before the grant of co- …action of *debt againſt an adminiſtrator*, there they …iance. † 14 M. 4. 20. b. ‡ 22 E. 4. 23.]

… D. 85. a. Paſch. 7 E. 6. in the Serjeant's caſe. ‡ Br. Conuſans, …—— S. C. cited by Hobart Ch. J. Hob. 48. —— Gilb. Hiſt. of C. B. 157. …ſame caſes.

…conuſance is granted to a man *pro ſe & hominibus* … Br. Grants, pl. 75. cites S. C. …of the king *out of the one bank and the other, except in* …*, that they have a conuſance ſicut habuerunt ante ad-* …and it was ſaid for the king, that *aſſiſe* is no plea …, nor of the other, unleſs for the county in which …manded in aſſiſe here, and that by … extend only to the villeins; per Shard

Shard, it extends to thoſe who become their men in doing homage, quære of thoſe who do fealty, but Parning was mere contra, and it was ſaid, in protection pro ſe & hominibus, villeins, nor franktenants ſhall not be aided, therefore it ſeems there that it extends only to his *family ſervants*. Br. Conuſance, pl. 34. cites 12 Aſſ. 35.

19. Conuſance of pleas was granted to an abbot in the time of the kings St. Edmond and St. Edward, *excluſive of the juſtices of the common pleas*, of the *King's Bench*, *and* of the juſtices of *aſſiſe*; this grant does not extend to aſſiſes, *without expreſs words of aſſiſes*, although it was confirmed by H. 8. Reſolved by the counſel, that the king's charter ought to have a reaſonable conſtruction. Jenk. 33. pl. 66. The Abbot St. Edmond's Bury's caſe.

20. *Tenor of a record of a fine was removed into Bank* by certiorari and mittimus out of the court of the abbot of Reading, and the abbot demanded conuſance of the plea, becauſe King H. 2. had *granted to the abbot the hundred of R. and that the tenants of the abbot ſhould not be impleaded out of the hundred de quibuſcunque placitis, contractis, &c. and that they may hold plea of aſſiſe before his juſtices, and to levy fines, & omnem libertatem, unleſs where the abbot himſelf was party*, and that the king had *confirmed* it *with a clauſe licet abuſi fuerint*, and that they have *uſed at all times after to levy fines*; by the beſt opinion he ſhall not have conuſance, as it ſeems. Br. Conuſance, pl. 12. cites 44 E. 3. 28.

21. In *ejectment* in B. R. &c. the mayor and commonalty of S. demand conuſance of pleas by virtue of a grant of Q. Eliz. ſhewn to the Court *tenere placita*, &c. Exception was taken, that the defendants did not ſhow any allowance in eyre, or in quo warranto, or upon any record, or that at leaſt he ought to have a ſpecial writ to the Court to allow the charter; beſides, the grant tenere placita does not take the juriſdiction from other courts
[576] without negative words. It was admitted, that if the demand had been by virtue of an old grant time out of mind, then there muſt be an allowance in eyre, &c. but this was upon a new grant in the reign of the queen, and ſhewn in court, and that this is good cites 39 E. 3. 15. which is expreſs in point; and it is true, that tenere placita does not take away the juriſdiction of others in expreſs words, but grant of *conuſance of pleas* ex vi termini, implies that no other court ſhall hold plea of ſuch matters, and cites 9 H. 7. It was adjourned. Palm. 456. Trin. 3 Car. B. R. Hampton v. Philips.

(E) *Of what* Actions, Suits, and Pleas, Conuſance ſhall be ſaid to be granted; *as Conſequents*, and incident to the Thing granted.

Br. Conuſance, pl. 12. cites S. C.

[1.] WHEN conuſance is granted, though *no proceſs is limited*, as that he ſhall have a *petit cape*, or *proceſs upon voucher*,

or other proceſs, touching the pleas, yet he ſhall have them as incident. 44 E. 3. 29.] & S. P. by Wyche. quod Finch. conceſſit.——Where conuſance of pleas is granted, *it belongs to it to make proceſs by capias*, contingit, or ſi per magnam diſtrict' non venerit, *exitus ſuos amittat* coram ballivo libertat' ſicut coram juſtic' & ſi pars covincatur, *capiatur & imprisonetur, & redimatur domino loci, becauſe all ſuch proceſſes belong to conuſance of pleas*, and without them conuſance cannot be made. Br. Conuſance, pl. 38. cites 22 Aſſ. 61. per Thorp, Baſſet, and Bank, J.——Br. Execution, pl. 121. cites S. C.——See (N) pl. 4, 5, &c. and the notes there.

[2. If conuſance be granted *of writs of covenant*, a *fine* may be levied there upon it; for this is but a conſequent. * 44 E. 3. 29. Quære, whether this general grant ſhall extend to ſo high a conveyance of land; this alſo will be prejudicial to the king by the loſs of his fines for alienation, * and Brook, Conuſance, 12. ſeems the better opinion, that this ſhall not extend to fines. 3 H. 4. 6.] * Br. Conuſans, pl. 12. cites 44 E. 3. 28. S. C. but there it is ſaid by Thorpe, that by the words plea of covenant, he cannot levy a fine, but can only hold pleas of covenant which are only in damages.——Fitzh. Conuſance, pl. 30. cites 44 E. 3. S. C. & S. P. accordingly.——Br. Patents, pl. 107. cites S. C. & S. P. accordingly.——See (B) pl. 4. and the notes there.

3. By grant *of conuſance of original*, a *man* ſhall not have conuſance *of reſummons*. Br. Conuſance, pl. 40. cites 26 Aſſ. 24.

4. Note, per tot. Cur. if the king grants to J. S. *cognitionem omnium placitorum tenendi before his bailiff, licet J. S. fuit pars*, it is good; *contra* if it was *to hold before the ſame J. S.* and ſo ſee that it ought to be † expreſſed before whom the plea ſhall be held Br. Conuſance, pl. 55. cites 21 E. 4. 47. † S. P. Br. Attachment, pl. 62. cites 2 H. 7. 15.

(F) *How* it *ought to be granted.* [*And when it muſt be ſaid before whom it ſhall be, as*]* Judge. [577]

[1. THE grant *ought to* make *mention before what judge* the pleas ought to be held, otherwiſe the grantee ſhall not have conuſance by force of it. ‡ 44 E. 3. 17. b. 18. 1 H. 4. 5. 6 H. 4. Placito, 3. Contra, 8 H. 6. 21. b.] ‡ Br. Conuſans, pl. 11. cites S. C. & S. P. by Thorpe.—Fitzh. Conuſans, pl. 27. cites S. C.——But if *grantee had a court there before*, he may make a ſteward; contra of him who had no court. Br. Conuſans, in pl. 11. cites 2 H. 7. per Keble. And Thorpe ſaid, that if ſuch grant had been *allowed in eyre*, it is material, but allowance in Bank oftentimes is not to the purpoſe. But Brooke ſays quære, becauſe he ſays it is not adjudged.——S. P. Br. Patents, pl. 83. cites 2 H. 7. 13 per Keble.——S. P. Br. Conuſans, pl. 62. cites 2 H. 7. 13. But Brooke ſays, quære inde, if he does not ſay in curia mea.—S. P. Br. Patents, pl. 100. cites 37 H. 8. and that it ought to ſhow where, as at Guildhall, or the like.——S. C. cited Arg. 6 Rep. 155.

[2. William the conqueror granted to an abbot *omnem regiam poteſtatem & omnem juſtitiam puniendi & dimittendi*, and this had been *anciently allowed to be held before his bailiff*, this ſhall not now be diſallowed. 12 H. 4. 13.] Br. Conuſans, pl. 20. cites 12 H. 4. 12. S. C.

[3. *But if a* grant be made *without ſuch allowance, and* it is *not determined before whom* the plea ſhall be held, it ſhall not be held before his bailiff. 12 H. 4. 13.] Br. Conuſans, pl. 20. cites S. C.

[4. *But*

Fitzh. Conuſans, pl. 28. cites S. C. —Br. Conuſans, pl. 11. cites S. C.

[4. *But* if it appears *by implication* what judge is intended, it is good; *as* if the grant be, *that* the grantee *ſhall have conuſance in his court*; this *implies*, that it ſhall be before the *judges* and miniſters *of the grantee*, and therefore it is good. 44 E. 3. 17. b.]

and if the juſtices of the king enter, they are not his juſtices; and ſays, that it was ſo held the ſame day, in the abbot of Reading's caſe.

[5. *But* a grant of conuſance of pleas to another *within the precinct of his manor*, is not good *without more*. 6 H. 4. placito 3.]

Such grant is good, though the grantee has no ſteward;

[6. *But if* in ſuch caſe it be further to be held *before his ſteward*, it is good. 6 H. 4. placito 3.]

for he may make a ſteward. Br. Conuſans, in pl. 11. cites 7 H. 4.

Br. Conuſans, pl. 58. cites S. C. that the grant is good; for

[7. If the king grants conuſance of pleas to another *to be held before his bailiffs, ſtewards, or juſtices*, if he *had not ſuch officers before* the grant, he cannot make them by this; ſo the grant is void. 7 H. 4. 5. b.]

he may appoint the ſteward or juſtice; quod nota; and that hence it follows, that if conuſance of pleas be granted, and it is not ſaid before whom, it ſhall be held the grant is not good.

In this caſe the Court was in doubt whether by the word *curia*, it

[8. If the king hath anciently granted to another *curiam ſuam of a town, without appointing who ſhall be judge*, yet if *conuſance* hath been thereupon *allowed to the bailiff* of the grantee, it ſhall be good. 37 Aſſ. 6. adjudged.]

ſhould be intended that the juſtice of the king ſhould hold it, or the ſteward of the grantee. And after, by advice of other juſtices, upon adjournment, conuſance was granted, becauſe their court ſhall be intended to be held before their own ſteward or bailiff. Br. Conuſance, pl. 49. cites S. C.—— Fitzh. Conuſans, pl. 64. cites S. C. accordingly.

9. Aſſiſe in the county of Southampton of tenements in S. where the bailiffs of S. came, and ſhewed charter, by which King H.
[578] had *granted to the burgeſſes of S. that they ſhall not be impleaded out of their vill of tenements within their vill, and that aſſiſe ſhall be taken within the vill*, and that at all times after the charter, the juſtices had uſed to come and take the aſſiſe in the vill; and note, that *non dicitur coram quo placita illa teneantur in the vill of S. nor does the charter will that the juſtices ſhall come within the vill, nor was conuſance of pleas granted by the charter to the bailiffs*. Fitzherbert ſaid, that this exception is for the party, and not for the bailiffs, for the cauſe aforeſaid, and the party is paſt it, for he had taken continuance before, and for theſe reaſons the Court was in opinion, that they ſhould not have theſe franchiſes. Br. Conuſance, pl. 45. cites 30 Aſſ. 1.

10. *And* after they demanded the aſſiſe, and the jury came, and ſome of them ſaid, that they were burgeſſes of S. and that by the ſame charter it was *granted that the burgeſſes ſhould not be put in aſſiſe, nor in juries, but within their vill*, and prayed thereof allowance, to which it was not anſwered. But Brook ſays, it ſeems clearly that they ſhall have thereof allowance upon ſhewing the charter. Ibid.

(G) *How* it *may* be granted.

[1 IF the *king grants conuſance*, he ſhall *not change the day* by his grant, for he cannot change the common day *in a plea of land*, for there is a *ſtatute called dies communes*, &c. and this ſtatute *limits the day in a plea of land*, and therefore the king cannot grant a ſhorter day, for this would be againſt the ſtatute. 8 H. 6. 21.]

[2. The king cannot grant conuſance of pleas to another, to *have the original out of any court*, &c. for if he ſhould have the original, *there could be no reſummons*, and ſo there would by a *failure of juſtice*. 26 Aſſ. 24. adjudged by all the counſel.] Br. Conuſans, pl. 40. cites S. C. but S. P. does not fully appear.

——Fitzh. Conuſans, pl. 57. cites S. C. & S. P. accordingly.——S. P. but he ſhall have only the *tranſcript* of it; for if they fail of right in the franchiſe, the words ſhall be *reſumm' to the Bank* again upon this original, and then the king's court ſhall proceed upon the original there; per Choke. Br. Conuſance, pl. 32. cites 37 H. 6. 27.

[3. A *preſcription and confirmation* of this *to have the original*, &c. *with conuſance of pleas*, is *not good* for the cauſe aforeſaid, *though* it hath been *ſeveral times allowed in eyre*. 26 Aſſ. 24. adjudged by all the counſel.] Br. Conuſans, pl. 40. cites S. C. but S. P. does not clearly appear.——Fitzh. Conuſans, pl. 57. cites S. C. & S. P. accordingly.

4. Where the king grants to J. S. *conuſance of all pleas to be held before his bailiff licet fuerit pars*, this is a good grant, per tot. Cur. *contra* if it was to be held *before himſelf*; for a man by juſtice cannot be his own judge. Br. Patents, pl. 71. cites 21 E. 4. 47.

5. The king *may grant* conuſance of pleas, but not otherwiſe than *ſecundum legem & conſuetudinem regni*; Arg. Show. 142. cites 12 Rep. 51. [Hill. 5 Jac.]

6. By a charter of Q. Eliz. cognitio placitorum, *with excluſive words of non alibi*, &c. was given to the court of the *vice chancellor of Cambridge, to proceed ſecundum legem & conſuetudinem univerſitatis in all caſes, where any of the body of the univerſity ſhould be defendants*, which charter was confirmed by act of parliament; per Cur. ſuch grant is *not good of itſelf without the help of an act of parliament*; for though the crown may grant conuſance of pleas to proceed ſecundum legem terræ, yet it cannot to proceed by other laws; for that would be *to make new laws*, which the crown, as being but one branch of the legiſlature, cannot do. 10 Mod. 125, 126. Hill. 11 Ann. B. R. Cambridge (Univerſity's) caſe. [579]

(H) Upon what Grant. Upon a *General Grant*.

[1 A Man upon a general grant ſhall *not* have conuſance of pleas *where he himſelf is party, and where the plea* is *to be held before himſelf*. * 40 E. 3. 10. b. adjudged. † 8 H. 6. 21. b. Curia.] * Br. Conuſans, pl. 9. cites S. C. and Brooke ſays, it ſeems the demand was diſallowed, becauſe it had no allowance, nor had theſe words, *licet fuerit pars*.——Fitzh. Conuſans,

ſans, pl. 26. cites S. C. and that conuſance was diſallowed for reaſons before mentioned by Brooke.

† Br. Conuſans, pl. 27. cites 8 H. 6. 18. S. C. & S. P. by Martin, but he ſaid, that though the words licet fuerit pars had been in the grant, yet it is not ſufficient, unleſs the king had granted further, that where he himſelf is party, he might make another judge; for where he himſelf is party he cannot be a judge indifferent in his own caſe.

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* Fol. 1 2.

[2. *So*] in *treſpaſs againſt a mayor, and ſeveral of the commonalty*, the *mayor and* * *commonalty* ſhall not have conuſance upon a general grant of conuſance, becauſe they cannot be *judges in their own cauſe*. 38 E. 3. 15. b. Curia.]

† Fitzh. Conuſans, pl. 15. cites S. C.——‡ Fitzh. Conuſans, pl 21. cites 22 H. 4 12. S. C.——Br. Conuſans, pl. 20. cites S. C.

[3. *But* where the plea is *to be held before the ſteward*, or bailiff, there conuſance ſhall be granted upon a general grant, *without the words licet ipſemet ſit pars*, where the *lord of the bailiff is a party*. D. 4. 5 Ma. 157. 27. Dubitatur, † H. 7. 11. Contra ‡ 12 H. 4. 13. 10 H. 6. 7. b.]

§ In ſuch caſe the grant ſhall be allowed. Br. Conuſans, pl. 20. cites 12 H. 4. 12. S. C. by Thirn. and Hull, but Hank. e contra and therefore Brooke adds a quere.——Fitzh. Conuſans, pl. 21. cites S. C.

[4. [*And*] upon a general grant *anciently made and allowed*, in caſe where the lord is party, *and* this had *uſed to be held before his bailiff*, he ſhall have conuſance at this day alſo, where he *himſelf is party*. § 12 H. 4. 13. ‖ 34 Aſſ. 14. adjudged; but it is not there mentioned whether it was *to be held before his bailiff*, but it ſeems it *is to be* ſo *intended*.]

‖ Br. Conuſans, pl. 48. cites S. C. and Brooke ſays, the reaſon ſeems to be, becauſe it may be held before the ſteward of the lord, who may be indifferent between the lord and the party, as the juſtices of the king are between the king and his ſubject, in an action between them.

Fitzh. Conuſans, pl. 90. cites S. C.

[5. Where conuſance is granted *to be held before the bailiff*, if an *action* is brought *againſt one of the bailiffs*, they ſhall not have conuſance thereof, for then the bailiff ſhould be his *own judge*. 10 H. 4. 9.]

Fitzh. Conuſans, pl. 90. cites S. C.

[6. *So* in this caſe, *if* after the writ brought *new bailiffs are elected*, yet they ſhall not have conuſance, becauſe the writ was well brought at firſt. 10 H. 4. 9.]

[580]

7. In a *writ of entry againſt the mayor and burgeſſes of B. they demanded conuſance*, and ſhewed the charter, which was, that *nullus burgenſis inhabitans infra burgum prædictum placitet vel implacitetur de terris, tenementis, contractibus, &c. within the ſaid borough elſewhere out of it*, &c. per Cur. the whole body being impleaded in this action, they cannot have conuſance of this plea, and ſo were ouſted of it. Bendl. 88. pl. 134. Paſch. 3 Eliz. Hunſton v. Boſton (Mayor and Burgeſſes in Lincolnſhire).

(I) *Special* Grant.

Br. Conuſans, pl. 27. cites 8 H. 6. 18. S. C. for where

[1.] IF conuſance of pleas be granted, *licet ipſemet ſit pars*, he ſhall not have conuſance in an action in which he *himſelf is party*, becauſe he ſhall not be his own judge, unleſs it be *granted*

granted further, that if he be party, that he may make another judge. 8 H. 6. 19. b.] he himſelf is party, he cannot be an indifferent judge in his own caſe.

[2. *But* upon ſuch grant, licet ipſemet ſit pars, if it be granted, *that if he be party, that the plea ſhall be held before his ſteward,* he ſhall have conuſance, for there the ſteward ſhall be judge. 8 H. 6. 20. b.] Br. Conuſans, pl. 27. cites 18 H. 6. 18. S. C. —Hob. 87. pl. 114.

per Hobart Ch. J. in delivering the opinion of the Court, in the caſe of Day v. Savage, S. P.

[3. If the grant be, *that if any clerk of Oxford be impleaded, that the chancellor ſhall have conuſance to be held before him,* if the *chancellor* be ſued, he *ſhall not have conuſance, though he himſelf be a clerk,* for the words are not expreſs, licet ipſemet ſit pars. 8 H. 6. 20. b.] Br. Conuſance, pl. 27. cites 8 H. 6. 18. S. C.

(K) Where they have Conuſance of the Action, yet for a *collateral Cauſe* the Conuſance ſhall not be granted.

Failure of Right.

[1. IF a *fine* be *removed out of a franchiſe by writ of error,* and *comes in Banco Regis by mittimus,* and after a *ſcire facias is* ſued *to have execution* of it, the franchiſe ſhall not have conuſance of it, becauſe the record ſhall not be remanded de Banco Regis, and without it they cannot do right to the party. * 50 Aſſ. 9. adjudged. † 44 E. 3. 37. adjudged.] * Br. Conuſans, pl. 61. cites S. C. & S. P. accordingly, whether any error be aſſigned or not. The caſe was, *writ of error* was ſued in B. R. *by which the record of a fine was removed out of the buſtings, Oxon.* inaſmuch as they had erred in ſcire facias upon fine, as it is ſuppoſed, and *no error was there aſſigned,* by which *he in remainder ſued execution there by ſcire facias* to have execution of the fine, and at the day the parties appeared, and the bailiffs of Oxon. demanded conuſance by *grant of* King H. 3. *that no burgeſs ſhall be impleaded of land out of the will, and that they had held pleas,* &c. and were ouſted by judgment, becauſe when the record comes into B. R. it ſhall not be remanded if error be aſſigned or not; and yet, when *franktenement is pleaded* of land in ancient demeſne, *and after it is proved to be of ancient demeſne,* it ſhall be remanded. Ibid.

† Br. Conuſance, pl. 13. cites S. C. but mentions the removal into B. but according to that Year-book it ſhould be into B. R. as Roll cites it. ——— Gilb. Hiſt. of C. B. 156, 157. cites S. C. & S. P. ‡ for the king never parts with the records of his court. ——— Gilb. New Abr. 561. cites S. C. & S. P. in totidem verbis.

‡ [581]

[2. *At the return of the exigent* conuſance ſhall not be granted for failure of right, for *he cannot be reſtrained in the franchiſe to appear by attorney,* and it is againſt the law to appear by attorney at the exigent. 3 H. 6. 10. b.]

[3. If a man *comes by exigent in* a writ of *debt,* conuſance ſhall not be granted; becauſe the defendant ought to remain in priſon till he has agreed with the plaintiff, and the *body cannot be delivered to the franchiſe.* § 40 E. 3. 1. adjudged; ſo failure of right. Contra ‖ 11 H. 4. 41. b. 43. b.] § Br. Conuſans, pl. 8. cites 40 E. 3. 2. S. C. —— Fitzh. Conuſans, pl. 25. cites S. C. ——— And Roll is miſprinted, there being no fol. 1. but the title page.

‖ Br. Conuſans, pl. 18. cites 11 H. 4. 43. 8. C. ——— Fitzh. Conuſans, pl. 20. cites S. C. ——— See (L) pl. 5. S. C.

Br. Conuſans, pl. 8. cites 40 E. 3. 2. S. C.

Fol. 493.

[4. *So* if *in a plea of land* the *tenant makes default after default at* the ſummons, conuſance ſhall not be granted, becauſe they *cannot give judgment* upon the default of record here. 40 E. 3. 1.]

[5. *Not* at the *grand cape* returned. 11 H. 4. 43. b. 14 H. 4. 20. b.]

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Br. Conuſance, pl. 8. cites 40 E. 3. 2. S. P. for they cannot do right to the party upon the default recorded here; quod nota.

Fitzh. Conuſans, pl. 20. cites S. C. —— Br. Conuſans, pl. 18. cites S. C. & S. P. accordingly; but then the plainiff counted of a retainer in his franchiſe, and a departure to D. out of the franchiſe, and there the defendant was compelled to anſwer; for now the franchiſe cannot do right.

[6. But vide 11 H. 4. 43. b. in an *action upon the ſtatute of labourers*, if the *defendant comes in ward at the firſt day*, and conuſance is demanded, it ſhall be granted, yet he *ſhall not find mainpriſe to keep his day in the franchiſe*. 11 H. 4. 43. b.]

Fitzh. Conuſans, pl 1. cites S. C. —— Br. Conuſans, pl. 1. cites S. C. accordingly, and it is a laches of the party who would have had the conuſance, and therefore now he ſhall not have the conuſance; quod nota.

[7. *At the grand cape returned*, conuſance ſhall not be granted upon demand, though the *tenant* be *an infant*, for the failure of right; for though the infancy be a good cauſe to ſave the *default*, yet this is a default *in law*, and ſo the *court once ſeiſed*. 3 H. 6. 10. b.]

Fitzh. Conuſans, pl. 1. cites S. C. but S. P. does not appear. —— Br. Conuſans, pl. 1. cites S. C. & S. P. by Babb. for by theſe matters the court is lawfully ſeiſed.

[8. *So if* at the grand cape returned the *demandant releaſes the default*, yet conuſance ſhall not be granted, for this *affirms the default*. 3 H. 6. 10. b.]

[9. If conuſance be *demanded at the grand diſtreſs returned in* a writ of *debt*, it ſhall be granted. 2 E. 3. 62. b. adjudged.]

Br. Conuſans, pl. 12. cites S. C. & S. P. by Kirton.

[10. *After battail joined in a franchiſe in a writ of right* upon a grant of conuſance, it ſhall be returned in Banco, becauſe the iſſue cannot be tried there. 44 E. 3. 29. b.]

* [582] Fitzh. Conuſans, pl 6. cites 8 H. 6. 30. S. C. — Br. Conuſans, pl. 28. cites S. C. accordingly; and if in this caſe conuſance ſhould be granted, it might be, that the one ſhould recover the writing here, and the other ſhould recover it in the franchiſe, which has no authority to warn the party out of their juriſdiction; beſides, a recovery of the writing in one court, is no plea in the other court.

[11. If one brings *detinue* and *counts of a bailment in a franchiſe*, and *another brings detinue for the ſame thing, and counts of a bailment in another place out of the franchiſe*, and the *defendant prays that they may interplead*, and the *franchiſe demands conuſance* * of the detinue, who counts of a bailment within the franchiſe, yet it ſhall not be granted, becauſe then the defendant ſhould be at a miſchief, for it cannot have conuſance of both, and ſo no interpleader could be there, and therefore *if it ſhould be granted*, the *defendant ſhould be twice charged*. 8 H. 6. 31. adjudged.]

In detinue of charters, when the plaintiff and garniſhee interplead, and the one counts of a delivery in a franchiſe, and the other in guildable, *then curia magis digna* ſhall have the plea; for now *by the interpleadre it is as one and the ſame action*, and not as two actions, and therefore is an *intire thing, and not ſeverable*. Br. Conuſance, pl. 28. cites 8 H. 6. 30. —— *But* where a man brings *formedon of land, part in a franchiſe, and part in guildable*, the writ ſhall abate; for he may have one writ in the franchiſe, and the other in Bank. Ibid. —— *So* if *aſſiſe* is brought, &c. Br. Conuſance,

ſance, pl. 15. cites 8 H. 4. 7. per Gaſcoigne and Hull. ——*But* where it is brought ut ſupra, *where the lord* of the franchiſe *has only returna brevium*, the writ ſhall not abate; for the ſheriff may ſerve the writ for the guildable, and the bailiff of the franchiſe for the land in franchiſe; and ſo in the one caſe there ſhall be two writs, and in the other but one. Ibid.

[12. If a *plea* be *removed* out of a franchiſe *becauſe of a foreign voucher*, if *in Banco the tenant waives the voucher, and pleads in bar*, *or* the *voucher is determined*, yet the franchiſe ſhall not have conuſance of this again, becauſe there *was once a failure of right there*, *though not by their negligence*. * 11 H. 4. 28. 87. b. † 14 H. 4. 25. b.]

* Br. Conuſans, pl. 16. S. P. cites 11 H. 4. 27. † Br. Reſummons, pl. 13. cites S. C.

[13. If conuſance of pleas be granted to a franchiſe, and after an *aſſiſe is there brought* (admitting this to be a plea within their grant), and the *tenant pleads*, *that by this grant they cannot hold plea originally*, *but ſhall have conuſance out of other courts*, which plea *they* there *over-rule*, *and award the aſſiſe*, by which the *diſſeiſin is found*, *and* the *tenant ouſted* of the poſſeſſion, if the *tenant that is ouſted brings an aſſiſe after upon this ouſter*, the franchiſe ſhall not have conuſance, becauſe they have *once failed of their right*. 38 Aſſ. 25. this is pleaded.]

[14. *In treſpaſs*, if the *defendant pleads villeinage in the plaintiff*, and after *conuſance* is demanded, it *ſhall be granted*, *though the villeinage cannot be tried in the franchiſe*, becauſe *it may be that he will plead another plea*, and not this, *when he comes there*. 26 E. 3. 73. b.]

Fitzh. Conuſans, pl. 86. cites S. C. —— An inferior court muſt, upon conuſance allowed, proceed upon the ſame plea and declaration. Hardr. 508. Arg. cites Co. Litt. 182. and 4 Inſt. 113. and that they cannot compel the plaintiff to declare anew. But I do not obſerve any ſuch point in the places cited.

[15. A *treſpaſs lies not in a franchiſe for a treſpaſs done* in a place *out of the franchiſe*, becauſe they cannot try it there, for they cannot compel a jury to come from the place. 1 E. 3. 24. adjudged.]

[16. If a *treſpaſs* be *brought of a treſpaſs within a franchiſe*, *againſt a foreigner* that hath nothing within the franchiſe, conuſance ſhall not be granted, becauſe they cannot do right to the party, for *they have no power to ameſne a ſtranger who hath nothing within the franchiſe to anſwer*. 22 Aſſ. 83.]

Gilb. Hiſt. of C. B. 157. cites S. C. —— Gilb. New Abr. 561. cites S. C.

[17. *So* it is of an action of *debt* brought *againſt ſuch foreigner*, *upon a contract within a franchiſe*. 22 Aſſ. 83. for the cauſe aforeſaid.]

[18. In *a conſpiracy againſt two*, *for a conſpiracy within a franchiſe*, *of which one is a foreigner*, *and the other within the franchiſe*, conuſance * ſhall not be granted, becauſe the *action is entire*, and they cannot do right there againſt the foreigner. 22 Aſſ. 8.]

* [583] Fol. 494.

So where conſpiracy is brought againſt two, whereof the one of them is of the Chancery, the action cannot be ſevered, and therefore he ſhall not have the privilege. Br. Privilege, pl. 7. cites 20 H. 6. 30.

[19. *But* if a *treſpaſs* be brought *againſt them for a treſpaſs within the franchiſe*, conuſance ſhall be granted, becauſe he *might have had ſeveral actions*, and ſo his joint bringing of the action ſhall not take away the conuſance. 22 Aſſ. 83.]

20. If it *appears to the* Court, that the party *defendant has nothing within the franchiſe, nor dwells there*, ſo that they cannot bring him in to anſwer, conuſance ſhall not be granted. Br. Conuſance, pl. 39. cites 22 Aſſ. 81.

21. Where *præcipe quod reddat of land* is brought in Bank, *and other* præcipe of the ſame land *in a franchiſe*, there *if the one recovers and enters*, the *writ is abated*, and the tenant ſhall plead it. Br. Conuſance, pl. 28. cites 8 H. 6. 30.

22. *But* it is no plea *in detinue of writings* or *chattels*; for this ſhall not abate the writ of the other, unleſs the other be made privy by garniſhment, which the franchiſe cannot do, therefore ſhall not have conuſance. Ibid.

23. The mayor and bailiffs of Coventry had *conuſance in aſſiſe* in the county of Warwick, and the *tenant in C. pleaded a plea which they could not try*, by which the plea and aſſiſe were remanded to the juſtices of aſſiſe in the county of W. and there the parties appeared, and the mayor and bailiffs at another time demanded conuſance again, upon which they were adjourned into C. B. and there by Newton, Fulth. and Aſcue, where the *franchiſe fails of right* to the party, *or* if the franchiſe *cannot do right becauſe they have not power*, there the franchiſe ſhall loſe the conuſance, and ſhall not have the conuſance again. Br. Conuſance, pl. 29. cites 22 H. 6. 58, 59.

24. *Debt in London*, the *defendant pleaded that the obligation* upon which, &c. *was made at Norwich by dureſs*, which was *found for the defendant*, and the *plaintiff brought attaint*, and thoſe of *Norwich demanded conuſance* of the plea; and by Needham, Littleton, and Jenney, they ſhall not have conuſance; for they *cannot award execution in London, nor* award *cape or exigent to deny the deed*, and alſo they have not the record in N. Br. Conuſance, pl. 53. cites 8 E. 4. 6.

25. *And* per Danby, *if it paſſes for the plaintiff* in the action, he ſhall have but his firſt action; *contra* per Littleton and Needham; for *he ſhall recover his debt*, as where the firſt verdict had paſſed for him, which was adjudged, 8 H. 4. as it is ſaid there. Ibid.

26. *Debt upon an obligation in London*, the *defendant ſaid, that it was made by dureſs at York*, upon which they were at *iſſue, that at large at London*, and the record was removed into Bank by writ of Chancery, and the plaintiff prayed venire facias upon the iſſue joined in London, and per Thirn. it is reaſonable that it ſhould be tried in Bank, and remanded into London; but Hill contra; for *by the foreign plea they are out of the juriſdiction*, and by this they ſhall not have any power to take any iſſue thereupon; for it is in vain to take iſſue which cannot be tried by them, and ſo is the beſt opinion, and the law, as it ſeems; and per Hank. in ſuch caſe of foreign plea in franchiſe, it was uſual, in ancient time, to condemn the defendant, becauſe he uſed a plea which could not be tried there, but the uſe is contrary now; but where a man pleads a plea in Bank *ultra mare*, he ſhall be condemned at this day, becauſe it cannot be tried in England,

England, as it was ſaid Mich. 36 H. 8. And per tot. Cur. in the caſe above, where *franchiſe demands conuſance out of the Bench*, and the *defendant pleads foreign releaſe*, * the plaintiff ſhall have *reſummons*; for this is a failure of right, and there, by the reporter, they ſhall plead all de novo, and after the plea diſcontinued; but it ſeems the law is with Hill. Br. Juriſdiction, pl. 29. cites 14 E. 4. 25.

27. In *ancient demeſne*, if they *put them in grand aſſiſe* now the plea ſhall be removed, and yet the tenements ſhall remain ancient demeſne, but becauſe they failed of juſtice, it ſhall be removed, per Cateſby. Per Townſend, if they cannot arraign grand aſſiſe, or grand inqueſt, according to the cuſtom of grand aſſiſe, then of neceſſity it ought to be removed. Br. Cauſe a Remover, pl. 51. cites 1 H. 7. 29, 30.

28. Recordare to the ſheriff to remove plaint of land out of the *court of K.* which is *held before the bailiffs and ſuitors of K.* becauſe the *plaintiff* in the court of K. *was one of the bailiffs there*, and a good cauſe to remove the plea, and diſtreſs awarded to ſend the record, and it was in writ of right in court baron of K. as it ſeems, and the ſheriff returned that the bailiffs and the ſuitors would not ſend the record, and therefore diſtreſs iſſued. Br. Cauſe a Remover, pl. 53. cites 1 H. 7. 29. & 26 H. 8. 4.

29. Conuſance of pleas is *never* to be *allowed unleſs the inferior court can give remedy*; per Ld. K. Guildford. 2 Vent. 363. Hill. 35 & 36 Car. 2. in Canc.

(L) *What* ſhall be ſaid *an Action ariſing within* the Franchiſe.

[*And where the Franchiſe ſhall not have Conuſance in reſpect of Part only being done within it.*]

[1. WHere an action is brought of a *thing done partly within* a franchiſe, *and partly out*, if it be a thing *that cannot be ſevered*, then the franchiſe ſhall not have conuſance. 8 H. 6. 31. b.] Br. Conuſans, pl. 28. cites S. C. —If a man brings action of land in franchiſe, and of land guildable, the writ ſhall abate; but where the action is intire, as in caſe where a man arreſts another in guildable, and impriſons him in franchiſe, action will lie at common law; for where it is intire, there majus dignum trahit ad ſe minus dignum; agreed. Br. Conuſans, pl. 14. cites 46 E. 3. 8. ——Fitzh. Conuſans, pl. 34. cites S. C. & S. P. accordingly.

[2. *As* in treſpaſs for a *battery in one place*, and *continued in another place*, if *one* of the places be *within a franchiſe*, yet conuſance ſhall not be granted, becauſe it is an entire treſpaſs. 8 H. 6. 31. b.]

[3. If one be *ſummoned againſt a prohibition* within a franchiſe, *to appear at a place within the franchiſe*, but *ſentence is given out of the franchiſe*, if an attachment upon the prohibition is brought, conuſance ſhall not be granted, for the principal grievance is where the ſentence was. 46 Ed. 3. 8. b.] Br. Conuſans, pl. 14. cites S. C. ——Fitzh. Conuſans, pl. 34. cites S. C.

Br. Juriſdiction, pl. 25. cites S. C. it ſhall be tried in the county palatine, and remanded hither.——Br. Trial, pl. 27. cites S. C. ——Br. Cinque Ports, at the end of pl. 8. cites S. C.——Fitzh. Debt, pl. 112. cites S. C.

[4. If a *leaſe* be made *in Middleſex of land in Durham*, he cannot have an action of debt upon this in Durham. 11 H. 4. 40.]

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Br. Conuſans, pl. 18. cites S. C. for now the franchiſe cannot do right.

[5. If a *retainer* of a ſervant be *out of a franchiſe*, and the *departure within* a franchiſe, yet the action upon the ſtatute of labourers lies not within the franchiſe. 11 H. 4. 44.]

But where, in *account, as bailiff and receiver in A. and B.* the biſhop of E. demanded conuſance of the plea, becauſe A. is within the iſle of Ely, and becauſe this *action may be ſevered*, and the king have conuſance in B. and the biſhop conuſance in A. therefore the writ was abated by award; for it is no reaſon that by an ill writ a man ſhall loſe his right. Br. Conuſance, pl. 30. cites 24 E. 3. 62.——*But* ſee elſewhere, that of *rent granted out of land in A. and B.* it is otherwiſe; for it is *intire*, and cannot be ſevered; note a diverſity. Ibid.——*And* it is ſaid, that in *præcipe quod reddat of land in A. and B.* the writ ſhall abate alſo; for this may be ſevered. Ibid.

[6. If an *account be* brought *of a receipt within the franchiſe*, conuſance ſhall be granted of it. 29 Ed. 3. 35. b.]

2 Roll. Rep. 48. Browne v. Carrington, S. C. reſolved that the judgment was erroneous; but Doderidge J. ſaid, that *though the aſſets are not alleged by the party to be within the juriſdiction, yet if the jury find them to be within* the juriſdiction *it is ſufficient.*—— The plaintiff ought to allege aſſets in ſome certain place; whether this action be brought in a town corporate, which has a limited juriſdiction, or at Weſtminſter, the jury in both caſes, upon this iſſue, may find aſſets in any other place. Adjudged and affirmed in error. Jenk. 333. pl. 69.——Cro J. 502. pl. 13. S. C. and judgment reverſed; but ſays, that in the ſame term a writ of error was brought of a judgment in Litchfield, betwixt CLERK AND BROUGHTON, where in debt againſt the heir, upon an obligation of his father, the defendant pleaded riens per deſcent. The plaintiff replies, that he had aſſets by deſcent, but they did not find any place where, and the plaintiff had judgment, and this judgment was affirmed, although it were objected, that this being a private juriſdiction, they had no authority to inquire if any thing was out thereof; and that this differs from the caſe of actions brought in the king's courts, which have a general juriſdiction; ſed non allocatur; for this inquiry is good enough; as an inquiry may be of aſſets in Ireland; wherefore the judgment was affirmed.——See Tit. Trial (M. f).

[7. An *heir* cannot be ſued *upon the obligation of his anceſtor* within a borough, where he hath *not aſſets within the juriſdiction* of the Court, but without. Mich. 16 Jac. B. R. between BOURN AND CARRINGTON, adjudged in a writ of error where the firſt judgment was reverſed, becauſe in the pleading there was no place alleged where the aſſets were, which might be out of the juriſdiction of the Court.]

8. *Aſſiſe* was brought *of rent* reſerved *upon a leaſe for life of land, part in guildable and part in franchiſe of D.* and the bailiff demanded conuſance; per Thorpe he ſhall have conuſance, for the rent is ſeverable, and therefore the plaintiff ſhall be put to two originals. But ſeveral e contra, and ſo is the law as it ſeems; for the rent is *one and the ſame rent*, and therefore *ſhall not have two originals, no more than of rent iſſuing out of land in two counties*, [in which caſe] aſſiſe does not lie, and as here the aſſiſe ſhall be at common law, pro toto; for *Curia magis digna*, &c. Br. Conuſance, pl. 60. cites 22 Aſſ. 52.

9. *Treſpaſs againſt two*, and *the one has nothing within the franchiſe*, and the bailiffs demanded conuſance of the plea againſt the other, and had conuſance by award, though one could not do right to the parties, for they cannot bring the one in to anſwer, becauſe

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becauſe he does not come there, nor has he land nor goods there to be diſtrained nor attached; the reaſon was, becauſe the *plaintiff might ſever his action*, and have one action againſt the one, and another againſt the other. Br. Conuſance, pl. 39. cites 22 Aſſ. 81.

10. *But* if it was *in conſpiracy*, &c. where the action cannot be ſevered, there he ſhall not have conuſance. Ibid.

11. A man *leaſed land* which is *in a franchiſe by deed indented at* another *place out of the franchiſe, with clauſe of re-entry*, and *for the rent arrear before his re-entry he brought debt*, and the bailiff demanded conuſance, becauſe the land whereof, &c. is in the franchiſe, & non allocatur, becauſe *the action is brought out of the* [586] *franchiſe*, in the place *where the deed bore date*. Br. Conuſance, pl. 59. cites 38 E. 3. 22.

12. If a *man* brings *action of land in a franchiſe, and of land guildable*, the writ ſhall abate, and he *ſhall have ſeveral actions*. Br. Conuſance, pl. 14. cites 46 E. 3. 8.

13. *But* where the action *is intire, as* in caſe where a man *takes another in guildable, and impriſons him in franchiſe*, action lies at the common law, for where it is intire, there *majus dignum trahit ad ſe minus*. Ibid.

14. *So* elſewhere of *recovery of land guildable and* land in a *franchiſe*. Ibid.

(M) At what *Time* it may be *demanded*.

[1. CONuſance ought to be demanded *the firſt day*, otherwiſe it ſhall not be allowed. 20 H. 6. 32. b.] Br. Privilege, pl. 7. cites S. C. & S. P. by Yelverton.

[2. When the *place appears in the writ where the action aroſe*, there conuſance ought to be demanded the firſt day, becauſe it appears whether conuſance belongs to them, but otherwiſe it is e contra. * 11 H. 4. 41. b. † 14 H. 4. 20. b. ‡ 3 H. 6. 30. b. 2 Ed. 3. 62. b.] * Br. Conuſans, pl. 7. cites S. C. —— Fitzh. Conuſans, pl. 19. cites S. C.

† Br. Conuſans, pl. 21. cites S. C. —— Fitzh. Conuſans, pl. 22. cites S. C.
‡ Br. Conuſans, pl. 3. cites S. C. —— Fitzh. Conuſans, pl. 3. cites S. C.

[3. *As in treſpaſs*, conuſance ought to be demanded the firſt day before the count, if the party makes default, becauſe the place of the treſpaſs appears in the writ. 11 H. 4. 41. b. 43. b. 14 H. 4. 20. b. 3 H. 6. 30. b.] See the notes to pl. 2. ſupra.

[4. But *otherwiſe* it is *in* a writ of *debt*. 11 H. 4. 41. b. 43. b. becauſe the place of contract does not appear in the writ. 14 H. 4. 20. b. 3 H. 6. 30. b. 2 E. 3. 62. b.] See the references at pl. 2. ſupra.

[5. The *ſame* law *in detinue*. 3 H. 6. 30. b.] Fol. 405.

See the references at pl. 2. ſupra.

[6. *But* theſe caſes are to be *intended when the writ is brought in a county within which the franchiſe is*, for there it may be, that Fitzh. Conuſans, pl. 3. cites S. C.

—Br. Conuſans, pl. 3. cites S. C.

the contract was within the franchiſe, or without in the county, for this ſtands indifferently by the ſuppoſal of the writ, and ſo *the truth cannot be known by the writ before the count.* 3 H. 6. 31.]

Br. Conuſans, pl. 3. cites S. C. ——Fitzh. Conuſans, pl. 3. cites S. C.——S. P. Jenk. 34. pl. 66.

[7. *But if* all *the town be a county by itſelf*, and no franchiſe within it, as Briſtol, there, becauſe they are aſcertained by the writ, they ought to demand conuſance *at the firſt day.* 3 H. 6. 31. adjudged.]

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Fitzh. Conuſans, pl. 24. cites S. C. —Br. Conuſans, pl. 21. cites S. C. he ought to challenge it at the day of the return of the original, viz. the firſt day, and every day after, and his challenge ſhall be entered, and yet he ſhall not have it allowed till the plaintiff and defendant are in court; per Cur.

[8. In a writ, if conuſance be not demanded *at the return of the original*, they ſhall *not* have conuſance after at the return *of the capias;* * for though upon the return of the original the defendant made default, and ſo the conuſance cannot then be granted, yet the demand *ought to be at the firſt day*, and this *ſhall be entered.* 14 H. 4. 20. Curia.]

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Br. Conuſance, pl. 1. cites 3 H. 6. 10.

[9. In an *aſſiſe againſt two*, if the aſſiſe be *awarded againſt one by default*, if conuſance be after demanded for the other that appears, it ſhall not be granted; for the *Court is ſeiſed* by the default of one, and the original is intire. 3 H. 6. 10. 14. b.]

Aſſiſe of land in G. the *bailiffs of G. demanded conuſance* of the plea, and the *plaintiff ſaid, that the ſame day another aſſiſe was awarded of tenements in G. and they did not demand the conuſance, and ſo have ſurceaſed*, &c. and yet they ſhall have conuſance, for they may demand it in one action, and omit it in another action. Br. Conuſance, pl. 2. cites 3 H. 6. 14.

[10. *But* if a man brings *ſeveral aſſiſes*, and *one is awarded by default*, yet for the other conuſance ſhall be granted upon demand at the ſame day; for he hath *election* to have conuſance of any which he pleaſes. 3 H. 6. 14. b.]

S.P. though they that demanded conuſance *ſaid that this default is by collufion* between the plaintiff and the tenant to make them loſe their conuſance, and prayed that it may be *oppoſed*, &c. and notwithſtanding it was awarded a default, and none appeared, then, by the default, the Court is intitled to award the aſſiſe by default. Br. Conuſance, pl. 26. cites S. C.——Br. Default, pl. 36. cites S. C.——Fitzh. Conuſans, pl. 7. cites S. C.

[11. *In* an *aſſiſe*, if the *tenant makes default* by which the aſſiſe is to be awarded by default; if conuſance is demanded *before the aſſiſe is awarded*, yet it ſhall *not* be granted. 8 H. 6. 7. b. adjudged.]

Fitzh Conuſans, pl. 71. cites S. C.—— Br. Conuſans, pl. 37. cites S. C. and Brooke ſays it ſeems to him, that he ſhall have conuſance in this action.

[12. In *treſpaſs againſt two*, if *one makes default*, and the *other* comes and *pleads not guilty*, conuſance may be *demanded now though* it ſhall *not* be *granted till the other comes*, yet this demand ſhall be *entered*, and he ſhall have it when the other appears. 22 Aſſ. 50.]

[13. In treſpaſs againſt two, if conuſance be not demanded every day of the proceſs continued, it ſhall not be granted, for it *ought to be demanded at every day of the proceſs continued.* 22 Aſſ. 83.]

14. In

14. In præcipe quod reddat, J. N. demanded conuſance, and had it *after the tenant had made attorney in Bank, and day given in the franchiſe*, and *at the day the tenant caſt eſſoin*, and the *demandant challenged it*, becauſe he had made attorney in Bank, who is not removed, and there it is awarded that the attorney in Bank ſhall remain in the franchiſe till he be removed; quod nota; that this is of record in the franchiſe, and yet the warrant was not ſent to the franchiſe, nor was it compriſed in the record which was ſent into the franchiſe that he is attorney there, and yet judgment ut ſupra. Br. Conuſance, pl. 25. cites 21 E. 3. 45. Br. Peremptory, pl. 51. cites 21 E. 3. 61. [S. C.] this eſſoign is not good, and therefore they ought to award ſeiſin of the land, or petit cape, per Seton; the reaſon ſeems to be there, inaſmuch as the party ought to have ſued reſummons in this caſe; quære, for it was not adjudged in that point. Br. Peremptory, pl. 51. cites 21 E. 3. 61.

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15. The *difference* with reſpect to the time of claiming conuſance is laid down to be, that *where the matter is local*, ſo that it appears upon the face of the record that there is ground for ſuch a claim, it muſt be made primo die, viz. when the writ was returned; but where the matter is *tranſitory*, it muſt be made upon the day given to plead. 10 Mod. 127. Arg. cites 11 H. 4. 41. and ſays, the reaſon is, that otherwiſe there would be a failure of juſtice, unleſs ſuch claims were *made as ſoon as poſſible*. Fitzh. Conuſance, pl. 19. cites S.C. & S.P. by Thirning.

16. Conuſance may be demanded as well *upon the original* as upon the reſummons, and the cauſe may be traverſed as well upon the one as upon the other. Br. Conuſance, pl. 5. cites 34 H. 6. 53.

17. *Præcipe quod reddat*; the *tenant is eſſoined*, and *no challenge entered to claim any conuſance of plea*, there, *at the day of eſſoin*, if he demands conuſance, he ſhall not have it; for the *court is ſeiſed* without challenge; quod nota. Br. Conuſance, pl. 6. cites 35 H. 6. 24.

18. *Replegiare* was *removed out of the county into B. R.* and *defendant took continuance; and at the day the ſame defendant demanded conuſance*, which was diſallowed, becauſe demanded after the continuance, and not the firſt day; beſides, himſelf being defendant, knew well when he diſtrained; and whether it was within his *juriſdiction* or not, and alſo his *charter*, by which, &c. *bore date in the time of William the Conqueror*, before time of memory, and *allowed in Bank, but not in eyre*, and therefore was diſallowed. Br. Conuſance, pl. 51. cites 9 H. 7. 10.

19. *And* per Curiam, conuſance may be demanded by *attorney*, and ſo ſee that *allowance in Banco without allowance in eyre* ſhall not ſerve; *but other charters and records, which are not of liberties*, may be allowed though they are before time of memory, and there was exception taken becauſe the charter had not theſe words *licet fuerit pars*. Ibid.

20. As to the time, it muſt be demanded *before an imparlance*, and *the ſame term the writ is returnable, after the defendant appears*, becauſe till he appears there is no cauſe in Court, otherwiſe there would be a delay of juſtice; for if after imparlance, when the defendant has a day already allowed him, he would have two days, ſince when the conuſance is allowed, the franchiſe prefixes

prefixes a day to both parties to appear before them, and it is the lord's laches if he does not come ſoon enough not to delay the parties. Gilb. Hiſt. of C. B. 158.

21. In indeb. aſſ. the *bail was put in in Eaſter term.* The *5th day in Trinity term the univerſity* of Cambridge came and *demanded conuſance* (in a proper manner). The *entry is of the laſt term.* It being objected that this was irregular, becauſe the defendant not pleading within four days of Trin. term, he ought to have an imparlance; to which it was anſwered, that *the demand* of conuſance *was ſo late becauſe of an agreement between the plaintiff and defendant's attorney;* but it was ſaid per Cur. that the *demanding of conuſance is a tranſaction between the two courts, and* it *muſt be done in court, and not between the attornies.* It *muſt be demanded either by the party that claims it, or by his bailiff or attorney, and not by the defendant.* (N. B. The record here was entered up without an imparlance, but it was now prayed to be done.) This cannot be a plea of Eaſter term, becauſe it came not within four days. The antient practice was, to make all pleading at the bar, but now the giving the pleadings to the plaintiff's attorney in writing is inſtead thereof. In this matter the former method is to be purſued, becauſe the Court may ſee that there is juſt ground of conuſance. The party may reply, that the cauſe does not come within the conuſance demanded, but ſtill the Court is concerned; for a day muſt be given over; the defendant's attorney cannot confeſs this, but the party, who claims it, muſt come into court,
[589] and produce his letters patents. Here the plaintiff might reject the imparlance, and yet upon praying that imparlance an allowance of conuſance is demanded. This demand by the attorney is nothing. It is a queſtion of juriſdiction between the two Courts. If the Court here ſees that there is ſuch a juriſdiction, they are to ſend a tranſcript of the record to the court below, and to give the parties a day. If the lord will not proceed at the day given, the Court here may reſummon the party, &c. Hereupon a rule was made, that the record ſhould be ſet right, and an imparlance entered, and then it will be the ſame thing as if the lord had come into court the 5th day. Mich. 11 Ann. B. R. Penn v. Manners.

22. And in Hill. term the charters were produced, and an exemplification of an act of parliament which confirmed them. It *appeared that this was an excluſive juriſdiction* granted, &c. viz. *that no juſtices or judges ſhould intermeddle, &c. and that the party ſhould be ſued before the Chancellor, &c. ſolummodo & non alibi.* There is a difference between a conuſance generally, and an *excluſive conuſance;* for the latter *may be* either demanded by the lord, or *pleaded by the party;* the lord ought to come the day he knows that his franchiſe is invaded. The juriſdiction here granted by the charter being ſuch as was inconſiſtent with the common law, there wanted an act of parliament, or elſe the charter could not ſubſiſt. There is no hardſhip in coming in the firſt day, viz. the day the declaration is delivered, which day is enlarged, and if the party comes within four days of the ſubſequent term, it is as if he came in of the former term; if the party lives within the juriſdiction, it muſt be known when he was arreſted; if he did

not live there no juſtice can be done by them; the caſe of an eſſoin is the ſame with the caſe here; for that is an excuſe to the Court to let them know he cannot come, and therefore it would be odd that he ſhould be excluded from pleading any plea that he lawfully might; but though this is the firſt day to the party, yet it is the ſecond day to the lord; ſo it is in caſe of an imparlance, for that is the ſecond day to the lord. *As to the manner and time of demanding it, the charters and act are ſilent*, but every thing ought to be laid before the Court, togethtr with the condition and circumſtances of the party, whether he be a member or ſervant of the univerſity; this is a fact triable by the Court here; the *lord need not come at the return of the writ, for nothing in this caſe appears, till the declaration, how the debt did ariſe*; but if he might come at any time, the plaintiff would be at a great diſadvantage. The authority of *Hard. 505, 506. as to what Ld. Ch. B. Hale ſays, is of little weight, neither is there any thing in that caſe to the purpoſe here; what Hale ſays that any one may demand conuſance, cannot be maintained; it is not only the right of the univerſity, but it is alſo of the party, if he will plead it; and ſhall a ſtranger come and obtain this? *The proceedings here, in caſe of an excluſive juriſdiction, are not merely null and void, though the charter ſays, that all writs ſhall be null*; it is but a franchiſe which doth not take away the juriſdiction of Weſtminſter-Hall, unleſs it be claimed; *a conuſance generally muſt be demanded, but an excluſive one may be either pleaded by the party, or demanded by the lord.* If it were a mere nullity, treſpaſs would lie againſt the ſheriff or officer; but it is a franchiſe, which muſt be claimed, and if it is ſo, it ſhall be allowed, but it doth not take away the juriſdiction of the courts here. In caſe of a bare conuſance, a day is given to the parties only, and a tranſcript is ſent hence, and if upon this there is a failure of juſtice below, there ſhall be a reſummons, but in the other caſe there is a ſtop, for there is no day given, as where the party pleads it. The crown could not grant pleas, to proceed ſecundum leges & conſuetudines of that place, but it could be only to proceed according to law, and therefore the act was of uſe to enable them to proceed by another method than the law did allow of, whereupon coſts were prayed, ſed non allocatur. Hill. 11 Ann. B. R. Pern v. Manners, alias Cambridge (Univerſity's caſe).

* The caſe of Caſtle v. Litchfield.

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23. An action of treſpaſs was brought in Trin. term 12 & 13 Geo. 2. for an *aſſault and battery, and falſe impriſonment*, by an attorney of this court.

Defendants in the ſame term plead a joint plea, viz. as to the wounding, and part of the impriſonment, not guilty, and as to the reſt, they *plead ſpecially the privileges of the univerſity* of Oxford, and ſet forth the charter, and the act of parliament of the 13 Eliz. by which the charter is confirmed; *that defendant* Trahern *is proctor* of the univerſity, *and, as ſuch, has power to apprehend any perſon making diſturbance within the univerſity; that finding the plaintiff making an affray late at night, he commanded him to keep the peace, but that inſtead thereof the plaintiff beat the defendant, whereupon*

whereupon defendant laid his hands gently upon him, and committed him to gaol; that the other defendant, Etty, is gaoler of the gaol, and received him, being ſo lawfully committed, and traverſe their being guilty of any other treſpaſs.

Plaintiff imparles till Mich. term, and then replies, and admits the privileges of the univerſity, &c. but *denies the facts* for which they impriſoned him, *and ſays they took him of their own wrong without ſuch cauſe, and tenders an iſſue upon the fact* of the diſturbance.

After this the univerſity of Oxford, (by the Chancellor,) comes and *claims conuſance*, ſetting forth the privileges of the univerſity, and relying principally upon a charter of the 1ſt of April, 14 H. 8. by which the king grants to the univerſity the conuſance of all cauſes, where either plaintiff or defendant is a member thereof, though the cauſe of action ariſe in any part of the kingdom, with an excluſive clauſe that no juſtice (and particularly mentions the judges of this court) ſhall preſume to intermeddle in any caſe ariſing within the juriſdiction of the univerſity. They then ſet forth the ſtat. of Eliz. which confirms all their privileges, and conſequently this of the excluſive juriſdiction, and that this conuſance was allowed to them in Eaſter term, 9 Ann. B.R. and thereupon claim conuſance of the cauſe.

Upon this caſe two queſtions ariſe, 1ſt, Whether the univerſity have claimed this conuſance in time or not? 2dly, If they have, whether they are intitled to the conuſance of this particular cauſe?

But the firſt only has been ſpoke to, becauſe if we are of opinion againſt the univerſity upon that, it will be unneceſſary to determine the ſecond.

And upon great conſideration we are of opinion, that the univerſity have not claimed in time, both from the reaſon of the thing, and from ſeveral authorities in which this has been determined.

The time required for the univerſity to come in is before imparlance, whereas in this caſe they have not come till after plea and replication.

And though this is ſaid to be hard upon the univerſity, becauſe they may not know any cauſe was depending, and therefore could not come ſo early, yet we think it would be much harder, on the other ſide, if it was otherwiſe; for if not till after imparlance, or plea pleaded, when are they to come? They may as well come at any time before judgment, and this would create great delay and expence, if after matters are brought to a ſingle iſſue to be tried, the univerſity can come and make all go for nothing.

Beſides, the univerſity, when they come to judge, muſt judge not according to the law of the land, but the civil law, and though it muſt be that the party be tried by another law than that of the land, when an act of parliament gives ſuch a juriſdiction, and it is not in the power of the courts at Weſtminſter to help it, yet we are to take care to keep it in its due bounds,

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and

and that it be claimed in proper time. This juriſdiction is ſo contrary to the laws of the land, that it could not be granted even by the king himſelf, unleſs by act of parliament; for it has been determined, that it is *not in the power of the crown to create a new court of equity*, becauſe ſuch a court does not proceed according to the rules of law. And the ſame reaſon holds as to this court of the univerſity, which determines men's properties without juries, and by a different law; ſo that without an act of parliament no ſuch conuſance at all could be allowed to the univerſity; and this was the opinion of the Court in the caſe of *Bourne v. Manners, Hill. 11 Ann. B. R. where the univerſity came five days after imparlance, and the Court held it was too late, that they ought to have come the firſt day, to prevent a delay of juſtice, and becauſe it took away the law of the land; and accordingly the claim was diſallowed. Indeed, it was not the caſe of this univerſity, but of Cambridge; but upon comparing the two charters, that of Cambridge has rather, if poſſible, a larger excluſive juriſdiction, ſo that it is a caſe in point.

* Alias Perne v. Manners. See pl. 21, 22. ſupra, and tit. Univerſity (K) pl. 12.

In that caſe were cited two caſes in the Year-books, one in 6 H. 7. 9. b. the other in 16 H. 7. 16. a. where it was expreſsly adjudged, that to claim conuſance the party muſt come before imparlance.

This caſe was cited and allowed, and the Court were of the ſame opinion in the caſe of ..... v. Warren, 12 Geo. 1. B. R.

The ſame point was determined in the caſe of this very univerſity, Trin. 1 Geo. 2. Wood v. Graham, according to a note I have had of it from a gentleman at the bar.

As to the caſes cited, that in Latch. 83, 84. where it is ſaid, that an ancient demeſne may be pleaded after imparlance, was cited as a parallel caſe. But it is remarkable, that the Court in allowing it, admitted it to be a ſingle caſe, and ſaid it was otherwiſe in all other caſes except that; and when one conſiders the particular caſe of *ancient demeſne*, it *ſtands upon a quite different reaſon*, inſomuch that a man may come after judgment; for though a fine be perfected, or a judgment in a real action given, yet the tenant may come and reverſe the fine or judgment by writ of deceit; and the reaſon is, becauſe if he was not allowed to do it, he would loſe the privilege of ancient demeſne for ever; for ſo long as ſuch fine or judgment ſtands in force, it appears to be land pleadable at common law. But the preſent caſe is very different, for though we ſhould diſallow this claim of conuſance, the univerſity will only loſe it as to this particular cauſe; but their juriſdiction remains the ſame in any other cauſe, provided they come in time.

Another caſe was laid before me, determined ſo long ago as Hill. 12 E. 3. in the court of Exchequer, where, in an action of treſpaſs, the Court granted a writ, directed to the univerſity of Oxford, to have the conuſance of the cauſe, non obſtante that they did not claim it at the return of the writ, but ſtaid till the parties had pleaded; but this determination is expreſsly contrary to

to the opinion we are of, and eſpecially as it is not only before the ſtat of Q. Eliz. but even before the charter of H. 8. upon which the univerſity put their caſe, ſo that I can pay no regard to the authority of it, but muſt conſider it as the effect of power, and not of judgment.

See tit. Univerſity (K) pl. 12.

One more was mentioned, and that was the caſe of ALDRIDGE v. DR. STRATFORD in Canc. Trin. 12 Ann. where Lord Harcourt determined contrary to our opinion, but as it was a judgment given without one ſingle reaſon, and contrary to ſtrong and unanſwerable reaſons given by himſelf a little before in the ſame cauſe, I have no regard to it. I ſhall never pay any regard to a judgment founded either on fear or favour.

[592] As to the ſecond queſtion, whether the univerſity's privilege will hold in the caſe of an attorney, as we have rejected the claim of conuſance, being made too late, it is not neceſſary to ſay any thing upon it, but as it may hereafter come in queſtion, I would mention ſome caſes which may be proper to be conſidered, viz. in Litt. R. 304. 1 Roll. 489. 3 Leon. 149. the privilege of an attorney's ſuing in his proper court will be preferred; for it is a privilege time out of mind, and is for the ſake of juſtice, and all the people of England, and that therefore a king's charter will not deprive him of it, nor even an act of parliament, without expreſs words.

I ſhall be as tender of the privileges of the univerſity as any man living, and have a great veneration for that body, yet I ſhall always endeavour to ſupport trials by juries, upon which all that we have, our liberties and properties, and lives depend, and prevent the incroachment of any juriſdiction whatever. The conuſance was diſallowed. Per Willes Ch. J. Mich. 14 Geo. 2. C. B. Wells v. Trahern and Etty.

(M. 2) Conuſance; how to be demanded and entered. Proceedings and Pleadings.

1. ACcount; conuſance was demanded by the *mayor and bailiffs of Coventry*, and they *ſhew a charter* to this purpoſe; *the demandant does not counterplead the franchiſe*, but a *ſtranger to the plea aſſigns reaſons to the Court, that this franchiſe ought not to be allowed*; & non allocatur. If the *demandant in a plea of land counterpleads the franchiſe*, and the tenant joins with the claim of the franchiſe, and it is found againſt the franchiſe, the *demandant ſhall recover* the land; *but if* it be found *againſt the demandant, the writ ſhall abate*. Jenk. 18. pl. 32. cites 20 E. 3. Fitzh. Conuſance, 46.

2. The king grants *conuſance* to A. *of pleas ariſing within certain bounds*; the *king grants to B. the like conuſance within the ſame bounds*; C. brings a præcipe quod reddat againſt D. for land within thoſe bounds; *both A. and B. claim conuſance*; the *demandant and tenant agree to the conuſance, but the tenant did not join with*

with either of the patentees. This controverſy between the patentees ſhall not be tried in this caſe, becauſe of the delay of the demandant, which ſuch trial would occaſion; but by all the counſel the *conuſance in this caſe ſhall not be granted to him who firſt demanded it;* and the *right of the ſaid patentees ſhall be tried in another action between them.* Jenk. 19. pl. 36. cites 20 E. 3. Fitzh. Conuſance, 46.

3. In aſſiſe, a man may challenge a franchiſe *by attorney, if he has warrant* to challenge the liberty; quod nota; per Berff. and ſo it is uſually done for the city of London in the Exchequer, B. R. and C. B. Br. Conuſance, pl. 36. cites 22 Aſſ. 14.

Conuſance of pleas is not well demanded by attorney, unleſs he has a warrant of attorney in Latin, and he muſt have it preſent in court, and ſaying that it is in his chamber, is not ſufficient; per Cur. Sid. 103. pl. 9. Hill. 14 & 15 Car. 2. B. R. The Biſhop of Ely's caſe.

4. *Treſpaſs againſt two* in the city of York; the *one came, and the other made default,* and *he who appeared pleaded not guilty,* and the *bailiffs of York prayed conuſance* of the plea, and Thorp *made them enter the claim, and give idem dies to the other,* for the miſchief of the franchiſe; quære, if by this he ſhall have conuſance in this caſe? or if he ſhall ſave it hereafter? Brooke ſays, it ſeems to him, that they ſhall have conuſance in this action, for in other actions he ſhall have conuſance, though he did not demand it now. Br. Conuſance, pl. 37. cites 22 Aſſ. 50. [593]

5. Note, that by conuſance of pleas granted by the king, the franchiſe *ſhall make ſuch uſual proceſs and execution as is at common law,* for all this appertains to the conuſance of pleas. Br. Grants, pl. 171. cites 22 Aſſ. 61.

6. In account conuſance of plea ſhall *not be alleged by the defendant, but* ſhall be *demanded by the bailiff of the franchiſe;* per Thorp J. and per omnes, and otherwiſe it ſhall not be granted; quod nota. Br. Conuſance, pl. 31. cites 39 E. 3. 17.

There is a *diverſity between a franchiſe to demand conuſance,* and a franchiſe *ubi breve domini regis non currit*; for *in the firſt caſe* the tenant or defendant ſhall not plead it, but the *lord of the franchiſe muſt demand* conuſance, but *in the other* caſe the *defendant may plead it to the writ.* 2 Inſt. 224. cap. 42. cites in Marg. 39 E. 3. 17. 30 Aſſ. 1. 8 E. 3. 22.

7. Reſummons is ſued out of a franchiſe for failure of right for conuſance of the plea granted, and the *bailiff* came and *traverſed the cauſe,* and *his challenge was not entered upon the eſſoin,* which was *caſt by the tenant upon the reſummons.* Br. Conuſance, pl. 66. cites 39 E. 3. 17.

8. Note, that the defendant cannot *challenge the franchiſe, inaſmuch as conuſance of plea is granted there,* but the bailiffs of the franchiſe ſhall demand it. Br. Conuſance, pl. 67. cites 39 E. 3. 17.

9. *Contra* it ſeems where it is granted *that none of the vill ſhall be impleaded but in the vill before the ſteward,* &c. For in this every inhabitant has intereſt. Contra of conuſance of pleas granted; note a diverſity. Ibid.

10. Where conuſance ſhall be granted *nothing ſhall be ſent into the franchiſe but the original,* and this at ſuch time as the franchiſe may do right to the parties, as the court of the king may; quod nota. Br. Conuſance, pl. 8. cites 40 E. 3. 2.

11. Record

11. Record which is *removed* out of a franchiſe *by error* ſhall be *ſent into Chancery, and thence into B. R.* by mittimus. Br. Cauſe a Remover, pl. 46. cites 44 E. 3. 37. 48 E. 3. 20. and 49 E. 3. 21.

12. Where record is removed *by foreign plea, it ſhall be at iſſue before the removement*, and when it is removed, the *Bank can do nothing but try this iſſue*, and can *not take plea to the writ after the laſt continuance.* Ibid.

13. *Aſſiſe* in com. Warwick. The conuſance was demanded by the mayor, &c. and in Coventry the tenant pleaded foreign plea, by which the parol was demanded before the juſtices of aſſiſe, but non patet how. It ſeems that this ought to be by *re-attachment* clearly *to give the parties day in court*, and this was the practice in the court of the biſhop of Ely, who had conuſance extra comitatum of Canterbury; the *tenant in Ely pleaded baſtardy in the plaintiff in aſſiſe*, and the plaintiff ſaid that he was mulier, and not baſtard, and *becauſe the juſtices of the bp. did not write to the bp. the plea was remanded before the juſtices of aſſiſe*, and the bp. demanded conuſance again, but could not have it, quod nota. Br. Parol, or Plea remanded, pl. 3. cites 22 H. 6. 58.

14. The *cauſe is traverſable always where the nature of the land ſhall be changed, and* where *a third perſon is to be prejudiced*, and *not where it is removed out of one court of the king into another.* Br. Cauſe a Remover, pl. 8. cites 34 H. 6. 48.

15. To the demand of conuſance *upon the original* the demandant may *ſay that the land is out of the franchiſe, and join iſſue*; quod nota. Br. Conuſance, pl. 5. cites 34 H. 6. 53.

[594] 16. In *præcipe quod reddat* the *tenant is eſſoined*, and *no challenge entered to claim any conuſance of plea* there, *at the day of eſſoin*, if he demands conuſance he ſhall not have it; for the *court is ſeiſed* without challenge; quod nota. Br. Conuſance, pl. 6. cites 35 H. 6. 24.

* S. P. Br. Cauſe a Remover, pl. 8. cites 35 H. 6. 24. and 54.

17. *And* after * *iſſue was taken that the land is out of the franchiſe*, by reaſon that a challenge of the franchiſe at the day of eſſoin was found upon the remembrance of the clerk of eſſoins, *and the tenant demanded the view*, and could not have it, becauſe *this iſſue ſhall be firſt tried*, by which the tenant was compelled to join to the one or the other, and ſo he did to the demandant. Ibid.

18. Treſpaſs againſt the *abbot* of B. who *who appeared by one attorney as party, and* appeared *by another attorney, and ſaid, that the place where*, &c. *was within his liberty*, &c. *and demanded conuſance of the plea before his bailiff*, by which *day was given to be adviſed*, and at the day he demanded conuſance to be allowed; and per Moyle, he ought to ſhew cauſe, and alſo he has loſt it by reaſon of the day which was given over; but per Priſot, Aſhton, Danby, Davers, and Needham, conuſance ſhall be granted; for the *day given* [does not] ouſt the matter, becauſe he challenged it before, and alſo it is of record here, that the liberty has been at another time allowed; for to the firſt demand of the conuſance he ſhall ſhew cauſe, as letters patents of the king, &c.

and

and *writ of allowance*, which *ſhall be entered of record*, and then this ſuffices after, upon which, by Priſot, he ſhall have conuſance, quod Cutia conceſſit, though he was *party*, for his bailiff or *ſteward before whom*, &c. *may be indifferent*, as the juſtices are between the king and party, *and if not, it is a failure of right*, and the party may have reſummons, by which, the defendant traverſed the cauſe, and ſaid, that the place is out of the liberty, &c. and held there that the defendant ſhall join to the one or to the other. Br. Conuſance, pl. 7. cites 35 H. 6. 54.

19. He who has conuſance of pleas *may demand* the conuſance *in perſon, or by bailiff, or by attorney*, but the *bailiff cannot make attorney to demand* conuſance *for his maſter; contra of the immediate attorney of the maſter*. Br. Conuſance, pl. 50. cites 6 H. 7. 9.

20. The king granted to the burgeſſes of Pomfret, *that they ſhall implead before themſelves, and that no burgeſs ſhall implead another of any thing done in P. but in the ſame vill, and that they ſhall not be impleaded in another place*, but there *of any thing done there*, and in treſpaſs againſt A. D. he ſaid, that he was burgeſs of P. and that it appeared that the treſpaſs was done in P. as appears in the declaration, judgment of the writ; and by judgment the writ was abated; quod nota; and it was not by demand of conuſance, but by plea of the burgeſſes, and per Keble, this judgment ſhall ſerve all other burgeſſes hereafter without ſhewing their charter again. Br. Conuſance, pl. 52. cites 9 H. 7. 12.

21. When a *lord demands conuſance* of pleas, *day ought to be given to the franchiſe*, otherwiſe it is a diſcontinuance of the niſi prius; for there ought to be a ſpecial day for the parties here to hear judgment in this. Lane, 81. Arg. cites 10 H. 7. 26. [but it ſeems that the book is miſcited.] Lane, 87. Arg. ſays, that *this is where the plea is to be ſent into another court, as Durham*, &c. where the parties had no day before, and that there a day ought to be given. See Fitzh. Jour, pl. 17. Mich. 14 E. 3.

22. In an *action brought againſt an attorney of C. B. for aſſaulting the plaintiff in the city of Wells*, the *biſhop of Bath and Wells, by his attorney demanded conuſance of* all pleas of land, &c. within the ſaid city and liberty of Wells, and of *all perſonal pleas of debt and treſpaſs*, &c. granted by King E. 4. to the then biſhop of Bath and Wells, and his ſucceſſors, and alſo ſhewed letters patents of Q. Eliz. in confirmation of the ſaid grant of E. 4. and alſo her cloſe writ directed to the juſtices to permit him to enjoy his liberties, and thereupon the conuſance was allowed. Bendl. 233, 234. pl. 262. Mich. 16 Eliz. Whoper v. Harewood. [595]

23. On a plaint levied in Yarmouth againſt T. S. he was committed, and being removed into B. R. by *habeas corpus* cum cauſa, the *plaintiff ſhewed a charter* granted to the bailiffs of Y. *that every perſon of that place ſhould be impleaded there, and not elſewhere*, and prayed a procedendo, but it was denied, becauſe B. R. cannot be ouſted of their juriſdiction without ſome matter of diſcharge pleaded and recorded, and this habeas corpus being directed to the *bailiffs*, &c. they *might* as well *have returned this charter* as the cauſe, and then the procedendo ſhould be granted; but by their

not doing ſo, they have loſt that advantage. Roll. Rep. 232. pl. 1. Mich. 13 Jac. B. R. Sterling's caſe.

24. It ſeems, that the conuſance is *demandable* by the lord of the franchiſe, and *not pleadable* to the juriſdiction by the party. Lev. 89. Hill. 14 & 15 Car. 2. B. R. obiter.

25. The *warrant of attorney* to demand conuſance *ought to be filed in court*. Lev. 89. cites Paſch. 18 Car. 2. B. R. per Cur.

2 Keb. 26. pl. 54. S.C. accordingly, and if he do not keep his day the party may return.

26. In caſe of conuſance *where the lord is party, entries ſhall be made on the roll of the day and place when he will try the cauſe before his ſteward*; per Cur. agreed. Sid. 283. pl. 16. Paſch. 18 Car. 2. B. R. Grange v. Simpſon.

1 Salk. 183. pl. 1. S. C. ——Carth. 109. S. C.

27. In *ejectment for lands in the iſle of Ely*, after not guilty pleaded it was ſuggeſted on the roll, the privilege of the county palatine, that no jury ſhould be returned out of the iſle, and ſo a *venire facias was prayed to R. the next vill in the county of Cambridge, et quia videtur juſticiariis hic rationi conſonans ei conceditur*; it was *objected, that the defendant's confeſſion ſhould have been entered likewiſe on the roll*, (viz.) *et quia defendens hoc non dedicit ideo ei conceditur*, but adjudged, though ſome precedents are ſo, yet either way is well enough; for if the fact is otherwiſe, he may bring a writ of error, and aſſign it for error. 3 Salk. 110. pl. 1. Hill. 2 W 3. B. R. Cotton v. Johnſon.

Carth. 109. S. C. the plaintiff had judgment.

28. Then it was objected, that the entry ought to have been quod liberi tenentes nec reſidentes in eadem inſula non aggredi debent ad aliquam juratam extra libertatem illam faciend'; for otherwiſe it doth not appear to be a privilege annexed to the inhabitants, but a mere cognizance in the biſhop; however, *the trial being in the county of Cambridge, of which this is parcel, the court held it to be aided by the ſtatute* 16 & 17 *Car.* 2. *cap.* 8. 3 Salk. 110. pl. 1. Hill. 2 W. 3. B. R. Cotton v. Johnſon.

29. *Ejectment in* court of *Ely removed by certiorari*, Serjeant Wright demands conuſance for the biſhop of Ely, being a royal franchiſe, and Stone had a warrant of attorney for that purpoſe; Holt ſaid, *there muſt be a new declaration in this court, and then after the defendant's appearance, the conuſance is to be demanded*, for the defendant may counterplead the conuſance, but if he will not appear you may have a procedendo; we muſt have a roll made of it, that the Court may be poſſeſſed, then we appoint a day upon the roll, and *if you do not hold your next aſſiſe, you loſe your conuſance*, it is a continuance [diſcontinuance] of your plea. Day was given to ſhew cauſe why there ſhould not be a procedendo. Comb. 319. Hill. 6 W. 3. B. R. Wild v. Villers.

30. One may *preſcribe* to hold pleas, but not to have conuſance of pleas; for that excludes other juriſdictions; per Holt Ch. J. Cumb. 282. Trin. 6 W. & M. in B. R. in caſe of Millard v. Cole.

[596] Ld. Raym. Rep. 475. Trin.

31. In *treſpaſs* quare clauſum fregit *removed by certiorari into B. R. and bail put in, conuſance was demanded* for the biſhop of Ely; and firſt, the *warrant of attorney under* the biſhop's *ſeal was*

read in Latin, and *then the record* as it was, *viz. treſpaſs*, &c. and then the record proceeded, *et modo ad hunc diem venit* Simon Epiſcopus Elienſis per Johannem Stone attornatum ſuum, *& petit cognitionem, &c. quia dicit, that the place where, &c. is within the liberty* of the biſhop; *& quod alias, ſcilicet, Mich.* 20 *Edw.* 3. *B. R. Rot.* 44. *in treſpaſs and battery, and Hill.* 21 *E.* 3. *Rot.* 21. *B. R. in treſpaſs, quare, &c. and Hill.* 17 *&* 18 *Car.* 2. *Rot.* 229. *B. R. in treſpaſs and ejectment, and Mich.* 35 *Car.* 2. *B. R. Rot.* 151. *in treſpaſs, aſſault, and battery, this conuſance was allowed, and he prays his privilege habendi cognitionem*, and then *the entry proceeds, quæſitum eſt of the plaintiff, ſi quid dicere queat, &c. ſuper quo allocatur, &c.* and then *day is given upon the roll to the parties at Ely, & dictum eſt to the biſhop quod celeris juſtitia fiat.* The two late records were produced, in court, but becauſe the old records were not produced, and becauſe it was the laſt day of the term, and therefore unfit for ſuch a motion, and becauſe Holt Ch. J. doubted of the manner, it was adjourned; for Holt Ch. J. ſaid that the true method of pleading ſhould be, to lay uſage immemorial, and not to rely upon it, but to produce the allowance in B. R. or in eyre, and this is agreeable to the reaſon of the law; for ſince ſuch privileges do not lie in preſcription, but in grant, that alone cannot be a title to them, but becauſe that if the charter was before time of memory, &c. before the firſt of R. 1. the ſaid charter could not be pleaded, therefore by the ſtatute of quo warranto, 18 E. 1. one may lay a uſage, which is an argument of an ancient grant time whereof, &c. and then ſhew the allowance; but if no ſuch uſage hath been, then the preſumption of the law is deſtroyed, and they muſt ſhew the patent; for allowances in B. R. or in eyre are not pleadable. See Foſter v. Mitton. See Kelw. 189, 190. 1 Sid. 103. It will be difficult to maintain this method of pleading. In the caſe of 17 & 18 Car. 2. Holt ſaid, he remembered, that no exception was taken to the manner of the demand. Adjourned. Ld. Raym. Rep. 427, 428. Hill. 10 W. 3. Foſter v. Hexham.

12 W. 3. S. C. was moved again, and then the conuſance was allowed niſi, &c. and Holt Ch. J. demanded a ſight of the record of the caſe in E. 3. but they had only a copy of it; upon which Holt ſaid, that the record itſelf ſhould have been in court, where the judgment is grounded upon the record, as it is here, the entry being in ſpectis record', &c. and he ſaid, that the demand ought to be entered as of Hill. term, and ſo continued, by Curia adviſare vult, &c. and he ſaid, that they had no need to have pleaded ſo many allowances, but they might have pleaded but one only, and have relied upon it, and cited 21 Ed. 4. 44. accordingly. For if a franchiſe lies in grant, and cannot be claimed by preſcription, the allowance in B. R. or eyre, or confirmation by patent, will be ſufficient. ——— 1 Salk. 183. pl. 2. Foſter v. Mitton. S. C. but no judgment. ——— Conuſance was prayed for the univerſity of Oxford, becauſe the defendant was a gent. commoner of Magdalen-hall, upon producing the chancellor's certificate, &c. and a rule was made to ſhew cauſe; and July 2. Trin. 1728, the rule was diſcharged. There was no ſuggeſtion nor entry of the claim made upon record. Cited Ld. Raym. Rep. 428. Paſch. 1728, as between Coote and Graham, and Paternoſter v. Graham.

32. The *lord only can take conuſance* of pleas, and neither the plaintiff nor defendant, for he cannot plead it to the juriſdiction of the Court, but the lord of the franchiſe, *by his bailiff or attorney, muſt come in and claim the franchiſe;* and though the lord ought to have the action, yet this court is not ouſted by it, but the plea remains under the controul of this court; for *day is given here* upon the roll to the parties *to be in the inferior court at a day certain*, and the parties are commanded there, and the tenor of the record of this court is ſent for the inferior court to proceed, and if juſtice is done there, all is well, but the record is here; and *if*

12 Mod. 643. S. C. and by Holt Ch. J. the *courſe is*, for the lord of the franchiſe by himſelf, his bailiff, or attorney, *to come into* the ſuperior *court, and produce his*

charter of conuſance, or, if it be very ancient, to ſhew an allowance of it in that court, and pray conuſance; and upon allowance of his claim, the Court above appoints him a day to bold this court on,

juſtice is not done there, as if the Court there does not proceed upon the day prefixed, or if the judge miſbehaves himſelf, &c. the plaintiff ſhall have a *reſummons*; and it is the benefit of the lords only, that it is conſidered in this matter; per Holt Ch. J. * 2 Lord Raym. 836, 837. Mich. 1 Ann. in caſe of Croſs v. Smith.

33. But he ſaid, that theſe juriſdictions were hardſhips to the ſubject, and *allowed* by 27 H. 8. cap. 24. *rather for their antiquity than for any other reaſon*, and they were detrimental to the prerogative of the crown, and therefore certioraries were always allowed to prevent the grievances of theſe inferior juriſdictions. Ibid.

and directs the parties to go down on that day, *and if juſtice be not done* below, the record remaineth here above; ſo that if juſtice be not done below, as if the defendant lives without the franchiſe, and has nothing within the franchiſe by which he may be ſummoned, or that the judge does not do right, the plaintiff may come up and ſhew this matter to the Court, and thereupon a *re-ſummons ſhall go upon the record here*, and the Court ſhall proceed to do juſtice here.

(N) At what Time it is to be granted.

[1. CONuſance ſhall *not* be granted *before the writ is ſerved*, as if the defendant ſays in an aſſiſe, that he was not attached by fifteen days, conuſance ſhall not be granted. 13 H. 4. 11.]

Fitzh. Conuſans, pl. 22. cites S. C.—Br. Conuſans, pl. 21. cites S. C.

[2. Conuſance ſhall *not* be granted *till* the defendant has made *defence*, for if he will not make defence, the plaintiff ſhall take advantage againſt him for his want of defence. 14 H. 4. 20.]

[3. In treſpaſs againſt two, if *one makes default*, and *the other appears and pleads*, and conuſance is demanded, yet it ſhall *not* be granted *till the other appears*, for upon a bill or writ, the Court cannot grant conuſance in part. 22 Aſſ. 50. adjudged.]

IV. In formedon, *the tenant was eſſoined, and day given till octab. Mich.* at which day *conuſance of the plea was granted* to the bailiffs of E. quod nota, *at the ſecond day*, et non patet ibidem, for it was challenged at the firſt day. Br. Conuſance, pl. 19. cites 11 H. 4. 87.

[N. 2] [*And how the Proceſs, &c ſhall be.*]

Br. Executions, pl. 121. cites S. C. & S. P. becauſe this is appurtenant to cognitio placitorum; per Thorpe, Baſſet, and Hank.——Br. Conuſans, pl. 38. cites S. C. & S. P. and for the ſame reaſon, and becauſe without that conuſance cannot be made.——Fitzh. Proceſs, pl. 177. cites S. C. & S. P. and for the ſame reaſon.

[4. When a court holds plea upon conuſance of a plea granted, the *proceſs* againſt the party *ſhall be by capias*, as other juſtices do. 22 Aſſ. 61.]

Br. Executions, pl. 121. cites S. C.—Br. Conuſans, pl. 38. cites S. C.—Fitzh. Proceſs, pl. 177. cites S. C. and all for the ſame reaſon.

[5. And they ſhall award the *grand diſtreſs*, if the cauſe requires it. 22 Aſſ. 61.]

[6. And

[6. And if he comes not, he ſhall *loſe* his iſſues. 22 Aſſ. 61.] Br. Executions, pl. 121. cites S. C.——Br. Conuſans, pl. 38. cites S. C.——Fitzh. Proceſs, pl. 177. cites S. C. and all give the ſame reaſon.

[7. *And if* the party is *convicted*, he ſhall be *fined or impriſoned*, *or* ſhall be *in* * *miſericordia* of him to whom conuſance is granted, if the caſe requires it, for without theſe, conuſance would be of no effect. 22 Aſſ. 61.] * Fol. 496. Br. Executions, pl. 121. cites S. C.——Br. Conuſans, pl. 38. cites S. C.——Fitzh. Proceſs, pl. 177. cites S. C. & S. P. and all for the ſame reaſon.

(N. 3) Allowed. In what Caſes.

1. IN aſſiſe, the bailiff of B. demanded conuſance, and the *tenant ſaid in proper perſon, that the tenements were not within the franchiſe*, and the aſſiſe came ready to paſs upon this point, whether it lies within the franchiſe or not? and the tenant at another day was demanded and came by bailiff, and becauſe this iſſue is between the bailiff of the franchiſe, and the tenant, out of the point of aſſiſe, it was adviſed to the Court, that the *bailiff of the tenant cannot be party to this iſſue*, by which the *default of the tenant was recorded*, and it was demanded of the *bailiff* of B. what he has to ſhew to have conuſance, and he *ſhewed record ſub pede ſigilli allowing it in aſſiſe in another county*; and it was ſaid that it is inſufficient; for he might have it granted in one county and not in the other; alſo the claimer of conuſance was of all his tenements within his fee, and the record did not make mention of ſo large a claim, but againſt the plaintiff the tenant was by bailiff, but not againſt the bailiff of the franchiſe; and they were adjourned into Bank, and there he ſhewed charter, and had the conuſance. Br. Conuſance, pl. 43. cites 28 Aſſ. 13.

2. Where a man brings aſſiſe of *land, part in a franchiſe, and part out*, the writ ſhall abate, per Cur. Br. Conuſans, pl. 23. cites 38 E. 3. 31.

3. Upon failure of right in a franchiſe, and a *reſummons* ſued, the court of the franchiſe ſhall never afterwards have conuſance of that plea. Jenk. 34. pl. 66. cites 11 H. 4. 27. Fitzh. Conuſance, 88.

4. Where the *ſuperior court is ſeiſed* of the plea, conuſance is not grantable. Jenk. 34. pl. 66.

5. *Nor* is it *grantable of a plea out of the county-court*; for this court cannot award a reſummons. Jenk. 34. pl. 66.

6. If the king grants *cognitionem placitorum extra curiam ſuam to J. N. and his heirs*, and *dies*, there the grant is void, becauſe he *did not ſay extra curiam ſuam & hæred' ſuorum*, but there a *confirmation of the new king* will ſerve; but Brooke ſays, quære; for *mirum*, where the grant is void before by the death of the king who granted. Br. Conuſance, pl. 63. cites 2 H. 7. 10.

7. *Grant*

* S. P. Jenk. 34. pl. 66.

7. *Grant* of conuſance of pleas * *before time of memory* ſhall not be allowed at this day, if it *has not been allowed* before *in eyre*. Br. Conuſance, pl. 65. cites 21 H. 7. 29.

8. *And* if it be granted in *B. and C.* and has been *allowed in B.* and *not in C.* it ſhall not be allowed in C. now, though the grant be intire; quod nota. Ibid.

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[599] 9. Though the *plaintiff and defendant are both inhabitants within the inferior juriſdiction*, yet in all *tranſitory actions* it is in the *plaintiff's election* to ſuppoſe or lay it where he will, as well out of the juriſdiction as within it. Sid. 103. Hill. 14 & 15 Car. 2. B. R. Biſhop of Ely's caſe.

10. Conuſance is not to be allowed in any caſe, if it *appears that by allowing it there would be a failure of juſtice*; as when they *cannot try the cauſe* becauſe it is *local*; but if this do not appear at the firſt, the cauſe ſhall be adjourned thither, and upon an eroneous and irregular proceeding, a *reſummons* lieth; per Hale Ch. B. Hard. 507. Paſch. 21 Car. 2. in the Exchequer, in caſe of Caſtle v. Litchfield.

(N. 4) Allowed. How. And to what Court. And the Effect thereof.

1. THE king *grants conuſance to A.* of pleas ariſing within certain bounds; the king *grants to B.* the *like conuſance within the ſame bounds*. C. brings a præcipe quod reddat againſt D. for land within thoſe bounds; both A. and B. claim conuſance; the demandant and tenant agree to the conuſance, but the tenant did not join with either of the patentees. This controverſy between the patentees ſhall not be tried in this caſe, becauſe of the delay of the demandant, which ſuch trial would occaſion; but by all the counſel, the conuſance in this caſe ſhall be *granted to him who firſt demanded it*, and the *right of the ſaid patentees ſhall be tried in another action between them*. Jenk. 19. pl. 36. cites 20 E. 3. Fitzh. Conuſance, 46.

2. Upon conuſance granted, the *original ſhall not be removed out of the ſuperior court, nor* ſhall *the record, but only a tranſcript*, ſo that upon a reſummons, upon a failure of juſtice in the inferior courts, the ſuperior court may proceed; by all the counſel. Jenk. 31. pl. 61. cites 26 Aſſ. 24.

3. *At the niſi prius* of tenements in W. the bailiffs of W. ſaid, that the king by *charter*, which they ſhewed, had granted *that no inqueſt ſhould be taken of land in W. but within the ſame vill*, and prayed that they ſhould not take the inqueſt contrary to the charter. Stouff. ſaid, this *ought to have been claimed in Bank*; for we have no warrants in the writ of niſi prius to go to W. to take it, but to N. by which they took the inqueſt. Br. Conuſance, pl. 44. cites 29 Aſſ. 13.

4. In *præcipe quod reddat*, the *tenant made attorney*, and after *conuſance of plea is granted*, there the *attorney ſhall remain of record* in

in the franchiſe, and ſhall be eſſoined there, and not the tenant; and ſo ſee that the intire record is ſent to the franchiſe, and not the original only. Br. Conuſance, pl. 64. cites 40 E. 3. 11. and 21 E. 3. 45. accordingly. But *contra of that which is in the franchiſe, and removed into Bank.*

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5. Note, by all the juſtices, that conuſance of pleas, or other thing once allowed, *ſhall bind the king till reverſed.* Br. Conuſance, pl. 54. cites 13 E. 4. 5.

6. Conuſance may be *demanded by attorney*; per Curiam. Br. Conuſance, pl. 51. cites 9 H. 7. 10.

The demand *by an attorney* is not good if he has not a *warrant of attorney in Latin*, for warrant of attorney in Engliſh is not allowable in ſuch caſe. Sid. 103. Hill. 14 & 15 Car. 2. B. R. Biſhop of Ely's caſe.

And the attorney *muſt have his warrant in court*, and it is not ſufficient for him to ſay that it is in his chamber. Sid. 103. Biſhop of Ely's caſe.

* Conuſance of pleas *cannot be pleaded by a defendant*, but muſt be demanded by the lord of the franchiſe, his bailiff, or attorney; per Holt Ch. J. 12 Mod. 666. Hill. 13 W. 3. in caſe of Taylor v. Reignolds. * [600]

7. A *charter* by which conuſance was demanded *bore teſte in the time of William the Conqueror*, before time of memory, and though it had been *allowed in C. B.* yet becauſe it had *not been allowed in eyre*, it was diſallowed. Br. Conuſance, pl. 51. cites 9 H. 7. 10. [12. a. at the end of pl. 6. the Abbot of Battle's caſe.]

16 H. 7. 16. b. pl. 17. Trin. 16 H. 7. S. P. as to its being allowed in C. B. and not in B. R. per Huſſey.

8. *No court* can demand conuſance *unleſs* it be *of record*, becauſe all courts of record are the king's, though another may have the profits of them. Co. Litt. 117. b. So that although the cauſe goes out of the king's courts at Weſtminſter, yet it goes to another of the king's courts, to which he has granted the privilege of determining the cauſes ariſing within a limited juriſdiction; but it is below the dignity of the king's courts to part with any cauſe to another's court, ſuch as the county-court, &c. Gilb. Hiſt. of C. B. 155. and cites 2 Inſt. 140.

Gilb. New Abr. 560. S. P. in totidem verbis, and cites ſame caſes.

THE END OF THE FIFTH VOLUME.

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E R R A T A.

Page 469, line 22. *for* againſt the 2d. *read* againſt the 3d.
Ibid. ——ult. *for* taken miſcontinued but not miſcontinued, *read* taken to be miſcontinued but not diſcontinued.
482, ——18. *for* Mich. 13 W. 2. *read* Mich. 13 W. 3.

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