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IN

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IN THREE VOLUMES.....Volume III.

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PAPIST.

PAPIST.

1 A PAPIST who has not taken the oaths, &c. (under an incapacity to hold under stat. 11 & 12 W. 3,) may devise lands to a protestant. *Mallom d. Marsh* v. *Bringloe*. *Willes*, 75.

He may sell to a protestant, by statute 3 G. 1, c. 18. *Ibid.*

He may devise for payment of his debts to protestant. *Ibid.*

And may change lands by a bond, &c. *Semble*. *Ibid.*

A protestant may devise lands to be sold for payment of his debts to papists. 82. *Ibid. n. a.*

New oaths to be taken by papists by statute 18 G. 3, c. 60; and 31 G. 3, 32 *Ibid.* 78, *n.*

2 The wife and executrix of a popish recusant convict cannot prove his will. *The Queen* v. *Ride*. 3 *Salk.* 133.

3 Upon a plea that plaintiff is a popish recusant convict, the defendant must shew, that he did not render himself before, or at the next sessions after the proclamation, and produce in court the record of conviction. *Moore* v. *Resdell*. 1 *L. Raym.* 243.

4 Of the effect and consequence of a foreign education in a popish seminary. *Thornby* v. *Fleetwood and another*. 1 *Str.* 318.

5 A conviction is not necessary to prevent the devise of lands by a papist in *Ireland*. *Rice* v. *Oatfield*. 2 *Str.* 1095.

6 One seized of a real estate, bequeaths several pecuniary legacies, and, as to some, directs they shall be paid to the full, whatever else, debts excepted, fall short; and then says, "in order to raise money for these payments, my estate of *B.* must be sold as soon as conveniently may be after my decease. To this end, I do appoint and empower *C.* and *D.* whom I make my executors, to sell, let, or set to sale, both my estates of *B.* and *E.*" Held, that a popish creditor was entitled to his debt out of the money arising by sale of the testatrix's real estate, according to the appointment of the will. *Foone* v. *Blunt*. 2 *Cowp.* 464.

The laws against papists are not to be extended by inference beyond what the reasons that gave rise to them require. *Ibid.*

Where lands are devised to trustees to be sold for payment of particular sums to certain persons, some of whom are papists, the statute 12 W. 3, c. 4, does not prevent such papists from taking the said legacies. *Ibid.*

A popish creditor cannot take a lease for years; but he may have a claim upon such lease, as assets. *Ibid.*

PARDON.

1 *Curia de banco nostro*, when the king, speaks, signifies the king's bench. *The King* v. *Leonard.* 1 *Str.* 302.

2 Pardon pleaded *in forma pauperis.* *The King* v. *Morgan.* 2 *Str.* 1214.

3 Pardon for murder, not to be allowed without writ of allowance certifying sureties taken for the peace. *The King* v. *Parsons.* 2 *Salk.* 498.

The king may pardon murder by express words. *Ibid. and* 3 *Salk.* 265.

4 Fine pardoned by general pardon, but abatement of a nuisance not excused. *The King and Queen* v. *Wilcox.* 2 *Salk.* 458.

5 If a man is attainted of felony and pardoned on condition of transporting himself within a limited time, his creditors shall not be permitted to charge him with civil actions. *Foxworthy's Case.* 2 *L. Raym.* 848. 2 *Salk.* 500.

6 A pardon makes an infamous person a competent witness. 1 *Salk.* 689.

It is the infamy of the crime, not of the punishment, which takes away a man's testimony; pardon may cure a criminal, not a civil disability. *Rex* v. *Crosby.* 1 *L. Raym.* 39.

7 Assiting in running goods, not pardoned by the statute 18 G. 2. *The King* v. *Gilliert.* 1 *Wils.* 97.

8 There are three ways by which accomplices obtain a right to a pardon, 1st, By approvement; 2dly, By coming within the statutes 10 and 11 W. 3, c. 20, s. 5, and 5 *Anne*, c. 31, s. 4. 3dly, By being entitled to it by the royal proclamation. *Rex* v. *Rudd.* 1 *Cowp.* 331.

An accomplice, though not within any of the three foregoing cases, may, if admitted a witness under the practice allowed, if he behaves fairly and discloses the whole truth, obtain a recommendation to mercy; but it rests upon his being a person properly within the usage, and upon his own behaviour in fully complying with the requisite conditions. *Ibid.*

A justice of peace has no authority to select whom he pleases, and to tell such offender he shall be a witness. *Ibid.*

9 Pardon by sign-manual, how to be worded and made use of. *The King* v. *Beaton.* 1 *Black.* 479.

See WITNESS I.

10 *A.* having been convicted of forgery, was sentenced to the state prison for life. He was afterwards pardoned by the governor. The pardon contained a proviso, that it was not to be construed so as to relieve *A.* from the legal disabilities arising from his conviction and sentence, &c. but only from the imprisonment. He was, afterwards, offered as a witness for the people, on a trial for an indictment, and admitted to testify, although objected to as incompetent. It was held that the proviso in the pardon being incongruous, and repugnant to the pardon itself, ought to be rejected, and that the witness was competent. *The People* v. *Pease, in error.* 3 *Johns Cases*, 333.

PARENT AND CHILD.

1 If the father appears improper to have the custody of the child, and the child be of too tender years to choose for itself, the power of the court of K. B. is discretionary in assigning the custody of the child. *Blisset's Case.* *Lofft*, 748.

The power of the parent is subordinate to the power and authority of the state in education of the child, as in other respects. *Ibid.*

2 A minor, whose father is dead, and his mother afterwards married, is entitled to his earnings in the service of a third person; the father in law may have an action on an implied *assumpsit* for necessaries, but cannot claim his earnings against the minor's consent. *Freto* v. *Brown* 4 *Mass.* 675.

Whatever rights or duties may belong to the mother, as guardian by nature, they do not devolve on her husband. *Ibid.*

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PARISH.

1 Evidence of a reputed parish within 43 *Eliz.* is that there be parochial chapel, chapel-wardens, and sacraments at the time of the statute. *Rudd* v. *Morton.* 2 *Salk.* 501.

2 Parish records may be contradicted and disproved by parol evidence. 1 *Mass.* 181.

3 Parishes have no authority to grant monies except for settling ministers, building houses of public worship, and for purposes incident to those objects. 1 *Mass.* 181.

4 When a town is incorporated with boundaries co-incident with those of a parish, antecedently part of a town, the parish is not thereby abolished. *Dillingham* v. *Snow et al.* 3 *Mass.* 276.

5 Persons assessed for the support of public worship in a parish, who have a right to have their monies paid over to a minister other than the minister of the parish, must notify the parish of their desire to have their monies so paid over, and the minister must demand the monies, within a reasonable time after the assessment is made; and a year from making such assessment is a reasonable time; but in particular cases the time may be extended. *Montague* v. *The first Parish in Dedham.*] 4 *Mass.* 269.

A person leaving the society in which the parish worship, and honestly and in good faith joining one of another religious denomination, is entitled to have his monies paid over to the teacher, on whose instructions he attends, although he may have no conscientious scruples on the subject. *Ibid.*

6 The legislature may, consistently with the third article of the declaration of rights, and with the statute of 1799, c. 87, set off a member of any religious incorporation to another religious incorporation, whether of the same or a different denomination. *Thaxter* v. *Jones et al.* 4 *Mass.* 570.

7 Where a parish is by the legislature enacted into a town, the parish is not of course extinguished. *Dillingham* v. *Snow et al.* 5 *Mass.* 547.

8 Where such a town is sued for property claimed by it in right of the parish, the parish ought to defray the expences of the defence of such suit, and may assess the amount thereof as a parish tax. *Ib.*

9 Where one was, with his poll and estate, by a private statute set off from the town of *A.* to a parish in *B.* forever thereafter to be considered as belonging to the said parish, there to do duty and enjoy parish privileges, it was held that a person afterwards living on the same estate was a member of the parish in *B.* and eligible as an assessor thereof; although as to municipal rights and duties he continued an inhabitant of *A.* *Colburn* v. *Ellis et al.* 7 *Mass.* 89.

10 A poll parish is within the statute of 1786, c. 10, s. 5, which provides that the remaining part of a town, from which a parish is taken, shall constitute the first parish. *Minot* v. *Curtis et al.* 7 *Mass.* 441.

A parish may be known by several names. *Ibid.*

11 A minister of a town or parish, seized of lands in right of the town or parish, as parsonage lands, &c. is for that purpose a sole corporation, and holds the same to him and his successors. *First Parish in Brunswick* v. *Dunning et al.* 7 *Mass.* 445.

In case of a vacancy of the office of minister, the town or parish is entitled to the custody of the lands, and may enter and take the profits, until there be a successor. *Ibid.*

Every town is considered to be a parish, until a separate parish be formed, when the inhabitants and territory not included in the separate

parish form the first parish; and the minister of such first parish by law holds, to him and his successors, all the estates and rights, which he held as minister of the town before the separation. *Ibid.*

PARISH CLERK.

It seems the appointment of a parish clerk needs not to be in writing. *Anon.* *Lofft*, 484.

PARISH RATES.

H. only occupying lands in a parish is taxable to a rate for bells. *Woodward* v. *Makepeace.* 1 *Salk.* 164.

PARLIAMENT, AND PRIVILEGE OF, &c.

1 A member of parliament discharged without bail, being committed for writing a seditious libel, by virtue of a warrant from the secretary of state. *The King* v. *Wilkes, Esq. Member of Parliament for Aylesbury.* 2 *Wils.* 151.

2 Peers may be sued in the king's bench by original bill. *Gosling* v. *Lord Weymouth.* *Cowp.* 844.

3 No privilege to servants of ambassadors, unless *bona fide* menial and domestic servants. *Poitier* v. *Croza.* 1 *Black.* 48.

4 A peer by patent, who is arrested by his christian and surname as a commoner, shall not be discharged on common bail if he has never sat in parliament. *Lord Banbury's Case.* 2 *L. Raym.* 1247. 2 *Salk.* 512.

5 *English* secretary to a foreign minister privileged, though formerly a trader, and now under very suspicious circumstances. *Triquet* v. *Bath.* 1 *Black.* 471.

6 No peer, or lord of parliament, hath privilege against being compelled by process in the courts of *Westminster-Hall*, to pay obedience to a writ of *hab. corp.* directed to him. *Rex* v. *Earl Ferrers.* 1 *Burr.* 631.

7 Where a peer is to answer to a bill, his answer put in upon his honor is sufficient; but where a peer is to answer interrogatories, to make an affidavit, or to be examined as witness, he must be upon his oath. *Meers* v. *Stourton, in chancery.* 2 *Salk.* 512.

8 Members of parliament may be sued in C. P. by bill. *Dawkins, privilege of,* v. *Burridge.* 2 *Str.* 734.

9 Members of parliament have privilege of return after its dissolution; they may be discharged on motion without filing common bail. *Holliday and another* v. *Colonel Pitt.* 2 *Str.* 985.

10 The check polls as well as the original book, must be lodged with the clerk of the peace. *The King* v. *Davis.* 2 *Str.* 1048.

11 An attorney, though servant to a peer, has no privilege of parliament. *Wickham* v. *Hobart.* 2 *Str.* 1065.

12 Powers derogatory to private property, though, by act of parliament, by one's own representatives, to be very strictly construed, and not extended. *Anonymous.* *Lofft*, 488.

13 The king's bench cannot discharge a man committed upon a warrant from the speaker of the house of commons for a breach of privilege. *The Queen* v. *Paty et Alios.* 2 *L. Raym.* 1105. 2 *Salkeld*, 503.

14 Member of parliament may be sued in the common pleas by bill. *Dawson* v. *Burridge.* 2 *L. Raym.* 1442. *Str.* 734.

15 Where the majority present at an election do not vote at all, the election made by those who do vote is good. *Oldknow* v. *Wainwright*; or *Rex* v. *Foxcroft.* 2 *Burr.* 1017. 1 *Black.* 229, S. C.

16 No man can demand a duty without an act of parliament. *Smith's Case.* *Lofft*, 783.

17 Parliament sat on a *Sunday, October* the 26th 1760, on the demise of the king. 1 *Black.* 499.

18 Member of parliament privileged, and must be proceeded against by sequestration. *Anon. Lofft*, 156.

19 Privilege of a party or witness attending process, in going, continuing, and returning; and this protection afforded a lady brought up by *habeas corpus* against her husband. *Anon. Lofft*, 434.

20 The court of C. P. cannot bail or discharge a prisoner committed by warrant of the speaker of the house of commons, for a breach of privilege of that house expressed in the warrant, during the session. *The Case of Brass Crosby, Esq. Lord Mayor of London.* 3 *Wils.* 188.

21 Privilege of peerage will be noticed without pleading. *Hunter* v. *Lord Deloraine. Lofft*, 49.

PARSONAGE.

1 Parsonage lands are holden by the minister in right of his parish; and in case of his death, &c. whereby a vacancy is created, the lands are in obeyance until there be a successor. 2 *Mass.* 500.

The parish is entitled to the profits during the vacancy. *Ibid.*

If the minister alien with the assent of the parish, it shall bind his successor; if, without such assent, it will be valid during his incumbency; and his successor may enter without action, or he may bring his writ of entry *sine assensu parochiæ*, counting on the seizin of his predecessor within fifty years. *Ibid.*

2 A minister may also have his writ of right on his own seizin within thirty years, or on the seizin of his predecessor within sixty years.

An alienation by the parish is void. *Ibid.*

PARTICULARS OF PLAINTIFF'S DEMAND.

1 If a bill of particulars state the plaintiff's demand to be for goods sold and delivered to the defendant, no evidence can be received of goods sold by the defendant as agent for the plaintiff. *Halland* v. *Hopkins.* 2 *Bos. & Pull.* 243.

2 If a plaintiff, by his bill of particulars, confine his demand to one count of his declaration, and defendant pay money into court generally, the plaintiff is not at liberty to apply the money so paid into any of those counts on which he is precluded from giving evidence by his bill of particulars. *Ibid.*

3 An order for a bill of particulars does not suspend the time for pleading, and therefore plaintiff may sign judgment immediately after delivering the particular, if the time for pleading be then out. *Hifferman* v. *Langelle.* 2 *Bos. & Pull.* 363.

4 In an action of *assumpsit* for nonperformance of a contract for the sale of a house, with counts to recover back the deposit, the plaintiff having in his first count alleged that the defendant, who was to make a good title, had delivered an abstract which was "insufficient, defective, and objectionable," the court obliged the plaintiff to give a particular of all objections to the abstract arising upon matters of fact. *Collett* v. *Thompson.* 3 *Bos. & Pull.* 246.

PARTITION.

1 No partition of land can be made without deed since the stat. 29 *C.* 2, *Johnson* v. *Wilson. Willes*, 253.

2 Proceedings on a writ of partition on default of the tenant. *Halton* v. *Earl of Thanet.* 2 *Black.* 1134, 1159.

3 Upon the death of the respondant named in a petition for partition, his heirs cannot be admitted to defend, and the petition abates. 2 *Mass.* 470.

4 In the division of the estate of an intestate the distributors are not obliged to divide and set out the whole estate in severalty. 1 *Mass.* 323.

5 Upon a petition for partition, and public notice pursuant to the statute, the right of possession of one claiming to hold in severalty, part of the land described in the petition, and of which partition is prayed for, is bound by the judgment for partition. 2 *Mass.* 462.

6 If upon a petition for a partition, the parties agree to certain commissioners to make the partition, there is no need of a judgment *quod partitio fiat.* *Symonds* v. *Kimball.* 3 *Mass.* 299.

The commissioners need only assign the petitioner's purparty. *Ibid.*

If they return that they have been duly sworn, it is sufficient, without other evidence of the fact. *Ibid.*

No costs are given upon a petition for partition, except where an issue is joined and tried. *Ibid.*

7 A petition for a partition ought not to include lands lying in different counties. *Exparte Bonner.* 4 *Mass.* 122.

8 Since the statute of frauds, partition by parol is void; and the law will not presume a deed of partition to have been made by tenants in common, merely from their several possessions. *Porter* v. *Perkins, et al.* 5 *Mass.* 233.

9 When partition is prayed of an extensive territory, the court prescribes such public notice, as will inform all the inhabitants of the pendency of the application. *Vaughan et al.* v. *Noble.* 6 *Mass.* 252.

10 A petition for a partition lies only for one who has the seizin in fact of the premises. *Bonner et al.* v. *Proprietors of the Kennebeck Purchase.* 7 *Mass.* 475.

11 Where lands lying on each side of a river were owned by tenants in common, who made partition of the same by assigning the land on one side of the river to one, and that on the other side to another; it was held that the two tracts were to be considered as separated by the thread or central line of the river. *King* v. *King.* 7 *Mass.* 496.

12 A petition for partition does not lie where the applicants hold the whole of the land, of which partition is prayed. *Swett et al.* v. *Bussey et al.* 7 *Mass.* 503.

13 The general guardian appointed by the surrogate is not sufficient, but a guardian for the infants must be appointed by the court under the act. *In the matter of Stratton and others.* 1 *Johns. Rep.* 509.

14 The petition of the plaintiffs, after setting forth their rights, stated "that *F.* one of the defendants, was seized of a moiety of the premises, subject to two mortgages in fee, to *A.* and *C.*, and to *P.* the other defendant." *F.* and *P.* pleaded in bar, that before the presenting of the petition of the plaintiffs, *A.* and *C.* assigned their mortgage to *P.*: *A.* and *C.* pleaded *non tenent insimul*, the plaintiffs replied, confessing all the facts in the pleas, and praying judgment. The plaintiffs then gave notice of a motion for judgment on the pleadings. The defendant, afterwards, put in a general demurrer to the replication; but on the motion of the plaintiffs, the court gave judgment on the pleadings, as prayed for by the plaintiffs. *Murray & others* v. *Fitzsimmons & others.* 2 *Johns. Rep.* 482.

15 Where a partition had been made by the proprietors of a patent, and a survey and map of the patent made for them, and possession was taken by the several proprietors according to such survey, it was held, that after the lapse of forty years, the parties were concluded from contesting with each other, the correctness of the actual locations. *Jackson ex dem. Schuyler & others,* v. *Vedder.* 3 *Johns. Rep.* 8.

16 A partition deed operates as an estoppel as to the parties and all claiming under them; so, that where a partition was made in 1747, and possession taken by the parties according to the survey and map, then made, it was held conclusive, though by a second survey, in 1801,

it was found that there was a mistake in the first survey, on which the partition was founded. *Jackson ex dem. Ostrander* v. *Hasbrouck.* 3 *Johns. Rep.* 331.

17 Where one of several tenants in common, had aliened his share, and the plaintiff in partition proceeded, as if no such alienation had been made, by giving notice to the original cotenant, without taking notice of his grantee, the judgment in partition was held to be void. *Jackson ex dem. Antell & Wife* v. *Brown.* 3 *Johns. Rep.* 456.

18 *A parol* partition of land, carried into effect, by possession taken by each party of his respective share, according to the partition, will be valid and binding on the parties. *Jackson ex dem. Duncan and others,* v. *Harder.* 4 *Johns. Rep.* 202.

19 *A.* died seized of lands, and the heirs proceeded to obtain partition of them, under the act; and the widow of *A.* not appearing, judgment passed against her by default; and in the judgment of partition entered thereon, reasonable dower was assigned and adjudged to her, out of the lands of her husband, and she was adjudged to pay 80 dollars and 96 cents for her proportion of the expences of the partition; and the heirs, afterwards, issued a *fieri facias,* and sold the dower of the widow, at auction, to pay the costs so adjudged; it was held, that the proceedings under the partition, were null and void, as against the widow's claim of dower; that she was not a tenant, nor did her rights come within the purview of the act for the partition of lands; and that she was not bound to appear, nor could her rights be affected by the judgment. *Bradshaw* v. *Callaghan.* 5 *Johns. Rep.* 80.

20 In a petition for a partition, under the statute, it is not necessary to set forth the rights and titles of the several tenants at large; nor is it necessary to allege the seizin of the ancestor or person from whom the parties derive title; but it is sufficient to state, in general terms, that each tenant was seized of his part or share in fee, or as the case may be, whether such seizin be acquired by descent or purchase. *Bradshaw* v. *Callaghan and Wife.* 8 *Johns. Rep.* 558.

21 A tenant in common of the inheritance, may maintain partition, notwithstanding a particular estate is outstanding. And where a partition was made among several heirs, assigning to each his portion of lands, by metes and bounds, but excepting from each portion one third thereof, as the dower of the widow of the ancestor, it was held valid. *Ibid.*

22 The statute relative to partition does not extend to a tenant in dower; but the estate may nevertheless, be divided among the other tenants; and a partition so made is good, though the dower of the widow is excepted and left undivided. *Ibid.* A widow's dower, not being within the purview of the act, her rights cannot be effected, by the partition, nor is she liable for any part of the costs and expenses of making the partition. *Ibid.*

23 It would be well for the party praying for a partition of an intestate's real estate, to be particular in the names of the persons entitled to shares, and of the purparty of each; but the court would not reverse an inquest for omitting this. 1 *Dallas,* 352.

24 The decree of the *orphan's court* was reversed, because in partition of an intestate's estate, no provision was made for a tenant by the curtesy of his wife's share. 1 *Dallas,* 353.

25 The practice in the *orphan's court* has been to direct the same inquest which is appointed to make a partition of real estate, if that cannot be done without prejudicing the whole, then to make the valuation. 1 *Dallas,* 354.

26 Where a recovery in partition is

no bar to an action of dower, in that moiety of the premises, which is assigned to the tenant. 1 *Dallas*, 418.

27 Whether tenant by the curtesy is entitled to a writ of partition against tenants in common seized of estates for life, or in fee. 2 *Dallas*, 257.

28 Whether tenant by the curtesy can maintain a writ of partition. 2 *Dallas*, 257.

29 Objections to the regularity of proceedings on a writ of partition. 4 *Dallas*, 67.

PARTNERS.

1 If one of two partners commit a secret act of bankruptcy, the other partner may, for a valuable consideration, and without fraud, dispose of the partnership effects; and though he himself afterwards become bankrupt, the assignees under a joint commission cannot maintain trover against the *bona fide* vendee against the partnership effects. *Fox* v. *Hanbury*. 2 *Cowp*. 445.

If partners dissolve their partnership; persons who deal with either, without notice of such dissolution, have a right against both. *Ibid.*

The assignees under a commission of bankruptcy against one partner, can only be tenants in common of an undivided moiety, subject to all the rights of the other partner. *Ibid.*

2 Every partner is liable jointly and severally. *Anon*. *Lofft*, 82.

3 If, on an execution against one of two partners, the partnership effects are taken and sold; the court will order the sheriff to pay over to the other a share of the produce proportioned to his share in the partnership effects, to be ascertained by the master. *Eddie* v. *Davidson*. 2 *Doug*. 650.

4 To make a person liable as a partner, there must either be a contract between him and the ostensible person to share in the profit and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable. *Hoare* v. *Dawes*. 1 *Doug*. 371.

5 Where the plaintiff goes upon the credit of both partners, the act of one is evidence against the other unless he shews a disclaimer. —— v. *Layfield and another*. 1 *Salk*. 291.

6 Two partners; execution against one, sheriff must seize all the goods, and sell an undivided moiety. *Heydon* v. *Heydon*. 1 *Salk*. 392.

7 The survivor of two joint merchants may sue on the partnership account without the personal representative of deceased partner. *Martin* v. *Crompe*. 1 *L. Raym*. 340. *Salk*. 444.

8 Money lent to a trader by a partner who retires from business at legal interest, with an additional annuity for a certain term of years, is not a continuance of the partnership. *Grace* v. *Smith*. 2 *Black*. 998.

9 *A*. and *B*. agree, on breaking up partnership, that the joint bonds shall be paid by *A*. to whom an allowance is made for the purpose. *H*. an obligee of such bond, knowing of this, agrees with *A*. that the bond shall bear an increase of 1 *per cent*. interest. Many years after, *A*. having failed, *H*. brings his bill against the executor of *B*. to compel him to redeem the bond. And held that he shall recover. *Heath* v. *Percival*. *In Chancery*. 1 *Str*. 403.

10 Surety for the service of *J. S*. sole trader, does not extend to a subsequent partnership. *Wright* v. *Russell*. 2 *Black*. 934.

11 Upon an execution against one of several partners, the share only of him against whom the execution is sued can be sold. *Jackey* v. *Butler*. 2 *L. Raym*, 871.

12 *Assumpsit* for partnership debts may be brought against one partner only; and unless he pleads in abatement, he shall be afterwards

concluded. *Rice* v. *Shute*. *Abbott* v. *Smith*. 2 *Black*. 695, 947. 5 *Burr*. 2611.

13 *Ann* and *Isaac Scott* were partners; *Isaac* on the 27th March absconded; on the 28th he sent to *Rolleston*, a creditor of the partnership, a letter from *Dover*, inclosing a bill of parcels dated the 23d of March, of seven bags of cochineal, as if *Rolleston* had purchased them of *Ann* and *Isaac Scott* (which was not at all true,) informing him "that he had deposited them at a public warehouse in *Rolleston's* name and for his use;" (which he had done on the 26th, and they were so booked; but *Rolleston* did not know it.) On the 30th, *Rolleston* went to the warehouse, found them there, sold them, and applied the produce to his own use in part of payment of the debt due to him from the partnership. This transaction of *Isaac's* is fraudulent and void; and shall have no effect to entitle *Rolleston* either to the moiety of *Isaac* or the moiety of *Ann*. *Hague and others* v. *Rolleston*. 4 *Burr*. 2174.

14 In order to constitute a partnership, *a communion of profit and loss* between the parties is essential; and this is the true criterion to judge by, where the question is, whether persons are partners or not? 1 *H. Black*. 43, 48.

15 *A*. having neither money nor credit, offers to *B*. that if he will order with him certain goods to be shipped upon an adventure; *if any profit should arise from them, B. should have half for his trouble*: *B*. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by *B*. alone: held, that he was entitled to recover back such payment in assumpsit against *A*. who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit; though *B*. were liable as a partner to third persons creditors. *Hesketh* v. *Blanchard & al*. 4 *East*, 144.

16 Where one takes a moiety of the profits indefinitely, he shall, by operation of law, be made liable for losses. 2 *H. Black*. 247.

17 Where *A*., *B*. and *C*. had entered into an agreement to purchase goods in the name of *A*. only, and to take *aliquot* shares of the purchase, but it did not appear that they were jointly to resell the goods; the court of C. P. (*Wilson* J. diss.) held that, on failure of *A*. the ostensible buyer, *B*. and *C*. were not answerable as partners with him. *Coope & al*. v. *Eyre & al*. 1 *H. Black*. 37.

18 Acts subsequent to the time of delivering goods on a contract may be admitted as evidence to shew that the goods were delivered on a partnership account, if it were doubtful at the time of the contract; but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person who may afterwards become a partner (not even an acknowledgement that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods sold and delivered; though he will be liable in an action on the bill of exchange. *Saville* v. *Robertson*. 4 *Term Rep*. 720.

19 *A*. and *B*., ship-agents at different ports, enter into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. By this agreement they were held to become liable as partners to all persons with whom either contracted as such agent: though the agreement provided, that neither should be answerable for the acts or losses of the other, but each for his own. *Waugh* v. *Carver & al*. 2 *H. Black*. 235.

20 One partner cannot bind the other

partners by deed. *Harrison* v. *Rushforth.* 7 *Term Rep.* 207.

21 But he may by drawing or accepting bills of exchange. 7 *Term Rep.* 210.

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22 Two (of three) partners who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor in their joint name; but such security is fraudulent and void as against the third partner, and cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action. *Shirreff* v. *Wilks.* 1 *East*, 48.

Vide Gregson v. *Hutton; and Marsh* v. *Vansommer, Guildhall*, 1786, *cited. Ibid.* 49.

23 Where the consignee or goods (to whom the bill of lading was indorsed in blank) assigned it over as a security for acceptances given by the assignee not amounting to the value of the goods, and afterwards they became partners in the goods by an agreement between them that the profits and loss should be equally divided, but the first was to stand guarantee to the other for the solidity of the factors by whom the goods were to be sold; and it appeared by the agreement that the consignor had not been paid for the goods; the assignee of the bill of lading cannot maintain trover against the consignor, if he stop the goods *in transitu* on the insolvency of the consignee; for one partner cannot recover those goods which the other could not. *Salomons* v. *Nissen.* 2 *Term Rep.* 674.

24 An action cannot be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner for the purpose of smuggling, though the other partners who resided in *England* knew nothing of the sale; for the act of one is in this respect the act of all; and it is a contract by subjects of this country, made in contravention of the laws: this case must be considered in the same light as if all the partners resided in *England. Biggs & al.* v. *Lawrence.* 3 *Term Rep.* 454. (And see *Waymell* v. *Reed; and Clugas* v. *Penaluna.*)

25 One of two partners applied trust-money in the trade with the privity of the other partner; afterwards they separated, and the partnership effects were assigned over to the first, who took on him the debts; this was held to be no payment in discharge of the other partner, but both were liable to make good the trust-money. *Smith* v. *Jameson.* 5 *Term Rep.* 601.

26 In some respects an individual partner, or a particular partnership, consisting of two or more of such persons as are partners in some larger partnership, may be considered as third persons in transactions in which the general partnership may happen to be engaged with a correspondent. *Per Eyre C. J. Bolton* v. *Puller & al.* 1 *Bos. & Puller*, 546, 7.

27 A contract made by two partners to pay a certain sum of money to a third person, *equally out of their own private cash*, is a joint contract, and they must be jointly sued upon it. *Byers* v. *Dobey.* 1 *H. Black.* 236.

28 Where money is owing to two partners, and after the death of one it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as survivor. *Smith* v. *Barrow.* 2 *Term Rep.* 476.

29 If partners by deed assign all their partnership effects, &c. to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is fraudulent and void. *Eckhardt & al.* v. *Wilson.* 8 *Term Rep.* 140.

30 On the dissolution of a partnership between *A.*, *B.* and *C.*, a power given to *A.* to receive all debts owing

ta, and to pay all those owing from the late partnership, does not authorize him to *indorse a bill of exchange in the name of the partnership*, though drawn by him in that name and accepted by a debtor to the partnership, after the dissolution. The person therefore to whom he so indorses it, cannot maintain an action on it against *A.*, *B.* and *C.* as partners. *Kilgour* v. *Finlyson & al.* 1 *H. Black.* 155.

31 Neither can such indorsee maintain an action against *A.*, *B.* and *C.* for money paid to the use of the partnership, though, in fact, the money advanced by him in discounting the bill be applied by *A.* to the payment of a debt due from the partnership. 1 *H. Black.* 155.

32 If three partners (two of whom reside abroad, and one in *England*,) be sued for a partnership debt, and the partner resident in *England* appear to the action, but refuse to appear for the partners resident abroad, the sheriff under a distringas against the two partners may take partnership effects, though paid for by the partner resident in *England* alone, to whom the partnership was legally indebted; and the court will not relieve him against such distress. *Morley* v. *Strombom & al.* 3 *Bos. & Pull.* 254.

33 *A.*, *B.* and *C.* traded under the firm of *A.* and *B.* in the *cotton* business: *C.* not being known to the world as a partner; and *A.* and *B.* traded as partners alone, under the same firm, in the business of *grocers;* in which latter business they became indebted to *D.* and gave him their acceptance; which not being able to take up when due, they, in order to provide for it, indorsed in the common firm of *A.* and *B.* a bill of exchange to *D.* which they had received in the cotton business in which *C.* was interested; but such indorsement was unknown to *C.*, of whom *D.* the indorsee had no knowledge at the time. Held that such indorsement in the firm common to both partnerships, of a bill received by *A.* and *B.* in the cotton business, bound *C.* their secret partner in that business, and that consequently *C.* was liable to be sued by *D.* on such indorsement; the latter not knowing of the misapplication of the partnership fund at the time. *Swan and others* v. *Steele, Clerk and Wood.* 7 *East*, 210.

34 The authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by the partner signing such security, that the money advanced on it, was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were, in fact, so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice. *Lord Viscount Gallway* v. *Mathew, et al.* 10 *East*, 264.

35 The law merchant respecting dormant partners does not extend to speculations in lands. *Pitts* v. *Waugh et al.* 4 *Mass.* 424.

36 Where there is a special and limited partnership, and persons deal with it, knowing it to be such, they are bound by the terms of such copartnership, and cannot hold the parties beyond them. *Ensign* v. *Wands.* 1 *Johns. Cas.* 171.

37 If one of two partners in trade purchase goods for both, and one of them dies, an action of assumpsit may be brought against the survivor, without taking notice of the partnership, or the death of one and the survivorship of the other. *Goelet* v. *M'Instry.* 1 *Johns. Cases*, 405.

38 Where *B.* and four other persons were owners of a cargo, in distinct

proportions, and the cargo was sold in *Calcutta*, and the proceeds invested in a return cargo, and *B.* carried on trade for himself, and was wholly unconnected in trade with the others; it was held, that they were not partners. *Holmes* v. *The United Ins. Co.* 2 *Johns. Cas.* 329.

39 A surviving partner may maintain a suit in his own name, for a debt incurred to the partnership, after the death of his copartner; and also for a debt contracted in the life-time of the partner. *Barnard* v. *Wilcox.* 2 *Johns. Cas.* 374.

40 One partner cannot bind his copartners, *by seal.* *Clement* v. *Brush.* 3 *Johns. Cases*, 180.

41 Where one partner gave a *specialty*, which he signed with the name of the firm, for a simple contract debt of the firm, and the creditor afterwards executed a *release* of all demands against the other partner, on account of the partnership debt; it was held, that giving the *specialty* was an extinguishment of the simple contract or partnership debt, and that the specialty, being the proper and sole debt of the partner executing it, was not affected by the release given to the other partner, as to the partnership debt. *Ibid.*

42 Where one of several partners dies, and the survivors continue to trade under the copartnership name, and an account is stated afterwards by a debtor, between him and the copartnership, admitting a balance due by him for goods sold in the life-time of the deceased partner; the surviving partner may recover such balance in an *insimul computassent*, without stating the death of the other partner and the survivorship. The stating of the account is in the nature of a new promise to the survivors. *Holmes & Drake* v. *D'Camp.* 1 *Johnson's Rep.* 34.

43 One of five partners executed bonds to the *United States*, for duties on goods imported into the *United States*, on account of the copartnership, and as their property, and *T.* became a surety on the bonds. The partner who signed the bonds died, and, afterwards, the surety paid the bonds, and brought his action against one of the surviving partners who resided in *Connecticut*, and declared against him *simul cum* the other partners, for money paid and laid out, &c. for the use of the copartnership. It was held, that proof of the payment of money for the surviving partners, after the death of one partner, would not support a declaration on an implied promise by all the partners. *Tom* v. *Goodrich & others.* 2 *Johns. Rep.* 214.

The claim of the *United States* against the copartnership, was extinguished by the bond of the individual partner. *Ibid.*

The surety has a right of action, only against the partner who signed the bond. *Ibid.*

44 On an application to the equity of the supreme court, they will take notice of the rule in chancery, that copartnership property, taken in execution for the separate debt of one of the partners, cannot be held against the joint creditors; nor can the share of such partner be applied to his separate debts, until the partnership accounts have been taken and settled. *Wilson & Gibbs* v. *Conine.* 2 *Johns. Rep.* 280.

45 Notice of the dissolution of a copartnership published in a gazette, is sufficient to all persons who have had no previous dealings with the copartnership. *Lansing* v. *Gaine & Ten Eyck.* 2 *Johns. Rep.* 300.

46 If one partner, after the dissolution of the copartnership, issues notes signed with the name of the copartnership, the other partner is not liable. The power of one partner to bind the copartnership ceases with it. *Ibid.*

47 Where a copartnership is entered into for a particular business, and is limited, and one partner gives the notes of the firm for a debt, arising out of his own private concerns, the other partner is not liable, when the

notes are issued without his knowledge or consent, and the person receiving them, knows that they are not for a copartnership debt. *Ibid.*

48 If one of several copartners executes a deed of release, under his hand and seal, of a debt due to the copartnership, it is binding on all the copartners. *Pierson* v. *Hooker.* 3 *Johns. Rep.* 68.

49 If one of two partners makes a special *warranty* on the sale of goods, the purchaser may maintain an action against the party who made the warranty, without joining the other partner. *Clark* v. *Holmes.* 3 *Johns. Rep.* 148.

50 If one partner, who is authorized to adjust the debts due from the copartnership, after its dissolution, adjusts an account, and acknowledges a balance to be due from the copartnership, this acknowledgment will not bind his copartner. *Hackley* v. *Patrick.* 3 *Johns. Rep.* 536.

51 One partner, after a dissolution of the copartnership, cannot indorse notes or bills given before to the firm, though he is authorised to settle the copartnership concerns. *Sanford* v. *Mickles & Forman.* 4 *Johnson's Reports,* 224.

52 In 1803, *A.* and *B.* entered into partnership, as sugar refiners, and published in two of the gazettes printed in the city of *New-York,* (and which were taken by *C.*) that they had so entered into partnership in the sugar refining business, under the firm of *A. & Co.* In *April,* 1805, *B.* without the knowledge or consent of *A.* purchased a quantity of brandy of *C.* for which he gave his individual note, payable to the firm, and endorsed by him with the name of the firm. The bill of parcels, by direction of *B.*, was made out in his name only, and the brandy was shipped to the *West-Indies,* in a vessel belonging to him, and on his own account; and *C.* in order to obtain the drawback, made oath at the custom-house, that the brandy was sold to *B.* *A.* and *B.* had entered the name of their firm in two of the banks in the city of *New-York,* and *B.* drew checks and made and endorsed notes in the name of the firm, which were regularly received and paid, the banks supposing them to be general partners. *C.* when he sold the brandy, required the partnership security, and it did not appear that he knew the limited nature of the partnership, until after its dissolution in *June,* 1805, notice of which was published in two of the news-papers. It was held, that the copartnership were not liable on the note. *Livingston* v. *Roosevelt & another.* 4 *Johns. Rep.* 251.

53 Where a person takes a partnership security from one of several partners, for what is known, at the time, to be a particular debt of the partner giving the security, the copartnership is not liable. *Ibid.*

54 Where there is a special or limited partnership, in any particular trade or business, one partner cannot bind his copartner, by any contract not connected with such trade or business; and a knowledge in third persons of the limited nature of the partnership will be inferred from circumstances. *Ibid.*

55 *It seems,* that a publication in the gazette, of the nature of a copartnership, at the time of its commencement, is constructive notice to all those who may, afterwards, take the partnership security. *Ib.*

56 A partnership may exist between attorneys and councellors at law. *In the matter of Woodward.* 4 *Johns. Rep.* 289.

57 Where a partnership between *A.* and *B.* expired, by its own limitation, on the first of *May,* 1807, and on the 22d day of *June,* 1807, *B.* accepted a draft on the copartnership in the name of the firm; it was held, that both partners were bound by the acceptance, there being no public notice of the dissolution of the partnership, nor any special notice of the dissolution to the party

dealing with the firm. *Ketcham & Black* v. *Clark*. 6 *Johns. Rep.* 144.

58 *D.* and *G.* being partners in trade, dissolved their partnership on the 31st Dec. 1801, and gave notice of the dissolution in the gazette, and that *D.* was authorised to receive payments and to adjust all accounts relative to the partnership. In June 1808, *A.* presented an account between him and the partnership to *G.* who said it was an account made out by him, but he thought it had been settled by *D.* who had the partnership books, and that he would see him and inform *A.* of the result. This was held to be a sufficient acknowledgment of the debt by *G.* to take the debt out of the statute of limitations. *Smith* v. *Ludlow*. 6 *Johns. Rep.* 267.

D. having, on the 1st Jan. 1808, also stated an account in the name of the partnership with *A.*, admitting the debt due to *A.* This was held a sufficient acknowledgement of the debt, to take it out of the statute of limitations and to bind both partners. *Ibid.*

59 Though one partner, after the dissolution of the partnership, cannot bind the other, by any new contract; yet his acknowledgment of a previous debt due from the partnership, will bind the other partner, so as to prevent him from availing himself of the statute of limitations. *Smith* v. *Ludlow*. 6 *Johns. Rep.* 267.

60 Where three or more copartners have contributed severally, and in different proportions, to the joint stock, and one of them withdraws from the copartnership in violation of their mutual agreement, each has his several remedy for a breach. *Dunham* v. *Gillis*. 8 *Mass.* 462.

61 One partner cannot bind another by executing a deed under the joint firm. 1 *Dallas*, 119.

62 Not only the ship's husband, but all the real owners at the time of the work done, are liable to the tradesmen. 1 *Dallas*, 129.

63 Payment to an executor, or administrator, of a deceased partner, can be no satisfaction to the survivor, who has the sole right of suing for, and of receiving the monies due to the company. 1 *Dallas*, 230.

64 Articles of copartnership being *res inter alios acta*, the limitations cannot be known, and, therefore, ought not to affect a third person, who acts under a legal authority from one of the partners. 1 *Dallas*, 269.

65 One of two partners may give an authority to a clerk under the firm of the house; and the clerk may, in consequence thereof, accept bills, and sign, or indorse notes, in the name of the company. *Ibid.*

66 Whether partners have power to appear for each other to suits. 3 *Dallas*, 331, 2.

67 Assumpsit will not lie by a surviving partner, against the administrator of the deceased partner, upon an unsettled account. 4 *Dallas*, 434.

68 A policy in the name of one joint owner, "as property may appear," (without the clause of stating the insurance to be for the benefit of all concerned,) does not cover the interest of another joint owner. *Graves et al.* v. *Boston Marine Ins. Company*. 2 *Cranch*, 419.

69 The interest of a copartnership cannot be given in evidence on an averment of individual interest, nor will the averment of copartnership interest be supported by a special contract relating to the interest of an individual. *Ibid.*

70 An assignment by one partner, in the name of the copartnership, of the partnership effects and credits, is valid. *Harrison* v. *Sterry*. 5 *Cranch*, 289.

71 Under a separate commission of bankruptcy against one partner, only his interest in the joint effects passes. *Ibid.*

PARTY-WALL.

The reimbursement of the costs of the moiety of a party-wall, is only a personal charge against the builder

of the second house, and not a lien upon the house itself. 1 *Dallas*, 345.

PATENT.

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1 A patent is void if the specification be ambiguous, or give directions which tend to mislead the public. *Turner* v. *Winter*. 1 *Term Rep.* 602.

2 So if the patentee say that by one process he can produce three things, and he fail in any one. 1 *Term Rep.* 602.

3 So if the specification direct the same thing to be produced several ways, or by several different ingredients, and any one of them fail. 1 *Term Rep.* 602.

4 A patent was granted by the crown to *A.* for 14 years, for his "method of lessening the consumption of steam and fuel in fire engines;" the specification stated that "the method consisted of the following principles," (describing the mode in which those principles were applied to the purposes of the invention;) afterwards an act of parliament was passed to extend the patentee's term, the title of which was 'An act for vesting the sole property, &c. of certain steam engines called *Fire Engines* of his invention, &c.' and after reciting that the patent was "for making and vending certain engines, by him invented for lessening the consumption of steam and fuel in fire engines," &c. it granted him the sole right of "making and selling the said engines." The court of K. B. held unanimously, that the invention was the subject of a patent; and (the patentee having in his specification described his invention) held that the patentee's right under the patent and act of parliament was valid. *Hornblower & al.* v. *Boulton & al. in error*. 8 *Term Rep.* 95.

5 This case, though it came from the court of C. P. was not argued there, that court having been equally divided in a former case arising on the same patent. *Eyre* C. J. and *Rooke* for the patent, and *Buller* and *Heath* J. J. against it. *Boulton & al.* v. *Bull*. 2 *H. Black.* 463, 500.

6 It seemed admitted, that under the proviso in statute 21 Jac. 1, c. 3, s. 6, there cannot be a patent for a philosopical *principle* only, neither organized nor capable of being so: but that a patent for a machine improved by a philosophical principle, though the machine existed before, is good. 8 *Term Rep.* 95. 2 *H. Black.* 463, &c.

7 In *assumpsit*, the plaintiff on an agreement by the defendant not to avail himself, or take any undue advantage of a communication made to him by the plaintiff of an invention for which the plaintiff intended to take out a patent, and assigned as a breach, that the defendant fraudulently obtained a patent for the invention in his own name. Evidence that the defendant fraudulently obtained a patent in his own name, which the plaintiff afterwards agreed should remain in the defendant's name upon certain terms, which terms the defendant before the commencement of the action had renounced, insisting upon the invention as his own, was held to maintain this breach. *Smith* v. *Dickinson*. 3 *Bos. & Pull.* 630.

8 The courts of this state have no jurisdiction in actions brought for the infringement of patent rights, granted by the *United States*. The cognizance of such actions belongs to the circuit courts of the *United States*. *Parsons* v. *Barnard*. 7 *Johns. Rep.* 144.

9 The assignee of *part* of a patent right cannot maintain an action on the case for a violation of the patent. *Tyler* v. *Tuel*. 6 *Cranch*, 324.

PAUPER.

1 Pauper shall be punished for not

going on to trial by paying costs, if they are taxed before he can try. *Noaks* v. *Watts.* 1 *Str.* 420.

2 Pauper not going on to trial shall be dispaupered. *Taylor* v. *Lowe.* 2 *Str.* 983.

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3 Pauper shall pay costs of a nonsuit. 2 *Salk.* 506.

4 Touching costs of suit as to a person admitted *in forma pauperis*; the court resolved, that a person so admitted shall not pay costs from the beginning of the action. *Blood* v. *Lee.* 3 *Wils.* 24.

5 A defendant removing an indictment by *certiorari* without good cause, cannot be admitted a pauper. *The King* v. *Reynolds.* 1 *Black.* 230.

6 Defendant removing an indictment by *certiorari* without good cause, cannot be admitted *in forma pauperis.* *The King* v. *Reynolds.* 1 *Black.* 230.

7 A motion was made, that a pauper might pay costs for not going on to trial; *sed per curiam*, he pays no costs unless upon a nonsuit or where the verdict is found against him, and then he shall pay costs or be whipped. *Anon.* 3 *Salk.* 107. 2 *Salk.* 506.

8 The court refused to make a rule to tax costs on a pauper's bringing a second ejectment, where he does not appear to be vexatious. *Brittain* v. *Greenville.* 2 *Str.* 1121.

9 Prosecutor cannot prosecute *in forma pauperis*, without special cause. *The King* v. *Clark et al.* 3 *Burr.* 1308.

10 Motion to defend *in forma pauperis* upon an attachment for a contempt denied. *Rex* v. *Pearson.* 2 *Burr.* 1039.

PAWN.

A market overt cannot be for pawning; nor can the court take notice of the custom of *London*, unless it be found. *Hartop* v. *Hoare & oth.* 1 *Wils.* 8. 2 *Str.* 1187.

PAYMENT OF MONEY.

1 *A.* receives money of *B.* by the hands of *C.*; it is *A.*'s money, and he must abide by the loss. *Carter* v. *Sheppard.* 2 *Salk.* 508.

2 Where the payer does not apply his payment, the receiver may apply it; but not to an uncertain demand, as to a debt from a testator. *Goddard* v. *Cox.* 2 *Str.* 1194.

3 If a man who goes to receive money in a shop is desired to take, in part, money which another is come to pay, and counts out any part of it, puts it into a bag, and lays it on the counter; this is so far an appropriation of the money put into the bag, that if it is stolen from the counter he must bear the loss. *Canter* v. *Shepheard.* 1 *L. Raym.* 330. *Salk.* 507.

4 Payment of debt, without knowledge of an action then commenced or costs incurred, is no defence at the trial. *Toms* v. *Powell.* 7 *East*, 536.

5 *A.* took a promissory note of *B.* for a debt due from *B.* and *C.* as partners, after the partnership was dissolved, and gave a receipt for the note, when paid, to be in full of the debt. In an action against *C.* on the original debt, it was held that the accepting the note was no payment of the precedent debt, and that *C.* was liable. *Herring* v. *Sanger.* 3 *Johns Cas.* 71.

Where a note was made payable to the bank of *Albany*, and a demand of payment was made of the maker, personally, in *Albany*, but not at the bank, and no objection made at the time, the demand was held sufficient. *Ibid.*

6 A note was lost or mislaid, and *A.* the maker, having paid the amount to *B.* the holder, took his bond of indemnity against the note, &c. and, afterwards, *A.* having a demand against *B.* for money, *B.* refused to pay, without first deducting the amount of the note, to which *A.* con-

sented, and took the balance and a receipt from *B.* the amount of the note as due, and afterwards brought an action against *B.* on his bond of indemnity. It was held, that the second payment being *voluntary* on the part of *A.* and no fraud alleged on the part of *B.*, no action could be maintained against him on the bond. *Bazen* v. *Roget.* 3 *Johns. Cases*, 87.

7 *M.* sold and delivered to *H.* a number of cattle, and received in payment bank notes, which afterwards passed away to *C.* who discovered one of them to be forged, and returned it to *M.* Neither *M.* nor *H.* knew the note to be forgery. In an action brought by *M.* against *H.* for the cattle sold, it was held, that a forged note, or a bill which proves to be of no value, is no payment; and that the party may treat as a nullity, and resort to his original contract. *Markle* v. *Hatfield.* 2 *Johns. Rep.* 455.

8 *A.* note is not payment of a precedent debt, unless there is an express agreement to accept it in payment, and take the risk of the insolvency of the maker. *Tobey* v. *Barber.* 5 *Johns. Rep.* 68.

9 The mere giving a bond for debt of another, is no payment; and an action for money paid, laid out and expended for the use of the defendant, will not lie, unless the plaintiff has actually advanced money. *Cummings* v. *Hackley and Fisher.* 8 *Johns. Rep.* 202.

The giving a negociable note may, in some cases, be equivalent to the payment of money; but the giving a bond is not such payment. *Ibid.*

10 Giving a promissory *note*, is no payment of a *book* debt. It only suspends the right of action during the time allowed for payment by the note. And the note not having been paid, the plaintiff was held entitled to recover the amount of his book debt, with interest from the time the note was payable. *Putnam* v. *Lewis.* 8 *Johns. Rep.* 389.

11 Under the plea of payment, mistake, or want of consideration, may be given in evidence. 1 *Dallas*, 17, 260.

12 A bond given in payment of a precedent debt, is conclusive evidence of the contract to prevent the obligor's claim of paying by instalments under the act of assembly. 1 *Dallas*, 83.

13 Partial payments, a rule for crediting them. 1 *Dallas*, 124, 378.

14 In an action of debt upon a bond, and where the issue is joined on a plea of payment, the jury may, and ought to presume every thing to have been paid, which, *ex equo et bono*, ought not to be paid. 1 *Dallas*, 260.

15 Money paid into the hands of the prothonotary upon a judgment, is to be considered in the same state as if paid to the sheriff; and is not liable to be attached by the person who paid it, on a suggestion that the debt may have been otherwise satisfied. 1 *Dallas*, 254.

16 When a bond shall not be considered as payment, or extinguishment, *pro tanto*, of money due upon a mortgage. 1 *Dallas*, 423.

17 Bills of exchange accepted as payment, will extinguish a demand on a bond, in favour of the surety. 2 *Dallas*, 101, 111.

18 What shall be deemed payment. 2 *Dallas*, 151, 2, 3, 4, 5.

19 The principal upon which the presumption of payment arises from the lapse of time is a reasonable principle, and the presumption may be rebutted by any facts which destroy the reason of the rule. *Dunlop & Co.* v. *Ball.* 2 *Cranch*, 180.

20 If the debtor at the time of payment does not direct to which account the payment shall be applied, the creditor may, at *any time*, apply it to *which he pleases*. *Mayor and Commonalty of Alexandria* v. *Patten.* 4 *Cranch*, 317.

21 To an action on a bond conditioned to pay money on a certain day, payment on a subsequent day is not

a good plea, without averring it to be the whole sum then due. *United States* v. *Gurney*. 4 *Cranch*, 333.

22 Upon the plea of payment to an action of debt upon a bond for the payment of 500 dollars, evidence may be received of the payment of a smaller sum, with an acknowledgment by the plaintiff, that it was in full of all demands; and from such evidence, if uncontradicted, the jury ought to infer payment of the whole. *Henderson* v. *Moore*. 5 *Cranch*, 11.

23 If neither the debtor, nor the creditor, has made the application of the payments, the court will apply them to the debts for which the security is most precarious. *Field* v. *Holland*. 6 *Cranch*, 9.

PAYMENT OF MONEY INTO COURT.

1 Court refused to let defendant bring money into court in an action for immoderately driving a chaise let to hire. *White* v. *Woodhouse*. 2 *Str*. 787.

2 Money cannot be brought into court in an action for dilapidations. *Squire* v. *Archer*. 2 *Str*. 906.

3 Money due by a first instalment may be brought in; but not to stay the plaintiff from signing his judgment, though execution may not issue for more than instalment and costs. *Darby* v. *Wilkins*. 2 *Str*. 957.

4 Where the sum of money demanded is certain, or capable of being ascertained by computation; payment into court admitted, and so much struck out of declaration. *Hellet, Esq. and others* v. *East-India Company*. 2 *Burr*. 1120.

5 Principal and interest due on bonds conditioned for payment of monies by instalments, may be paid into court. *Bonafous* v. *Rybot*. 3 *Burr*. 1370.

6 Though plaintiff is nonsuited, yet he shall have money brought in upon striking it out of the declaration. *Elliot* v. *Callow*. 2 *Salk*. 597.

7 Penalty for exercising a trade contrary to 5 Eliz. c. 4, permitted to be repaid into court without costs. *Rex* v. *Strong*. 1 *Burr*. 431.

8 Money paid into court generally, on two counts in debt for penalties on the game laws, being actions popular and not *qui tam*. *Stock* v. *Eagle*. 2 *Black*. 1052.

9 Money paid into court in action of covenant, not generally, but on two breaches assigned; 1st, For nonpayment of rent; 2dly, For advanced rent of 5l. *per* acre for ploughing meadow ground. *Fullwell* v. *Hall*. 2 *Black*. 837.

10 In an action for the *mesne* profits after a recovery in ejectment, defendant shall not pay money into court. *Holdfast* v. *Morris*. 2 *Wils*. 115.

11 Penalty of a bastardy bond paid into court. *Brangwin* v. *Perrot*. 2 *Black*. 1190.

12 Cannot pay money into court after plea pleaded. *Thornton, qui tam* v. *Gibson*. 1 *Wils*. 157.

13 Where an administrator sues, cannot bring money into court. *Gregg's Case*. 2 *Salk*. 596.

Money may be brought into court, in covenant for rent, debt for rent, replevin, and avowry for rent. *Ibid*.

14 Money may be brought into court after the expiration of the time limited by the rules for pleading. A jury will not give interest in the damages in an action for a wager. *Medena* v. *Kilder*. 1 *L. Raym*. 398.

15 On a bond for 40l. payable by 5l. *per ann*. defendant had leave to bring the arrears in court. *Bridges* v. *Williamson*. 2 *Str*. 814.

16 The court gave leave to withdraw the general issue, in order to bring money into court and replead it. *Turlton* v. *Wragg*. 2 *Str*. 1271.

17 Where one defendant suffers judgment by default and a second is outlawed, the third shall not bring money into court. *Kay* v. *Panchiman*. 2 *Black*. 1029.

18 In debt for the penalty of 5l. in killing a hare (with no other count,)

the court let the defendant bring in the penalty and costs. *Webb, qui tam* v. *Punter*. 2 *Str.* 1217.

19 Money may be brought into court at the suit of an executor. *Crutchfield* v. *Scott*. 2 *Str.* 796.

20 Money brought in on pleading a tender, cannot be taken out by the defendant though he has a verdict. *Cox* v. *Robinson*. 2 *Str.* 1027.

21 Rule to pay money into court, and have it struck out of the declaration upon payment of costs, was discharged as to the costs; action appearing to have been brought and kept on foot very oppressively. *Johnson* v. *Houlditch*. 1 *Burr.* 578.

22 No bringing money into court in debt. *Leapidge and another* v. *Pongillionne*. 2 *Str.* 890.

23 If the court see reason to suspect that a *qui tam* action is prosecuted merely for the issue money, they will on motion permit it to be paid into court to abide the event of the suit. *Parker q. t.* v. *Macfarlan*. 3 *Term Rep.* 137.

24 The plaintiff having declared on a bond, dated in 1775, for 2400l. proclamation-money of *North-Carolina*, avering that it was of a certain value, the court would not permit the defendant to pay the 2400l. proclamation-money into court in the year 1792, when the proclamation-money had become depreciated, &c. *Cuming* v. *Munro*. 5 *Term Rep.* 87.

25 The court of K. B. refused to permit a defendant to pay money into court in an action against the sheriff for a false return to a *fi. fa.* *Bowles* v. *Fuller*. 7 *Term Rep.* 335.

26 The court also refused to permit the defendant to pay money into court in an action for dilapidations. *Salt* v. *Salt & al. executors*. 8 *Term Rep.* 47.

27 The court of C. P. permitted the plaintiff in replevin to pay into court the rent for which the defendant avowed. *Vernon* v. *Wynne*. 1 *H. Black.* 24.

28 In an action against a carrier who had given notice that he would not be answerable beyond 20l., unless on certain conditions, the court of king's bench permitted the carrier to pay 20l. into the court. *Hutton & Ux.* v. *Bolton*. 1 *H. Black.* 299, *n.*

29 In assumpsit against a carrier for goods spoiled, the defendant was not allowed to pay the invoice price into court. *Fail* v. *Pickford*. 2 *Bos. & Pull.* 234.

30 In an action for breach of a contract to deliver goods at a certain price *per* ton, the court will not allow the defendant to pay the money into court. *Strong* v. *Simpson*. 3 *Bos. & Pull.* 14.

31 Payment of money into court is only an acknowledgment by the defendant that the plaintiff is entitled to recover the sum so paid; but it does not preclude him from taking any objection to the legality of the contract, in order to prevent plaintiff from recovering beyond that sum; though unless such sum were paid, such objection would be a bar to the plaintiff's action. *Cox & al.* v. *Parry*. 1 *Term Rep.* 464.

32 The court of C. P. held that payment of money into court is an admission of a legal demand only, if there be a legal demand in the declaration to which it may be applied, though there may be an illegal one also; and that in such case money so paid cannot be applied to an illegal account. *Ribbans* v. *Crickett & al.* 1 *Bos. & Pull.* 264.

33 The court of C. P. held that payment of money into court *on the whole declaration*, in an action on a bill of exchange, is such an admission of the validity of the bill, as to prevent the necessity of proving the drawer's handwriting. *Gutteridge* v. *Smith*. 2 *H. Black.* 374.

34 *Qu.* Whether a defendant can demur to evidence after having paid money into court, 1 H. B. 93; or be nonsuited? 2 *H. Black.* 375.

35 The payment of money into court upon a count stating a special contract is an admission of such contract, and narrows the inquiry to

the quantum of damages sustained by the breach thereof. Therefore if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5l. into court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a greater value than 5l. unless entered and paid for accordingly; though if no money had been paid into court, the plaintiff must have been nonsuited on such evidence. *Yate* v. *Willan.* 2 *East*, 128; and *Piggott* v. *Dunn*, *cited*. *Ibid.*

36 Where money is paid into court generally upon a declaration in contract, it is an admission of the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties. *Bennett* v. *Francis.* 2 *Bos. & Pull.* 550.

37 Therefore where a defendant who had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, paid money into court generally, upon a declaration containing a count for goods sold and delivered, it was held, that he had thereby admitted the transaction, to have been converted into a contract, and that the plaintiff was entitled to recover the value of all the goods under the count for goods sold and delivered. *Ibid.*

38 If the defendant pay money into court generally upon a declaration containing a count on a policy of insurance, together with the money counts, and it appear that the plaintiff by his conduct previous to the trial, induced the defendant to believe that the only point to be tried was a question of fraud, and suffered him to prepare his evidence accordingly, the court will not allow the plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by payment of money into court. *Muller* v. *Hartshorn.* 3 *Bos. & Pull.* 556.

39 If defendant bring money into court on a plea of tender, plaintiff may take it out, though he reply that the tender was not made before action brought. *Le Grew* v. *Cooke.* 1 *Bos. & Pull.* 333.

40 Paying money into court, where the demand is for unliquidated damages, by a judge's order after plea pleaded, is irregular; but if the plaintiff take the money out he thereby waives the irregularity, and cannot afterwards, have a verdict unless he recover more than the sum paid in. *Griffiths* v. *Williams.* 1 *Term Rep.* 710.

41 The only case where a party shall be bound by the payment of money, though by mistake, is where it is paid into court under a rule. *Malcolm* v. *Fullarton.* 2 *Term Rep.* 645.

42 The court will not order money paid into court by the defendant through a mistake to be restored to him. *Vaughan* v. *Barnes.* 2 *Bos. & Pull.* 392.

43 Though perhaps in case of fraud they would. *Ibid.*

44 Payment of money into court admits the cause of action, as stated in the plaintiff's declaration. *Johnston* v. *Columbian Ins. Co.* 7 *Johns. Rep.* 315.

45 After plea pleaded, leave was granted to pay money into court, with costs to the time, but not specifically as the premium on the policy of insurance on which the action was brought. *Dunlap & Grant* v. *Commercial Ins. Co.* 1 *Johns. Rep.* 149.

PEDIGREE.

A special verdict between other parties, not received in evidence of a pedigree. *Neal on the demise of the Duke of Atholl*, v. *Wilding & another.* 2 *Str.* 1151.

PEER.

1 *Qu.* Whether a peer of parliament can be sued in the king's bench by *bill? Lonsdale* v. *Littledale, in cam. scac.* 2 *H. Black.* 267.

2 But having pleaded in chief to a bill filed against him in that court, he cannot afterwards assign for error that he ought to have been sued by *original writ* and not by bill. *S. C. in the house of Lords, in error.* 2 *H. Black.* 299.

3 If a peer be sued by bill, no objection can be taken to such proceeding, except by plea in abatement. *Hosier* v. *Lord Arundel.* 3 *Bos. & Pull.* 7.

4 *Quære,* Whether even in that mode, such an objection could prevail. *Ibid.*

5 A writ of latitat issued against a peer was superseded on motion, grounded on an office copy of the *præcipe,* in which he was stiled baron of *W. Couche* v. *Lord Arundel.* 3 *East,* 127.

6 A Roman Catholic peer is not entitled to the privilege of franking. *Lord Petre* v. *Lord Auckland, in error.* 2 *Bos. & Pull.* 189.

PENAL ACTIONS.

1 Leave granted to compound in a *qui tam* action. *Bradshaw* v. *Mottram.* 1 *Str.* 167.

2 An action to recover a penalty on the statute 5 & 6 *E.* 6, c. 14, must be brought in the county where the fact was committed, and not commenced in the superior courts at *Westminster. Jefferey qui tam* v. *Coles. Willes,* 634.

3 On a *bona fide,* but not a collusive composition, a reasonable sum may also be paid towards the plaintiff's costs. *Wood* v. *Johnson.* 2 *Black.* 1157. *Wood* v. *Caffin. Ibid.* 1157.

4 On compounding a penal action, the king's part of the composition to be first paid. *Wood* v. *Ellis.* 2 *Black.* 1154. *Wood* v. *Johnson. Ibid.* 1157.

5 Affidavits in *qui tams* need not be filed. *French qui tam* v. *Coxon.* 2 *Str.* 1081.

6 The exceptions in the enacting clause of a statute, which creates an offence and gives a penalty, must be negatived by the plaintiff in his declaration. *Spiers* v. *Parker.* 1 *Term Rep.* 141.

7 Not so where they are contained in a subsequent proviso. *Ibid.*

8 Nor if they are contained in a subsequent statute, in which case the defendant must shew, by way of defence, that he comes within such exceptions. *Rex* v. *S. Hall.* 1 *Term Rep.* 322.

9 And where a prosecutor in his information negatives some of the exceptions which he need not, they may be rejected as surplusage. 1 *Term Rep.* 322.

10 Where a statute gives accumulative damages to party grieved, it is still but a civil remedy. *Woodgate* v. *Knatchbull.* 2 *Term Rep.* 154.

11 The statute 21 *Jac.* 1, c. 4, only applies to those penal statutes on which proceedings may be had before the justices of assise, justices of the peace, &c. *Leigh q. t.* v. *Kent.* 3 *Term Rep.* 362. *Balls q. t.* v. *Atwood.* 1 *H. Black.* 546.

12 The court of K. B., under favourable circumstances, gave leave to compound in a penal action for usury, after verdict. *Maughan q. t.* v. *Walker.* 5 *Term Rep.* 98.

13 But the court of C. P. on such an application said, it lay with the defendant to shew the circumstances which might entitle him to such indulgence. *Crowder q. t.* v. *Wagstaff.* 1 *Bos. & Puller,* 18.

14 In compounding a penal action on the post horse act, (which gives costs to the prosecutor,) the prosecutor was allowed to receive the deficient duties (not amounting to 40s.) and full costs of suit, though together exceeding the 40s. paid to the crown. *North q. t.* v. *Smart.* 1 *Bos. & Pull.* 51.

15 The court will not (before trial) stay proceedings in an action against a sheriff's officer for a penalty on statute 32 *G.* 2, c. 28, s. 12, though a similar action has been commenced against the sheriff for the same offence. *Pechell* v. *Layton.* 2 *Term Rep.* 512.

16 But after verdicts in both actions, the court will stay the proceedings in both on paying one penalty, and the costs in one action. 2 *Term Rep.* 712.

17 A discontinuance is cured by the appearance of the party by statute 32 *H.* 8, c. 30. in penal as well as civil actions. *Humble* v. *Bland, in error.* 6 *Term Rep.* 255.

18 If the jury find a verdict for the plaintiff with one penalty *generally* in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another, though the former be bad in law, and though the evidence would have warranted the verdict on any other count. *Holloway q. t.* v. *Bennet.* 3 *Term Rep.* 448.

19 It appearing that the bill in a penal action had been taken off the file, the court permitted it to be supplied from a copy taken by the plaintiff himself. *Petrie* v. *Benfield.* 3 *Term Rep.* 476.

20 The statute 37 *G.* 3, c. 90, s. 26, requiring a proctor to take out a certificate for practising under a certain penalty, gives no action to a common informer for the recovery of it; the 6th section of that act, incorporating the power of suing, &c. given by former statutes, only referring to penalties in respect of duties created by prior sections of that act. *Barnard* v. *Gostling.* 2 *East*, 569.

21 It seems that two proctors may be sued together for not obtaining and entering their certificates, and that one may be acquitted and the other convicted. *Ibid.*

22 But on error brought in the exchequer chamber, both points were overruled. *Barnard* v. *Costling and al. New Rep.* 245.

23 *Quere*, Whether it be not bad to sue under the statute for not having *obtained and entered* a certificate, without distinguishing which of those two omissions the person sued has been guilty of. *Ibid.*

24 A joint action may be maintained against several to recover a penalty upon the game laws. *Hardyman* v. *Whitaker, cited.* 2 *East*, 573, *n.*

25 The statute 39 *G.* 3, c. 79, giving a penalty of 20*l.* for printing papers to be published, without adding the printer's name and place of abode, directs that any penalty imposed by the act *exceeding* 20*l.* may be sued for in the courts at *Westminster*; and any penalty not exceeding 20*l.* *shall and may* be recovered before any justice of peace; but it also gives, in the same clause, a form of declaration *for recovering* 20*l.* in the courts of *Westminster.* Yet held, that a common informer cannot sue for a penalty of 20*l.* in this court; no such power being given by the statute, and their being no power at common law for a common informer to sue for any penalty; and that the form of the declaration must be read *in blank*, as to the sum, such form being otherwise inapplicable to a larger penalty before given; and that no such action lay to recover two or more penalties of 20*l.* each. *Fleming q. t.* v. *Bailey.* 5 *East*, 313.

26 Assuming it to be necessary in an action for a penalty by a common informer that the court should refer to the statute *giving the remedy* as well as to that *creating* the *offence* and *giving the penalty*; yet a court for a penalty on the statute 5 *Ann*, c. 14, stating that the defendant kept a snare to kill *game, against the form of the statute in such case made, &c., by reason whereof*, and by the force of the statute in such case made, &c. is sufficient; for the first statute mentioned, refers to the 5 *Ann*, c. 14, creating the offence, and giving the penalty; and the statute lastly mentioned, refers to

the 2 G. 3, c. 19, whereby the *whole* penalty is given to the common informer, the half only of which had been given to him by an intervening statute. *The Earl of Clanricard* v. *Stokes*. 7 *East*, 516.

PENALTY.

1 An *East-India* merchant, being bound at *Bombay* in a bond to appear in this court to answer the demands of a black merchant there, permitted to appear here accordingly. *A black merchant of Bombay* v. *Dorrell*. 1 *Burr*. 398.

2 When a penalty is paid according to the stipulation of articles, no subsequent action on the case lies for the breach of contract. *Bird* v. *Randall*. 1 *Black*. 387 and 373.

3 But one may recover more than the penalty in damages, where there has been no such precedent payment. *Winter* v. *Trimmer*. 1 *Black*. 395.

4 In debt for a penalty for non-performance of covenants, judgment on demurrer may be entered up for the penalty in like manner as before the statute 8 and 9 W. 3, c. 11; but then it can stand only as a *security* for the damages sustained. *Goodwin* v. *Crowle*, (*Executor*.) *Cowp*. 357.

5 To entitle himself to a penalty on articles of agreement, the plaintiff must shew a strict performance on his part. 1 *H. Black*. 270.

6 By articles of agreement between the plaintiff and defendant, it was agreed that the plaintiff should pay the defendant so much *per* week to perform at his theatres, with her travelling expences, and that the defendant should perform at the theatres such things as she should be required by the plaintiff, and attend at the theatres beyond the usual hours on any emergency, and at rehearsals, or be subject to such fines as are established at the theatres, and abide by the regulations of the theatres, and pay all fines: and that "either of them neglecting to perform that agreement should pay to the other 200l." The court held, principally on the ground of the stipulation in the agreement for the payment of smaller sums in certain cases, namely, the fines, that the 200l. was in the nature of a penalty, and not of liquidated damages. *Astley* v. *Weldon*. 2 *Bos. & Pull*. 346.

7 If a party agree not to do some specified act under a "penalty" of 1000l. such sum cannot be considered in the nature of liquidated damages. *Smith* v. *Dickenson*. 3 *Bos. & Pull*. 630.

8 In an action on the statute 2 and 3 Ed. 6, c. 13, for the treble value of the tithe corn, omitted to be set out, it is not enough for the defendant to shew the existence, *in fact*, of a custom in the parish to set out the 11th instead of the 10th mow; for the validity as well as the existence of such a custom is properly triable in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him. *Phillips* v. *Davies*. 8 *East*, 178.

9 A question as to what is to be considered as a penalty. 1 *Mass*. 191.

10 *A*. and *B*. entered into a written agreement, by which *A*. agreed to convey to *B*. 700 acres of land to be appraised, in part payment for a farm, valued at 3,750 dollars, which *B*. agreed to sell to *A*., and it was covenanted, that in case either party failed to fulfil the agreement, the party failing to perform, "should forfeit and pay, to the party who should fulfil the agreement, the sum of 2,000 dollars, as damages." It was held, that the 2,000 dollars was, according to the intention of the parties, as inferred from the whole agreement, to be considered as a penalty, and not as *stipulated damages*. *Dennis* v. *Cummings*. 3 *Johns. Cases*, 297.

11 Penalties must be created by the

express words of an act, and cannot be raised by implication. *Jones* v. *Estis*. 2 *Johns. Rep.* 379.

12 Where the party may sue for damages beyond the penalty of the contract. 4 *Dallas*, 149.

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PENNSYLVANIA.

Operation of the compact for settling of the disputed territory between *Pennsylvania* and *Virginia*, as to rights previously acquired. 3 *Dallas*, 425 to 466.

What constitutes a legal right of entry in *Pennsylvania*. *Ibid.*

PEREMPTORY.

A peremptory rule is always understood so as to be without prejudice to justice. *Anon. Lofft*, 262. 2 *Black.* 929. 1 *Cowp.* 161.

PERFORMANCE.

Where an act cannot be completed without the concurrence of the party for whom it is to be done; if the party who is to do it does as much as he can without such concurrence, he does what is equivalent to an actual performance of the act, and may insist upon any recompence he was to have upon such performance. A tender cannot amount to a performance, unless it is actually rejected, or unless it is to be made at a particular place and the party to whom it is to be made does not attend. A man who would insist on a tender at a particular place, and a non-attendance by the party to whom it was to have been made, must shew that he was at the place the last moment the tender could properly have been made. *Lancashire* v. *Killingworth*. 1 *L. Raym.* 686. *Salk.* 623. 3 *Salk.* 342.

PERJURY.

1 In perjury upon an answer in chancery, no need to prove the identity of the person or the actual swearing. The handwriting of the defendant and the master must be proved. *Rex* v. *John Morris*. 2 *Burr.* 1189.

2 Perjury committed at the *Old Bailey* on a trial before a *Middlesex* jury, is laid in and tried by a jury of the city of *London*. *The King* v. *Gough*. 2 *Doug.* 794.

3 Perjury being committed in the booth-hall within the limits of the county of the city of *Gloucester*, on the trial of a cause before a jury of the county at large; the indictment may be found and tried by juries of the county at large. *Rex* v. *Gough*. 2 *Doug.* 791 to 797.

4 It is necessary in indictments for this offence, to state a legal authority to administer an oath. *The King* v. *Lyme Regis*. 1 *Doug.* 156.

5 Perjury must not only be false swearing upon oath, and in a court having authority to administer an oath, and in a matter which is material to the cause, but it must be a wilful and deliberate false swearing; for if a man in hurry of evidence, or from defect of memory, swears false by error or surprize, this is not perjury; for there must be the mind of swearing false to make it perjury; and then it will be perjury, even if a man swears to a true fact, if it can be proved he believed it false. *Gilbert* v. *Berkinshaw*. *Lofft*, 771.

6 Affidavit that they the deponents, *nor* any of them, *never* received, held a good and sufficient denial; and that if false, and they had received, the words were full enough to subject them to an indictment of perjury. *Anon. Lofft*, 274.

7 Perjury punishable at common law, if it relate to justice by statute; if to a spiritual matter in that court.

it is punishable there. *Buxton* v. *Gouch.* 3 *Salk.* 269.

8 False evidence, if immaterial, is not perjury; but whatever is perjury at common law, is perjury under the statute. The statute does not alter the offence, but merely increases the punishment. In pleading collateral matters, the county in which they arose must be mentioned as well as the vill. An *innuendo* can only explain or apply precedent matter; it cannot add to or extend it. *The King* v. *Griepe.* 1 *L. Raym.* 256.

9 Articles of peace appearing malicious and untrue, court stayed process on them, and committed the exhibitant for perjury. *Rex* v. *Robert Parnell.* 2 *Burr.* 806.

10 To found an indictment for perjury the requisite circumstances are these; *the oath must be taken in a judicial proceeding, before a competent jurisdiction; and it must be material to the question depending, and false.* *Rex* v. *E. Aylett.* 1 *Term Rep.* 69.

11 Perjury may be assigned on an affidavit of an attorney of the court made in answer to a charge exhibited against him in a summary way for having in his possession blank pieces of paper with affidavit stamps, and the signatures of a master extraordinary in chancery and another person at the bottom of the papers. *Rex* v. *Crossley.* 7 *Term Rep.* 315.

12 It is no objection to such an indictment that it is not stated where the court was holden when the original application was made, or when the rule was made, calling on the defendant to answer the charge; a sufficient venue being laid on the fact of taking the false oath. 7 *Term Rep.* 315.

13 In the indictment there must be an allegation of *time* and *place*, which are sometimes material and necessary to be laid with precision, and sometimes not. 1 *Term Rep.* 69.

14 Where time is not material, it need not be positively averred, and if under a *videlicit*, may be rejected. 1 *Term Rep.* 70, 1.

15 It is not necessary to set forth in an indictment for perjury so much of the proceeding of the former trial as will shew the materiality of the question on which the perjury is assigned; it is sufficient to allege generally that the particular question became a material question. 5 *Term Rep.* 318.

16 By statute 23 G. 2, c. 11, the prosecutor need only set forth in the indictment the substance of the offence charged, and by what court, or before whom the oath was taken, (averring such court, &c. to have competent authority to administer the same,) &c. without setting forth the commission or authority of the court, &c. 5 *Term Rep.* 317.

17 In an indictment for a perjury committed at the admiralty session, where the commission was directed to *A. B.* and *C.*, and others not named, of whom *A. B.* and *C.* were among others *to be one*; the court will take it to mean, that if either of the persons named of the quorum were present, it would be sufficient. *Rex* v. *Dowlin.* 5 *Term Rep.* 311.

18 In such case it is not necessary to set out the commission in the indictment. 5 *Term Rep.* 317.

19 But where the prosecutor in perjury, undertakes to set out in the indictment more of the proceedings that he need under the statute 23 G. 2, c. 11, he must set them forth correctly. 5 *Term Rep.* 317.

20 Stating that at a court of admiralty session *J. K.* was *in due form of law tried upon a certain indictment then and there depending* against him for murder, and that *at and upon the said trial it then and there became and was made a material question* whether, &c. are sufficient averments that the perjury was committed on the trial of *J. K.* for the murder, and that the question on which the perjury was assigned was material on that trial. 5 *Term Rep.* 317.

21 A complaint having been made *ore tenus* by a solicitor before the chancellor in the court of chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that "*at and upon the hearing of the said complaint*," the defendant deposed, &c.; this is a sufficient averment that the complaint *was heard*. 1 *Term Rep.* 70.

22 The complaint of the defendant being that he was taken before he got to his own house in the parish of *St. Martin in the Fields*, *innuendo* his house *in the Haymarket* in *St. Martin's*, &c. The *innuendo* is only a more particular description of the same house, and good. 1 *Term Rep.* 70.

23 The oath being that the defendant was arrested upon the steps of his own door, an *innuendo* that it was the *outer* door is good. 1 *Term Rep.* 70.

24 An indictment for perjury assigned on an affidavit sworn before the court of *B. R.* need not state, nor is it necessary to prove, that the affidavit was filed of record or exhibited to the court, or in any manner used by the party. 7 *Term Rep.* 315.

25 The punishments directed by the statute 18 G. 2, c. 18, to be inflicted upon perjury in falsely taking the freeholder's oath at an election of a knight of the shire, are *cumulative* under the statute 5 Eliz. c. 9, s. 6, and 2 G. 2, c. 25, s. 2, to which the first mentioned statute refers. *Rex* v. *Price*. 6 *East*, 327.

PETERSBURGH.

By the act of congress of 10th of May, 1800, the collector of the district of *Petersburgh* was *not* restricted to a commission of two and an half *per cent.* on the monies by him collected and received after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods imported into the *United States*. *United States* v. *Heth*. 3 *Cranch*, 399.

PEW.

1 A person may prescribe for a pew in the chancel of a church. *Griffiths* v. *Matthews*. 5 *Term Rep.* 297.

2 There cannot be a gift of a pew to a man without a faculty. *Rogers* v. *Brooks*. 1 *Term Rep.* 431, *n.*

3 *Possession* alone of a pew in a church, though for above sixty years, is not a sufficient title to maintain an action on the case, even against a wrong-doer, for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration *as appurtenant to a messuage in the parish*. *Stocks* v. *Booth*. 1 *Term Rep.* 428.

4 But possession for 36 years, where the pew is claimed *as appurtenant to a messuage*, is a good presumptive evidence of a faculty. *Rogers* v. *Brooks & Ux.* 1 *Term Rep.* 431, *n.*

5 So uninterrupted possession of a pew in the chancel for 30 years, unexplained, is presumptive evidence of a prescriptive right to the pew in an action against a wrong-doer. 5 *Term Rep.* 297.

6 But that presumption may be rebutted by proof that prior to that time the pew had no existence. 5 *Term Rep.* 297.

7 A faculty to a man *and his heirs* is bad. *Stocks* v. *Booth*. 1 *Term Rep.* 432.

8 If a faculty be annexed to a messuage, it may be transferred with the messuage to another person. 1 *Term Rep.* 431.

9 There may be a faculty for exchanging seats in a church. 1 *Term Rep.* 431.

10 Trespass will not lie for entering into a pew; because the plaintiff has not the exclusive possession, the possession of the church being in the parson. 1 *Term Rep.* 430.

PHYSICIAN.

1 The prescribing what is fit for a patient, is practising physic. *College of Physicians* v. *Rose.* 3 *Salk.* 17.

2 Undetermined, whether the licentiates in physic have in general a right to demand admission into the college. *Rex* v. *College of Phisicians.* 5 *Burr.* 2740.

3 A graduate doctor of one of the universities cannot practice physic in *London*, or within seven miles of it, without licence from the college of physicians. *College of Physicians* v. *Levett.* 1 *L. Raym.* 472.

4 Candidates to be admitted of the college are to be examined by the *comitia minora*, then proposed to the *comitia majora* and elected by them, before they can claim to be admitted. *Rex* v. *Askew & others.* 4 *Burr.* 2186.

5 A physician cannot maintain an action for his fees. *Chorley* v. *Bolcot.* 4 *Term Rep.* 317.

6 A doctor of physic, who has been licensed by the college of physicians to practice physic in *London*, and within seven miles, cannot claim, as a matter of right, to be examined by the college in order to his being admitted a fellow of the college. *Rex* v. *The President and College of Physicians.* 7 *Term Rep.* 282.

7 The college of physicians, who have power by their charter (confirmed by act of parliament) to make bye-laws, have made bye-laws respecting the qualifications of persons to be admitted into the college; by them it is ordained that no person shall be admitted into the class of candidates before admission into the college, unless he has taken a degree of *M. D.* at *Oxford*, *Cambridge*, or *Dublin*, except in two cases; in one of those cases, the president may propose once in every other year a doctor of physic of a certain standing, and if he be approved by the college, he may be admitted a fellow; in the other, any fellow may propose a doctor of physic of a certain age and standing, and if approved at certain meetings he may be admitted a fellow; held that these were reasonable bye-laws. 7 *Term Rep.* 282.

PILOTS.

1 Every person who takes upon himself to be pilot of ships before being examined, approved, and admitted into the fellowship of the pilots of the Trinity House, incurs the penalties of statute 3 G. 1, c. 13. *Kimber qui tam, &c.* v. *Blanchard.* 5 *Burr.* 2602.

2 A master or owner, not being a regular pilot, may not pilot his own vessel up the *Thames*. *Kimber qui tam* v. *Blanchard.* 2 *Black.* 690.

3 The penalty imposed by the statute of 1796, c. 85, s. 3, does not extend to one who pilots a public vessel of war, of the *United States*. *Ayers* v. *Knox.* 7 *Mass.* 306.

4 A *pilot*, while on board of a ship, has the exclusive direction and control of her, and is considered as master, *pro hac vice*. *Snell, Stagg & Co.* v. *Rich.* 1 *Johns. Rep.* 305.

5 The owner of a ship doing damage to another, is liable, though the ship was in charge of a pilot. 4 *Dallas*, 206.

PLEADING.

I. *Declaration.*
II. *Departure.*
III. *Double plea, or Duplicity in Pleading.*
IV. *Heir, Plea by.*
V. *Not guilty, & Nil Debit.*
VI. *Plea in bar.*
VII. *Prescription or Usage.*
VIII. *Profert.*
IX. *Replication & Rejoinder.*
X. *Title.*
XI. *Traverse.*

XII. *Videlicit.*
XIII. *Ancient Demesne, Surplusage, and points of Practice in Pleading.*

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I. *Declaration.*

1 In an action of debt upon an award, plaintiff needs shew forth nothing more than is necessary to support his claim and entitle him to the thing demanded; but if such an action be brought upon the arbitration bond, plaintiff must set forth whole demand. *Perry* v. *Nicholson.* 1 *Burr.* 278.

2 *Que.* Whether a man who has a right to be present at a vestry, can maintain an action against one who keeps him out of the room in which the vestry is holding?

If such an action will lie, the declaration must shew that the parishioners had a right to hold their vestry in the room out of which the plaintiff was kept.

An allegation that the room was the usual place in which vestries were wont to be held, is not sufficient to shew the parishioners had a right to hold their vestries in it. *Phillibrown* v. *Ryland.* 2 *L. Raym.* 1388. *Str.* 624.

3 *Latitat* may be alledged in pleading to be sued out 23d *February*, (though out of term,) it not being an impossible time, though the usual course is to allege it to be sued out the last day of the preceeding term on which it bears test. *Hart* v. *Weston.* 2 *Black.* 683. 5 *Burr.* 2586.

4 Three counts out of seven in a declaration upon a policy of insurance, ordered to be struck out as unnecessary; they being only repetitions of three other counts, stating the signature to have been by an agent of the defendant, and the three former counts having alleged the signature to have been by defendant himself; but no costs given. *Sarah Nicholson* v. *Stephen Cross.* 2 *Burr.* 1188.

5 Where there are mutual remedies, either may sue without shewing a performance on his part; but where defendant by deed pool covenants to accept so much stock from plaintiff as soon as the receipts should be delivered out, and pay 950l. for same on a certain day; in an action for the money, a tender or delivery of the stock must be averred. *Lock* v. *Wright.* 1 *Str.* 569.

6 In trespass *quare clausum fregit*, the plaintiff may declare generally, without naming the closes, which draws on the common bar, and new assignment. *Martin* v. *Kesterton.* 2 *Black.* 1089.

7 Declaration relates back to the first day of the term, unless there be any circumstance on record to refer it to any subsequent return, and then only to the essoign day of that return. 3 *Wils.* 154.

8 Assault and imprisonment. Defendant justifies under a *capias ad respondendum*; plaintiff replies, the defendant released him from the arrest and afterwards arrested him; and prays judgment, because the defendant has acknowledged the trespass; this is naught, and the plaintiff ought to have made a new assignment. *Scott* v. *Dixon.* 2 *Wils.* 3.

9 In an action by one commoner against another for surcharging, plaintiff may declare generally, and need not particularly shew the surcharge or defendant's right of common. *Atkinson* v. *Teasdale.* 3 *Wils.* 278.

10 In a declaration upon the statute of 9 G. 1, c. 22, it was laid that two stacks of oats of the plaintiff were set on fire feloniously; and well enough, although it was objected it ought to have been laid to be done unlawfully and maliciously. *Allen qui tam, &c.* v. *The Inhabitants of the Hundred of Kirton.* 3 *Wils.* 318. 2 *Black.* 842.

11 Where the proper venue (*N.*) is stated in the margin of a declaration, and the venue in the body of the declaration is laid at *D.* in the

county aforesaid, when the next antecedent county is *W.*; the reference shall be to the venue in the margin on a general demurrer. *Sutton* v. *Fenn.* 3 *Wils.* 339. 2 *Black.* 817.

12 Case for obstructing a wharf contrary to agreement, and *trover* may be joined. *Mast* v. *Goodson.* 3 *Wils.* 348. 2 *Black.* 818.

13 Trespass. Prescription for toll through the streets of *Gainsborough* in consideration of repairing divers streets there, ill; because does not say he repaired all the streets there. *Truman* v. *Walgham & Key.* 2 *Wils.* 296.

14 A declaration stating that the defendant was paymaster, that he promised the plaintiff that he should be his clerk as long as he the defendant should be paymaster, that the plaintiff served the defendant *in servitio predicto* until a particular day, and that on that day the defendant *dimisit et expulsit* the plaintiff *extra servitium suum*; is good, though it does not state in terms that the defendant continued paymaster after the dismission of the plaintiff. *Vaughan* v. *Lucking.* 2 *L. Raym.* 1222.

15 The count stating that in consideration the plaintiff's testator had carried certain merchandizes for the defendant, promised to pay him *tantam denariorum summam pro transportatione merchandizarum predictarum, predictarum rationabiliter habere meruisset*, omitting the words, "*quantam ipse*," and avering that *pro transportatione merchandizarum*, omitting the word, "*predictarum*," he deserved so much, cannot be objected to after verdict. *Glover* v. *Rogers.* 2 *L. Raym.* 1155. 2 *Salk.* 557.

16 In an action for a copyhold fine for a licence to aliene, there is no occasion to shew that the place where the fine was appointed to be paid is within the manor. Where a tender ought to be pleaded with a *tout temps prist*, it cannot be pleaded, after an imparlance. *Yaxley* v. *Rainer.* 1 *L. Raym.* 44.

17 In debt on a bond of indemnity against the maintenance of *J. S.*, his wife, and children, it is a good breach that two justices made an order to pay 2*s.* for the maintenance of *T. S.* one of the children of *J. S.* his wife and children. An additional averment that part of the 2*s.* was for the maintenance of *T. S.* is surplusage; and a traverse of such averment immaterial. No traverse is good which does not reduce the point in debate to a conclusion. Two justices out of sessions may make an order for an express sum for the maintenance of a pauper. *Waltham* v. *Sparkes.* 1 *L. Raym.* 41.

18 In a declaration in covenant, so much only of the substance of the deed and the covenant shall be set out as will shew the plaintiff's title. *Dundass* v. *Lord Weymouth.* *Cowp.* 665.

19 If more be inserted, the court will refer it to the master to strike it out with costs, and will animadvert upon the drawer of the declaration. *Ibid. and Price* v. *Fletcher*, 727.

20 In *assumpsit* upon *quantum meruit*, upon *non assumpsit* pleaded and verdict for the plaintiff, it was moved in arrest of judgment that the declaration was ill, because it was to pay such sums as the plaintiff *rationabiliter habere meretur*; upon which judgment was stayed until this term; and now the court held that it was well enough, and the same with *meruit*: Judgment for the plaintiff. *Clerk* v. *Usdall.* 2 *L. Raym.* 835.

21 Upon stating facts to shew a man was a bankrupt it is necessary to set forth that there was a petition. And that they were creditors to the amount of the sums mentioned, 5 G. 1, c. 24.

An allegation that the commissioners issued in one form of law is not sufficient. *Tully* v. *Sparkes.* 2 *L. Raym.* 1546. *Str.* 869.

22 Assault laid to be done on such a

day, &c. The day is not material. *Anonymous.* 3 *Salk.* 123.

28 In an *indebitatus assumpsit* the plaintiff may state that the defendant was indebted to him in so much foreign money, without shewing its value in *English*; at least no objection can be taken on this account after verdict. A man cannot sue in his own right and as executor in the same action. *Bennett* v. *Verdum.* 2 *L. Raym.* 841.

24 A small mistake in the title of the declaration not a reason to set aside the judgment, and the roll may be right. *Johnson* v. *Bridgwater.* 1 *Wils.* 104.

25 In an information for exercising a trade, not having served an apprenticeship, it need not be averred that the defendant did not exercise the trade at the time of making of the act. *Ball qui tam* v. *Cobus.* 1 *Burr.* 356.

26 Not material though the request laid in the declaration be to pay the debt before due. *Frampton* v. *Coulson.* 1 *Wils.* 33.

27 Declaration in debt on a recognizance against bail must set out for whom defendant was bail, and in what sum. *Park* v. *Yerbury.* 1 *Wils.* 284.

28 Two counts in *narr.* for things of the same kind, not averred to be different, well after verdict. *West* v. *Troles.* 1 *Salk.* 213.

29 Repugnancy in count fatal. *Nevil* v. *Soper.* 1 *Salk.* 213

30 Case for a misfeasance and negligence may be joined with trover in the same declaration, and wherever the judgment is the same. *Dickson the younger* v. *Clifton.* 2 *Wils.* 319.

31 A count stating that the defendant was indebted to the plaintiff in 10*l.* and, being so, would pay to the plaintiff, omitting the promise, is bad. *Lea* v. *Welch.* 2 *L. Raym.* 1516. *Str.* 791.

32 *John Connor* of *Barnett*, was summoned to answer; *John Connor* held sufficient in a declaration. *Connor* v. *Connor.* 2 *Wils.* 386.

33 Declaration must be intitled agreeable to the true time of delivery to defendant. *Thompson* v. *Marshall.* 1 *Wils.* 304.

34 Debt on a bye-law for not paying 2*s. per ann.* quarterly, the breach need not assign the days of quarterly payment. *Innholders Case.* 1 *Wilson,* 281.

35 In an action for disturbing plaintiff in his pew, it need not be laid or proved that he repaired it against a stranger; *aliter* in a dispute with the ordinary. *Kenrick* v. *Taylor.* 1 *Wils.* 320.

36 In detinue, the values of the several parcels need not be laid separately in the declaration. *Pawley* v. *Holey.* 2 *Black.* 853.

37 Misrecital of the title of a public act, though the party confines himself by the word *contra formam statuti*, not fatal. In debt upon a penal statute the plaintiff must particularize each offence. *Chance* v. *Adams.* 1 *L. Raym.* 77.

38 A declaration for taking away chattels must, in general, expressly shew that they belong to the plaintiff; but if such chattels are, from their nature, likely to be appropriated or annexed to any particular place, it will be sufficient after verdict, if such place appears to be the plaintiff's. *Fontleroy* v. *Aylmer.* 1 *L. Raym.* 239.

39 One trespass well alleged is sufficient upon demurrer to declaration. *Chamberlain* v. *Greenfield.* 2 *Black.* 810. 3 *Wils.* 292.

40 To an action upon an executory promise the defendant cannot plead *non assumpsit infra sex annos.*

'Tis no objection to a declaration that it appears upon the face of it that the time prescribed by the statute of limitations for bringing the action had elapsed before the declaration was delivered or filed. *Gould* v. *Johnson.* 2 *L. Raym.* 838. 1 *Salk.* 25.

41 The court will censure an unnecessary length of pleading. *Yates* v. *Carlisle.* 1 *Black.* 270.

The same censured as vexatious. *Ibid.* 291.

42 *Austriala* for *Australia*, in the name of the *South Sea* company, bad. *Turvil* v. *Aynsworth.* 2 *L. Raym.* 1515. *Str.* 787.

43 In trespass the plaintiff may declare generally, without naming the closes, and so draw on the common bar, and new assignment. *Martin* v. *Kesterton.* 2 *Black.* 1089.

44 Upon pleading a bargain and sale the consideration should be shewn; but though it is not, the objection cannot be taken after a verdict, though on collateral issue. *Stream* v. *Seyer.* 1 *L. Raymond*, 111.

45 Declaration that the defendant on the 6th *May*, and on divers other days and times between that day and the commencement of the suit, assaulted the plaintiff, is bad. *Michell* v. *Neale.* 1 *Cowp.* 828.

46 In trespass for taking goods declaration must specify particulars. *Bertie* v. *Pickering.* 4 *Burr.* 2155.

47 An *assumpsit* upon a *quantum meruit* for sufficient meat, drink, washing and lodging, for divers months, is sufficiently certain, at least it is unobjectionable after verdict. *Snow* v. *Firebrace.* 1 *L. Raym.* 611. *Salk.* 557.

48 In declarations, the county aforesaid, where more than one is named, always refers to that which is named in the margin. *Sutton* v. *Fenn.* 2 *Black.* 847. 3 *Wils.* 339.

49 In case for stopping lights it must appear that the lights were ancient, but *consuevit* after verdict in such action imparts usage time out of mind. *Rosewell* v. *Prior.* 2 *Salk.* 459. 1 *L. Raym.* 392.

50 In an action at the suit of several plaintiffs, if the introductory part of the declaration states that the defendant is in custody of the sheriff by virtue of a *latitat* issued, &c. of a plea that he render to them, it must be taken that the *latitat* was sued out by the plaintiffs. *Morris* v. *Watkins.* 2 *L. Raym.* 1362. 1 *Wils.* 119.

51 Declaration in trespass without *vi & armis*, ill on a general demurrer. *Wildgoose* v. *Kellaway.* 2 *Salk.* 636.

52 Declaration in trespass, *quare vi & armis*, &c. ill. *Hore* v. *Chapman.* 2 *Salk.* 636.

53 Declaration against the defendant only, stating that he and another made their promissory note, by which they jointly or severally promised to pay, is good. *Rees* v. *Abbott.* 1 *Cowp.* 832.

54 In an action against an administrator in the King's Bench, by bill, if the plaintiff styles him administrator the first time he mentions him in the declaration, he need not aver specially that administration was committed to him. *Holliday* v. *Fletcher.* 2 *L. Raym.* 1510. *Str.* 781.

55 A declaration for stopping up a water course, without shewing how, is bad upon demurrer; but unobjectionable after verdict. *Anon.* 1 *L. Raym.* 452.

56 A declaration for taking away chattels must, in general, shew expressly that they belonged to the plaintiff. In a declaration for taking away particular goods found and being at *D.* and also 100 bushels of wheat, of the goods and chattels of the plaintiff, the words of the goods and chattels of the plaintiff can only apply to the 100 bushels of wheat. In trespass, if the defendant justifies and the plaintiff demurs to his plea, and takes conditional damages, if those damages are entire, and any of the trespasses are ill laid, the judgment shall be arrested as to the whole. *Jose* v. *Mills.* 2 *L. Raym.* 890.

57 Agreement to convey to *H.* or his assigns. Breach that he did not convey to *H.* good. Diversity between covenant to do an act to, or by, *H.* or his assigns. *Smith* v. *Sharp.* 1 *Salk.* 139.

58 In declaring on a deed (as in covenant,) it is only necessary to state enough of the deed to shew a title

to the action. *Bristow* v. *Wright*. 2 *Doug*. 667.

And that part need not be set forth *in hæc verba*, but only according to the legal effect or operation. *Ibid.*

In debt by an informer against a sheriff's officer, if the declaration state a judgment, and *fi. fa.* upon that judgment, both must be proved, although it might be unnecessary to have stated the judgment. *Ibid. n.*

59 Heir's assigns for breach that the premises were not out of repair, *tali die* and *per* 10 *annos*, which included his ancestor's time, held well. *Vivion* v. *Campion*. 1 *Salk*. 141. 2 *L. Raym*. 1125.

60 In an action of covenant by the husband of tenant in fee, he must declare on a seizin in their demesne as of fee in himself and his wife, in right of his wife. *Pollyblank* v. *Hawkins*. 1 *Doug*. 328, 329.

If he declare on a seizin in his demesne, as of freehold, in right of his wife, it will be bad on special demurrer. *Ibid.*

61 In an action against the sheriff for taking goods without leaving the amount of a year's rent, the declaration need not state all the particulars of the demise; but if it does they must be proved as laid. *Bristow* v. *Wright*. 2 *Doug*. 665 to 669.

62 In a declaration in case for breach of a custom for inhabitants to grind at plaintiff's mill, it is not necessary to state that the inhabitants "had and ought, from time whereof, &c." nor that the mill is an ancient mill. 1 *Doug*. 218, *n.*

63 Trade of a tiler, not setting forth that it was a trade used in *England* at the time when the statute was made, yet good, the trade being mentioned in the statute. *White* v. *England*. 3 *Salk*. 42.

64 Attornment, since the statute of 4 Ann. c. 16, s. 9, need not be averred in a declaration in covenant for rent. *Moss* v. *Gallimore*. 1 *Doug*. 283.

Nor in an avowry. *Ibid.*

65 In an action for a malicious prosecution in charging the plaintiff with conspiring with others to defraud the defendant of interest of an *East-India* bond, the declaration stated that the bond bore interest "as therein *is* (not *was*) mentioned," and held good. *Jackson* v. *Sharp*. *Willes*, 525.

66 Where a statute creates a new thing in writing it must be so pleaded; but where it only adds it to a common law-matter it need not be set forth in a declaration; but in a plea it must. *Anon*. 2 *Salk*. 519.

67 *Sex triginta libris*, held well. *Henderson* v. *Foster*. 2 *Salk*. 462.

68 A demandant in formedon who claims under a devise with a condition may set forth the devise only, without the condition. *Brice* v. *Smith*. *Willes*, 1.

69 Plaintiff must aver performance of what is to be done on his part, or shew that he was ready to perform it. *Collins* v. *Gibbs*. 2 *Burr*. 899.

70 *Testatum existit* is no *averment*, but only recital. *Woodward* v. *Cliff*. 2 *Salk*, 515.

71 *Indebitatus assumpsit* for 13l. 10s. for nine guineas, well. *Dixon* v. *Willoughs*. 2 *Salk*. 446.

72 If it do not appear on the record that there is a condition to a recognizance on which an action is brought, the court will not intend that there is any condition. *Crosse* v. *Porter*. *Willes*, 18.

But if it appears upon the record that there is a condition, the declaration is bad unless the condition be set forth therein. *Ibid.*

73 Declaration upon bail bond needs not set forth that there was an affidavit of debt, or that the sum sworn to was indorsed on the writ. *Whiskard, assignee, &c.* v. *Wilder*. 1 *Burr*. 300.

74 It is sufficient for an assignee of a bail bond to state in his declaration that the sheriff assigned the bond to him according to the form of the statute, without adding "that the assignment was under the hand and

seal of the sheriff. *Dawes* v. *Papworth*. *Willes*, 408.

To such a declaration the defendant may plead that the sheriff did not assign, &c. according to the form of the statute; and the plaintiff may tender an issue on it in those words. *Ibid.*

75 Declaration against a corporation for not repairing the banks of a navigable river, as from time immemorial they had been used and ought to do, whereby the course of the river became obstructed, and the plaintiff was obliged to carry his corn about; 2d count charging as above, and that thereby he had not sufficient use of the navigation *prout consuevit et debuit*. Judgment for the plaintiff affirmed on error. *Anon*. *Lofft*, 556.

76 A declaration in replevin should specify the place where the goods were taken; but the defect is cured by the defendant's pleading; he should demur. *Bullythorpe* v. *Turner*. *Willes*, 475.

A plea of *cepit in alio loco* (in replevin) is a plea in bar, not in abatement, though it pray the judgment of the declaration. *Ibid.*

In replevin the defendant pleaded *cepit in alio loco*, and avowed taking the goods in such other place whither they had been fraudulently conveyed within 30 days, &c. from the demised premises, as a distress for rent; the plaintiff in his plea in bar traversed the avowry, and took no notice of the plea; and on demurrer it was holden ill, the avowry being in nature of a suggestion to entitle the party to a return of the distress, and not reversable. *Ib.*

Form of judgment in replevin. *Ibid.* 481.

77 On covenant to stand seized for love and affection, one named in the deed may aver himself a relation. A covenant in consideration of love and affection to *B.* his wife to stand seized to the use of such persons as *B.* shall think fit to dispose to. *B.* disposes to one who is a stranger to the consideration. No use arises. *Goodtitle* v. *Petto*. 2 *Str*. 934.

78 An action of covenant cannot be maintained except upon a deed, and the declaration must shew that it is brought on one. *Moore and wife* v. *Jones*. 1 *L. Raym*. 1516 2 *Str*. 814.

An allegation that a party *concessit per quoddam scriptum factum apud A.* does not imply that the writing was a deed; nor does an allegation that the party covenanted *per quoddam scriptum*. *Ibid.*

79 Declaration that defendant, in consideration the plaintiff would make him a set of sails worth 45*l*. promised to pay so much *on request*, and avers that he made the said sails, and that defendant, although often requested, refuses to pay. Held, on demurrer, that a special request was unnecessary. *Wallis* v. *Scott*. 1 *Str*. 88.

80 Covenant not to buy or sell within two years. Breach, that *diversis diebus et vicibus*, between such a day and such a day, he sold to *H.* and several other persons, held well. *Farrow* v. *Chevrlier*. 1 *Salk*. 139. 1 *L. Raym*. 478.

81 In an action for a penalty under the bribery act, 2 G. 2, c. 24, it is sufficient to state that the defendant corrupted *A. B.* (a voter, &c.) to vote for *C. D.* by giving him a sum of money as a gift or reward for his the said *A. B.*'s giving his vote, &c. without saying he gave *A. B.* that sum for the purpose of bringing him to give his vote, &c. *Mead* v. *Robinson*. *Willes*, 427.

82 Declaration upon administration granted by the official of a peculiar *debito modo commissa fuit*, sufficient, without averring that he had jurisdiction of administrations. *Denham* v. *Stephenson*. 1 *Salk*. 40.

83 The court will not oblige the consolidating of declarations where they relate to different rights of way through the same close to the same town. *Mynot* v. *Bridge and another*. 2 *Str*. 1178.

84 The court cannot join declarations

against separate persons. *Bayly* v. *Rayby and another.* 1 *Str.* 420.

85 Where the action is against the original lessee, the breach need not extend to assigns. *Gyse* v *Ellis.* 1 *Str.* 228.

86 Where there is a special agreement the plaintiff cannot go upon a general *indebitatus assumpsit.* *Weaver* v. *Boroughs.* 1 *Str.* 648.

87 *Clarencieux* is part of the name of the person, and must be stated in declaration. *Holt* v. *Ward.* 2 *Str.* 850.

88 In a case for malicious prosecution, must shew proceedings determined and how. *Lewis* v. *Farrel.* 1 *Str.* 114.

In avowries the commencement of particular estates must be shewn. *Reynolds* v. *Thorpe.* 2 *Str.* 796.

89 In B. R. calling the defendant administrator in the declaration is sufficient, without a special averment. *Holiday* v. *Fletcher.* 2 *Salk.* 90.

90 Leaving out *super se assumpsit*, is ill on a judgment by default. *Lee* v. *Welch.* 2 *Str.* 793.

91 Addition of "late of *London*, merchant," good; though defendant commorant in *Middlesex*. *Cortisos* v. *Manox.* 2 *Str.* 924.

92 In an action from being excluded from the vestry-room, must shew the parish had a right to meet there. *Phillybrown* v. *Ryland.* 1 *Str.* 621.

93 Note to pay jointly or severally, and one sued, declaration must be general against him, and the note given in evidence. *Butler* v. *Malissy.* 1 *Str.* 76.

94 *Ad maria Austrial' vocat'* the South Sea Company, instead of *Austral'*, without the *i*, bad in a declaration. *Turvil* v. *Aynsworth.* 2 *Str.* 787.

95 If the note be the defendant's own writing, it need not be said in the declaration, that he signed it. *Taylor* v. *Dobbins.* 1 *Str.* 399.

96 In *assumpsit* the day is not material, and the plaintiff may allege a different one in the replication. *Matthews* v. *Spicer.* 2 *Str.* 806.

97 Where the same plea may be pleaded and the same judgment given on two counts, they may be joined in the same declaration. *Brown* v. *Dixon.* 1 *Term Rep.* 274.

98 *Assumpsit* and *trover* cannot be joined. 1 *Term Rep.* 277.

99 But to a declaration against a common carrier, upon the custom of the realm, a count in trover may be added. 1 *Term Rep.* 277.

100 In debt for goods sold and delivered, the plaintiff declared that the defendant *at Westminster in the county of Middlesex was indebted* to him in a certain sum for goods sold and delivered, without alleging an express contract, and place where such contract was made: upon special demurrer for these causes, the court held the contract and venue well laid. *Emery* v. *Fell.* 2 *Term Rep.* 28.

101 A declaration stated that in consideration that the plaintiff had sold to the defendant *a certain horse* of the plaintiff at and for a *certain quantity of certain oil*, to be delivered within *a certain time*, which had elapsed before the commencement of the suit, the defendant promised to deliver the said oil accordingly; held well enough after verdict. *Ward* v. *Harris.* 2 *Bos. & Pull.* 265.

102 Declaration that "in consideration that the plaintiff had taken the defendant's goods on board his ship to be carried to *A.*, the defendant promised to pay the money due for freight and carriage of the same on the delivery of the bill of lading; that the bill of lading was delivered, by reason whereof the defendant became liable to pay a large sum, to wit. 20*l.* for freight and carriage of the said goods:" held bad on demurrer, because it did not appear that any thing became due for freight on the delivery of the bill of lading. *Blakey* v. *Dixon.* 2 *Bos. & Pull.* 321.

Qu. Whether in alleging the promise

to pay in the above case, the plaintiff should not have stated the specific sum, or have said, so much as should be reasonably due? *Ibid.*

103 *A.* having recovered judgment against *B.*, and a *fi. fa.* being delivered to the sheriff, in consideration that *A.* at the special instance and request of *C. had requested the sheriff not to execute the writ*, *C.* promised to pay *A.* the debt and costs, together with the sheriff's poundage, bailiff's fees, and other charges. On a judgment by default and error brought, the promise was holden to be binding on *C.*, though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, &c. was, nor that the defendant had notice of such amount. *Pullen* v. *Stokes, in Cam. Scac.* 2 *H. Black.* 312.

104 The omission of "and thereupon the said *J. S.* complains," in the beginning of a declaration in trespass on the case is no cause of special demurrer. *Dobson* v. *Herne.* 1 *Bos. & Pull.* 366.

105 The defendant being sued by the name of "*Jonathan otherwise John Soans*" is no cause of demurrer to the declaration; for, *non constat* that it is not all one *christian* name. *Scott* v. *Soans.* 3 *East*, 111.

106 In declaring against *A.* upon a joint contract by *A.* and *B.*, it is not enough to allege that *B.* was *in due manner outlawed*; without adding that he was outlawed *in that suit*. *Sounderson* v. *Hudson.* 3 *East*, 144.

107 In *assumpsit* brought by an administrator *de bonis non*, the promise may be laid to have been made to the first administrator. *Hirst* v. *Smith.* 7 *Term Rep.* 182.

108 It is not necessary in a declaration on a bill of exchange to aver that the maker *delivered* it: it is sufficient to state that he made it. *Churchill* v. *Gardner.* 7 *Term Rep.* 596.

109 *A.* having covenanted to make a good title to *B.* at his expence, *quære*, whether it be a good averment, that *A.* was *capable*, *ready*, and *willing*, to make a good title, if *B.* would have prepared the conveyances. 1 *H. Black.* 270.

Qu. Also whether a breach be well assigned, stating that *B.* did not nor would accept the title; whether it ought not to be shewn, that *A. tendered a good title* to him, which he refused? 1 *H. Black.* 270.

110 In *assumpsit* by the vendor against the vendee of land for not accepting it and paying the purchase money, the plaintiff averred that he was *seized in fee* of the land, and that the defendant agreed to purchase it *on having a good title*, and that his title to the land *was made good, perfect, and satisfactory to the defendant*, and that he, the plaintiff, had been always ready and willing, and *offered to convey the lands to the defendant*, but that the defendant did not pay the purchase money; and, on demurrer, held that such general allegation of title in the plaintiff, and that his title was made *good and satisfactory* to the defendant, and that the plaintiff was ready and willing, and offered to convey to the defendant, were tantamount to performance of the agreement on his part so as to entitle him to recover for a breach of the defendant's part in not paying the purchase money. *Martin* v. *Smith.* 6 *East*, 555.

111 *A.* declared in covenant against *B.* and her husband, for that *B.*, before her intermarriage covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.*, protesting that *B.* had not before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded B.* to pay *A.* a certain sum; and alleged a breach for non-payment of such sum. Af-

ter verdict on *non est factum* pleaded; held, that upon this declaration it must be taken that *B. intermarried after* the submission and *before* the *award* made; in which case, although the plaintiff could not recover on the breach assigned, *for nonpayment of the sum awarded*, because the *marriage* was a *countermand* to the *authority of the arbitrator*; yet, as by the marriage itself *B.* had, by her own act, put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested, on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for breach by non-performance of the award*. *Charnley* v. *Winstanley & ux.* 5 *East*, 266.

112 On a motion in arrest of judgment the court of K. B. held, that if one of several part-owners of a chattel sue alone for a tort the defendant can only take advantage of the objection by a plea in abatement, even though the defect appear on the declaration. *Addison* v. *Overend.* 6 *Term Rep.* 766.

113 The reversion of lands demised to the defendant for years, is conveyed to *A.* and *B.*, and the heirs of *B.* in trust for *A.* and his heirs: *A.* declares singly on a covenant contained in the lease, and after setting out the above title, without averring the death of *B.*, states himself to be "thereby seized of the reversion in his demesne as of fee." Upon general demurrer, to the declaration, the court of C. P. held this to be bad, and that the defendant need not plead it in abatement. *Scott* v. *Godwin.* 1 *Bos. & Pull.* 67.

114 Declaration on a policy on ship and goods at and from *London* to *Amsterdam*, "beginning the adventure on the goods from the loading thereof on board the said ship;" with a memorandum that the insu[rance] was on 15 hogheads of tobacco, marked B. No. 51, and 65: special demurrer, first, because the goods were not averred to have been put on board at *London*; secondly, because they were not alleged to have been marked or numbered as in the memorandum but only thus, "15 hogsheads the goods in the said policy mentioned;" thirdly, because the plaintiff was stated to have been interested until and at the time of the loss, without shewing that he was interested at the time of the policy being made; fourthly, because the allegation of the loss was without a venue. Semb. that the declaration was bad. *De Symonds* v. *Shedden.* 2 *Bos. & Pull.* 153.

115 If a declaration on a policy of insurance aver the goods to have been seized in a hostile manner by the enemies of our lord the king, to the plaintiff unknown; the averment is not supported by evidence that they were seized by the *Spanish* government as about to be imported into the *Spanish Main*, contrary to the laws of *Spain*. *Matthie* v. *Potts.* 3 *Bos. & Pull.* 23.

116 In a declaration for slander the plaintiff stated that he was a jobber or dealer in the funds, and as such jobber or dealer had been accustomed lawfully to contract, and had from time to time lawfully contracted, &c. that the defendant said of him as such jobber or dealer, "he is a lame duck," meaning that he had not fulfilled his contracts in respect of the said stocks or funds, in consequence of which divers persons refused to fulfil their contracts with him (specifying the contracts,) and he was prevented from fulfilling his contracts with other persons: held that it did not sufficiently appear either that the words were spoken of lawful contracts or that the plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad. *Morris* v. *Langdale.* 2 *Bos. & Pull.* 284.

117 *Qu.* Whether, under such circum-

stances it can be stated as special damage, that divers person refused to fulfil their contracts with the plaintiff, since he might recover a compensation by action if the contracts were lawful? *Ibid.*

118 The first count of a declaration stated that the defendant heretofore, to wit, on such a day, drew a bill of exchange bearing date the day and year aforesaid, payable two months after date. The second count stated that afterwards, to wit, on the day and year aforesaid, the defendant drew a certain other bill of exchange, payable two months after date; without mentioning any express date in either count. Held that both counts were good. *Hague* v. *French.* 3 *Bos. & Pull.* 173.

119 In an action against the sheriff *for* an escape on mesne process, it is sufficient to aver that the sheriff had not the body at the return of the writ, without negativing the appearance of the party, or his putting in bail. *Stovin* v. *Perrin.* 2 *Bos. & Pull.* 561.

120 If the writ issue from C. B. and the declaration for an escape aver that the defendant had not the body "before our said Lord the King" on the return day, it is bad on special demurrer. *Ibid.*

121 Trespass for assault and false imprisonment may be laid *diversis diebus et vicibus.* *Burgess* v. *Freelove.* 2 *Bos. & Pull.* 425.

122 But a declaration charging that the defendant on such a day, and on divers other days and times, &c. made an assault on the plaintiff, was held bad on special demurrer; as *one assault* cannot be laid on different days. *English* v. *Purser.* 6 *East*, 393.

123 If a contract of freight and demurrage be entered into by deed, the plaintiff cannot declare in debt generally, and give the deed in evidence; but ought to declare upon the deed. *Atty* v. *Parish.* *New Rep.* 104.

124 In an action on the case in tort for a breach of a warranty of goods, the *scienter* need not be charged, nor if charged, need it be proved. *Williamson* v. *Allison.* 2 *East*, 446.

125 It is not necessary to give a local description to the nuisance in an action on the case for diverting the water of a navigation; and therefore if it be doubtful whether the place where such navigation is stated to lie be laid in the declaration as a venue or a local description, it will be referred merely to venue, and need not be proved to be at such place; but it is sufficient if it be at any other place within the county. *Mersey & Irwell Navigation* v. *Douglas.* 2 *East*, 497.

126 If in an action on the case for a nuisance in erecting a weir, it be described in the declaration to be at *H.* and be proved to be at a lower part of the same water called *T.*, the variance is fatal. *Shaw* v. *Wingley.* *York Sum. Ass.* 1790, *cor. Wilson J. cited.* *Ibid.* 500.

127 Where one declared in case for obstructing a water-course, upon his *possession* of a mill *with the appurtenances*, and *that by reason of such his possession he had a right to the use of the water running in a certain tunnel to the mill*; such allegation is not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose, for a certain consideration, but of which *no conveyance* was made by the defendant to the plaintiff; and he had since refused assent; because the plaintiff had not the water *by reason of the possession* of the mill, &c. but by parol licence or contract, which could not pass the title to the land, and as a licence was revocable, and revoked. *Fentiman* v. *Smith.* 4 *East*, 107.

128 A declaration, entitled generally of the term, relates to the first day of the term; and the promises and breach, being laid on the first day of the term, may be presumed to have been made before the delivery

of the declaration; because by a reference to the ancient practice of declaring *ore tenus*, the declaration cannot be supposed to have been delivered till the sitting of the court on that day. *Pugh* v. *Robinson.* 1 *Term Rep.* 116.

129 Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. *Coutanche* v. *Le Ruez.* 1 *East*, 133.

130 A declaration must be entitled of the term when the writ is returnable, though in certain cases according to the practice of the cor need not actually be filed next term; so that in thes cases the plaintiff cannot any demand arising after when the writ is returnable before the declaration is filed. *Smith* v. *Muller.* *Rep.* 624.

131 Upon breach of a contract purchase of 100 bags of wh or 50 of which were to be del on one market day, and the re der on the next market day plaintiff cannot declare as upo absolute contract for the delive the 40 bags on the first day, though 40 bags were then in t delivered; but the contract must stated in the alternative, accordi to the original terms of it. *Pew* v. *Porter.* 2 *East*, 2.

132 The same where the contract was to deliver goods within 14 days or as soon as a certain vessel arrived. *Shipham* v. *Saunders, cited.* *Ibid.*

133 In an action against a tenant upon promises that he would occupy the farm *in a good and husbandlike manner according to the custom of the country*; an allegation, that he had treated the estate contrary to *good husbandry and the custom of the country*, is proved by shewing that he had treated it contrary to the *prevalent course of good husbandry in that neighborhood*; as by tilling *half* his farm at once, when no other farmer tilled more than a *third*; though many tilled only a *fourth*. And it is not necessary to shew any precise definite custom or usage in respect to the quantity tilled. *Legh* v. *Hewett.* 4 *East*, 154.

134 The plaintiff, having declared upon an agreement to deliver soil or breeze, with a count for money had and received, proved that the defendant having [illegible] soil, he the [illegible] for [illegible] re[illegible]

[illegible] declaration of evidence [illegible] the jury in reduction [illegible]ges. Therefore assumpsit may be maintained in the common form of declaring against a carrier for the loss of goods, which were of above 5*l.* value, and were not in fact paid for accordingly, although it were part of the contract provided by general notice fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff, that the carrier *would not be accountable for more than* 5*l.* *for goods*,

unless entered as such, and paid for accordingly. *Clarke* v. *Gray.* 6 *East*, 564.

136 An allegation that the codefendant was "by due course of law outlawed at the suit of the plaintiff in this plea and suit," is sufficient without a *prout patet per recordum.* *Carmichel* v. *Johnson.* 7 *East*, 50.

137 Where the whole consideration of a promise is truly stated and also all such parts of the promise itself, the breach of which is complained of; it is not necessary to state in the declaration other parts of the promise not qualifying or varying in any respect the parts so complained of as broken. As where the plaintiff declared that in consideration of his redelivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which should be worth 80l. and be a *young horse;* and then alledged a breach in both these respects; held sufficient, though the proof were not only of a promise that the second horse should be worth 80l. (which it was not) and be a young horse, but also a warranty that it was *sound* and had never been in harness. *Miles* v. *Sheward.* 8 *East*, 7.

138 In covenant breaches assigned generally against the defendant for having made cordage for *divers persons*, and for employing *other persons* than the plaintiffs to make cordage for his friends, &c., were held to be well assigned; though no particular persons were named, nor the quantities or kinds of cordage mentioned, &c. such facts lying more particularly within the defendant's knowledge. *Gale & others* v. *Reed.* 8 *East*, 80.

139 In slander the plaintiff averred that he had in due manner put in his answer on oath, to a bill filed against him in the court of exchequer by the defendant, (but did not proceed to aver any colloquium respecting that answer, with reference to which, the words were spoken,) and then alledged that the defendant said of him, that he was *foresworn*, innuendo, that the plaintiff had *perjured* himself, in what he had sworn in his aforesaid answer to the bill so filed against him; held that this innuendo could not without the aid of such colloquium, enlarge the sense of the words by referring them to the answer averred in the prefatory part of the declaration to have been put in. *Hawkes* v. *Hawkey.* 8 *East*, 427.

140 A new assignee of a bankrupt, suing in debt on a judgment recovered by a former assignee displaced by the lord Chancellor, may declare in a general form as having been duly constituted and appointed assignee. *De Cosson* v. *Vaughan, in error.* 10 *East*, 61.

141 To a count in covenant, charging the defendants, as executors, for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors and assigns, may be joined another count charging them that after the testator's death, and their proving the will, and during the term, the demised premises came by assignment to one *D. A.* against whom breaches were alledged; and concluding that so neither the testator nor the defendants, after his death, nor *D. A.* since the assignment to him had kept the said covenant, but had broken the same. And *plene administravenent* may be pleaded to both counts. *Wilson* v. *Wigg.* 10 *East*, 313.

142 Where a request to the defendant to do an act is necessary to be alledged in order to give the plaintiff his cause of action; and it is alleged, but without a particular venue, (there being a general venue laid in the preceding part of the declaration) such omission cannot be taken advantage of in arrest of judgment since the statute 4 *Ann*, c. 16, s. 1, being mere matter of form, availa-

ble only upon special demurrer; and this, though judgment passed by default, on which a writ of inquiry was executed. And where in consideration of the purchase of hay by the plaintiff of the defendant, the latter promised to deliver to and suffer the plaintiff to take it away as he wanted it, when requested; an allegation that the defendant, after suffering the plaintiff to take away a part, sold and disposed of the residue to other persons, superseded the necessity of alleging a request to deliver, &c. the residue. *Bowdell* v. *Parsons.* 10 *East*, 359.

143 A solvent partner may join with the assignees of his two bankrupt partners in maintaining an action for money had and received to recover back from a creditor the amount of a bill, the joint property of the firm received by him from the acceptor by the indorsement of the two other partners after acts of bankruptcy committed by them. *Thomson, jointly with Hipgip and others, assignees of Underhill and Guest* v. *Frere.* 10 *East*, 418.

144 *There afterwards continuing his said assault* is not within the technical meaning of a *continuando*, in a declaration for an assault and battery. 2 *Mass.* 50.

145 A declaration in trespass for an assault and battery is sufficient, though it begin, "for that whereas," &c. by way of recital. 2 *Mass.* 358.

146 A declaration, which sets out a defective title, is not cured by verdict. 2 *Mass.* 521.

147 In a declaration in *assumpsit* the word *promise* is not necessary; any other intelligible word of the same import, as *agreed* for instance, is sufficient. *Avery* v. *Tyryingham.* 2 *Mass.* 160.

148 A declaration in trespass for entering the plaintiff's house, taking his goods and falsely imprisoning his wife, is good after verdict; and the injury to the wife shall be taken as matter of aggravation only. *Heminway* v. *Saxton et al.* 2 *Mass.* 483.

149 When a count is struck out of a declaration by leave of court, the declaration must afterwards be considered as if the count struck out had never been introduced. *Prescott* v. *Tufts.* 4 *Mass.* 146.

150 A declaration in *assumpsit* laying the promise on a day posterior to the teste of the writ is well enough after verdict; although it would be bad on special demurrer. *Bemis* v. *Faxon.* 4 *Mass.* 263.

151 In an action against the sheriff for extortion, in receiving illegal fees upon the service of an execution, a declaration which describes the parties to, and the date of the execution, is sufficient after verdict. *Livermore* v. *Boswell.* 4 *Mass.* 437.

So if it shews the sum received as fees, and the sum levied, without setting forth the whole transaction. *Ibid.*

If the date of an original writ is posterior to the date of the service, this being matter in abatement is waived by the defendant's appearing and pleading the general issue. *Ibid.*

152 In debt upon a recognizance to a party, taken before a justice of the peace conditioned for prosecuting an appeal, it must be shewn that the justice had jurisdiction of the action and that the recognizance has been entered of record in the common pleas; and the condition must be set forth, and the breach alleged. *Bridge* v. *Ford.* 4 *Mass.* 641.

153 In an action *qui tam* for taking fish contrary to a statute, the plaintiff declared that the defendant on such a day, and on three other days and times between that day and such another day, took the fish; and he demanded four several penalties: a verdict was found for one penalty, and held good. *Burnham* v. *Webster.* 4 *Mass.* 266.

Such an action may be maintained against one or more offenders, without joining the rest. *Ibid.*

154 A declaration without a *venue*, or with a wrong one, is bad in form; but the defendant, to avail himself of it, must assign it as a special cause

of demurrer. *Briggs* v. *Nantucket Bank.* 5 *Mass.* 94.

If a declaration on a bank bill allege the promise to have been made to *A. B.* or bearer, and that the plaintiff holds the bill for a valuable consideration, it is sufficient. *Ibid.*

A wrong *venue* will not support a motion in arrest of judgment. *Ibid.*

155 Of reciting the former judgment in a *scire facias* against one as trustee of the original defendant. *Dyer et al.* v. *Stevens.* 6 *Mass.* 389.

156 In an action of covenant of warranty of lands, brought by one who has assigned his interest in the lands to another, the declaration must shew that the plaintiff is answerable to his assignee. *Niles* v. *Sawtell.* 7 *Mass.* 444.

157 A general count in an action for defamation, as for *charging the plaintiff with stealing*, is good. *Nye* v. *Otis.* 8 *Mass.* 122.

158 Where the declaration on a promissory note, alleged a demand of payment in general terms, as "although requested," &c. it was held good, especially after a verdict. *Leffingwell and Pierpont* v. *White.* 1 *Johns. Cases*, 99.

159 Where there is a precedent debt or duty, it is not necessary for the plaintiff to state a special request or demand, in his declaration. *Ernst* v. *Bartle.* 1 *Johns. Cas.* 319.

160 Where matter is stated in a declaration, which might have been struck out, on motion, as surplusage, it need not be proved at the trial. *Allaire* v. *Ouland.* 2 *Johns. Cases*, 53.

Where a promise in one of the counts in a declaration, by reference to the day in the preceding count, was laid after the breach assigned, the mistake was held to be cured by the verdict. *Ibid.*

161 A declaration on a bond of 70*l.* stating that the plaintiff demanded 70*l.* of the value of 175 dollars, lawful money of the state, which the defendant owes and detains, is good. *Johnston* v. *Hedden.* 2 *Johns. Cases*, 274.

162 Where a declaration commences thus: "*James Hildreth* complains of *Peter Becker* and *James Harvey*, the said *James* being in custody, &c. and the said *Peter* being returned not found, of a plea," &c. It was held to contain sufficient certainty, and that *James Harvey* the defendant, and not *James Hildreth*, was the person in custody, &c. *Hildreth* v. *Becker and Harvey.* 2 *Johns. Cases*, 339.

163 In an action for a *deceit* in the sale of a newspaper establishment, it was held that the declaration must expressly allege that the defendant made the affirmation *falsely, fraudulently, or knowingly*; the want of these words will not be supplied by the concluding part of the count, *and so by reason of the said affirmation the plaintiff was falsely and fraudulently deceived*, &c. *Bayard* v. *Malcolm and Malcolm.* 1 *Johns. Rep.* 458.

The want of an allegation of *fraud* or a *scienter* is not helped by a verdict. *Ibid.*

164 If in a suit on a bail bond, the suit, court, and place of the defendant's appearance, are substantially set forth in the plaintiffs declaration, it is sufficient. *Stevens & Waters* v. *Clancey*, &c. 1 *Johns. R.* 521.

165 Where part of a declaration states a sufficient ground of action, and a part of it is not actionable, the court will intend, after a verdict that the jury gave damages only for the actionable part of the declaration. *Steele* v. *Western Inland Lock Navigation Company.* 2 *Johns. Rep.* 283.

S. P. decided in *Phetteplace* v. *Steele.* 2 *Johns. Rep.* 442.

166 In an action on the case, for a *deceit*, in the sale of a newspaper establishment, the declaration (after stating the *affirmation* of the defendants, that the number of subscribers was 900, and the profits of the paper 3,000 dollars, per annum, and the giving faith to such affirmation, the plaintiff made the purchase, whereas, the number of sub-

scribers were only 306, and the profits nothing) concluded, "and the said *S. B.* saith, that he, by reason of the said affirmation of the said *R. M.* and *S. M.*, was falsely and fraudulently deceived, to wit, the day and year aforesaid, at the city and county aforesaid; wherefore, he saith, that he is made worse, and hath damage." &c. This was held, to be a sufficient allegation, that the defendants made affirmation falsely and fraudulently, especially after verdict. *Bayard* v. *Malcolm and Malcolm, in error.* 2 *Johns. Rep.* 550. S. C. 1 *Johns. Rep.* 453.

167 Where a declaration, in a suit for a libel, was entitled of *November term*, generally, but the *memorandum* was of the second *Monday*, or the 14th of *November*, being the first day of the term, and the libel was alleged to have been published on the 18th of the same *November*, it was held, on demurrer, to be bad, and that such a mistake would not have been cured by a verdict. *Cheetham* v. *Lewis.* 3 *Johns. Rep.* 42.

168 In an action of *assumpsit*, the declaration stated that the plaintiff and *U.* and *W.* were joint owners of a vessel and her cargo, then on a distant voyage, and were jointly interested in her earnings and the profits of the voyage, of which vessel *W.* was also master and died during the voyage, and that after his death, the defendant, *B.* in consideration, that the plaintiff had undertaken and promised to the defendant, that the defendant should receive from the plaintiff the effects of *W.* in the vessel, and her earnings, in like manner as *W.* was entitled to receive them, according to the agreement between the owners, and in consideration that the plaintiff had agreed with the defendant to account to him for the said vessel, her earnings, profits, &c. in like manner, as he was bound to do to *W.* he, the defendant undertook and promised to pay to the plaintiff, any demands or sums of money, due and owing from *W.* to the plaintiff, at the time of *W.*'s death, and also any demands which the plaintiff had against the share of *W.* in the vessel; and the plaintiff set forth in his declaration, a certain debt due to him from *W.* and averred, that the plaintiff, was always ready to perform his part of the agreement, &c. On a *demurrer*, this declaration was held bad, as it did not set forth a sufficient *consideration* for the promise of the defendant. *Powel* v. *Brown.* 3 *Johns. Rep.* 100.

169 In an action on a promissory note to pay money when collected, &c. the plaintiff must *allege* and prove, that the money was collected, in order to recover on the promise. *Dodge* v. *Coddington.* 3 *Johns. Rep.* 146.

170 In an action by the holder of a bill of exchange, protested for non-payment, against the drawer, after setting forth the presentment and protests, &c. in the declaration, a general averment of notice "of all the premises," is sufficient. *Boot and Bently* v. *Franklin.* 3 *Johns. Rep.* 207.

171 In an action for a penalty under the 35th section of the act to "regulate highways," the plaintiff need not negative the *proviso*, in his declaration. *Bennett* v. *Hurd.* 3 *Johns. Rep.* 438.

172 A declaration on a promise to pay the debt of another need not state, that the promise was in writing. That is matter of evidence at the trial; and after a verdict, the court will presume that it was proved to be in writing. *Elting* v. *Vanderlyn.* 4 *Johns. Rep.* 237.

Where one of several heirs is sued on his promise to pay the debt of his ancestor, the plaintiff need not allege in his declaration, that the defendant or the heirs had *assets*. *Ib.*

173 In an action brought against *A.* on his guaranty of the performance by *B.* of his agreement made with *C.* it was held that the declaration ought to state a consideration for

the undertaking of *A. Bailey and Bogert* v. *Freeman.* 4 *Johns. Rep.* 280.

174 Several of the *common counts* on different contracts may be included in one count; and the plaintiff is not bound to prove all the causes of action stated, in order to entitle him to recover. It is enough if he proves any one of the causes of action, and he will recover *pro tanto. Bailey and Bogert* v. *Freeman.* 4 *Johns. Rep.* 280.

175 Where a clause or section of a statute giving an action for any offence, contains a *proviso* or *exception*, which is against the plaintiff, it is matter of defence or justification, for the defendant, the plaintiff need not negative the proviso in his declaration. *Teel* v. *Fonda.* 4 *Johns. Rep.* 304.

176 Where the time laid in a declaration under a *scilicet* is *material*, and the *gist* of the action, it shall be taken to be the true time, and the *scilicet* if repugnant is to be rejected as void, or if consistant, is to be held as a direct affirmation. *Vail* v. *Lewis and Livingston.* 4 *Johns. Rep.* 450.

177 Where the plaintiff, in his declaration, assigned a breach of the condition of the bond, in general terms, to wit, that the defendant had collected money as under sheriff, to the amount of 1,000 dollars, which he refused to account for, or pay over, this was held a sufficient assignment of a breach. *Hughes* v. *Miller and Smith.* 5 *Johns. Rep.* 169.

So if the breach assigned is that the defendant embezzled 1,000 dollars belonging to the plaintiff, for which he refused to account, &c. it is sufficient. *Ibid.*

It is enough if the breach be assigned generally, negativing the condition of the bond or covenant. *Ibid.*

178 In an action of covenant, where some of the breaches are well assigned, and some not, and there is a demurrer to the whole declaration, the plaintiff will have judgment for the breaches which are well assigned. *Adams* v. *Willoughby.* 6 *Johns. Reports*, 65.

179 In an action of covenant, for rent due on a lease, against the assignee of the lessee, the plaintiff need not aver in his declaration, that the lessee had not paid the rent; it is sufficient if he states that the rent accrued subsequent to the assignment to the defendant, and that the same was due and owing to the plaintiff and in arrear, &c. *Dubois's Executors* v. *Van Orden.* 6 *Johns. Rep.* 105.

180 Where the plaintiff grounds his action on a deceit or fraud in the sale of a chattel, the deceit or fraud must be substantively alleged in his declaration, otherwise no proof of it is admissible. *Evertson's Executors* v. *Miles.* 6 *Johns. Rep.* 138.

181 In an action *qui tam*, brought by a common informer, under the 2d section of the act for preventing *usury*, (10 sess. c. 13,) the declaration must state that the party aggrieved neglected to sue within the year, in order to give the plaintiff a right of action. *Morrell* v. *Fuller.* 7 *Johns. Rep.* 402.

182 Where a promissory note, payable in *chattels*, was declared upon as under the statute; and the breach assigned was, that the defendant did not pay the money mentioned in the note, &c. it was held, after verdict, that the reference to the statute might be rejected as surplusage, and the defect in assigning the breach was aided by the verdict, so that the court would intend that a sufficient breach was proved. *Thomas* v. *Roosa.* 7 *Johns. Rep.* 461.

183 In an action of debt, on a bond given for the *gaol liberties*, the suggestion of the breach generally, in the words of the condition, is sufficient without alleging the particular damages; and the court adjudging the declaration on such a bond to be sufficient, the entry on the re-

cord was, that the judgment on the demurrer should be stayed, until the truth of the breach to be suggested should be ascertained, and the damages assessed; this was held to be correct within the statute, (sess. 24, c. 90, s. 7,) which is to receive a liberal and beneficial construction. The suggestion of breaches may be before a formal entry of judgment on demurrer, &c. *Smith and others* v. *Jansen.* 8 *Johns. Rep.* 111.

But where, in the final judgment, the court of common pleas gave judgment for the debt, and six cents costs, together with the damages assessed by the jury, and also the costs of suit adjudged of increase; this was held erroneous, and the judgment of the court below was reversed as to the sum assessed for damages, but suffered to stand good as to the debt and costs, including the costs of assessment; and neither party in this case was held to be entitled to costs, on the writ of error. *Ibid.*

184 It is sufficient to state a promissory note, in a declaration, according to its terms. *Herrick* v. *Bennett.* 8 *Johns. Rep.* 374.

185 In an action of *assumpsit* against an administrator, the plaintiff in his declaration stated that the promises were made by the intestate in his life time, and by the defendant, "administrator as aforesaid," since the death of the intestate. The declaration was held sufficient, especially after verdict, it being tantamount to alleging that the promise was made by the defendant, *as administrator.* *Carter* v. *Phelps's Administrator.* 8 *Johns. Rep.* 440.

A count on a promise made by an *executor* or *administrator as such*, and for which he is not personally liable, may be joined with a count on a promise made by the testator or intestate; and whether the promises be in one and the same, or in separate counts is immaterial. *Ibid.*

186 In a declaration, the averment that the assignment of a promissory note was for *value received*, is an immaterial averment, and need not be proved. *Wilson* v. *Codman.* 3 *Cranch*, 193.

II. *Departure.*

1 In trespass, if the defendant justifies upon a day *in narr.* the plaintiff may allege another day in his replication. *Webly* v. *Palmer.* 1 *Salk.* 222.

2 In debt upon bond to pay 40l. so long as the defendant should enjoy such an office, by quarterly payments every year, and plea that the office was granted to three for their lives, and that he enjoyed it as long as they lived, and so long he paid the said rent quarterly; replivative enjoyed the office longer, and that he had not paid the money by quarterly payments; upon demurrer, it was objected that there was double: *sed per curiam*, it is not, for the defendant cannot in his rejoinder tender an issue upon payment of the money, because that would be a departure from his plea. *Gaile* v. *Betts.* 3 *Salk.* 141.

3 He that pleads *exoneravit*, must shew how, and it is a departure to rejoin an account stated after infancy pleaded. *Hillier* v. *Plympton.* 1 *Str.* 422.

4 To debt on bond, given by defendant on his marriage with condition, that he would permit his intended wife to dispose of 50l. a year out of his personal estate, defendant pleaded that he had not prevented his wife disposing of that sum; plaintiff in his replication set forth a particular disposition of the money by the wife, and a request on defendant to pay, and a refusal by him; defendant rejoined, that he had not any personal estate out of which he could pay the 50l.; rejoinder held bad; 1st, because it was a departure from the plea; 2dly, because it would have been no defence, if pleaded at first. *Cossens* v. *Cossens.* *Willes*, 25.

5 A rejoinder excusing the nonperformance of a condition, is a depar-

ture from a plea insisting upon performance. Upon a bond conditioned to execute an office singly, without the plaintiff's aid, if the defendant pleads that he did execute it singly, he cannot rejoin, that the plaintiff for a time prevented him from executing it singly. *White* v. *Clever*. 2 *L. Raym.* 1419.

6 Defendant in a plea justified taking cattle *damage feasant*, and afterwards rejoined, that they were taken surcharging the common; held to be a departure. *Ellis* v. *Rowles*. *Willes*, 1638.

7 In an *indebitatus assumpsit* the day is not material, and the alleging a different time in the replication is no departure. *Cole* v. *Hawkins*. 1 *Str.* 21.

8 Varying from that which is not materially alleged, is no departure. *Primer* v. *Philips*. 1 *Salk.* 222.

9 Where performance is pleaded, and matter of excuse is afterwards set forth in the rejoinder, it is a departure. *Countess of Arran* v. *Crispe*. 1 *Salk.* 221.

10 To a justification by distress, the plaintiff may reply an abuse, and it is no departure. *Gargrave* v. *Smith*. 1 *Salk.* 221.

11 A rejoinder excusing the breach or nonperformance of a condition is a departure from a plea insisting upon performance. *Rosse* v. *Hodges*. 1 *L. Raym.* 233.

12 New matter may be rejoined by the defendant to explain or fortify his bar, and held no departure. *Long* v. *Jackson*. 2 *Wils.* 8.

13 In debt on bond, payment before the day pleaded, is ill. *Anonymous*. 2 *Wils.* 150.

14 Debt on an arbitration bond, *plea* no award; *replication* shewed an award, and assigned a breach, rejoinder that there were other matters pending, of which the arbitrators took no notice; this is a departure. *Harding* v. *Holmes*. 1 *Wils.* 122.

15 The bail plead that there was no *ca. sa.* against the principal on *sci. fa.* replication that there was a rejoinder; that it did not lie four days in the sheriff's office, held a departure. *Elliot* v. *Lane*. 1 *Wils.* 334.

16 Replevin for taking the plaintiff's goods and chattels, to wit, a lime kiln; avowry for rent; plea in bar that the lime-kiln was affixed to the freehold; the court held the plea in bar bad, because it was a departure from the declaration, which had treated the lime-kiln as a chattel. *Niblet* v. *Smith*. 4 *Term Rep.* 504.

17 To debt on an annuity-bond the defendant pleaded no such memorial as the statute requires, to which plaintiff replied that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted; the defendant rejoined that the consideration was untruly alleged in the memorial to have been paid to both obligors, for that one of them did not receive any part of it; the rejoinder was held bad; first, because it was a departure from the plea; secondly, because the fact alleged respecting the memorial did not contradict the replication, for the consideration might have been paid to the other obligor on account of himself and the co-obligor, or to a stranger for them both. *Praed* v. *The Dutchess of Cumberland*. 4 *Term Rep.* 585.

Affirmed in *Cam. Scac.* 2 *H. Black.* 280.

18 If the lord of a manor set up a custom to have the best live or dead chattel as an heriot; *qu.* if the tenant can modify that custom by pleading another that homage shall assess a compensation in lieu of the heriot? 1 *Bos. & Pull.* 282.

III. *Double plea, or Duplicity in Pleading.*

1 Defendant cannot plead *non assumpsit* and a tender together. *Dowgall* v. *Bowman*. 3 *Wils.* 145.

2 *Non est factum* and *solvit post diem*, incompatible. *Fox* v. *Chandler*. 3 *Black.* 905.

3 So, *Non est factum* and *solvit ad diem*. *Arnold* v. *Baas*. 2 *Black*. 993.

4 *Non assumpsit* and alienage of the plaintiffs denied. *Feron* v. *Ladd*. 2 *Black*. 1826.

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5 *Non assumpsit* and tender not allowed to be pleaded. *Dougal* v. *Bowman*. 2 *Black*. 723. 3 *Wils*. 145, 1520.

6 Not guilty, and tender of amends in trespass allowed. *Martin* v. *Kesterton*. 2 *Black*. 1093.

7 Not guilty and a justification, not allowed to be pleaded. *Palmer* v. *Waldbrooke*. 2 *Str*. 876.

8 Not guilty and the statute of limitations pleadable. *Da Costa* v. *Carteret and another*. 2 *Str*. 889.

9 Leave granted to plead *non assumpsit* and *non assumpsit infra sex annos*. *Harrison* v. *Winchcombe*. 2 *Str*. 678.

10 Two justifications allowed to be pleaded on motion. *Clare* v. *Frost*. 1 *Str*. 425.

11 It was refused to let the defendant plead *non assumpsit* and a tender. *Baker* v. *Westbrooke*. 2 *Str*. 949.

12 In debt for rent, *Strange* moved for leave to plead a tender and eviction, which was granted. *Cary* v. *Jenkings*. 1 *Str*. 496.

13 Leave to plead double to debt on bond. *Dunn* v. *Vacher & Ux*. 2 *Str*. 908.

14 Leave was given to plead *non assumpsit*, and a discharge by bankruptcy, though said to be denied in C. B. *Philips* v. *Wood and another*. 2 *Str*. 1000.

15 Bankrupt long after his discharge had leave to plead it generally and specially. *Lord Clinton* v. *Morton*. 2 *Str*. 1000.

16 In an action for money to be paid for stock by covenant, that the plaintiff did not tender, is no plea. *Dawson & Ux*. v. *Myer Mill, in the exchequer*. 2 *Str*. 712.

17 Statute 4 and 5 *Anne*, for pleading double, does not extend to *qui tam* actions. *Law qui tam* v. *Growther*. 3 *Wils*. 21.

18 General issue waived, and allowed to plead double. *Meard* v. *Philips*. 2 *Str*. 906.

19 In cases out of the statutes, an accomplice *fully* and fairly *disclosing* the joint guilt of himself and his companions, and who is admitted a witness, and does give evidence, ought not to be prosecuted for his own guilt so disclosed; nor perhaps for any other offence *accidentally* omitted by him; but if prosecuted, he cannot plead this in bar, nor avail himself of it on his trial. But he may apply to the court to put off the trial, that he may have time to apply for a pardon. *Rex* v. *Rudd*. 3 *Cowp*. 339.

20 Plaintiff counts that defendant being sheriff of *M*. suffered plaintiff's debtor to escape, *per quod* he lost his debt; that defendant being sheriff, *ut supra*, might have arrested plaintiff's debtor and did not; judgment for plaintiff in C. P. Error, that counts were repugnant, but judgment affirmed. *Raymond* v. *Bridges*. *Lofft*, 69. 2 *Black*. 800.

21 A plea may contain various parts, yet if it forms one connected proposition, it is not double. *Bolts* v. *Purvis*. 2 *Black*. 1022.

22 Trespass at *Teddington*; defendant justifies for *damage feasant at Kingston*, and that he impounded the cattle at *Teddington*, good without a traverse; duplicity in a plea must be pointed out. *Ryley* v. *Parkhurst and others*. 1 *Wils*. 219.

23 *C. R.* convicted of high treason in 1716, being brought by *habeas corpus*, pleads that he is not the same person, in reply to the prayer of execution; issue being thereupon joined, and found against him, execution is awarded, nor is he afterwards permitted to plead pardon, or any other thing. *The King* v. *Charles Ratcliffe*. *Old Bailey*. 1 *Wils*. 150.

24 Defendant permitted to plead a special justification, after he had pleaded the general issue on terms. *Taylor* v. *Joddrell*. 1 *Wils*. 254.

34 Though at common law a defendant could not plead several matters in *quo warranto* information, he may by statute 32 G. 3, c. 58, s. 1. *The King* v. *Archbishop of York.* *Willes*, 534, *n. a.*

35 One defendant cannot plead two pleas that go to the whole. *Aliter nunc per* 4 and 5 Ann. for amendment of the law. *Coombe* v. *Talbot.* 1 *Salk.* 218.

37 Leave was given to plead *non est factum*, and a discharge by a commission of bankruptcy. *Atkinson* v. *Atkinson.* 2 *Str.* 871.

38 No pleading double in a *qui tam.* *Morgan* v. *Luckup.* 2 *Str.* 1044.

39 In dower, leave to plead *Ne unques seisie*, and *Ne unques accouple*, denied. *Anderson* v. *Anderson.* *And Hillier* v. *Fletcher.* 2 *Black.* 1157, 1207.

36 Cannot rejoin double. *Warren* v. *Ive.* 2 *Str.* 908.

31 The statute 4 Ann. c. 16, which allows double pleading, does not extend to penal actions. *Heyrick* v. *Foster.* 4 *Term Rep.* 701.

32 To assumpsit on a bill of exchange the court of C. P. will not allow a defendant to plead the general issue; and that the bill was given on a stock-jobbing transaction, contrary to 7 G. 2, c. 8. *Shaw* v. *Everett.* 1 *Bos. & Pull.* 222.

33 But to debt on bond they will permit the defendant to plead *non est factum*; and usury. *Lechmere* v. *Rice.* 2 *Bos. & Pull.* 12.

34 That court only continues to exercise an authority over applications for pleading several matters, (which had originally been the practice of K. B. also) in order to prevent an oppressive use being made of the liberty given by the statute. *Ibid.*

35 They will not allow non assumpsit; and alien enemy, to be pleaded together. *Thyatt* v. *Young.* 2 *Bos. & Pull.* 72.

36 To debt on an escape, defendant pleaded a negligent escape and voluntary return, since which the prisoner had been safely kept; plaintiff in his replication admitted the negligent escape and voluntary return, but alleged that the prisoner had not been safely kept since that time, having again escaped, which was a different escape from that mentioned in the plea, and the same for which the action was brought; defendant in his rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication as to a new assignment, a negligent escape, a voluntary return, and safe keeping since, in the same manner as in the plea. This latter part of the rejoinder the court refused to strike out on motion, but held it bad on special demurrer. *Griffin* v. *Eyles.* 1 *Bos. & Pull.* 413.

37 The stat. 32 G. 3, c. 58, s. 1, enabling defendants in *quo warranto* to plead double, is, as well as the stat. 9 Ann, c. 20 confined to corporate officers. *The King* v. *Richardson.* 9 *East*, 469.

38 Pleading double allowed, in some cases, at the second term. 1 *Mass.* 94.

Double plea not allowed to a writ of error. *Ibid.*

39 Under leave to plead double to a writ of *entry sur disseizen*, the tenant pleaded, 1, *nul disseizen* in bar, that the demandant was never seized *modo et forma*, &c. upon demurrer the second plea was adjudged bad, as putting in issue a fact, which must be proved under the first issue. *Martin* v. *Woods.* 6 *Mass.* 6.

40 In an action of debt on a judgment obtained in another state, the defendant pleaded *nul tiel record* and *nil debit*, and one of the pleas was ordered to be struck out. *Le Conte* v. *Pendleton.* 1 *Johns. Cases*, 104.

41 Where the defendant pleaded two pleas of payment to an action on a bond, one *before the day*, and the other *at the day*, the court, on motion, ordered the first plea to be struck out. *Thayre* v. *Rogers.* 1 *Johns. Cas.* 152.

42 Where a party demurs to a plea, because it is double, he must point out in what the duplicity consists. *Currie & Whitney* v. *Henry.* 2 *Johns. Rep.* 438.

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43 To a declaration in debt against a sheriff for an *escape*, the defendant pleaded an involuntary *escape*, and the return of the prisoner into his custody, before the action was brought; and also, that the prisoner was discharged by the court of common pleas, pursuant to the act for the relief of debtors in respect to the imprisonment of their persons; and the plea was held good, for both facts are necessarily blended, and make but one defence. *Ib.*

44 *Double pleas* must be signed by counsel. *Satterlee* v. *Satterlee.* 8 *Johns. Rep.* 327.

Plene administravit, singly pleaded, need not be signed by counsel; but if joined with the general issue, the plea is double, and must be signed by counsel. *Ibid.*

IV. *Heir, Plea by.*

1 The heir cannot plead a term for years raised by his ancestor in delay of execution, but should confess assets. *Smith & Ux.* v. *Angel.* 1 *Salk.* 334. 2 *L. Raym.* 783.

If he plead a bad plea, a general judgment *de bonis propriis* shall be entered against him. *Ibid.*

2 In an action against the heir on a covenant made by the ancestor, it is not necessary to allege in the declaration, that the heir had lands by descent; if he had not he must plead it. *Dyke* v. *Sweeting. Willes*, 585.

To an action on a covenant to pay money on a particular day, the defendant cannot plead payment on a prior day; he must plead payment on the day. *Ibid.*

At the end of six months, in such covenant, will be understood to mean calendar, not lunar months. *Ibid.*

3 By 3 W. & M. c. 14, heir may plead *riens per descent*, and the jury shall inquire into the value of the lands descended. *Campbell's Case. Lofft*, 263.

4 Debt against an heir, who pleaded he had nothing by descent *preter reversionem* not good. *Osbaston* v. *Stanhope.* 3 *Salk.* 180.

5 A plea by an heir at law who was sued by an obligee of his ancestor, that he claimed to retain a certain sum for money laid out in repairing the premises, cannot be supported. *Shettleworth* v. *Neville.* 1 *Term Rep.* 454.

Qu. Whether necessary repairs might be so pleaded? *Ibid.* 457.

V. *Not guilty, & Nil Debit.*

1 Performance in *assumpsit* amounts to a general issue. *Sea* v. *Taylor.* 1 *Salk.* 394.

2 A plea of *non tenure* as to part, admits the party to be tenant for the residue, and precludes him from insisting upon any matter inconsistent with that admission. A formedon cannot be brought by a person having a right of entry. An entry by a person intitled to a formedon, will not preclude him from bringing a formedon upon a subsequent ouster. An entry, by a demandant, after the writ brought, abates the writ. A plea of entry by a demandant must shew that the entry was subsequent to the bringing of the writ. *Mosley* v. *Coldwell.* 1 *L. Raym.* 430.

3 In debt on a specialty for not accepting and paying for stock, *nil debet* is no plea. *Warren* v. *Consett.* 2 *Str.* 778.

4 If *A.* license *B.* to enter his house to sell goods, *B.* may take assistants, if necessary, for the purpose of selling the goods: and if it be pleaded, that *B.* and also *C.* and *D.* his servants, and by his command, entered for that purpose, and necessarily continued there so long, it will be understood, that it was necessary for them to enter. *Dennett* v. *Grover. Willes* 195.

6 Trespass, plea that it was the horse of *J. S.* and the plaintiff took and impounded it, and the defendant took him by replevin, &c. amounts to the general issue. *Holler* v. *Bush.* 1 *Salk.* 394.

5 In *assumpsit* on several promises, the defendant pleads, *quod ipse performavit omnia ex parte sua performanda*, and the plaintiff demurred for that cause. Mr. *Ward*, for the plaintiff; this plea, if any thing, amounts to the general issue, and it was adjudged for the plaintiff *per totam curiam*. *Taylor* v. *Sea.* 2 *L. Raym.* 968.

7 Before joinder in demurrer, the defendant may waive his special plea, and plead the general issue; *contra*, where a rule is to plead, so as to stand by it, and he pleads specially, and the plaintiff demurs. *Anon.* 2 *Salk.* 515.

8 If an action of debt is founded upon a specialty, the defendant cannot plead *nil debet* to it.

Although the plaintiff may be bound to state in his declaration other facts to support his demand. *Warren* v. *Consett.* 2 *L. Raym.* 1500. *Str.* 778.

9 A plea to an *indebitatus assumpsit*, that the parties stated an account, and agreed to be quiet one against the other, except as to the balance, amounts to the general issue. *May* v. *King.* 1 *L. Raym.* 680.

10 Matter which might be given in evidence on the general issue may be pleaded specially, if it admits the plaintiff had a cause of action. A plea which admits the plaintiff had once a cause of action, ought not to begin with an *onerari non*. *Brown* v. *Cornish.* 1 *L. Raym.* 217. 2 *Salk.* 516.

11 *Qu.* Whether *not guilty* may be pleaded to an action of debt on a penal statute? *Coppin q. t.* v. *Carter.* 1 *Term Rep.* 462.

12 Upon a *devastavit* against executors, not guilty, may be pleaded as well as *nil debet*. *Ibid.*

13 The defendant pleaded *nil debet*, and payment, to an action of debt on a judgment of the supreme court of *Pennsylvania*; and it was held, that he was bound to produce and prove the record, or an exemplification thereof. *Rush* v. *Cobbett.* 2 *Johns. Cas.* 256.

14 *Nil debet* is not a good plea to an action of *debt* on *recognizance*, nor to any action founded on a *record* or *specialty*. But where the record or specialty is merely inducement to the action, which is grounded on matter of fact, as in debt for *rent*, for an escape, or on a *devastavit*, there *nil debet* may be pleaded. *Bullis* v. *Giddens & Brown.* 8 *Johns. Rep.* 82.

VI. *Plea in bar.*

1 Whether a replevin below cannot be pleaded in bar to trespass in C. P. *White* v. *Willis.* 2 *Wils.* 87.

2 *Insimul computassent* no bar to an *assumpsit*. *Rolls* v. *Barnes.* 1 *Black.* 65.

3 *Solvit ante diem* not an immaterial plea in debt on bond, to pay on or before the day. *Fletcher* v. *Hennington.* 1 *Black.* 210.

4 A judgment for the defendant in trover is not pleadable in bar to an action against him for money had and received for the plaintiff's use. *Hitchins* v. *Campbell.* 3 *Wils.* 240. 2 *Black.* 779.

5 Payment to a bond with condition indorsed, is a good plea before breach, but not afterwards, no more than to an action of debt upon a single bill; the benefit of the condition is lost when the breach is made; *per Holt*, C. J. *contra* now. *Marle* v. *Make.* 2 *Salk.* 508; and *Salk.* 110.

6 One personal action, not going on to judgment, is no bar to another for the same cause of action; but if judgment is had on the merits, then it bars all personal suits for the same cause of action. *Hitchin and Campbell.* 2 *Black.* 830.

7 Debt on an obligation, the defend-

ant pleaded want of a specification in bar; on demurrer, adjudged for the plaintiff, that it is not a bar. *Doddins* v. *Burley*. 2 *L. Raymond*, 1243.

8 In an action by a bill, a plea which prays judgment of the declaration, and that the same may be quashed, is to be considered as a plea in bar. *Bond* v. *Barnes*. 2 *L. Raym.* 1205.

9 Bankruptcy is no plea in bar to an action of trespass for mesne profits, because the damages are uncertain. *Goodtitle* v. *North*. 2 *Doug.* 584 to 585.

10 Matter of defence, admitting the plaintiff had once a cause of action which might be given in evidence on the general issue, may be pleaded specially, as an accord and satisfaction. *Paramore* v. *Johnson*. 1 *L. Raym.* 566.

11 Where the defendant will take advantage of a misrecital he must not demur, but plead *nul tiel record*. *Platt* v. *Hill*. 3 *Salk.* 330. 1 *L. Raym.* 381.

12 In debt upon an obligation without any condition, satisfaction must be pleaded by deed. A release of an equity of redemption is nothing in the eye of the law. *Preston* v. *Christmas*. 2 *Wils.* 86.

13 In an action by bill, in a plea which prays judgment of the declaration, and that the same may be quashed, is to be considered as a plea in bar.

In an action upon a bond, the defendant cannot plead in bar, that there was another obligor who is still alive; such matter can only be pleaded in abatement. *Watts* v. *Goodman*. 2 *L. Raym.* 1460.

14 Twenty years quiet and peaceable possession, shall be a bar to informations in the case of corporation elections. *K.* v. *Portsmouth*. *Lofft*, 552.

15 *Qu.* Whether a plea beginning in bar and containing matter in bar, but concluding in abatement, shall be considered as a plea in bar, or a plea in abatement only. *Slaney* v. *Slaney*. 1 *L. Raym.* 694.

16 In debt upon a bond, payment of part can only be pleaded in bar. A neglect to make a *profert in curiam* where necessary, is fatal upon a general demurrer. *Pierce* v. *Paxton*. 1 *L. Raym.* 691. *Salk.* 519.

17 The lessee covenanted to put a house in repair *before* the first of *June*, 5000 *slates being found, allowed, and delivered by the lessor towards the repair*, and afterwards to keep it in repair during the term. The lessor assigned a breach for not keeping in repair *after* the 1st of June; defendant pleaded that the lessor had not, after making the lease, found, allowed, and delivered the slates, &c. and plea adjudged to be bad. *Muckleston* v. *Thomas*. *Willes*, 146.

18 Plea of payment the day previous to the day in the condition of a bond issuable; but ill, if the day be mistaken. *Jernegan* v. *Harrison*. 1 *Str.* 317.

19 In pleading a judgment of a court of limited jurisdiction, it is necessary to state those facts that gave that court a jurisdiction; and having stated those, the party may allege generally that the court gave such a judgment. *Ladbroke* v. *James*. *Willes*, 199. *And Sollers* v. *Lawrence*. *Willes*, 413.

The insolvent act 10 G. 2, gave the court of quarter sessions power to discharge certain persons who had surrendered before a certain time; it was ruled, that in pleading a discharge by a court of sessions, it was necessary to allege that the party was in prison or had surrendered himself before the time. Saying "that he was duly discharged by the court of quarter sessions from his imprisonment aforesaid," is not sufficient. *Ibid.*

20 When a defendant wishes to avoid a contract as being made contrary to a statute, he must in his plea set forth facts to shew that the case is within the statute: saying general-

by the case is within the statute, is insufficient. *Huggins* v. *Bambridge*. *Willes*, 247.

21 Action against a tenant for breach of covenant in not repairing the demised premises. Plea that the landlord did not assign him materials, bad; for he should have shewed that he asked. And so plea that there were none proper to which he had a right; for this is putting the issue not upon the fact but upon the law. *Anon*. *Lofft*, 43.

22 Matter of defence happening after the action brought, if before plea pleaded, may be pleaded in bar. *Sullivan* v. *Montague*. 1 *Doug*. 109 to 113.

23 But *Qu*. as to that point. *Evans* v. *Prosser*. 1 *Doug*. 112, 113, *n*.

24 Leave to withdraw a plea of *Non est factum*, and plead infancy. *Olding* v. *Arundel*. 1 *Black*. 357.

25 It is a bad plea in abatement, that the defendant's name of baptism is not so and so. *Evans* v. *King*. *Willes*, 558.

26 In a counter plea (to a prayer of view in a real action,) it is not sufficient for the defendant to say that the tenant is in actual possession of the lands demanded; he must also add, "and of none other lands in the same vill." *Davis* v. *Lees*. *Willes*, 348.

27 If a personal representative pleads *plene administravit præter* a certain sum, and afterwards to another action brought in the same term *plene administravit præter* the same sum, and as to that sum states that he had confessed it in the other action; this is a good bar. *Waters* v. *Ogden*. 2 *Doug*. 452 to 455.

28 A feoffment is not pleadable in satisfaction of a specialty. *Wyvil* v. *Stapleton*. *Shelburne* v. *Eundem*. 1 *Str*. 615.

29 *Non assumpsit* a good plea to an action against a carrier. *Robinson* v. *Green*. 1 *Str*. 574.

30 Pleading the delivery of any thing in satisfaction, is not sufficient without shewing an acceptance. *Paine* v. *Masters*. 1 *Str*. 573.

31 In an action of account, nothing can be pleaded before auditors contrary to what has been pleaded to the action, and been found by verdict: therefore where a defendant, charged as surviving bailiffs of goods delivered to him and his co-bailiff, to be merchandized, and to render an account, goes to issue upon the question, whether upon his delivering over the goods to the deceased bailiff, the defendant's concern in the trust thereof ceased, which issue is found against him, he cannot afterwards plead before auditors, that he delivered the goods to his co-bailiff with the plaintiff's consent; for this might have been given in evidence on the issue; and the consequence of putting it on issue again before auditors, would be either two verdicts the same way, and thus nugatory; or contradictory, which would entangle the court. *Godfrey* v. *Saunders*. 3 *Wils*. 94.

32 Debt for 10*l*. shewing, in consideration he had paid the defendant the rent due to him, viz. 5*l*. he (the defendant) by his deed did covenant to save him (the plaintiff) harmless against *W. R.* who claimed the lands; and then sets forth that *W. R.* did implead him, *inter alia*, in the court of exchequer, in an action of debt, to recover his 5*l*. and upon a demurrer to this declaration, it was held ill, because the *inter alia implacitavit* was too general. *Hole* v. *Burgoigne*. 3 *Salk*. 271.

33 A plea to an avowry for rent, that no rent is in arrear, ought to be pleaded generally, and conclude to the country; a plea *de injuria* with a traverse, or that the rent is in arrear, concluding to the court, is informal. If rent be tendered at the day upon the land, *Qu*. What demand must be made to warrant distress for it afterwards? *Vide* 18, *Vin*. 483, *pl*. 489. A man cannot proceed for damages upon a plea of

tender after taking the money out of court. On a plea of tender to an avowry for rent, the plaintiff need not bring the money into court. Attending on the land to pay rent will not destroy the right to distrain unless a tender of payment is actually made. *Horne* v. *Lewin.* 1 *L. Raym.* 639. *Salk.* 583.

34 In an action against the assignee of a term, the plea of an assignment over ought to shew that such assignment over was made after the assignment stated in the declaration; but if it does not, no objection can be made against it after a replication that such assignment over was fraudulent. It is not necessary, that notice should be given to the reversioner of an assignment over. *Cook* v. *Harris.* 1 *L. Raym.* 367.

35 The defendant in his avowry in replevin stated, that by lease and release, he, in consideration of an annuity within mentioned, conveyed certain premises, containing the place where, &c. to the plaintiff in fee, subject to a rent charge payable to the defendant during her life, with power of distress for nonpayment of the annuity, and that by virtue of the lease and release, and by force of the statute, &c. and then she justified as a distress for nonpayment of the annuity. Pleas in bar. 1st, That plaintiff never was seized in fee; 2dly, (Admitting that the defendant did by the lease, bargain and sell, &c. to the plaintiff for a year,) That at the time of making the bargain and sale the defendant was only seized, &c. for her life, the reversion in fee then belonging to another, traversing that the defendant was seized in fee of the reversion; both these pleas were holden bad on demurrer; the first, because it denied what was before admitted, and because it traversed only a consequence of law; the second, because it admitted, that the defendant had an estate sufficient to justify the distress. *Grills* v. *Mannell. Willes*, 378.

The facts pleaded in one plea can neither assist or invalidate another plea in the same record. *Ibid.*

36 Covenant to levy a fine of certain lands in the township of *A.* which was in the parish of *B.* on the request, and at the costs of the grantee; breach assigned, that the grantor refused to acknowledge a fine, tendered to him of lands in the parish of *B.*; plea that the note of the fine tendered comprised other lands in *B.* than those contained in the covenant, of which the grantor was seized; and held a good plea. *Danby* v. *Gregg. Willes*, 150.

37 In an action on a bond of indemnity, a plea that he did indemnify, though it does not state how, it is unexceptionable upon a general demurrer. *White* v. *Cleaver.* 2 *Str.* 681. 2 *L. Raym.* 1416.

38 In covenant for rent against an assignee, an assignment over before the rent accrued is a good plea, though the plaintiff reply that the assignee is a feme covert. 2 *Doug.* 452.

39 Tender pleaded to a *quantum meruit. Johnson* v. *Lancaster.* 1 *Str.* 576.

40 An account stated is no plea in bar to the demand of a debt of the same nature; and a note of hand cannot be pleaded in bar to an action upon a simple contract, though a bond may, but not one bond to another. *Roades* v. *Barnes.* 1 *Burr.* 9. 2 *Black.* 65.

41 Payment pleaded specially in *assumpsit*, or given in evidence on the general issue. *Hutton* v. *Morse.* 1 *Salk.* 394. 2 *L. Raym.* 787.

42 If any interest was paid upon an old bond after the day, it must be a plea upon the statute. *Moreland* v. *Bennett.* 1 *Str.* 652.

43 Plea of payment previous to the day in the condition of a bond is issuable. *Martin* v. *Pritchard.* 1 *Str.* 622.

44 Plea of privilege without *affidavit* set aside. *Stiles* v. *Serjeant Mead.* 2 *Str.* 788.

45 Consideration executory is traversable. *Ergo* a venue must be laid. *Sexton* v. *Miles*. 1 *Salk.* 22.

46 In *indebitatus assumpsit* the defendant pleaded that the plaintiff was bankrupt; and therefore the defendant could not pay, for fear a commission should be sued, &c. upon demurrer. Judgment for the plaintiff. *Harvey* v. *Williams*. 1 *L. Raym.* 496.

47 In an action on a bond of indemnity, a plea that he did indemnify, though it does not state how, is unexceptionable upon a general demurrer. *White* v. *Clever*. 2 *L. Raym.* 1416. *Str.* 691.

48 An accord is no bar before execution. *Allen* v. *Harris*. 1 *L. Raym.* 122.

49 Giving a note for 5*l.* cannot be pleaded as a satisfaction for 15*l.* *Cumber* v. *Wane*. 1 *Str.* 426.

50 *Solvit ante diem* not an immaterial plea in debt upon bond. *Fletcher* v. *Hennington*. 2 *Burr.* 944.

51 A matter which destroys the right of action but for a time only, cannot be pleaded in bar. *Copley* v. *Delannoy*. 2 *L. Raym.* 1055.

52 *Nunquam in legitimo modo copulati*, is no good plea in personal actions. *Machele* v. *Garrett*. 3 *Salk.* 64.

53 After a plea in abatement and demurrer, plaintiff must pray a *respondeas ouster* and not judgment in chief. *Anon.* 1 *Wils.* 302.

54 Bond to *Doctor Craven*, master, fellows, &c. of *Sussex* and *Sidney* college, *solvendum* to the master, &c. is a bond taken in their corporate capacity. *The Master*, &c. v. *Davenport*. 1 *Wils.* 184.

55 In assault and imprisonment, defendant justifies under a *capias* in debt in a base court without shewing any summons; and held well enough. *Adams* v. *Freeman*. 2 *Wils.* 5.

56 Debt upon a bond conditioned for payment at a certain day. Plea, that it was given as an indemnity to the plaintiff's testator against another bond, and that plaintiff has not been damnified, bad. *Mease* (*Executrix*) v. *Mease*. *Coup.* 47.

57 Trespass for impounding cattle and keeping them so close that one died, and justification for damage feasant, the dying of the beast is only *gravamen*, and need not be answered in trespass. *Gates* v. *Bayley*. 2 *Wils.* 313.

58 Judgment for defendant in trover is not pleadable in bar of action on the case for the value of the same goods, unless the question in both appears to have been the same. *Hitchin* v. *Campbell*. 2 *Black.* 179. 3 *Wils.* 240.

59 The mint act was not pleadable in bar of any action; it could only be pleaded in bar of the execution thereon. *Mayne* v. *Harvey*. 2 *L. Raym.* 1383.

60 Debt on bond to indemnify the plaintiff from charges of a bastard child. Plea that the mother took the child away, bad. *Hulland* v. *Malken and Bristow*. 2 *Wils.* 126.

61 [To an action of *indebitatus assumpsit* for the value of goods, a judgment for the defendant in trover for the same goods may be pleaded in bar by means of proper averments.] *Indebitatus assumpsit* will lie for the assignee of a bankrupt against a creditor who has levied his debt by *fi. fa.* subsequent to the act of bankruptcy. *Kitchen and others, assignees of Anderson, a bankrupt*, v. *Campbell, Esq.* 3 *Wils.* 304.

62 If the plaintiff in chancery reply to a plea in bar, he thereby admits it to be good in law. *Anon. In Chancery*. 1 *Wils.* 82.

63 The facts of a plea, unless local, must be stated to have arisen in the county in which the plaintiff has laid the venue. A deed dated at a particular place in *England* is local. *Errington* v. *Thompson*. 1 *L. Raym.* 183.

64 In covenant for nonpayment of a rent for tithes, eviction is a good plea. *Dalston* v. *Reeve*. 1 *L. Raym.* 77.

65 Payment and *hoc parat' verificare*,

not a good plea in court for nonpayment of rent. *Skinner* v. *Kilby*. 3 *Salk*. 210.

66 A plea of bankruptcy given by statute 5 G. 2, c. 30, s. 7, must state that the *cause of action* accrued before the bankruptcy; stating that an *indenture*, on which an action of covenant is brought, *was executed* prior to the bankruptcy is not sufficient. *Charlton* v. *King*. 4 *Term Rep*. 156.

67 The general plea of bankruptcy, and the certificate given by statute 5 G. 2, c. 30, s. 7, may be pleaded, without averring that the bankruptcy happened *before* the commencement of the suit. But if it appeared at *nisi prius* that it happened *after* the action brought, it seems that the defendant cannot avail himself of the defence under such a general plea, which is only given by the statute in case any bankrupt who has conformed to the law shall afterwards be arrested or impleaded for any debt due before such time as he became bankrupt. *Tower* v. *Cameron*. 6 *East*, 413.

68 In K. B. a plea of bankruptcy need not be signed by counsel. *Leigh q. t.* v. *Monteiro*. 6 *Term Rep*. 496.

69 But in C. P. it must. *Pitcher* v. *Martin*. 3 *Bos. & Pull*. 171.

70 A declaration in a *scire facias* by the assignees of a bankrupt, stating "that he became a bankrupt within the meaning of the statutes, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs," is sufficiently certain, without alleging that the party was declared a bankrupt, or that his effects were assigned by deed. *Winter* v. *Kretchman*. 2 *T. Rep*. 45.

71 A general plea of bankruptcy in *Ireland*, referring to an *Irish* act of parliament, and concluding to the country (in a mode similar to that given by statute 5 G. 2, c. 30, s. 7, to bankrupts in *England*,) is bad. 2 *H. Black*. 553.

73 The court of C. P. set aside a regular judgment on an affidavit of merits, though the defendant intended to plead his bankruptcy. *Evans* v. *Gill*. 1 *Bos. & Pull*. 52.

73 To *assumpsit* by several partners the defendant may plead in bar the bankruptcy of one of them. *Eckhardt & al.* v. *Wilson*. 8 *Term Rep*. 140.

74 Assumpsit by several as executors; plea in bar, that the promises were made by defendant jointly with one of the plaintiffs; and held good on demurrer. *Moffatt & al.* v. *Van Millingen*. 2 *Bos. & Pull*. 124, *n*.

75 *A*. made a promissory note payable to himself and *B*. and *C*. his partners; it was by them indorsed to *C*. (one of the payees) and *D*. and *E*., also partners: In assumpsit upon the note by *C*., *D*., and *E*., against *B*., he pleaded in bar that the promises were made by him jointly with *C*. one of the plaintiffs; and held good on special demurrer. *Mainwaring* v. *Newman*. 2 *Bos. & Pull*. 120.

76 It is no bar to an action of assumpsit that there was a former action of assumpsit between the same parties, in which the plaintiff recovered one demand, and might also have recovered the present demand; if in point of fact the present demand were not the subject of inquiry in the former action. *Seddon* v. *Tutop*. 6 *Term Rep*. 607.

77 *Aliter*, if the present demand were inquired into in the former action. *Ibid*.

78 A *supersedeas* obtained after judgment cannot be pleaded in bar to an action on such judgment. *Topping* v. *Ryan*. 1 *Term Rep*. 273.

79 *A*. having privilege of parliament, owes *B*. a sum of money, for which *B*. sues him; in consequence of which *C*. enters into a bond together with *A*., conditioned for the payment to *B*. of such sum as *B*. shall recover in the action against *A*., in pursuance of the statute 4 G. 3, c. 33. In that action *B*. obtains judgment, and puts the bond in suit against *C*. To the action on the

bond, &c. (though under terms by a judge's order to *plead issuably*,) may plead in bar that a writ of error is depending on the judgment against *A. Curling* v. *Innes*. 2 *H. Black.* 372.

80 *A.* gave *B.* a bond to secure an annuity, and before any payment became due *A.* lent *B.* a sum of money; on which it was agreed that *B.* should retain the payments of the annuity as they became due till that sum was discharged; then *B.* became a bankrupt; and the agreement to retain was held a good plea to an action on the bond by *B*'s. assignees for the payments accruing after the bankruptcy, being equivalent to a plea of *solvit ad diem*. *Sturdy* v. *Arnaud*. 3 *Term Rep.* 599.

81 If the obligor of a bond after notice of its being assigned take a release from the obligee and plead it to an action brought by the assignee in the name of the obligee, the court will set the plea aside, nor will they under these circumstances, allow the obligor to plead payment of the bond. *Legh* v. *Legh*. 1 *Bos. & Pull.* 447.

82 *Non damnificatus* cannot be pleaded to debt on bond conditioned for the payment of a sum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity. *Holmes & al.* v. *Rhodes*. 1 *Bos. & Pull.* 638.

83 A plea that the plaintiff and defendant agreed to settle all matters in dispute, and to bind themselves in a penalty not to sue each other, is a bad plea, as it does not amount to satisfaction. *James* v. *David*. 5 *Term Rep.* 141.

84 To an action on a covenant in a deed (made for the performance of several matters,) the defendant cannot plead that in the deed there is a covenant, that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by arbitrators, and that he offered to refer the matter in dispute, but that the plaintiff refused, &c. *Thompson & al.* v. *Charnock*. 8 *Term Rep.* 139.

85 Performance of a covenant pleaded otherwise than in the terms of the covenant itself is bad, even on general demurrer. 1 *Bos. & Pull.* 458.

86 One of three joint covenantors gives a bill of exchange for part of a debt secured by the covenant, on which bill judgment is recovered; held, such judgment to be no bar to an action of covenant against the three; such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted as satisfaction, nor to have produced it in fact. *Drake* v. *Mitchell & al.* 3 *East*, 251.

87 To debt on bond conditioned for performance of articles in an agreement referred to, a plea of performance generally was held bad on special demurrer, because it did not appear but that some of the articles might be negative or disjunctive. *Earl of Kerry* v. *Baxter*. 4 *East*, 340.

88 *Quære*, If such plea would have been helped by an allegation, that none of the articles were negative or disjunctive. *Ibid.*

89 So where general performance was pleaded to debt on bond conditioned to perform covenants, and the plaintiff in his replication set out the indenture verbatim and then demurred, shewing for cause that the defendant had not shewn how he had performed the negative covenants; demurrer held good. *Aliter*, If the indenture set out in the replication had contained no negative or disjunctive covenants, in which case the defect of the plea in not setting out the indenture would have been cured. *Plomer* v. *Bain, cited. Ibid.* 344, *n.*

90 Plea to *assumpsit*, that the defendant, who was the payee of a promissory note, indorsed it to the plain-

tiff "for and on account of" the said debt, is a good plea. *Kearslake* v. *Morgan*. 5 *Term Rep.* 513.

91 To a debt on bond conditioned for the payment of a certain sum at a certain day, defendant pleaded that by articles of agreement between the plaintiff, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened; but as the plea did not allege the payment of the interest accordingly, it was holden bad. *Baldee* v. *Elers*. 5 *Term Rep.* 260.

92 A plea in bar of an avowry for taking damage feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defects of fences, must shew that they were *passing on the highway* when they escaped; it is not sufficient to state, that *being* in the highway they escaped. *Dovaston* v. *Payne*. 2 *H. Black.* 527.

93 The plaintiff in replevin pleaded in bar to an avowry for damage feasance that the *locus in quo*, from time whereof, &c. ought to be open and common "on or before the 15th of *October*, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards," that the plaintiff when, &c. put in his cattle "the same time being when the said field was and ought to be open and common *as aforesaid*;" held that the plea was bad for uncertainty, even after verdict, the right of common being too generally described both in its commencement and conclusion. *Da Costa* v. *Clarke*. 2 *Bos. & Pull.* 257.

94 In an avowry defendant averred that all those whose estate he now has, &c. *from time whereof*, &c. have been accustomed to have, and of right *during all the time aforesaid* ought to have had, and still of right ought to have common of pasture in the *locus in quo*: held bad, and that it did not amount to an averment of right of common at all times of the year. *Hawkins* v. *Eccles*. 2 *Bos. & Pull.* 359.

95 If a defendant in replevin plead by way of justification of the taking, that he was *possessed* of a messuage with common appurtenant, and that the plaintiff's cattle were damage feasant, on the common, and conclude in bar without praying a return, it seems that such a plea is bad. *Ibid.*

96 Replevin of cattle taken in *A.* The defendant avowed the taking in *A.*, under a demise of certain premises of which *B.* was parcel, and because the cattle were damage feasant in *B.* he took them and drove them through *A.* in his way to the pound; and upon general demurrer the avowry was held to be well pleaded. *Abercrombie* v. *Parkhurst*. 2 *Bos. & Pull.* 480.

97 If to an avowry for 12*l.* rent in arrear, the plaintiff plead "that the said 12*l.* is not due," and the defendant join issue thereon, and at the trial it appear that 24*l.* only is due, upon which the plaintiff objects that the evidence does not support the issue joined by the defendant; yet if a verdict be taken for 24*l.* subject to the opinion of the court, such finding will cure the defect in the formality of the issue. *Cobb* v. *Bryan*. 3 *Bos. & Pull.* 348.

98 To a declaration against one upon joint promises by him and another, whom he avers to be outlawed, a plea of *nul tiel* record of outlawry is in effect a plea in abatement, for want of parties; and therefore, if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment *quod recuperet*, &c. *Nowlan* v. *Geddes*. 1 *East*, 634.

99 In justifying a trespass under the process of a foreign court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior courts; but at any rate a plea which only states that the court abroad was governed by foreign laws, that

the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such court, having competent jurisdiction in that behalf, *et taliter processum, &c.* that the defendant was ordered by the said court, having competent authority in that behalf, to seize the property, is bad; being too general; and not giving the plaintiff notice whether the defendant justified as an officer of the court, or party to the cause; or of what nature the charge was, or by whom instituted; or what the order of seizure was; whether absolute or quousque, &c. *Collett* v. *Ld. Keith*, 2 *East*, 260.

100 No matter of defence arising after action brought can properly be pleaded in bar of the action generally, but it ought to be pleaded in bar of the *further maintenance* of the suit. Therefore where one who was an alien *amy* at the time of the action brought, became an alien *enemy* before plea pleaded, and the defendant pleaded that the plaintiff ought not *to have or maintain* his action, because he was before *and at the time of exhibiting his bill*, and that he *now* is *an alien enemy*, &c.; concluding that therefore the plaintiff ought to be barred from *having or maintaining his action*, &c.; to which the plaintiff replied, that *at the time of exhibiting his bill* he was an *alien amy*; wherefore he *prayed judgment and his damages*: to which there was a demurrer; held, that the plea was ill pleaded: But yet, as the court were *ex officio* bound to give such judgment as appeared upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side; and as it appeared upon the whole that the plaintiff was *now* an alien *enemy*, and therefore incapable of *maintaining further* his suit, judgment was given that he be barred from *further having or maintaining his action*. *Le Bret* v. *Papillon*. 4 *East*, 502.

101 A plea of *nul tiel record*, pleaded to an action of debt on an *Irish* judgment recovered, must conclude to the *country*; for though, since the union, such judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury. *Collins* v. *Ld. Viscount Mathew*. 5 *East*, 473.

102 Every plea to the jurisdiction of the court ought to give some other court by which the matter may be tried. Therefore it is not sufficient for a native of *Ireland*, charged with the publication of a libel in *Middlesex*, to plead to the jurisdiction of *B. R.*, that *Ireland*, before the union, was governed by its own laws, and not by the laws of *Great Britain*; and that, since the union, it is yet governed by its own laws, &c. and that there always have been, and now are, courts and jurisdictions in *Ireland*, distinct from those in *Great-Britain*, and competent for the trial of all offences committed by the natives resident there; and that the defendant is a native of, and was resident in *Ireland*, at the time of the offence alledged, and that the subject matter of the supposed libel related to things in *Ireland*; for the objection, if any, going to the total want of jurisdiction in any of the courts of this part of the kingdom to try the defendant for such an offence, it should either be taken advantage of by a plea in bar, or by evidence under the general issue. *Rex* v. *The Hon. Robert Johnson*. 6 *East*, 583.

103 The toleration act, 1 *W. & M.* c. 18, provides (s. 18.) that any person maliciously disturbing any dissenting congregation under that act, on proof before a justice of peace, shall find sureties in 50*l.* or in default be committed to prison till the next sessions, and on conviction forfeit 20*l.* to the crown. To an action against magistrates for trespass and

false imprisonment they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties under it to the next sessions; and that before the next sessions it was agreed between the prosecutor and the now plaintiff, *with the consent* of the committing magistrates, (the now defendants,) that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged *in full satisfaction and discharge of the assault and imprisonment*; held this was no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for a *public misdemeanor*, and thereby impeding the course of justice; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff, and *their consent* afterwards to the prosecutor dropping the prosecution being a mere nulity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgcomb* v. *Rodd.* 5 *East*, 294.

104 Partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses cannot be pleaded in bar to an action on the bond, conditioned for the performance of the award; but is only matter for application to the equitable jurisdiction of the court to set aside the award. Neither can a parol agreement between the parties to waive and abandon the award be pleaded to such action. *Braddick* v. *Thompson.* 8 *East*, 344.

105 A plea of tender after the day of payment of a bill of exchange, and *before* action brought, is not good; though the defendant aver that he was always ready to pay, from the time of the tender, and that the sum tendered was the whole money then due, owing, or payable to the plaintiff in respect of the bill, with interest, from the time of the default, for the damages sustained by the plaintiff by reason of the nonperformance of the promise. *Hume* v. *Peploe.* 8 *East*, 168.

106 *Qu.* Whether a special plea in bar stating no facts but what might have been proved under the general issue, but leaving other facts unanswered which the general plea would have put in issue, be good. *Boot* v. *Wilson.* 8 *East*, 311.

107 A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the *locus in quo* under a deed of grant by a former owner, alledged to be since lost, or destroyed by accident and length of time, and therefore not profferred in court of which the date and names of the parties are unknown. *Hendy* v. *Stevenson.* 10 *East*, 55.

108 A sheriff justifying in trespass, under a writ of *fieri facias*, need not shew its return; the distinction being in this respect between a justification under mean process, and under process in execution; at least where in the latter case no ulterior process is necessary to complete the justification. *Cheasley* v. *Barnes & others.* 10 *East*, 73.

109 In a plea in bar, the statute of another state, relied on in defence, must be set out, and the general allegation that the proceedings were pursuant to the statute is not sufficient. 1 *Mass.* 104.

110 A plea in bar that the defendant has had judgment against him *as trustee*, in an action on the statute of foreign attachment, is good; though no execution has issued on such judgment, and though the defendant has not paid over any part of the sum which he had in his hands as trustee. 1 *Mass.* 117.

111 A plea in bar, of a former recovery *may* be good although no sum be stated in the plea as recovered in damages or costs; but had blank

spaces where the sums are usually inserted. 1 *Mass.* 282.

112 In dower a plea in bar that the defendant is not and never was the tenant in possession is good, where the demand is against him as tenant in possession. 1 *Mass.* 469.

113 In an action against a town for expences incurred for the support of a person alleged to be a pauper, it is a good plea in bar upon a general demurrer, that he was able to maintain himself. 1 *Mass.* 459.

Such plea would be bad upon a special demurrer, assigning for cause that it amounted to the general issue. *Ibid.*

114 A judgment upon a *formedon in the descendes*, that the tenant recover his costs, is a good bar to a writ of entry *sur disseizin* for the same lands brought by the same demandant against the son and heir of the tenant in the first action. 2 *Mass.* 388.

115 It is no good bar to an action of debt upon a replevin bond, that the plaintiff recovered judgment for a return of his goods, and for his damages and costs, and that the defendant delivered part of the goods, and tendered the remainder, which were not received; and as to the damages and costs *cognoscit actionem*. 2 *Mass.* 541.

116 Nor that the defendant has always been ready to return the goods and pay the damages and costs; but the plaintiff never demanded them, nor delivered his writ of *retorno habendo* to an officer to be executed. *Ibid.*

117 To a *scire facias* against bail, the defendant pleads in bar of execution, that since the arrest, the principal debtor became bankrupt, and obtained his certificate; and that the debt was due before the bankruptcy, and might and ought to have been proved under the commission. The plea is good, and the bail is not held to surrender the principal. 2 *Mass.* 431.

118 To an action of debt on a replevin bond, the condition of which was that the plaintiff in repleving should prosecute his writ to final judgment, pay such damages and costs as shall be adjudged against him, and return the cattle, the defendant pleads that there has been no final judgment that he should return the cattle, or that he should pay damages or costs; and the plea was adjudged bad. 2 *Mass.* 318.

119 In debt upon a replevin bond against the surety, the defendant pleads that the goods replevied were the proper goods of the plaintiff in replevin, and were attached and held as such by the defendant in replevin, who was a deputy sheriff, upon mesne process against the plaintiff in replevin; the plea was adjudged bad. *Flagg* v. *Tyler.* 2 *Mass.* 303.

120 A justification in trespass for taking and carrying away the plaintiff's goods under a writ of replevin, must allege that the bond was given pursuant to the statute; and that the goods were not detained on mesne process, &c. *Moore* v. *Parker, et al.* 2 *Mass.* 310.

Where several defendants join in pleading in bar, if the plea is bad as to one defendant, it is bad as to them all. *Ibid.*

121 In an action of *assumpsit* by a surety in a bond, who has paid a part of the debt, against the principal, statute of limitations is a good bar. *Vinton et al. adms.* v. *Vinton.* 4 *Mass.* 276.

122 A plea in bar to an action of debt on bond, which admits the plaintiffs right to part of the debt is bad. *Fitzgerald* v. *Hart et al.* 4 *Mass.* 429.

123 To an action against an administrator, it is a good plea in bar, that since the commencement of the action against him, he has been removed from his office by the judge of probate. *Jewett* v. *Jewett.* 5 *Mass.* 275.

124 To an action against a surety in a replevin bond, it is no sufficient

answer, that the principal has since become bankrupt, and has obtained a certificate of discharge, and that the property in the chattles having, by force of the commission of bankruptcy, vested in the commissioners, it had become by the act of law impossible to fulfil the condition of the bond. *Flagg* v. *Tyler, adm.* 6 *Mass.* 33.

125 If to a writ of *entry sur disseizin* the tenant plead a deed from the demandant or his ancestors conveying the land demanded to a stranger, made after the disseizin committed, in bar, the demandant may reply, that nothing passed by such deed, which may be traversed, and upon issue joined and found for the demandant, he shall have judgment. *Wolcot et al.* v. *Knight et al.* 6 *Mass.* 418.

126 To an action of debt on a review bond, the condition of which, was that the judgment debtors should pay such sum as the judgment creditors might recover on the review, the defendants, after oyer of the bond and condition, plead in bar, that they have performed all things on their part to be performed; the plaintiff replies that the judgment on the review was wholly unsatisfied. The court held, the plea in bar bad, and the plaintiff had judgment. *Freeland* v. *Ruggles et al.* 7 *Mass.* 511.

127 To a replevin bond the defendant pleads in bar, that he duly entered his action at the common pleas, and prosecuted it with effect, that upon the judgment there an appeal was interposed by the plaintiff in replevin; that the creditor, at whose suit the chattels had been attached had received full satisfaction for damages and costs, and that the officer, plaintiff in the action on the bond, had been indemnified, and kept harmless, &c. and on demurrer to this plea, the defendant had judgment. *Arnold* v. *Allen & al.* 8 *Mass* 147.

128 In debt on an administration bond against a surety, the principal being dead, the defendant pleaded performance generally: the plaintiff demurred because a special performance of each article of the condition was not averred in the plea: the plea was adjudged sufficient. *Dawes* v. *Gooch.* 8 *Mass.* 488.

The plaintiff moved for leave to waive the demurrer and reply. This motion was denied, particularly because the bond was of long standing, &c. *Ibid.*

129 To an action of debt on a judgment in the circuit court of the *United States*, for the district of *Massachusetts*, the defendant pleaded that the record of the judgment had been removed by writ of error, according to law, into the supreme court of the *United States*, wherefore he prayed judgment, &c.; on demurrer, the plea was held bad. *Jenkins* v. *Pepoon.* 2 *Johns. Cases*, 312.

130 *A.* being indebted to *B.* in the sum of 1785 dollars, for goods sold and delivered, and to other creditors, on the 1st January, 1793, executed a bond to *C.* and *D.* for 22,500 dollars, for and on account of all his debts, and including the sum due to *B.* on which bond a judgment was entered up in April 1793. Afterwards, on the 18th July, 1793, *A.* gave to *B.* a single bill for the 1785 dollars; and on the 1st August, 1793, *B.* affirmed the trust in *C.* and *D.* as to the judgment, and on the 2d Aug. directed a *ca. sa.* to be issued against *A.* on such judgment, on which *A.* was taken into custody, and afterwards discharged, with the consent of *B.* In an action brought by *B.* on the single bill against *A.* it was held that *B.* having no *cestuy que trust* of the judgment, affirmed the trust, and elected to proceed on that judgment, and obtain satisfaction for his debt, the single bill was thereby discharged. *Seamen* v. *Haskins.* 2 *Johns. Cas.* 195.

131 A plea of discharge under the *in-*

ment act need not set forth, specially, all the proceedings previous to the certificate of discharge It is sufficient, if the discharge itself be set forth *verbatim*. Where new matter is alleged in a plea, it must conclude with a *verification*. *Service* v. *Heermance*. 1 *Johns. Rep.* 91.

132 Where the defendant, in his plea, alleged, that on stating a balance of accounts, between him and the plaintiff, he delivered certain negotiable notes to *C.* on account of and in behalf of the plaintiffs, but did not aver that *C.* was the agent of the plaintiffs nor that the notes were accepted in full satisfaction and discharge of the debt due to the plaintiffs, the plea was held bad on demurrer. *Bird, Savage, and others* v. *Caretat*. 2 *Johns. Rep.* 342.

133 In setting forth, in a plea, the proceedings of an inferior court, after giving it jurisdiction, it is sufficient to say, that *such proceedings were thereupon had*, that such an act was done by the court, *e. g.* that the defendant was discharged from his debts as an insolvent, without setting forth all the proceeding specially. *Peebles* v. *Kittle*. 2 *Johns. Rep.* 363.

134 Where the plaintiff, in a declaration on a bond, conditioned to perform covenants, elects to assign the breaches in the first instance, in the declaration, as he may do, the defendant cannot plead a performance generally, but must particularly answer the breaches assigned, and show when, how, and where he performed his covenants. *Postmaster Gen. of the United States* v. *Cochran*. 2 *Johns. Rep.* 413.

135 Where the plea stated that the defendant was in custody on an execution, for less than 2500 dollars, and was discharged by the court of common pleas, &c. this was held a sufficient allegation of jurisdiction in the court of common pleas. *Currie and Whitney* v. *Henry*. 2 *Johns. Rep.* 433.

A plea, alleging generally, that the prisoner was discharged by due course of law, is bad. *Ibid.*

136 In an action of *trespass*, the defendant pleaded, that the goods taken were seized by a deputy-sheriff, by virtue of a warrant, as the property of an absconding debtor, (setting forth the proceedings under the act, and that the plaintiff held the goods by a fraudulent conveyance from the debtor) and that the defendant acted in aid of, and under the direction of the deputy-sheriff; and the plea was held good. Several dependent facts, which make but one defence, may be pleaded together. *Patcher* v. *Sprague*. 2 *Johns. Rep.* 462.

137 *C.* and *W.* gave a joint and several promissory note to *H.* for 71 dollars; *H.* made a verbal agreement with *W.* that if he would pay 21 dollars and 55 cents, he would not call on him for the payment of the note, but would look to *C.* for the residue. *W.* thereupon, paid *H.* the 21 dollars and 55 cents. *H.* afterwards brought an action on the note, against *C.*, and *W.* who pleaded the agreement with *C.* and the acceptance of the 21 dollars and 55 cents, from *W.* in bar of the action; but it was held, that it was no bar, it not being an accord and satisfaction for the note. *Harrison* v. *Close and Wilcox*. 2 *Johns. Rep.* 448.

138 In an action before a justice, the defendant pleaded a former judgment, for the same cause of action, before a justice. In the first action the jury found a verdict of no cause of action, but the justice rendered no judgment upon the verdict. It was held, that as the verdict was substantially for the defendant and, though informal, the justice ought to have given judgment, the plea of the former action was good. A justice must give judgment on a verdict, for he cannot arrest it, or grant a new trial. *Felter* v. *Mulliner*. 2 *Johns. Rep.* 181.

139 In an action before a justice, it is

a good plea in bar, that the plaintiff sued the defendant, for the same cause of action, before another justice, in which a verdict was given for the defendant for his costs. *Young* v. *Overacker*. 2 *Johns. Rep.* 191.

140 In a suit before a justice, the defendant pleaded in bar, a former suit and trial for the same cause of action. It appeared, that the former suit was on a note, and also for work and labour for which the second suit was brought; but the jury, after hearing all the allegations and proofs found a verdict for the note only, without taking notice of the work and labour. It was held, that the former action was a bar to the second; the whole of the plaintiff's demand having been submitted to the jury, they were bound to decide upon it. *Brockway* v. *Kinney*. 2 *Johns. Rep.* 210.

141 Where a declaration was of *Nov.* term, 1806, and there was an imparlance over to *Feb.* term, 1807, when the defendant pleaded, that on the 7th *Jan.* 1807, he paid to the plaintiff several sums of money, &c. the plea was held good, without saying that he paid the interest and costs which had accrued. *Tillotson* v. *Preston*. 3 *Johns. Rep.* 229.

142 A plea *puis darrein continuance*, of a discharge under the insolvent act, stating generally, that the defendant being an insolvent debtor, and having, in all things, conformed to the directions of the act, in pursuance thereof, on such a day, obtained his discharge, &c. is bad. The discharge, at least, ought to be set forth in the plea. *Cruger* v. *Cropsey*. 3 *Johns. Rep.* 242.

143 In an action of covenant for a breach of the covenant of seizin, &c. contained in a deed, the defendant pleaded, 1. "That the plaintiff after the deed to him, in consideration of 1000 dollars, sold, released, and quit claimed all his right and title to the land to the defendant," &c. 2. "That before the plaintiff had sustained damage by a breach of the covenants in the deed to him he sold and released all his right title and interest in the land to the defendant." 3. "That in consideration of 1000 dollars paid to him, the plaintiff agreed to give up the deed to the defendant." The defendant demurred to the 1st and 3d pleas, and replied to the 2d plea, that the plaintiff had sustained damages, before the release, by reason of the breach of the covenant of seizin, to wit, by paying to the plaintiff 1408 dollars, for the land when the defendant was not in fact seized," &c. and tendered issue thereon. To this replication the defendant demurred specially: It was held, that the subsequent reconveyance of the land to the defendant, was not an extinguishment of the covenants in the deed to the plaintiff; that the 1st and 3d pleas were bad; and though the replication to the 2d plea was also bad, yet the plaintiff was entitled to judgment on the demurrer. *Bennett and wife* v. *Irwin*. 3 *Johns. Rep.* 363.

144 *A.* being indebted to *B.* by a promissory note for 1,667 dollars, it was agreed in writing between them, that *A.* should deliver to *B.* as much *coal*, at 10 dollars the chaldron, as would amount to the sum due on the note, the coal to be of the like quality with that purchased by *A.* of *B.* out of a certain ship. No time or place was fixed for delivery. *A.* having in his coal-yard a large quantity of coal, and sufficient of the quantity mentioned, though consisting of different kinds, immediately afterwards, and at different times, tendered to *B.* the coal, in satisfaction of the note, and *B.* made no objection to the place or mode of delivery, but said, at one time, that he would send and take them, and at another that he was not ready to receive them, and finally neglected to take them. In an action, after

wards, brought by *B.* against *A.* on the note, it was held, that the agreement for the delivery of the coal was valid, and that the tender on the part of *A.* was equivalent to a performance, so as to bar the plaintiff's action, and might be pleaded by way of accord and satisfaction. *Coit and Woolsey* v. *Houston.* 3 *Johns. Cas.* 243.

145 Where a suit was brought on a note to *A.* or bearer, and the defendant pleaded a former suit on the same note against him by *H.* and a judgment in favour of the defendant, it was held not to be a bar to the second suit, unless the defendant also proved that *A.* was the rightful owner or possessor of the note. *Hutchins and Cary* v. *Fitch.* 4 *Johns. Rep.* 222.

146 To an action of debt for the penalty of a bond given to a sheriff, as surety for the liberties of the gaol, *non damnificatus* is not a good plea. *Wood* v. *Rowan and Coon.* 5 *Johns. Rep.* 42.

147 *It seems*, that where a plea contains matter of fact and matter of law, it may conclude to the country. *Lytle* v. *Lee and Ruggles.* 5 *Johns. Rep.* 112.

148 Where the defendant pleads the justification under mesne process, without setting forth the cause of action, it is good. *Linsley* v. *Keys and Williams.* 5 *Johns. Rep.* 123.

149 In an action of debt on a bond given by a deputy-sheriff to the sheriff, for the due execution of the office of deputy, &c. the sheriff having been appointed in 1801, was reappointed to office in 1803, the defendant pleaded that the sheriff was not damnified by acts of the defendant, previous to the plaintiff's reappointment in 1803; it was held, that the plea was bad; for as the sheriff's authority was continued and uninterrupted by the renewal of the commission, there was no necessity of a renewal of the bond, which continued in force as long as the defendant continued deputy. *Hughes* v. *Miller and Smith.* 5 *Johns. Rep.* 168.

150 In an action by the indorsee against the indorsor of a promissory note for 933 dollars and 40 cents, the defendant pleaded *puis darrein continuance*, that the *maker* had paid to the plaintiff 932 dollars and 86 cents in full satisfaction and discharge of the note, and which the plaintiff accepted in full satisfaction, &c. On demurrer, this was held a good plea and a bar to the plaintiff's action; though the sum paid fell short of the whole interest added to the principal, and did not include the costs of suit which had occurred. *Johnston* v. *Branna.* 5 *Johns. Rep.* 268.

151 A plea *puis darrein continuance*, that he, together with *B.* being indebted to *C.* and several others, agreed to assign all their stock in trade and outstanding debts to *C.* and their other creditors, who agreed to accept the same in full satisfaction of their respective debts; and averred that he and *B.* did deliver all their stock in trade and assign all the debts due to them for the use and benefit of *C.* and the other creditors, and which delivery of stock and assignment of debts, were received in full satisfaction by *C.* and the other creditors, &c. This was held to be a good plea of accord and satisfaction. *Watkinson* v. *Inglesby and Stokes.* 5 *Johns. Rep.* 384.

152 *A.* brought an action for a *libel* against *B.* who pleaded, *puis darrein continuance*, that he was partner with *C.* in the printing and publishing the newspaper which contained the libel; and that *A.* brought a separate action against *C.* for the same publication, and recovered judgment, which had been satisfied, &c. This was held to be a good plea. *Thomas* v. *Rumsey.* 6 *Johns. Rep.* 26.

It is no objection to a plea of a former recovery and satisfaction, that it

contains matter of fact and matter of record. *Ibid.*

A *venue*, is not necessary in a *plea*; the *venue* laid in the declaration draws to it the trial of every thing that is transitory. *Ibid.*

153 Plea of acceptance in satisfaction from a third person or stranger, is not a good plea in covenant. *Clow* v. *Borst & Best.* 6 *Johns. Rep.* 37.

154 In an action of trespass *quare clausum fregit*, the plaintiff alleged several trespasses, in several closes, at different times, and the defendant pleaded that the several closes were one and the same close, and that it was his freehold, &c. On demurrer, the plea was held bad. *Nevins* v. *Keeler.* 6 *Johns. Rep.* 63.

The defendant should have justified as to all the closes, or have denied the trespasses as to all the closes except one, and justified as to that. *Ibid.*

Where a plea begins as an answer to the whole declaration, but answers only a part, it is bad. *Ibid.*

155 *A.* brought an action of trespass against *B.*, in a justice's court, for cutting down wood on the land of *A.* and making it into coal; and the value of the timber cut down, and a countermand of *B.* for the coals left on the land of *A.* were submitted to the jury, who found a verdict for the plaintiff. *B.* afterwards brought an action of trover against *A.* for the coals still remaining on the land of *A.* and the question was again submitted to the jury; it was held, that the question as to the coals having been submitted to the jury in the former suit, it was a conclusive bar to the second suit. *Curtis* v. *Groat.* 6 *Johns. Rep.* 168.

156 If an insolvent who has obtained his discharge under the insolvent act, undertakes to plead specially, and to state all the proceedings relative to his discharge, he must state a conformity to the directions of the act, in every respect; and if he does not state the facts correctly, and especially, if he omits to state that *three fourths* of his creditors in amount, subscribed to his petition, &c. so as to give the judge jurisdiction, the plea is bad. *Frary* v. *Dakin.* 7 *Johns. Rep.* 75.

157 *Son assault, &c.* is a justification, and when pleaded, the plaintiff must reply specially *moliter manus imposuit*, and cannot give it in evidence under the general replication *de injuria sua propria, &c.* *Collins* v. *Moulton.* 7 *Johns. Rep.* 108.

158 Where a declaration on a promissory note alleged that the defendant did not pay the money mentioned in the note, &c.; and the defendant pleaded, *puis darrein continuance*, that he "paid the plaintiff the several sums of money mentioned in the plaintiff's declaration;" on demurrer, the plea was held good, being as broad as the declaration; and there was no necessity of stating that the plaintiff accepted it in satisfaction. *Chew* v. *Wolley.* 7 *Johns. Rep.* 399.

159 In an action of *assumpsit* before a justice of the peace for staves sold and delivered, the defendant pleaded a former action of *trespass*, brought by the same plaintiff for the same staves, against the defendant, in which there was a verdict and judgment for the defendant. It was held, that the judgment in the action of trespass for the same goods was a bar to an action of *assumpsit* for the same cause. *Rice* v. *King.* 7 *Johns. Rep.* 20.

160 In an action before a justice of the peace, a plea of a former action and trial, between the same parties, in which the present plaintiff set off his demand, is not good, if the money on which the demand was founded, was not then due; and the setoff for that reason, rejected. *Bull* v. *Hopkins.* 7 *Johns. Rep.* 22.

161 *A.* gave a promissory note to *B.* payable in 60 days, and in consideration that *C.*, at the request of *A.*, would also sign the note as surety, *A.* undertook and promised to take up the note when it became due, and to

indemnify C. and save him harmless from all damages and costs, which he might sustain by reason of signing the note, &c. and A. did not take up the note, &c. but C. was sued by B. who recovered judgment against him, on which C. was taken in execution, and committed to prison. In an action of *assumpsit*, brought by C. against A., the latter pleaded that C. was discharged from his imprisonment under the execution, by virtue of the act for the relief of debtors, &c. and had never paid the note, or the judgment against him, or any part thereof, &c. On *demurrer*, the plea was held bad, and that the plaintiff was entitled to recover on the promise to indemnify. *Powell* v. *Smith*. 8 *Johnson's Rep.* 249.

162 In an action of trespass *quare clausum fregit*, and for cutting and carrying away wheat, before a justice of the peace, the defendant pleaded a former suit by the plaintiff against him, for the wheat, in bar, and it was held good. The rule in this case depends, not on the identity of the action, but on the proof being the same in both cases. *Johnson* v. *Smith*. 8 *Johns. Rep.* 383.

163 In an action for *deceit*, before a justice, a plea of a former suit by the defendant against the plaintiff on a *contract*, in which the present plaintiff neglected to set off his demand, is no bar. *Dean & another* v. *Allen*. 8 *Johns Rep.* 390.

164 In an action of debt against a sheriff, for the *escape* of G., a prisoner in his custody on execution, at the suit of the plaintiff, the defendant pleaded, that on the 1st of *October*, 1810, G. escaped against the will of the defendant, and that he returned into gaol before the commencement of the plaintiff's suit, and continued in gaol until the 6th of *October*, 1810, when he presented his petition to the court of common pleas, &c. and was discharged out of custody on the said execution, by order of the court of common pleas, having full power and authority for that purpose, pursuant to the *act for the relief of debtors, with respect to the imprisonment of their persons*; (sess. 34, c. 66.) it was held, on general demurrer, that the plea was sufficient to show that the court of common pleas had jurisdiction in the case, and that the discharge was sufficient justification to the sheriff, who has no concern with the regularity of the proceedings before the court. *Cantillon* v. *Graves*. 8 *Johns. Rep.* 472.

165 In an action by the payee of a promissory note, against the maker, brought before a justice, the defendant pleaded that the note had been endorsed by the payee, and that the endorsee had sued the defendant on the note before another justice; but it appearing that in that suit the maker objected to the title of the endorsee, or to some defect in the endorsement, in consequence of which, no recovery was had on the note, it was held that the plea was no bar, and that the defendant could not, in this suit, set up the endorsement as good, which he had, in the former suit, shown, or attempted to show, to be bad. *McDonald* v. *Rainor & another*. 8 *Johns. Rep.* 442.

166 In an action for a *deceit*, in the sale of a certain improvement, or patent right, before a justice, the defendant set up, in defence, a former trial, and judgment in an action brought by him before a justice against the plaintiff, on a promissory note given for the purchase-money, in which suit the present plaintiff set up the *deceit* in the sale, as a defence against the note, and the same was considered by the justice, and a judgment given for the plaintiff, for the amount of the note; it was held, that the first trial and judgment was a complete bar to the second suit for the *deceit*. *Jones* v. *Scriven*. 8 *Johns. Rep.* 453.

167 A judgment in *assumpsit*, upon a policy under seal, is a bar to a sub-

sequent action of *covenant*, on the same policy. *Ins. Co. of Alexandria* v. *Young*. 1 *Cranch*, 331.

168 An assignment of debts cannot be pleaded as an *accord and satisfaction* to debt on bond. *Buddicum* v. *Kirk*. 3 *Cranch*, 293.

169 If an account stated be pleaded in bar to bill in equity, such plea will be sustained, except so far as the complaint shall show it to be erroneous. *Chappedelaine* v. *Dechenaux*. 4 *Cranch*, 305.

170 To an action upon a bond conditioned to pay money on the 1st of *March*, it is not a good plea to say that the defendant paid it on the 13th of *May*, without averring it to be the whole sum then due. *United States* v. *Gurney*. 4 *Cranch*, 333.

171 To an action of debt for the penalty of an *embargo bond*, it is a good plea, under the act of congress of the 12th of *March*, 1808, s. 3, that the party was prevented from relanding the goods in the *United States, by unavoidable accident*. *Durousseau* v. *United States*. 6 *Cranch*, 308.

172 A promissory note *given and received* for and in discharge of an open account is a bar to an action upon the open account, although the note be not paid. *Sheehy* v. *Mandeville*. 6 *Cranch*, 254.

VII. *Prescription or Usage.*

1 Prescription for a right of burial in a chancel, claimed as belonging to a messuage, allowed. *Waring* v. *Griffiths et al.* 1 *Burr*. 440.

2 A natural person cannot prescribe except in right of a permanent estate. A grant of common *sans nombre* in gross is good. Inhabitants cannot as such take by purchase or have an interest in the soil of another by custom, except on account of some special reason. A right of common is an interest in another's soil. The word "aforesaid" does not necessarily refer to the last antecedent. It is never to be presumed that a custom owes its origin to an act of parliament. *Weekly* v. *Wildman*. 1 *L. Raym*. 485.

3 An ancient grant without date does not necessarily destroy a prescriptive right; for it may be either prior to time of memory, or in confirmation of such prescriptive right; which is matter to be left to a jury. *Addington* v. *Clode*. 2 *Black*. 989.

4 A lessee for years cannot prescribe in his own name; such a prescription is bad after verdict. In a possessory action for an injury to an easement, the plaintiff need not set out his title, unless the defendant appears to be tenant of the land; but if he offers to do it, and sets out an insufficient title, it will be bad. A termor cannot be charged in a *que* estate with an immemorial obligation. *Dorney* v. *Cashford*. 1 *L. Raym*. 266.

5 If to an action on the case by a commoner, for injuring his right of common, the defendant plead that he dug turves under a licence from the lord; he should add, that "sufficient common was left for the commoner;" and if he do not, the plaintiff need not reply that sufficient common was not left. *Greenhow* v. *Ilsley*. *Willes*, 619.

6 A prescription for a right to fish in the sea as annexed to certain tenements, is bad; because it is a right common to all the king's subjects. *Ward* v. *Creswell*. *Willes*, 265.

A prescriptive right claimed in respect of certain ancient tenements, &c. without saying how many, is bad. *Semb Ibid.*

If a man have a prescriptive right in respect of one tenement and ten acres, and another in respect of another tenement and ten acres, he must make two several titles in pleading. *Ibid.*

7 Prescription for common for four cows is good for one cow. Prescription cannot be by one who hath an estate for years. Tenants in ancient demesne may join in a pre-

scription for common. *Hill* v. *El; lord.* 3 *Salk.* 279.

7 Prescription cannot be where the creation of the thing in which it is claimed is within time of memory. *Rex* v. *Johns.* *Lofft*, 76.

9 In prescribing for a pew, it is not necessary to allege that he and his ancestors have always been accustomed to repair; for it is only evidence, and perhaps the pew never wanted repair. *Fishe* v. *Rout.* *Lofft*, 423.

10 Prescription for three bushels of barley out of every ship's cargo brought to a quay to be exported, is good. *Serjeant* v. *Read.* 1 *Wils.* 91. 2 *Str.* 1228.

11 Customary tenants can prescribe in *non decimando*. *Stephenson* v. *Hill.* 3 *Burr.* 1273.

12 Where the original of a way is accounted for, the prescription is destroyed. *The King* v. *Hudson.* 2 *Str.* 909.

13 One custom may be pleaded against another where both are consistent. *Kinchen* v. *Knight.* 1 *Black.* 49.

14 Trespass. Whoever claims an easement must plead it specially. *Hawkins* v. *Wallis.* 2 *Wils.* 173.

15 In an action on the case for not repairing a private road leading through the defendant's close, it is sufficient for the plaintiff to allege that the defendant, *as occupier* of the close, is bound to repair. *Rider* v. *Smith.* 3 *Term Rep.* 766.

16 But a defendant, who prescribes in right of his own estate, must set forth the estate in right of which he claims the privilege. 3 *Term Rep.* 766.

17 A plea of prescription for common in a *que* estate is good after verdict, though it be not in *express terms* alledged that the owners of the estate have used it from time immemorial. *Clarke* v. *King.* 3 *Term Rep.* 147.

18 In pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, it is necessary to allege that the house was out of repair, that the party entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of that house, and that the materials were used for that purpose. *Peppin* v. *Shakespeare.* 6 *Term Rep.* 748.

19 A charter of W. 3, granted to the town of *Liverpool*, directs that the common council men shall be elected in such manner as was used before a former charter of Car.; the defendant, to a *quo warranto* information for exercising the office of common council man, pleaded, that before the charter of Car. 2, the mayor, bailiffs and burgesses, used to elect (except at those times when there was any bye-law to regulate the mode of election:) it was held that the plea was bad, because it did not shew what was the usage in fact before the charter of Car. 2. *Rex* v *J. Birch.* 4 *Term Rep.* 608.

20 Where in trespass *quære clausum fregit*, commenced before a justice of the peace, the defendant pleads that the *locus in quo* is part of a public highway, and that the plaintiff had wrongfully encumbered it with a gate, &c. the justice should proceed no further in the hearing, but recognize the defendant to enter the action at the next court of common pleas. *Spear* v. *Beeknall.* 5 *Mass.* 125.

21 If to such a plea the plaintiff replies a prescription in those whose estate he hath, to maintain a gate on the highway, he need not traverse the highway, nor the wrongful encumbering it with a gate. *Ibid.*

22 The plaintiff, by his prescription, alleges a right to maintain the gate at all seasons of the year, when it shall be found necessary for the preservation of the grass, &c. and avers that finding it necessary, &c. he erected the gate: and held good on demurrer. *Ibid.*

23 But the want of an averment of his finding it necessary at the time of the trespass would be bad on de-

murrer, although it is helped by the defendant's pleading over. *Ibid.*

VIII. *Profert.*

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1 The breach must be as particular as the covenant; and where a deed is pleaded, the plaintiff cannot reply new matter in the deed but must set it out upon oyer. *Stibbs* v. *Clough.* 1 *Str.* 227.

2 Want of profert only form, and cannot be taken advantage of after verdict. *Salisbury* v. *Williams.* 2 *Salk.* 497.

3 Where *H.* is bound to make a deed he must set it forth; otherwise where to shew, deliver, and produce it only. *Armit* v. *Bream.* 2 *Salk.* 498.

4 A party who claims under a deed, &c. in the hands of a third person, to the possession of which he has no right, need not make a profert of that deed in pleading. *Stone* v. *Rawlinson. Willes,* 560, and *Titley* v. *Foxall,* 689.

Therefore the indorsee of the administrator of the payee of a promissory note need not make a profert of the letters of administration in his declaration in an action on the note against the maker. *Ibid.* 560.

5 Against a popular action the defendant cannot plead another action in the same term, but must shew the other action to be actually prior in time. *Combe qui tam* v. *Pitt.* 1 *Black.* 437. 3 *Burr.* 1423.

6 Profert not necessary to be made of an assignment of a bail bond, nor the witnesses' names thereto necessary to be set forth in the declaration. *Leafe* v. *Box.* 1 *Wils.* 121.

7 *Virtute cujus* is not traversable, except when it takes in matter of fact. *Beats* v. *Simpson.* 3 *Salk.* 352.

8 The court of K. B. (*dissent. Gross* J.) held that a deed may be pleaded *as lost by time and accident,* without profert. *Read* v. *Brookman.* 3 *Term Rep.* 151. Or *destroyed. Totty* v. *Nesbitt.* 3 *Term Rep.* 153, *n.*: But if it appear by the record that defendant had *oyer* of a *copy* only, it is error. *Matteson* v. *Atkinson.* 3 *Term Rep.* 153, *n.*

9 If profert be made, nothing but the production of the deed will suffice. *Smith* v. *Woodward.* 4 *East,* 585.

10 Where in setting forth a conveyance it was stated, that a release was cancelled, "by the seal of the releasor being taken off and destroyed or lost," with a profert of the residue of the deed, the court of C. P. held this to be good pleading. *Bolton* v. *Carlisle* (*Bishop*) *& al.* 2 *H. Black.* 259.

11 Where there is an assignment of all debts with a power of attorney to the assignee to receive and compound for the same, and to submit them to arbitration, and the assignee on an arbitration has a sum awarded to be paid to him; it is not necessary, in an action upon promises in consequence of the nonpayment of such sum, that the assignee in setting forth the assignment, should make a profert of the same in his declaration. *Banfill* v. *Leigh.* 8 *Term Rep.* 571.

12 No profert need be made of a deed which is only inducement to the action. 8 *Term Rep.* 571.

IX. *Replication & Rejoinder.*

1 Imprisonment and statute of limitations pleaded to part. Plaintiff ought to reply it was one continued duress. *Coventry* v. *Apsley.* 2 *Salk.* 420.

2 Debt on bond to indemnify plaintiff for what beer he should deliver to *J. S.* Plea, no delivery after making the bond. Replication that plaintiff did deliver beer to such an amount, without saying before filing the bill, is well enough on a general demurrer. *Thrale* v. *Vaughan.* 1 *Wils.* 5.

3 Debt on bond; plea *per* duress. Replication that defendant executed the bond of his own free will and not for fear of imprisonment,

and concludes to the country, is good. *Tomlin* v. *Burlace*. 1 *Wilson*, 6.

4 In debt upon a bond conditioned to deliver up certain goods, if the law should adjudge them to be prize; if the defendant pleads that the law had not adjudged them prize, he admits that he hath not delivered them, and therefore the plaintiff need not allege that in his replication. *Green* v. *Waller*. 2 *L. Raym.* 891.

5 To a plea in abatement, though the plaintiff replies issuable matter he may conclude with an averment. But to a plea in bar, he must in such case tender issue. *Dimater* v. *Hooper*. 1 *L. Raym.* 101.

6 In debt upon a bond against the executors of an executrix of the obligor, the defendant pleaded *plene administravit*, except goods to the value of 10*l*. Plaintiff replies, and prays judgment on the 10*l*; and says that on suing forth the original, defendant had goods of the testator to the amount of the residue of debt on the 10*l*. with an averment, and held good. *Lockyer, Esq.* v. *Coward and another, Executors of Frampton, widow, Executrix of Frampton*. 3 *Wils.* 52.

7 Debt on bond to save harmless from expences by reason of naming one to a curacy, or from suits by reason thereof. Plea *non damnificatus*. Replication assigns for breach that plaintiff was obliged to pay such a sum by reason of such nomination, but does not say how he was obliged; and held well enough. *Simmons, Vicar of Kendall*, v. *Langhorn*. 2 *Wils.* 11.

8 In debt upon a bond with a condition, if the defendant pleads a collateral matter the plaintiff need not assign a breach; but in debt on a bond conditioned to perform an award, if the defendant pleads "no "award" the plaintiff must in his replication assign a breach; if the defendant however, even in debt on an award, pleads any other collateral matter, the plaintiff need not assign a breach. *Lockey* v. *Darby*. 1 *L. Raym.* 109.

9 Replication of *nul tiel* record to a plea of recovery in K. *B.* concluded with an averment, held good. *Sandford* v. *Rogers, Esq.* 2 *Wils.* 113.

10 Where defendant pleads matter of excuse that admits a non-performance, plaintiff need not assign a breach in his replication. Reason of the difference in debt upon bond to perform award. *Mredith* v. *Alleyn*. 1 *Salk.* 138.

11 If to covenant for not repairing certain premises demised, the defendant plead that the plaintiff, before the cause of action accrued, *entered and pulled down the premises and expelled him therefrom*; the plaintiff may reply that he did not expel, &c. *modo et forma*. *Hodgskins and others* v. *Queenborough*. *Willes*, 129.

But he cannot plead an expulsion from part by the plaintiff. *Ibid.*

12 Where there is an affirmative to a negative, yet if the matter is new it needs not be concluded to the country. *Loder* v. *Loder*. 3 *Salk.* 211.

13 In trespass, assault and battery, if the plaintiff lay the assault one day, and the defendant pleads a special matter that justifies at another day, whereby the day becomes material; the plaintiff may reply an assault at another day: and it is no departure, although it hath been otherwise held; for the day is not material, and the plaintiff may maintain his count. *Anon.* 2 *L. Raym.* 1015.

14 Where the defendant pleads a matter of excuse which admits a non-performance, (except in the case of an award,) the plaintiff need not assign a breach in his replication. *Shelly* v. *Wright*. *Willes*, 12.

Aliter where the defendant pleads a performance. *Ibid.*

When the plaintiff replies that the defendant is estopped to plead his plea, he may demand judgment generally. *Ibid.*

15 Declaration of six counts, stating

as many promises, and all on the same day. Plea *infra ætatem* generally. Plaintiff may reply as to some of the promises of age, and as to the rest that they were for necessaries, without being a departure. *Howard* v. *Jennison*. 1 *Salk*. 223.

16 In an action by bill if the plaintiff gives the defendant an addition, and he pleads a misprison of addition, the plaintiff may reply that he had by reputation the addition mentioned in the bill. *Bennett* v. *Purcell*. 2 *L. Raym*. 849.

17 *De injuria sua propria* is a good replication to a justification by the common law or general statues. *Chance* v. *Weidon*. 2 *Salk*. 628. 1 *L. Raym*. 700.

18 In covenant for rent against the defendant as assignee of all the lessee's interest, &c. by virtue whereof he became and still is possessed, &c. if the defendant plead that all, &c. did not come to him by assignment, and that he did not become possessed, &c. it is good evidence to support the plea that the assignment was by way of mortgage, with a clause of redemption, and that the defendant has never taken actual possession, and this although the mortgage is forfeited. *Eatin* v. *Jaques*. 2 *Doug*. 455 to 461.

19 But if the defendant plead an assignment over before the rent accrued, it will not be a good replication that the assignee over never took actual possession, without adding that the assignment over was by way of mortgage. *Walker* v. *Reeves*. 2 *Doug*. 461, *n*. to 463, *n*.

Or that it was collusive and fraudulent. *Ibid*.

20 Nor is it a good replication in such case that the assignee over was a feme covert. *Barnfather* v. *Jordan*. 2 *Doug*. 432.

21 The prosecutor may reply to a return to a *mandamus*. *The King* v. *Lyme Regis*. 1 *Doug*. 159.

22 Where there is a traverse the replication should conclude with an averment. Administrator discontinues without costs. *Baynham* v. *Matthews*. 2 *Str*. 871.

23 In debt upon a bond conditioned for the payment of all dues to an inn of court as a barrister, if the defendant pleads payment, a replication that for a length of time each barrister has used to pay an annual sum for pensions to the treasurer of the society for the time being, and that an annual payment was in arrear from the defendant at the time of the commencement of the action, is good, though it does not shew that such sum was ever demanded. Upon a bond conditioned for the payment of a sum in gross, the obligor is bound to pay it though it is not demanded. *Sir Creswell Levinz* v. *Randolph*. 1 *L. Raym*. 594.

24 Replication *de injuria sua propria absque tali causa*, is bad where the defendant insists on a right. *Cooper* v. *Monke*. *Willes*, 54. *And Cockerill* v. *Armstrong*. 99.

And it is immaterial whether the defendant insists on the right in himself, or whether he justifies by command of another claiming that right. 102, *Ibid*.

So it is bad where the replication puts several matters in issue; as where replied to a plea (to trespass for taking cattle) that it was seized in fee of the *locus in quo*, and that defendant, as his servant, took the cattle damage feasant, 99. *And Bell* v. *Wardell*. *Willes*, 204.

25 To a plea *de injuria sua propria absque tali causa* to a cognizance for rent, is bad. 100, *n. a*.

When (in trespass) the defendant justifies taking the goods as a distress for rent, the plaintiff in his replication must either admit or deny the rent in arrear; replying *de injuria sua propria*, is improper. 54.

Where the defendant justifies (in trespass for taking the plaintiff's goods, and converting them, &c.) taking them as a distress for rent, the taking and converting are considered as the same thing; and therefore it is not inconsistent in a plea of jus-

tification as to the taking and converting, to say he took all the goods as a distress, and afterwards to say that he left part of them in the plaintiff's possession. *Ibid.* 55.

26 To a plea of *liberum tenementum*, the plaintiff may reply that the place in question is the soil and freehold of the plaintiff, and not the soil and freehold of the defendant. *Lambert* v. *Stroother.* *Willes*, 218.

When the plaintiff names the close in his declaration of trespass, whether the defendant can plead *liberum tenementum*? *Qu.* *Ibid.*

To the plea of *liberum tenementum*, the plaintiff may reply in either of three ways: 1st, he may traverse the defendant's plea, and then it is immaterial whether or not he sets forth his own title; 2dly, he may admit the freehold to be in the defendant, and insist on a lease or some other title under him; or 3dly, that before the defendant had any thing in the premises, *A. B.* was seized in fee, and made a lease either to the plaintiff or to a person under whom he claims, which is subsisting, without confessing or denying the defendant's plea. *Ibid.*

27 Defendant, having covenanted to transfer stock within three days after request, pleads that the request was made such a day, and that he transferred it the following day. Plaintiff may reply that he did not transfer it on that day. *Merrit* v. *Bane.* 1 *Str.* 458.

28 Replication ill when an immaterial part of the plea parcel of the issue; and in debt on a bond, plea that the money for which the bond was given was well enough, though not the very words of the statute, but should set forth the game. *Colborne* v. *Stockdale.* 1 *Str.* 493.

29 The replication ought to conclude to the country when the plea contains matter of abatement if true. *Wilkins* v. *Brown.* 2 *Str.* 1220.

30 Replication *non est attorn'* must not conclude *al pais*, and plea of privilege bad after imparlance. *Barker* v. *Forest.* 1 *Str.* 532.

31 In trespass the plaintiff need only falsify the defendant's title. *Cary* v. *Holt.* 2 *Str.* 1238.

32 Statute of limitations replied to a set-off. *Remington* v. *Stevens.* 2 *Str.* 1271.

33 Where the plaintiff replies full age of the defendant, it is not necessary to lay a venue as it is of a release. *Brett* v. *Minter and another.* 1 *Str.* 8.

34 If the plea contains matter of excuse, it is enough for the plaintiff in all cases but that of an award to falsify the excuse. *The Attorney General* v. *Elliston and another.* 1 *Str.* 191.

35 Where a replication denies the whole substance of the plea, there the plaintiff may tender issue, and conclude to the country; though, indeed, there are exceptions to that rule, where the replication is proper either way; but where the plaintiff selects one out of several facts in the plea, he may traverse that one, and conclude with a verification. 2 *Term Rep.* 142, 4; and see 3 *Term Rep.* 426.

36 If defendant plead to debt on bond that plaintiff won money of him at cards, and that the bond was given for securing payment of it; to which the plaintiff replies that it was given to secure the payment of money justly due, and not for securing the payment of money won; the replication may either conclude to the country, or with an averment. *Hodges* v. *Sandon.* 2 *Term Rep.* 439.

37 To a plea to *scire facias* against bail that the principal died before the return of any *ca. sa.*, a replication stating a particular *ca. sa.*, and that the principal was alive at the return of that *ca. sa.*, must conclude with an averment; for the *ca. sa.* in the replication is new matter; and, by the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it. *Henderson* v. *Withy.* 2 *Term Rep.* 576.

38 A replication to a plea of "ne un-

ques accouple" in dower, alleging in a marriage in *Scotland*, may conclude to the country; and in such replication it is not necessary to state that the marriage was had at any place in *England*, by way of venue. *Ilderton* v. *Ilderton*. 2 *H. Black*. 145.

39 In replying to a plea of infancy, the plaintiff must shew enough in his replication to maintain every part of the declaration. *Trueman* v. *Hurst*. 1 *Term Rep*. 40.

40 It is a common rule that a replication, when entire, which is bad as to part, is bad as to the whole: (see 1 *Term Rep*. 40,) but the rule cannot apply to any case where the objection is merely on account of surplusage. Therefore where the replication states matter sufficient for the plaintiff to maintain his action, even though it state something afterwards which is inaccurate, the whole is not vitiated. 3 *Term Rep*. 374.

41 To a *quo warranto* information the defendant derived a title in his plea to the office of a burgess under a custom for the common council to admit *ad libitum* any person of the age of twenty-one whom they chose; the prosecutor, after denying that custom, replied that no person was entitled to be admitted but in right of servitude, and that the defendant had not served a seven year's apprenticeship; rejoinder stating the special circumstances upon which he had served; on a demurrer to this rejoinder, because it was a departure from the plea, the court held the replication itself to be bad, as *immaterial* to the title in the plea; and gave judgment for the defendant. *Rex* v. *Knight*. 4 *Term Rep*. 419.

42 Assumpsit against three; two pleaded a debt of record by way of set-off; the plaintiff replied *nul tiel record*, and gave a day to the two defendants, but entered no suggestion respecting the third; held, on demurrer, that the action being discontinued, judgment must be given against the plaintiff, even though the defendant's plea were bad. *Tippet & al.* v. *May & al.* 1 *Bos. & Pull*. 411.

43 To a replication of *nul tiel record* and day given, if the defendant demur, the plaintiff need join in demurrer, but if the record is not produced may sign judgment. *Tipping* v. *Johnson*. 2 *Bos. & Pull*. 302.

44 Debt on bond conditioned for *J. S.* rendering account to the plaintiffs of all monies which he shall receive as their agent. Defendant pleads performance in the words of the condition. Plaintiffs reply, that *J. S.* received divers sums of money amounting to 2000*l*. belonging and relating to the plaintiffs business as their agent, and hath not rendered to the plaintiffs an account of the said 2000*l*. or any part thereof. This replication being specially demurred to for generallity, was held sufficient by the court of C. P. *Shum & al.* v. *Farrington*. 1 *Bos. & Pull*. 640.

45 So where to debt on bond, conditioned that one *B. R.* should account for and pay over to the plaintiffs as treasures of a charity, such voluntary contributions as he should collect for the use of the charity, the defendant pleaded general performance; the plaintiffs replied, that *B. R.* had *received divers sums* amounting, to a large sum, *viz*. 100*l*. *from divers persons, for divers voluntary contributions* for the use of the said charity, which he had not accounted for or paid over, &c. It was held by the court of K. B. on special demurrer, that the replication was sufficiently certain. *Barton et al.* v. *Webb et al.* 8 *Term Rep*. 459.

46 To a plea of set-off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication, protesting that the plaintiff did not acknowledge, &c. and then pleading that he was not indebted in manner and form as the defendant had in

pleading alleged, and concluding to the country, is bad; inasmuch as it refers matter of record to the recognizance of a jury. But as it was a sham plea, the plaintiff had leave to amend without payment of costs. *Solomons* v. *Lyon.* 1 *East*, 369.

47 Plaintiff declared against defendant as acceptor of a bill of exchange, payable to certain persons using the firm of Messrs. *M'Brair, Watson*, and Co.; defendant pleaded that the said Messrs. *M'Brair, Watson*, and Co. had accepted satisfaction; plaintiff replied that the said persons so as aforesaid using the firm of Messrs. *M'Brair* and Co. (leaving out the name of *Watson*) did not accept satisfaction, and concluded to the country. *Semble*, that this variance could only be taken advantage of on special demurrer. *Bell* v. *Da Costa.* 2 *Bos. & Pull.* 446.

48 A replication to a plea of tender, stating an original writ sued out and returned before the tender, but not proceeded upon, and then a second original writ sued out after the tender, and proceeded upon, but unconnected with the first writ, is no answer to the plea. *Stratton* v. *Savignac.* 3 *Bos. & Pull.* 330.

49 In C. P. a replication *taking* issue on a plea of payment to debt on an annuity bond must be signed by a serjeant. *Ellis* v. *Govey.* 1 *Bos. & Pull.* 469.

50 Where the plea is signed by a serjeant, the replication should be signed also; though to this rule a similiter is an exception; for no judgment is required in merely joining issue. 1 *Bos. & Pull.* 469.

51 A demurrer must be signed by a serjeant. *Douglas* v. *Child.* 2 *Bos. & Pull.* 336, *n.*

52 So must a joinder in demurrer; for a serjeant ought to be met by a serjeant. *Brooker* v. *Simpson.* 2 *Bos. & Pull.* 336. *Douglas* v. *Child. Ibid. n.*

53 To a declaration in assumpsit, containing several distinct causes of action in several counts, the defendant pleads the statute of limitations in bar of the action. Replication that the promise in the first count is within an exception in the statute, and held good. 2 *Mass.* 81.

54 A fraudulent concealment by the defendant; that a cause of action has accrued to the plaintiff, is a good replication to a plea of the statute of limitations. *First Mass. Turnpike* v. *Field et al.* 3 *Mass.* 201.

55 In debt on a replevin bond, the defendants pleaded performance generally; the plaintiff replied, that he had judgment for a return, and that no return had been made; the defendants rejoined, that the plaintiff in replevin reviewed the action, that the present plaintiff had judgment and execution, on which the chattel replevied was seized and sold. The rejoinder was adjudged bad, as being a departure from the plea in bar. *Larned* v. *Bruce et al.* 6 *Mass.* 57.

56 In an action upon a bond to save harmless the obligee on account of his having given a receipt on behalf of the obligors, the defendants pleaded *non damnificatus*; the plaintiff replied the attachment of his property in the hands of his trustees, and a payment by them of a sum of money in discharge of the said suit; the defendants traverse the payment before the commencement of the action against them; it was held that the replication was not double, and that the rejoinder was bad. *Otis* v. *Blake et al.* 6 *Mass.* 336.

57 Where the plaintiff in his replication traversed the only allegation in the defendant's bar, and tendered an issue; and in place of joining the issue tendered, the defendant demurred, the plaintiff had judgment, the court observing that if the allegation was immaterial, the demurrer could not prevail; and if material, the issue tendered

ought to have been joined. *Dyer et al.* v. *Stevens.* 6 *Mass.* 389.

58 If to a writ of *entry sur disseizin* the tenant plead a deed from the defendant, or his ancestors conveying the land demanded to a stranger, made after the disseizin committed; in bar, the demandant may reply that nothing passed by such deed, which may be traversed, and upon issue joined and found for the demandant he shall have judgment. *Wolcot et al.* v. *Knight et al.* 6 *Mass.* 418.

59 To a writ of *entry sur disseizin* in which the demandants counted on the seizin of their father, and on an abatement on his death by a stranger; the tenant pleads a release from the demandants to him, pending the suit, of all their right: The demandants reply, that they had bargained and sold the demanded premises to one *W. D.* and his heirs, they and the said *W. D.* believing that they had good right to convey the same, and that this action is sued for his use and benefit; of all which they allege the tenant to be well knowing before the execution of the release to him. Upon demurrer the replication was held bad. *Everenden et al.* v. *Beaumont et al.* 7 *Mass.* 76.

60 To an information for an intrusion into the lands of the commonwealth, the defendants pleaded a former judgment of this court in their favour, on an information in behalf of the commonwealth against them, concerning the same lands, rendered on a report of referees, which report contained a stipulation that the defendants should within six months execute a release to the commonwealth of certain other lands; and that the judgment was entered agreeable to the report: Replication, that the six months are elapsed, and that the defendants did not within the six months execute the release; and held good. *Commonwealth* v. *Pejepscut Proprietors.* 7 *Mass.* 399.

61 To a plea of *non assumpsit in fra sex annos*, the plaintiff replies, that when the cause of action accrued, the defendant was out of the state, and did not return until within six years before the commencement of the action, and that he left no property, &c. The defendant rejoins that he never was an inhabitant of or resident within the state, but in the state of *Connecticut*, where the promise was made, until he came into the state as alleged in the plaintiff's replication. Upon demurrer to the rejoinder the plaintiff had judgment. *Dwight Adm.* v. *Clark.* 7 *Mass.* 515.

62 In debt on judgment, the defendant pleads his discharge under a commission of bankruptcy; the plaintiff replies that the defendant afterwards, waived that advantage, and promise to pay the amount of the judgment. Issue was taken on the promise, which being found for the plaintiff, he had judgment for his debt. *Maxim* v. *Morse.* 8 *Mass.* 127.

63 The declaration stated that the defendant did not take care to fill, stop up, or cover a certain vault or hole, dug by him in the street, nor to place a fence to prevent, &c. whereby, &c. The defendant pleaded that he did place, &c. The replication was in the words of the declaration, and concluded with a *verification*, and it was held to be bad, and that the plaintiff ought to have taken issue on the plea. *Bindon* v. *Robinson.* 1 *Johns. Rep.* 516.

64 To a plea of discharge, under the insolvent act, the plaintiff replied, setting forth all the causes for which the discharge is made void by the act. On demurrer, the replication was held to be bad. The plaintiff must specify the particular cause or fraud on which he means to rely to avoid the discharge. *Service* v. *Heermance.* 2 *Johns. Rep.* 96.

65 *B.* brought an action of trespass against *C.* for an injury done to two horses, in consequence of which one died, and the trespass on one of

them was on one day, and on the other at another day, and the court, on motion, ordered the plaintiff to elect for which trespass he would proceed, and he elected to proceed for the trespass on the horse which survived, and the jury found a verdict accordingly. The executors of *B.* afterwards, brought an action for the trespass on the horse that died. The defendant pleaded a former recovery for the same trespass; the plaintiff replied, setting forth the above facts, by way of *protestando;* and on *demurrer* it was held, that the replication was bad, in stating the facts by way of *protestando*, and for not traversing the former recovery for the same matter. *Executors of Bradt* v. *Croy.* 2 *Johns. Rep.* 227.

66 Where the replication denies the substance of the plea, it may conclude to the country. *Snyder and others* v. *Croy.* 2 *Johns. Rep.* 428.

67 Where the issue to be taken on a rejoinder, must be substantially the same as on the plea, the replication may conclude to the country. *Patcher* v. *Sprague.* 2 *Johns. Rep.* 462.

68 To a plea of a discharge under the insolvent act, the plaintiff replied, that the defendant had procured a creditor to sign his petition and to make affidavit for a larger sum than was really due to him; and that he had concealed a debt due to him, which he did not insert in his inventory; and also that he had been guilty of perjury. On a demurrer, the replication was held bad, as containing three distinct and independant grounds for avoiding the discharge, which would require several and distinct points to be put in issue. *Cooper* v. *Hermance.* 3 *Johns. Rep.* 315.

69 In an action of debt, on arbitration bond, the defendant pleaded no award; the plaintiff replied, setting forth the award, and the defendant rejoined that the award was not *final*, &c. On demurrer, it was held that the rejoinder was a departure from the plea, and therefore bad. *Barlow* v. *Todd.* 3 *Johns. Rep.* 367.

70 If the defendant in an action of trespass *quare clausum fregit*, pleads *liberum tenementum*, the plaintiff cannot reply *de injuria sua propria*, but must traverse the title; but if the defence is set up by way of excuse, and not in justification, then the plaintiff may reply *de injuria sua propria. Hyatt* v. *Wood.* 4 *Johns. Rep.* 150.

71 In an action of trespass, where the defendant, pleads or insists on a right, a general replication *de injuria propria absque tali causa*, is bad, though after a verdict, it will be held good. *Lytle* v. *Lee & Ruggles.* 5 *Johns. Rep.* 112.

72 To a plea of the statute of *usury* the plaintiff may reply directly, that it was not corruptly agreed, in manner and form, &c. without a traverse, and conclude to the country. *Waterman* v. *Haskins.* 7 *Johns. Rep.* 283.

73 In an action of *debt* on an arbitration bond, the defendant pleaded no award; and the plaintiff replied that the defendant revoked the submission, &c. but did not state that the *revocation* was under *seal*, the replication was held bad. *Van Antwerp* v. *Stewart.* 8 *Johns. Rep.* 125.

74 A general replication to a special plea need not be signed by counsel. *Pumpelly* v. *Crosby.* 8 *Johns. Rep.* 322.

X. *Title.*

1 In an action on an agreement to deliver possession of certain premises, subject to the forfeiture of a stipulated sum on failure by either party, the person who was to deliver possession cannot support an action for the forfeiture, although he aver that he was ready and willing to deliver the possession, &c. without shewing in his declaration a possessory title in himself. *Luxton* v. *Robinson.* 2 *Doug.* 620.

2 Where it is necessary to shew a

title, the commencement of all particular estates must be stated. In an avowry for rent, it is necessary to shew a title. *Silly* v. *Dally*. 1 *L. Raym.* 331. *Salk.* 562.

3 Estates in fee simple may be generally alleged, but the commencement of estates tail and other particular estates must be alleged in pleading. *Johns* v *Whitley and another*. 3 *Wils.* 65.

4 Where the action is grounded on the possession, the plaintiff needs not shew a title. *Bird* v. *Stroud*. 3 *Salk.* 12.

5 Where *nil habuit in tenementis* is the issue, the title needs not be set forth, *Nil habuit in tenementis*. *Marcher* v. *Harris*. 3 *Salk.* 211.

6 In an action for obstructing a way, if it appears upon the declaration that the defendant is possessed of the land over which the way is claimed the plaintiff ought to set forth his title to the way; but no objection can be taken at the trial because he does not do so. *Jones* v. *Hammond*. 2 *L. Raym.* 751.

7 A verification is the proper conclusion of the replication to a plea to a *scire facias* against bail, "that the principal died before the return of any *ca. sa.*" when the replication mentions a particular *ca. sa.* and alleges that he was alive at the return thereof. *Chandler* v. *Roberts*. 1 *Doug.* 58 to 61.

A verification is the necessary conclusion whenever new matter is introduced. 1 *Doug.* 60.

8 It is a bad conclusion (if specially demurred to) to a plea of the statute of 23 H. 6, c. 9. *Boyce* v. *Whitaker*. 1 *Doug.* 94 to 97.

9 Plea alleging that *A.* having been lawfully possessed, &c. as tenant at will to *B.* is a sufficient averment that *A.* was tenant at will to *B.* *Eaton* v. *Southby*. *Willes*, 131.

Pleading that corn which had been cut was left on the ground until it was fit in a course of husbandry to be carried, is sufficient, without saying how long it remained there, the reasonableness of the time being fact for the jury, and not a questio of law for the court. *Ibid.*

10 So when a party justifies under custom for all the inhabitants of town to go over to a close at a reasonable times of the year, se sonable time is partly a question o law and partly of fact. *Bell* v. *Wo dell*. *Willes*, 206.

11 If the plaintiff fails in his title, h cannot take advantage of want o title in the crown or of a stranger' title. The record of the inquisitio is only before the court with respe to the plaintiff, but not in respect t other persons and parties. *Th Queen* v. *Mason*. 2 *Salk.* 447.

12 Where the plaintiff declares upo a possession only, and the defend ant pleads *liberum tenementum*; th plaintiff must shew the title in th replication, and must not barely re ly on traversing the defendant's ti tle. *Vernon* v. *Goodrich*. 1 *Str.* 5

13 When a plaintiff in possessio brings an action on the case agains a wrong-doer, it is sufficient to de clare generally, without disclosing any title; but when a defendan justifies under a right, it must b set out formally in the plea. *Grim stead* v. *Marlowe*. 4 *Term Rep.* 718

14 An averment in a declaration o statute 11 G. 2, c. 19, s. 8, to recov er double the value of goods remov ed in order to prevent a distress that 57l. *was due for rent* before th goods were removed, need not b precisely proved as laid with re spect to the sum. *Gwinnet* v. *Phil lips*. 3 *Term Rep.* 643.

15 The rule is, that if a plaintiff al ledge any thing which forms *a con stituent part of his title*, he must se it out correctly; but here it was im material to state what the rent was and therefore it need not be prove 3 *Term Rep.* 645.

16 But with respect to actions on *con tracts*, there the whole of the con tract must be proved which is se out. 3 *Term Rep.* 646.

17 The same of records. *Ibid.*

18 The omitting to state the consideration of a bargain and sale, cannot be taken advantage of on a general demurrer. *2 H. Black.* 261.

19 In trespass for taking and driving the plaintiff's cattle, to which there was a justification, that the defendant was *lawfully possessed* of a certain close, and that he took the cattle there damage feasant; the plaintiff may specially reply title in another, by whose command he entered, &c. and it does not vitiate the replication that it unnecessarily proceeded farther to give colour to the defendant. *Taylor* v. *Eastwood.* 1 *East*, 212.

20 Plea of non-tenure not taken away by the statute of *February* 27, 1796. 1 *Mass.* 134.

XI. *Traverse.*

1 Debt against executor of *J. S.*; plea, that *J. S.* died intestate and he is administrator. He need not traverse that he intermeddled before administration granted. *Powers* v. *Coot.* 1 *Salk.* 298. 1 *L. Raym.* 68.

2 Matter of law when connected with fact is traversable. *The Grocer's Company* v. *The Archbishop of Canterbury.* 2 *Black.* 776.

3 Where traverse goes to the matter, all before is inducement, and waived; otherwise where to time only. *Green* v. *Goddard.* 2 *Salk.* 641.

4 In debt upon a bail bond if the defendant in his plea states an arrest upon a different writ from that upon which the bond was given, and the plaintiff in his replication sets out that writ, he should not traverse the arrest by the other; but the traverse will not make his replication bad. *Anon.* 1 *L. Raym.* 562.

5 *Absque hoc* that he ousted him *de præmissis*, goes to every part. *White* v. *Bodinam.* 2 *Salk.* 629.

6 An allegation that *J. S.* on the 28th *November*, by his writing obligatory, the date whereof is the day and year aforesaid, acknowledged himself to be bound to *T. N.* is equivalent to a direct averment that the bond was delivered on that day. In a plea that it was first delivered on a subsequent day *et non antea*, is not a sufficient traverse. *Pullein* v. *Benson.* 1 *L. Raym.* 349. *Salk.* 628.

7 If the defendant pleads a recaption upon fresh pursuit to an action of escape, the plaintiff may take a traverse that he did not retake and does not still detain him. *Meriton* v. *Briggs.* 1 *L. Raym.* 39.

8 In trespass and in avowry, if a freehold is pleaded, it must be traversed. *Radborne* v. *Kennadale.* 3 *Salk.* 354.

9 Where a matter is confessed and avoided it need not be traversed. *Anon.* 3 *Salk.* 353.

10 Action against executor; plea that he is administrator, need not traverse that he intermeddled before administration granted; plea that he is an executor, must traverse the dying intestate. *Pooler* v. *Cooke*, 1 *Salk.* 297.

11 In *assumpsit* the defendant may plead a gift and acceptance in satisfaction of the promises. Under such a plea the plaintiff may protest against the gift and traverse the acceptance. *Young* v. *Rudd.* 1 *L. Raym.* 60. 2 *Salk.* 627.

12 There must be a colourable title set forth in an inducement to a traverse. *Anon.* 3 *Salk.* 357.

13 In an action for a pound breach the plaintiff need not shew his right to distrain. Where a defendant justifies a tort under a licence from the plaintiff, the plaintiff, cannot take the general traverse; but it cannot be objected to after verdict. If a distress is taken without cause, the owner may rescue it before it is impounded; but if it is once impounded he cannot justify a breach of the pound to take it out. *Cotsworth* v. *Betison.* 1 *L. Raym.* 104. *Salk.* 247.

14 If a man in justifying a trespass

with cattle states that *J. S.* was, on such a day, rightfully and lawfully seized in fee of the manor of *A.* and granted a copyhold tenement to him, and that by custom all the copyholders are entitled to common on the *locus in quo*; a traverse that *J. S.* was rightfully and lawfully seized in fee on the day mentioned in the statement, is bad. No objection can be taken upon demurrer to any inaccuracy in the recital at the beginning of a declaration. *Helliott* v. *Selby*. 2 *L. Raym.* 902.

15 A plea by lessee that the lessor made a conveyance in fee before the lease, with a traverse that he was afterwards seized in fee, is a special *nil habuit tenementis*. Where the lease is by indenture, the lessee is estopped from so pleading even in covenant by an assignee of the lessor. It is also ill for the generality of the traverse; as it ties plaintiff up to prove an estate in fee, when any other would do. As a plea of *nil habuit*, &c. it may be taken advantage of on a general demurrer. *Palmer* v. *Ekins*. 2 *Str.* 817.

16 Where the first traverse is immaterial there may be a traverse upon it. *King qui tam* v. *Bolton*. 1 *Str.* 117.

17 The authority of a bailiff to distrain is traversable in trespass, not in replevin. *Harrison* v. *Britton*. 1 *L. Raym.* 233.

18 Whatever is materially alleged and not traversed is admitted. *Nicholson* v. *Simpson*. 1 *Str.* 297.

19 Defendant in trespass justifies under a prescriptive right to a duty called tensary, and to the like right to distrain for it. Plaintiff traverses the right to the duty without traversing the right to distrain, and held good. *Griffith* v. *Williams*. 1 *Wils.* 338.

20 Upon pleading a seizin generally, traverse may be taken that he is sole seized. *Gilbert* v. *Parker*. 2 *Salk.* 630.

21 It is the tenure that is traversable, and not the being pleadable in the lord's court. *Kite* v. *Laury*. 3 *Salk.* 34. 1 *Salk.* 56.

22 Traverse is necessary where defendant justifies at another place than is laid in the declaration. *Benjamin* v. *Howell*. 1 *Wils.* 81.

23 Traverse of his name is repugnant afterwards pleading that he was baptised by such a name. *Anon.* 3 *Salk.* 238.

24 When a traverse makes issue too strait, it is immaterial. *Proger* v. *Arthur*. 3 *Salk.* 28.

25 Though in general a traverse ought to conclude with a verification, yet when it denies the whole substance of the plea, the proper conclusion is to the country. *Boyce* v. *Whitaker*. 1 *Doug.* 95, *n.* 96, *n.*

26 A traverse is good, because pursuant to the plea, though part of it nonsense. *Newdigate* v. *Selwyn*. 3 *Salk.* 355.

27 *A.* and *B. demiserunt* imports a joint covenant as to the interest granted, but several as to subsequent acts. Where plaintiff assigns several breaches, defendant may traverse severally. *Coleman* v. *Shercin*. 1 *Salk.* 137.

28 In case of bail bond the arrest of the principal is not traversable. *Watkins* v. *Parry*. 1 *Str.* 444.

29 In *quære impedit* the plaintiff having stated his title in the declaration, the defendant pleads his own title in bar, in deducing which several incidental points are also stated: the plaintiff in the replication sets forth essential matter, which would fully avoid the defendant's title, but does it by way of inducement to a traverse of one of those incidental points, with which traverse the replication concludes; the defendant in the rejoinder takes no notice of the traverse in the replication, but *traverses the matter of inducement*, which precedes it. This rejoinder is good, and may well *pass by the traverse* in the replication, that *traverse being an immate-*

riat &c. *Thrale & al.* v. *London (Bishop) & al.* *H. Black.* 376.

30 To trespass for fishing in the plaintiff's fishery, the defendant pleaded that the place is an arm of the sea in which every subject has a right to fish; the plaintiff in his replication claimed an exclusive right by prescription, traversing the general right; it was held by the court of K. B. that the defendant ought to take issue on the traverse, and not to traverse the prescriptive right claimed by the plaintiff; for that the first traverse was a material one, and would put in issue the true question in dispute between the parties. *Orford Corporation* v. *Richardson.* 4 *Term Rep.* 437.

31 But on error in the exchequer chamber, it was determined that the plaintiff's traverse of the general right was bad: and that the defendant therefore might well pass by it in the rejoinder, and traverse the prescriptive right of the plaintiff stated in the replication. *Richardson* v. *Orford Corporation.* 2 *H. Black.* 182.

32 If to trespass in the common called *A.* the defendant plead that *A.* and *B.* commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the *whole* prescription. *Morewood* v. *Wood.* 4 *Term Rep.* 157.

33 For all prescriptions are entire, and, when pleaded, the adverse party cannot deny a part only, but must deny the whole. *Ibid.*

34 Plea (to trespass) that an *ancient* messuage and 12 acres of land were immemorially parcel, and a customary tenement, of the manor of *A.*; and that there is a custom in the manor "that from the time whereof, &c. the customary tenant of the said customary tenement for all the time aforesaid has had right of common, &c." A replication *traversing the custom* does not admit *the antiquity of the messuage*; but the plaintiff may prove that it was built within 20 years, and not upon the scite of an ancient house. *Dunstan* v. *Tresider.* 5 *Term Rep.* 2.

35 To debt on bond dated 20th July, conditioned for repayment of the principal with interest at 5 per cent. from 24th June preceding, defendant pleaded that there was a corrupt agreement between plaintiff and defendant that the former should lend the principal sum on 20th July, to be repaid with interest from 24th June preceding, which exceeds legal interest, and that the bond was given in pursuance thereof; the plaintiff, in his replication, traversed the corrupt agreement; and defendant demurred; judgment was given for the plaintiff, because the demurrer admitted the non-existence of any corrupt agreement. *Grimwood* v. *Barrit.* 6 *Term Rep.* 460.

36 In an action on *scire facias* against bail, the defendant pleaded that another person of the same name and description, became bail, and traversed that he was the person named in the bail piece; and the plea was held good. *Renoard* v. *Noble.* 2 *Johns. Cas.* 293.

37 Where a traverse comprises the whole matter generally, it may conclude to the country. *Snyder and others* v. *Croy.* 2 *Johns. Rep.* 428.

XII. *Videlicit.*

1 What comes under a *scilicet* rejected. *Towne* v. *Barry.* 2 *Str.* 954.

2 What comes under a *scilicet* shall not vitiate. *Webb* v. *Turner.* 2 *Str.* 1095.

3 Plea that bond was delivered as an escrow, ought to conclude to the country. *Watts* v. *Rosewell.* 1 *Salk.* 274. 2 *L. Raym.* 803.

4 Two affirmatives cannot make an issue; and whenever new matter is introduced, the plea, &c. must conclude with a verification. *Chandler* v. *Roberts.* 1 *Doug.* 60.

5 In an action on a deed, a plea that

it was delivered as an escrow ought to conclude to the country. *Johns* v. *Bromfield.* 2 *L. Raym.* 787.

6 In an action for a penalty for breach of a bye-law, whether it should not be positively stated, that the defendant was subject to the bye-law when he did the act complained of? *Qu. The Gunmakers' Company* v. *Fell. Willes*, 390.

Whether it be sufficient in such a case to state the fact was done on a day after *videlicet* after he was subject to the bye-law, as it appears by other parts of the declaration? *Qu. Ibid.*

7 In an action on a bill of exchange, if there is a plea of an usurious agreement, and that the bill was given in consequence thereof, the plaintiff may traverse the usurious agreement, and conclude with a verification. *Smith* v. *Dovers.* 2 *Doug.* 428 to 431.

When the whole of the plea is denied in the replication, the conclusion ought to be to the country; but if a particular allegation is selected and denied, the conclusion ought to be a verification. *Ibid.*

8 Debt on a bond to pay money on or before such a day, payment before the day, *scilicet*, such a day, is good. *Anonymous.* 2 *Wils.* 173.

9 Where any thing is pleaded under a *videlicet*, the party is not concluded by it; *secus*, where there is no *videlicet*. *Symmons* v. *Knox.* 3 *Term Rep.* 68.

10 The want of a *videlicet* may in some cases make an averment material, which would not otherwise be so; but the addition of a *videlicet* cannot render a material averment immaterial. *Grimwood* v. *Barrit.* 6 *Term Rep.* 460.

11 In an action on a bond the defendant must set forth in the plea the sum really due on the bond, before he is entitled to set off any cross demand on statute 8 G. 2, c. 24, s. 5. *Ibid.*

12 Such averment is traversable though laid under a *videlicet*, the averment being material. 6 *Term Rep.* 460.

13 An allegation in pleading which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*. *R.* v. *Stevens & Agnew.* 5 *East*, 244.

XIII. *Ancient Demesne, Surplusage and points of Practice in Pleading.*

1 Plea of payment of the principal and all the interest supported by proof of payment of less accepted by plaintiff in full, good. No new trial where party might have had evidence on first trial. *Price* v. *Brown.* 2 *Str.* 691.

2 Leave given to withdraw *non est factum* to a bond, and to plead the statute of gaming. *Jeffereys* v. *Walter.* 1 *Wils.* 177.

3 A sham plea not considered as a special plea. *Weld* v. *Nedham.* 1 *Wils.* 29.

4 There must be an affidavit to verify the fact in a plea of ancient demesne. *Hatch* v. *Cannon.* 3 *Wils.* 51.

5 Plea of *nul tiel* record need not have a serjeant's hand. *Hubert* v. *Lord Weymouth.* 2 *Black.* 816.

6 Every material allegation upon pleadings, which is not answered, is admitted. *Blake* v. *West and Trench.* 1 *L. Raym.* 504.

7 Nothing can be taken advantage of on a plea over, which could not on a general demurrer. *Anon.* 2 *Salk.* 519.

8 Secundum formam statuti *in hujusmodi causa editi et provisi* the latter rejected, as surplussage in the plea. *Woolley* v. *Briscoe.* 1 *Str.* 554.

9 A term for 500 years pleaded, must be pleaded to be by deed and a reversion, after its immediate assets in the hands of the heir by descent. *Villers* v. *Hanley.* 2 *Wils.* 49.

10 When several defendants plead a

joint plea; if it be bad as to one defendant, it is bad as to all. *Bowe* v. *Tutte*. *Willes*, 15; *Morravia* v. *Sloper*. *Willes*, 32; *Morse* v. *James*. *Willes*, 128; *and Dennett* v. *Grover*. *Willes*, 196.

11 A defendant in an indictment for a misdemeanor cannot plead over to the charge, after a plea in abatement for a misnomer, on which issue is taken and found against him. *The King* v. *Gibson*. 8 *East*, 107.

12 The defendant cannot justify an assault and false imprisonment of *A. B.* by shewing a latitat issued against *C. B.* and averring that it was issued against *A. B.* by the name of *C. B.* and that they are one and the same person; there being no averment that *A. B.* was known as well by the name of *C. B.* *Shadgett* v. *Clipson*. 8 *East*, 328.

13 It is sufficient to state the substance of fines and recoveries in a special verdict, where the legal result only is material. *Goodright* v. *Forrester*. 8 *East*, 560.

14 Where new matter introduced by an innuendo, without any antecedent colloquirem to which it can refer to support it, is not necessary to sustain an action of slander, it may be rejected as surplussage. And therefore an innuendo, that the attorney general spoken of meant the attorney general for the county palatine of *Chester*, was so rejected. *Roberts* v. *Camden*. 9 *East*, 93.

15 Where a sham plea was pleaded of judgment recovered in the court of *Pie-poudre*, in *Bartholomew* fair, in terms palpably fictitious and out of the regular course, the court reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the pleas, and the costs of the rule for correcting the proceedings. *Blewit* v. *Marsden*. 10 *East*, 237.

16 After a writ sued out and common bail filed against the defendant by the name of *J.* it is irregular for the plaintiff to declare against him by the name of *R.*, sued by the name of *J.* (he not having then appeared) and the defendant may set aside the proceedings before plea. *Delanoy* v. *Cannon*. 10 *East*, 328.

17 Under the plea of *non est factum* in covenant, the defendant not permitted to give in evidence any thing except what goes to disprove the deed. 1 *Mass.* 5.

18 Under a plea of *noncepit* in replevin, special matter in justification not admitted to be given in evidence. 1 *Mass.* 153.

19 Pleadings in review cannot be altered without consent of parties. 1 *Mass.* 159, 242.

20 In trespass *quare clausum fregit* before a justice of the peace, the defendant pleads in bar, that he entered into his adjoining close, and there erected a fence, &c. the justice has jurisdiction. 2 *Mass.* 174.

21 In a declaration upon a promissory note payable by instalments, the plaintiff declares that two of the instalments have elapsed, and alleges that the whole sum of the note is due; this allegation shall be rejected as surplusage, and judgment rendered for the amount of the two installments that are due. 2 *Mass.* 283.

22 In debt for a penalty, *nil debit* is the most proper plea. 2 *Mass.* 521.

23 In a plea of *non tenure* with disclaimer it is not necessary to allege that the tenant doth not *make* any claim to the demanded premises. *Hunt & Ux.* v. *Sprague*. 3 *Mass.* 312.

24 If the tenant in a writ of entry, whereby a freehold is demanded, pleads the general issue, he thereby admits himself to be tenant of the freehold, and is estopped from proving that he is tenant at will only. *Kelleran* v. *Brown*. 4 *Mass.* 413.

25 In an action by the endorsee of a promissory note against the promiser, the defendant cannot tender his oath in verification of a plea of usu-

ry under the statute of 1783, c. 55. 4 *Mass.* 516.

26 If the record of a judgment of a justice of the peace refer to the writ on file, the court, on error brought to reverse such judgment, will consider the declaration in such writ as a part of the judgment. *Clap* v. *Clap.* 4 *Mass.* 520.

27 A plea to a transitory action, alleging that neither of the parties lives within the county where the action is brought, is a plea in abatement to the writ, and must be filed before the jury is impanneled, pursuant to the statute of 1782, c. 11, s. 6. *Cleaveland* v. *Welsh.* 4 *Mass.* 591.

28 It is no sufficient plea to a writ of replevin, that the chattels replevied had been before delivered to the defendant upon his writ of replevin against a third person: nor that the same officer, from whom they were taken by such writ, executed the writ of replevin against the defendant. *Ilsley et al.* v. *Stubbs.* 5 *Mass.* 280.

29 *Non devisavit*, pleaded to a writ of *formedon*, is a special issue. *Dudley* v. *Sumner.* 5 *Mass.* 438.

30 In pleading a common recovery as suffered for the use of the tenant in tail who was tenant to the *praecipe* it is not necessary to aver that the indenture to lead to uses was executed by him, as the recovery would have the same effect without the indenture, as that was intended to give it. *Dow* v. *Warren.* 6 *Mass.* 328.

31 Of the pleadings where the court direct an issue to the country, to ascertain the sanity of a testator at the time of making his will. *Hubbard* v. *Hubbard, Exr.* 6 *Mass.* 397.

32 In *assumpsit* against several defendants, it is improper for them to plead to issue severally, and if the plaintiff demurs to such pleas, he must have judgment. *Meagher* v. *Bachelder et al.* 6 *Mass* 444.

Defendants cannnot sever in pleading, except in actions of tort. *Ibid.*

33 Where the defendant in the court below reserves liberty to plead anew in this court generally, such new plea must be to the country. *Moody et al.* v. *Blake.* 6 *Mass.* 459.

34 A want of proper plaintiffs in actions upon contracts is an exception to the merits, and is to be taken advantage of, either upon demurrer, in bar, or on the general issue, but not in abatement. *Baker* v. *Jewell.* 6 *Mass.* 460.

35 In trespass for taking chattels, the defendant justified as an officer under a writ of replevin. It is sufficient to allege in such plea that the plaintiff in replevin gave bond, &c. before the chattels were delivered to him. *Cushman* v. *Churchill.* 7 *Mass.* 97.

36 Whether in any case the party, who tenders an immaterial issue, which is found against him, can have a repleader awarded on his own motion. *Qu.* *Eaton et al.* v. *Stone.* 7 *Mass.* 312.

37 *Quere*, Whether *nil debit*, to an action of debt on a judgment, be such a general issue as to entitle the defendant to give special matter in evidence, pursuant to a notice for that purpose? *Meyer* v. *M'Lean.* 1 *Johnson's Rep.* 509.

38 In an action against a person for practising physic contrary to the act, it is incumbent on the defendant to show himself within some of the provisions; the plaintiff need not negative them in his declaration. *Sheldon* v. *Clark.* 1 *Johns. Rep.* 513.

39 Where the defendant pleaded *nil debet* to an action of debt on a judgment, and gave notice of special matter to be offered in evidence at the trial, and the plaintiff went to trial on the plea; the court refused, afterwards, to arrest the judgment, on the ground that the plea was a nulity. *Meyer* v. *M'Lean.* 2 *Johns. Rep.* 183.

40 Where the defendant in a cause, obtained his discharge under the insolvent act, on the 8th *November*, and filed his plea, *puis darrein con-*

Germance, at the first day of the sittings after *November* term, on the 8th *December*, and the plaintiff refused to receive it, but noticed his cause again for trial, at the next sittings in *April*, the court granted a rule to stay all further proceedings, on payment of the costs of the *December* sittings, until the plaintiff replied to the plea; or that the plaintiff might discontinue without costs. *Merchants Bank* v. *Moore*. 2 *Johns. Rep.* 294.

41 In an action of *trespass*, against two defendants, they severed in their pleas; one pleaded a former suit for the same cause of action, and a judgment in his favour, to which plea the plaintiff demurred, and a judgment was given on the demurrer for that defendant. The other defendant pleaded the general issue, and also, that his co-defendant had been sued by the plaintiff for the same cause of action, in which a judgment was given against the plaintiff; on these pleas, a verdict was given for the plaintiff against the second defendant. It was held, that where two were sued for a *tort*, they may plead separately or jointly, and the jury may find one guilty, and the other not; and that the judgment on the demurrer against the plaintiff, as to one defendant, was no *estoppel* to the proceedings of the plaintiff against the other defendant. *Lansing who is impleaded with Goeway* v. *Montgomery*. 2 *Johns. Rep.* 382.

42 Where three issues were joined, and one of them was on an immaterial point, and the jury found a special verdict, the court gave judgment for the plaintiff, the merits of the cause being with him. *Havens* v. *Bush*. 2 *Johns. Rep.* 387.

43 The court will not take notice of any informality in the pleadings, unless specially pointed out by the *demurrer*. *Snyder and others* v. *Cray*. 2 *Johns. Rep.* 428.

44 Pleading the general issue with another plea, that another action was pending for the same cause, though put in the form of a plea in bar, is not pleading *issuably*, according to the meaning of the condition annexed to a rule granted, on pleading issuably. *Davis* v. *Grainger*. 3 *Johns. Rep.* 259.

45 Where an award, on the face of it, is final, nothing *dehors* the award can be pleaded, or given in evidence against it. *Barlow* v. *Todd*. 3 *Johns. Rep.* 367.

46 *D.* a creditor of *B.* in *New-York*, attached a debt due to *B.* and *C.* partners in trade, from *A.* in *Maryland*, pursuant to the laws of that state; and *B.* and *C.* afterwards, sued *A.* in this court, for the same debt; it was held that *A.* might plead in abatement, the attachment pending in *Maryland* against him by *D. Embree and Collins* v. *Hanna*. 5 *Johns. Rep.* 101.

47 In an action of trespass, the defendant pleaded the general issue, and gave notice of a justification, that having a *warrant* issued by *A.* *B.* a justice of the peace against *C.* *D.* at the suit of *E. F.*, he entered, &c. this was held a sufficient notice to entitle him to give the *warrant* in evidence at the trial, without stating in the notice, the cause for which the warrant issued. *Linsley* v. *Keys and Williams*. 5 *Johns. Rep.* 123.

48 Where the plaintiff declares on a joint and several contract, against several defendants, and one of them pleads *infancy*, or gives it in evidence at the trial, under the general issue, the plaintiff may enter a *nolle prosequi* as to the *infant*, and proceed to judgment against the other defendants. The jury may find a verdict for the infant; and a verdict for the plaintiff against the other defendants. *Hartness* v. *Thompson and others*. 5 *Johns. Rep.* 160.

49 Where there are several tenants in common, and all do not join in an action of trespass *quare clausum fregit*, the defendant cannot take advan-

tage of it at the trial, but must plead it in abatement. *Brotherson* v. *Hodges.* 6 *Johns. Rep.* 108.

50 To an action of trespass, assault and battery, the defendant pleaded the general issue, and gave notice that he should offer evidence of *son assault demesne;* and the plaintiff, at the trial, proved that he ordered the defendant to leave the house of the plaintiff, and on the defendant's refusing, the plaintiff *molliter manus imposuit*, to put him out, when the defendant resisted and struck the plaintiff. It was held that the defendant might give evidence to rebut the evidence of the *molliter manus imposuit*, or in mitigation of damages. *Collins* v. *Moulton.* 7 *Johns. Rep.* 108.

51 Any matter arising since issue joined in a cause, and which might be pleaded *puis darrein continuance*, must be so pleaded, and cannot be given in evidence under the general issue. *Jackson ex dem. Colden and others* v. *Rich.* 7 *Johns. Rep.* 194.

52 To a *sci. fa.* on a judgment, the defendant cannot plead any matter which he might have pleaded to the original action, or which existed prior to the judgment; and it makes no difference whether the judgment was entered up by confession on a warrant of attorney, or by default, or on plea; but where the judgment is by confession, the proper remedy is by an application to the court for relief on motion. *M'Farland* v. *Irwin.* 8 *Johns. Rep.* 77.

53 Where a cause is removed from a court of common pleas into this court by *habeas corpus*, the plaintiff may declare in this court for a different cause of action, and for a demand which has accrued subsequent to the commencement of the suit below, and prior to the removal of the cause into this court; and the defendant may, in like manner, plead or *set off* any demand which has accrued subsequent to bringing the action below, and prior to its removal to this court; but he cannot plead the *statute of limitations*, or *coverture*, or matter subsequently arising, that does not go to the merits of the plaintiff's demand. *Vosburgh* v. *Rogers.* 8 *Johns. Rep.* 91.

54 Pleadings in covenant. 4 *Dallas*, 436.

55 A finding by a jury which contradicts a fact admitted by the pleadings, is to be disregarded. *M'Ferran* v. *Taylor.* 3 *Cranch*, 270.

56 Upon the plea of payment to debt on bond, the defendant may give in evidence *wheat* delivered, on account of the bond, at a certain price; and also *an assignment* of debts to the plaintiff, part of which he collected, and part were lost by his negligence or indulgence. *Buddicum* v. *Kirk.* 3 *Cranch*, 293.

PLEDGE.

Where a creditor has received from his debtor a personal chattel in pledge, as collateral security for the debt, he cannot cause other property of the debtor to be attached in an action for the debt, without first returning the pledge. *Cleverly* v. *Brackett & al.* 8 *Mass.* 150.

POOR, OVERSEERS OF.

I. *Appointment.*
II. *Accounts.*

I. *Appointment.*

1 Overseers of the poor cannot be appointed in a place, which has never been considered as a separate vill in respect of the poor, unless there be a competent number of substantial householders. *The King* v. *Showler.* 1 *Black.* 419.

2 A person who is an acting justice of the peace and also a substantial householder, and a lieutenant of marines in his majesty's service up-

on half-pay, cannot be appointed an overseer of the poor, whilst there are other sufficient householders within the parish for the execution of such office. *The King* v. —— *Gayer.* 1 *Burr.* 245.

3 The court will not quash an appointment of overseers, after their year is expired. *The King* v. *Butler.* 1 *Black.* 649.

The mayor, or head officer, in towns corporate, hath not the sole appointment of overseers, under the statute of 43 Eliz. *Ibid.* 1 *Black.* 650.

4 Order for the appointment of overseers of the poor for a village or township quashed, because the place was not such village or township as the order implies. *The King* v. *Showler and another.* 3 *Burr.* 1391. 1 *Black.* 419.

5 Order of sessions appointing one overseer of the poor, confirmed. *The King* v. *Bestland.* 1 *Wils.* 128.

6 An order for appointing an overseer of the poor must shew that the person appointed is a substantial householder. *The King* v. *Sheringbrook.* 2 *L. Raym.* 1394.

7 It is not enough, that overseers are styled principal inhabitants instead of substantial householders. *Case of the Overseers of Weobly in Herefordshire.* 2 *Str.* 1261.

8 Parol evidence of an appointment of overseers, inadmissible. *The King* v. *Arnold.* 1 *Str.* 101.

9 Order made on *Easter Wednesday* 1766, appointing overseers for the present year 1766, is a good order. *The King* v. *Helling.* 3 *Burr.* 1904.

10 Overseers may be appointed at any time in the year. *The King* v. *Sparrow and another.* 2 *Str.* 1123.

11 Appointment of overseers made on a *Sunday*, quashed. *Rex* v. *Bridgewater Overseers.* *Cowp.* 139.

12 The appointment of overseers for the subdivisions of a parish is void, unless it expressly appear that the parish could not reap the benefit of 43 Eliz. c. 2. *Rex* v. *Uttoxeter.* 1 *Doug.* 346.

13 More than four overseers cannot be appointed under 43 Eliz. c. 2. *Ibid.*

14 A woman may be appointed an overseer of the poor. *Rex* v. *Alice Stubbs.* 2 *Term Rep.* 395.

15 The word *substantial* as applied to overseers in statute 43 Eliz. c. 2, must be understood relatively. 2 *Term Rep.* 395.

16 Where a district contains only three houses, the inhabitants of all three may be appointed overseers of the poor, notwithstanding two of them are labourers and poor. 2 *Term Rep.* 395.

17 Appointment of overseers by two justices *separately* is bad; for, where magistrates are to execute a judicial act, they must meet and execute it together. 3 *Term Rep.* 38.

18 After an appointment of four overseers for a parish by the magistrates at one meeting, they are *functi officio*; and no other magistrates can afterwards, upon the claim of one of the persons so appointed to be exempted, appoint another in his place; but the party must appeal to the sessions to get his discharge. *Rex* v. *Great Marlow, Inhab.* 2 *East*, 244.

19 And this objection to the second appointment may be disclosed to this court on affidavit, upon the removal of the appointment hither by *certiorari*, who will thereupon quash the same. *Ibid.*

20 But overseers need not be appointed by one and the same instrument. 4 *Term Rep.* 552.

21 An appointment of overseers, dated in *October*, for a year next ensuing the date, is good, because it shall be understood to be the overseer's year. 2 *Term Rep.* 395; and *Rex* v. *J. Burder.* 4 *Term Rep.* 778.

22 The parishioners (as well as the overseers appointed) may appeal to the sessions under statute 43 Eliz. c. 2, against the appointment of overseers. *Rex* v. *Forrest.* 3 *Term Rep.* 38.

23 To entitle any district of a parish

to have separate overseers, it must be shewn to be a township; and that the parish cannot have the benefit of statute 43 Eliz., that is, cannot maintain their own poor as a parish. 1 *Term Rep.* 376, 7.

24 Where a parish, consisting of several townships, some of which maintain their own poor, has immemorially had more than four overseers, that is a proof that they cannot have the benefit of statute 43 Eliz.; and entitles each township to have separate overseers. 1 *Term Rep.* 374.

25 Wherever there is a constable, there is a township. *Ibid.*

26 Where a parish consisted of two separate districts, each of which immemorially made a separate rate, but the money when raised was blended together in one joint fund, though applied in certain proportions, and the sessions did not find it as a fact that the parish could not reap the benefit of statute 43 Eliz. it was held that the districts were not entitled to maintain their own poor separately, though since the year 1648, they had constantly had, on the whole, more than four overseers, some of whom were chosen separately by the hamlet, and though the hamlet part had immemorially had a constable of its own, and since 1709 certificates had been granted to and from the hamlet to third parishes, and orders of removal made to and from it. *Rex* v. *T. Newell.* 4 *Term Rep.* 266.

27 Where a township had for sixty or seventy years past (and before, for any thing that appeared to the contrary) had separate overseers, and maintained its own poor separately from the parish at large, it was held that it was still entitled to the same privilege. *Rex* v. *Leigh Inhab.* 3 *Term Rep.* 746.

28 An order of justices which appointed *A.*, "being a substantial householder of the parish of *B.*, to be overseer of the poor in the hamlet of *C.* in the said parish," was confirmed generally at the sessions with costs; and both those orders were affirmed here. *Rex* v. *Morris.* 4 *Term Rep.* 550.

29 An appointment of one overseer alone for a township is bad in law; the statute 13 and 14 Car. 2, c. 12, requiring at least two. *Rex* v. *Clifton Inhab.* 2 *East*, 168.

30 Though a parish had at no time antecedent to the year 1773 to 5, had the benefit of the statute 43 Eliz. c. 2, but had always had five overseers of the poor appointed separately, two for one district, two for another, and one for a third; yet two of the districts having agreed in 1773 to act together, to which the third acceded in 1775, and there having been but four overseers since that period, who had been appointed for the whole parish; the court held, that such agreement at the time, acted upon for 30 years past, was proper evidence for the jury to decide that the parish could in fact enjoy the benefit of the statute 43 Eliz. and consequently that a distress levied for a poor rate made by the overseers conjointly appointed for the whole parish was legal. *Lane* v. *Godham.* 7 *East*, 1.

31 Although a parish might not have had the benefit of the statute 43 Eliz. c. 2, before and at the passing of the statute 13 and 14 Car. 2, c. 12; but perhaps at that period, and certainly for a long course of years antecedent to the year 1773 to 5, maintained its poor in separate districts, yet it was competent to the parishioners at the latter period to cease acting under the statute of Car. 2, and to recur to the general provision of the statute 43 Eliz. by maintaining their poor as one entire parish; and having so done from the year 1775, the court refused a mandamus to the justices of the peace to appoint separate overseers as before that time. *The King* v. *Palmer.* 8 *East*, 416.

II. *Accounts.*

1 Quarter sessions have no jurisdiction to make an original order for late overseers of the poor to pay money to successors. *The King* v. *Whitear.* 3 *Burr.* 1365.

2 If an overseer alter the poor rate after it has been allowed, but with the approbation of the justices, and deny criminal motives, the court will not grant an information against him. *Rex* v. *Barrat.* 2 *Doug.* 465.

3 Justices may make an order, that the last overseers pay the succeeding what remains in their hands. *The Case of the Churchwardens of Topsham.* 2 *Salk.* 484.

4 Vestry cannot order overseers to retain balance of their accounts. *The King* v. *The Justices of Somersetshire.* 2 *Str.* 992.

5 Sessions has no original jurisdiction over overseers' accounts. *The King* v. *Overseers of Portsmouth.* 1 *Black.* 395.

6 The accounts of an overseer of the poor should be settled at the end of the year; and if a person be appointed overseer for four successive years, and do not make any rate in the three first to reimburse himself what he expends in those years, he cannot in the fourth year make a rate for that purpose. *Rex* v. *Goodcheap.* 6 *Term Rep.* 159.

POOR RATE.

I. *What persons, and property liable to.*

II. *The manner and purpose of raising.*

III. *Appeals against; quashing, &c.*

I. *What persons and property liable to.*

1 Where the parson agrees that the tenant shall retain the tithes, yet the tax for them must be upon the parson. *The King* v. *Inhabitants of Lambeth.* 1 *Str.* 525.

2 Vicar chargeable to poor's rate. *The King* v. *Turner.* 1 *Str.* 77.

3 Administrator not liable to pay the poor's rate for the intestate; nor distrainable without summons. *Stevens* v. *Evans et al.* 2 *Burr.* 1152. 1 *Black.* 284. S. C.

4 Lead mines not rateable to the poor. *Governor and Company for smelting down Lead* v. *Richardson & others.* 3 *Burr.* 1341. 1 *Black.* 389.

5 On inclosure of a waste in the parish of *A.* on which the land-owners of *B.* had a right of common appurtenant, the allotments given in lieu of that right shall be assessed to the poor in the parish of *A.* *Kempe* v. *Spence.* 2 *Black.* 1244.

6 *Qu.* How far personal estate is rateable. *The King* v. *The Guardians of the Poor in Canterbury.* 1 *Black.* 667.

7 Preacher at a meeting-house not liable to poor's rate. *The King* v. *Inhabitants of St. Thomas in Southwark.* 2 *Str.* 745.

8 Administrator is not liable to pay a poor's rate for his intestate, at least is not distrainable without summons. *Stevens* v. *Evans.* 1 *Black.* 284.

9 If beech be timber by the custom of the country, it is not liable to the poor's rate. *The King* v. *The Inhabitants of Minchin Hampton.* 3 *Burr.* 1308.

10 Lead mines not rateable to the poor. *Lead Company* v. *Richardson.* 1 *Black.* 389.

11 *Qu.* Whether herbage and pannage are rateable to the poor? 1 *Doug.* 302 to 305.

The ranger of the royal park is not rateable for herbage and pannage. *Lord Bute* v. *Grindall.* 1 *Doug.* 305, *n.*

12 Occupiers, without naming persons, are not liable to poor's rates. *The King* v. *The occupiers of St. Luke's Hospital.* 1 *Black.* 249.

Hospitals not liable for the lodging, &c. of the poor objects. *Ibid.* 2 *Burr.* 1053.

13 If a place be a reputed parish, and

have churchwardens and overseers of the poor, it is within 43 *Eliz.* though in truth it be no parish; but if it be merely extraparochial, as the justices cannot send to such a place, so they cannot send from it. *The Inhabitants of the Forest of Dean, and the parish of Linton.* 2 *Salk.* 486.

14 A farmer is not taxable to the poor's rate for his stock; a tradesman is. *The Queen* v. *The Inhabitants of Barking, &c.* 2 *L. Raym.* 1280.

15 A corporation seized of lands in fee for their own profit, are, within the meaning of stat. 43 *Eliz.* c. 2., inhabitants or occupiers of such lands, and, in respect thereof, liable in their *corporate capacity*, to be rated to the poor. *Rex* v. *Gardner.* *Cowp.* 79.

16 Uncertainty in the value of property is not a reason against its rateability. *Jones* v. *Maunsell.* 1 *Doug.* 303, 304.

Nor the tenure under which it is occupied, whether in fee, for life, years, or by a keeper, or servant, in lieu of sallary or wages. *Ibid.*

Property which does not lie in occupancy according to the strict common law sense of the word may be rateable. *Ibid.*

17 Lot and cope in the mines of *Derbyshire*, are rateable. *Rowlls* v. *Gell.* 1 *Doug.* 304, *& n.*

Tolls are rateable. *Ibid.*

18 The parochial assessments for the vicar of *St. Michael's* in *Coventry*, established by 19 G. 3, c. 60, are not rateable. *Rex* v. *Toms.* 1 *Doug.* 401, to 406.

19 But those for the vicar of the *Trinity* in the same place, established by 19 G. 3, c. 57, are. *Rann* v. *Pickin.* 1 *Doug.* 406, *n.*

A *modus* for tithes is rateable. *Ibid.*

20 Hospital lands are chargeable to the poor. *Anon.* 2 *Salk.* 527.

21 Neither governors, servants, nor the poor in hospitals, rateable to the poor tax. *Rex* v. *Inhabitants of St. Bartholomew's the Less.* 4 *Burr.* 2435.

22 Neither quit-rent, nor heriots, or other casual profits of a manor are rateable to the poor's rate. *Rex* v. *Vandevald.* 2 *Burr.* 991. 1 *Black.* 212. S. C.

23 Tithes are a tanement, and rateable to the poor as such. *The King* v. *Skingle.* 1 *Str.* 100.

24 Not liable to the poor rate, on account of salary only. *Sherrington's Case.* 4 *Burr.* 2011.

25 A sum of money made payable by the owners of lands in lieu of tithes by act of parliament, with a clause of distress annexed, is liable to the poor's rate. *Lowndes* v. *Horne.* 2 *Black.* 1252.

26 Toll of a light-house not rateable, because the toll is not locally related to the parish. *King* v. *Rebot.* *Lofft*, 77.

27 The occupier of land is rateable to the poor, and it is immaterial by what tenure he holds it, or whether he has any title. 1 *Term Rep.* 343. 7 *Term Rep.* 590.

So the bare possession of personal property is evidence from whence the justices may draw the conclusion that the possessor should be rated. 6 *Term Rep.* 53.

28 Where a corporation was seized in fee of certain uninclosed lands, which were stocked with the cattle of the resident burgesses, or the widows of such, who alone were permitted by the burgesses to claim such right, and also by poor parishioners, who were admitted to such enjoyment from charity; and such lands were altogether omitted out of the poor-rate; the sessions, on appeal by one who had given notice of his objection to the parish officers, and to the corporation as the party interested under the statute 41 G. 3, c. 23, s. 6, having quashed the rate, the court confirmed that order. *Rex* v. *Aberavon Inhabitants.* 5 *East*, 453.

29 Where a corporation were seized in fee of lands, which by the custom were annually meted out under their control by a leet jury, accord-

ing to a certain stint, to such of the resident burgesses who chose to stock the same; they paying 19s. 4d. to each of the other burgesses who did not stock; held that the burgesses who so stocked were *tenants in common* of the lands so occupied by them, and as *such occupiers* were liable to be rated for the same. *Rex* v. *Watson*. 5 *East*, 480.

30 Personal property, if visible, and yielding a certain annual permanent profit, is rateable. *Rex* v. *Hogg*. 1 *Term Rep.* 727.

31 So that a house and engine for carding cotton, which are rented as one entire subject, and described by the general name of an engine house may be rated. *Ibid.*

32 So may the profits of a weighing machine house. *R.* v. *St. Nicholas, Gloucester*. 1 *Term Rep.* 723, *n.*

33 Ships are rateable in the parish to which they belong. *R.* v. *S. White*. 4 *Term Rep.* 771.

But household furniture is not. *Ibid.*

Neither is money, whether at interest or not. *Ibid.*

Nor the pay of officers in the navy, or of merchant's ships. *Ibid.*

Nor the salary of officers of the customs, or merchant's clerks. *Ibid.*

34 Nor any attorney in respect of the profits of his profession. *Rex* v. *Startifant*. 7 *Term Rep.* 60.

35 Under a local act, 10 *Ann* c. 6, for rating persons to the relief of the poor in *Norwich*, for lands, &c. stock, and personal estates in the parish, &c., and *money out at interest*; they are not liable to be rated for *government stocks or funds*, which are no more than perpetual annuities, the principal of which can never be recalled by the holder from government, though redeemable at the pleasure of the latter. *R.* v. *St. John Maddermarket, in Norwich, Churchwardens*. 6 *East*, 182.

36 Stock in trade is rateable when its value can be ascertained. 6 *Term Rep.* 154; and *R.* v. *Darlington Inhabitants*. 6 *Term Rep.* 468; and see 4 *Term Rep.* 771.

37 The circumstance of a person's having been rated for his stock in trade one year is *prima facie* evidence that it is productive the next year, and if not contradicted by other evidence is sufficient to warrant the justices to decide that it should be then rated. 6 *Term Rep.* 468.

38 The possessions of the crown, or of the public are not rateable. 3 *Term Rep.* 372.

39 Stables, rented by the colonel of a regiment by order of the crown for the use of the regiment are not liable to be rated. *Lord Amherst* v. *Lord Somers*. *Ibid.*

40 But persons holding houses or lands under the crown, or under any hospital, *if for their own separate benefit*, are liable to be rated. 3 *Term Rep.* 497.

41 Where the commanding officer in barracks had distinct appartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and his family, who resided there with him, containing amongst others a kitchen, wash-house, and coach-house, together with a stable, yard, and garden; held that he was rateable to the relief of the poor for the same, having a beneficial enjoyment of them beyond his necessary accommodations *as an officer* for the purpose of *public* service. *Rex* v. *Terrott*. 3 *East*, 506.

42 The ranger of a royal park is rateable as for inclosed lands in the park yielding certain profits. *Lord Bute* v. *Grindall*. 1 *Term Rep.* 338.

Affirmed in *Cam Scac.* 2 *H. Black.* 265.

(See *Eyre*, C. J.'s observations on the loose and inaccurate statement of the special verdict.)

43 But he is not rateable for the herbage and pannage, which yield no profits. 1 *Term Rep.* 338.

44 The lessee of a coal mine is liable to be rated, though he derive no profit from the mine, the mine being rateable property. *R.* v. *Parrot*. 5 *Term Rep.* 593.

45 Lime works are rateable in the hands of the occupier, though there be risk and expence in the working and the profits be uncertain. *Rex* v. *Alberbury Churchwardens.* 1 *East* 534.

46 A *slate work* (or, as improperly called, a slate *mine*) is rateable. *R.* v. *Woodland Inhabitants.* 2 *East*, 164.

47 Iron mines are not rateable. *Rex* v. *Cunningham.* 5 *East*, 478.

48 A person entitled to toll, tin and farm dues, (which are certain portions of the tin raised by the adventures in the tin-mines,) is liable to be rated in respect thereof. *Rex* v. *St. Agnes.* 3 *Term Rep.* 480.

49 If *A.* has an exclusive right of using a way-leave over land which he holds in common with *B.*, paying *B.* a certain sum yearly, and has the privilege of using a way-leave occupied by *C.* paying him so much *per* ton for the goods carried over it, *A.* is not liable to be rated in respect of either of such way-leaves, they being mere easements. *Rex* v. *Jolliffe.* 2 *Term Rep.* 90.

Qu. Whether the owner of the land, who receives a profit for such way-leave, is not liable to be rated for such an increase of value. *Ibid.*

50 And where *A.* having granted to *B.* a lease for years of way-leaves, (for the purpose of carrying coals,) and the liberty of erecting bridges, and levelling hills over certain lands, *B.* made the waggon-ways, inclosed them, thereby excluding all other persons, erected bridges, and built two houses on the land for his servants; it was held, that *B.* was liable to be rated to the poor for "the ground called the waggon-way." *Rex* v. *Bell.* 7 *Term Rep.* 398.

51 Fish are tithable by custom; and the proprietors of such tithes are liable to be rated. *Rex* v. *T. Carlyon.* 3 *Term Rep.* 585.

52 Property is not rateable to the poor, unless there be some person in the beneficial occupation of it. 4 *Term Rep.* 730.

53 Therefore where by an act of parliament the commissioners of a navigation were authorized to take certain tolls, the whole of which were directed to be applied to public purposes, it was held, that the tolls were not rateable to the poor. *R.* v. *Salter's Load Sluice Navigation. Ibid.*

54 The trustees of a quakers' meeting-house, of which no profit is made by the pews, &c. are not rateable. *Rex* v. *Woodward.* 5 *Term Rep.* 79.

55 Lands purchased by a company, and converted into a dock, according to an act of parliament, which declares that the shares of the proprietors shall be considered as *personal property*, are rateable in proportion to the annual profits. *Rex* v. *the Dock Company of Hull.* 1 *Term Rep.* 219.

56 If the owner of an house occupy part of it, he is liable to be rated for the whole, unless there be a distinct occupation of the rest by some other person. *Rex* v. *St. Mary the Less, Durham.* 4 *Term Rep.* 477.

57 A person employed by the Philanthropic society to superintend the children at annual wages, under an agreement that he shall have "a dwelling free from taxes," &c. with certain other perquisites, and who may be dismissed at a minute's warning on receiving three months wages, is not rateable as the occupier of the house provided by the society, she having no distinct apartments in the house but a bed-chamber, and her family not being allowed to live there. *Rex* v. *S. Field.* 5 *Term Rep.* 587.

58 A master of a free school, appointed by the minister and inhabitants of the parish under a charitable trust, whereby a house, garden, &c. were assigned "for the habitation and use of the master and his family, freely without payment of any rent, income, gift, sum of money, or

other allowance, whatsoever," for the teaching of ten poor boys of the inhabitants, is rateable for his occupation of the same. *Rex* v. *Catt.* 6 *Term Rep.* 332.

59 The objects of a charitable foundation in the actual occupation of the alms-house and lands for their own benefit in the manner prescribed by the rules of the institution, and liable to be discharged for any breach of such rules, are rateable in respect of such occupation. *Rex* v. *Mundny.* 1 *East*, 581.

60 Where the sessions found that the master gunner at *Seaford* was the *occupier* of the battery-house there, which was the property of the crown, and from whence he was removeable at pleasure; it was held that the *fact* found of his being the *occupier* precluded any other question, and fixed his liability to be rated. *Rex* v. *Hurdis.* 3 *Term Rep.* 407.

61 This court is not precluded by the sessions stating in the case "that the party rated is the occupier," from examining into the propriety of that conclusion, if the sessions also state all the circumstances of the case, and desire to have the opinion of this court upon the whole. 5 *Term Rep.* 587.

62 Every person is to be rated according to the present value of his estate, whether that value has or has not been increased by his own improvements. *Rex* v. *Mast.* 6 *Term Rep.* 154.

63 A lessee of lands should be rated according to the present value of the lands. *Rex* v. *Skingle.* 7 *Term Rep.* 549.

64 An exemption in a private statute in 12 C. 2, of lands given to charitable purposes "from all *public* taxes, charges, and assessments whatsoever, civil or military," extends to the poor's rate. *Rex* v. *J. Scott.* 3 *Term Rep.* 602.

65 Where a coal mine, becoming unproductive ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord. *Aliter*, where the mine is itself productive, although it be worked to a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner. *The King* v. *The Inhabitants of Beduorth.* 8 *East*, 387.

66 The owners of the packet boats employed under a personal contract with the post-masters in carrying the mails, &c. between *Holyhead and Dublin*, are liable in respect of the profits accruing to them from the carriage of passengers and baggage in such boats, to be rated for the same in the parish of *Holyhead, where such owners reside*, and from and to which the boats sail, where they are repaired, and where the passage money is in part receivable and is collected; though they are registered in another place. *The King* v. *Jones.* 8 *East*, 451.

67 But in order to rate a person for personal property producing profit in a parish, not only the property must be within the parish at the time of making the rate, but the owner must come within the description of an *inhabitant* of such parish. *Ibid.* 455, 8.

68 Where a farmer is rated for the whole farm, it is no ground of objection to the rate by a third person, that a dairyman who rented under the farmer his stock of cows to be depastured on the same land, was not rated for such dairy; although it were stated in the case that the dairyman made a profit of the produce of the cows, independent of the profits made by the farmer. For though such a taking of a dairy be a taking of a tenement in law, which will confer a settlement, yet that is in respect of the interest in the land; and the rate upon the farmer, for the whole farm, includes all the profit of the land and the stock appertaining to

it; or considering the cows as personal stock, distinct from the land, they are the personal stock or capital of the farmer, not of the dairyman; and the latter only makes his profit by his labor out of the capital stock of another. *The King* v. *Brown.* 8 *East*, 528.

The occupier of a clay-pit is rateable for the same. *Ibid.*

69 Silk throwsters, working up in their mills the silk of their employers sent to them for that purpose, are not liable to be rated in that respect, as for their stock in trade. *The King* v. *The Inhabitants of Sherborne.* 8 *East*, 537.

70 *Saleable underwoods* are rateable annually to the relief of the poor, within the construction of the stat. 43 *Eliz.* c. 2, in proportion to their value, though they should happen not to be cut down more than once in 21 years; and their annual value may be estimated among other ways according to the value they may be worth to rent for a lease of the duration of their intended growth. *The King* v. *The Inhab. of Mirfield.* 10 *East*, 219.

71 One who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual, is liable to be rated to the relief of the poor, as occupier of the whole house. *The King* v. *The Inhab. of Aberystwith.* 10 *East*, 354.

72 Beech being admitted to be timber by the custom of the county of *Bucks*, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at 20 years growth; and therefore upon an issue, whether certain beech trees in that county (which after being felled had been distrained for payment of a poor's rate, to which it was contended they were liable) were, or were not *timber*, according to the custom of the county, the inquiry is confined to the nature of the wood, and the period of its growth, whether of 20 years; and no evidence can be received to qualify its character of *timber*, by shewing that it was not deemed to be such in the county, unless the tree contained ten feet of solid wood. And the jury having found a general verdict for the plaintiff on this issue, affirming such trees of 20 years growth and upwards, though not containing ten feet of solid wood, to be *timber* by the custom; and also upon another issue, negativing them to be *saleable underwood* within the statute 43 *Eliz.* c. 2; the court refused to grant a new trial. *Aubrey* v. *Fisher.* 10 *East*, 446.

II. *The Manner and Purpose of raising.*

1 *Averia carucæ* are distrainable for the poor rates; and if a man mistakes the value of the goods, he may seize again, if his first distress was for the proper sum. *Hutchins* v. *Chambers et al.* 1 *Burr.* 579.

2 A rate cannot be made for repairing or rebuilding a workhouse. *Rex* v. *Wavell.* 1 *Doug.* 116 to 118.

Nor to reimburse an overseer for money advanced for the parish. *Ibid.*

If a rate appear to be illegal by the title, the court will quash it, though no special case has been stated. *Ib.*

3 Assessments for the poor ought to be raised monthly. *Tracy* v. *Talbot.* 2 *Salk.* 532. *Sed Qu.*

4 Poor's rates need not be made monthly. *The King* v. *The Overseers of St. George's Middlesex.* 2 *Black.* 694.

5 If a landlord tender the rate for his tenant, the overseer ought to receive it, and a warrant ought not to be granted to distrain on the tenant. *Rex* v. *Cozens.* 2 *Doug.* 426 to 428.

6 A standing rate cannot be made,

but must be varied by circumstances. *The King* v. *The Inhabitants of Audly.* 2 *Salk.* 526.

7 A rate cannot be made to reimburse an overseer; but where an overseer is in advance for the parish, he may get a rate for the relief of the poor, and reimburse himself out of the money raised thereby. And the justices are compellable to sign and allow such a rate. *Tawney's Case.* 2 *L. Raym.* 1009. 3 *Salk.* 233. 2 *Salk.* 531.

8 Justices may order one parish to pay a sum in gross to another, but then they must make the rate by which it is to be raised. *Case of the Parish of St. Peter and St. Paul in Marlborough.* 2 *Str.* 1114.

9 A person shall be rated for profits where they become due, not where they happen to be received. 2 *Term Rep.* 660.

10 Where a navigation ran from *A.* to *B.* through several intervening parishes, and the tolls for the whole navigation were collected in these two parishes, the court held they might be assessed in these two parishes for the whole amount according to the proportion collected in each. *Rex* v. *Aire and Calder Navigation.* 2 *Term Rep.* 660.

11 A barge-way and toll-gate in the hamlet of *Hamptonwick*, purchased by the city of *London*, by virtue of statute 17 G. 3, c. 18, (for completing the navigation of the *Thames*, and empowering the city to levy tolls and duties towards the charges of the navigation,) was held to be rateable for such tolls as became due there, notwithstanding the tolls were collected in another parish. *Rex* v. *Mayor, &c. of London.* 4 *Term Rep.* 21.

12 So where a navigation act empowered the proprietors to take so much *per* mile *per* ton for all goods carried along the canal; held that they were rateable to the poor for the tolls in the different parishes where the tolls became due, that is, *where the respective voyages finished*, though for their own convenience they were authorized to *collect* the tolls where they pleased, and did in fact collect them in other parishes. *Rex* v. *Staffordshire and Worcestershire Canal Navigation.* 8 *Term Rep.* 340.

13 Where by a navigation act the proprietor was entitled to a toll of 4*s. per* ton for goods carried from *A.* to *B.*, or from *B.* to *A.*, and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection; it was held that the tolls for goods carried the whole voyage from *A.* to *B.* were rateable in *B.* though in fact they are collected in a parish between *A.* and *B.*; because the tolls become due where the voyage is completed. *Rex* v. *Page.* 4 *Term Rep.* 543.

14 Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of the *tolls*, and the other not; though the voyage happen to finish on the unexempted line, where the tolls became due and are received, yet the canal company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much *per* ton *per* mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the act directs that the tolls should be exempt from any taxes, rates, &c. other than such as the *land* which should be used for the purpose of the navigation would have been subject to if the act had not been made; that goes to exempt the *tolls*, *quasi tolls*, altogether from being rated in respect of the line so exempted, leaving the *land* rateable as before. *Rex* v. *The Leeds and Liverpool Canal Company.* 5 *East*, 325.

15 Where a statute says that a company shall not be liable to any rates which had not *usually* been assess-

ed; that only means that they shall not have any other *kind* of rate imposed on them than those which were then levied, but does not fix the proportion of the rate. 2 *Term Rep.* 660.

16 If a poor rate be not published in the church on the *Sunday* next after it is allowed, it is a nullity; and payment under it cannot be enforced, though there be an appeal to the sessions which was dismissed. *Rex* v. *Newcombe.* 4 *Term Rep.* 368.

17 But it is not necessary to state in a reserved case, that the rate was regularly published in the church, if that queston was not intended to be referred. 2 *Term Rep.* 660.

18 County justices cannot rate a parish within their jurisdiction, *in aid* of another parish, lying within a borough which has an exclusive jurisdiction, though within the same hundred and county. *Rex* v. *T. Holbeche.* 4 *Term Rep.* 778.

19 An order for taxing one parish in aid of another under the 43 Eliz. was held well; although the two parishes, together with others, were incorporated for the maintenance of their poor, with fixed quotas of contribution, between each other, under special officers, who were empowered to purchase land for the erection of poor-houses, and for a burial ground; there being a proviso in the act in general terms, that nothing therein contained should extend to repeal or lessen the power of justices of the peace "to tax *parishes* in aid of others by virtue of the statute 43 Eliz. as fully as if this act had not been made." *Rex* v. *St. Hellen, Worcester Inhabitants.* 2 *East*, 417.

20 The granting of a warrant of distress by magistrates to enforce payment of a poor rate is a judicial, not a ministerial act; they ought first to summon the party and hear what he has to say in his defence. *Harper* v. *Carr.* 7 *Term Rep.* 270.

III. *Appeals against; quashing, &c.*

1 The poor's rate cannot be removed by *certiorari.* *The King* v. *Inhabitants of Uttoxeter, in the county of Stafford.* 2 *Str.* 932.

2 Order of justices for assessing one parish to the poor rates in aid of another, affirmed; though it was not stated that the parishes were in the same hundred, but only in the same liberty of the soke. *Rex* v. *Inhabitants of the Tithing of Milland.* 1 *Burr.* 576.

3 A distress for a poor's rate for lands not in the occupation of the plaintiff, may be replevied; notwithstanding the sessions on appeal had confirmed the rate; the determining that a man be assessed for what he does not occupy, being an excess of jurisdiction. *Milward* v. *Caffin.* 2 *Black.* 1330.

4 On an appeal from a poor's rate, because particular persons or particular property only is omitted in the rate; the sessions ought not to quash the whole rate, but should amend it in such particulars. *Rex* v. *Ringwood Inhabitants.* *Cowp.* 326.

Qu. If personal property is rateable. *Ibid.*

5 The sessions may not quash a poor's rate, merely because no stock in trade is rated; but if particular persons are proved to have stock for which they are not rated, sessions may amend the rate by inserting the particular persons, and so bring the question on those cases before the court. *The King* v. *The Inhabitants of Witney.* 2 *Black.* 709. 5 *Burr.* 2634.

6 Justices may quash the whole rate where the rate is unequal, and make, or order to be made, a new one. *The Case of the Parish of Shoreditch.* 2 *Salk.* 524.

7 Poor rate confirmed by sessions shall not be set aside, unless it appears manifestly to be unequal. *Rex* v. *Brograve.* 4 *Burr.* 2491.

8 On appeal from a poor's rate the sessions may quash the whole, and

make, or order the church wardens, &c. to make a new rate. *The Case of the Parish of St. Leonard Shoreditch.* 2 *Salk.* 482.

9 *B. R.* will not meddle with the goodness or badness of a poor's rate. *The King* v. *Justices of Dorchester.* 1 *Str.* 393.

10 Whether houses shall be rated in different proportion from land, must depend on local circumstances; and the court will not quash an order for rating them equally. *Rex* v. *Swannage.* 2 *Doug.* 562, 563.

If any error in a rate affects the proportion payable by every person rated, the rate must be quashed *in toto.* *Ibid.*

11 Order of sessions quashing a poor's rate upon an appeal generally without assigning any reasons, is a good order. *Rex* v. *Justices of Cornwall.* 4 *Burr.* 2402.

12 Order for relief of poor prisoners and providing materials to set them to work, ill; being under two statutes, there should be two orders. *Inhabitan. Paroch. Eaton-Bridge and Inhabitan. Paroch. Westram in Hanc.* 2 *Salk.* 486.

13 Under a warrant for levying a poor's rate directed to the constables of *A.* they may seize goods in *B.* *Hampton* v. *Lammas.* 1 *L. Raym.* 735.

14 If a poor rate be legal on the face of it, though stated to be made for illegal purposes, the court will not quash the rate, but will leave the parties aggrieved to appeal against the allowance of the overseers' accounts if the money be improperly applied. 5 *Term Rep.* 346.

15 A private act, relating to *Gloucester*, enables the overseers, &c. to make a rate for the relief of the poor, and to include in it such just and reasonable sums as they shall be put to in the execution of their offices; they made a rate, the title of which expressed it to be for both these purposes; and this court would not quash it, though the sessions on appeal stated in a case that it was partly made to pay a debt incurred by the late overseers; the rate itself appearing on the face of it to be legal. *Rex* v. *Gloucester, Mayor, &c.* 3 *Term Rep.* 346.

16 *Iron mines* are not rateable to the relief of the poor; and being rated conjointly with *coal mines*, the coal whereof was raised by *the owner of the lands for his own use* in smelting the iron, the order of sessions confirming such rate generally, without ascertaining the proportion at which each was rated, was quashed. *Rex* v. *Cunningham.* 5 *East*, 478.

17 Where a person is *overcharged* in a poor rate, the sessions may relieve him on appeal, and amend the rate, by lessening the sum assessed on him under statute 17 G. 2, c. 38. *Rex* v. *Cheshunt, Inhab.* 2 *Term Rep.* 628.

18 But if the name of any person be *omitted* in the rate, the justices ought to quash the rate, and not amend it by adding his name. *Rex* v. *Maddern, Churchwardens.* 1 *Term Rep.* 625; and *Rex* v. *Darlington, Inhab.* 6 *Term Rep.* 468.

19 On an appeal against a poor rate, because *A.* and *B.* were not rated for their stock in trade, the sessions quashed the rate, and stated that *A.* and *B.* were in possession of so much stock in trade, &c. but that it was not proved at the sessions whether it belonged to *A.* and *B.*, or whether it produced profit; this court quashed the order of sessions. *Rex* v. *Dursley Inhab.* 6 *Term Reports*, 53.

20 The justices below are the proper judges of the equality of poor rates; and the court of *B. R.* will not interfere on the ground of their being unequal, unless the inequality be manifestly apparent on the rate. 2 *Term Rep.* 660.

21 Appeal against a poor rate must be to the sessions next after the allowance of it. *Rex* v. *J. Atkins.* 4 *Term Rep.* 12.

22 And if at a subsequent sessions it be dismissed for not having been

made in time, and it be removed by *certiorari* into *B. R.*, the court will not go into any objection appearing upon the face of it. 4 *Term Rep.* 12.

23 Notice of an appeal against a poor rate must be given to the churchwardens or overseers of the parish making the rate, by statute 17 G. 2, c. 38. 1 *Term Rep.* 627.

24 But it is not necessary for the appellant to give notice to the person whose name is omitted in the rate. 1 *Term Rep.* 627.

25 Trespass will not lie for a distress for non-payment of the poor rate, if the objection to the rate be that it is made for six months; if the party object to the rate on that ground, he must appeal to the sessions. *Durrant* v. *Boys.* 6 *Term Rep.* 580.

26 If a party appeal against a poor rate on the ground that he has no rateable property in the parish, the respondents must first establish their case. *Rex* v *Newbury Inhab.* 4 *Term Rep.* 475.

POOR, RELIEF OF.

1 Substitute must be considered as a militia man; and a particular township may be reimbursed from the county at large, for the expences incurred in relieving the wives and children of substitutes. *Rex* v. *Sir Willoughby Aston, Bart. and John Dodd et al.* 2 *Burr.* 1149.

2 A man is not bound to maintain his wife's mother. *The King* v. *Munden.* 1 *Str.* 100.

3 A person who applies to the parish for relief for one of his children but not for himself, is entitled to such relief though he refuse to go into the workhouse. *The King* v. *North Shields.* 1 *Doug.* 331 to 338. See also *Rex* v. *Haigh.* 1 *Doug.* 332, *n.*

No appeal lies to the quarter sessions from an original order of relief by a justice of peace. *Ibid.*

4 Examination of a pauper must be by both the justices. *The King* v. *Wykes and another.* 2 *Str.* 1092.

5 A father in law is not bound to maintain his children in law. In the observations upon the words father and mother, grandfather and grandmother, and children. Nor a child in a law his parent in law. *The King* v. *Benoier.* 2 *L. Raym.* 1451.

6 Whether parish officers are obliged to relieve poor who refuse to go into the workhouse. *Rex* v. *Winship.* 5 *Burr.* 2677.

7 Justices may order payment of a sum in gross. *Regina* v. *Odam.* 1 *Salk.* 124.

8 Order to relieve his father till sessions order the contrary, good. *Jenkin's Case.* 2 *Salk.* 534.

9 When relief is granted to a poor person, *only* such person (and not any of the rest of the family) is obliged to go into the workhouse, under statute 9 G. 1, c. 7, s. 4. *Rex* v. *Haigh.* 3 *Term Rep.* 637.

10 Where an allowance is ordered to be paid weekly to a pauper, it is due at the beginning of the week. *Rex* v. *J. Fearnley.* 1 *Term Rep.* 320.

11 Under statute 9 G. 1, c. 7, s. 4, which enables *the churchwardens and overseers with the consent of the major part of the parishioners*, to contract for the providing for the poor, it is not necessary that *all* the churchwardens and overseers should concur; the contract of a *majority* of them will bind the rest. *Rex* v. *Beeston.* 3 *Term Rep.* 592.

12 The parish to which the principal militia man belongs is liable to reimburse the parish of the substitute the expences of maintaining the substitute's family, though the substitute had more than one child when he was approved by the deputy lieutenants and inrolled; which under such circumstances he ought not to have been. *Rex* v. *Willis.* 6 *Term Rep.* 179.

13 *Semble*, That if a substitute be sworn and actually served in the militia, his family are entitled to be relieved within the meaning

of statutes 26 G. 3, c. 107, s. 24; 33 G. 3, c. 8, s. 3, though the substitute were not previously approved by two deputy lieutenants, or inrolled. 7 *Term Rep.* 558.

6 A husband is not bound to maintain his wife's child by a former husband. 4 *Term Rep.* 118. 1 *Str.* 190. And tit. GUARDIAN, PARENT and CHILD, ASSUMPSIT II. 65, 74.

7 In an action against a town for the support of a person alleged to be a pauper, the defendants may prove his ability to maintain himself. 1 *Mass.* 459.

8 Expences incurred by a town for the support and *burial* of a pauper are recoverable of the town in which his settlement is supposed to be, if the overseers of the poor in the *same* town have neglected for two months, after notice, and request to remove him, to object to such request—and his settlement cannot be contested in an action brought to recover such expences. 1 *Mass.* 459, 518.

9 A town in which a prison is situate is held to support a pauper confined in prison for debt, whether he has a legal settlement in any other place or not, after due application to the overseers. 2 *Mass.* 547, 564.

10 The kindred of a pauper cannot be called upon to contribute to his support, but by the overseers of the town, where he has his legal settlement, or by some other of his kindred. *Salem* v. *Andover.* 3 *Mass.* 436.

The only remedy for a town, other than that wherein he is settled, which has provided for a pauper, is by an action against the town where he has his settlement. *Ibid.*

In such action the declaration must aver the settlement, and notice to the town liable within three months from the commencement of the expence. *Ibid.*

11 If the town of *A.* has incurred expences in the support of a pauper, supposed to have his legal settlement in *B.* and the overseers of *A.* give notice thereof to the overseers of *B.* and request his removal; although the notice be not answered, nor objected to, and the expences are paid by the town of *B.* but the pauper is not removed; in an action against the town of *B.* for after expences incurred by the town of *A.* in the support of the pauper, the defendants are not estopped to deny that the settlement of the pauper is in *A.* *Leicester* v. *Rehoboth.* 4 *Mass.* 180.

12 In what cases a town is estopped from denying the settlement of a pauper. *Bridgewater* v. *Dartmouth.* 4 *Mass.* 273.

13 When an act incorporating part of a town, and erecting it into a new town, provides that all the debts due to or from the original town, shall be divided between the two towns, in proportion to the state valuation; and that the poor, with which the original town was then chargeable, together with those then removed therefrom, and afterwards returning for support, shall be divided in the same proportion; the legal construction of such a provision is that the debts are to be paid to or by the original town, who may be compelled by the new town to pay over to it its proportion of debts received, and may compel such new town to reimburse its proportion of debts paid; and that the charges of maintaining the poor and not their persons, are to be divided, each town having a remedy against the other for a reimbursement of any excess of such charges beyond its due proportion. *Brewster* v. *Harwich.* 4 *Mass.* 278.

Such a provision does not effect the settlement of any of the inhabitants of either of the towns. *Ibid.*

14 Before the statute of 1793, c. 34, when a new town was formed of part of an existing town, the settlement of persons absent at the time of the incorporation of the new town continued in the old town, though their former dwelling was

in that part, of which such new town is formed. *Windham* v. *Portland.* 4 *Mass.* 384.

16 Where a new town *A.* was incorporated out of an old town *B.* and the act of incorporation provided that *A.* should pay to *B.* a sum of money, or as a consideration for being exempted from any expence on account of paupers belonging to *B.* previous to the incorporation, except such as might thereafter be returned as paupers from some other town, or were born in, or formerly were inhabitants of that part of *B.* which constituted *A.*; it was held that the paupers returned to *B.* and not born in *A.* for whose support *A.* must pay, were those who, when they removed to another town removed from that part of *B.* forming *A.* and not such as might have once lived in *A.* not being born there, but before they dwelt in another town, removed and lived in *B.* whence they in fact emigrated. *Salem* v. *Hamilton.* 4 *Mass.* 676.

16 The town, in which a gaol is situated, is liable to the gaoler for the support of a poor prisoner confined for not obeying the order of the common pleas in providing for the maintenance of a bastard child of which he is adjudged the putative father; and such town has its remedy over upon the town, wherein such prisoner has his settlement, or if he has no settlement, upon the commonwealth. *Sayward* v. *Alfred.* 5 *Mass.* 214.

17 No action lies by one town against another for the expence of supporting a pauper, unless such expence accrued within three months previous to notice; but whether this limitation extends to the expence of the removal or burial of the pauper; *quere.* *Bath* v. *Freeport.* 5 *Mass.* 325.

18 Prisoners committed for offences against the commonwealth are a charge upon the commonwealth; and the town in which the prison is situated, is not answerable for their support, or for medical aid furnished them. *Adams* v. *Wiscasset.* 5 *Mass.* 328.

19 If one town will voluntarily maintain a pauper having a settlement in another town, no action will lie to recover compensation, unless it be given by the statute of 1793, c. 59, or is founded on an express promise. *The Inhabitants of Dalton* v. *The Inhabitants of Hinsdale.* 6 *Mass.* 501.

Notice from one town to another, to obtain the removal of a pauper, or a reimbursement of the expences of a pauper's support is sufficient if it be given to one of the overseers of the town on which the claim is made; but it must be in writing, and signed by a major part of the overseers of the town giving the notice, or perhaps by an agent duly authorized by the town. *Ibid.*

20 Where in an action against the town of *A.* for expences incurred by the town of *B.* in the support of a pauper, it appeared that the paupers settlement was not in *A.* but that the defendants were estopped from denying the settlement, and a verdict was given against them; the court refused to set aside the verdict, that the defendants might pay the money found due by the verdict, and thus prevent a judgment, which would bar them upon the question of settlement, as to any further expences. *Greene* v. *Monmouth.* 7 *Mass.* 467.

21 A notice to a town to be charged with the support of a pauper, signed by one overseer by order of the whole, is sufficient within the statute of 1793, c. 59, s. 12. *Westminster* v. *Bernardston.* 8 *Mass.* 104.

Such notice, not duly objected to, is a bar to a defendant town, as to the question of the pauper's settlement, although it appears that such pauper had no legal settlement in any town within the commonwealth. *Ib.*

22 An order signed by two justices, to an overseer of the poor, to provide for the maintenance of a pauper,

under the first section of the act of the 24th *March*, 1809, (sess. 32, c. 90,) is valid. And though such order does not recite that the justice and overseer inquired into the state and circumstances of the pauper, before giving the order, such an inquiry will be intended to have been made and implied from the order. The justice and overseer need not make the inquiry together, for the order is not to be their joint act. *Adams v. Supervisors of Columbia.* 8 *Johns. Rep.* 323.

Matters of *form*, in orders for the relief of paupers, are not to be overlooked; and the justice has a reasonable discretion, as to the nature and extent of the weekly allowance; and if the pauper be sick or wounded, medicines and the attendance of a physician, are a reasonable charge; but all the charges for maintaining the pauper must be adjusted and paid, in the first instance, by the overseers of the poor, who are responsible to the persons rendering the assistance. *Ibid.*

2 A *mandamus* will not lie, at the instance of the party, to compel the supervisors of the county to audit and pay the account of such charges. The supervisors are only to pay such accounts as have been adjusted and paid by the overseers, in pursuance of the justice's order. *Adams* v. *Supervisors of Columbia.* 8 *Johns. Rep.* 323.

POOR, REMOVAL OF.

I. *Who are removable.*
II. *Orders of Removal.*
III. *Appeals against; or quashing, &c.*

I. *Who are removable.*

1 A person clandestinely removing himself from his legal settlement to another parish, gains no new settlement even after six years residence. *Between the Inhabitants of the Parish of St. Nicholas and St. Helen.* 2 *Salk.* 472.

2 Certificate men not removeable till actually chargeable. *The Parishes of Teelby and Willerton.* 1 *Str.* 77.

3 A certificate man may be sent back, though there is a mistake in the name of the parish to which it is addressed. 2 *Str.* 1163. *St. Nicholas in Harwich and Wolverstone in Suffolk.* *Str.* 1163.

4 A schoolmaster who has a certificate, gains no settlement. *The Parishes of Sheepshead and Milburn.* 1 *Wils.* 87. 2 *Str.* 1225.

5 A wife cannot be removed from a tenement of 10l. per annum in the occupation of her husband, though he resides elsewhere. *Leeds* v. *Blackfordby.* 1 *Black.* 466.

6 A person coming with a certificate from one parish to another, where he is chosen tithingman, but becomes chargeable before he has served the office a year, is removeable. *Parishes of Fittleworth and Pulborough in Sussex.* 1 *Wils.* 81.

7 Certificate man is not removeable till actually chargeable. *The Parishes of Little-Hire and Woolfull.* 2 *Salk.* 530.

8 Vagrant to be sent to the place of his birth, and from thence by order to the place of his settlement. *Anon.* 2 *Salk.* 526.

9 Where a person settled in *A.* has an estate descended to him in *B.* he cannot be sent thither, though if he was there he would be irremoveable. *The Parishes of Wookey and Hinton Blewer.* 1 *Str.* 476.

10 A child cannot be with the grandmother for nurture, and a boy with her cannot be removed if he has an estate in the parish. *Between the Parishes of Hasfield and Furley in Gloucestershire.* 2 *Str.* 1131.

11 Justices of the peace cannot remove a pauper to an extraparochial place. *The Inhabitants of the Parish of Clerkenwell* v. *Bridewell.* 1 *L. Raym.* 549.

12 One who is resident on an estate granted to him for lives, in consid-

eration of two guineas fine and 1s. rent, cannot be removed therefrom, though actually chargeable. But *semble*, he cannot gain a settlement by 40 days residence as on *his own* estate under the statute 9 G. 1, the consideration being under 30l. *Rex* v. *Martlet Inhab.* 5 *East*, 40.

13 A husbandman, who has actually served in the militia, and is married, may be removed to his place of settlement before he becomes chargeable to the parish from which he is removed; for by statute 26 G. 3, c. 107, s. 131, only those militia-men, *who exercise any trades*, are irremoveable. *Rex* v. *Gwenop.* 3 *Term Rep.* 133.

14 But those who are privileged *morando* are privileged *eundo*. 3 *Term Rep.* 133.

15 A certificated person cannot be removed under statute 8 and 9 W. 3, c. 30, till he is *actually* chargeable. *Rex* v. *St. Mary Westport.* 3 *Term Rep.* 44.

16 Therefore a probability that one of the certificated persons residing together in one family will become chargeable (as if a female be pregnant with a bastard) is no cause for removing them. 3 *Term Rep.* 44.

17 But now under statute 35 G. 3, c. 101, s. 6, an unmarried woman may be removed to the place of her settlement on account of her being pregnant; even though she be residing under a certificate from her own parish. *Rex* v. *Great Yarmouth Parish.* 3 *Term Rep.* 68.

18 A *single woman* living in service with her master is not removeable even since the statute 35 G. 3, c. 101, s. 6, against the consent of herself and her master, though adjudged by the order of removal to be *with child*, and *therefore* chargeable to the parish in which she was serving; that statute not extending to make persons removeable who were not proper objects of removal before, but only to leave certain descriptions of persons excepted out of the act liable to be removed, though not in fact chargeable, if otherwise proper objects of removal. *Rex* v. *Aveley Inhab.* 3 *East*, 563.

19 *Semble*, a servant cannot be removed out of the service of his master. *Rex* v. *Oxleworth Bur. S. C.* 302, 4, cited. 3 *East*, 568, *n.*

20 Where relief was given to a son and grandson, living in a separate house from the father, it was held to be no ground to remove him and his other children living with him; but that part of the family only which was chargeable was removeable. 3 *Term Rep.* 44.

21 An order of justices, removing purse children to their derivative settlement, without taking notice of the death or settlement of the parents, is good. *Rex* v. *Bucklebury Inhab.* 1 *Term Rep.* 164.

22 The evidence of the father in such case may be dispensed with, where his attendance cannot be procured. 1 *Term Rep.* 164.

23 A married woman pregnant in the absence of her husband with a child, which when born would by law be a bastard, is removeable as an unmarried woman under the sect. 6 of stat 35 G. 3, c. 101; and the presumption of her being chargeable arises by the same clause from the bare fact of being with child of a bastard, if no circumstances be stated to shew that such presumption is not applicable to a person in the particular situation of the party coming within the general description of the clause. And the order of removal may charge such a person generally as *actually chargeable*, without setting forth in what manner chargeable. *The King* v. *Inhabitants of Tibbenham.* 9 *East*, 388.

24 A labourer employed by his master to drive a cart into his parish with one load, and to return with another, and who broke his leg there by accident, which detained him for some time in such parish, by which he was relieved, is to be considered as *casual poor*, and as such, is not removeable either under

the statute 13 and 14 Car. 2, c. 12, or the statute 35 G. 3, c. 101, as not coming there to *settle* or *inhabit*; and consequently the expences of his relief cannot be directed to be paid during the suspension of the order of removal under the latter statute. *Rex* v. *The Inhabitants of St. James's in Burry, St. Edmunds.* 10 *East*, 25.

25 The same point was ruled in *The King* v. *The Inhabitants of Thatcham, M.* 49 G. 3, in a case nearly like in circumstances.

II. *Orders of removal.*

1 Where children are sent as actually settled, their ages need not be set out. *Between the Parishes of Heptonstall and Evingdon in Yorkshire.* 2 *Str.* 1047.

2 Removing need not be by justices of the division. *Anon.* 2 *Salk.* 473.

3 Parish upon whom an original order is made cannot remove till that be reversed. *The Inhab. of Chalburgh and Chipping* v. *Farringdon.* 2 *Salk.* 488.

4 Order quashed, for that it did not set forth that the person was poor, &c. *Scrivenham Parish* v. *St. Nicholas.* 3 *Salk.* 255.

5 One justice for removal must be of the quorum. *Between the Inhabitants of Chittinston and Penhurst.* 2 *Salk.* 473.

6 By the confirmation of an order of removal on appeal, the parish to which the pauper is removed is concluded as to all the world from insisting that he is settled elsewhere. *Rex* v. *Inhabitants of Rislip, Hendon, and Harrow.* 1 *L. Raym.* 394.

7 A poor man coming with a certificate into a parish shall not go back to the parish who certified, if he hath gained a settlement elsewhere. *Harrison* v. *Lewis.* 3 *Salk.* 255.

8 An order to remove a pauper and his family is bad on account of the generality of the word "family." *Rex* v. *Inhabitants of Wrangford, in Suffolk.* 1 *L. Raym.* 395. *Salk.* 482, 485.

9 To remove his wife and family, ill. *The Case of Sylvanus Johnson.* 2 *Salk.* 485.

10 Justices cannot command the officers of the parish whither *H.* is sent, to remove him. *The Inhabitants of St. George's and St. Olave's, Southwark.* 2 *Salk.* 493.

The order ought to be directed to both parishes. 3 *Salk.* 256.

11 Pauper returning to the parish from whence removed, without bringing a certificate, is punishable by commitment to the house of correction. *Baldwin & ux.* v. *Blackmore.* 1 *Burr.* 591—595.

12 Order reversed final to parties; confirmed to every body. *The Parish of Little Bitham* v. *Somerby.* 1 *Str.* 282.

13 Though the parishes are the same, yet different persons cannot be removed by the same order upon independent settlements. *The Parishes of Chewton and Compton Martin.* 1 *Str.* 471.

14 The adjudication need not mention what parish the party is likely to become chargeable to. *The Parish of Maidstone and Dething.* 1 *Str.* 393.

15 It is necessary to shew in a removal order that it was made upon complaint of the church wardens, &c. but not that the party did not rent a tenement of 10*l.* *per annum*, and defect of an order not made good by matter alleged in the return. *The Inhabitants of Weston Rivers and St. Peter's in Marlborough.* 2 *Salk.* 492.

16 If a son grown up does not remove with his father, he gains no settlement in the last place his father lived in. Where an order is made at an adjourned sessions, it must appear that the sessions began in time. *The Parishes of St. Michael Costany in Norwich* v. *St. Matthew's in Ipswich.* 2 *Str.* 831.

17 An order of removal, whereby *J. S.* was adjudged likely to become chargeable, without saying to the

parish from whence removed, was confirmed. *The King* v. *Inhabitants de Leofield.* 2 *Str.* 698.

18 Order to remove a married woman is good; unless it appears she is sent from her husband. *The Parishes of St. Michael in Bath and Nunny in Somerset.* 1 *Str.* 544.

19 After an order of removal is quashed, the party cannot be removed a second time without stating a new settlement. *The Parishes of Foston and Carlton.* 1 *Str.* 567.

20 Vagrant money ought to be raised quarterly, but a previous settlement of the grand jury is not necessary. Order for raising vagrant money should specify the time for which it is raised, and they ought to be made quarterly or half yearly. *Rex* v. *Justices of Peace for Middlesex.* 2 *Str.* 1028.

21 An order unappealed from to remove a man and his wife is conclusive as to after-born children. *Between the Parishes of Nympsfield and Woodchester in Gloucestershire.* 2 *Str.* 1173.

22 It appearing to us that he is likely to become chargeable, is sufficient, without saying to the parish from whence removed; for it is not to give a jurisdiction, but only the reason of the judgment. *The King* v. *Inhabitantes de Witham super Montem.* 1 *Str.* 142.

23 Where a certificate man is sent back there needs no adjudication of his not gaining a settlement during his stay; and if it appears that the certificate was legally allowed, that supplies the want of shewing an attestation. *The Parish of Barleycroft* v. *Coleoverton.* 1 *Str.* 402.

24 In orders of removal it is not necessary to say the party is come into the parish. *The King* v. *Inhabitants of South Marston.* 1 *Str.* 189.

25 Order to remove *A.* and family, bad as to family; but adjudication that it was the place of the last legal settlement is well enough. *Between the parishes of Beaston in Nottinghamshire and Scisson in Leicestershire.* 1 *Str.* 114.

26 A person irremoveable need not give notice before, 3 and 4 *W.* & *M. Certiorari* to remove an order of two justices may be directed to the sessions, and returned by them. *The King* v. *Inhabitants of Westminster.* 1 *Str.* 470.

27 Order to remove *A.* and his family, ill for generality. *Anon.* 2 *Salk.* 482.

28 Justices have no jurisdiction to remove poor persons to or from extra-parochial places. *The Inhabitants of the Precinct of Bridewell and the parish of Clerkenwell.* 2 *Salk.* 486.

29 After order confirmed on appeal, if the person goes to a parish not party, he must be removed by original order. *Inhab. Paroch. Bowenhead and Broadchalk in Wilts.* 2 *Salk.* 481.

30 Examination must be by two justices previous to removal. *The Inhabitants of Ware and Stanstead-Mount Fitchet.* 2 *Salk.* 488.

31 An order of removal only prohibits the party thereby removed from returning again in a state of vagrancy to the same parish. *R.* v. *Fillongley Inhabitants.* 2 *Term Rep.* 711.

32 An order of removal may be executed a year after it is signed, if the pauper's circumstances be not altered in the interval. *Rex* v. *Llanwinio Inhab.* 4 *Term Rep.* 473.

33 If two justices take the examination of a pauper relative to his settlement, but do not remove him, and the pauper afterwards die or become insane, whether two other justices may remove his family on it? *Qu. Rex* v. *Eriswell Inhabitants.* 3 *Term Rep.* 707.

34 An alteration in an order of removal by one justice in the presence of the other, before it is delivered to the parish officers, does not vitiate it. 4 *Term Rep.* 473.

35 The quarter sessions can only amend an order of removal as to mere defects or want of form under statute 5 G. 2, c. 19. 8 *Term Rep.* 181.

36 Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order, must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for the *said county*, although the proper county were named in the margin, and were also named last before such description of the justices. *Rex* v. *Moor Critchell, Inhabitants.* 2 *East*, 66.

37 An order of justices removing "*M. F., wife* of *P. F.*, a *Scotchman*, who never gained a settlement in *England*," and their children, to the place of *her* last legal settlement, which order was stated on the face of it to be made *on examination of the husband*, and *with the consent of him and his wife*, was holden good. *Rex* v. *Eltham Inhab.* 5 *East*, 113.

38 An order of removal of *J. S.* and *B.* his wife, made upon the examination of the wife, adjudging that they lately came into the parish of *K.* and are likely to become chargeable to *it*, and *were* last legally settled in *M.*, is good upon the face of it, and conclusive upon the parish of *M.* as to the marriage and settlement of the husband and wife, so that upon a subsequent removal of the wife, discribing her as *B. S. single woman*, from *M.* to *B*, *M.* cannot shew in evidence that the marriage was null and void. *The King* v. *The Inhab. of Binegar.* 7 *East*, 377.

39 An order of removal, directed to the *parish of Poole*, or *town and county of Poole* is sufficient; though the proper name of the parish be *St. James* in *Poole*. *The King* v. *The Inhab. of Topsham.* 7 *East*, 466.

40 Under the statute 35 G. 3, c. 101, s. 2, an order of justices, suspending their order made for the removal of a pauper to his place of settlement, on account of sickness, may be made, though he were not *brought before the justices* at the time of such orders made; the plain intent and precise object of the statute being to extend the power of suspension to all cases where orders of removal may be made; and orders of removal may be made though the paupers to be removed be not brought personally before the magistrates; however fit that is to be done where it may be done. *The King* v. *The Inhab. of Everdon.* 9 *East*, 101.

41 An order of removal founded on the statute 35 G. 3, c. 101, s. 6, stating that *A. E.*, single woman was "*by being pregnant, deemed to have become chargeable*," &c. is good. *The King* v. *The Inhab. of Deddlebury.* 9 *East*, 398.

42 In a complaint, and also in an adjudication for the removal of a pauper, it is required to state the cause of the likelihood of his becoming chargeable. *Walpole* v. *West-Cambridge.* 8 *Mass.* 276.

It is not sufficient for the common pleas, upon such an adjudication, to file or record the evidence, on which their judgment is founded; they must make a statement of it. *Ib.*

43 Two justices of the peace may order the removal of a pauper, on information obtained from any source, if the order states that the pauper is likely to become chargeable; that the justices cannot discover the place of legal settlement, and that such pauper came last from the town of *S.*; this is sufficient, without a more formal or precise adjudication of facts. *Overseers of Shawangunk* v. *Overseers of Mamakating.* 1 *Johns. Rep.* 54.

44 If the order of removal of a pauper contains no evidence of, or adjudication, that the pauper had a settlement in, or last came from the town to which he is ordered to be removed, it will be quashed. The sessions may allow costs on appeals to them on such orders. *Overseers of Newburgh* v. *Overseers of Plattekill.* 1 *Johns. Rep.* 330.

45 Where the order of removal of a pauper has been made, and the pauper removed, settled and maintained by another town, and no appeal

made from the order, the justices, by whom it was granted, cannot, afterwards, supersede it. *The Overseers of Southfield* v. *The Overseers of Bloomingrove.* 2 *Johns. Rep.* 105.

16 Where paupers are to be sent out of the state, by virtue of the 7th section of the act, (sess. 24, c. 184) the justices, in their order of removal, must designate the route by which the pauper is to be transported, and not leave it to the discretion of constables, who are mere ministerial officers, who cannot be allowed to take the pauper where they please, in search of his place of last legal settlement. *The Overseers of Niskayuna* v. *The Overseers of Guilderland.* 3 *Johns. Rep.* 412.

17 It is not necessary that an examination should appear upon an order of sessions for the removal of a pauper. 1 *Dallas*, 28.

If a pauper was injured by removal, a remedy may be had by information. *Ibid.*

III. *Appeals against; or quashing, &c.*

1 The removal of a feme covert is *prima facie* evidence that the husband's settlement is in the parish to which she was removed. *Rex* v. *Leigh.* 1 *Doug.* 46. *Rex* v. *Hinckssworth.* 1 *Doug.* 46, *n.*

And this, although it is not expressly declared to be so in the order for her removal. *Ibid.*

2 The reversal of an order of removal upon the merits, precludes the parish who obtained such order from insisting at any future period that the pauper was settled in the parish to which he was removed; but not any other parish. *The Inhabitants of the parish of Kingston Bowsey* v. *Those of Beddingham in Sussex.* 1 *L. Raym.* 513. *Salk.* 486.

3 Order to remove a poor man and his family quashed. *Anon.* 3 *Salk.* 260.

4 An appeal must be to the next sessions after removal and not date of the order. *The King* v. *Inhabitants of Norton in county of Salop.* 2 *Str.* 831.

5 A man cannot be removed from his term in a cottage, &c. *The King* v. *Inhabitantes de Sundrish in Kent.* 2 *Str.* 983.

6 Two houses in an extraparochial place are not enough to denominate a *ville*. *Between the parishes of Denham and Dalham in Suffolk.* 2 *Str.* 1004.

7 The justices are bound to receive an appeal from an order of removal if tendered at the next quarter sessions, although no notice of an appeal has been given. *Rex* v. *The Justices of Gloucestershire.* 1 *Doug.* 191.

8 If the parish to which a pauper has been removed is at such a distance that there is no time to lodge an appeal at the quarter sessions immediately subsequent to the removal, the justices are bound to receive it at the sessions next ensuing, such being the true construction of 13 & 14 *Car.* 2, c. 12. *Rex* v. *The Justices of the East Riding of Yorkshire.* 1 *Doug.* 192.

9 Where the quarter sessions are holden at two different places in the county, the one being an adjournment only from the other, and an order of removal is executed after the beginning of the original sessions but before the adjourned sessions, an appeal at the next ensuing adjourned sessions, is in time and ought to be received. *Rex* v. *The Justices of Sussex.* 7 *Term Rep.* 107.

10 An appeal against an order of removal may be entered at the next sessions but one after the order is executed, if there be not time between the execution of the order and the next sessions to make inquiries respecting the pauper's settlement. *Rex* v. *The Justices of Flintshire.* 7 *Term Rep.* 200.

11 If an order of removal be executed three days before the sessions in a

parish 20 miles from the place where the sessions are holden, and there is no appeal to those sessions, the justices are not bound to receive an appeal at the following sessions. *Rex* v. *Justices of Herefordshire.* 8 *Term Rep.* 504.

12 The sessions are not bound to receive *and adjourn* the hearing of an appeal against an order of removal at the next sessions, if they think the appellant had sufficient time to be prepared to try it, and to give notice to the respondents. *Rex* v. *Justices of Yorkshire North Riding.* 3 *Term Rep.* 150.

The justices are to judge of the reasonableness of the time. *Ibid.*

13 An order of removal quashed for form is not conclusive on the parties. *Rex* v. *St. Andrew, Holborn.* 6 *Term Rep.* 613.

14 An order of removal unappealed from is conclusive, not only on the parties removed, but also as to all derivative settlements under them. *Rex* v. *S. Mary, Lambeth.* 6 *Term Rep.* 613.

15 Therefore if *A.* and *B.* be removed as man and wife from *X.* to *Y.* and there be no appeal against the order, it is conclusive not only as to *A.* and *B.*, though they be not married, but also as to their children, though illegitimate. 6 *Term Rep.* 615. See *Rex* v. *South Owram.* 1 *Term Rep.* 353.

16 If a feme covert be removed by an order of two justices from *A.* to *B.*, describing her as "widow," and there be no appeal against it, it is conclusive not only as to her settlement; but as to that of her husband also. *Rex* v. *Rudgeley Inhab.* 8 *Term Rep.* 620.

17 After an order of removal unappealed from, a new settlement can only be gained by some act altogether subsequent to the removal. *Rex* v. *Kenilworth Inhab.* 2 *Term Rep.* 598.

18 On an appeal to the sessions against an order of removal, those justices, who are rated to the relief of the poor in either of the contending parishes cannot vote. *Rex* v. *Yarpole Inhab.* 4 *Term Rep.* 71.

19 If an order of removal be, on appeal, confirmed by a majority of the justices present, and it be afterwards determined, on a question reserved for the opinion of the court of K. B., that so many of them were disabled to vote as to reduce the number to a minority, the court will not quash the original order, but will send the case back to the sessions, directing them to enter a continuance to the next sessions, in order that they may quash it. 4 *Term Rep.* 71.

20 If an order of removal be confirmed at the sessions, and both orders be afterwards removed into B. R. by *certiorari* on a case reserved, and this court disapprove of the orders for want of jurisdiction of the removing magistrates appearing on the face of the original order; this court will quash both the orders, without remitting the matter back to the sessions to quash the original order, for the purpose of enabling them to give maintenance according to statute 9 G. 1, c. 7, s. 9, and at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *Rex* v. *Moor Critchell, Inhab.* 2 *East*, 222.

21 By the statute 35 G. 3, c. 101, s. 2, the party aggrieved by an order of justices, directing payment, to the amount of above 20*l.* of the charges and costs of the suspensions of an order of removal, on account of the illness of the pauper, may appeal to the next sessions, in like manner as against an order of removal, though he omit to give notice of such his appeal within three days after the demand of such charges and costs; by which he makes himself liable to a distress for the amount. And if on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the surplus, if be-

fore levied by distress, must be refunded. *The King* v. *The Inhab. of Bradford.* 9 *East*, 97.

22 An order of two justices of *A.* for the removal of a pauper, directed to the constable to convey and transport him to the town of *W.* being the place from whence he last came, and there deliver him to a constable of *W.* who was required also to deliver him to the next constable, and so from constable to constable, until the pauper should be transported to the place of his last legal settlement, if any he had, in the state. The pauper was delivered to a constable of *W.*, who transported and delivered him to a constable of *N.* The overseers of *N.* appealed to the general sessions from the order, who dismissed the appeal. It was held, that the order had no force beyond the town of *W.* to which the pauper was first sent; and as to every other place or purpose, was void for uncertainty; and that *N.* not being bound, by such an order, to receive the *pauper*, had no right of appeal, having acted in their own wrong. *The Overseers of Niskayuna* v. *The Overseers of Guilderland.* 8 *Johns. Rep.* 412.

23 An order of two justices for removing a pauper from *Germantown* to *Upper Dublin*, confirmed on appeal to the quarter sessions, was quashed in the supreme court, the justices who made it being inhabitants of and rateable to the poor tax of *Germantown.* 2 *Dallas*, 213.

POOR, SETTLEMENT OF.

I. *By Apprenticeship; and of parish Apprentices, their Indentures, &c.*
II. *By Birth, or Derivative.*
III. *By, or under Certificate.*
IV. *By Estate.*
V. *By Hiring & Service.*
VI. *By serving an office.*
VII. *By being rated to, and payment of rates.*
VIII. *By renting a tenement.*
IX. *By marriage.*
X. *Warning out to prevent a settlement, and other points relative to.*

I. *By Apprenticeship; and of parish Apprentices, their Indentures, &c.*

1 One of the justices to allow a binding must appear to be one of the quorum. *The King* v. *The Inhab. of Woolstanton.* 2 *Str.* 1140.

2 A certificate-man's apprentice, being assigned to a parishioner, gains a settlement. *The King* v. *Inhab. of Petham.* 2 *Str.* 1147.

3 Where the duty on apprentices is not paid, the apprentice gains no settlement. *Between the parishes of Curenden and Laland in Lancashire.* 2 *Str.* 903.

4 Apprentice may gain a settlement though the master has none. *The parishes of St. Bride and St. Saviour's.* 2 *Salk.* 533.

5 The failure of the master does not dissolve the apprenticeship. An apprentice cannot legally let himself until his apprenticeship is dissolved. The surrender of the indentures by the master, after the letting, will not relate back so as to make the letting lawful. A settlement cannot be gained by hiring and service, unless the letting was lawful. *The Inhab. of Buckington* v. *the Inhab. of St. Michael, Sebington.* 2 *L. Raym.* 1352. 1 *Str.* 581.

6 Apprentice, assigned over, by his own consent, by the widow of his master, who had not administered, gains a settlement in the last parish. *The King* v. *Inhabitants of East Bridgford.* 2 *Str.* 1115.

7 Parish apprentice may agree with his master to cancel his indentures at twenty-one, though bound till twenty-four, and gain a settlement of his own. *Ecclesal Bierlow* v. *Warslow.* 1 *Black.* 502.

8 Apprentice, dismissed without cancelling the indenture, gains no settlement by a subsequent service

with another master, so long as the term continues. *The King* v. *St. Luke's, Middlesex.* 1 *Black.* 553.

9 The forty days' inhabitation of an apprentice need not be all together. *The King* v. *Inhab. of Cirencester.* 1 *Str.* 579.

10 Apprentice is settled where he lies. *The parishes of St. John the Baptist in Devises and St. James in Bishops Kenny.* 1 *Str.* 594. 2 *L. Raym.* 1371.

11 The bankruptcy of the master does not dissolve the apprenticeship. *The parishes of Puckington and Cheepton Beenchamp in the county of Somerset.* 1 *Str.* 582.

12 Apprentice hired out by the master gains a settlement where the service is performed. *Between the parishes of St. George, Hanover Square, and St. James, Westminster.* 2 *Str.* 1001.

13 Colber's stall no inhabitancy to gain a settlement. *The King* v. *The Inhab. of St. Olaves Surrey.* 1 *Str.* 51.

14 *A.* is bound to *B.* but serves *C.*; his settlement is in *C*'s. parish. *Parishes of Holy Trinity and Shoreditch.* 1 *Str.* 10.

15 *A.* is bound to *B.* but serves *C.*; his settlement is in *C*'s. parish. *The parishes of Allhallows on the Wall and St. Olave, Surrey.* 1 *Str.* 554.

16 An apprentice, who is assigned, may, as such, gain a settlement in the parish in which he serves the master to whom he is assigned. *Between the parishes of Caister and Eccles.* 1 *L. Raym.* 683. *Salk.* 68.

17 Apprentice living forty days in a parish after his master, who was certificated, purchased an estate, gains a settlement. *The parishes of Ivinghoe and Stonebridge.* 1 *Str.* 265.

18 An apprentice who works in one parish and lodges in another, gains a settlement in that in which he lodges. *The Inhabitants of Saint John, Baptist* v. *The Inhab. of Saint James.* 2 *L. Raym.* 1371. 1 *Str.* 594.

19 Apprentice gains a settlement where he lies. *Parishes of St. Mary Colechurch and Radcliffe.* 1 *Str.* 60.

20 An apprentice, bound for four years only, gains a settlement. *The parishes of St. Nicholas and St. Peter in Ipswich.* 2 *Str.* 1066.

21 A poor parish-girl, bound to serve till 21 (without saying or till marriage) and assigned over to another, gains a settlement where she last served. *The parish of Petrock and Stoke Fleming.* 1 *Wils.* 96.

22 If the master of an apprentice die, and the executor, at the request of the apprentice, agree that he shall go to live with another person, a service of 40 days with such person, before the term of the apprenticeship expires, will gain a settlement. *Rex* v. *Stockland.* 1 *Doug.* 70, 71.

Though an apprentice is not strictly assignable, nor transmissible, yet, if he continue with an assignee or a personal representative of his master, with the consent of all parties, and his own, that will be a continuation of the apprenticeship to the effect of gaining a settlement. *Ib.*

23 A parish apprentice may be turned over from *A.* to *B.* and from *B.* to *C.*, and shall gain a settlement where he served the last 40 days. *The Parish of Austwick and Clapham.* 1 *Wils.* 158.

24 A person occupying lands within a parish, is compellable to receive a parish apprentice, though he do not reside within such parish. *R.* v. *Clapp.* 3 *Term Rep.* 107.

25 And if several persons hold lands in partnership, in the parish of *A.*, some of whom reside on such lands and the others in another parish, the latter, as well as the former are liable to take parish apprentices in *A. Rex* v. *J. Barwick.* 7 *Term Rep.* 33.

26 So, although it is enacted by stat. 20 G. 3, c. 36, relative to the binding of poor apprentices within particular incorporated districts, that no person, shall be bound to receive

any such apprentice, unless he be an inhabitant and occupier in the parish where such child lives, it is not necessary that the master should actually reside in the parish; if he be an occupier there it is sufficient; for *inhabitant* and *occupier* are for this purpose synonimous terms. *R.* v. *Tunstead and Happing Hundreds*, 3 *Term Rep.* 523.

27 An indenture of a parish apprentice assented to by two justices *separately* is void, and gives no settlement. *Rex* v. *Hamstall Ridgware*. 3 *Term Rep.* 380.

28 But the assent of two magistrates is sufficiently signified by one of them first signing alone and being afterwards present when the other signs. *Rex* v. *Winwick Inhab.* 8 *Term Rep.* 454.

29 If a poor boy be bound apprentice by the parish officers, with the consent of two justices of the county to a master residing in a different parish and county, and all the parties (except the apprentice) sign the indenture, the apprentice will gain a settlement in the parish of the master by residing there 40 days under the indenture. *Rex* v. *St. Nicholas, Nottingham.* 2 *Term Rep.* 726.

30 Service under indentures of apprenticeship, not stamped, gives no settlement. *R.* v. *Edgworth.* 3 *Term Rep.* 353; and see 4 *Term Rep.* 218.

31 Nor does service under an unstamped agreement of apprenticeship. *Rex* v. *Ditchingham Inhabitants.* 4 *Term Rep.* 769.

32 An agreement for the assignment of an apprentice from one master to another must also be stamped by statute 23 G. 3, c. 58. 6 *Term Rep.* 452.

33 Where a sum agreed to be given with an apprentice was five guineas, which was inserted in the indenture, and the duty paid accordingly, by statute 8 *Ann* c. 9; held well, though in fact only four guineas were paid; for the *full sum received, given, paid, agreed, or contracted for*, as required by the act, was inserted, and the duty paid for it; and the stamp used was of the same description, and the duty appropriated to the same fund, as if four guineas only had been inserted and paid for, supposing that would have sufficed. *Rex* v. *Keynsham Inhab.* 5 *East*, 309.

34 Money given by the parish officers in the case of a voluntary binding, as the consideration of taking an apprentice, is not liable to the stamp duty imposed by statute 8 *Ann* c. 9, s. 35, for it comes within the exception to it, as being *at the public charge of the parish.* 4 *Term Rep.* 196.

35 Neither is any duty payable for any consideration-money under s. 35, of that act, (or thing actually given or contracted to be given under s. 45,) unless it be given to, or to the use of, the master or mistress of the apprentice. 4 *Term Rep.* 196, 732.

36 If the friends of an apprentice covenant to maintain him, and provide him with clothes, this is not such a benefit as is liable to the duty imposed by statute 8 *Ann* c. 9, s. 45. *Rex* v. *Leighton Inhab.* 4 *Term Rep.* 732.

37 And consequently a settlement may be gained by serving 40 days under an indenture of apprenticeship, containing such a covenant, although no additional duty be paid for it. *Ibid.*

38 A master stipulating for 4d. out of every 1s. of the earnings of his apprentice is no benefit to him within the statute of *Anne*, for which an additional duty is to be paid, being by law entitled to the whole. *Rex* v. *Wantage Inhab.* 1 *East*, 601.

39 Where the apprentice covenanted in the indentures to provide for himself meat, drink, lodging, and physic in sickness, during the term, for which benefit to the master no additional duty was paid under statute 8 *Ann* c. 9, s. 45, the indentures were nevertheless held good, and a settlement was gained under them; it not appearing whether certain

weekly payments, which the master covenanted to make to the apprentice during the term, were not an equivalent. *Rex* v. *Walton in Le Dale.* 3 *Term Rep.* 515.

40 If *A.* serve seven years as an apprentice, and there be no indenture, he cannot gain a settlement either as an apprentice or as a yearly servant. *Rex* v. *Margram Inhab.* 5 *Term Rep.* 153.

41 It is a general rule that a defective contract of apprenticeship cannot be converted into a contract of hiring and service, so as to give the apprentice a settlement as a yearly servant by serving under it. Whether a contract be a contract of apprenticeship, or of hiring and service, must depend on the intention of the parties, which is to be collected from the whole of their agreement. A contract of apprenticeship may be formed without using the term "apprentice." *Rex* v. *Laindon Inhab.* 3 *Term Reports*, 379.

42 Where a pauper agreed with a weaver to serve him for a year and a half, and the master was *to teach him to weave*, and the pauper was to have half his earnings, and find himself in every thing; under which contract the pauper served his master for above a year; held, that he thereby gained a settlement as by hiring and service; it being the apparent intention of the parties to create the relation of master and *servant*, and not that of master and *apprentice*. *Rex* v. *Eccleston Inhab.* 2 *East*, 298.

43 To establish a settlement by apprenticeship it was proved that the indenture was of two parts, that one had been destroyed, that the other had come to the hands of *A.*, who, when asked for it, said he could not find it, but *A.* was not supœnaed to give evidence; and upon that ground the evidence offered was deemed insufficient to establish the apprenticeship. *Rex* v. *Castleton Inhabitan.* 6 *Term Rep.* 236.

44 Serving forty days under an indenture of apprenticeship to an infant will give a settlement. *Rex* v. *St. Petrox, Dartmouth.* 4 *Term Rep.* 196.

45 The latter part of the service of an apprentice may be joined to the former, notwithstanding an intervening service. 1 *Term Rep.* 281.

46 If an apprentice live with his master forty days in *A.*, then forty days in *B.*, and then one day in *A.*, he is settled in *A.* *Rex* v. *Brighthelmstone Inhab.* 5 *Term Rep.* 188.

47 An apprentice cannot gain a settlement in a different parish by serving another master unless there be an express consent of the original master to the particular service; a mere recommendation is not sufficient. *Rex* v. *Sandford.* 1 *Term Rep.* 281; and 6 *Term Rep.* 452.

48 So the mere *knowledge* of the master of the apprentice serving another person, without a consent to the particular individual, is not sufficient. 3 *Term Rep.* 605.

49 If the agreement between the first and second master, expressing such consent, cannot be received in evidence, (because not stamped,) parol evidence of the agreement ought not to be admitted. *Rex* v. *St. Paul's Bedford.* 6 *Term Rep.* 452.

50 Where a master, after giving his apprentice leave to get another master, *recommended to him to go to a particular person* in the same business, and make an agreement with him *for his own good*, which he accordingly did, and served his second master two months before his indentures were given up to him by his first master, such service with the second master gained a settlement. *Rex* v. *Holy Trinity in the Minories.* 3 *Term Rep.* 605.

51 An apprentice agreed verbally with his master to purchase the rest of his time, and that the indentures should remain with the master till payment of the sum stipulated, part of which only was paid; before the expiration of the time he

served another man at the recommendation of his original master, above 40 days; this was holden to enure as a service under the indentures. *Rex* v. *Chipping Warden Inhab.* 8 *Term Rep.* 108.

52 Where there has been such an agreement between the master and the apprentice to give up the indentures, as that to an action of covenant brought by the former, the latter could plead the matter in bar; or so as to enable the apprentice to bring *trover* or detinue for the indentures on the master's refusing to deliver them up; the indentures are considered as cancelled, for the purpose of enabling the apprentice to gain a settlement by hiring and service, though the indentures still subsist in fact. *R.* v. *Harberton.* 1 *Term Rep.* 139.

53 But when indentures of apprenticeship still subsist in point of law, and the pauper has served another master under an idea that they were relinquished, no settlement is gained by such service, either as an apprentice, or as an hired servant. *Rex* v. *Sandford.* 1 *Term Rep.* 281.

54 Where the master of an apprentice told him "that he had no further employment for him, and he might go where he pleased;" and the apprentice hearing of another master, was going to him, and being met by his original master, and asked where he was going, answered that he was going to *U.*, to which the master replied, "*he might go there or where he pleased;*" held, this was not such a particular assent of the original master to the service with *U.* as would enable the apprentice thereby to gain a settlement, though the indentures were not given up or cancelled. *Rex* v. *Crediton Inhabitants.* 1 *East*, 59.

55 An apprentice offered his master a guinea "to let him off," to which the master agreed, and was also to give him a suit of clothes when the guinea was paid, but the indentures were not delivered up or cancelled. The guinea not being paid, the indentures still subsisted in law, and a settlement may be gained by serving another master with the consent of the first. The sessions ought properly to find the fact of such consent, and not merely evidence of it: but having found that on application by the apprentice to his original master for leave to serve one *B.*, who would not take him without the master said "he might go with all his heart, and that it would be a good thing for him to learn the trade:" this was holden sufficient evidence to warrant the conclusion of the sessions, that the original master had consented to the particular service. *Rex* v. *Shebbear Inhabitants.* 1 *East*, 73.

56 The pauper, an apprentice, being about to marry, told his master that he wished to provide and work for himself, to which the master consented, and said he might do the best he could for himself; but nothing was said about the indentures, and they were not in fact delivered up or cancelled; the pauper afterwards engaged to work with another master, who told the original master, that he had got the pauper at work, to which the original master answered, "I am glad of it, he was a bad lad, and I could make nothing of him;" held, this was not such a consent to the particular service as would confer a settlement in the parish where the pauper then lived with the second master. *Rex* v. *St. Helen Stonegate Inhabitants.* 1 *East*, 285.

57 A contract under seal and stamped, to serve another for three years, at so much *per* week, the master agreeing to learn the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship. And at any rate the pauper having served under it for more than a year gained a settlement either as an ap-

prentice or as a hired servant. *Rex* v. *Rainham Inhab.* 1 *East*, 531.

58 Supposing an infant, who binds himself an apprentice, may put an end to the apprenticeship at his election, yet he does not put an end to it by leaving the master's service and entering into the king's service. *Rex* v. *Hindringham Inhab.* 6 *Term Rep.* 557.

59 In such a case the indentures continue in force for the term, and no settlement can be gained during that term by hiring and service. 6 *Term Rep.* 557.

60 Whether an infant can put an end to the apprenticeship, it being a contract for his benefit? *Qu.* 6 *Term Rep.* 558; *and Askcroft* v. *Bertles.* 6 *Term Rep.* 652.

61 The residence of an apprentice with his grandmother in a different parish from his master on account of illness, though with the consent of the master, is not referable to the apprenticeship so as to gain him a settlement in such third parish. *The King* v. *The Inhabitants of Bramby-in-the Marsh.* 7 *East*, 381.

62 An apprentice to a ship owner living at *A.* gains a settlement by residing on board his master's ship for 40 days in *B.* while the ship was staying and trading there in the course of his master's trade and employ upon a coasting voyage. And if the apprentice afterwards, upon the bankruptcy of his master, return to *A.* where he formerly resided with his master as at his home, and finding that his master had absconded, live there with a relation without doing any further service there for his master; such residence though for more than 40 days before his apprenticeship expired, will not regain him a settlement in *A.* *The King* v. *The Inhabitants of Topsham.* 7 *East*, 466.

63 Where the master and father of the boy agreed, under seal, that the master should teach the son the art and mistery of weaving for five years, and find utensils, and that the son should receive half his earning, and the master the other half; under which the boy served out the time as an apprentice; held that this agreement between the father and master (to which the son was no party) not binding the son, or the father for him to any service to the master; but the son's service in fact being merely voluntary; was no apprenticeship in point of law; and consequently no settlement could be gained by the son serving his master under such contract. *The King* v. *The Inhabitants of Cranford.* 8 *East*, 26.

64 An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father in law and the master, though with her consent, does not constitute her an apprentice; and consequently no settlement can be gained by her under such indenture. *Rex* v. *The Inhabitants of Ripon.* 9 *East*, 295.

II. *By Birth, or Derivative.*

1 Bastard, born pending an illegal order of removal from *A.* is settled in *A.* *Between the Inhabitants of Much Waltham and Peram in Essex.* 2 *Salk.* 474.

2 Listing as a soldier, such a separation from the father's family that the son does not afterwards change his derivative settlement, though the father changes his own. *Rex* v. *Walpole St. Peter's.* 1 *Black.* 669.

3 When a man purchases for less than 30*l.* and continues to reside thereon for 36 years, the settlement of his children born during such residence, if they leave the father, is at the father's prior settlement. *Over Norton* v. *Salford.* 1 *Black.* 433 and 455.

4 Bastard settled where born. *The Inhab. of St. Nicholas Guildford in Surrey, and Hillington in Sussex.* 2 *Salk.* 484.

5 Where the husband is settled, the wife and children must likewise be

settled there. *Rex* v. *Inhabitants of Oaking.* 3 *Salk.* 256.

6 Bastard born in *B.* pending an illegal order of removal of the mother from *A.* to *B.* (which is after reversed,) is settled in *A. Wood's Case.* 1 *Salk.* 121.

7 Father settled at *A.* removed to *B.* with his children, and gains a new settlement there; and so do the children, though under the age of seven years. *The Inhabitants of the Parishes of Cumner and Milton in the County of Berks.* 2 *Salk.* 528.

8 If a son grown up removes with his father as part of his family, he gains a new settlement with the father; but if the father afterwards removes and leaves him behind, he gains no settlement in this last place. *The Parish of Eastwoodhey* v. *Westwoodhey.* 1 *Str.* 438.

9 If the widow gains a settlement after her husbands death, such of her children as have never been emancipated will be settled at the place in which she gains such settlement, and not in the place in which the husband was settled. *Between the Parishes of Paulsbury and Wooden.* 2 *Str.* 746. 2 *L. Raym.* 1473.

10 Where parents are dead the children must be settled where born. *Lackington* v. *St. Austin's Parish.* 3 *Salk.* 257.

11 The bastard of a certificate person is settled where born. *Between the Parishes of Lydlinch and Hilton.* 2 *Str.* 1168.

12 The legitimate child of persons having no settlement is settled where it is born, and may be removed thither, unless that parish can shew that it is settled elsewhere. *The Hamlet of Spitalfields* v. *The Parish of St. Andrews, Holborn.* 1 *L. Raym.* 567.

13 A certificate man has a son born, who lives till 20 years old, and then serves a year; this gains the son no settlement. *The King* v. *The Parish of Bray.* 1 *Wils.* 121.

14 A bastard born pending an illegal order for removing the mother thither, it is no settlement there. *Inter Inhabitant. Paroch. Westbury and Costham.* 1 *Salk.* 121.

15 Children born where the father is not settled may be sent to his settlement after his death. *The Parishes of St. Giles in Reading and Eversley Blackwater in Berks.* 1 *Str.* 580.

16 A legitimate child obtains a settlement by birth in the place in which it is born, if its parents have no settlement.

But if the father had a settlement when the child was born, the child will be settled by parentage in the parish to which its father belongs, although the father resided elsewhere at the time of the birth, and for the whole of his life afterwards. *St. Giles's in Reading* v. *Eversley, Blackwater.* 2 *L. Raym.* 1332. 1 *Str.* 580.

17 Bastard born at *A.* pending an order of removal from *B.* afterwards reversed, is settled at *B. The Parishes of Westbury and Coston.* 2 *Salk.* 532.

18 Where a woman with child of a bastard is removed from *A.* to *B.* and privately returns to *A.* and is there delivered, the settlement of the bastard is in *B. The Parishes of Landinaboe and Much Birch.* 1 *Str.* 476.

19 Bastard is settled in the place where born, unless by fraud she was delivered there. *Masters* v. *Child.* 3 *Salk.* 66.

20 A bastard, living with its mother for nurture at the place of her settlement, must be maintained by its own parish, and not by the mother's. *Simpson* v. *Johnson.* 1 *Doug.* 7 to 9.

21 The place of birth is *prima facie* the place of settlement. *Rex* v. *Heaton Norris, Inhab.* 6 *Term Rep.* 653.

22 The sessions having decided in favour of a settlement in *A.* by which the pauper's father was proved to have been *relieved while resident in another parish* 40 years ago, and before the pauper's birth; and the

only evidence to oppose this being that of the pauper's own birth in *B.* the court of K. B. confirmed the order of sessions on a case reserved. *Rex* v. *Wakefield Inhab.* 5 *East*, 385.

23 Where a certificate was granted to a pauper *and his wife*, which latter appeared afterwards to have had a former husband living at the time, and a child was born during the cohabitation of the pauper and his supposed wife in the certificated parish, and was baptized as their child; this was held sufficient evidence of bastardy to settle the child where born. *Rex* v. *Lubbenham Inhabitants.* 4 *Term Rep.* 251.

24 The settlement of a child five years old, leaving the father's family, and living with different relations till ten, follows that of the father; if he has not gained any settlement in his own right. *Rex* v. *Offchurch.* 3 *Term Rep.* 114.

25 A child is not emancipated so as to lose the benefit of any settlement which his father may gain, till 21, or marriage, or till he has gained a settlement in his own right, or till he has contracted a relation inconsistent with the idea of his being part of his father's family. *Rex* v. *Witton cum Twambrookes.* 3 *Term Rep.* 355.

26 A son, of age, and married, continuing to live with his father, does not follow a settlement subsequently acquired by the father in another parish, to which the son also accompanied him as part in fact of his household. *Rex* v. *Everton Inhabitants.* 1 *East*, 526.

27 A drummer, under age, entered into the same militia in which his father was serjeant, and lived with his father, the latter receiving the son's pay; held, that a settlement gained by the father during such time was communicated to the son. *Rex* v. *Woburn Inhab.* 8 *Term Rep.* 479.

28 An adult who leaves her father's house, and goes into service, becomes thereby emancipated, and is not entitled to a settlement gained afterwards by the father. *Rex* v. *Roach Inhab.* 6 *Term Rep.* 247.

29 A son, sixteen years old, was bound apprentice in *A.* for four years, which he served, and never afterwards returned to his father's family; the indenture was void for want of a stamp, and the father in the mean time gained a settlement at *B.*; held, that the son was not settled in *A.* by the apprenticeship, and that he was not emancipated, but followed his father's settlement at *B.* *Rex* v. *Edgworth.* 3 *Term Rep.* 353; 4 *Term Rep.* 218.

30 Proof of the father's settlement is sufficient to establish the settlement of the son in the same parish, if nothing appear to contradict it. *Rex* v. *Stone Inhabitants.* 6 *Term Rep.* 56.

31 The settlement of a person attainted, acquired before the attainder, is communicated to his children born afterwards. *Rex* v. *St. Mary in Cardigan, Inhabitants.* 6 *Term Reports*, 116.

32 A settlement gained by a *Scotchman* some years after his son was emancipated by having left his family and enlisted in the army, is not communicated to the son; and it is immaterial whether the son had gained a settlement for himself or not. *Rex* v. *Stanwix Inhab.* 5 *Term Rep.* 670.

33 Before the revolution the settlement of a slave always followed that of his master. *Winchendon* v. *Hatfield.* 4 *Mass.* 123.

Slaves were not within the statutes relating to the warning of persons, in order to prevent their gaining a settlement; nor within the act of 7 G. 3, c. 3, which provides that no settlement shall be gained by residence. *Ibid.*

But when manumitted, they could acquire a settlement in their own right, and if they had resided a year in the town where they were manumitted, they could not then be warned out. *Ibid.*

34 Upon a father's gaining a new settlement, a child of full age voluntarily living with him does not gain such new settlement, within the statute of 1793, c. 34, s. 2, art. 2. *Springfield* v. *Wilbraham.* 4 *Mass.* 498.

35 Of the settlement of slaves. *Dighton* v. *Freetown.* 4 *Mass.* 539.

36 The question of settlement cannot be tried in an action, brought on a bond given to indemnify a town for the support of a bastard child; and the party is stopped by his bond from alleging that the place of settlement was in another town. *Falls and Smith, overseers, &c.* v. *Belknap.* 1 *Johns. Rep.* 486.

The surety of such indemnity bond given to save harmless the town, *from time to time thereafter,* is holden, after the child was arrived at the age of 21 years, and as long as it shall continue chargeable. *Ibid.*

37 *S. W.* was born in the state of *Connecticut*, where she had a legal settlement, and on the 1st *May*, 1801, came to reside in the city of *New-York*, where she continued to reside in the capacity of a servant, until the 19th *January*, 1804, when she was delivered of a bastard child. She had not been bound as an apprentice, or servant, to any person. The overseers of the poor of the city of *New-York*, granted an order, charging the reputed father of the child with its maintenance, which order was confirmed by the *general sessions.* It was held, that the mother had no legal settlement in *New-York*, and that it was competent to the justices to grant the order of filiation. *Wynkoop* v. *Overseers of the poor of the City of New-York.* 3 *Johns. Rep.* 15.

It seems that where the mother of a bastard child had no legal settlement, the child acquires a settlement *by birth*, in the place it is born. *Ibid.*

38 Where a town is divided by an act of the legislature, into two towns, and the poor are also to be divided between the two, those who, afterwards, become paupers, are to be considered as settled in the town, within which they were respectively born, and not where they happened to reside, at the time of division. *Overseers of Washing* v. *Overseers of Stanford.* 3 *Johns. Rep.* 193.

III. *By or under Certificate.*

1 Certificate concludes the parish that gives it as to all facts therein mentioned. *The Parish of New Windsor* v. *White Waltham.* 1 *Str.* 186.

2 A certificated person having returned to the certifying parish, and remained there 18 years, a son who was born to him there, being hired, and serving for a year in the parish certified to, gains a settlement in that parish. *Rex* v. *Frampton.* 2 *Doug.* 418, 419.

3 Certificate concludes the parish giving it only against the parish to which it is given. *The Parishes of All-Saints and St. Giles in Northampton.* 2 *Salk.* 530.

4 A pauper's certificate signed by two justices witnesses, without stating their allowance, held void. *Between the Parishes of Horncastle and Boston.* 1 *Str.* 94.

5 When the son of a certificate man becomes independent of his father, he shall not follow his father's last settlement that he gained by purchase, but that from whence he came with his father by certificate. *The King* v. *The Parish of Bugden.* 4 *Wils.* 183.

6 Certificate concludes the parish giving it as to all the world. *The Inhabitants of the Parish of Honiton and St. Mary Axe.* 2 *Salk.* 535.

7 Certificate conclusive to the parish that gives. *Between the Parishes of Maidstone and Hedcome in Kent.* 2 *Str.* 1233.

8 A certificate given to a pauper is an indemnity to the parish to which the pauper is going, from the cou-

sequences of permitting him to reside there. *Rex* v. *Newington Inhabitants*. 1 *Term Rep.* 356.

9 An allowance of a certificate of a settlement, as having been duly executed, written in the margin of the certificate, and signed by two justices is alone sufficient proof of the certificate, where such certificate is above thirty years old, notwithstanding the allowance does not certify the affidavit of one of the witnesses as to the due execution and attestation of the certificate according to statute 8 G. 2, c. 29. *Rex* v. *Farringdon Inhab.* 2 *Term Rep.* 466.

10 *Qu.* Whether an allowance of a certificate written in the margin and signed by two justices, which allowance does not certify any affidavit made by one of the witnesses according to statute 8 G. 2, c. 29, can be connected with a writing on the other side of the same paper, not signed by the justices, certifying that such an affidavit was made, so as to amount to proof of such certificate within the provisions of stat. 8 G. 2, c. 29. 2 *Term Rep.* 466.

11 The parties producing, on an appeal at the sessions, a parish certificate of thirty years' date, need not give any account of it; the bare production of it is sufficient. *Rex* v. *Ryton Inhab.* 5 *Term Rep.* 259.

12 A certificate, promising to receive the paupers when *requested*, means only when they shall be *legally* requested, namely, by two justices when the paupers become chargeable. 3 *Term Rep.* 44.

13 If it meant to receive them before they became chargeable, it would be void under the statute 8 and 9 W. 3, c. 30; for a certificate is only binding when it is conformable to that statute. 3 *Term Rep.* 44.

14 A certificate must be signed by a majority of the parish officers *de facto*, and must be directed to one parish in particular. *Rex* v. *Wymondham Inhab.* 6 *Term Rep.* 552.

15 But it has since been held, that a certificate directed to the parish of *A.* or any other in *C.* will operate upon delivery to the parish of *B.* which is also in *C.*; and that by the statute 8 and 9 W. 3, c. 30, a certificate need not be directed to any particular parish. *R.* v. *Lillington.* 1 *East*, 438.

16 An appointment of one overseer alone for a township is bad in law; the stat. 13 and 14 Car. 2, c. 12, requiring at least two; and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein; such certificate not being made pursuant to the statute 8 and 9 W. 3, c. 30, which requires it to be made "by the churchwardens and overseers, or the major part, or by the overseers, where there are no churchwardens." *Rex* v. *Clifton Inhabitants* 2 *East*, 168.

17 On a settlement case, the court will not inquire into the validity of the titles of the officers who signed the certificate. 6 *Term Rep.* 552.

18 An order of removal, adjudging that the pauper was settled at *A.* *by virtue of a certificate*, was confirmed at the sessions on the merits; on its being stated by the sessions, according to direction from the court, that the certificate was not signed by a majority of the churchwardens and overseers of *A.*, this court quashed the orders. *Rex* v. *Margam.* 1 *Term Rep.* 775.

19 The parish of *A.* consisted of several hamlets, having separate churchwardens and overseers; and a certificate having been granted by some of them, describing themselves as officers of *the parish at large*, evidence was admitted to shew that they were the officers of the hamlet in which the pauper was settled; for such evidence does not contradict, it only explains the certificate. *Rex* v. *Samborn.* 3 *Term Rep.* 609.

20 A certificate granted under statute 8 and 9 W. 3, c. 30, to the head of

a family in general, extends to all his children living with him. *Rex* v. *Storrington Inhabitants.* 7 *Term Rep.* 136; *and see* 4 *Term Rep.* 797.

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21 But if the parties wish it, it may be so framed as to exclude a son of the age of fourteen, who maintains himself by his own labour. 7 *Term Rep.* 136.

22 Such certificate does not extend to illegitimate children. *Rex* v. *Mathon Inhab.* 7 *Term Rep.*, 361.

23 Nor to grandchildren; the word *family* extends only to those who live under the father's roof. *Rex* v. *Darlington Inhab.* 4 *Term Reports*, 797.

24 Where the parish officers of *A.* engaged by a certificate to receive the certificated person, therein stated to be an unmarried woman, and the child of which she was stated to be then pregnant, and all other children, she might afterwards have, it was ruled that the certificate did not extend to an illegitimate child born several years afterwards. 7 *Term Rep.* 362.

25 If a certificate be granted to *A.* and to *B.*, *C.*, and *D.*, his children, by name, *B.*'s residence in the certificated parish is protected by it, although he afterwards marry and live separate from his father, not having gained any settlement or lived out of the certificated parish. *Rex* v. *Testerton Inhabitants.* 5 *Term Rep.* 258.

26 So under a certificate granted to *A.*, and to *B.* and *C.* his children by name, the residence of *B. and of his family* in the certificated parish is protected by it, and a son of *B.* (not having been emancipated) cannot gain a settlement in the certificated parish by hiring and service. *Rex* v. *Batheaston Inhab.* 8 *Term Rep.* 446.

27 When the son of a certificated person marries and lives in a house of his own, he ceases to be under the protection of the certificate, and may gain a settlement in the certificated parish by being rated. *Rex* v. *Heath Inhabitants.* 5 *Term Rep.* 583.

28 Where the son of a certificated person (not named in the certificate otherwise than under the general appellation of the father's family) marries and lives in a house of his own in the certificated parish, he ceases to be under the protection of the certificate as part of his father's family; and an apprentice may gain a settlement by serving such person in the certificated parish. *Rex* v. *Mortlake Inhabitants.* 6 *East*, 397.

29 A certificate extends to a wife married after it is granted; and no apprentice to such wife, after the husband's death can gain a settlement in the certificated parish by stat. 12 Ann. stat. 1, c. 18. *Rex* v. *Hampton Inhabitants.* 5 *Term Rep.* 266.

30 The son of a certificated person cannot gain a settlement in the certificated parish by apprenticeship, though the father, (to whom the certificate was given) died six months before the expiration of the apprenticeship. *Rex* v. *Alfreton Inhabitants.* 7 *Term Rep.* 471.

31 The apprentice to a master, living at *A.*, who has a certificate from *B.*, but not delivered to the parish officers of *A.* may gain a settlement by such apprenticeship. *Rex* v. *Wensley Inhabitants.* 5 *Term Rep.* 154.

32 If an apprentice to a certificated person be assigned to a second master in the same parish he cannot gain a settlement in that parish by serving the second master. *Rex* v. *Hinckley Inhabitants.* 4 *Term Rep.* 371.

33 A certificate granted by the parish of *A.* to the parish of *B.* acknowledging *C.* and *D. his wife* and their children to be their parishioners, is conclusive as between *A.* and *B.*, though *D.* were not the legal wife of *C.* *Rex* v. *Ullesthorpe Inhab.* 8 *Term Rep.* 465.

34 But such certificate is only *prima*

facie evidence as to others; and therefore where the parish of *A.* granted a certificate to the parish of *B.* acknowledging the pauper and his wife to be their parishioners, it was held to be competent to *A.* as between that parish and *C.* to shew that the woman supposed to be the pauper's wife had a former husband living, at the time of her marriage with the pauper. *Rex* v. *Lubbenham Inhab.* 4 *Term Rep.* 251.

35 A second certificate to a pauper discharges a former one given by the same parish. *Rex* v. *St. Peter, Derby.* 1 *Term Rep.* 218.

36 If a parish are desirous to get rid of a certificate, it is incumbent on them to shew clearly some matter in discharge thereof; and the court will not *presume* such discharge from other facts. *Rex* v. *Warblington.* 1 *Term Rep.* 241.

37 A temporary absence for a particular purpose will not discharge a certificate. 1 *Term Rep.* 356.

38 But if the pauper quit the parish to which the certificate is given without any intention of returning, the certificate is at an end. 1 *Term Rep.* 356.

39 If a person, formerly settled at *A.*, receive a certificate from that parish while living on his own estate at *B.*, the certificate is discharged by his subsequent residence on his estate at *B.* *Rex* v. *Ufton.* 3 *Term Rep.* 251.

40 The infant son of a person living at *A.* under a certificate, served a year at *B.* (an extraparochial place) under a yearly hiring, and then returned to *A.* under twenty one, where he was hired and served a year; it was held that he gained no settlement in *A.* *Rex* v. *Collingborn-Ducis, Inhab.* 4 *Term Rep.* 199.

41 Where the son of a certificated person served a year under a yearly contract in the parish granting the certificate, and then returned under age to the father's house for a short time, and then served another year with another master under a yearly hiring in the certificated parish, held that he did not gain a settlement in the latter parish. *Rex* v. *Ingworth Inhab.* 8 *Term Rep.* 339.

42 Whether a certificate be abandoned by the head of the family returning to the certifying parish, leaving his children in the parish to which the certificate is granted? *Qu.* 4 *Term Rep.* 800, 801.

43 A certificate is not abandoned by a temporary absence of the certificated person; as where he goes to another parish on a visit, or on occasional business. *Rex* v. *St. Michael's, Coventry Inhabitants.* 5 *Term Rep.* 528.

44 But where he leaves the certificated parish with all his family, and takes up his residence in another parish, it is abandoned, though he again return to the certificated parish after an interval of two years. *Ibid.*

45 All the parishes in *Norwich* are consolidated by act of parliament for the purpose of maintaining their poor out of one joint fund, but as far as respects strangers they are distinct parishes; therefore a certificate granted to the parish of *A.* in *Norwich*, is discharged by the certificated person serving a year under a yearly hiring in the parish of *B.* in *Norwich*, though the certificating parish engage to receive the pauper when he shall become chargeable either to *A.* or to any other parish in *Norwich.* 6 *Term Rep.* 552.

46 The mutiny act enables two justices to take the examination of a soldier respecting his settlement, and directs them to give an attested copy of it to the soldier to be by him delivered to the commanding officer in order to be produced when required, and makes such attested copy evidence; it was held that no other attested copy of the original examination than that given to the soldier is evidence. *Rex* v. *Clayton-le-Moors.* 5 *Term Rep.* 704.

47 *Qu.* Whether such an original ex-

amination be admissible as evidence? *5 Term Rep.* 707, 708.

48 It was held so to be. *Rex* v. *Warley Inhab.* *6 Term Rep.* 534.

49 Where one of two *churchwardens* was also appointed *overseer* of the poor, a certificate of settlement signed by both is a nulity, and does not prevent an apprentice serving the certificated man in the certificated parish from gaining a settlement therein; for the certificate act 8 and 9 W. 3, c. 30, requires the certificate to be under the hands and seals of the churchwardens and *overseers* or the major part of them, or of the overseers where there are no churchwardens; and there must be at least two overseers at the time. *The King* v. *The Inhabitants of St. Margaret, Leicester.* 8 *East*, 332.

IV. *By Estate.*

1 Though part of the purchase-money is advanced by another, yet if there is no fraud a settlement may be gained on 9 G. 1, c. 7. *Between the parishes of Waddington and Tedford in Lincolnshire.* *2 Str.* 1013.

2 A mortgagor in possession gains a settlement by 40 days' residence. *The King* v. *St. Michael's East.* 2 *Doug.* 629.

So it should seem does a mortgagee in possession. *Ibid.*

3 Descent of a copyhold to a certificate man gives him a settlement. *The parish of Burclear* v. *Eastwoodhay.* 1 *Str.* 163.

4 Long possession is a settlement till the right is determined. *The parishes of Ashbrittle and Wyley.* 1 *Str.* 608.

5 The husband of an administratrix who is entitled as a *cestuy que* trust to a lease for years, is not removeable from such an estate, and therefore by a residence of 40 days gains a settlement. *Between the parishes of Mursley and Grandborough in Com. Bucks.* 1 *Str.* 97.

6 Allowing a debt in a purchase is good to make a purchase of 30*l.* value for gaining a settlement. *Between the parishes of Cotleigh and Stockland.* *2 Str.* 1162.

7 A certificate man gains a settlement by purchase. *Between the parishes of Deddington and Dunfrew.* *2 Str.* 1193.

8 A settlement is gained by living on his own estate, and remains after the estate is sold. *Between the parishes of St. Neots and St. Cleer.* 2 *Str.* 1116.

9 Subsequent improvements on a purchase are not part of the purchase-money, under the statute 9 G. 1; but a fine, or money borrowed on a mortgage of the premises, is part. *Dunchurch* v. *South Kilworth.* 1 *Black.* 596.

10 Pauper may be removed from a parish in which she has a freehold, not living thereon. *Ibid.* 1 *Black.* 598.

If a man who is insolvent has conveyed his estate to trustees, for the payment of his debts, and afterwards, before the trust is performed, gets fraudulently into possession, he will not gain a settlement by residing 40 days. *Rex* v. *St. Michael's.* 2 *Doug.* 630.

Persons entitled to administration or dower, who reside on the estate without administration granted or dower assigned, do not gain a settlement. *Ibid.*

Qu. If a sole next of kin would gain a settlement by residence before administration? *Ibid.*

A settlement may be gained by residence on a mere equitable estate. *Ibid.*

A mortgagor in possession gains a settlement. *Ibid.*

So it should seem does a mortgagee in possession. *Ibid.*

11 An estate being devised to trustees to be sold to pay debts and to divide the surplus, if any, between *A.* *B.* and *C.*, *A.* has an equitable interest in the estate, and by residing on it 40 days gains a settlement. *Rex* v. *Wivelingham.* 2 *Doug.* 767.

12 But a person, though solely entit-

led to administration, if the whole would not thereby have vested in him for his own use, does not gain a settlement by a residence of 40 days on premises held for a term of years determinable on lives. *Rex* v. *North Curry.* 2 *Doug.* 770, *n.*

Residence on an estate coming by devise, though under the value of 30l. gains a settlement; a devise not being a purchase within the meaning of 9 G. 1, c. 7. *Ibid.*

Residence on such an estate, though the devised interest is only equitable, discharges a certificate. *Ibid.*

13 Living in a parish where he has land gains a settlement. *The parish of Rislip and Harrow.* 2 *Salk.* 524.

14 Residence on an *equitable* estate will confer a settlement. 3 *Term Rep.* 117.

15 A voluntary gift of an estate, though under the value of 30l. will give a settlement, and this whether the donee be a certificated man or not. 1 *Term Rep.* 241.

A certificated man may gain a settlement by residing forty days on his own estate. *Ibid.*

R. v. *Cold Ashton Bur. S. C.* 1 *Term Rep.* 450.

16 A husband may gain a settlement by residing on an estate vested in trustees for the separate use of his wife. *Rex v. Offchurch.* 3 *Term Rep.* 114.

17 A pauper having a freehold estate in the parish of *A.*, in the occupation of a tenant to whom he had let it, was deemed to gain a settlement by residing thereon 40 days with the licence of his tenant for making some repairs; such residence being considered as equivalent to a residence in any other part of the parish. *Rex* v. *Houghton le Spring Inhab.* 1 *East*, 247.

18 A cottage leased for 99 years, determinable on lives, purchased by the pauper's wife before marriage, was in the lifetime of her first husband conveyed by them to a trustee in trust that he should by sale or mortgage raise 10l. (for the benefit of the parish by whom the family had been before relieved to that amount,) interest and charges and after payment of the same, in trust to re-assign the premises; the parties always continued in possession; and it did not appear whether the money were ever paid, or what was the value of the cottage. Held, that on the death of the first husband, the pauper who married the widow gained a settlement by residing forty days in the cottage, of which she had retained the possession. *Rex* v. *Edington Inhabitants.* 1 *East*, 288.

19 While the pauper resided in the parish of B. a freehold estate descended to his wife and her sisters, as coparceners, in the same parish; and in a month after, the pauper and his wife contracted to sell their share, but the conveyance was not actually executed for more than 40 days after their title accrued; held, that the pauper was thereby settled in *B.*, although the estate during all the time was in the occupation of another. *Rex* v. *Dorstone Inhab.* 1 *East*, 296.

20 Where a pauper purchased a leasehold tenement for less than 30l., and afterwards conveyed the whole term to one, in trust to let the premises, and out of the rents and profits to repay himself 10l. advanced thereon, and then to apply the rents and profits to the separate use of the pauper's wife during her life, and afterwards to the pauper's own use for life, if he survived her, and afterwards amongst their children; and the trustees suffered the pauper to continue to reside in the house above 40 days, till becoming chargeable to the parish he was removed; held, that he gained no settlement by such residence; for he had no immediate interest remaining in him at the time, but at most a doubtful and contingent future interest; it being uncertain whether the 10l. would ever be paid off, and even if

it were, that not giving him any right to reside upon the premises. *Rex* v. *Tarrant Launceston Inhab.* 3 *East*, 226.

21 Where a woman, on her marriage, with a copyholder of a manor, in which the widows of husbands dying seized are entitled to their freebench, gave a bond that the son of her intended husband by a former wife should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her, and after the death of the husband the widow delivered up the possession to the son according to the bond, he gained a settlement by residing on it 40 days. *Rex* v. *Lopen Inhab.* 2 *Term Rep.* 577.

22 The mortgagee of several houses, after recovering possession in ejectment, permitted the mortgagor to inhabit one of them *for a particular purpose:* the latter gained no settlement by such residence, for he was not in possession *as mortgagor*. *Rex* v. *Catherington Inhab.* 3 *Term Rep.* 771.

23 If *A.* residing on a cottage of his own, grant it by lease and release to *B.* in fee, in consideration of 36*l.* with a proviso "that *A.* shall live in, *and occupy* the said cottage with the appurtenances, as he had theretofore done, for life;" *B.* only takes a remainder after an estate for life in *A.*, and therefore has not such an interest during *A*'s. life as will enable him to gain a settlement by a residence on the estate. *Rex* v. *Eatington Inhab.* 4 *Term Rep.* 177.

Secus if there had not been the word "occupy" in the proviso. *Sembl. Ibid.*

The word "occupy" reserved the whole estate. *Ibid.*

24 The executor of a tenant from year to year of an estate under 10*l.* a year may gain a settlement by residing on it forty days, though he had not proved the will at the time. *Rex* v. *Stone Inhabitants.* 6 *Term Rep.* 295.

25 Where an estate has been enjoyed nearly twenty years without any interruption or claim, the court will not permit the title to the possession to be examined in a settlement case. *Rex* v. *Butterton Inhabitants.* 6 *Term Rep.* 554.

26 Where the pauper's father, upon his marriage, obtained from his father-in-law a spot of ground, though without any conveyance, upon which he built a house, and enjoyed it during his life, and it afterwards descended to his eldest son, who enjoyed it also (in the whole near twenty years.) without any interruption or claim from the donor or his heirs; it was held that the younger children of the person who built the house could not be removed from that parish. 6 *Term Rep.* 554.

27 *A.* agreed to give a cottage to his grandson on his marriage, but there was no conveyance; the grandson entered, fitted it up at his own expense, and lived in it several years; then the grandfather died intestate, leaving an only child (the mother of the grandson) who never entered on the cottage, or received or demanded any rent for it; afterwards the mother died, leaving a husband and an only son (the above-named grandson); it was held, that the husband was not tenant by the curtesy; that the son (the above-named grandson) was seized in fee; and consequently that he gained a settlement by residing on it 40 days. *R.* v. *Great Farringdon Inhab.* 6 *Term Rep.* 679.

28 There must be a seizin in fact in the wife, in order to make her husband tenant by the curtesy. *Ibid.*

29 A conveyance from a father to his son in consideration of *natural love and affection, and of* 10*l.* is not a purchase within the statute 9 G. 1, c. 7, and a residence upon it will give a settlement. *Rex* v. *Ufton.* 3 *Term Rep.* 251.

30 *Purchase* in that statute means for a "pecuniary consideration." 3 *Term Rep.* 251.

31 Where the consideration expressed in the deed of conveyance was 28l., under which the pauper claimed his settlement, *parol* evidence was admitted to prove that 30l. was the real consideration. *R.* v. *Scammonden.* 3 *Term Rep.* 474.

32 Taking a grant of a copyhold with 1s. fine, 1s. heriot, and 1s. rent is a purchase within the statute 9 G. 1. *Rex* v. *Warblington.* 1 *Term Rep.* 241.

33 Where *A.* contracted for the purchase of a copyhold estate for 39l., mortgaged to another person for 32l., and paid 7l., and was admited to the estate, subject to the mortgage, he did not gain a settlement by it under that statute. *Rex* v. *Mattingley Inhabitants.* 2 *Term Rep.* 12.

34 *A.* agreed to purchase a copyhold estate of *B.* for 60l., which was then mortgaged to *C.* for 30l.; he paid the 10l. and was admitted, subject to the mortgage interest in *C.*; afterwards he borrowed 50l. of *D.* to pay off *C*'s. mortgage, and on *C*'s. mortgage being satisfied, he mortgaged the estate to *D.* for 50l; it was held, that *A.* gained a settlement by residing 40 days on the estate. *Rex* v. *Chailey Inhabitants.* 6 *Term Rep.* 755.

35 A *sole* next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing 40 days in the same parish after the intestate's death, before administration granted to her. And it matters not that the widow of the intestate survived him, if she died afterwards without having taken out letters of administration, leaving the other sole next of kin to the intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only eighteen days before the next of kin parted with her interest in the leasehold; so as to connect a residence of those 18 days with a residence by such next of kin in the same parish for more than 40 days, after the deaths of the intestate and his widow, before such administration granted. *The King* v. *The Inhab. of Horsley.* 8 *East*, 405.

36 A settlement was gained by two years occupancy of a freehold, under the statute of 1789, c. 14, although the occupant was warned to depart within the two years. *Salem* v. *Andover.* 3 *Mass.* 436.

37 A seizin of a freehold estate in right of his wife is sufficient to give one a settlement under the statute of 1789, c. 14. *Windham* v. *Portland.* 4 *Mass.* 384.

38 No settlement could be gained in any town under the statute by residence and payment of taxes for five years; the statute not having continued so long in force. *Ibid.*

39 If one, who has a freehold, or estate of inheritance of a clear yearly income of more than ten dollars, by which, and dwelling in the town where it lies for three years, he would gain a settlement, mortgage it in fee to secure a sum, the interest of which, being deducted from the annual income, reduces the income below ten dollars, within the three years, he gains no settlement. *The Inhab. of Groton* v. *The Inhab. of Boxborough.* 6 *Mass.* 50.

40 The personal occupation of lands, required by the statute of 1789, includes an occupation by others under the direction and controul of the owner. *Granby* v. *Amherst.* 7 *Mass.* 1.

But lands leased are not within the statute. *Ibid.*

A seizin and occupation by a minor gave a settlement by that statute, although his lands were in the care of his guardian. *Ibid.*

But by the statute of 1793, c. 34, a freeholder, to gain a settlement, must be of full age. *Ibid.*

V. *By Hiring & Service.*

1 Servant removing with his master, in his second year, gains a settlement, although there was no new hiring. *Between the parishes of Croscombe and St. Cuthbert in Wells.* 2 *Str.* 1240.

2 Turning the servant out of doors before the end of the year doth not prevent the settlement *The Parishes of Eastland and Westhorsely.* 1 *Str.* 526.

3 Hired servant is settled where the service is. *St. Peter Oxon,* v. *Chipping Wicomb, Bucks.* 1 *Str.* 528.

4 A servant, before 3 and 4 *W. and M.* needed not be hired for 40 days. *The King* v. *Inhabitantes de Portsmouth.* 2 *Str.* 746.

5 If the master carries his servant on a visit and stays 40 days, the servant gains a settlement. *The King* v. *Inhab. of St. Peter in the county of Oxon.* 1 *Str.* 524.

6 Sickness or absence of servant for part of the time, does not prevent the settlement. *The King* v. *Inhab. of Pe Islip.* 1 *Str.* 423.

7 Agreement to part on a month's notice does not reduce it under a hiring for a year. *Between the parishes of Atherton and Barton.* 2 *Str.* 1182.

8 Connected service for a year, although part of it not under the hiring for a year, gives a settlement. *Between the parishes of Hanmer in the county of Flint, and Ellesmere in the county of Salop.* 2 *Str.* 878.

9 The son of a certificate man gains no settlement by hiring and service. *The King* v. *The Inhab. of Sherborne.* 2 *Str.* 1165.

10 Where there is an hiring for a year, and a service for part to a stranger, yet if there be no dissolution of the first contract, it is a settlement. *The King* v. *Inhabitantes de Ivinghoe in Com. Bucks.* 1 *Str.* 90.

11 Hiring for a year to work by the piece gains a settlement. *Between the parishes of King's Norton and Cambden in Gloucestershire.* 2 *Str.* 1139.

12 Several hirings and services for 11 months give no settlement. *The King* v. *Inhabitantes de Haughton.* 1 *Str.* 83.

13 When a hiring, on the face of it, necessarily appears to be for less than 365 days, no usage to consider the time specified in the hiring as a year, will make it sufficient for the purpose of gaining a settlement. *R.* v. *Hanwood.* 2 *Doug.* 439.

But a hiring for a year from *Whitsuntide* to *Whitsuntide*, if such hiring is according to the usage of the country, is sufficient, although the space of time should be less than a year. *Ibid.*

14 When a servant has resided part of the year in one parish, and part in another, at different intervals, making, when added, more than 40 days in each, his settlement is in the parish where he slept the last night. *Rex* v. *Hulland.* 2 *Doug.* 657, 658. *Rex* v. *Iveston.* 2 *Doug.* 658, *n.*

15 A militia man being hired for a year, with an express agreement that he shall be absent on duty for a month, and, in lieu thereof, serve a month over the year, gains a settlement, without serving the additional month. *The King* v. *Winchcomb.* 1 *Doug.* 391.

16 Hiring for a quarter, and to stay the year if agreeable to each, and service for a year, a settlement. *Between the parishes of Lidney and Stroud in Gloucester.* 2 *Str.* 950.

17 A hiring by the year to work by the piece, with an implied liberty, from the usage of the place, to be absent when the servant pleases, but not to work for any other master, and service under it, are sufficient, though the servant may have absented himself at different times in the course of the year. *The King* v. *Birmingham.* 1 *Doug.* 333.

18 Two services under different hirings may be tacked together, so as to make a sufficient service for a year, even when there has been an

interruption between them, and an absence from the master's house for part of a day. *The King* v. *Ellesfield.* 1 *Doug.* 310, *n.*

19 A hiring on the day after *Michaelmas*, to serve till the *Michaelmas* following, is sufficient, "till *Michaelmas*" being inclusive. *The King* v. *Syderton.* 2 *Doug.* 441, *& n.*

20 Going away twelve days before the end of the year, prevents a settlement. *Between the parishes of Seaford and Castle Church.* 2 *Str.* 1022.

21 An order to common intent is good till disproved. *The parishes of Ratcliffe Culy and Exall.* 1 *Str.* 211.

22 Parish hiring from statute fair to statute fair, seems a good hiring to gain a settlement. *Anon. Lofft*, 54.

23 A hired servant is settled where the service is. *Between the parishes of Bishops Hatfield and St. Peter's in St. Albans.* 2 *Str.* 794.

24 Absence of a servant by the master's permission, does not prevent a settlement. *Between the parishes of Beccles and Leowstoff in Suffolk.* 2 *Str.* 1207.

25 Absence, through sickness, from a service at the end of a year, is no obstruction to the servant's settlement. *Christchurch* v. *Bethnal Green.* 1 *Black.* 214.

26 If there is hiring for a year, and service for part of that year, in the parish of *A.* and before the end of the year the servant removes, with the master, to the parish of *B.*; serves out the year there, is hired to the same master for another year with any increase of wages, and serves several months longer in *B.* without an interval, he gains a settlement in *B.* *Rex* v. *Underbarrow.* 1 *Doug.* 309.

27 Servant going to sea with his master's leave, and finding another to do his work, is settled. *Between the parishes of St. Peter in Sandwich and Goolaston in Kent.* 2 *Str.* 1232.

28 Serving out the year with an executor in another parish is a settlement there. *Between the parishes of Ladock and St. Ennidere.* 2 *Str.* 1164.

29 There must be a hiring and service for a year, either absolute or conditional, to gain a settlement. *The parishes of Tetbury and Ham.* 1 *Wils.* 807.

30 There must be a complete hiring and service for a year to gain a settlement. *The parish of Coombe* v. *Westwoodhay.* 1 *Str.* 143.

31 Being hired to work by the piece, or grose, and continuing five years upon that contract, gains no settlement. *Trinity* v. *St. Peter's Dorchester.* 1 *Black.* 443.

32 A service under different hirings for a year confers a settlement, if any of those hirings was for a year. The sessions is not bound to make any order upon an appeal. *Inhab. of South-Molton in Suffolk.* 1 *L. Raym.* 426.

33 Two several hirings for half a year, and service for a year, not sufficient to gain a settlement. *The Inhabitants of the parish of Dunsford and Ridgwick.* 2 *Salk.* 535.

34 The contract of hiring, in order to gain a settlement, cannot be presumed. *The King* v. *Weyhill.* 1 *Black.* 206.

35 Unmarried person, hired for a year, marrying before the year is expired, cannot be removed, and, performing the service, gains a settlement. *The parishes of Farringdon in Berks and Witty in Oxfordshire.* 2 *Salk.* 527.

36 A marriage is void, and no settlement gained under it, if celebrated in a chappel erected since 26 G. 2, (unless cured by 21 G. 3, c. 53,) although marriages *de facto* may have been frequently celebrated there. *Rex* v. *Northfield.* 3 *Doug.* 659, *to* 661.

37 Where the service was for more than a year, though not upon one contract, yet it is a settlement. *Bayly's Case.* 3 *Salk.* 257.

38 Husband of a woman, who, when *sole* had purchased for less than 30*l.* gains a settlement by marrying her,

and living thereon; and then communicates that settlement to his wife. *Ilmington* v. *Mickleton.* 1 *Black.* 598.

39 Clandestine marriage of minors, void as to parish settlement. *Chinham* v. *Preston.* 1 *Black.* 192.

40 No occasion to shew the banns actually published, or the marriage-register regularly signed, to establish a marriage in respect of a parish settlement. *St. Devereux* v. *Much Dew-Church.* 1 *Black.* 367.

41 Apprentice assigned to *A.*, and going to live with *B.* on condition to pay *A.* a guinea a year, gains a settlement by the first 40 days' service with *B.* *The King* v. *Tavistock.* 1 *Black.* 635.

42 A service for a year uninterruptedly will confer a settlement, if any of those hirings was for a year. *The King* v. *Inhabitants of Aynhoe.* 2 *L. Raym.* 1511.

43 Hiring and service from the day after old *Martinmas-day* until the old *Martinmas-day* following, is sufficient to give a settlement. *R.* v. *Skiplam.* 1 *Term Rep.* 490.

44 Under a hiring from *Whitsuntide* to *Whitsuntide*, a service of 365 days, though less than the period of the contract in the particular year, is sufficient to confer a settlement. *R.* v. *Ulverstone Inhab.* 7 *Term Rep.* 564.

45 A hiring three days after *Michaelmas till* the *Michaelmas* following in leap-year, together with a service till the day after *Michaelmas day*, making 365 days, will not give a settlement. *Rex* v. *Ackley.* 3 *Term Rep.* 250.

46 An hiring at so much *per* week is not an implied hiring for a year. *Rex* v. *Newton Toney.* 2 *Term Rep.* 453; and *Rex* v. *Odiham.* 2 *Term Rep.* 622.

47 If there be any thing in the contract to shew that the hiring was intended to be for a year, there a reservation of weekly wages will not control that hiring. 2 *Term Rep.* 453.

48 But if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring. *Ibid.*

49 A hiring at so much a week, meat, drink, washing, and lodging, and to part on a week's notice by either party, will not warrant a conclusion of a general hiring: though the servant continued six years with the master, and the wages were raised during the period; and therefore no settlement can be gained under such hiring and service. *Rex* v. *Hanbury Inhab.* 2 *East*, 423.

50 Where nothing is said in a contract of hiring about time but a reservation of *weekly* wages, is a *weekly hiring* only. Therefore where the contract was for the servant to live with his master, the latter finding him board and loding, and *paying him 2s. 6d. per week*, no settlement could be gained by service for more than a year under such contract. *Rex* v. *Pucklechurch Inhab.* 5 *East*, 382.

51 Service for a week under an hiring "at 3s. per week the year round," with liberty to go on a fortnight's notice, will give a settlement. *Rex* v. *Birdbrooke Inhab.* 4 *Term Rep.* 245.

52 A hiring to serve for 3s. 9d. per week, with the liberty of parting on a month's notice, is a general hiring; and the pauper serving a year under it gains a settlement. *Rex* v. *Hampreston Inhabitants.* 5 *Term Rep.* 205.

53 A service under a hiring by the week (the servant boarding and lodging himself,) nothing being said about Sunday, but the servant working on that day occasionally, when asked by his master, without additional wages, though he sometimes received victuals, may be joined with service under a yearly hiring as a menial servant, so as to confer a settlement by hiring and service for a year. *Rex* v. *Sutton Inhab.* 1 *East*, 656.

54 An agreement by a daughter to live with her father and to do the offices of a servant for a year for her board and lodging and other perquisites, is a good hiring for a year, though the daughter is to be at liberty to earn what she can by her labour, and a service under it will be sufficient to gain a settlement. *Rex* v. *Chertsey Inhabitants.* 2 *Term Rep.* 37.

55 The pauper, having lived with his uncle on charity, was afterwards hired as a yearly servant by another person, whom he accordingly served; at the expiration of which he returned to his uncle on an invitation from him, "that if he would come *and live with him as before*, he would make it better for him than a common service;" and lived with him several years in the parish of *A.* performing the work of a servant in husbandry; during the time he so lived with his uncle, the latter promised that if he continued with him for his life he would leave him his farm and stock, but he received no wages; it was held that he gained no settlement in *A.* *Rex* v. *Stokesley Inhabitants.* 6 *Term Rep.* 757.

56 *A.* went into the service of *B.* without making any terms at the time; a few days afterwards *B.* agreed to find *A.* in meat, drink, and clothes, but no money; *A.* continued in the service two years and a half, when she was dismissed by *B.*; held that this was a general hiring, and that it conferred a settlement on *A.* *R.* v. *Worfield Inhab.* 5 *Term Rep.* 506.

57 The pauper came to an inn at the request of the waiter, who was ill, to help him, and continued there boarding and lodging for nineteen months; and the waiter went away in thirteen months; after which the pauper continued to serve in the same manner that he had done before, without making any agreement at all with the master, though the master knew of his being in the service the second day; it was held that he did not gain a settlement by such service, because there was no hiring for a year either express or implied. He could only be considered as the servant of the master for the last six months. *R.* v. *St. Matthew, Ipswich.* 3 *Term Rep.* 449.

58 Service under a hiring for seven years, to work only thirteen hours in the day, and *Sundays* excepted, will not give a settlement. The servant must be under the control of the master for the whole year. *R.* v. *Kingswinford Inhab.* 4 *Term Rep.* 219.

59 A pensioner of the East-India Company, hiring himself as a servant for a year, with a reservation to himself, of two days in each half year, when he might go for his pension, cannot gain a settlement by service under such a contract. *Rex* v. *Over Inhab.* 1 *East*, 599.

60 A service under a hiring for five years as a colt-shearman, to work twelve hours each day, will not give a settlement. *Rex* v. *North Nibley.* 5 *Term Rep.* 21.

61 *A. clubbed* with *B.* for three years, (which signifies one person contracting to serve another for the purpose of being taught some art or trade,) and *also agreed to do any work* that *B.* set him about; held that *A.* gained a settlement by serving *B.* under this contract for a year. *Rex* v. *Coltishall Inhab.* 5 *Term Rep.* 198.

62 *A. clubbed* with *B.*, for three years, at a certain rate of weekly wages, with a proviso that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionable deduction of wages: held that *A.* gained a settlement by serving a year under this hiring, though occasional deductions on these accounts were made. *Rex* v. *Maxtham Inhab.* 1 *East*, 239.

63 If a husbandman serve for a year, it is strong evidence from which the justices at the sessions may presume,

that he served under a yearly hiring. *Rex* v. *Lyth Inhab.* 5 *Term Rep.* 327.

64 So where a servant had lived three years in service with the same master, held that it was evidence from which the justices might infer a yearly hiring, though it appeared that at first the servant was only hired for part of a year. *Rex* v. *Long Whatton.* 5 *Term Rep.* 447.

65 So if a servant, after serving a year, part of which was under a retrospective hiring, so that no settlement could be gained under it, (see No. 64) continue in service part of another year, the justices may presume a hiring for a second year. *Rex* v. *Hales Inhab.* 5 *Term Rep.* 668.

66 A settlement may be gained by serving a year under different hirings, if one of them be for a year, though there be not forty days' service under the yearly hiring. *Rex* v. *Adson Inhab.* 5 *Term Rep.* 98.

67 If a servant be hired from Nov. to Michaelmas following, and before Michaelmas-day his master offer to hire him from Michaelmas for a year at certain wages, to which he does not agree but remains in the house till the second day after Michaelmas, working as usual, and then accepts the offer, and serves a part of the year; the service under the latter hiring commences on the Michaelmas-day, and may be coupled with the former service so as to give a settlement. *Rex* v. *Sulgrave.* 1 *Term Rep.* 778.

68 The servant, having been hired for and served eleven months, for ten guineas, was told by his master, at the expiration of that time, that "he might stay on an end," without mentioning the wages, to which the servant assented; the second agreement was held to be a general hiring, and the party serving a year under it, gained a settlement. *Rex* v. *Macclesfield.* 3 *Term Rep.* 76.

69 A retrospective hiring will not give a settlement. *Rex* v. *Murton Inhab.* 4 *Term Rep.* 257.

70 No settlement is gained by a hiring and service for less than a year, though the master tell the servant at the time of the hiring, that he shall not belong to the parish, and the sessions state such contracts to be fraudulent. *The King* v. *Mursley.* 1 *Term Rep.* 694.

71 If a master and servant before *Michaelmas* agree for yearly wages, and the master while he is taking money from his pocket to give earnest tells him that *he shall be absent a fortnight at Michaelmas because of his settlement*, and that he will *give* him that time to get what he can, to which the servant assents; this is a mere dispensation of the service for that time, and not such an exception out of the original contract as will make the hiring insufficient for the purpose of gaining a settlement. *Rex* v. *Sulgrave Inhab.* 2 *Term Rep.* 376.

72 The servant's apprehending that his master would not have hired him if he had not agreed to the fortnight's absence, will not alter the case. 2 *Term Rep.* 376: and see 455.

(As to dispensing with service or dissolving the contract, see tit. SESSIONS.)

73 A *bona fide* exception of part of the time at the time of hiring will prevent a settlement, but if there be no exception, then a permissive absence afterwards will not prevent it. 2 *Term Rep.* 379.

74 Absence at the beginning, the middle, or the end of the year, may be dispensed with, either with the consent of the master, or for an excusable cause. *Rex* v. *East Shefford.* 4 *Term Rep.* 806.

75 And a settlement was gained, though the pauper ran away without leave, was brought back by a justices warrant after thirteen weeks absence, and then consented to have a deduction made out of his wages for that time. 4 *Term Rep.* 806.

76 Absence can only be purged where the act itself is doubtful. 1 *Term Rep.* 101.

77 Where the master insisted on turning away his servant, and threw down his wages, which the other took up and then went away, and after the expiration of six days, returned at the *master's request*, and served the remainder of the year, the absence was not purged by the subsequent return. *The King* v. *Gresham.* 1 *Term Rep.* 101.

78 The servant, a few days before the end of the year for which he was hired, went away in order to get another place for the next year, without asking his master's consent; on his return, before the end of the year, the master insisted on turning him away, and offered him his wages up to that time, which he accepted without making any objection; this was held to be a dissolution of the contract, and defeated the settlement, though the servant *wished* to stay out the year. *Rex* v. *Clayhydon Inhab.* 4 *Term Rep.* 100.

79 A yearly servant, being deprived of his reason forty days before the end of the year, was taken home by his father, who lived in another parish, and who received the wages for the whole year; held that the servant was settled in the master's parish, though he continued in his father's house during the remainder of the year. *Rex* v. *Sutton Inhab.* 5 *Term Rep.* 657.

80 If a yearly servant be discharged four or five days before the end of the year on his master's becoming a bankrupt, and receive the full year's wages, the service is sufficient to give him a settlement. *Rex* v. *St. Andrew, Holborn.* 2 *Term Rep.* 627.

81 A master being obliged to leave his house seven days before the end of a year for which he had hired a servant, told the latter that he had no further occasion for her services, and paid her the whole year's wages; the master would otherwise have kept her, and she was unwilling to leave the service;—held, a dispensation of the service for the rest of the year; and the service sufficient to give a settlement. *Rex* v. *St. Mary, Lambeth Inhabitants.* 8 *Term Rep.* 236.

82 If there be not a voluntary agreement between the parties, and the master *fraudulently* turn away the servant with a view of preventing his gaining a settlement, or *wrongfully* discharge him before the end of the year, that will not defeat the servant's settlement. *Dictum.* 2 *Term Rep.* 626.

83 But where a servant, who was ill-treated and turned out of doors by his master three days before the end of the year, refused (on his master's request the next day) to return into the service, it was held that he did not gain a settlement by his service, though his master paid him his wages for the whole year. *Rex* v. *Grantham.* 3 *Term Rep.* 754. u *Rex* v. *Corsham.* 2 *East*, 303.

84 And where a servant who had been hired for a year was beaten by her master sixteen days before the end of the year, on which she desired him to dismiss her from his service, threatening to apply to a magistrate for redress, the master paid her the whole year's wages, and told her she might serve the remainder of the year, but the servant went away; it was held that she gained no settlement. *Rex* v. *Upwell Inhabitants.* 7 *Term Reports*, 438.

85 If a servant hired for a year give warning eight days before the expiration of the year, to leave his master at the end of the year, and the master discharge him on the same day, paying him his full wages; the servant being willing to stay till the end of the year, the contract is not thereby dissolved so as to prevent the servant's gaining a settlement, but the discharge is merely a dispensation with the remainder of the service. *Rex* v. *St. Philip in Birmingham.* 2 *Term Rep.* 624.

86 *A.* was hired at *Martinmas* to serve in husbandry for a year, at the

wages of 8l.; in the middle of the year he married, and then agreed to serve his master as a hind, for a year from that time, at the wages of 5s. *per* week, and he was to live out of his master's family, but at another farm, in the same parish, belonging to his master; it was held, that the former agreement was dissolved by the latter, and that *A.* did not gain a settlement by serving under those contracts. *Rex* v. *Great Chilton Inhab.* 5 *Term Rep.* 672.

87 A yearly servant three weeks before the end of his year hired himself to a second master, provided his first would let him go; the former master refused at first, but a week after he said, "I have got a new servant, you may go now, I have not work for you both;" and paid him his whole year's wages; held, that this was a dissolution of the contract with the first master, and prevented the pauper's gaining a settlement under it. *Rex* v. *Thistleton Inhab.* 6 *Term Rep.* 185.

88 When before the end of the year the mistress asked the servant whether she chose to go away on a certain day (within the year,) assigning as a reason that she had hired a new servant who wished to come to her then, and the servant said it was immaterial to her and agreed to go then, which she did, the court of K. B. thought that was evidence sufficient to find an agreement to dissolve the contract before the end of the year. *Rex* v. *St. Peter, Mancroft, Norwich Inhabitants.* 6 *Term Rep.* 477.

89 A servant, who has been hired for a year, was taken ill five days before the end of the year, on which he went to his brother's, and sent to his master for his money; the latter sent him the whole year's wages, deducting one 1s. for the rest of the year, and the servant said he was satisfied; it was held that this was an agreement by the master and servant to put an end to the contract before the end of the year, and consequently that the servant gained no settlement. *Rex* v. *Whittlebury Inhab.* 6 *Term Rep.* 464.

90 A servant hired for a year, four months before the end of the year being discharged by her master upon a trivial dispute, applied to a magistrate for redress, being desirous of continuing in the service. The magistrate ordered the master to take her back, or pay the whole year's wages. The master refused to take her back, but paid the whole year's wages, (but not some wool which he also had agreed to give her if she behaved well.) The servant took the money, and tendered herself as a servant to others; held, that the contract was thereby dissolved, and no settlement gained under it, as in case of a mere dispensation of service. *Rex* v. *King's Pyon Inhab.* 4 *East*, 351.

91 A yearly servant, about a fortnight before his year expired, being too ill to work, his master paid him his *whole* year's wages, when he *left the service*, and went to an hospital, and never returned into his master's service; held, a dissolution of the contract; and that no settlement was gained by such hiring and service. *Rex* v. *Sudbrooke Inhab.* 4 *East*, 356.

92 If a servant be unmarried at the time when he is hired for a year, he gains a settlement by a year's service, though he marry before the service commences. *Rex* v. *Allendale*, and *Rex* v. *Stannington.* 8 *Term Rep.* 385.

93 A widower, having a son who has no settlement of his own, is prevented by statute 8 W. & M. c. 11, s. 7, from gaining a settlement by hiring and service for a year, though the son be hired for a year on the same day when the father is hired, and serve that year. *Rex* v. *New Forrest Inhab.* 5 *Term Rep.* 478.

94 If a pauper in service at *A.* under a yearly hiring be removed to *B.* and does not appeal, but returns in

a few days to his master at *A.*, is received by him, serves out the year, and receives his full wages, yet he gains no settlement in *A.* *2 Term Rep.* 598.

95 The order of removal in that case put an end to the service. *2 Term Rep.* 598.

96 A yearly servant served forty days in *A.*, then forty days in *B.*, and afterwards returned to his father's house in *A.*, for the three last days of the year; held, that he was settled in *A.* *Rex* v. *Under Milbeck Inhab.* *5 Term Rep.* 387.

97 A person cannot gain a settlement by hiring and service with the son of a certificated man continuing to reside in the certificated parish with his mother after the father's death, as part of her family; though the son were of age, and carried on business for himself; such circumstances, not amounting to an emancipation. *Rex* v. *Sowerby Inhabitants.* *2 East*, 276.

98 A pauper placed by the parish with a parishioner, upon an agreement between the latter, and the parish officers to find board, washing and lodging for the pauper at 2s. 6d. per week, and that the pauper was to do what he was set about, does not constitute the relation of master and servant between such parishioner and the pauper, so as to enable the latter to gain a settlement as by hiring and service. Neither does such relation arise by implication from a continuance of services to the parishioner by the pauper, who continued to live with him as before, after the parish had refused any longer to continue the parochial allowance; and the pauper, who was a *Greenwich* prisoner, going there twice a year without asking or receiving the leave of the parishioner; the latter, however, not refusing leave when informed of the other's going. *The King* v. *The Inhabitants of Rickinhall Inferiour.* *7 East*, 378.

99 The pauper desired her mother to look out a place for her; and the mistress on the application of the mother sometime before *old Michaelmas* said that she would give the pauper the same wages as her other servants, and wait till she came; but the mother made no absolute agreement for her daughter; though she informed her that she had got a place for her, if she liked it. About *a week after old Michaelmas* the mistress applied to the pauper to know if she liked to come into her service, and they then agreed for the first time for certain yearly wages (the same as the other servants) *with liberty of parting at a month's wages or warning.* Held, that the hiring commenced only from the day when the pauper and her mistress agreed on the terms specified, and not from *old Michaelmas*, or before, when the mother spoke to the mistress. And the pauper having given a month's previous notice to quit at *old Michaelmas-day*; which the mistress accepted, and procured another servant to come on that day; when the pauper received her whole year's wages; but upon the mistress telling her that she wanted a week of serving out her year, she offered to stay another week; to which the mistress said it did not signify, as she had got another servant in her place; held that this was a *dissolution* of the contract before the end of the year, by the notice to quit given and accepted; and not a mere *dispensation* of the service; and consequently no settlement was gained by such hiring and service. *The King* v. *The Inhabitants of Rushall.* *7 East*, 471.

100 Five days before the end of the year a servant absented himself by leave, one day from his master's service to look out for another place; and on his return the master on some trivial pretence said he should not stay any longer in his service, and offered him a trifle less than his

whole wages, which the servant refused; but was then ready to have accepted his whole wages; though he would rather have staid out his year; and immediately he applied to a magistrate to oblige his master, either to pay him the whole or to receive him into his service for the remainder of the year; when the magistrate ordered half a crown to be deducted; and the servant thereupon *hired himself to another master, before his first year was out;* and after the year received from his first master his whole wages. Held that this was a dissolution of the contract before the end of the year by mutual consent, signified on the part of the servant by his entering into another service. *The King* v. *The Inhabitants of Leigh.* 7 *East*, 539.

101 A deserter from the King's marine service cannot gain a settlement under a hiring and service for a year; not being *sui juris*, nor competent *lawfully* to *hire* himself within the statute 3 W. & M. c. 11, s. 7. *The King* v. *The Inhabitants of Norton.* 9 *East*, 206.

102 A poor boy sent out of the house of industry at 14 years of age to the parish officers, and by them *allotted* to a parishioner, who handed him over to another person, by whom the boy was told that he was to stay with them a year, and should have clothes, &c.; to which the boy made no objection; conceiving himself obliged to accept the service; but made no agreement for wages, or concerning the nature or duration of his service, nor was consulted upon the subject; does not gain a settlement by serving under this supposed obligation for a year; for neither did he consider himself, nor was he considered by the other parties, as a free agent; and such only can contract, or adopt a contract made by others. *The King* v. *the Inhabitants of Stow-Market.* 9 *East*, 211.

103 A widower having a daughter, placed her at 11 years of age with an uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service to him, but without any contract of hiring to give her a settlement of her own; the father in the mean time having gone out to service. Held that on her coming of age she was emancipated, although her father conceived himself bound, as such, to receive and support her if she left her uncle's: and consequently the father was capable of gaining a settlement by hiring and service for a year, as "an unmarried man, *not having a child*," (i. e. not having a child who would follow his settlement) within the statute 3 W. & M. c. 11, s. 7. *The King* v. *The Inhabitants of Cowhoneyborne.* 10 *East*, 88.

104 No settlement can be gained by serving under a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends; for that is to be taken distributively, i. e. reserving a week out of each year. *The King* v. *The Inhab. of Rushulme.* 10 *East*, 325.

105 Under a contract of hiring as a bleacher and crofter for a year at 12*s.* a week, the servant continuing to work under such contract for a year gained a settlement in the parish where he resided, although by the practice of the manufactory in which he was engaged, if he finished his appointed week's work, calculated at so many pieces a day for *six* days, in less time, he had the rest of the week to do as he pleased, and he also went where he pleased on *Sundays*, without asking leave; for this is an express contract for a year, without any express exception. *The King* v. *the Inhabitants of Harwich.* 10 489.

106 A statute fair being held yearly on the day after *old Michaelmas*, except when old *Michaelmas* falls on a *Saturday*, and then the fair be-

ing held on the *Monday*; held that a hiring from such *Monday* till old *Michaelmas* day following is not a yearly hiring under which a settlement can be obtained. *The King v. the inhabitants of Standon Massey.* 10 *East*, 576.

VI. *By serving an office.*

1 Executing the office of collectors of the duties on births and burials, gives a settlement. *The King* v. *Inhabitants of Bicham.* 1 *Str.* 411.

2 Executing office of constable settles certificate man. *Between the Parishes of St. Maurice and St. Mary Calender in Winchester.* 2 *Str.* 1214.

3 Executing the office of tithingman gains a settlement. *The Parishes of Burlescome and Samford Peverell.* 1 *Str.* 544.

4 Serving constable as substitute for another, is not serving an office so as to gain a settlement. *The King* v. *Wixterborne.* 1 *Black.* 453.

5 A certificate man must be sworn into an office, else he gains no settlement by executing it. *Between the Parishes Wingham and Sellinge in Kent.* 2 *Str.* 1199.

6 Parish clerk nominated by the parson is in for life, and gains a settlement. *The parishes of Gatton and Milwich.* 2 *Salk.* 538.

7 A settlement was gained by serving the office of hayringer for the parish; it being stated that the pauper was chosen and sworn in at court-leet: and that it was an office of great antiquity, and serviceable to the parish. *Rex* v. *Whittlesea Inhab.* 4 *Term Rep.* 807.

8 A settlement may be gained by serving the office of tithingman. 4 *Term R.* 808.

9 Or the office of borsholder. *Ibid.*

10 Or the office of aletaster. *Ibid.*

11 Or the office of hayward. *Ibid.*

12 The sessions finding that the pauper was legally appointed governor of the workhouse in *I.* at an annual salary, and that the office of governor is a public annual office, and that the pauper served it for a year; held, that a settlement was thereby gained in *I.* *Rex* v. *Ilminster Inhab.* 1 *East*, 83.

13 A curate officiating in a parish for above a year, under the bishop's licence to perform the office of curate at a certain annual stipend, is yet not such an annual *officer* as entitled to gain a settlement by virtue of the stat. 3 W. 3, c. 11, s. 6. *Rex Wantage Inhabitants.* 2 *East*, 65.

14 If a churchyard lie in two parishes, the sexton may gain a settlement in the one in which he resides, although no part of the church lie within that parish. *Rex* v. *Liverpool.* 3 *Term Rep.* 118.

15 *A.*, who at an adjournment of a court-leet holden 16th Nov. 1792, was appointed to an annual office "for a year or until he should be discharged," and who executed the office until the adjournment of another court-leet holden 1st Nov. 1793, did not thereby gain a settlement. *Rex* v. *Bow Inhab.* 3 *Term Rep.* 445.

16 The appointment of a master of a work-house by the parish officers and vestry, pursuant to the statute 9 G. 1, c. 7, which enables the parish officers and parishioners, &c. to contract with any person for the management of the poor in the work-house (and who did contract with the pauper to manage the poor in the work-house, and teach the children to spin, &c. at a yearly salary; and after some years service dismissed him at a quarter's notice) is not a *public annual office or charge* within the statute 3 W. and M. c. 11, s. 6, the executing of which for a year will confer a settlement. *The King* v. *The Inhabitants of Mersham.* 7 *East*, 167.

VII. *By being rated to, and payment of Rates.*

1 Paying to the poor gives no settlement, if not rated. *The King* v.

1 *The Inhabitants of Bovindon in Hertfordshire.* 2 *Str.* 1023.

2 When the title of the poor rate is "so much in the pound" and the pauper's name is inserted in the rate, and, also, his yearly rent, and he pays at the rate of 2s. in the pound for his specified rent, though nothing is written against his name in the column of "sums assessed;" this is a sufficient rating and paying for the purpose of gaining a settlement. *Rex* v. *Corhampton.* 2 *Doug.* 631.

3 Taxing alone, without paying, will not make a settlement. *Rex* v. *Parish of St. Nicholas.* 3 *Salk.* 253.

4 Taxation only, without payment, makes no settlement. *The Inhabitants of the Parish of Talborn and Boston.* 2 *Salk.* 528.

5 Settlement by payment of parish rates. *The Inhabitants of the Parish of St. Mary Le More and Heavy Tree in Devonshire.* 2 *Salk.* 477.

6 Though a tenant has actually paid the land tax, and his name is in the rate in a column of "occupiers," yet if the landlord's name is in a column of "landlords rated," the tenant does not gain a settlement. *Rex* v. *St. John's.* 1 *Doug.* 225, 226.

7 Assessment and payment of a poor's rate by the tenant will gain him a settlement, though the landlord has privately agreed to pay it. *Rex* v. *Openshawe.* 1 *Black.* 463.

8 If the title of a land-tax rate is "an assessment on the inhabitants of the parish of *A.*" and both the landlord's and tenant's names are in the rate, but without any works importing which is rated, and the tenant holds by paying a rent certain, clear of all taxes, parliamentary and parochial, and pays the rate, he gains a settlement. *Rex* v. *Milcom.* 1 *Doug.* 226, *n.* *Rex* v. *Endon.* 1 *Doug.* 227, *n.* *Rex* v. *St. Laurence.* 1 *Doug.* 227, *n.*

9 But if there is a column of proprietors and another of occupiers, and it is not specified in the rate which is rated, and the tenant, on paying the land-tax, takes a receipt, in which the sum paid is described as "so much assessed on the landlord," the tenant gains no settlement. *Rex* v. *St. James's.* 1 *Doug.* 227, *n.*

10 If the name of a former occupier who, to the knowledge of the parish officers, is dead, is continued in the poor rate, but the present occupier pays, he shall gain a settlement. *Rex* v. *Heckmondwicke.* 2 *Doug.* 564.

11 A person gains a settlement by being rated and paying the poor rate, though the rate be not regularly made or allowed. 6 *Term Rep.* 543.

12 Whether the landlord or tenant be rated to the land-tax, (both names being in the rate,) is a question of fact which must be found by the justices at sessions; and if they state it as a fact, this court, is precluded from considering whether they have drawn a right conclusion though they state all the other circumstances of the case. *Rex* v. *Folkstone.* 3 *Term Rep.* 605: 5 *Term Rep.* 240.

13 If they only state the evidence of that fact, this court will send the case down to be restated. *Rex* v. *Rainham Inhab.* 5 *Term Rep.* 240.

14 Where the farm was rated, and the landlord paid the rate, and was allowed it by the tenant, the tenant did not gain a settlement, it being stated that the overseer did not know that the tenant resided there. *Rex* v. *Llangan Parish Inhab.* 2 *Term Rep.* 628.

15 For though where a house is rated, it is *prima facie* a rate on the occupier; it is not conclusive. 2 *Term Rep.* 628.

16 A settlement by being rated and paying rates cannot be proved by evidence of paying only, without the production of the rate, accounting reasonably for the non-production of it; although the payer was both owner and occupier of the estate for which he paid

rate. *Rex* v. *Coppull Inhab.* 2 *East*, 25.

17 An exciseman who was rated for his salary, which was in fact paid by the collector, without any deduction from the salary, does not thereby gain a settlement. *Rex* v. *Weobley Inhab.* 2 *East*, 68.

18 The pauper being duly rated and having absconded, his landlord desired the collectors to levy a distress on his goods, lest *he* (the landlord) *should lose the money*; in consequence of which they went to the house, where the pauper's daughter said a friend of her father would assist them; they went to this friend, who gave a guinea to the collectors; who *thereout received the tax*; this was held payment of the rate by the pauper. *Rex* v. *Bridgewater*. 3 *Term Rep.* 550.

19 By statute 10 Ann. c. 6, the parishes in *Norwich* are incorporated for the purpose of maintaining the poor out of one joint fund: but as far as respects strangers, those parishes continue separate and distinct: therefore a person who resides in one parish in *N.* and is rated in another, gains no settlement in either. *R.* v. *St. Michael's Thorn in Norwich*. 6 *Term Rep.* 536.

20 The town and parish of *Birmingham* is, for the convenience of the overseers, divided into twelve divisions under the superintendance of so many overseers respectively, each of whom copies the names out of the general rates into a separate book, of such of the inhabitants assessed as are within his district; and it is usual for each overseer to add such names to his book as ought to be inserted in the general rate; such addition is not in fact made till the next year, but in the mean while the general rate is from time to time ordered to be collected with the additions: it was held that a person paying the rate, whose name is *afterwards* added in the overseers' book, does not thereby gain a settlement. *Rex* v. *Edgbaston Inhab.* 6 *Term Rep* 540.

21 *Aliter*, if his name be added *before* he pays the rate. 6 *Term Rep.* 540.

22 The statute 35 G. 3, c. 101, which provides, that after the passing of the act, no person *who shall come* into any parish shall gain a settlement by being rated to any tenement under 10l. a year value, extends to persons who were in the parish at the time of the passing of the act. *R.* v. *Islington Inhab.* 1 *East*, 283.

23 A custom-house officer who was rated for his salary towards the land tax, and in fact paid the rate himself, though the money was either given to him beforehand for the purpose, or allowed to him afterwards by the collector, gains a settlement in the parish in which he is so rated and pays. *The King* v. *The Inhab. of Axmouth.* 8 *East*, 383.

24 Payment by one who was assessed to a church rate upon *householders* only, and not upon the parishioners at large, will nevertheless gain him a settlement; for it is not less a public tax because laid too narrowly; and it is *charged* and *paid* within the parish, which is all that is required by the statute 3 W. 3, c. 11, s. 6. *Rex* v. *The Inhab. of St. Bees.* 9 *East*, 203.

25 Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated, though not his own, but in his son's name, for the purpose of making such parishioner a witness, is nevertheless incompetent to prove the settlement in the other parish. *Rex* v. *The Inhabitants of Killerby.* 10 *East*, 292.

26 A citizen, having taxable property, and being able to pay the taxes assessed on him, gains a settlement in a town by dwelling there for ten years together, and half that time paying state and town taxes, although he is omitted in the county tax. *Wrentham* v. *Attleborough.* 5 *Mass.* 480.

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7 Assessment and performance of labour on the high-ways, is not the payment of a tax, within the meaning of the second section of the act for the settlement and relief of the poor, (24 sess. c. 134, s. 21, act 32 sess. c. 90.) The word taxes means a contribution in *money*, not labour or personal service. *Overseers, &c. of Amenia* v. *Overseers, &c. of Stanford.* 6 *Johns. Rep.* 92.

VIII. *By renting a tenement.*

1 Nothing will amount to a notice in writing to make a settlement, that is not specified in 3 & 4 *W.* & *M.* c. 11. *Between the Inhab. of Talbury and the Hamlet of Foston in Scropton.* 2 *Salk.* 475.

2 Renting 10l. *per ann.* and immediately letting off the greater part to an under tenant, and residing on the rest, gives a settlement. *R.* v. *Llanverras.* 1 *Black.* 603.

3 There cannot be a settlement by constructive notice, even after forty years residence. *The parishes of Aldenham and Abbots Langley in Hartford.* 2 *Str.* 853.

4 Renting above 10l. per ann. in two parishes is a settlement where he lives. *The parishes of Elstead and Holliburne.* 2 *Str.* 849.

5 Renting a mill of 10l per ann. gains a settlement. *The parishes of Evelin in Oxfordshire and Rentcomb in Gloucestershire.* 2 *Salk.* 536.

6 Renting the pasture is no settlement. *R.* v. *Inhabitants of Minchinhampton.* 2 *Str.* 874.

7 Renting a windmill is a settlement. *Rex* v. *Inhabitants of Butley in Suffolk.* 2 *Str.* 1077.

8 Renting a coney warren is a settlement. *The Parishes of Kniver and Stone in Com. Stafford.* 2 *Str.* 678.

9 A lease at will gains a settlement. *The Parishes of Cranley and St. Mary Guildford.* 1 *Str.* 502.

10 Pauper renting a house at 10l. when the real value only 6l. 10s. gains no settlement. *Between the parishes of Southwold and Yoxford in Suffolk.* 2 *Str.* 1127.

11 An entire tenement of 10l. per ann. though it lies in two parishes, gives a settlement in that where the party lives. *The parishes of St. John in the town and Amwell in the county of Hertford.* 1 *Str.* 529.

12 Renting a house of 25l. a year within the rules of the *Fleet* by a prisoner gains a settlement. *Between the parishes of St. Margaret Westminster and St. Martin Ludgate.* 2 *Str.* 924.

13 Taking an entire tenement of 10l. per annum gains a settlement, though it lies in two parishes; *aliter* of two distinct tenements, making together 10l. per annum, in different parishes. *The parishes of South Sydenham and Lamerton.* 1 *Str.* 57.

14 The fact of the pauper's taking a tenement of 10l. a year is sufficient to give a settlement under statute 13 & 14 C. 2, c. 12, though the lessor may have no title. 1 *Term Rep.* 358.

15 A cattlegate is a *tenement* within that statute so as to enable the occupier of it to gain a settlement. *Rex* v. *Whixley.* 1 *Term Rep.* 137.

16 Taking the hay, grass, and aftermath of a meadow for ten months at the annual value of 10l. is a taking of a tenement within that statute. *Rex* v. *Stoke Inhab.* 2 *Term Rep.* 451.

17 Renting a dairy will give a settlement. *Rex* v. *Piddletrenthide.* 3 *Term Rep.* 772.

18 So will a rabbit-warren, though the party taking it have no interest in the soil, except that of entering upon the warren to kill rabbits. *Ib.*

19 A settlement may be gained by renting the fogs or after grass of a meadow, of the yearly value of 10l. *Rex* v. *Brampton Inhab.* 4 *Term Rep.* 348.

20 The pauper rented 20 cows at 3l. 10s. *per annum each*, and agreed with the farmer that they should be fed in particular fields for a certain

part of the year, during which time no other cattle were to depasture there; this was held to be a tenement within statute 13 & 14 C. 2, c. 12. *Rex* v. *Tolpuddle Inhab.* 4 *Term Rep.* 671.

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21 Renting a dairy (including the cows and their pasture) at above 10l. a year in value, will not confer a settlement, if the annual value of the lands on which the cows were to be depastured were under 10l. *Rex* v. *Minworth Inhab.* 2 *East*, 198.

22 One who resided on a tenement of 5l. a year in the parish of *W.*, and at the same time rented the ley (i. e. pasturage) of two cows from *Mayday* to *Michaelmas* in certain land in *H.* at six guineas, thereby gains a settlement in *W.*, though he were not entitled to the *exclusive* pasturage of the land in *H.* *Rex* v. *Hollington Inhab.* 3 *East*, 113.

23 A settlement may be gained by renting a right of common in gross of the annual value of 10l, that being a tenement within statute 13 & 14 *C.* 2. *Rex* v. *Dersingham Inhab.* 7 *Term Rep.* 671.

24 Where the pauper rented the fishery of a pond with the spear-sedge, flags, and rushes growing in and about the same, for 10l. a year, "the court understood that the soil passed with it, and that it was a tenement within statute 9 & 10 *W.* 3, c. 11." *Rex* v. *Old Alresford.* 1 *Term Rep.* 358.

25 The renting by a needle-maker of two out of six pointing places in another's mill, any two of which he was at liberty to use from time to time at 16l. a year rent, and engaging also to do all his landlord's work in preference to that of others, for which he was to be paid by the piece, is not the taking of a tenement within the statute so as to gain a settlement by it. *Rex* v. *Dodderhill Inhab.* 8 *Term Rep.* 449.

26 The renting by a needle maker of certain *runners* in another's mill, together with a packeting room, of all which he had the exclusive use (a runner being a piece of machinery for scouring needles screwed down to the floor of the mill,) the whole being of the annual value of above 10l. including the separate value of the *runners*, is not the taking of a *tenement*, whereby a settlement can be gained. *Rex* v. *Turdebigg Inhab.* 1 *East*, 528.

27 A contract for a *standing place in another's mill* for a carding machine, (the party's own property,) which was fastened to the floor and the roof, for the purpose of being worked by the steam engine of the mill; for which the party was to give 20l. a year, with liberty to quit on giving three months notice, is not a taking of a tenement, but a mere licence to use the machinery of the mill; and therefore no settlement can be derived under it. *Rex* v. *Mellor Inhab.* 2 *East*, 189.

28 The grazing cattle in a meadow and using a stable and cart house *gratis*, under an agreement by which the pauper was to pay certain sums weekly for the liberty of grinding wheat at a mill, was held to be no renting of a tenement. *Rex* v. *Hammersmith Inhab.* 8 *Term Rep.* 450, *n.*

29 In order to gain a settlement by taking a tenement of 10l. *per annum*, the occupier must reside in the parish where part of the premises lies. *Rex* v. *Knighton Inhab.* 2 *Term Rep.* 48.

30 One may gain a settlement by renting a tenement of above 10l. a year in the parish where he *resided*, though such residence be *in a turnpike house*, as servant to the collector for whom he received the tolls; for the general turnpike act 13 G. 3, c. 84, s. 56, only says that "no gate keeper or person *renting the tolls and residing in the toll house* shall *thereby* gain a settlement, *i. e.* by such taking of the toll house, or renting the toll. *Rex* v. *Denbigh Inhabitants.* 5 *East*, 333.

31 A residence for forty days is indis-

pensably necessary to enable a party to gain a settlement by residing on a tenement of 10l. *per ann.* *Rex* v. *Llanbedergoch Inhab.* 7 *Term Rep.* 105.

32 So that, if a party after residing on such a tenement for twenty-nine days be forcibly prevented residing there eleven days more, he does not thereby gain a settlement. 7 *Term Rep.* 105.

33 *A.* took a tenement of 10l. a year in the parish of *B.* and after living in it with his family five days he was arrested and sent to prison in the parish of *C.*, but his wife and children continued in it seven weeks longer; held that no settlement was gained in *B.* either by the husband or wife. *Rex* v. *St. George the Martyr, Southwark Inhab.* 7 *Term Rep.* 466.

34 In order to gain a settlement by forty days residence on a tenement, the party must stand in the relation of tenant of the premises during the whole time. *Rex* v. *South Lynn Inhabitants.* 5 *Term Rep.* 664.

35 So that a residence of 33 days by a widow on a tenement of 10l. a year cannot be coupled with a residence on the same tenement with her husband for sixteen days preceding, so as to give her a settlement. *Ibid.*

36 The occupation of a cottage for 40 days, by the leave of the former tenant, who then went out, under an agreement with him to pay the same rent to the landlord which he had before done, but without any authority from the landlord, (the cottage, together with other premises occupied at the same time being 10l. a year and upwards,) was holden to give the occupier a settlement. *Rex* v. *Aldborough Inhab.* 1 *East*, 597.

37 Where a corporation, by a verbal agreement with a pauper, leased to him the tolls of a market for above 10l. a year; held that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal; therefore he had no more than a mere licence to collect the toll. But if such toll had been leased to him under seal of the corporation, *semble* that he would have gained a settlement by residing for 40 days in the same parish where the market was. *Rex* v. *Chipping-Norton Inhabitants.* 5 *East*, 239.

38 It is not necessary that the pauper should pay 10l. a year in money for a tenement, in order to gain settlement; it is sufficient if he occupy a tenement of the annual value of 10l. as tenant. *Rex* v. *Fritwell Inhab.* 7 *Term Rep.* 197.

39 The criterion by which the court form their judgment is not the *ability* of the party coming to reside on a tenement of 10l. a year; for if a person be trusted with a tenement of that value, even out of charity, that is sufficient. 1 *Term Rep.* 459.

40 The pauper *took* a tenement at 11l. a year which he occupied, still receiving parish pay for six months after; having previously agreed to underlet to another, a part, for 6l. a year, which other *guaranteed* to the landlord the payment of the rent, without which he would not have let to the pauper; but the pauper paid the whole rent for the first year; held, that this was a coming to settle upon a tenement of 10l. a year within the statute 13 and 14 Car. 2, c. 12, by occupying which for 40 days irremoveable, the pauper gained a settlement; though the sessions concluded from the whole of the case that *credit* was given by the landlord to the pauper *for* 6l. *a year only of the rent*, and that for the residue the credit was given to the guarantee; for if the pauper were *legal tenant* of the whole, it was immaterial whether *credit* were given him for the *rent*. *Rex* v. *Hooe Inhab.* 4 *East*. 362.

41 A foreigner may gain a settlement here by occupying a tenement of 10l. a year for 40 days. *Rex* v. *Eastbourne Inhabitants.* 4 *East*, 103.

42 Where a pauper was permitted by several persons, having a right of common, to occupy a tenement of 10l. a year value as a reward for his service as a herd, it was held that that gave him a settlement. The service of the pauper was equivalent to his paying rent. *Rex* v. *Melkredge.* 1 *Term Rep.* 598.

43 So repairing gates was held equivalent to payment of rent. *Rex* v. *Whixley.* 1 *Term Rep.* 137.

44 In order to gain a settlement by coming to settle on a tenement of 10l. *per annum*, it is not necessary that the party should *rent* such a tenement, or that the whole should lie in one parish; it is sufficient if he occupy 9l. *per annum* of his own in the parish of *A.*, and rent a tenement of 1l. *per annum* in the parish of *B.* *Rex* v. *Culmstock Inhab.* 6 *Term Rep.* 730.

45 Where a pauper rented a tenement of 8l. a year in *A.*, and held another of 2l. 10s. *per annum* in *B.* under a parol demise from his brother *to hold as long as the brother pleased, and to be taken by him again when he pleased*, and was to pay nothing for it, this was held a sufficient taking of a tenement of 10l. *per annum* under statute 13 and 14 Car. 2, c. 12, for the purpose of giving the pauper a settlement. *Rex* v. *Fillongley.* 1 *Term Reports*, 458.

46 A man had a tenement of above 10l. a year in *A.*, in which he generally, and his wife and family constantly, resided for several years, but he occasionally slept in *B.*, where he had another tenement under 10l. a year, which he had lately taken for the more conveniently carrying on of his business; and upon the whole he slept in *B.* above 40 nights, and particularly for the last night, when both the tenancies expired; held that his settlement was in *B.* *Rex* v. *St. Mary, Lambeth Inhabitants.* 8 *Term Rep.* 240.

47 A pauper rented land in *A.* of the annual value of 6l. 10s. 6d, and built on part of it a post-windmill at the expence of a 120l. which, by agreement with his landlord, he was to be at liberty to remove at pleasure; he let the mill for a part of the time at the rent of 9l. *per annum*; held, that this was not the taking of a tenement of 10l. a year so as to confer a settlement in *A.* *Rex* v. *Londonthorpe Inhab.* 6 *Term Rep.* 377.

48 A fraudulent renting of 10l. *per annum* will not give a settlement. *Rex* v. *Woodland.* 1 *Term Rep.* 261.

49 Where a pauper rented a meadow for ten guineas a year, and did not stock it, but let the grass for the first half year to *A. B.* for three guineas, who stocked it, and paid him, and then the pauper paid his landlord half a year's rent, and then let the mowing of his meadow to his landlord for five guineas, and the after grass for two guineas, and at the end of the year received two guineas from his landlord on the balance of accounts; the sessions adjudged this a fraudulent taking, which the court confirmed, 1 *Term Rep.* 261.

50 If the sessions draw a conclusion of fact that the taking of a tenement is fraudulent, or that it does not amount to 10l. *per annum*, it is decisive here, though they state all the facts, and refer the consideration of those questions to this court. *Rex* v. *Llanwinie Inhab.* 4 *Term Rep.* 473.

51 In settlement cases the court will not infer fraud from circumstances; fraud must be stated expressly. 7 *Term Rep.* 105.

52 Where a person renting and residing on a tenement of 10l. a year in *A.* was removed to *B.* by an order of two justices, and afterwards returned to the same tenement without making any new contract, and resided there more than 40 days, he thereby gained a settlement, though the order of removal was unappealed from; for the contract was not thereby dissolved. *Rex* v. *Fillongley Inhabitants.* 2 *Term Rep.* 709.

53 *A.* occupied a tenement of 10l. a year, and died leaving three children living, to two of whom he bequeathed 5s. each, and to the other, whom he made executrix, the residue of his property; the pauper who had before married the executrix, resided on the tenement above 40 days, and paid rent for it; this was held to gain him a settlement, though the wife never proved the will. *Rex* v. *Netherseal Inhabitants.* 4 *Term Rep.* 258.

54 *A.* agreed with *B.*, on *B.*'s taking a farm of *C.* of the yearly value of 120l. to become joint partner with *B.* in the stock and farm; but there was no agreement between *A.* and *C.*; it was held that *A.*, who lived with *B.* on the farm more than 40 days, thereby gained a settlement. *Rex* v. *Seamer Inhab.* 6 *Term Reports*, 554.

IX. *By marriage.*

1 Adjudication of husband's settlement sufficient to send the wife with him. *The parishes of Hobey and Kingsbury.* 1 *Str.* 527.

2 Clandestine marriage of minors is void in respect of parish settlements, and the woman cannot be removed as wife. *Chincham* v. *Preston.* 1 *Black.* 192.

3 Woman's settlement before marriage remains, if husband has no settlement. *The Parishes Westham and Chiddingstone.* 2 *Str.* 683.

4 When a wife marries a second husband (living the first,) and it is found the first had no access to her for a long time, the children of the second marriage are bastards, and the wife's settlement where the first husband's was. *Between the parishes of St. Andrew and St. Bride.* 1 *Str.* 51.

5 An order of removal of *J. S.* and *B.* his wife, made upon *the examination of the wife*, adjudged that they lately came into the parish of *K.* and are likely to become chargeable to it, and were last legally settled in *M.* is good upon the face of it, and conclusive upon the parish of *M.* as to the marriage and settlement of the husband and wife; so that upon a subsequent removal of the wife, describing her as *B. S. single woman* from *M.* to *B.*, *M.* cannot shew in evidence that the marriage was null and void. *The King* v. *The Inhabitants of Binegar.* 7 *East*, 377.

6 Evidence that *British* subjects in a foreign country, being desirous of intermarrying, went to chapel for that purpose where a service in the language of the country was read by a person habited like a priest, and interpreted into the *English* by the officiating clerk; which service the parties understood to be the marriage service of the church of *England* and they received a certificate of the marriage, which was afterwards lost; is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after eleven years cohabitation as man and wife, till the period of the husband's death. And such *British* subjects being attached at the time to the *British* army on service in such foreign country, and having military possession of the place; it seems that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence) would be a good marriage by the law of *England* as a marriage contract *per verba de præsenti* before the marriage act; marriages beyond sea being excepted out of that act; and it would make no difference if solemnized by a Roman catholic priest. *The King* v. *The Inhab. of Brampton.* 10 *East*, 282.

X. *Warning out to prevent a settlement, and other points relative to.*

1 Giving parish relief to a pauper within the parish is no evidence of

his settlement there. In the instance in question the relief was administered at one time for a fortnight, and at another time for a longer period, in the parish workhouse. *The King* v. *The Inhab. of Chatham.* 8 *East*, 498.

2 Hearsay evidence of the declaration of a deceased father as to the *place* of birth of his bastard child is not admissible to prove the birth settlement of such child. *The King* v. *The Inhab. of Erith.* 8 *East*, 539.

3 A warning of a pauper *and his family* under the statute of 4 W. & M. c. 12, s. 9, is sufficient to prevent the wife and children of the pauper from gaining a settlement. *Shirely* v. *Watertown.* 3 *Mass.* 322.

4 If a person, before the statute of 7 G. 3, c. 3, had been duly warned to depart from a town, so as to prevent his acquiring a settlement in such town, and after the warning removed from the town without an intention of returning, continuing long enough to have gained a new settlement, and afterwards came back and dwelt in the town he had been warned to leave, he must have been again warned within a year from his return, or he would have gained a settlement. *Chelsea* v. *Malden.* 4 *Mass.* 131.

5 Before the statute 7 G. 3, c. 3, a mariner gained a settlement in a town, by making his home therein, and following the business of his profession therefrom. *Abington* v. *Boston.* 4 *Mass.* 312.

6 Where the territory of which a new town is composed was, before the incorporation, an unincorporated place, the incorporation *ipso facto* gives every one inhabiting there a legal settlement. *Bath* v. *Bowdoin.* 4 *Mass.* 452.

But where the new town is formed from a part of an ancient one, those settled in that place at the date of the incorporation are legally settled in the ancient town. *Ibid.*

7 An inhabitant of a town, living in a part of it, which by an act of incorporation is formed into a new town, and not having a settlement in the old town, gains none by the incorporation. *West-Springfield* v. *Granville.* 4 *Mass.* 486.

8 A notice from the overseers of the poor of the town of *A.* to the overseers of the poor for the town of *B.* stating that a pauper has his settlement in *B.* that he is resident in *A.* and requires support, which has been afforded him by the overseers of *A.* is sufficient within the statute of 1793, c. 57, s. 12, to estop the town of *B.* from contesting the settlement of the pauper in *B.* in an action for support; the said notice being unanswered by the town of *B.* *Quincy* v. *Braintree.* 5 *Mass.* 86.

9 When a plantation is made a town by incorporation, the inhabitants gain a settlement therein, and of course lose any former settlement they may have had. *The Inhab. of Buckfield* v. *The Inhabitants of Gorham.* 6 *Mass.* 445.

Where a complaint alleges the settlement of a pauper to be in *B.* it is not a material error, if the court adjudge the settlement to be *not in B. but in the town* in whose behalf the complaint is made. *Ibid.*

10 After the provincial act of 7 G. 3, c. 3, and before the statute of 1789, c. 14, no settlement could be gained, but by the approbation of the town at a general meeting. *Granby* v. *Amherst.* 7 *Mass.* 1.

A student of a college does not change his domicil by his occasional residence of the college. *Ibid.*

11 Where a part of an existing town is detached, and annexed to another existing town, the inhabitants of such part, having a settlement in the town from which they are detached, acquire by such annexation a settlement in the town to which they are annexed. *Groton* v. *Shirley.* 7 *Mass.* 156.

POSSESSION.

1 Possession is very favourable, as a rule of certainty and an evidence of right, and for quieting of disputes. *Anon. Lofft*, 332.

2 By the common law, a conveyance of land by a person against whom there is an adverse possession at the time, to a third person, is void; but the title of the grantor is not thereby extinguished or devested; nor will such conveyance enure, by way of estoppel, for the benefit of the defendant in possession. *Jackson ex dem. Jones and others* v. *Brinckerhoff*. 3 *Johns. Cas.* 101.

3 Where the legal possession of lands was in the heirs of *A.* under a claim of title, and a descent in 1762, and *B.* afterwards entered on the land and made improvements, and his possession was continued for 37 years, but it did not appear that he entered under claim or colour of title, or hostile to the heirs of *A.*, whose title was not disputed until after 1788; it was held that the legal intendment was, that *B.* entered under the title of the heirs of *A.*, and that the statute of limitations could not begin to run till after the possession of the defendant was held adversely to the heirs of *A.* *Jackson ex dem. Ganse-voort et al.* v. *Parker*. 3 *Johns. Cases*, 124.

4 Where the ancestor of the demandant was in possession of the premises in question 51 years ago, and died in possession 41 years ago, leaving the demandant, his only son, this was held sufficient evidence to rebut the presumption of right in the tenant, arising from a possession of 38 years only, commenced by wrong. And a patent dated in 1697, produced in evidence by the tenant, not for the purpose of deducing the title to himself, but to show a title out of the demandant was held not sufficient to repel the conclusion in favour of the demandant, as the jury might presume a title in the ancestor of the demandant, derived from the patent. *Nase* v. *Peck*. 3 *Johns. Cases*, 128.

5 Where *A.* went into possession of land under an agreement made with *B.* for the purchase; and *C.* afterwards took possession under an agreement with *A.* for the purchase, the possession of *C.* was held not to be adverse to the title of B. *Jackson ex dem. Griswold* v. *Bard*. 4 *Johns. Rep.* 230.

6 The act of the 22d of March, 1791, (sess. 14, c. 42, s. 11,) sometimes called the *Canaan act*, granted the lands only to those who were in possession in their own right and not occupying in the right of another. Where *A.* bought land in *Canaan*, in 1782, and put *B.* one of his sons, in immediate possession, and declared he had bought it for him, and afterwards died in 1789, leaving several children his heirs at law, and *B.* continued in possession of the land above 27 years but without having obtained a deed from his father; it was held that *B.* was in possession under his father, and not in his own right, or adverse to his father, and that the act of 1791, confirmed the right to the land in the heirs of *A.* generally, on whom the law cast the inheritance; and that the rest of the children of *A.* were entitled to their proportion of the land so occupied by *B.* *Jackson ex dem. Bromley and others* v. *Benjamin*. 8 *Johns. Rep.* 101.

7 If the plaintiff seeks to avoid a deed on the ground of an adverse possession at the time of its execution, such adverse possession must be clearly made out, by positive facts, and not be left to inference or conjecture. *Wickham, qui tam, &c.* v. *Conklin*. 8 *Johns. Rep.* 220.

POST-MASTER AND POST-OFFICE.

1 Post-master-general not liable to

an action on the case, for the value of a bank-note stolen by one of the sorters of the post-office, out of a letter delivered in there. *Whitfield* v. *Lord Le Despenser*. *Cowp.* 754.

2 A post-master is bound to deliver all the letters to the several inhabitants *within a post-town or place* at their respective *place of abode*, at the rate of postage *only*, as established by act of parliament. *Smith* v. *Powdich*. *Lofft*, 753.

3 Post-master in the county obliged to deliver the letters to the persons they are directed to, at their place of abode. *Stock, one, &c.* v. *Harris*. 5 *Burr.* 2709.

4 Post-master in a country town cannot demand money for delivering letters at private houses. *Barnes* v. *Foley*. 1 *Black.* 643. 4 *Burr.* 2149.

5 The statute 9 Ann. c. 13, s. 40, which inflicts a penalty of 20*l.* on persons who willingly open or detain letters, after they have been delivered at the post-office, only extends to persons in the employment of the post-office. *Martin* v. *Ford*. 5 *Term Rep.* 101.

6 It seems that it is not a felony within 7 G. 3, c. 50, s. 1, for a person employed in the post-office to steal out of a letter entrusted to his care, a draft on a *London* banker, purporting to be drawn in *London*, but actually drawn about 10 miles from *London*, on unstamped paper. *Rex* v. *Pooly*. 3 *Bos. & Pull.* 311.

7 It seems, also that s. 2, of the same act does not apply to persons employed in the post-office; and that a person of that description therefore, who steals a letter out of the post-office, is not guilty of felony under that section. *Ibid.*

8 No action will lie against the executors or administrators of a post-master for bank notes stolen by one of the clerks of the postmaster, out of a letter delivered at the post-office. *Quere*, whether the action could have been maintained against the post-master himself, had he been living? *Franklin* v. *Low and Swartwout, administrators of Bauman*. 1 *Johns. Rep.* 396.

POUGHKEPSIE.

By the "act to vest certain powers in the freeholders of the village of *Poughkepsie*," passed the 8th April, 1801, (sess. 24, c. 182,) the trustees of the village had power to make a by-law to prevent the sale of meat, &c. for the consumption of the inhabitants, within certain prescribed limits, except at the public market-places; and an action may be maintained by the trustees, to recover the penalty given for every offence against such by-law. *Brush and others* v. *Seabury*. 8 *Johns. Rep.* 418.

POUND.

1 A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not. *Brandling* v. *Kent*. 1 *Term Rep.* 62.

2 It is no answer to an action for treble damages on stat. 2 W. and M. c. 5, for a pound breach, that the rent and demand were tendered after the distress and impounding. *Firth* v. *Purvis*. 5 *Term Rep.* 432.

POWER.

1 Power to let the premises for 31 years in possession and reversion, reserving the best yearly rent, and after a certain event, that whoever should become seized by virtue of the will, might make a 31 years lease, reserving the best yearly rent, construed to be a valid power. *Forster* v. *Graham*. 2 *Str.* 962.

2 Power to make a life estate to one's wife may be executed at different times, if the words by which the

power is given can be so construed, as to intend that the power might be so executed. *Zouch ex dimiss. Woolston* v. *Woolston et al.* 2 *Burr.* 1136.

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3 Where tenant for life has a power to grant leases, "in possession, but not by way of reversion of future interest," a lease *per verba de presenti* is not contrary to the power, though the estate at the time of making the lease, was held by tenants at will, or from year to year, if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee. *Goodtitle* v. *Funucan.* 2 *Doug.* 563 to 575.

Under a power "to lease all manors, messuages, lands, &c. so as there be reserved as much rent as is now paid for the same," such parts of the estates enumerated in the power as have never been demised may be let. But in a family settlement of an estate, consisting of some ground always occupied with the family seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, "that the ancient rent must be reserved," excludes the mansion-house and lands about it never let. *Ibid.*

Where a qualification annexed to a power goes in destruction of the power, the law will dispense with the qualification. *Ibid.*

Qu. If a lease under a power, by which the lessor must reserve the old rent, would be a fraud on the power, and void, although the old rent were reserved, if the covenants in the new lease were less advantageous to the reversioner than those in the former leases? *Ibid.*

4 Expression of what the law implies, though not expressed in the deed under which the powers are derived, or by which they are reserved, shall not prejudice the execution of power. *Hotley* v. *Scott.* *Lofft*, 316.

5 Power to make a life estate to one's wife may be executed at different times. *Woolston* v. *Woolston.* 1 *Black.* 281.

Naked powers to be construed strictly. *Ibid.* 283.

Powers coupled with property, if merely legal, construed equally strict in equity as at law. *Ibid.*

Powers under the statute of uses, to be construed as liberally at law as in equity. *Ibid.*

6 Where the power is only to revoke, no new uses can be declared. *Anon.* 1 *Str.* 584.

7 A power to appoint by *deed* executed in the presence of two witnesses is *ill* executed by a *will*; otherwise if the power had been to appoint by *any writing* or *instrument*, or other *general term*. *Darlington* v. *Pulteney.* *Cowp.* 260.

8 Where by *statute* a special authority is delegated to particular persons, affecting the *property* of individuals, it must be *strictly* pursued, and appear to be so upon the *face* of the proceeding. *R.* v. *Croke.* *Cowp.* 26.

9 Power good, though not strictly pursued. *Norris* v. *Trist.* 3 *Salk.* 277.

10 Power to charge lands with a sum of money, imports interest thereof also. *Kilmurry* v. *Geery, in Chancery.* 2 *Salk.* 538.

11 Copyholders are part of the demesnes of a manor. A power never shall be construed to give a right to destroy the nature of its subject. *Winter* v. *Lovedens.* 1 *L. Raym.* 267. 2 *Salk.* 537.

12 A power to grant a life estate is not well executed by a lease for 99 years determinable on a life. *Rattle* v. *Popham.* 2 *Str.* 992.

13 Master of the rolls, under his leasing powers, by act of parliament, may grant as many concurrent leases as he pleases during the last seven years of a former lease in being; and (*semble*) may at any time take a surrender and renew for 21 years, even in trust for himself

Wilson v. *Sewell.* 1 *Black.* 617. 4 *Burr.* 1975.

14 Leasing powers to be liberally construed; and therefore land settled in a family settlement for a term determinable on lives shall so far forth be esteemed land usually letten or demised. *Right, on demise of Basset* v. *Thomas.* 1 *Black.* 446. 3 *Burr.* 1441.

15 The limitation and modifying of estates by virtue of powers, came from equity into the common law with the statute of uses. The intent of the parties who gave the powers ought to govern every construction of them; they shall not be exceeded, nor their condition evaded, but shall be strictly pursued in form and substance; and all acts done under special authority, not agreeable to it, nor warranted by it, are void. *Taylor on dem. Atkyns* v. *Horde & al.* 1 *Burr.* 60.

16 A father, having a power to appoint portions to be raised at all events in such shares as he shall think fit, cannot annex a condition to any of the shares. *Pawlet* v. *Pawlet, in Chancery.* 1 *Wils.* 224.

17 Power under a marriage settlement to appoint to the children of the marriage, is strictly confined to those children. *Goodtitle on dem. of Russel, Clk. and others* v. *Weal, Wid. and others.* 2 *Wils.* 369.

18 Power under a marriage settlement to give to the children of the marriage in such shares, &c. and for such estate, &c. and there is but one child of the marriage, such child must have the whole estate which was settled. *Roe, on dem. of Buxton and Wife* v. *Dunt.* 2 *Wils.* 336.

19 A deed, authorising a man to make leases in possession, and not in reversion, rendering the ancient rent, and making the tenant liable for waste, cannot be represented, in pleading generally, to have authorized him to make leases. In debt by a remainder man for rent reserved upon a lease by tenant for life, the plaintiff must shew what authority the tenant for life had to make the lease. *Sands* v. *Ledger.* 2 *L. Raym.* 792.

20 A person impowered, by warrant of attorney, to execute a deed for another, must execute it in the name of the principal. A lease, importing to be made by the lessor as attorney for another, is void upon the face of it; at least the attorney cannot maintain an action upon it in his own name. *Frontin* v. *Small.* 2 *L. Raym.* 1418. *Str.* 705.

21 Powers given under settlement to make leases of present and not of future interest, and so as the same go with and be incident to the remainder and reversion; reservation, with a view to the execution of these powers, held good, being made to the tenant in possession of the freehold, his heirs, and assigns, for that, both by reason and authorities, heirs and assigns meant those to whom the remainder and reversion shall go under the settlement. *Hotley* v. *Scott. Lofft*, 316.

22 An estate being conveyed, by a marriage settlement, to trustees, to the use of the settlor (the husband) for life, with remainders over, and with a power to the settlor, with the consent of the trustees, to revoke all the uses in the settlement, and the settlor having granted an estate for his own life, for valuable consideration, in the settled estate: a revocation subsequent thereto of all the uses, executed by him with the consent of the trustees, and a conveyance of the estate to a purchaser, for valuable consideration also, but with notice of the prior grant for the settlor's life, shall not affect the interest granted for his life. *Goodright* v. *Cator.* 2 *Doug.* 477 to 486.

23 A lease, to commence from the day of the date, is good, under a power to grant leases in possession only, and not in reversion. *Pugh* v. *The Duke of Leeds.* 1 *Doug.* 53 *n.*

24 Though a tenant for life with power to grant leases in possession for

21 years, convey his life estate to pay an annuity for his life, and the overplus to himself, he may still grant leases agreeable to the terms of the power. *Renn* v. *Bulkeley*. 1 *Doug*. 292, 293.

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25 Powers are to be construed in the same manner in a court of law as in equity. *Ibid.*

26 Devise in fee to a feme covert with a power to dispose of the estate without the controul of her husband; the Court of C. P. held that such a power was void, as being inconsistent with the fee given to her in the first instance, and that she could not convey without fine. *Goodill* v. *Brigham*. 1 *Bos. & Pull.* 192.

27 A lease made, under a special power by a tenant for life, for a longer term than his own life, is void on his death, unless the power be strictly pursued. *Doe d. Ellis* v. *Sandham*. 1 *Term Rep.* 705.

28 So that under a power to a tenant for life to lease for years, reserving the usual covenant, &c. a lease made by him, containing a proviso that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual. *Ibid.*

29 Every execution of a power must have a reference to the original instrument creating that power, and whoever claims under the execution must make title under the power itself. *Robinson* v. *Hardcastle*. 2 *Term Rep.* 241, 380, 781.

30 So that where a power was given to *A.* on his marriage, to appoint to and amongst the children of the marriage, in such proportions, &c. and in default of such appointment, the estate was limited to the first and other sons of the marriage in tail, and *A.* by will appointed to his eldest son *C.* for life, remainder to trustees, &c. remainder to the first and other sons of *C.* in tail, and in default of such issue to *D.*, another child of *A.*, the limitation of a life estate to a person not in being at the original creation of the power being void, the subsequent limitations depending thereon are void also, and *C.* the eldest son took an estate-tail either under the execution of the power, or the original settlement. *Ibid.*

31 A power of appointment under a marriage settlement unto and among all or any the child or children of the marriage, for such estates as the husband and wife, *or the survivor* of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment, reserving to them, and the survivor, a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, &c. remainder to the daughter in fee; all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power; and the ultimate remainder dependant upon such intermediate limitations, though made in favour of one of the objects of the power, is also void, and shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue male of the eldest son, &c. to whom the appointment was made. For an appointment not good in its creation will not become so by subsequent circumstances; and such an appointment being by deed cannot be construed cypres, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will. *Brudenell* v. *Elwes*. 1 *East*, 442.

32 A power of appointing by will is not executed by a mere devise of the residue. 2 *H. Black*. 136.

33 Under a power of appointing a re-

al estate to the use of such *child and children*, &c. and where in default of appointment the estate was settled "to the use of all and every the child and children," an exclusive appointment to one is good. *Swift d. Huntly & Ux.* v. *Gregson.* 1 *Term Rep.* 482.

34 Under a power of appointing real and personal estate "*to and amongst such of the testator's relations as shall be living at the time of his death in such parts, shares, and proportions, &c.*" an exclusive appointment to one is good. *Spring d. Titcker* v. *Biles & al.* 1 *Term Rep.* 435, *n.*

35 A power to appoint to children was held to extend to grand-children; because the court thought that it was the intention of the person creating the power that it should be so executed; and there being no rule of law against it, as all the objects of the appointment were in existence when the power was created. *Doe d. Devonshire* v. *Cavendish.* 4 *Term Rep.* 741, *n.*

36 A power to raise portions may be executed at several times, provided the first execution be not meant as a complete execution, and that the party in the whole execution do not transgress the limits of their power. *Doe* v. *Milborne.* 2 *Term Rep.* 721.

37 A power given to *an executrix* to raise a portion for a younger child does not extend to real estates, of which she was also trustee. 2 *Term Rep.* 721.

38 Under the settlement of an estate with a power to the tenant in possession to let *all or any part* of the premises, *so as* the usual rents be reserved, a lease of tithes which had not been let before, was held void. *Pomroy* v. *Partington.* 3 *Term Rep.* 665.

39 In these cases, the intention of the parties is to govern the court in construing the power: (and see No. 35.) 3 *Term Rep.* 665.

40 Under a power in a will to lease in *possession* and *not in reversion*, a lease for years executed the 29th of March to the then tenant in possession, *habendum* as to the arable from the 13th of Feb. preceding, and as to the pasture from the 5th of *April then next*, &c. under a yearly rent payable quarterly, on the 10th of July, 10th of October, 10th of January, and 10th of April, is void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power. *Doe d. Allan* v. *Calvert.* 2 *East*, 376.

41 Where, in a marriage settlement made by tenant in tail, he settled the same to himself for life and to the children of the marriage in strict settlement; with a proviso that it should be lawful for him by deed or instrument in writing, attested by three witnesses and *to be enrolled*, with the consent in writing of certain trustees, to revoke the old, and declare new uses: held that a deed of revocation executed by him and all the trustees in person except one, and the consent of that one being given by means of a general power of attorney before made by him to the settlor to consent to any such deed he might think proper to make, by virtue of which the settlor executed the deed for and in the name of such trustee, is bad, though properly attested and enrolled; and that another deed of revocation properly executed and assented to, but *not enrolled till after the settlor's death*, was also void; for that every thing required to be done in the execution of such a power must be strictly complied with, and must be completed in the life-time of the person by whom it is to be executed: and also held that the defect of the one deed could not be supplied by the other. *Hawkins* v. *Kemp.* 3 *East*, 410.

42 The lease of a tenant for life, who has power of leasing under certain conditions, must strictly comply

with the conditions; and if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainder-man. *Doe d. Pultney* v. *Lady Cavan.* 5 *Term Rep.* 567. (Affirmed in *Dom. Proc.* 7th May, 1795.)

43 By a marriage settlement an estate was settled to the use of the wife for life, remainder to such persons and for such estates as she should by deed or will attested by three witnesses appoint, and for want of such appointment reversion to herself in fee: during her husband's life she made a will in pursuance of the power, devising her estate to *A.* in fee; after which she and her husband executed a lease of part of the settled estate to the defendant, not executed pursuant to the power; and after the husband's death she received rent from the defendant: held, that such lease was avoidable only by her upon her husband's death, and that her receipt of rent accruing afterwards was a confirmation of it against *A.*, who claimed under the appointment by the will. *Doe d. Collins* v. *Weller.* 7 *Term Rep.* 478.

44 Under a power of leasing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, such lands as were then demised for any such term, lands are not included which were then held under a demise to "*W.* and *G.* for 99 years if *W.* and his widow and any eldest son living or *in ventre sa mere*, at the time of his (*W.*'s) death, or if no son, any eldest daughter then living or *in ventre sa mere*, or any other of those three, viz. of the said *W.* and such his wife, son, or daughter should so long live, remainder to the said *G.* and his widow, son, or daughter, in the same manner," of which description of persons five were in fact living at the time of the power reserved, who were all entitled in succession, three at a time, to come in under the lease; for under such a general power the three lives must be certain and coexisting. *Doe d. Wyndham* v. *Halcombe.* 7 *Term Rep.* 713.

45 If a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. Therefore, a condemnation of four out of the six triers of leather appointed under 1 Jac. 1, c. 22, (the whole number being met for the purpose of trying,) must be considered as the condemnation of all. *Grindley & al.* v. *Barker & al.* 1 *Bos. & Pull.* 229.

46 A power to appoint a schoolmaster to an ancient foundation given to the vicar and churchwardens (of whom there were eleven) and in case of their neglect in appointing, then to devolve to two corporate bodies in succession, and to result, in the dernier resort, to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, is well executed by the vicar and a *majority* of the churchwardens; especially if such an election be supported by usage. *Withnell* v. *Gartham.* 6 *Term Rep.* 388.

47 Where a special power is granted by statute, affecting the property of individuals, it must be strictly pursued; and it must appear, on the face of the proceedings, that the directions of the statute have been strictly observed. *Gilbert* v. *Columbia Turnpike Company.* 3 *Johns. Cas.* 107.

PRACTICE.

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XXX. *Endorsement of Writ.*
XXXI. *Rules and Practice of the Courts on various other Points, general and special.*

I. *Of Summonses and Particulars of Demand.*

1 A judge's summons stays nothing, unless it be returnable before the judgment may be regularly signed. *Calze* v. *Lord Lyttleton.* 2 *Black.* 954.

2 Plaintiff ought to give defendant particulars of his demand, even where he is an attorney. *Le Breton* v. *Braham.* 3 *Burr.* 1389.

3 Attendance on judge's summons for half an hour next immediately following the return thereof shall be deemed sufficient. *Reg. Gen.* 6 *Term Rep.* 402.

4 On every appointment by the master, the party served shall attend such appointment without waiting for a second: otherwise the master shall proceed *ex parte* on the first appointment. *Reg. Gen.* 4 *Term Rep.* 580.

5 Service of rules, orders, or notices after 10 o'clock at night, not valid. *Reg. Gen. K. B. M.* 44 *G.* 3, 1 *East*, 132.

6 When the defendant pleads payment, and gives notice of *set-off*, in general terms, for goods sold and delivered, money paid, &c. the plaintiff may require him to specify and deliver an account of the *particulars* of the set-off. *Mercer* v. *Sayre.* 3 *Johns. Rep.* 248.

In like manner, where the particulars of the plaintiff's demand are not set forth in the declaration, the defendant may require him to deliver an account of the particulars. *Ibid.*

II. *Arguing Cases, &c.*

1 An action commenced as a town cause, and not objected to, shall be considered as such in all its subsequent stages, especially after a verdict. *Keddey and Jordan.* 2 *Black.* 992.

2 You cannot move for your argument for a matter of course in the paper in the King's Bench. *The King* v. *The Vicar and Churchwardens of Froom Selwood.* 1 *Wils.* 76.

3 In a case for the opinion of the court, the facts proved at the trial ought to be stated, and not the evidence of facts only. *Palmer* v. *Johnson.* 2 *Wils.* 163.

4 No special arguments to be entered the last paper day of the term. *Anon. Lofft*, 370.

5 All special cases set down for argument by the clerk of the papers shall be entered within the four

first days of the term next after the trial at which such special cases have been reserved; and none shall ever be set down for argument on any of the four last days of the term *Reg. Gen. M.* 38 *G.* 3. 7 *Term Rep.* 454.

6 No rules entered in the peremptory paper shall be enlarged during the term, or put off from the appointed day, by the consent of counsel, or of the attornies, without leave of the court. *Reg. Gen. K. B. East* 41 *G.* 3. 1 *East*, 497.

7 The paper books in causes entered for argument on *Tuesdays* shall be delivered to the judges on the *Saturday* preceding; and in those entered for *Fridays* on the *Tuesdays* preceding with such marginal notes as are directed by the rule Hil. 38 G. 3. *Reg. Gen. K. B. T.* 40 *G.* 3. 1 *East*, 131.

8 All arguments upon demurrers and other arguments in C. P. are to be heard on Mondays and Thursdays only. *Reg. Gen. C. P. H.* 42 *G.* 3. 3 *Bos. & Pull.* 110.

9 Where issues are taken on some of the pleas and demurrer to others, the plaintiff has a right to argue the demurrers either before or after trial. *Duberley* v. *Page.* 2 *Term Rep.* 394.

10 A point reversed by the judge at *nisi prius* is like a special verdict, and the plaintiff must prepare the case and open the argument. *Percival* v. *Jones.* 1 *Johns. Cases*, 393.

11 Where a verdict is taken, subject to the opinion of the court on a case stated, the counsel for the plaintiff opens the argument of the cause. *Jackson ex dem. Gansevoort* v. *Murray.* 2 *Johns. Cas.* 219.

12 When the argument of a cause is about to be opened, the opening counsel must furnish the opposite side with the points he intends to rely on, in support of his motion. *Schmidt* v. *United Ins. Co.* 1 *Johns. Rep.* 63.

13 The words "as soon thereafter as ——l can be heard," usually inserted in notices of arguments, are unnecessary. *Anon.* 1 *Johns. Rep.* 143.

14 On an appeal from the opinion of a judge refusing a certificate to stay proceedings in a cause after verdict, the party appealing may deliver to the court the points and authorities on which he relies, together with the case. *Anon.* 1 *Johns. Rep.* 275.

15 In arguing, on a petition to the court of errors, to have proceedings stayed until a new assignee of a bankrupt is made a party to the appeal, the counsel in support of the motion are first to be heard. *Sands and others* v. *Codwise and others, in error.* 2 *Johns. Rep.* 485.

16 In every case made for argument, the party who is to open the argument must first deliver to the court and the opposite party the points he means to insist on. *Main* v. *Newson.* 3 *Johns. Rep.* 542.

17 Where proof of the issue lies upon the defendant, he shall open the cause. 2 *Dallas*, 125.

III. *Bail.*

1 Where additional bail is put in, the whole entry shall be of that term. *Anon.* 1 *Salk.* 100.

2 Special bail must be put in upon appearing to an outlawry where special bail was originally required. *Campbell* v. *Daley.* 3 *Burr.* 1921.

3 Special bail in counties palatine cannot be taken for less than 20l. *Smith* v. *Dudley.* 2 *Str.* 1102.

4 It seems four days to put in bail, means exclusive of the return day; and if the last day is a Sunday, then the whole of Monday. *Anon. Lofft*, 190.

5 If time of exception against bail is out and you have not justified, you cannot justify after the time allowed; but you may avail yourself to stop an attachment against the sheriff. *Anon. Lofft*, 224.

6 Putting in bail where not required does not bind the court from order-

ing common bail. *Robinson, one, &c.* v. *Niccols.* 2 *Str.* 1077.

7 If a second writ is taken out pending the first, common bail shall be taken. *Belifante* v. *Levy.* 2 *Str.* 1209.

8 Plaintiff having done an act to wave his bail in the original action, shall not have bail in an action on the judgment. *Crutchfield* v. *Seward.* 2 *Wils.* 93.

9 Notice that *A.*, *B.*, and *C.* or two of them will justify, is bad. *Anon. Lofft*, 26.

10 Bail may be put in above without the defendant's consent. *Berchire and another* v. *Colson.* 2 *Str.* 876.

11 Rules of practice about putting in bail and excepting thereto. 1 *Salk.* 98.

12 Debt in K. B. on a recognizance of bail in C. P. *Anonymous.* 3 *Salk.* 55.

13 Bail cannot justify at a judge's chambers in vacation, unless by consent; and are no bail, unless they justify the next term in court. *Hawkins* v. *Plomer.* 2 *Black.* 1064.

14 Notice to justify three bail is irregular. *Allen* v. *Keyt.* 2 *Black.* 1122.

15 If notice of justification has been given by a new attorney not allowed by the court, the bail will not be permitted to justify. *Macpherson* v. *Rorison.* 1 *Doug.* 217.

16 Bail taken by the court on a charge of a rape, both from the principal and accessaries on special affidavits and particular circumstances. *King* v. *Lord Baltimore.* 1 *Black.* 648.

17 Defendant's attorney, changed without leave of the court, cannot give notice to justify bail. *Kaye* v. *De Mattos.* 2 *Black.* 1323.

18 A foreigner of credit, though he has few effects in *England*, may justify as bail, especially if the defendant is a foreigner also. *Christie* v. *Filleul.* 2 *Black.* 1323.

19 If proceedings against bail are stayed upon undertaking to pay debt and costs, within four days after affirmance of judgment, it means the final affirmance of it. *Kershaw* v. *Cartwright and Pearce, Bail of Green.* 5 *Burr.* 2819.

20 Where the defendant is guilty of a neglect in not putting in bail in time, whereby the bail bond becomes forfeited, the plaintiff may except to bail put in, in order to stay proceedings on the bail bond; and it will not be a waiver of the assignment. *Boldero* v. *Gray.* *Cowp.* 769.

21 Landed property in *Jamaica* does not qualify to justify as sufficient bail. *Boddy* v. *Leyland.* 4 *Burr.* 2526.

22 Sunday not to be computed one of the four days for bail if the last. *Studley* v. *Start.* 2 *Str.* 782.

23 Bail bond on a writ returnable in Easter, and plaintiff did not proceed till 24th October, when he took an assignment thereof. Held, that it should stand a security, although special bail put in after the assignment. *Merryman* v. *Carpenter.* 2 *Str.* 1262.

24 Bail in a civil action for a convict of felony, too late to have *certiorari* to bring up principal to surrender him in their discharge after principal actually on board for transportation. *Fowler* v. *Dunn.* 4 *Burr.* 2034.

25 Plaintiff may except to bail above, though they are the same that become bound to the sheriff. *Bouhhton* v. *Chaffey and another.* 2 *Wilson*, 6.

26 If costs have incurred in the course of the proceedings, bail cannot get their recognizance discharged without payment of them. *Rex* v. *Lyon.* 3 *Burr.* 1461.

27 Common pleas requires special bail, this court only common, in action upon judgment where original cause of action but ten pounds. *Belither* v. *Gibbs.* 4 *Burr.* 2117.

28 If a rule be moved for, to stay the proceedings on a bail bond, it must not be entitled in the original cause,

but in the action on the bail-bond. *Smithson* v. *Smith*. *Willes*. 461.

29 Sheriff cannot take bail on an attachment. *Anon*. 1 *Str*. 479.

30 The practice as to the 5*l*. for not filing common bail, is to make rule absolute in the first instance. *White* v *Holland & another*. 2 *Str*. 737.

31 Common bail to be accepted in action upon judgment of nonsuit merely for costs. *Bush* v. *Bates*. 5 *Burr*. 2660.

32 Notice of *three* to justify, good, if all the three can justify. *Anon*. *Lofft*, 252.

33 Exception to bail, styling himself *gentleman*, it appearing he had a commission in the *Birmingham* way, bad. *Anon*. *Lofft*, 281.

34 Not having been assessed to the poor's rate, no ground to except to bail, being only evidence of his being a housekeeper. *Anon*. *Lofft*, 329.

35 Notice of bail in *Hatton-street*, *Middlesex*, sufficient, though the name changed from *Hatton-garden* to *Hatton-street* within two years preceding. *Anon*. *Lofft*, 418.

36 Justification signifies nothing after the sheriff has been ruled. *Anon*. *Lofft*, 438.

37 Bail never goes farther than as a security in the original action. *Anonymous*. *Lofft*, 545.

38 An accomplice of felony may be bailed, though the principal be not taken. *Anon*. *Lofft*, 554.

39 A motion to discharge bail on a commission of lunacy issued against the principal, bad. *Anon*. *Lofft*, 617.

40 Not admissible, on account of effects abroad being out of the reach of process. *Anon* *Lofft*, 34 & 147.

41 Parish of the residence of bail not a sufficient designation in notice. *Anon*. *Lofft*, 72.

Bail rejected who did not know for how much, nor in how many actions he was bail. *Ibid*. & 194.

Irregular notice does not make bail bad, but entitles to a farther day to justify. *Ibid*.

42 Bail not present at the sitting of the court must wait till the rising. *Anon*. *Lofft*, 88.

43 The value of a house rented by bail not material. *Anon*. *Lofft*, 148.

44 No sheriff's officer, or person concerned executing process, can be bail. *Anon*. *Lofft*, 153.

45 Bail described as a hatter, being the servant of a hatter, rejected. *Anon*. *Lofft*, 187.

Surname of bail omitted, time given to justify. *Ibid*.

Bail, in the name of *one* of two joint plaintiffs, bad. *Same Term*, 237.

46 If a man carry on his business at a lodging in one place, and keep a house at another, notice of bail describing him as of the former place is sufficient. *Weddall* v. *Berger*. 1 *Bos*. & *Pull*. 325.

47 Where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification. *England* v. *Kerwan*. 1 *Bos*. & *Pull*. 335.

48 Bail must actually have become so before notice of justification is given. *Collier* v. *Godfrey*. 1 *H*. *Black*. 291.

49 In C. P. two days notice of justification must be given, as well where the bail originally put in, as where added bail are brought up. *Nation* v. *Barrett*. 2 *Bos*. & *Pull*. 30.

50 In justifying bail by affidavit where the same persons are bail in more actions than one, each affidavit ought to state that the bail are worth double the amount of the debts in all the actions wherein they offer to become bail. *Field* v. *Wainewright*. 3 *Bos*. & *Pull*. 39.

51 The plaintiff cannot file common bail, according to the statutes, after the succeeding term after the writ is returnable. *Smith* v. *Painter*. 2 *Term Rep*. 719.

52 Where a writ is returnable the first return of a term in a country cause, the defendant (in C. P.) has eight days after the *quarto die post* to put in bail. 2 *H*. *Black*. 276.

53 Where a rule to set aside proceedings for irregularity, and to stay proceeding in the mean time, is obtained, the proceedings are suspended *for all purposes* till the rule is disposed of. *Swayne* v. *Crammond.* 4 *Term Rep.* 176.

54 And therefore the time for putting in bail remains the same after the rule is discharged, as it was when it was granted. 4 *Term Rep.* 176.

55 The clerk of the bails in K. B. is directed in future to mark the bail pieces numerically as they are received. *Reg. Gen.* (K. B.) *E.* 30 G. 3. 3 *Term Rep.* 660.

56 If a defendant be arrested by process of K. B., and removed by *habeas corpus* to C. B., he may put in and justify bail in either court. *Knowlys & al.* v. *Reading.* 1 *Bos. & Pull.* 314.

57 If bail be put in with the filazer of the county in which the defendant is arrested on a *testatum capias*, the bail may be treated as a nullity and an attachment issue. *Clempson* v. *Knox.* 2 *Bos. & Pull.* 516.

58 Bail is not regularly put in till the allowance of it has been served, even though the plaintiff oppose the justification. *It.* v. *Middlesex Sheriff.* 4 *Term Rep.* 493.

59 Or be otherwise informed of it. *Holland* v *White.* 2 *Bos. & Pull.* 341.

60 This practice proceeds not only on the ground of protecting the revenue, but also on the notion that the defendant must be taken to have waived his justification unless he serve the rule for the allowance. 2 *Bos. & Pull.* 324.

61 Bail above may be put in on a *dies non juridicus.* *Baddeley* v. *Adams.* 5 *Term Rep.* 170.

62 Bail are not regularly put in unless the name of the proper county be inserted in the bail piece. *Smith* v. *Miller.* 7 *Term Rep.* 96.

63 It is no exception against bail until the plaintiff give notice of the exception. *Oldham* v. *Burrell.* 7 *Term Rep.* 26.

64 Where bail are opposed, and rejected, and the defendant is surrendered on the next day, he may justify new bail without paying the costs of the former opposition. *Holward* v. *Andre.* 1 *Bos. & Pull.* 32.

65 Where the action is by original, the defendant (in K. B.) has till four days after the *quarto die post* to put in bail. *Frampton* v. *Barber.* 4 *Term Rep.* 377.

66 If the fourth day for perfecting bail (in K. B.) be the last day of term, and the bail be not perfected before the rising of the court on that day, an assignment of the bail bond to the plaintiff in the evening of that day is regular. *Dent* v. *Weston.* 8 *Term Rep.* 4.

67 Of the four days allowed to perfect bail in, after an exception, the first is reckoned (in C. P.) exclusively, and the last inclusively; so that where the exception was on *Wednesday*, an attachment could not regularly issue against the sheriff till the *Tuesday* following, (*Sunday* being no day;) but though the attachment did issue on the *Monday*, the court would not set it aside, because the *bail was not* perfected. *North* v. *Evans.* 2 *H. Black.* 35.

68 Time for putting in bail expired on the 30th; defendant on the 31st moved to justify, pursuant to a notice previously given; held, that the plaintiff was entitled to the costs of preparing to move for an attachment. *Jurrett* v. *Creary.* 3 *Bos. & Pull.* 603.

69 The defendant has four days exclusive from the day of the exception to jutify bail; and if an attachment be obtained on the fourth day, the court will set it aside, without first calling on the defendant to justify bail. *Maycock.* v. *Solyman.* *New Rep.* 139.

70 If a bail above be put in and justified within four days from the ruling the sheriff to bring in the body, the court will set aside all proceedings upon the bail bond commenced previous to the time of justification.

Wrigh v. *Walker*. *Bos. & Pull.* 564.

71 Where bail are put in *in due time*, the defendant is not bound to give notice, but the plaintiff must search in the filazer's book, otherwise if they be *not put in in due time*. *Dawkins* v. *Reid*. 1 *H. Black.* 529.

72 The judgment in an original action, and the judgments in the actions against the bail, may be set aside upon one motion, and one affidavit entitled in the original action. *Winder* v. *Wood*. 3 *Bos. & Pull.* 118.

73 The court will enter an exoneretur on the bail piece on payment of the sum sworn to and costs, though less than the sum acknowledged to be due, as well where the action is by original as by bill. *Jacob* v. *Bowes*. 6 *East*, 312.

74 Upon a defendant's coming in to reverse an outlawry in a civil case upon the statute 4 and 5 W. & M. c. 18, the usual form for taking the recognizance of bail is to pay the condemnation money; and not in the alternative, to pay it, or render the defendant. *Matthews* v. *Gibson*. 8 *East*, 527.

75 None can be held to special bail in trover, or detinue, without a judges order. *Reg. Gen.* 9 *East*, 325.

76 Bail above having been put in, and exception entered in the vacation, notice of justification for the first day of the next term must be given *within four days after such exception*. *Millson* v. *King*. 9 *East*, 434.

77 Where the principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff, before 12 o'clock on the first day of term, being the return day of the writ, and the under sheriff signified his assent to the surrender by the return of the post the next day, at the distance of 17 miles; held sufficient to discharge the bailbond of which the plaintiff had taken an assignment afterwards, with notice of such surrender. *Plimpton* v. *Howell*. 10 *East*, 100.

78 Where bail would surrender principal before judgment upon *scire facias*, the costs of the *scire facias* must first be paid. *Bartlet* v. *Folley*. 5 *Mass.* 873.

When bail has surrendered the principal upon *scire facias* and he is committed, the plaintiff is entitled to an *alias* execution, on which to charge the principal, although more than a year has elapsed since the return of the former execution. *Ib.*

79 Where attorney of the defendant gave notice of special bail before judgment, but the bail was not actually filed, it was ordered to be filed *nunc pro tunc*, and that the attorney pay the costs of the motion for that purpose. *Britt* v. *Van Norden*. 1 *Johns. Cases*, 590.

80 Special bail need not justify, unless required so to do. *Stransbury* v. *Durell*. 1 *Johns. Cases*, 396.

81 Bail in error may be put in before a judge at his chambers, and it will be considered as taking effect from the judgment. *Richardson* v. *Backus*. 1 *Johns. Rep.* 493.

It is sufficient if the penalty be to the amount of the judgment. The bail cannot gainsay their recognizance. *Ibid.*

Notice of bail need not state before whom it was taken. *Ibid.*

82 There need not be eight days between the *teste* and return of a *ca. sa.* to charge bail, where the proceedings are not by original writ. *Carmer* v. *Weeks and another*. 3 *Johns. Rep.* 246.

83 Before a suit can be commenced against bail, a *ca. sa.* or *test. ca. sa.* against the principal must be *actually* returned, with *non est inventus* indorsed thereon, and filed in the clerk's office. *Pearsall* v. *Lawrence and Doe*. 3 *Johns. Rep.* 514.

84 Where bail was put in, and the plaintiff entered an exception on the bail-piece, and afterwards proceeded in the cause, without any justification of bail, and obtained a judgment, it was held to amount to a waiver of the bail; and that he

could not proceed against the bail to whom he had excepted. *Flack* v. *Eager*. 4 *Johns. Rep.* 185.

No formal notice of a waiver of bail is necessary. *Ibid.*

85 Pledges of prosecution to a declaration are mere form, and may be added any time before judgment. *Baker and others* v. *Philips*. 4 *Johns. Rep.* 190.

86 After the return of a *ca. sa.* against the principal and the bail has become fixed, the court will not relieve the bail, when the principal is dead. *Olcott* v. *Lilly*. 4 *Johns. Rep.* 407.

The court affords relief to bail only to enable them to surrender the principal; and where the principal is convicted of felony, sent abroad as an alien, or charged under the bankrupt or insolvent laws, it is regarded as equivalent to a surrender. *Ibid.*

87 Where a defendant is taken in custody in vacation, his bail may justify before a judge at his chambers. *Fenn* v. *Smith*. 6 *Johns. Rep.* 124.

88 Where the plaintiff takes an assignment of the bail bond, and brings an action against the principal and the bail to the arrest, and obtains a judgment, and issues execution, he cannot, afterwards, file common bail, in the original suit, and proceed to judgment therein; but is concluded by his election to proceed on the bail bond. *Beecker* v. *Simmons* 7 *Johns. Rep.* 119.

89 Where bail in a court of common pleas, remove out of the county, an action on the recognizance may be brought in this court. *Davis* v. *Gillet and another*. 7 *Johns. Rep.* 318.

90 Special bail was entered, but afterwards the defendant was discharged upon citation on common bail; an *exoneretur* ordered. 2 *Dallas*, 79.

91 What is sufficient cause to hold a foreign governor to bail, for an act done abroad. 2 *Dallas*, 249.

92 Under what circumstances the circuit court will order bail, on an action brought there, though it had been refused in a state court, in consequence of which the plaintiff discontinued. 2 *Dallas*, 330.

93 Evidence on motion to discharge bail, must be by deposition and not *viva voce*. *Rules of Court*. 1 *Cranch, xvii.*

IV. *Certificate of Judges.*

1 A judge of *nisi prius* cannot certify for costs out of court. *Ford* v. *Parr and another*. 2 *Wils.* 21.

2 The certificate of the judge or court that there was probable cause for seizing a ship or goods as contraband, shall protect the person making the seizure and prosecuting for a condemnation, although the ship and goods shall be acquitted.

Or when an action is brought for seizing a ship or goods, although there is a verdict for the plaintiff, if the judge or court grant such certificate the plaintiff shall not have more than nominal damages besides his ship or goods, and shall not have costs.

Such certificate may be granted after the trial or sentence. *Sullivan* v. *Montague*. 1 *Doug.* 106.

3 Not to have a *non precedendo*, for want of transcribing, till you have first a certificate, there is no transcript. *Anon. Lafft*, 329.

4 And although no suit has been commenced in the exchequer for the condemnation of the ship or goods. *Renalls* v. *Cooper*. 1 *Doug.* 106, *n.*

5 And by a court of appeal from the admiralty jurisdiction in the plantations. *Sullivan* v. *Montague*. 1 *Doug.* 106.

6 The court of K. B. will certify in a case sent from the rolls. *Daintry* v. *Daintry*. 6 *Term Rep.* 307.

7 After a verdict, unless a certificate or order of a judge to stay proceedings, be obtained, the party in whose favour the verdict is given, though a *case* be made, may proceed to enter up judgment. *Case* v. *Shephard*. 1 *Johns. Cases*, 245.

the court ordered two counts to be struck out, and the word defendants to be substituted for the names of the defendants in all the places where they occurred, except the first. *Meeke* v. *Oxlade & al.* *New Rep.* 289.

31 Where the defendant gives notice of bail *in propria persona*, and the plaintiff serves him with a copy of the declaration and notice of rule to plead, and the defendant, afterwards, retains an attorney, the plaintiff need not serve another copy of the declaration and notice on such attorney. *Haskins* v. *Snowden.* 2 *Johns. Cases*, 287.

32 In an action, not bailable, or where no *ac etiam* clause is inserted in the writ, any number of the defendants may be joined in one writ, and the plaintiff may, afterwards declare against those brought into court, severally, or against some omitting others. *Montgomery* v. *Hasbrouck, and others.* 2 *Johns. Rep.* 538.

33 Where the plaintiff files common bail for the defendant, according to the statute, the declaration may be filed *de bene esse*, at any time within 40 days. *Conklin* v. *Havens.* 6 *Johns. Rep.* 127.

Whether the declaration may be filed *de bene esse*, at any time before bail is filed, or an appearance entered, and after the time for the appearance has expired? *Qu. Ibid.*

34 Filing a declaration is no waiver of bail. 2 *Dallas*, 141.

35 A declaration for foreign money without averment of its value, is cured by the verdict finding the value. 2 *Dallas*, 365 to 369.

36 A declaration in the *debit*, though the action is for foreign money, will be cured by the verdict finding the value. 2 *Dallas*, 369.

VI. *Delay; how it shall effect proceedings, and of remedying same.*

1 Rule *nisi* to set aside execution for want of *scire facias* to revive, same being occasioned by defendant's own delay, discharged with costs. *Michell.* v. *Cue et Ux.* 2 *Burr.* 660.

2 Replication permitted to be withdrawn after six terms. *Alder* v. *Chipp.* 2 *Burr.* 755.

3 Where proceedings are staid by consent for a time certain, though above a year, they may go on at the expiration of the time without a term's notice. *Watkins* v. *Haydon.* 2 *Black.* 762.

4 Counsel not being prepared, no cause for courts not proceeding. *Colebroke* v. *Dobbs.* 3 *Burr.* 1319.

5 Leave given to add a plea two terms after first plea pleaded. *Waters* v. *Bovell.* 1 *Wils.* 223.

6 If the plaintiff be hung up a year by injunction, he must have a *scire facias* before execution. *Winter* v. *Lightbound.* 1 *Str.* 301.

7 The court refused to set aside the execution in the second action, (a writ of error having been brought on the first judgment,) because the defendant had not before applied to stay the proceedings in the second action. *Robinson* v. *Tuckwell.* *Willes*, 183.

8 And in such case it is immaterial whether the execution has been executed or the writ only delivered to the sheriff to be executed. *Clarkson* v. *Physick.* *Willes*, 184.

9 Slight causes of delay will not be allowed after notice given of trial. *Davis* v. *Taylor.* *Lofft*, 57.

10 If the plaintiff take no step in the cause for three terms, and in the fourth sign a *concilium*, and obtain judgment in the fifth term, the signing the *concilium* is taking a step in the cause, so as to make it unnecessary to give a term's notice. *Bland* v *Darley.* 2 *Term Rep.* 530.

11 The rule, requiring a term's notice after a delay of four terms, is to prevent surprise on the defendant, and therefore does not apply where the proceedings have been delayed at the defendant's request. 2 *Term Rep.* 530.

12 No proceedings having been had for above a year, the plaintiff, two

days before *Hilary* term, gave notice of his intention to proceed; two days after the term he served a rule to plead, and in the same vacation judgment was signed for want of a plea, which was held to be regular; and the judgment appearing to be signed as of *Hilary* term makes no difference. *Milbourne* v. *Nixon*. 2 *Term Rep.* 40.

13 If the plaintiff do not declare within two terms after the return of the writ, the defendant may sign judgment of *nonpros*; but if no such judgment be signed, the plaintiff may declare within a year. *Worley* v. *Lee*. 2 *Term Rep.* 112; *and Penny* v. *Harvey*. 3 *Term Rep.* 123.

14 On a rule to plead, reply, &c. in four days, if the party on whom the rule is made delay complying with it till the morning of the fifth day, the adverse party may refuse to receive it, and sign judgment. *Thomson* v. *Ryall*. 4 *Term Rep.* 195.

15 The plaintiff in an action for bribery on statute 2 G. 2, c. 24, is bound by section 11, to proceed without *wilful delay*; and if he do not proceed to trial till six years after issue joined, and assign no reason for it, the court will consider the delay to be *wilful*. *Petrie* v. *White*. 3 *Term Rep.* 5.

16 In such case, even after verdict, the court will stay the proceedings on motion, and will not allow the plaintiff his costs. *Ibid.*

17 The defendant is entitled to the benefit of the act, though he do not claim it so soon as he might. *Ibid.*

18 Where a rule for an attachment against the sheriff for not bringing in the body, was obtained on the 11th of *February*, which attachment was returned on the 4th of *May*, and the plaintiff did not issue the attachment till the 3d of *May*, and in the mean time the defendant became bankrupt on the 19th *March*, by which means the sheriff lost his opportunity of paying the debt, and proving it under the commission; the attachment was set aside for such laches. *The King* v. *The Sheriff of Surry*. 9 *East*, 467.

19 The sheriff cannot relieve himself from an attachment for not bringing in the body, by payment of the debt sworn to, and endorsed on the bailable writ since the statute 43 G. 3, c. 46, s. 2, having neglected to take the money at the time of the arrest, as directed by that act; but must pay the whole debt and costs. *The King* v. *The Sheriff of London*. 9 *East*, 316.

20 The resignation of a judge of probate operates a discontinuance of an action in his name upon an office bond. 2 *Mass.* 440.

21 Judgment cannot be rendered by the full court in an action continued *nisi* from a court in another county holden by a single judge, if the last mentioned court had not ultimate jurisdiction of the action. 2 *Mass.* 445.

22 When an action is delayed for the convenience of the court, they will take care that no party suffers by such delay: Therefore, where after a continuance of an action by order of court for advisement, the defendant in the action died, judgment was entered as of the former term. *Perry* v. *Wilson*. 7 *Mass.* 393.

23 Where the plaintiff does not declare within the time required by the statute, the defendant cannot enter a judgment of *non pros*, without having previously entered a rule for the plaintiff to declare, and served him with a *notice* of such rule. *Gilbert* v. *Field*. 2 *Johns. Cases*, 293.

24 Though a party had not a regular notice in writing of a writ of error being brought, or of a judgment of reversal; yet if he was informed and sufficiently apprised of the pendency of the writ of error, to have pleaded in time, and of the judgment of reversal, by default, in season to have moved the court, at a former term, to set it aside, it is a *laches*, and the judgment will not be set aside, after a term has interven-

ed. *Clement* v. *Crosman.* 8 *Johns. Rep.* 287.

25 It is too late to move for a rule to shew the plaintiff's cause of action, and why the defendant should not be discharged on common bail, on the last day of the term to which the *capias* is returned. 2 *Dallas*, 110.

26 The jury being at the bar, the court refused to let the defendant retract his plea, and enter the judgment by *non sum informatus*, on account of the delay. 2 *Dallas*, 111.

27 When the plaintiff is too late to strike off a rule of reference, and discontinue his suit. 4 *Dallas*, 222.

VII. *Ejectment.*

1 In ejectment on a condition of reentry, proof of actual entry and ouster is not necessary; but the demand of the money for the rent must be proved, notwithstanding the confession of the entry. *Little* v. *Heaton*, *26th March*, 1702, *at the Assizes.* 1 *Salk.* 258. 2 *L. Raym.* 750.

2 The notice in ejectment was to appear the essoin day of this term; and held ill; for it should be to appear the first day in full term, which is the appearance day. *Holdfast* v. *Freeman & another.* 2 *Str.* 1049.

3 Court cannot stay proceedings in ejectment, though lessor's title is at an end. *Thrustout on demise of Turner*, v. *Grey & another.* 2 *Str.* 1056.

4 Court stayed proceedings in ejectment on payment of rent due, and costs. *Goodtitle* v. *Holdfast.* 2 *Str.* 900.

5 Ejectment lies not for a tenement. *Goodtitle* v. *Walton.* 2 *Str.* 834.

6 An infant lessor in ejectment must get some person to be security for costs. *Anon.* 1 *Wils.* 130.

7 Copartners may join in ejectment. *Boner* v. *Joiner.* 1 *L. Raym.* 726.

8 Court will not consolidate declarations in ejectment. *Smith* v. *Crabb.* 2 *Str.* 1149.

9 May plead to the jurisdiction in ejectment in the next term after declaration delivered. *Doe on the demise of the Duchess of Hamilton* v. *Robinson & another.* 2 *Str.* 1120.

10 Ejectment by mortgagee not considered as adverse against the tenant. *Anon. Lofft*, 864.

11 Discussion of the reason and practice of confessing lease, entry, and ouster in ejectment. *Oates* v. *Brydon.* 3 *Burr.* 1895.

12 Plea to debt on a bond to leave his wife so much, is not good. *Thompson* v. *Woods.* 3 *Salk.* 65,

13 Plea after judgment in ejectment before possession delivered, good. *Anon.* 2 *Salk.* 516.

14 The issue in ejectment cannot be made up different from the declaration delivered, except in the defendant's name. *Bass* v. *Bradford.* 2 *L. Raym.* 1411.

15 Proceedings stayed on the second ejectment; lessors not being liable for costs on the former. 2 *Str.* 1152.

16 Legal relation to teste of writ is to be supported in maintenance of *hab. fac. poss.* on judgment in ejectment. *Doe on dem. Beyer* v. *Roe.* 4 *Burr.* 1970.

17 The same precision and exactness is not necessary in an ejectment as in a precipe. *Connar* v. *West*, 5 *Burr.* 2672.

18 Landlord may be joined a defendant if he request it, but is not compellable. No objection to admitting landlord that he has privilege of parliament. *Underhill* v. *Durham.* 1 *Salk.* 256.

19 Declaration must shew the quantum of each sort of land. *Knight* v. *Syms.* 1 *Salk.* 254.

20 Service upon the servant and acknowledgment of the tenant that he received it, sufficient. *Anonymous.* 1 *Salk.* 255.

21 After a whole term elapsed, the plaintiff must give a new notice. *Anon.* 1 *Salk.* 257.

21 In ejectment on the demise of a corporation, the demise should be stated to have been by deed; but no objection can be taken after verdict. *Partridge* v. *Bull.* 1 *L. Raym.* 136.

23 The term cannot be enlarged without consent. *Anon.* 1 *Salk.* 257.

24 Casual ejector cannot confess judgment. *Hooper* v. *Dale.* 1 *Str.* 581.

25 Service of declaration at the house granted when a refusal to receive it. *Douglas* v. ——— 1 *Str.* 575.

26 Near twenty years after landlord had brought an ejectment against his tenant, and judgment had against the casual ejector by default, and re-possession thereupon delivered, the tenant brought an ejectment against the same landlord for the same premises. Defendant is not obliged to produce such an affidavit as 4 G. 2, c. 28, s. 2, requires, as an essential requisite previous to his original recovery. *Doe on the demise of Hitchins and another* v. ——*Lewis, Esq.* 1 *Burr.* 614.

27 If by any intendment a judgment in ejectment after a verdict can be made good, the court will do it. *Morris* v. *Barry.* 2 *Str.* 1180.

28 Notice of ejectment must be fair and honest, and fairly and honestly interpreted to the tenant in possession; otherwise it will serve only to inform the person who uses it deceitfully that nothing is so silly as cunning. *Anon. Lofft*, 53.

29 The lessor of the plaintiff being an infant, the court obliged him to name a good plaintiff, who might be answerable for costs. *Noke* v. *Windham.* 2 *Str.* 694.

30 Plaintiff's lessor enters; afterwards defendant levies a fine; then an ejectment is brought, and the demise laid before the fine; and well enough. *Musgrave ex dem. Hilton* v. *Shelley.* 1 *Wils.* 214.

31 Leave to plead to the jurisdiction in ejectment before the judgment *nisi* against the casual ejector. *Lessee of Johnson* v. *Keen.* 1 *Black.* 197.

32 Though the lessor is a peer, there need be no knight returned on the jury. *Goodtitle* v. *Thrustout.* 2 *Str.* 1023.

33 Ejectment for five eighths of a cottage, and sheriff gives possession of the whole; the tenant shall be restored to his possession of three eighths of the premises. *Roe on demise of Saul* v. *Dawson.* 3 *Wils.* 49.

34 In ejectment for several tenements upon several demises, a charge that the defendant entered into the tenements aforesaid is sufficient, and will not be made otherwise by the addition of an averment that the plaintiff's term aforesaid therein was not then expired. *Slabourne* v. *Bengo.* 1 *L. Raym.* 561.

35 In ejectment for empty houses, a lease is to be sealed therein, and entry &c. and a judgment set aside for want of affidavit of such lease. *Smartley* v. *Henden.* 1 *Salk.* 255.

36 After a judgment in ejectment in *Ireland*, affirmed in the king's bench in *England*, the declaration was amended by *enlarging the term*, though the record had been remitted to the king's bench in *Ireland*. The court issued a writ of *supersedeas* to the former *mittimus*, and also a new writ of *mittimus* inclosing the tenor of the record so amended; the whole at the expence of the party applying. *Vicars* v. *Haydon, Lessee of Carrol.* *Cowp.* 841.

37 The new defendant in ejectment may give a rule to reply, and *non pros.* the plaintiff; but can have no costs, unless the lessor of the plaintiff has joined in the rule by consent. *Goodright on the demise of Ward* v. *Badtitle.* 2 *Black.* 763.

38 Attachment absolute in the first instance for non-delivery of possession by the tenant in possession in ejectment, after being served with rule of court for that purpose. *Davis on the demise of Povey* v. *Doe.* 2 *Black.* 892.

39 Proceedings in ejectment shall stay till the costs of a former ejectment be paid; although, in such former

ejectment, the lessor of the plaintiff never entered into the consent rule. *Smith on the demise of Ginger* v. *Barnardiston.* 2 *Black.* 904.

40 Ejectment will lie by a mortgagee against a tenant, under a lease from the mortgagor subsequent to the mortgage, without notice to quit. *Keech* v. *Hall.* 1 *Doug.* 21.

Qu. But if there is tenant from year to year, and the landlord mortgages preceding the year, the tenant is entitled to six months notice to quit from the mortgagee. 1 *Doug.* 21, *n.*

41 In ejectment, execution cannot be sued after the year and day without a *sci. fa.* and may be brought either by the plaintiff or his lessor, who may falsify recovery in ejectment. *Withers* v. *Harris.* 1 *Salk.* 258. 2 *L. Raym.* 806. 3 *Salk.* 319.

42 The lessor of the plaintiff in ejectment shall not be permitted to defeat a solemn deed under his own hand, covenanting that the defendant shall enjoy the premises, and for further assurance. *Goodtitle* v. *Bailey.* 1 *Cowp.* 597.

43 Service of ejectment at the house may be made good by a subsequent rule of court. *Lesse of Hollings* v. *Dunch, cited in Lesse of Methold and Noright.* 1 *Black.* 290.

44 Where judgment is against the casual ejector, the title may be gone into on an action for *mesne* profits. *Jefferies* v. *Dyson.* 2 *Str.* 960.

45 A regular judgment in ejectment set aside upon payment of costs, and taking short notice of trial. *Dobbs* v. *Passer.* 2 *Str.* 975.

46 Lessor of the plaintiff dies before the assizes, and the plaintiff is nonsuited for defendant, not confessing the lease, entry, &c.; the executor of the lessor shall have no costs taxed on the common rule. *Thrustout* v. *Bedwell.* 2 *Wils.* 7.

47 On the trial of an ejectment where there are several defendants, if any of them refuse to confess lease, entry and ouster, a verdict shall be given for them; but the cause of such verdict shall be indorsed on the *postea*, and the plaintiff shall have judgment for the premises in their possession against the casual ejector. *Claxmore* v. *Searle & others.* 1 *L. Raym.* 729.

48 Tender of rent before an ejectment delivered, shall stay the proceedings, under statute 4 G. 2. *Goodright on the demise of Stevenson* v. *Noright.* 2 *Black.* 746.

49 If there be judgment for the plaintiff and defendant bring a writ of error, he ought not to bring a new ejectment. *Fenwick* v. *Grosvenor.* 1 *Salk.* 258.

50 *Locus in messuagio vocatus* a passage-room, is a sufficient description of the place for which an ejectment is brought, if the part of the house in which it lies is ascertained. *Bindover* v. *Sindercombe.* 2 *L. Raym.* 1470.

51 When the tenant in possession absconds, the plaintiff in ejectment may serve the apparent manager of the house, and fix the copy of the declaration upon the house, and this is good service. *Sprightly on the demise of John Collins* v. *Humphry Dunch.* 2 *Burr.* 1116.

52 Tenant in possession being personated, at the time of service, by another, who accepted the service in her name; this deemed good service on the tenant herself. *Fenn ex dem. Tyrell et al.* v. *Denn.* 3 *Burr.* 1181.

53 If cause for setting aside execution in ejectment be not shewn in time, court will not afterwards set it aside. *George ex demiss. Bradley et al.* v. *Wisdom.* 2 *Burr.* 756.

54 Leave to plead to the jurisdiction in ejectment, before judgment *nisi* against the casual ejector. *Williams, on demise of Johnson,* v. *Keen.* 1 *Black.* 197.

55 Service of a declaration in ejectment on the wife of the tenant in possession, good. *Goodright* v. *Thrustout.* 2 *Black.* 800.

56 Regular judgment against casual ejector, tenant having neglected to give notice, his landlord, who was an infant, set aside upon terms.

Doe, on the demise of Troughton, v. *Roe*. 4 *Burr*. 1996.

57 Ejectment will lie for a mine. 1 *Doug*. 305.

An attorney cannot be lessee in an ejectment. 2 *Doug*. 466, *n*.

58 The defendant in ejectment is bound to confess the lease entry and ouster, though the demise is laid upon a day not arrived at the time of the trial. *Anonymous*. 1 *L. Raym*. 728.

59 Landlord cannot be made defendant in an ejectment in the room of tenant in possession, upon affidavit that he is a material witness for the former. *Bourne* v. *Turner*. 1 *Str*. 632.

60 When the possession of a tenant is adverse, it is not necessary to give him notice to quit, in order to support an ejectment against him. *Doe* v. *Williams*. 1 *Coup*. 621.

61 No relief against a tenant's refusing to appear and make defence in ejectment. *Goodright* v. *Hart and wife*. 2 *Str*. 830.

62 Ejectment against two; one died after issue joined, but before the trial; the death must be suggested on the roll; the judgment need not say, *quod quærens nil capiat per billam* against the dead defendant, and it is not to be for a moiety only, but that he recover his term. *Far* (*Spinster*) v. *Denn*. 1 *Burr*. 362.

63 In ejectment, where the lessor of the plaintiff's own deed is set up against him, if colourable evidence of fraud or imposition upon the plaintiff be given, such fraud is a matter of fact to be left to the jury, and therefore a nonsuit would be wrong. *Goodtitle* v. *Bailey*. 2 *Cowp*. 597.

So if there be proof that such deed were made under a mistake; because that would be equivalent to fraud. *Ibid*.

64 If at the trial the defendant will not appear and confess lease, entry and ouster, the course is to call the defendant, and his attorney if he be within the rule; and then to call the plaintiff himself and nonsuit him; and then upon the return of the *postea*, judgment will be given against the casual ejector. Also the Master will tax costs upon the rule for confessing lease, entry, and ouster; and if these be demanded of the defendant and not paid, the court, upon affidavit, will grant an attachment. *Turner* v. *Barnaby*. 1 *Salk*. 259.

65 If nobody can be found on whom to serve notice of ejectment, you may stick it up at the door. *Anon*. *Lofft*, 266, 273.

66 Notice of ejectment held good at the house, though the premises lay in another county. *Anon*. *Lofft*, 301.

Held, that where there were joint owners, notice ought to be served on both, at least where they lived in separate houses. *Ibid*.

67 Notice of declaration in ejectment not to be delivered to the servant of one insane, but to committee. *Bernard and others* v. *The Bishop of Winchester*. *Lofft*, 401. 2 *Black*. 936. 3 *Wils*. 483.

68 Rule to shew cause granted, why declaration in ejectment, left in the shop where the wife of tenant in possession was, who refused to hear the notice read, and went out, should not be deemed good service. *Doe, on demise of Neale*, v. *Roe*. 2 *Wils*. 263.

69 The clerk of the rules shall keep a book for entering rules in ejectments, containing a list of the ejectments moved, the number of the entry, the county, and the names of the parties; and the rule for judgment shall be drawn up and taken away from the office within two days after the end of the term in which the ejectment shall be moved. *Reg. Gen. K. B. M.* 31 *G*. 3. 4 *Term Rep*. 1.

70 The court will not set aside the proceedings in ejectment for irregularity because the notice at the foot of the declaration is subscribed in the name of the nominal plaintiff, in-

stead of the casual ejector. *Hazlewood d. Price* v. *Thatcher*. 3 *Term Rep.* 351.

71 A declaration in ejectment may be served on the wife either on the premises or at the husband's house off the premises. *Doe d. Morland* v. *Bayliss*. 6 *Term Rep.* 765: *Doe d. Baddam* v. *Roe*. 2 *Bos. & Pull.* 53: *Oates d. Chatterton* v. *Cotes*, S. P.

72 Or *semble* elsewhere; if it be shewn that she lived with the husband, and admitted that he had received the declaration. *Jenny d. Preston* v. *Cutts*. *New Rep.* 308.

73 Service of a declaration in ejectment on one of two tenants, was held by C. P. to be good service on both. *Doe d. Bailey* v. *Roe*. 1 *Bos. & Pull.* 369.

74 Affidavit of service made by a person who saw the declaration served, and heard it explained to the tenant in possession is sufficient. *Goodtitle d. Wanklen* v. *Badtitle*. 2 *Bos. & Pull.* 120.

75 Nailing the declaration on the barn-door of the premises, in which barn the tenant had occasionally slept; there being no dwelling house, and the tenant not being to be found at his last place of abode, was deemed good service. *Fenn d. Buckle* v. *Roe*. *New Rep.* 293.

76 The court of C. P. refused to admit the mere acknowledgment of the wife of the tenant in possession, that she had received a declaration, to bind the husband. *Goodtitle d. Read* v. *Badtitle*. 1 *Bos. & Pull.* 381.

77 And that court held the service of a declaration, on a person appointed by chancery to manage an estate for an infant, to be insufficient. *Goodtitle d. Roberts & ux.* v. *Badtitle*. 1 *Bos. & Pull.* 385.

78 A service before the essoign day on the daughter (the tenant and his wife being absent) was held good on the acknowledgment of the wife, though it did not appear the delivery to her by her daughter was before the essoign day. *Smith d. Stourton* v. *Hurst*. 1 *H. Black.* 644.

79 In ejectment against several tenants, the name of each was prefixed to the notice served on him; and held that only one rule was necessary on motion for judgment against the casual ejector. *Roe d. Burlton* v. *Roe*. 7 *Term Rep.* 477.

80 In ejectment for a forfeiture of a lease, the court will compel the plaintiff to deliver a particular of the breaches of covenant, on which he intends to rely. *Doe d. Birch* v. *Phillips*. 6 *Term Rep.* 597.

81 The lessor of the plaintiff in ejectment must prove the defendant in possession of the premises which he seeks to recover, although the defendant has entered into the general consent-rule to confess lease, entry, and ouster. *Goodright d. Balch* v. *Rich*. 7 *Term Rep.* 327.

82 If a declaration in ejectment be served on a tenant, and his landlord be admitted to defend, the plaintiff can only recover such premises as the tenant is proved to be in possession of. *Fenn d. Blanchard* v. *Wood*. 1 *Bos. & Pull.* 573.

83 The defendant in ejectment is entitled to the general reply, where the plaintiff, claiming by descent, proves his pedigree and stops, and the defendant sets up a new case in his defence, which is answered by evidence on the part of the plaintiff. *Goodtitle d. Revett* v. *Braham*, (*trial at bar.*) 4 *Term Rep.* 497.

84 On affidavit of the tenant in *ejectment*, that one of the lessors of the plaintiff was dead, at the commencement of the suit, the demise from such lessor was ordered to be struck out of the declaration. *Jackson ex dem. Butler* v. *Ditz*. 1 *Johns. Cas.* 392.

85 The service of a second declaration in *ejectment* by the plaintiff's agent, though without his knowledge, is a waiver of the first. *Kemble* v. *Finch*. 1 *Johns. Cases*, 414.

86 In ejectment, a person who has no

claim or any subsisting title to the premises in question cannot be made lessor. *Jackson ex dem. Starr and Wife* v. *Richmond.* 4 *Johns. Rep.* 483.

87 In an action of ejectment where the tenant swears to merits, and no trial has been lost, a regular default will be set aside, to let in the tenant to defend his possession. *Jackson ex dem. Mentz* v. *Stiles.* 4 *Johns. Rep.* 489.

88 After a judgment by default against the casual ejector in ejectment the landlord will be let in to appear and defend; and if he be an *alien* he is at the time when he is let in to defend, in season to petition the court for the removal of his cause to the court of the *United States. Jackson ex dem. Cantine and others* v. *Stiles.* 4 *Johns. Rep.* 493.

Where actions of ejectment, after judgment against the casual ejector, are removed into the circuit court of the *United States*, this court will order all further proceedings on such judgment to be stayed, until the further order of the court. *Ibid.*

89 Where a lessor in an action of ejectment, was brought up on attachment, for non-payment of costs, and he denied that he had ever consented to have his name used in the action; the court said that they could not receive his denial, in bar of the attachment, nor decide between the contradictory affidavits of the party, and his attorney; but the party must pay the costs, and take his remedy over against the attorney, who inserted his name as lessor; but they stayed proceedings, to give the party an opportunity to bring his action against the attorney, and to try the truth of the act. *The People* v. *Broett.* 7 *Johns. Rep.* 539.

90 When the defendant has shown title in a third person, he may take the opinion of the court on that title, by motion for a *nonsuit*, before he has gone through all his evidence. 4 *Dallas*, 18.

91 In such case the plaintiff cannot demur to the defendant's evidence, till he has gone through the whole. *Ibid.*

92 Amendment of a declaration in ejectment by enlarging the demise. 2 *Dallas*, 97.

93 The costs of a former ejectment, which had been *non-pros'd* must be paid before trial of the second. 4 *Dallas*, 353.

VIII. *Imparlance.*

1 *Habeas corpus* to remove a cause brought *November* 6th, declaration *November* 12th; defendant is not entitled to an imparlance. *Wood* v. *Wenman.* 1 *Wils.* 154.

2 A misnomer pleaded after a special imparlance. *Brewster* v. *Capper.* 1 *Black.* 51.

3 The refusal of leave to imparl is error, if the defendant's right to it appears upon record; otherwise it is not. *Ellis* v. *Thomas, exchequer chamber.* 1 *L. Raym.* 285. 3 *Salk.* 186.

4 Proceedings stayed against mortgagee in ejectment, on payment of principal, interest, and costs. *Anon.* 1 *Str.* 413.

5 To pay costs or give an imparlance on amending in the election of defendant. *Lethill* v. *Sir Thomas Reynell.* 2 *Str.* 950.

6 An imparlance so special as to save all exceptions to the jurisdiction of the court, cannot be entered without leave of the court; nor can a plea to the jurisdiction be pleaded after an appearance by attorney. *Grant* v. *Lord Sondes.* 2 *Black.* 1094.

7 *Fitzgerald* was bound in a recognizance to appear the first day of this term, and an information was preferred against him for a libel before the essoin day of the term; and upon motion by the attorney general that he might plead in this term, it was ruled by the advice of the clerks that he ought to imparl until next term. The same law if

he comes in upon attachment; but upon a *cepi* returned to a *capias*, he shall plead *instanter*. *Rex* v. *Fitzgerald*. 1 *L. Raym.* 706.

8 If a writ be returnable the last day of one term, and the defendant do not justify bail until the fourth day of the next, he is not entitled to an imparlance to the third term, though the plaintiff do not deliver a declaration *de bene esse* before the essoin day of the second term. *Rolleston* v. *Scott*. 5 *Term Rep.* 372.

9 And where, in such case, the plaintiff declared after the bail had justified, and signed judgment in the same term for want of a plea; the court held the judgment to be regular. *Bailey* v. *Huntler*. 2 *Bos. & Pull.* 126.

10 But if the writ by which a replevin is removed be returnable on the first return of the term, and the plaintiff do not declare within four days before the end of that term, the defendant is entitled to an imparlance, though he has not appeared within the term. *Thompson* v. *Jordan*. 2 *Bos. & Pull.* 137.

11 When the defendant removes the cause by *habeas corpus* from an inferiour court, and the plaintiff does not declare until the next term, the defendant is not entitled to an imparlance. *Smith* v. *James*. 6 *Term Rep.* 752.

12 The court will not always grant a continuance for the purpose of pleading specially. *Craigie* v. *Mellen et al.* 4 *Mass.* 587.

13 Where there are several actions on the same policy of insurance, imparlances will be granted in all but one, until the plaintiff consent to enter into the consolidation rule, which is the same as the *English rule*. *Clason and Stanley* v. *Church*. 1 *Johns. Cases*, 29.

14 Where on a writ of right a special imparlance is granted to the first day of the next term, the tenant is bound to plead on that day, and is not allowed until the *quarto die post*. *Haines* v. *Budd*. 1 *Johns. Cas.* 335.

The demandant on a writ of right is entitled to a *view* as a matter of course. *Ibid.*

15 In an action of *dower*, it is a matof course, after the demandant has counted, to grant the defendant a special imparlance to the next term. *Haviland* v. *Bond*. 4 *Johns. Rep.* 309.

16 Though the court has a discretionary power to grant, or refuse, imparlances, they will not compel executors to plead at the first term, in order to prevent their giving a fair preference to certain creditors. 2 *Dallas*, 260, 1, 2, 3.

IX. *Issue, and Issue Money.*

1 Issue to be paid for on delivery of judgment. *Anon.* 1 *Salk.* 4.

2 If it appears no issue is joined, the jury must be dismissed. *Heath* v. *Walker*. 2 *Str.* 1117.

3 Judgment cannot be signed because the defendant had not paid for the issue, if the plaintiff demands more than is due. *Atterbury* v. *Benson*. 2 *Black.* 1098.

4 If a prisoner appears in person, he is not bound to pay for the issue; otherwise if he appears by attorney. *Everall* v. *Mason a Prisoner*. 2 *Wils.* 11.

5 The plaintiff having added the *similiter* to the replication, and delivered the issue to the defendant, who accepts it, but does not pay the issue money, judgment may be signed by the plaintiff *without* giving a *rule to rejoin*. *Boone* v. *Eyre*. 1 *H. Black.* 254.

6 The plaintiff does not waive his right of signing judgment for not paying the issue money by giving notice of trial after demanding it. *Jones* v. *Bryant*. 5 *Term Rep.* 400.

7 The court determined that a pauper plaintiff was not entitled to the issue money; and that if he sign judgment because the defendant does not pay it, the court will set aside the judgment. *Codron* v. *Hayman*. 5 *Term Rep.* 509.

8 But now no judgment shall be signed for non-payment of issue money; but the issue money shall remain to be taxed as part of the costs in the cause. *Reg. Gen. K. B.* and *C. P.*, *H.* 35 G. 3. 6 *Term Rep.* 218: 2 *H. Black.* 552.

9 And this extends to all cases. *Fuller* v. *Osborne.* 6 *Term Rep.* 477.

10 The court of C. P. therefore, refused to allow a plaintiff to sign judgment on the refusal of the defendant to pay for half the paper books delivered to the judges on a demurrer. *Fluham* v. *Bagshaw.* 1 *Bos. & Pull.* 292.

11 If after issue joined and notice of trial given the plaintiff enter a suggestion on the roll, and assign breaches under statute 8 and 9 W. 3, c. 11, he cannot deliver the second issue without a judge's order. *Ethersley* v. *Jackson.* 8 *Term Rep.* 255.

12 The issue must be entered as of the term when the rule of reply was given and the *similiter* joined, and not as of the preceding term when the plea was pleaded. *Wood* v. *Miller.* 3 *East.* 204.

13 After the general issue pleaded, the court will not permit the plea to be withdrawn, to enable the defendant to tender his oath under the statute against usury. 2 *Mass.* 540.

14 Upon an issue of *nul tiel record* of a judgment of the common pleas, this court does not direct the original record to be sent up, but receives copies attested by the clerk. *Ladd* v. *Blunt.* 4 *Mass.* 402.

X. *Irregularity; what shall be, and how remedied.*

1 Defendant died before time given to plead expired; judgment signed after, and process thereon irregular. *Wallop* v. *Irwin.* 1 *Wils.* 315.

2 Dilatory plea to indictment set aside for want of affidavit to verify it. *Rex* v. *Grainger.* 3 *Burr.* 1617.

3 No reference for irregularity after error brought. *Anon.* 1 *Salk.* 402.

4 Where judge at *nisi prius* nonsuits plaintiff from mistake, it may be set aside. *Sadler* v. *Evans, or Windsor's Case.* 4 *Burr.* 1894.

5 Though a rule for time be not served, yet if no advantage be taken of it the irregularity may be saved by a subsequent service. *Jans* v. *Hutton.* 1 *Black.* 290.

6 Irregularity by surprize; judgment set aside thereon. *Wooden* v. *Boynton.* 1 *Black.* 50.

7 Warrant of attorney for the plaintiff in the action against the principal cannot extend to the suit against the bail, but there must be a new one. *Bever* v. *Atwood.* 1 *Salk.* 89.

8 Defendant must search for a *concilium.* The plaintiff is not obliged to serve the rule when defendant demurs. Court will not set aside regular judgment upon payment of costs, to give the defendant the advantage of a nicety in pleading. *Forbes* v. *Lord Middleton.* 2 *Str.* 1242.

9 If a writ be sued out during the term, but the declaration entitled generally of the term so as to have relation to the first day, the writ may be given in evidence to prove that the debt accrued after the suing out of the writ. *Morris* v. *Pugh and Harwood.* 3 *Burr.* 1241. 1 *Black.* 320.

10 New *postea* made out on the former being lost. *Dayrell* v. *Bridge.* 2 *Str.* 1264.

11 Act of the court upon record may be altered the same term though not of the party. *Turner* v. *Barnaby.* 2 *Salk.* 566.

12 Essoin lies on a *capias* to arrest; and plaintiff may go on notwithstanding an irregular *non pros* is signed. *Barclay* v. *Earle.* 2 *Str.* 1194.

13 No advantage shall be taken to a declaration upon a plea in abatement; the defendant ought to demur. *Harecourt* v. *Hastings.* 3 *Salk.* 19.

14 If a party is arrested by bill of *Middlesex* out of that county, the

proceedings will be set aside for irregularity. *Devenege* v. *Dalby*. 1 *Doug*. 384.

15 Proceedings by consent continued after plaintiff's death, and the judgment entered as in his lifetime. *Pond* v. *Thring*. 1 *Wils*. 124.

16 Where a bill is filed against one as an attorney of K. B. who is attorney of C. P. this seems error, and not irregularity. *Anon*. *Lofft*, 653.

17 If the record of *nisi prius* agrees with the declaration delivered, a variation in the issue delivered is not material. *Skepley* v. *Marsh*. 2 *Str*. 1131.

18 Inquiry returnable on a general return, when proceedings on a day certain, a miscontinuance. *Launder* v. *Cripps*. 2 *Str*. 947.

19 The benefit of an act of grace allowed to a defendant, after he had omitted to pray it at his trial, on payment of full costs out of pocket. *The King* v. *Haines*. 1 *Wils*. 214.

20 *Homine replegiando* brought for plaintiff's wife, who dies after appearance and before a plea. *Qu*. Whether the suit shall stay? *Saunders* v. *Fortescue*. 1 *Wils*. 256.

21 The party need not verify a negative. *Harvey* v. *Stokes*. *Willes*, 6.

If a party conclude, and "this he is ready to certify," instead of "verify," it is no objection. *Ibid*.

22 You should complain of it on the first opportunity. *Anon*. *Lofft*, 323, 333.

Where there had been an irregularity, and the party who suffered by it came late, and without merits complaining of surprize, the court dismissed the application, telling them that they came out of season, to inform the court they were surprised into doing justice. *Ibid*.

23 When a sheriff is plaintiff, a *latitat* directed to himself is irregular. *Weston* v. *Coulson*. 1 *Black*. 506.

24 A judgment, if irregular, not to be set aside in order to plead the statute of limitations. *Willet* v. *Atterton*. 1 *Black*. 33.

25 *Qui peccat in syllaba peccabit in tota causa*, is not to be taken generally; and it is less to be admitted in civil causes than in criminal charges, and less in civil upon the defensive side, which is favourable, than upon the adverse, in which greater nicety should be used. *Anon*. *Lofft*, 145.

26 Warrant of attorney given to confess judgment to two, and one dies before judgment entered; leave given to the survivor to enter it. *Todd* v. *Dodd*. 1 *Wils*. 312.

27 Irregularity may be waived if you continue the process on the other side as if it had not been committed. *Anon*. *Lofft*, 236.

On a common appearance, proceeding to plead admits regularity of the appearance. *Ibid*.

28 An original writ of the term, wherein final judgment is given, will not warrant that judgment if it appear upon the same record that there have been proceedings of a preceding term. *Dyke* v. *Sweeting*, *in error*. 1 *Wils*. 181.

29 A warrant of attorney and a release of errors of a day in term, are good. *Landon* v. *Pickering*. 2 *Str*. 1215.

30 Informal issue cured by a verdict. *Cary* v. *Hinton*. 2 *Str*. 973.

31 Plaintiff obliged to make his memorandum according to the special fact, where the general one would oust defendant of his plea of a tender. *Smith* v. *Key*. 1 *Str*. 638.

32 If a bill be brought against baron and feme, and she alone be taken by process of contempt, and afterwards enters her appearance and prays time to answer, without her husband, this is regular both at law and in equity. *Traverse* v. *Buckley & ux*. 1 *Wils*. 264.

33 If the plea does not cover the whole, and the parties are at issue, yet if it be a record of the same term the plaintiff may still take judgment. *Woodward* v. *Robinson*. 1 *Str*. 302.

34 If there be a warrant of attorney

any time *pendente lite*, it is sufficient. No damages for delay of execution are recoverable upon a *scire facias* against bail. Where the judgment for damages is distinct, it may be reversed in part and affirmed *pro residuo*. *Heneriques* v. *The Dutch West-India Company*. 2 *Str.* 807.

35 Defendant pleaded specially, and delivered plea to plaintiff, who made up the issue. Finding his mistake, he went afterwards to clerk of the papers, paid fees, and made up the record, and went to trial. Though there was no defence, court would not set proceedings aside, as defendant made the first blunder. *Thompson* v. *Lee*. 2 *Str.* 1266.

36 Plaintiff declares in an action *qui tam*, &c. upon a *capias ad respondendum*, sued out in his own name only; and held well enough. *Lloyd* v. *Williams*. 3 *Wils.* 141.

37 One sued by a wrong name, and pleading by her right name in bar; the plea bad on demurrer, but leave to amend. *Jackson* v. *Ford, spinster*. 3 *Wils.* 413.

38 Want of a continuance on the issue-book delivered, may be entered at any time on the roll. *Wilkes* v. *Wood*. 2 *Wils.* 203.

39 After a defence made on a writ of inquiry, the defendant is not allowed to take advantage of a mistake in the declaration. *Freeland* v. *Hunt*. 2 *Wils.* 380.

40 Appearance on bail by defendant cures a wrong name or addition, and plaintiff may declare against him by the right name or addition. *Hole* v. *Finch*. 2 *Wils.* 393.

41 Attorney's name to the process being set thereto without his authority, the proceedings were set aside. *Oppenhein qui tam* v. *Harrison*. 1 *Burr.* 20.

42 A plaintiff may sue in his own name, without an attorney, and subscribe the process with his own name as attorney for the plaintiff, in any action, which is no irregularity. *La Grue qui tam* v. *Penny*. 2 *H. Black.* 600.

43 A plaintiff may sue out execution by a different attorney, from the attorney in the cause, without an order of court for changing the attorney. *Tipping* v. *Johnson*. 2 *Bos. & Pull.* 357.

44 So the defendant in the original action may bring a writ of error by a different attorney without such an order. *Batchelor* v. *Ellis*. 7 *Term Rep.* 337.

45 If two defendants in trespass suffer judgment by default, and the plaintiff execute writs of inquiry against them separately, and take several damages against them it is irregular. *Mitchill* v. *Milbank & al.* 6 *Term Rep.* 199.

46 And if the plaintiff enter up final judgment with those several damages against the defendants, it is erroneous. 6 *Term Rep.* 199.

47 But the court will permit the plaintiff to set aside his own proceedings before final judgment on payment of costs. 6 *Term Rep.* 199.

48 If a plaintiff after entering up judgment for himself upon two counts, discover an error in one of them, he may waive his judgment on that count, and enter it for the defendant. *Spicer* v. *Teasdale*. 2 *Bos. & Pull.* 49.

49 Judgment by default having been suffered in an action on a bond, the plaintiff entered up judgment for the penalty, together with 9l. 10s. for damages and costs. A writ of enquiry having been executed, damages were assessed at 1115l. 13s. 4d. and costs 40s; and the plaintiff entered up another judgment for those damages, together with 31l. 6s. 8d. for costs: but afterwards entered a *remittitur* on the roll for the costs; held, that the second judgment was erroneous. *Hankin* v. *Broomhead*. 3 *Bos. & Pull.* 607.

50 It is irregular to rule the plaintiff in error to assign errors before the expiration of the rule to appear to the *scire facias*. *James* v. *Staples, in error*. 6 *Term Rep.* 367.

51 If the defendant in error from C.

B. to *B. R.* give an eight day rule to certify the record, the record may be certified in less time, though the rule expire in vacation; and a *sci. fa. quare executionem non* having been issued immediately upon the record being certified returnable the first day of the following term, the defendant may serve the plaintiff in error on that day with a rule to appear to the *sci. fa.*, and a rule to assign errors. *Samhidge* v. *Housley.* 2 *Term Rep.* 17.

52 It is irregular to hold a defendant to bail in assumpsit, and then to declare in trover. *Tetherington* v. *Golding.* 7 *Term Rep.* 80.

53 An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested on bailable process is irregular, and he cannot be holden to special bail thereon. *Davison* v. *Frost.* 2 *East*, 303.

54 If a defendant be served with process by a wrong christian name, and afterwards the plaintiff enter an appearance for him and serve him with notice of declaration by his right name, and proceed to judgment and execution, the court will not set aside the proceeding for irregularity merely on the ground that the defendant never appeared, because he ought to have pleaded such misnomer in abatement. But he was afterwards let in to defend on payment of costs, and swearing to a mistake of the practice and to merits. *Oakely q. t.* v. *Giles.* 3 *East*, 167.

55 If plaintiff take an assignment of the bail bond while the cause is pending, his proceeding upon it after the cause is out of court is not an irregularity. *Pigott* v. *Truste.* 3 *Bos. & Pull.* 221.

56 If the plaintiff sue the defendant by a wrong christian name, and the defendant appear by his right name the plaintiff may declare against him by such right name. *Doo* v. *Butcher.* 3 *Term Rep.* 611.

57 *Secus*, if the plaintiff file common bail for him according to the statute by his right name. 3 *Term Rep.* 611.

58 Defendant being arrested by the name of *F. H.*, put in bail by the name of *S. H.*; plaintiff then declared thus; "*S. H.*, arrested by the name of *F. H.*, was attached to answer, &c." defendant without craving oyer, pleaded in abatement of the writ that his name was *S. H.*, plaintiff having treated this plea as a nulity, and signed judgment accordingly, the court refused to set it aside. *Murray* v. *Hubbart.* 1 *Bos. & Pull.* 645.

59 Arrest by the name of *Weston*; declaration *de bene esse* against '*Wason*, sue by the name of *Weston*;' held regular by C. P. *Symmers* v. *Wason.* 1 *Bos. & Pull.* 105.

60 If the *latitat* be sued out against the defendant by one christian name and the *alias* by another, and the plaintiff afterwards proceed, the court will set aside the proceedings for the irregularity. *Corbet* v. *Bates.* 3 *Term Rep.* 660.

61 So if the defendant's name be properly inserted in the copy of the process served, but a quite different name in the notice at the foot thereof. *Jones* v. *Armytage.* 2 *Boss. & Pull.* 38.

62 The defendant must take advantage of an irregularity in the writ before appearance. *Fox & al.* v. *Money.* 1 *Bos. & Pull.* 250.

63 Taking out a summons before a judge, to stay proceedings on the bail bond is a waiver of an irregularity in the notice of the declaration. 1 *Bos. & Pull.* 342.

64 Where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shewn as cause against referring the note to the prothonotary. *Pell* v. *Brown.* 1 *Bos. & Pull.* 369.

65 If an action be brought on a judgment, which is irregular, the whole proceedings may be set aside in one rule. *Barlow* v. *Kaye.* 4 *Term Rep.* 639.

66 The plaintiff must give notice of his having abandoned a former *commissitur*, which is erroneous, before he enters a second, rectifying the mistake. *Topping* v. *Ryan.* 1 *Term Rep.* 227.

67 A discontinuance is cured by the appearance of the party by statute 32 H. 8, c. 30, in penal as well as civil actions. *Humble* v. *Bland, in error.* 6 *Term Rep.* 255.

68 Serving a rule to discontinue does not of itself discontinue an action; there must be an appointment to tax the costs. *Whitmore* v. *Williams.* 6 *Term Rep.* 765.

69 Though judgment has been irregularly signed without filing common bail for the defendant according to the statute, until after the succeeding term after the writ was returnable, and after the judgment itself has been entered up, yet the defendant having given a *cognovit* is estopped from objecting to the irregularity, if before the time of making the objection the plaintiff has filed common bail *nunc pro tunc.* *Davis* v. *Hughes.* 7 *Term Rep.* 206.

70 If a rule to set aside proceedings for irregularity with costs be discharged, it must be understood that the rule is discharged with costs. *Reg. Gen.* (K. B.) *M.* 37 G. 3. 7 *Term Rep.* 82.

71 All double pleas must be filed, and not merely delivered to the plaintiff's attorney; though two pleas be pleaded, which separately need only have been delivered. *Harrison* v. *Franco.* 2 *East*, 225.

72 The rule that final judgment cannot be signed till four days after the return of the *habeas corpora juratorum* does not extend to the case where the term closes before the four days are expired. *Thomas* v. *Ward.* 2 *Bos. & Pull.* 393.

73 Order to amend writs of *scire facias* on a judgment, and a declaration thereon, conformably to the judgment roll. *Braswell* v. *Jeco.* 9 *East*, 316.

74 The court will not grant a repleader after joinder in demurrer, when the amended or new plea does not go to the merits. 2 *Mass.* 81.

75 Want of an indorser on an original writ must be pleaded in abatement at the return term. 2 *Mass.* 102.

76 Upon a *certiorari*, the court inspect the record, and if they find errors, will quash the proceedings, without an assignment of errors, which is necessary upon a writ of error. *Commonwealth* v. *Sheldon et al.* 2 *Mass.* 188.

77 Where an appellant had failed from accident to enter his appeal at the last term, the court permitted him to enter it now as of that term, the appellee consenting, and the bail not being prejudiced, nor subsequent attachments effected thereby. *York* v. *Noyes.* 4 *Mass.* 645.

78 Where a bank has issued its notes by a wrong corporate name, and is sued on its notes by such name, the common pleas ought to permit the plaintiff to amend after demurrer without costs; and if they refuse it, this court will grant the amendment on the appeal. *Bullard* v. *Nantucket Bank.* 5 *Mass.* 99.

79 Where it appears, that neither the defendant, nor any property of his, is within the jurisdiction of the commonwealth, the court will stay all further proceedings. *Lawrence* v. *Smith et al.* 5 *Mass.* 362.

80 In a popular action to recover a forfeiture for taking excessive usury, the plaintiff had leave to amend his declaration on payment of costs; it appearing that he was barred by the statute of limitations from commencing another action for the same cause. *Davis qui tam* v. *Saunders.* 7 *Mass.* 62.

81 Where the plaintiff took an inquest by default, after a regular notice of an intended application to move, at the next term, for a commission, it was set aside. *Le Conte* v. *Pendleton.* 1 *Johns. Cases*, 135.

82 A motion to set aside proceedings

for irregularity, must be made at the next term, after the irregularity happens. *M'Evers* v. *Markler.* 1 *Johns. Cases*, 248.

83 After the order of the court in a cause, a further order of a judge at his chambers on the same matter, is irregular. *Stansby* v. *Durell.* 1 *Johns. Cases*, 396.

When the proceedings in a cause are stayed on payment of costs, it is the duty of the defendant to seek the plaintiff, and tender the costs. *Ibid.*

84 Where the tenant on a writ of right, vouches, and a writ of summons is issued, which is irregular in its service, or defective in the return, an *alias summons* will be granted the vouchee. *Scofield and Wife* v. *Loder.* 2 *Johns. Cases*, 75.

85 Where a judge's order was obtained to enlarge the time for pleading, until the second day of the term; it was held that the defendant had until the third day to plead, and a default entered on the second day was irregular. *Thomas* v. *Douglas.* 2 *Johns. Cases*, 226.

After a rule to change the *venne*, the plaintiff entered a default for want of a plea, without altering the declaration filed, or filing a new declaration, and it was held irregular. *Ibid.*

86 Where one of two defendants is taken on a *cap. ad. respondend.* and judgment is entered and execution issued against both, the execution will not be set aside for irregularity, if it appear that only the defendant originally arrested is taken on the *ca. sa.* *Ballou, Assignee, &c.* v. *J. & A. Hulbert.* 1 *Johns. Rep.* 62.

87 A warrant of attorney given in vacation, to enter up judgment, on a bond payable immediately, in term, or vacation, will include the vacation in which the bond was given, and a judgment entered up in the same vacation, as of the preceding term, was held to be regular. *King* v. *Shaw.* 3 *Johns. Rep.* 112.

88 In an action of debt on a bond, conditioned to convey land, &c. the defendant pleaded performance, and the plaintiff replied generally, that the defendant did not perform; and the jury found a verdict for the plaintiff for six cents damages and six cents costs, and the plaintiff entered up judgment and issued execution for the penalty in the bond, the court set aside the execution with costs. The plaintiff ought to have assigned breaches and had his damages assessed by the jury. *Caverly* v. *Nichols and Brown.* 4 *Johns. Rep.* 189.

89 In suits on bonds for the performance of covenants, it is compulsory on the plaintiff to assign breaches, and have his damages assessed; and if no damages are assessed on the breaches assigned, it will be error. *Van Benthuysen* v. *De Witt and others.* 4 *Johns. Rep.* 213.

90 Where an *ac etiam* clause in *assumpsit* was inserted in a *capias*, and the plaintiff, afterwards declared in *account*, the proceedings were set aside for irregularity. *Rogers* v. *Rogers.* 4 *Johns. Rep.* 485.

Where the defendant is held to bail by an *ac etiam* clause in a *capias*, the plaintiff is bound to pursue the nature of the action so stated in the writ, or an *exoneretur* may be ordered to be entered in the bail-piece. *Ibid.*

91 A writ made returnable "before us," &c. is voidable only, and may be amended. *Morrell* v. *Waggoner.* 5 *Johns. Rep.* 233.

92 An attorney of this court appeared for a defendant against whom a writ had been issued, but was not served; and without authority from the defendant, confessed a judgment which was entered up in vacation; it was held that the judgment was regular. *Denton* v. *Noyes.* 6 *Johns. Rep.* 296.

An appearance by an attorney of the court, without a warrant, is good as to the court; and the defendant has his action against the attorney. *Ib.* *Aliter*, if there be any fraud or collu-

tion between the plaintiff's attorney and the attorney for the defendant. *Ibid.*

Or if the attorney for the defendant is not responsible, or perfectly competent to answer to his assumed client, the court will relieve against the judgment. *Ibid.*

And the court, in order to protect the plaintiff from suffering by the act of the attorney, and at the same time to save the defendant from injury, will let the judgment stand, but stay all proceedings, and let in the defendant to plead, if he has any defence. *Ibid.*

93 After the lapse of 20 years, no judicial proceeding can be set aside for irregularity. *Thompson* v. *Skinner.* 7 *Johns. Rep.* 556.

94 It is irregular to issue a second execution, until the first is returned. Though where an execution has issued unadvisedly, it may be withdrawn, before any thing is done upon it; yet where a sale has been made under an execution, and the sheriff died without executing a deed, it was held irregular to withdraw and suppress the execution, and issue a second to the new sheriff, for the purpose of selling the property a second time. Whether the sale on the first execution was *bona fide*, or fraudulent, the court will not decide, on motion. *Cairns* v. *Smith.* 8 *Johns. Rep.* 337.

XI. *Judgment of* Non Pros., *and of* Nolle Prosequi *by Plaintiff.*

1 By judgment of *non pros*, the plaintiff is out of court as to all the defendants. *Philpot* v. *Muller.* 1 *Doug.* 169, *n.*

Therefore if several defendants sever in pleading, one cannot sign judgment of *non pros* as to himself, and take out execution. *Ibid.*

If judgment is signed in such case, the court will set aside on motion in the same term. *Ibid.*

But such a motion in a subsequent term is too late, and the redress must be by writ of error. *Ibid.*

If, on such a judgment, the action being trespass *vi et armis*, the *ca. sa.* sued out is in trespass on the case, the court will set aside the execution, even in a subsequent term, (the plaintiff undertaking not to bring an action,) because there is no other remedy. *Ibid.*

2 Where the defendant finds bail without arrest, the plaintiff may be *non prossed*. *Cook* v. *Forster.* 2 *Salk.* 455.

3 In trespass against several, *non pros* ought to be joint, not distinct, against each. *Pryce* v. *Foulkes.* 4 *Burr.* 2418.

4 After *non pros* the defendant shall find bail to the second action. *Turton* v. *Hayes.* 1 *Str.* 429.

5 *Non pros* may be entered as to one defendant after interlocutory judgment, not after final. *Lover* v. *Salkeld.* 2 *Salk.* 455.

6 Where two defendants in *assumpsit* sever in pleading, and one pleads a special plea, which is found for him, the plaintiff may enter a *nolle prosequi* as to him, and proceed to final judgment and execution against the other. In a joint action, the plaintiff cannot be *non prossed* by one or some of the defendants. *Powell* v. *White.* 1 *Doug.* 169.

7 In ejectment against two defendants, afterwards at the *nisi prius* the plaintiff entered a *retraxit* against one of them, and the cause was tried against the other; adjudged that before the record is set down by *nisi prius*, either before or after issue joined, the plaintiff may enter a *non pros* against one defendant where they sever in their pleas; but where they do not sever, the plaintiff cannot enter a *non pros* as to one of them; that there cannot be a *non pros* at the trial at the assizes. *Cree* v. *Roll.* 3 *Salk.* 246.

8 After a verdict with entire damages against two defendants, the plaintiff cannot enter up judgment against one of them only, unless he first either enters a *nolle prosequi* as to the other, or suggest upon the

record a sufficient reason for omitting him; his death is a sufficient reason; his infancy, (in an action in which it is no bar,) though he appeared by attorney, is not. In an action against one person only, a *nolle prosequi* amounts to a *retraxit*; in an action against several, not. A *retraxit* in trespass as to one of several defendants discharges all. A *retraxit* cannot be entered by attorney. A *retraxit* after judgment shall, unless the contrary appear on the record, be presumed to have been entered by the plaintiff in person. *Coux* v. *Lowther*. 1 *L. Raym.* 597.

Judge of *nisi prius* may receive a *non pros* at the assizes. In ejectment against several, if some confess lease, &c. and others do not, the plaintiff may go on as to the former, and be nonsuit as to the latter. Where several defendants sever in plea, plaintiffs may enter *non pros* against one any time before record sent down. *Greeves* v. *Rolls*. 2 *Salk.* 456.

9 The statute 13 Car. 2, stat. 2, c. 2, enabling a defendant to sign judgment of *non pros* for want of a declaration in due time, extends to all cases. 7 *Term Rep.* 26.

10 The plaint in a replevin being removed by the defendant into the court of C. P. by *re. fa. lo.* which is filed on the appearance day of the return, and a rule to declare being given, he may sign judgment of *non pros* for want of declaring without demanding a declaration. *James* v. *Moody*. 1 *H. Black.* 281.

11 The defendant is bound to search in the office, whether the plaintiff has brought in the issue roll on the same day that he signs judgment of *non pros*, even though he may have searched on another day on the expiration of the rule to bring in the roll. *Minus* v. *Baxter*. 1 *Term Rep.* 16.

12 If plaintiff declare against one of two defendants named in his writ, and do not proceed against the other, the latter may sign judgment of *non pros* immediately. *Roe* v. *Cock*. 2 *Term Rep.* 257.

13 So if plaintiff serve notice of declaration, or take out a rule for time to declare against one only, without proceeding against the other. *Ibid.*

14 Where a plaintiff does not declare, after having obtained time for that purpose, the defendant may sign judgment of *non pros without giving a rule to declare*. *Towers* v. *Powel & ux.* 1 *H. Black.* 87.

15 And wherever it can appear that the action is not a joint action, judgment of *non pros* may be signed by all or any of the defendants named in the writ. *Butler* v. *Upton*. 2 *Term Rep.* 259, *n.*

16 Where the cause of demurrer to a declaration was that the counts were improperly joined, the court of C. P. held that the plaintiff could not enter a *nolle prosequi* as to some, and leave the others remaining. *Ross & ux.* v. *Bowler & al.* 1 *H. Black.* 108.

17 So after demurrer to a declaration of two counts against two defendants, because one of them was not named in the last count, the court of K. B. held that the plaintiff could not enter a *nol. pros.* on that count, and proceed on the other. *Drummond* v. *Dorant*. 4 *Term Rep.* 360.

18 The court of C. P. will not allow a defendant to strike out the entry of a judgment of *nolle prosequi* entered by the plaintiff, as to one of the counts of his declaration after it had been demurred to. Nor will it, in that stage of the proceedings, determine a question of costs respecting such a count. *Milliken* v. *Fox & al.* 1 *Bos. & Pull.* 157.

19 *Semble*, That judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be considered as a judgment by default. 2 *H. Black.* 523.

20 On a rule for a trial or *non pros*, the *non pros* must be moved for in

court; it cannot be signed in the prothonotary's office. 1 *Dallas*, 347.

21 A *non pros* entered in a mistaken presumption that a rule had been obtained to try, or *non pros*, taken off upon terms. 2 *Dallas*, 266.

22 *Non pros* for not appearing on a writ of error. 4 *Dallas*, 6.

XII. *Judgment of Nonsuit.*

1 In trespass against four, there can be but one nonsuit for want of declaring. *Allington* v. *Vavasor*. 2 *Salk*. 455.

2 Judgment as in case of a nonsuit may be moved for without a term's notice after acquiescence for a year. *Manby* v. *Wortley*. 2 *Black*. 1223.

3 In replevin, no judgment as in case of a nonsuit for not trying the cause. *Eggleton* v. *Smart*. 1 *Black*. 375.

4 Where a plaintiff is nonsuited, the defendant is entitled to costs. Where the judgment is arrested, each party pays his own costs. *Cameron* v. *Reynolds*. 1 *Cowp*. 407.

5 Where the plaintiff is nonsuited on the issue, contingent damages on the demurrer shall not be assessed. *Snow* v. *Como*. 1 *Str*. 507.

6 The insolvency of the defendant, happening after the action brought, is good cause against judgment, as in case of a non-suit. *Bailby* v. *Wilkinson*. 2 *Doug*. 671.

7 Where, in a joint action, there is judgment by default against one defendant, the other cannot nonsuit the plaintiff at the trial. *Powell* v. *White*. 1 *Doug*. 169, *n*.

Nor obtain judgment, as in case of a nonsuit in such case, if the plaintiff neglect to go to trial. *Ibid*.

8 In trespass against several, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest; and it is matter for the jury whether the trespass proved be the same as that confessed; but the plaintiff cannot be nonsuited. *Harris* v. *Butterley*. 2 *Cowp*. 483.

9 Court will not set aside a regular *non pros* obtained by defendant against a common informer, though manifest mistake may have happened. *Bennet qui tam, &c.* v. *Smith*. 1 *Burr*. 401.

10 The court refused to set aside a nonsuit voluntarily suffered by the plaintiff, and to give him leave to reply *de novo*. He had replied, "that the cause of action arose within six years; which fact he could not prove. He wanted therefore to set aside the nonsuit and reply *de novo*; which if he had succeeded in, he would have replied, "that the writ of *latitat* issued within the six years." But the court said that would make quite a new question; which the plaintiff had before pretermitted, and had put the issue quite upon another footing and upon a point which he could not establish. *Hutchinson* v. *Brice*. 5 *Burr*. 2692.

11 A plaintiff cannot be nonsuited without his consent after he has appeared. *Watkins* v. *Towers*. 3 *Term Rep*. 275.

12 If one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him, but such defendant must have a verdict if the plaintiff fail to make out his case. *Hannay* v. *Smith*. 3 *Term Rep*. 662.

13 Plaintiff cannot sign judgment for the defendant's refusing to pay 4d. for the warrant of attorney when the copy of the declaration is delivered to him. *Oneale* v. *Price*. 4 *Term Rep*. 370.

14 If a record be ever so erroneous, the plaintiff, who has made default by suffering a nonsuit, can never have a judgment afterwards in his favour. 4 *Term Rep*. 486.

15 It seems that undertaking by a rule of court to give material evidence in the county of *A*. in order to fix the *venue* there, does not imply a consent to be nonsuited if the party fail. 2 *Term Rep*. 281.

16 If the plaintiff, an attorney, by at-

tachment of privilege sue a defendant resident in Wales for words spoken there, and lay the *venue* in the Welch county, (in order that the cause may be tried in the next English county,) and the judge at the trial certify that the defendant was resident in Wales, &c., that fact thus certified may be suggested on the judgment-roll in order to entitle the defendant to enter a judgment of nonsuit under statute 13 G. 3, c. 51. *Evans* v. *Jones*. 6 *Term Rep.* 500.

17 An action of covenant for not levying a fine is a personal action within the meaning of the 13 G. 3, c. 51, s. 1, which empowers the judge to certify the defendant's residence in Wales, if the verdict be under 10l., in order that a nonsuit may be entered. *Davis* v. *Jones*. *New Rep.* 267.

18 Although notice has been given of a motion for judgment as in case of a nonsuit for not proceeding to trial in due time after issue joined, on which the plaintiff enters into a peremptory undertaking to try, yet *notice must also be given* (under 14 G. 2, c. 17,) of the like motion for not proceeding to trial in pursuance of the undertaking. *Gooch* v. *Pearson*. 1 *H. Black.* 527.

19 An affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge a rule for judgment as in case of a nonsuit, in a *qui tam*, as well as any other action. *Stone* v. *Farey*. 1 *East*, 551.

20 The court of C. P. laid down as a rule, that a peremptory undertaking to try, should of itself be sufficient to induce the court to refuse a rule for judgment as in case of a nonsuit for not proceeding to trial, on a first default. *Mallet* v. *Hilton*. 2 *H. Black.* 119.

21 The defendant in C. P. may rule the plaintiff to enter the issue, and move for judgment as in case of a nonsuit in the same term. *Peeters* v. *Throgmorton*. 1 *Bos. & Pull.* 287.

22 Where plaintiff withdraws his record after entering it for trial, the defendant may have judgment, as in case of a nonsuit. *Burton* v. *Harrison*. 1 *East*, 346.

23 After judgment for the defendant on demurrer to certain special pleas, there may be judgment of nonsuit, against the plaintiff for not proceeding to trial upon the other general pleas on which issues were joined. *Paxton* v. *Popham*. 10 *East*, 366.

24 A motion for a judgment as in case of nonsuit, for not proceeding to trial, will not be granted for the first default, if the plaintiff will *stipulate* to try his cause at the next court, or be nonsuited. *Wild* v. *Gillet*. 1 *Johns. Cas.* 30.

A motion for a nonsuit must be made at the next term after the default, otherwise the plaintiff need not stipulate. *Ibid.*

25 Both parties in replevin are actors, and judgment as in case of nonsuit, for not proceeding to trial, is never granted. *Barrett* v. *Forrester*. 1 *Johns. Cas.* 247.

26 The demandant in a writ of right may be called, on the first day of the term, and his default entered for his nonappearance; and if he does not appear on the *quarto die post*, and excuse his default, he will be nonsuited. *Swift* v. *Livingston*. 2 *Johns. Cas.* 112.

27 A defendant is not entitled to judgment as in case of nonsuit, for not proceeding to trial, in the *city of New-York*, if it appear that the cause could not have been tried in its order on the calendar, had it been noticed for trial. *Currie* v. *Moore*. 1 *Johns. Rep.* 492.

28 An agreement to put off the trial of a cause, made between the counsel of the parties, must be in writing, otherwise, the court will grant a rule for judgment, as in case of nonsuit, for not proceeding to trial. *Griswold* v. *Lawrence*. 1 *Johns. Rep.* 507.

29 Where a new trial has been granted and the plaintiff does not bring

on the cause, pursuant to notice, judgment as in case of nonsuit will be granted unless the plaintiff *stipulates* to try the cause at the next circuit, or be nonsuited. *Jackson ex dem. Ludlow* v. *Meyers.* 3 *Johns. Rep.* 541.

10 In a joint action of trespass against the defendants, one of them suffered judgment to pass by default, and it was held that the other defendants could not obtain a judgment as in a case of nonsuit, for not proceeding to trial; as the plaintiff, in such case, cannot be nonsuited. *Yates* v. *Lansing et al.* 8 *Johns. Rep.* 289.

XIII. *As to appearance; and of judgment for non-appearance.*

1 There must be four days exclusive between the day in bank and the signing of judgment. *Clerk* v. *Rowland.* 1 *Salk.* 399.

2 Where there is a judgment by default on a bill of exchange or promissory note, they must be produced before the inquiry jury. 1 *Doug.* 316, *n.*

But need not be proved. *Ibid.*

3 No objection can be taken on account of the want of a judicial writ, either after a verdict or a judgment by default. A writ of inquiry is a judicial writ. *Iles* v. *Pitt.* 2 *L. Raym.* 1397.

4 No finding can discharge a man against a confession by *nient dedire. Anon.* 1 *Salk.* 23.

5 Though defendants who plead to issue are acquitted, yet damages may be assessed against defaulters. *Jones* v. *Harris.* 2 *Str.* 1108.

6 Suffering judgment to go by default, is an admission of the contract declared on. *East-India company* v. *Glover. Eadem* v. *Lutman & another.* 1 *Str.* 612.

7 In judgment by default, the plaintiff is to make up the whole record; but on error brought for a slip in not making proper entries for the defendant, judgment shall stay till he can apply to amend below. *French* v. *Cornelys.* 1 *Black.* 453.

8 The general rule respecting signing judgments for non-appearance is, that where by the writ each party has a day in court, and the defendant may be damnified by not appearing, he may appear and demand the plaintiff, and if the plaintiff does not appear, the defendant is entitled to sign judgment, and to have his costs; and this even though the writ be not returned, as upon a *capias, exigent,* or *distringas. Davies* v. *James.* 1 *Term Rep.* 378.

9 Where plaintiff files common bail for the defendant on any day between the 2d and 6th *November,* and he is in other respects entitled to sign judgment, it is signed as on the day preceding the essoign day of *Michaelmas* term. *Wansey* v. *Moore.* 5 *Term Rep.* 65.

10 The return day of a *clausum fregit* and the *quarto die post,* are both reckoned inclusively. There is no difference whether the return day be on a Sunday or any other day; if it is on a Sunday the plaintiff must appear on Wednesday. *Fano* v. *Coken.* 1 *H. Black.* 9.

11 The notice to appear annexed to common process must contain *the name* of the defendant on whom it is served. *Worgman* v. *Plank.* 1 *H. Black.* 100.

12 It is in the discretion of the court, to put a defendant under terms who moves to have the issues levied under several distringases restored to him on his appearance, according to 10 G. 3, c. 50. s. 4. *Cazalet* v. *Dubois.* 1 *Bos. & Pull.* 81.

13 Defendant, before the action commenced, quitted the kingdom, leaving another in possession of his house and goods; plaintiff having served a summons to appear at the house, distrained the goods to compel an appearance; and held regular. *Staines & al.* (*Sheriff of Middlesex*) v. *Johannot.* 1 *Bos. & Pull.* 200.

14 A defendant cannot demand a bill of particulars till after appearance. *Kitchin* v. *Blanchard*. 1 *Bos. & Pull.* 378.

15 If a defendant accept a declaration and act as if an appearance has been entered for him, the court will not afterwards permit him to set aside a judgment for want of an appearance having been entered. *Williams* v. *Strahan*. *New Rep.* 309.

16 Where the notice of a rule to plead with a copy of the declaration, was served on the defendant personally, on the 12th *May*, and special bail was put in the 28th *May*, but no notice thereof or of the retainer of an attorney, was given to the plaintiff's attorney until the 8th *June*, and the default was entered the 4th *June*, for want of a plea; it was held, that the default was regularly entered. *Leispenard* v. *Baker*. 6 *Johns. Rep.* 333.

17 The notice of appearance being for the benefit of the plaintiff's attorney, may be waived by him. *Ib.* It is sufficient, under the *seventh* rule of *April* term. 1796, that the defendant, though the rule for pleading has expired, has four days after bail is actually filed, before his default is entered. *Ibid.*

18 In all cases where special bail is not required, an appearance must be entered, or common bail filed; a mere notice of retainer by an attorney is not a sufficient appearance on which to enter a default for want of a plea. *De Wandelaer* v. *Comer and Doe*. 6 *Johns. Rep.* 328.

19 What constitutes a regular appearance of a party to a suit. 3 *Dallas*, 331.

20 Whether partners can appear, or authorize an appearance to a suit, for each other. *Ibid.* 331, 2.

XIV. *Judgment for want of a plea.*

1 Judgment by confession upon a warrant of attorney may be entered in the vacation as of the term precedant, though the defendant died in that vacation. *Post terminum*, roll cannot be filed without leave of the court. *Oades* v. *Woodward*. 1 *Salk.* 87. 2 *L. Raym.* 766.

2 Judgment cannot be signed till 24 hours after a plea is demanded. *Wooden* v. *Boynton*. 1 *Black.* 50.

3 Irregular to sign judgment while a sham plea is standing. *Webb* v. *Holt*. 2 *Str.* 1234.

4 Suffering judgment by default admits the fact and the law to be against you, and you cannot offer affidavits in denial or justification; but you may to extenuate and mitigate. *Blackwell* v. *Green*. *Lofft*, 82.

5 A judgment by *nihil dicit* is where one is in court and required to make answer to what it objected against him, but he is silent and says nothing in his defence. There is likewise a judgement for departing in despite of the court; and that is, where the party appears, and, being to attend that day, goes out of the court without leave of the court. *Morrice* v. *Green*. 3 *Salk.* 213.

A judgment by default is where the party hath a day certain, and is demandable, and being demanded doth not appear; whereupon judgment is given against him by default. *Ibid.*

6 *B.* has judgment of *non pros* against *A.* and brings debt on that judgment, and signs judgment by default; then brings a second action of debt on such second judgment, and therein also signs judgment by default. The court stayed execution on the third judgment on *A.*'s bringing into court the debt and costs recovered by the second judgment. *Simpson and Stone*. 2 *Black.* 785.

7 On all process returnable in C. P. the last return of any term, if plaintiff declares in *London* or *Middlesex*, and defendant lives within 20 miles of *London*, defendant shall plead within four days after declaration filed or delivered with notice to plead, without any imparlance; provided declaration is filed, &c. or

the return day or the day after, or if the return day is a *Saturday*, on the *Monday* following. In the country eight days are given to plead in like manner. *Reg. Gen. 2 H. Black.* 552.

8 Judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded. *Dyche* v. *Burgoyne.* 1 *Term Rep.* 454.

9 But plaintiff cannot sign judgment for want of a plea till the expiration of twenty-four hours after demand of a plea, whether the time for pleading be or be not expired when such demand is made. *Bowles* v. *Edwards.* 4 *Term Rep.* 118.

10 If the defendant however suffer plaintiff to file common bail for him under the statute, the latter may, upon the expiration of the rule to plead, sign judgment for want of a plea, without any demand of a plea. *Palk* v. *Rendle.* 8 *Term Rep.* 465; *North* v. *Lambert.* 2 *Bos. & Pull.* 218.

11 *Aliter*, where the defendant enters an appearance, though he does not take the declaration out of the office. *White* v. *Dent.* 1 *Bos. & Pull.* 341.

12 So no demand of a plea is necessary, after a judge's order for time to plead. *Pearson* v. *Reynolds.* 4 *East*, 571.

13 If a declaration be indorsed "to plead in ——," it must be understood to mean within the number of days allowed by the rules of the court. *Hifferman* v. *Langelle.* 2 *Bos. & Pull.* 363.

14 If defendant, being under an order to plead issuably, plead several pleas, one of which is not issuable, the plaintiff may sign judgment as for want of a plea, though the others be issuable pleas; for the plea which was pleaded in disobedience to the order vitiated all the others. *Waterfall* v. *Glode.* 3 *Term Rep.* 305.

15 Where a defendant, under an order to plead issuably, puts in a sham demurrer to some of the counts in the declaration, and pleads issuably as to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea. *Cuming* v. *Sharland.* 1 *East*, 411.

16 Where a defendant, when under an order to plead issuably, put in a plea, though informal, which went to the substance of the action, the court held that the plaintiff could not sign judgment, as for want of a plea. *Thelluson* v. *Smith.* 5 *Term Rep.* 152.

17 Not guilty pleaded to an action of debt on a penal statute is not such a nullity as warrants judgment to be signed for want of a plea. *Coppin qui tam* v. *Carter.* 1 *Term Reports*, 462.

18 If a declaration in debt demand 2,000l. and contain several counts, each of which states a debt of 224l. 7s. 4 1-2d, and the defendant plead thereto, that he does not owe the said sum of 224l. 7s. 4 1-2d, the plaintiff may sign judgment for want of a plea. *Macdonnell* v. *Macdonnell.* 3 *Bos. & Pull.* 174.

19 The plea of *solvit ad diem* should be delivered, and ought not to be entered in the general issue book. *Lockhart* v. *Mackreth.* 5 *Term Rep.* 661.

20 But if the defendant, who is entitled to an imparlance, do enter such a plea in the general issue book before the plaintiff is entitled to a plea, it operates as a waiver of the imparlance, and enables the plaintiff to sign judgment as for want of a plea. 5 *Term Rep.* 661.

21 A plaintiff having tendered an issue to a plea, and demanded a rejoinder, where the defendant was under terms to rejoin *gratis*, and signed judgment for want of a rejoinder; the court held the judgment regular; but set it aside without costs, because the plaintiff might have added the *similiter* himself. *Wye* v. *Fisher.* 3 *Bos. & Pull.* 413.

22 If defendant do not rejoin, the plaintiff may strike out the previ-

ous pleadings, and enter judgment as, for want of a plea. *Petrie* v. *Fitzroy*. 5 *Term Rep.* 152.

23 If a plea be filed before the bail are perfected, it is a nullity, and does not become a good plea by perfecting the bail afterwards. *Venn* v. *Calvert*. 4 *Term Rep.* 578.

24 The irregularity of giving a rule to plead before the delivery of the declaration, is waived by putting in any plea, though a nullity; but such inoperative plea having been put in without authority, by a new attorney for the defendant, without any order to change the attorney, the judgment which had been signed as for want of a plea was set aside. *Perry* v. *Fisher*. 6 *East*, 549.

25 If an appearance be entered in the name of an agent to the attorney for the defendant, and the plea be delivered in the name of the attorney, and the plaintiff thereupon enter up judgment for want of a plea, the court will set aside that judgment for irregularity. *Buckler* v. *Rawlins*. 3 *Bos. & Pull.* 111.

26 If after the time for pleading is out, but before judgment signed by the defendant, the court, on his application, stay proceedings till the plaintiff give security for costs, to be approved by the prothonotary, the plaintiff, though he give security *instanter*, which is accepted by the defendant, is not at liberty to sign judgment before the opening of the office on the next morning. *Decker* v. *Thomson*. 3 *Bos. & Pull.* 319.

27 The plaintiff is not bound to notice an order for time to plead obtained by the defendant, if it be not drawn up and served; but may sign judgment as for want of a plea after the time when the defendant would have been bound to plead if no such order had been made. *Sedgewick* v. *Allerton*. 7 *East*, 542.

28 A default for want of a plea, must be entered against the casual ejectors, not the tenant. *Jackson ex dem. Van Alen* v. *Vischer*. 2 *Johns. Cases*, 406.

29 In ejectment, signing the consent rules, delivering a new declaration, putting in common bail, and filing a plea, are all simultaneous acts; and if the tenant neglects to file the plea, *instanter*, a default may be entered against the casual ejector. *Jackson ex demise Quackenboss* v. *Woodward*. 2 *Johns. Cases*, 110.

30 Where a plea is put in, which the plaintiff considers as frivolous or a nullity, he may either enter a default, for want of a plea, or demur, but must not apply to the court for judgment by default. *Falls* v. *Stickney*. 3 *Johns. Rep.* 541.

31 Where a plea was delivered to the plaintiff's attorney, who searched the clerk's office, and finding no plea on file, entered a default for want of a plea; the court considered the entry of the default a nullity, and no excuse for not proceeding to trial on the plea. *Smith* v. *Wells*. 6 *Johns. Rep.* 286.

The party is to be governed by the pleadings delivered to him, and not search the clerk's office to see whether the originals are filed. *Ib.*

XV. *Judgment criminal.*

1 Judgment for a corporeal punishment cannot be given against *H.* in his absence. *Duke's Case*. 1 *Salk.* 400. 1 *L. Raym.* 267.

2 Judgment altered the same term, and the punishment increased. *The Queen* v. *Fitzgerald*. 1 *Salk.* 401.

3 The indicting of a witness for perjury, not a reason to postpone the judgment of the person convicted of a misdemeanor. *The King* v. *Heydon*. 1 *Black.* 404.

4 If an offender convicted in B. R. receive sentence to be set on the pillory in a different county, the prosecutor is not bound to pay the tipstaff any fees, or even the expence of carrying the offender thither. *Rex* v. *Cholsey*. 2 *Coup.* 726.

5 Where a defendant is brought up for sentence on any indictment or information, *after verdict*, the defen-

dant's affidavits shall be first read, and then those for the prosecution; after which the defendant's counsel shall be heard, and lastly the counsel for the prosecution. *R.* v. *Bunts.* 2 *Term Rep.* 683.

6 Where a defendant is brought up for sentence *after judgment by default*, the prosecutor's affidavits shall be first read, then the defendant's; after which the counsel for the prosecution shall be heard, and lastly the defendant's counsel. 2 *Term Rep.* 689.

7 But if no affidavits be produced, the defendant's counsel shall be heard first, and then the counsel for the prosecution. 2 *Term Rep.* 683.

8 After conviction on a criminal information, to which objections were taken, the defendant must stand committed pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out on bail. *Rex* v. *Waddington.* 1 *East*, 159.

9 After judgment on the defendant for a libel, the court refused to make an order on the prosecutor to deposit the original libelous papers with the officers of the court. *Rex* v. *Cator.* 2 *East*, 361.

10 Besides the common four day rule on a defendant in misdemeanor to join in demurrer to his plea, there must be a peremptory rule, giving him a certain day in the discretion of the court, without which judgment cannot be signed against him. *Rex* v. *The Honorable R. Johnson.* 6 *East*, 383.

XVI. *Oyer.*

1 Upon *non est factum* found against the deed, it may be kept in court; otherwise upon a collateral issue. *Filch* v. *Wells.* 1 *Salk.* 215.

2 A defendant who prays *oyer* of a deed, is entitled to a copy of the attestation and of the names of the witnesses, as well as every other part of the deed. *Longmore* v. *Rogers.* *Willes*, 288.

3 Where a prior recovery in the same court is pleaded, *oyer* must be given. *Hunter* v. *Wiseman.* 2 *Str.* 823.

4 Where a bond is in the hands of a third person, the court will oblige him to give *oyer* and produce it. *White* v. *The Earl of Montgomery.* 2 *Str.* 1198.

5 Defendant who has *oyer* is not bound to insert it in his plea.—*N. B.* It was held in C. B. (where other like actions were brought) that the words of 7 G. 2, being "any person or persons," a corporation could not sue as a common informer. *The Weaver's Company qui tam* v. *Forrest.* 2 *Str.* 1241.

6 *Oyer* may be had of a recognizance; but it is not grantable of errors after the term the declaration is delivered, though the court will *ex gratia* sometimes grant it afterwards. *Ward* v. *Griffith.* 1 *L. Raym.* 83.

7 That if the defendant craves *oyer* of any thing whereof he is entitled to have *oyer*, and it is not delivered in time; he shall have so many days to plead after the rules are out, as he demanded *oyer* before the rules were out. *Powell* v. *Gay.* 2 *Str.* 705.

8 A defendant is not entitled to *oyer* of the original; and if he crave *oyer* thereof, the plaintiff may proceed without taking any notice of it. *Boats* v. *Edwards.* 1 *Doug.* 227.

This is also the rule in the court of common pleas. *Ibid.*

9 If *oyer* is granted of any instrument or record, and it is set forth; although the party was not entitled to such *oyer*, yet he shall be thereby entitled to take the whole instrument as part of his adversary's plea. *Jeffery* v. *White.* 2 *Doug.* 476.

10 *Oyer* cannot be compelled of an act of parliament. *Ibid.*

Nor of letters patent. *Rex* v. *Amery.* 2 *Doug.* 447, *n.*

11 A defendant cannot have *oyer* of the original, after he has pleaded in abatement. *Longueville* v. *The*

Inhabitants of Thistleworth. 2 *L. Raym.* 969. 2 *Salk.* 498.

12 *Oyer* indispensible, though the original deed shewn to be lost. *Thoresby* v. *Sparrow.* 1 *Wils.* 16. 2 *Str.* 1186.

13 *Oyer* will not be granted after rule to plead out. *Gerrard, Wid. Administratrix* v. *Early.* 2 *Wils.* 413.

14 By a *profert hic in curia*, the deed is in court. *Anon.* 3 *Salk.* 119.

15 Upon *profert* made unnecessarily, *oyer* shall not be given. *Morris's Case.* 2 *Salk.* 497.

16 When *oyer* is given to the defendant of a record which is set out in the declaration, he need not set it forth in his plea. *Simmons* v. *Parmenter & al.* 1 *Wils.* 97.

17 Deed remains in court all the term it is produced; otherwise, of letters testamentary or of administration. *Roberts* v. *Arthur.* 2 *Salk.* 497.

18 A record may be pleaded without a *profert*; and therefore a man cannot have *oyer* of it. A man cannot have the copy of a conviction for felony or treason, without leave of the attorney general; no copy of record of indictment for felony and acquittal, where there was probable cause for the prosecution. *Dr. Groenvelt* v. *Dr. Burrell.* 1 *L. Raym.* 252.

19 Where the writing is only evidence, and the action not founded on it; the defendant cannot have copy. *Hill* v. *Aland,* 1 *Salk.* 215.

20 Defendant demands *oyer* of an indenture which he ought to set forth himself; and the plaintiff gives *oyer*, but imperfect; it is at the defendant's peril. *Cook* v. *Remmington.* 2 *Salk.* 498.

21 If the defendant pleads another action depending for the same cause in the same court, the plaintiff may pray *oyer* of the record being in the same court; and if there is no *oyer* of the record, the plaintiff may sign judgment by default; for in all cases where a deed or record is pleaded, and *oyer* prayed; if *oyer* is not granted, the plea is as no plea. *Theobald* v. *Long.* 1 *L. Raym.* 347.

22 Where on *nul tiel record*, it is proper to crave *oyer* of the record unless it be in another court. *Hambleton* v. *Lancashire.* 3 *Salk.* 295.

23 *Oyer* of a record is never granted. 1 *Term Rep.* 149.

24 The party who is to give *oyer* of a deed is allowed two days for that purpose, exclusive of the day on which it is demanded. *Page* v. *Divine.* 2 *Term Rep.*

25 The defendant has *as many pleading days* to plead, after *oyer* is granted, as he had when it was demanded. *Webber* v. *Austin.* 8 *Term Rep.* 356.

26 *Oyer* may be prayed any time before the expiration of 24 hours after the *demand* of a plea though the *rule* to plead be out. *Sparkes* v. *Simpson.* 2 *Bos. & Pull.* 379.

27 The defendant having pleaded letters patent to a *quo warranto* information, and made a profert of them, *oyer* was refused in another term from that in which the profert was made. *Rex* v. *Amery.* 1 *Term Rep.* 149.

28 If defendant, after craving *oyer* of a deed, do not set forth the *whole* deed, the plaintiff may sign judgment as for want of a plea; or the court will quash the plea. *Wallace* v. *The Dutchess of Cumberland.* 4 *Term Rep.* 370.

29 Where the defendant, in an action of debt on bond, after craving *oyer*, and setting it out truly, pleaded payment, on which the plaintiff took issue, and served defendant's attorney with a rule to abide, &c. and gave notice of trial; and afterwards defendant returned the paper book, setting out a false *oyer* of the bond, and pleading as before, on which the plaintiff inrolled the true condition, and demurred; the court ordered all the pleadings to be struck out, and that plaintiff should have judgment, and that the defendant's attorney should pay all

seats. *Ferguson* v. *Mackreth, cited.* 4 *Term Rep.* 371, *n.*

30 In an action on a probate bond the court do not grant oyer of the original bond, but order a copy to be furnished the defendant. *Thatcher* v. *Lyman et al.* 5 *Mass.* 260.

31 Where a declaration has been served with *oyer* and the declaration is amended, a copy of the amended declaration served, a *new oyer* need not be delivered. *Lefferts* v. *Byron.* 1 *Johns. Cases*, 415.

32 Though profert is made of a deed, if oyer is not prayed, the deed is no part of the record. 4 *Dallas*, 436.

XVII. *Plea, Demanding.*

1 A demand of plea in writing must be made where bail is filed, although there be notice to plead on the declaration. *Nott* v. *Oldfield*, 1 *Wils.* 134.

2 It seems to be the practice, that delay to demand a plea does not hinder your signing judgment the instant after you have demanded it. *Anon. Lofft*, 333.

3 A demand of a plea before the defendant has appeared, or the plaintiff filed common bail for him, is a nullity. *Cooke* v. *Raven.* 1 *Term Rep.* 635.

4 Where the defendant is joined with his wife in the writ, he may enter an appearance for himself only; and in such case the plaintiff cannot sign judgment for want of a plea, without demanding a plea. *Clark* v. *Norris & ux.* 1 *H. Black.* 235.

5 A demand of a plea may be made at the time of delivering the declaration. *Edmonton Churchwardens* v. *Osborne.* 6 *Term Rep.* 689.

6 If a plea be demanded on a *Saturday*, the defendant has twenty-four hours to plead after the demand, exclusive of *Sunday*. *Solomons* v. *Freeman.* 4 *Term Rep.* 557.

7 No demand of a plea is necessary when the defendant is in custody of a sheriff. *Wilkinson* v. *Brown.* 6 *Term Rep.* 524.

8 Nor is it necessary, in cases where the plaintiff sues the defendant in the custody of a sheriff, and the defendant, without notice to the plaintiff, procures himself to be removed to a different custody. 6 *Term Reports*, 524.

9 If a prisoner be prevented from justifying bail by the plaintiff desiring further time to enquire into their sufficiency, he is from the time of his notice of justification entitled to a demand of a plea before judgment can be signed against him. *Davies* v. *Chippendale.* 2 *Bos. & Pull.* 367.

10 A summons for further time to plead not attended by the party taking it out, does not waive the necessity of a rule to plead. *Decker* v. *Shedden.* 3 *Bos. & Pull.* 180.

11 The rule to plead to an amended declaration must be a four days' rule. *Barton* v. *Moore, one, &c.* 8 *Term Rep.* 87.

12 Though a rule to plead expires on a *dies non juridicus*, the defendant is bound to plead on or before that day, and if he does not, judgment may be signed on the next day. *Mesure* v. *Britten.* 2 *H. Black.* 616.

XVIII. *Plea, Issuable.*

1 A plea of tender (but not a plea in abatement) is an issuable plea, within a judge's order of time to plead upon the usual terms. *Kilvick* v. *Maidman.* 1 *Burr.* 59.

2 Leave given to withdraw the general issue and plead a special plea upon terms. *Wilkes* v. *Wood.* 2 *Wils.* 204.

3 A demurrer on the merits is an issuable plea within the meaning of an order for time. *Wright* v. *Russel.* 2 *Black.* 923. 3 *Wils.* 530.

4 Sham demurrer, evasion of judge's order for pleading, issuable. *Gray* v. *Ashton.* 3 *Burr.* 1788.

5 The plea of a recovery in another court is not an issuable plea under a judge's order to plead issuably. *Lowfield* v. *Jackson.* 2 *Wils.* 117.

6 Plea without defence may be refused, but is made good by acceptance. *Ferrer* v. *Miller*. 1 *Salk.* 217.

7 Where there is a plea in abatement, or a general issue is pleaded, if not entered the defendant may waive it. *Watts* v. *West*. 3 *Salk.* 211. 1 *L. Raym.* 674.

8 The court refused to permit a defendant to add the plea of the statute of limitations, after having pleaded the general issue. *Cox* v. *Rolt*. 2 *Wils.* 253.

9 Whether defendant has been always ready to pay, is not issuable. *French, an attorney* v. *Watson*. 2 *Wils.* 74.

10 After time to justify bail, and rule to plead issuably, &c.; plea of recovery in K. B. set aside with costs. *Cave* v. *Aaron*. 3 *Wils.* 33.

11 Plea of statute 23 H. 6, c. 10, is an issuable plea within judge's order, giving time to plead, within the usual terms of pleading on issuably, &c. *Dearden, assignee, &c.* v. *Holden*. 1 *Burr.* 605.

12 Where the defendant pleads a payment and acceptance in satisfaction the plaintiff may take issue upon the acceptance; which will be an argumentative denial of the payment. *Hawkshaw* v. *Rawlins*. 1 *Str.* 23.

13 Cannot withdraw special plea but in order to plead the general issue. *Law* v. *Law*. 2 *Str.* 960.

14 The defendant cannot put in a special demurrer when he is under terms of pleading issuably. *Berry* v. *Anderson*. 7 *Term Rep.* 530.

15 A defendant who is under terms to plead issuably, is not at liberty to take advantage of any objections upon special demurrer, of which he could not have availed himself upon general demurrer. *Bell* v. *Da Costa*. 2 *Bos. & Pull.* 446.

16 Under a judge's order to plead issuably, the defendant can only put in a plea which goes to the merits. The plea of *alien enemy* is not such a plea. *Simeon* v. *Thompson*. 3 *Term Rep.* 71.

17 Upon a complaint to the court of common pleas, by the owner of land flowed in consequence of the erection of a mill-dam, if the defendant claim to be wholly exempted from the payment of damages, he must plead to issue at the bar of the court; otherwise the sheriff's jury are bound to give some damages. *Vandusen* v. *Comstock*. 3 *Mass.* 184.

18 If a defendant put in a frivolous demurrer, he cannot afterwards withdraw it, to plead the general issue, though he has merits. *Griswold* v. *Haskins*. 1 *Johns. Cas.* 135.

19 Where a rule has been granted upon condition of pleading *issuably*, and the defendant plead the general issue, and also that another action for the same cause had been frivolously commenced by the plaintiff and was pending, the second plea, though in the form of a plea in bar, was held to be a plea in abatement, and so far vitiated the first plea, as not to be a fulfilment of the condition of the rule. *Davis* v. *Grainger*. 3 *Johns. Rep.* 259.

20 *Fi. fa.* issued on a judgment in the bail-bond suit; proceedings were stayed on affidavit of a defence, pleading issuably in the original action, and consenting that the judgment on the bail-bond should remain as security. 1 *Dallas*, 130.

21 In an action of debt brought here, on a judgment obtained in another state, there can be no plea but *nul tiel record*. 2 *Dallas*, 392.

XIX. *Plea, puis darrein continuance.*

1 Plea *puis darrein continuance* is a waiver of the bail. *Barber* v. *Palmer*. 1 *Salk.* 178. 1 *L. Raym.* 693.

2 Where a plea *puis darrein continuance* is put in, the court will immediately require some evidence of its truth. *Martin* v. *Wyvill*. 1 *Str.* 492.

3 An administration *pendente lite*

may be pleaded *puis darrein continuance* to justify a retainer. *Vaughan* v. *Browne.* 2 *Str.* 1106.

4 Outlawry of plaintiff between action brought and plea pleaded, need not be pleaded *puis darrein continuance.* *Moor* v. *Green.* 1 *Salk.* 178.

5 Plea *puis le darrein continuance* that defendant became a bankrupt, cannot be rejected by the court if verified by an affidavit; but the plea must allege that he hath conformed, or it is bad. *Paris* v. *Salkeld.* 2 *Wils.* 139.

6 Defendant, after a verdict against him, obtained a rule for a new trial, which after argument on a subsequent day was discharged; he then pleaded a plea *puis darrein continuance, intitled of the term generally;* and the court refused to order a special memorandum of the day when it was filed, under these circumstances. *Lovell* v. *Eastaff.* 3 *Term Rep.* 554.

7 If a plea *puis darrein continuance* be filed and verified on oath, the court cannot set it aside on motion, but are bound to receive it. 3 *Term Rep.* 554.

XX. *Plea, Rule to abide by.*

1 After a rule to abide by a special plea, or plead such other plea as the defendant will abide by, he can only plead the general issue. *Hare* v. *Lloyd.* 1 *Term Rep.* 693. *Prout* v *Dewar.* 1 *Term Rep.* 693, *n.*

2 But after such a rule the defendant may plead the general issue, and give notice of set-off. *Cockran* v. *Robertson.* 1 *Term Rep.* 693, *n.*

XXI. *Time to plead; and rule for, with delivery and effect of plea.*

1 Upon a special *capias* by original, the defendant shall not be obliged to plead sooner than upon a common *latitat.* *Haywys* v. *Savage.* 2 *Str.* 684.

2 No new rules to plead after an amendment, unless an imparlance be given. *Anon.* 2 *Salk.* 518.

3 On amending a declaration, the defendant is entitled to a new four days' rule to plead. *Blunt* v. *Morris.* 2 *Black.* 785.

4 Upon bills filed against officers, it is sufficient if there be four days within term to plead. *Pasmore* v. *Goodwin.* 2 *Salk.* 517.

5 A month's time to plead, means a *lunar month.* *Tullett.* v. *Linfield.* 3 *Burr.* 1455.

6 By the course of the court, if the plaintiff moves to amend his declaration the same term the defendant's plea comes in, the plaintiff need not give new rules to plead; but the defendant must plead in convenient time. *Anon.* 2 *Salk.* 520.

7 A judgment in the common pleas, if not true in fact, is no issuable plea within the meaning of a rule for time. *Heron* v. *Heron.* 1 *Black.* 376.

8 Upon a *habeas corpus* returnable in Michaelmas term, if the declaration be delivered before *crastinum Omnium Animarum* the defendant must plead to try; but upon a *cepi corpus*, he is only to plead to enter. So in Easter term, if the declaration be delivered before *mens. Paschæ.* *Hall* v. *Englestone.* 2 *Salk.* 515.

9 Leave given to withdraw general issue and plead same again with notice of set-off on motion in due time. *Blackbourn* v. *Matthias.* 2 *Str.* 1267.

10 Pleading the plea of *nul tiel* record must have a serjeant's hand. *Simpson* v. *Neale.* 2 *Wils.* 74.

11 Plea to an indictment of mayhem may be delivered in the office. *The King* v. *Haddock.* 2 *Strange,* 1100.

13 Matter of substance must be pleaded, but matter of indictment only may be given in evidence upon the general issue. *Sibly* v. *Cumming.* 4 *Burr.* 2464.

13 Offender discovering, in respect of bribery at a parliamentary election,

if sued, may plead *nil debet*, and give his excuse in evidence. *Davy* v. *Baker*. 4 *Burr*. 2471.

14 *Son assault demesne* pleaded is a sufficient admission of the assault, and plaintiff need not prove it if defendant fails in supporting his plea. *Hay and wife* v. *Kitchen and wife*. 1 *Wils*. 171. 2 *Str*. 1271.

15 If a man is indicted and tried in B. R. the indictment is entered upon the plea roll; but if he be tried at the sessions of the Old Bailey, the indictment, when brought here, is put into a bag and laid by. *The King* v. *Walcot*. 1 *Salk*. 371.

16 In a cause in which the defendant has pleaded in abatement, and the court has awarded a *respondeat ouster*, the plea in abatement, and *respondeat ouster* must be entered on the *nisi prius* roll. *Doberton* v. *Chancellor*. 1 *L. Raym*. 329.

17 The court refused to give the defendant leave to withdraw a special plea, and plead the general issue, after laying by a term. *Freeman* v. *Jones, a surviving partner with one Napleton*. 2 *Wils*. 391.

18 Where a defendant pleads a sham plea, the court will not let him withdraw it and plead the general issue. *Ellis qui tam, &c.* v. ——. 2 *Wils*. 369.

19 In an order to enlarge the time for pleading, the court of C. P. held that the time was reckoned inclusive of the date of the order, but exclusive of the day when it expired. *Kay* v. *Whitehead*. 1 *H. Black*. 35.

20 But in a subsequent case it appears that the officers of the court considered that the first and last days are both to be reckoned inclusively. *Freeman* v. *Jackson*. 1 *Bos. & Pull*. 479.

21 In trover for goods where the defence is that they were sold by the plaintiff, the court will give the defendant time to plead, in order that he may obtain a discovery from the court of chancery in the mean time. *Whitter* v. *Cazelet*. 2 *Term Rep*. 683.

22 After a defendant has obtained an order for time to plead on the terms of pleading issuably, he cannot plead the statute of limitations, or any other plea which does not go to the merits; and if he plead such a plea, the court will set it aside on motion. *Stadholme* v. *Hodgson*. 2 *Term Rep*. 390.

23 But this case was afterwards overruled, and the court held that a defendant might in such case plead the general issue, and the statute of limitations. *Rucker* v. *Hannay*. 3 *Term Rep*. 124.

24 And the court of C. P refused to restrain a defendant from pleading the statute, on setting aside a regular interlocutory judgment. *Maddocks* v. *Holmes & al*. 1 *Bos. & Pull*. 228.

25 Both in K. B. and C. P. a plea of tender may now be pleaded after a judge's order for time to plead. *Noone* v. *Sith*. 1 *H. Black*. 369.

26 When time to plead has been obtained, if the defendant plead and give a rule to reply before the expiration of such time, the rule to reply will be of no avail unless he give notice of his plea. *Gandy* v. *Borrowdale*. *New Rep*. 278.

27 Where a party pleads at the court of common pleas with reservation, he must file his new plea at the first term in this court. *Tyng* v. *Prentice, exr*. 3 *Mass*. 299.

28 In ejectment, the tenant must plead at the time he signs the consent rule. *Jackson ex dem. Van Alen* v. *Vischer*. 2 *Johns. Cas*. 106.

29 If a party wants time to plead, he must apply to a judge for that purpose. *Gorham* v. *Lansing and Doe*. 2 *Johns. Cas*. 107.

30 Where the 20 days for pleading are expired, when the *venue* is changed, the defendant must plead *instanter* to the *amended* declaration; and if the 20 days are not out, he is entitled only to the remaining days, within which to plead to a

new declaration. *Russel* v. *Ball.* 3 *Johns. Cases*, 91.

81 In an action of dower, *unde nihil habet*, the tenant must appear and plead on the *quarto die post* of the term in which the summons is returnable, otherwise his default may be entered. Plea of *non summons* must be verified by affidavit, and be put in on the *quarto die post*. *St. Croix* v. *Sands.* 1 *Johns. Rep.* 328.

82 Where a cause is removed from the court of common pleas, into this court, by *habeas corpus*, the plaintiff cannot, as in ordinary cases, enter a rule to plead in this court, and after 40 days, file bail according to the statute; but must enter a rule for the appearance of the defendant in this court, or that a *procedendo* issue, and if an appearance is not entered in 20 days, take out a *procedendo*. *Vanduzen* v. *Willet.* 5 *Johns. Rep.* 231.

83 Where the *venue* is changed in a cause, the defendant is not entitled to 20 days to plead to the amended declaration. *Burroughs* v. *Hillhouse.* 6 *Johns. Rep.* 132.

XXII. *Prisoner; proceedings against.*

1 Where a prisoner is removed from B. R. to C. B. there is no need, in action of escape, to shew a process against him in C. B. *Gambier* v. *Wright.* 2 *Str.* 951.

2 Course of charging a prisoner in custody with an action. *Tilsden* v. *Palfriman.* 1 *Salk.* 345.

3 *H.* brought into B. R. shall not be removed into any other court till he has answered. *Anon.* 1 *Salk.* 350.

4 Bringing an action on a judgment within two terms is not equivalent to charging the defendant in execution within two terms, within the rule. *Childs* v. *Prowse.* *Willes*, 531.

5 If a suit is pending in B. R. against one in the admiralty custody, he must be turned over to the marshal. *Rutherford* v. *Scott.* 2 *Str.* 936.

6 Notice of trial to a turnkey, good. *Whitehead* v. *Barber.* 1 *Str.* 248.

7 Declaration must be served on a prisoner, or left with the turnkey, though he has appeared by attorney. *Clavey* v. *Watts.* 2 *Black.* 786.

8 A fugitive surrendering himself to the *Fleet*, under the insolvent act, is not a prisoner in the custody of the warden, nor liable to be charged with a declaration. *Smith* v. *Eyles.* 2 *Black.* 970.

9 Where the defendant is in custody, the declaration must be delivered to the turnkey, and not into the office. *Greenhouse* v. *Cleever.* 1 *Str.* 474.

10 Diversity between charging a prisoner in term and vacation. *Tilsden* v. *Palfriman.* 1 *Salk.* 213.

11 In a declaration against a prisoner in custody of the sheriff, it must be alleged at whose suit he is detained pursuant to the act 4 and 5 *W. and M.* c. 21. *Williams* v. *Wills.* 1 *Wils.* 119.

12 A prisoner attainted, and afterwards charged in a civil suit by leave of the chief justice, not to be discharged on motion. *Ramsay* v. *Macdonald.* 1 *Black.* 30.

13 The *declaration* was filed on the last day of the second term after the return of the writ; but the *notice to plead* was only given a little before the essoign day of the following term; and holden to be well enough. *West* v. *Radford.* 3 *Burr.* 1452.

14 Verdict for plaintiff in *Hilary* vac.; defendant renders himself 2d *April*, final judgment in *Trinity* term, and defendant charged in execution *Michaelmas* following, regular. *Pierce* v. ——— 1 *Wils.* 297.

15 Method, and ancient and modern practice in term time and vacation, of charging prisoners in execution. is, that though a defendant may be entitled to be superseded, yet, if not actually superseded, he may still be charged as in custody; and if it be vacation, the bill must be filed and entitled as of the preceding term.

Hutchins v. *Kenrick*. *Hills et al.* v. *Kenrick*. 2 *Barr*. 1048.

16 While a treaty subsists between the plaintiff and the defendant, who is a prisoner, the plaintiff is not obliged to declare against him within two terms, according to the rule of the court. *Walter and another* v. *Stewart, a prisoner*. 3 *Wils*. 455. 2 *Black*. 918.

17 There must be exceptions from the literal meaning of every rule, where the letter would work an injustice, or contradict the spirit of the rule; and therefore the court refused to discharge out of custody, for want of proceedings against a prisoner within two terms; where there was a mistake by two being of the same surname. —— v. *Parks*. *Lofft*, 273.

18 Where a man is actually in custody, the entry of an action in the marshal's book is a good commencement of the action. *Tilden* v. *Palfriman*. 3 *Salk*. 149.

19 A plaintiff need not declare against a prisoner until the end of the term next after the return of the writ, even though there was time, in the term in which the writ was sued out, to have made the writ returnable in that term. *Richardson* v. *Richardson*. 6 *Term Rep*. 547.

20 A copy of the declaration must be *delivered*, as well as the declaration entered, before the end of the term next after the return of the writ. *Blyth* v. *Harrison*. 1 *Bos. & Pull*. 533.

21 The defendant having surrendered in discharge of his bail in K. B. removed himself by *habeas corpus* into the *Fleet*, and plaintiff declared against him there after the end of the second term after the writ was returnable; a judgment of *nonpros* signed afterwards was irregular. *Sherson* v. *Hughes*. 5 *Term Rep*. 35.

22 If a person, having privilege of parliament be in the king's bench prison, a declaration may be filed against him as being in custody of the marshal, and no summons need be issued against him. *Jackson* v. *Mackreth*. 5 *Term Rep*. 361.

23 A summons is generally issued to bring the party into court; but it is unnecessary when the defendant is already in the custody of the marshal. 5 *Term Rep*. 362.

24 The declaration need not be delivered to a prisoner personally, or to the gaoler, unless where he is in custody at the suit of the same plaintiff for the same cause of action. *Robertson* v. *Douglas*. 1 *Term Rep*. 191.

25 A declaration against a prisoner may be delivered in the vacation. *Heron & al.* v. *Edwards*. 8 *Term Rep*. 643.

26 The rule of *E*. 5 *W*. and *M*. *Reg*. 2, requiring the affidavit of the delivery of the declaration to be filed within 20 days of the delivery does not extend to the case of a declaration delivered by way of detainer. *Davis* v. *Davenport*. 2 *Bos. & Pull*. 72.

27 The delivery of a declaration against a prisoner, though within two terms, is a nullity if there were no bill filed before: and he is entitled to his discharge under the above rule of court. *Nowell* v. *Bingham*. 4 *East*, 16.

28 If a declaration be delivered against a prisoner as such, after he has obtained a *supersedeas*, it is irregular; but he cannot take advantage of the irregularity unless he apply to the court in due time. *Gehegan* v. *Harper*. 1 *H. Black*. 251.

29 A prisoner who is supersedeable for want of filing a bill against him in time, waives the irregularity by afterwards pleading. *Pearson* v. *Rawlings*. 1 *East*, 77.

30 When a prisoner pleads out of time, he must give the plaintiff notice of his plea. *Thomas* v. *Prickard*. 4 *Term Rep* 664.

31 In general a prisoner need not give notice of his having filed a plea, but when he pleads at an earlier time than by the rules of the court he is compellable to plead, he must

give notice. *Rusholm* v. *Chapman.* 5 *Term Rep.* 473.

32 And if he do not, the plaintiff may sign judgment as for want of a plea. *Parkinson* v. *Thompson.* 8 *Term Rep.* 596.

33 Persons charged with offences against the excise laws (who by statute 26 G. 3, c. 77, s. 16, and 35 G. 3, c. 96, are to be committed to gaol in case they cannot find bail, and in whose names an appearance and the plea of not guilty is to be entered within a time to be limited by this court, to any indictment or information exhibited against them for the same, unless they appear and plead) are allowed by rule of court six days to enter an appearance and plead in case they are confined within forty miles of *London*, and eight days if above forty miles. 6 *Term Rep.* 406.

34 If a plaintiff do not proceed to trial or judgment within three terms against the defendant, (a prisoner,) the latter is not entitled to be discharged until the expiration of the third term. 4 *Term Rep.* 664.

35 When a defendant surrenders in discharge of his bail in the vacation *after verdict* against him, the plaintiff must charge him in execution within the two terms next following such vacation. *Smith* v. *Jefferys.* 6 *Term Rep.* 776.

36 But when he surrenders in the vacation *after judgment*, the term in which the judgment is signed is reckoned as one of the two terms within which the plaintiff must charge him in execution. 6 *Term Rep.* 777.

37 If the plaintiff's attorney sign judgment, and file the committitur piece with the clerk of the judgments within the second term after trial had and verdict obtained against a prisoner, that is a sufficient *charging him in execution within two terms*, pursuant to the rule of court of *Hilary*, 26 G. 3, though the final judgment and the committitur be not entered of record by the officer of the court till the continuance day after such second term; provided such entries be then completed. *Pearson* v. *Rawlings.* 1 *East*, 405.

38 Every committitur of a judgment against a prisoner shall be filed with the clerk of the dockets on or before the last day of the term, in which the prisoner is charged in execution; and the clerk shall enter the committitur on the judgment roll within four days next after the end of such term, exclusive of the last day of the term; unless the last of such four days be *Sunday*, and then within five days, &c. and in default thereof the prisoner shall be discharged. *Reg. Gen.* 1 *East*, 410.

39 By the rule of court, *Hil.* 26 G. 3, if there be a trial against a prisoner, he is supersedable, unless charged in execution within two terms afterwards. If there be final judgment against him, without trial, (which is what is there meant by final judgment,) then he is supersedable, unless charged in execution within two terms after such final judgment; inclusive of the term of trial or final judgment respectively. *Heaton* v. *Wittaker.* 4 *East*, 349.

40 A creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the *Fleet*, though he be not there by compulsion. *Wilkinson* v. *Jaques.* 3 *Term Rep.* 392.

41 A person in custody under an attachment for non-payment of costs may be charged with an execution in a different action. *Bonafous* v. *Schoole.* 4 *Term Rep.* 316.

42 A prisoner, after judgment against him may notwithstanding the allowance of a writ of error, be charged in execution; as he would otherwise be supersedable. *Fisher* v. *M'Namara.* 1 *Bos. & Pull.* 292.

43 The court will not discharge a prisoner out of execution, because the judgment against him is not docketed and entered upon the rolls

of the court. *Pariente* v. *Castle*. 2 *Bos. & Pull.* 163.

44 A prisoner under criminal process in the house of correction cannot be brought up by *habeas corpus ad respondendum*, for the purpose of being charged with a declaration on a bailable writ, and recommitted to his former custody so charged; for the court have no power to make the gaoler of such prison liable for the escape of a prisoner on civil process. *Brandon* v. *Davis*. 9 *East*, 154.

Aliter, In the case of a sheriff or gaoler of the court. *Ibid.*

45 A prisoner may be brought up from a different county from that in which the court sits, in order to be discharged, under the act for the relief of debtors, with respect to the imprisonment of their persons. *Nichols* v. *Gregory*. 5 *Johns. Rep.* 239.

XXIII. *Process and Papers; Service of.*

1 Where debt is upwards of 10l. no excuse for notice to appear on service of process. *Willis* v. *Lewis*. 1 *Wils.* 22.

2 Service of a bill of *Middlesex* good, when it is doubtful whether defendant was served in *London* or *Middlesex*. *Drew* v. *Marriott*. 1 *Wils.* 77.

3 Writ may be served at any time of the return day, although after rising of the court. *Maud* v. *Bernard*. 2 *Burr.* 812.

4 Service of a rule on the wife not good, if husband is gone beyond sea the week before. *The King* v. *Badouin*. 2 *Str.* 1014.

5 Process whereon to ground *testatum* is returned by the attorney of course. *Palmet* v. *Price*. 2 *Salk.* 589.

6 Personal service necessary in the first process in *latitat*. *Anon. Lofft*, 253.

7 May declare *qui tam*, though the process is not set out. *English* notice on process need not express the year. *The Weaver's Company qui tam* v. *Forrest*. 2 *Str.* 1232.

8 12 G. 1, c. 29, on serving copies of process need not shew the writ. *Worley* v. *Glover*. 2 *Str.* 877.

9 The court will give a man leave to serve a felon with process, though he is under sentence of death, and likely to have his sentence changed for transportation, if the felony did not occasion any forfeiture; and the party applying will undertake not to sue out execution against the person. *Coppin* v. *Gunner*. 2 *L. Raym.* 1572. *Str.* 878.

10 Copy of process served without defendant's name to the notice at the bottom, bad. *Behena* v. *James*. 1 *Wils.* 104.

11 A bailiff is bound to make affidavit of the service of process, when required. *King* v. *Rudge*. 1 *Black.* 432.

12 Judgment on a demurrer to a plea must be entered with *et quia videtur curiæ quod placit' præd'*, &c. *Attwood* v. *Burr*. 1 *Salk.* 402. 2 *L. Raym.* 821.

Judicial writ must be returned before *alias* can be sued out. When error quashed, plaintiff entitled to sue out another writ. *Ibid.*

13 The *custos brevium* is to indorse on every writ on what day and at what hour it is filed. *Reg. Gen.* 3 *Term Rep.* 787.

14 A bill of *Middlesex* may be returnable the same day that it is sued out. *Oxlade* v. *Davidson*. 4 *Term Rep.* 610.

15 The court refused to set aside a bill of *Middlesex*, which was to answer plaintiff in a plea of *debt*, instead of *trespass*. *Barber* v. *Lloyd*. 2 *Term Rep.* 513.

16 The court will quash a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form. *Reubel* v. *Preston*. 5 *East*, 291.

17 It is irregular if a *capias* be served after the date of the return, and if

there be not 15 days between the *teste* and the return. *Whale* v. *Fuller*. 1 *H. Black.* 222.

18 But if the defendant take the declaration out of the office, he thereby waives all preceding irregularity. 1 *H. Black.* 222.

19 If a defendant be *arrested* after the writ is returnable, the officer cannot legally detain him, (though for the shortest time) until the writ be continued. *Loveridge* v. *Plaistow.* 2 *H. Black.* 29.

20 On all writs of distringas returnable on the last day of term, plaintiff may, at the rising of the court, move to increase issues on the *alias* or *pluries*, to be thereupon issued next day; or to sell the issues where they have been levied on such *distringas*. *Reg. Gen.* 1 *Bos. & Pull.* 312.

21 After a summons and distringas issued against a privileged defendant in the county where the action is brought, but in which he did not reside, and of which process he had no notice, and returns of *non est inventus* and *nulla bona*, a *testatum distringas* may regularly issue into the county in which he resides and has property, without any new summons in such county; but the sheriff ought not to levy more than 40*s.* under such *testatum distringas* in the first instance, according to the usual course. *Bloxam* v. *Surtees.* 4 *East*, 162.

22 Only the defendant or defendants in one action can be included in a bailable writ; *secus* if the writ be not bailable. *Holland* v. *Johnson.* 4 *Term Rep.* 695.

23 Proceedings set aside because the bill of *Middlesex* was served in the city of *London*. *Borman* v. *Bellamy.* 1 *Term Rep.* 187.

24 But the court refused to set aside the proceedings merely because the defendant was served with a *latitat* in *Middlesex*; service is sufficient if it gives personal notice to the party, provided it be not a bailable process. *Kelly* v. *Shaw.* 6 *Term Rep.* 74.

25 So service of a writ (directed to the sheriff of *Northumberland*) in *Newcastle upon Tyne*, was held good. *Busby & al.* v. *Fearon.* 8 *Term Rep.* 285.

26 Service of a *latitat* at eight o'clock in the evening of that day when it is returnable is good, though the declaration be left in the office in the course of the same day. 1 *Term Rep.* 191.

27 So, in the case of *Ward* and *Wilkinson*, the court refused to set aside the proceedings, though the notice of declaration was not served till half after ten at night. 1 *Term Rep.* 192, *n.*

28 Service of notice of a declaration on a *Sunday* is bad, though the defendant accept it knowing it to be irregular. *Morgan* v. *Johnson.* 1 *H. Black.* 628.

29 So is service of a *latitat*, though the defendant afterwards applied to settle debt, and do not take the objection till served with a rule to plead. *Taylor* v. *Phillips.* 3 *East*, 155.

30 It is a matter of public policy that no proceedings of the nature described in the statute should be had on a *Sunday*; their irregularity, therefore, cannot depend on the assent of the party to waive the objection to proceedings, absolutely avoided by the statute. 3 *East*, 156.

31 Where there is an agent in town all notices are given to him, and are not sent into the country. *Buller* J. *Griffiths* v. *Williams.* 1 *Term Rep.* 710. But see *Hayes* v. *Perkins.* 3 *East*, 568.

32 The plaintiff, after suing out common process, may sue out a bailable writ for the same cause, and arrest the defendant, before he discontinues the first action. *Bishop* v. *Powell.* 6 *Term Rep.* 616.

33 *Aliter* if the first writ be bailable. *Ibid.*

34 The *English* notice to appear must be added to all common process

where the defendant is not holden to bail, whether the cause of action do or do not amount to 10l. *Lumley qui tam* v. *Fitz.* 7 *Term Rep.* 337.

35 Notice subscribed to process to appear on the *quarto die post*, is good. *Sumner* v. *Brady & al.* 1 *H. Black.* 630.

36 But the court have since ordered that the *return day* should be inserted; which they said was the practice previous to the case of *Sumner* v. *Brady* and more conformable to the statutes. *Rushton* v. *Chapman.* 2 *Bos. & Pull.* 340.

37 It is not necessary to add the name of the filazer to a common *capias* in C. P. *Frost* v. *Eyles & al.* 1 *H. Black.* 120.

38 If the plaintiff prove a cause of action before the bill filed, though after the writ sued out, it is sufficient as well in the case of bailable as common writs. *Best* v. *Wilding.* 7 *Term Rep.* 4.

39 The plaintiff is entitled to recover for goods sold and delivered upon credit for a certain time; it appearing by the special memorandum that the bill was filed on a day subsequent to the expiration of the credit, though the writ appeared to have issued before. But if the defendant were actually arrested before the credit expired, *semble*, that he has his remedy in damages. *Swanscott* v. *Westgarth.* 1 *East*, 75.

40 One who was residing at an hotel in *London* from the time of his arrest till he was served with notice of executing the writ of inquiry was holden not entitled to more than eight day's notice in a town cause, though his general residence (his home) was above 40 miles from town. *Lloyd* v. *Hooper.* 7 *East*, 624.

41 Service of notice of a plea filed on *Sunday* is void, by construction of the statute 29 Car. 2, c. 7, s. 6, which avoids all process, &c. served on that day. *Roberts* v. *Monkhouse.* 8 *East*, 547.

42 When a writ is returned by an officer as duly served, the defendant is estopped from denying the service. And the court *ex officio* take notice of the return. *Slayton* v. *Inhabitants of Chester.* 4 *Mass.* 478.

43 Original writs against aggregate corporations of every description, must be served thirty days at least before the return day; by statute of 1785, c. 79, s. 8. *Ballard* v. *Nantucket Bank.* 5 *Mass.* 99.

44 Where several defendants are sued on a joint contract, and some of them are out of the jurisdiction of the commonwealth, having no usual place of abode within the state, at which a summons might be left; the plaintiff may cause his writ to be served on those within the state, and proceed only against them for the breach of contract by all. This rule extends also to actions against executors and administrators. *Tuppen* v. *Bruen.* 5 *Mass.* 193.

45 In an action against six several obligors service was made on five only, and as to the sixth the officer certified that he had no last and usual place of abode in his county; the defendants, on whom service had been made moved that the proceedings should be stayed for want of service on the sixth, whom they suggested to be an inhabitant of the commonwealth, and within the reach of process. The motion was overruled, and the action proceeded against the five who had been served with process. *Call* v. *Hagger et al.* 8 *Mass.* 423.

46 On proceedings under the act for the relief of debtors with respect to the imprisonment of their persons, where the plaintiff creditor resides out of the state, service of a notice of the petition on his attorney, is sufficient. *Bates* v. *Williams.* 1 *Johns. Cases*, 39.

47 A service of a notice must be on some person in the house or office of the attorney of the opposite party; and it must be shown that eve-

ry thing has been done to bring it home to the party. *Gelston* v. *Swartwout*. 1 *Johns. Cases*, 136.

48 Service of a copy of a bill against an attorney, on a person in his office, who appeared to be one of his family, is not a sufficient service, where the receipt of it is denied, and no reason shown why there was not a better service. *Salter* v. *Bridgen*. 1 *Johns. Cases*, 244.

49 Service of a notice of a motion, by leaving it at the lodgings of an attorney is not sufficient. It must be served personally, or be left at his office or place of business. *Jackson ex dem. Pickart* v. *Eacker*. 1 *Johns. Cases*, 331.

50 In proceedings under the act for the relief of debtors with respect to the imprisonment of their persons, creditors residing out of the state, as it respects notice, are to be considered not found. *In the matter of Williams*. 1 *Johns. Cases*, 416.

51 Notice of taxing costs must be served on the attorney, not on the counsel in the cause. *Jackson ex dem. Lewis and others* v. *Larroway*. 2 *Johns. Cases*, 114.

52 Where an attorney is employed, notice must be served on him, not on the party. *Wardell* v. *Eden*. 2 *Johns. Cases*, 126.

53 Where no attorney is employed by a defendant in error, on *certiorari*, the notice of the rule to join in error, must be served on the defendant personally. *Hardenbergh* v. *Thompson*. 1 *Johns. Rep.* 61.

54 Service of a notice of a rule for the assignment of errors, must either be personally, or good reason be shown why it is not, and that it has been left at the last and usual place of abode of the party, if he has removed from the county. *Graves* v. *Miller*. 1 *Johns. Rep.* 509.

55 A notice of a judge's order, enlarging the time of pleading, is not sufficient; a copy of the order, at least, must be served on the attorney of the plaintiff. *Cheetham* v. *Lewis*. 2 *Johns. Rep.* 104.

56 Is not the proper mode of serving a judge's order, to show the original, and leave a copy with the party? *Ibid.*

57 To bring a person into contempt, for disobeying a judge's order, it must have been served by showing the original order at the same time the copy was served. *Howland* v. *Ralph*. 3 *Johns. Rep.* 20.

58 Where the attorney of one of the parties resided out of the city of *New-York*, but within 40 miles, and had an agent in the city, service of notice in the cause on such agent, in vacation was held not to be sufficient. *Hunt* v. *Onderdonk*. 3 *Johns. Rep.* 149.

59 Service of a notice on Thursday, of an intended motion on Monday following, is sufficient. *Charles* v. *Stansbury*. 3 *Johns. Rep.* 261.

60 In every case of the service of notice, except it be to bring a party into contempt, the leaving the notice at the dwelling-house of the party, is sufficient, and equivalent to a personal service. *Johnston* v. *Robbins*. 3 *Johns. Rep.* 440.

61 *It seems*, that where a sheriff is plaintiff, he may serve his own writ. *Bennett* v. *Fuller*. 4 *Johns. Rep.* 486.

62 Where the plaintiff resides in a foreign country, and the defendant produced affidavits to show that the judgment was satisfied, a rule to show cause why a satisfaction should not be entered on the record was granted, which was directed to be served by delivering a copy thereof to the attorney of the plaintiff on record, and putting up another at the clerk's office. *Lee* v. *Brown and others*. 6 *Johns. Rep.* 132.

63 Appearance in a suit waives all irregularity as to notice. *Bowley* v. *Stoddard*. 7 *Johns. Rep.* 209.

64 Where on application of a defendant in ejectment, a demise is ordered to be struck out of the plaintiff's declaration, he must serve a certified copy of the rule for the amendment, on the plaintiff, which shall

be deemed an actual amendment, as to all subsequent proceedings on the part of the plaintiff; and the defendant, without a new copy of the declaration being served upon him, must enter into the consent rule, and plead in 20 days after service of the certified copy of the rule for the amendment, unless otherwise ordered by the court; and the rule shall be sufficient to authorise an actual amendment of the declaration on file, or to file a new one in its stead, whenever it may become necessary. *Jackson ex demise Kelly and Oakley* v. *Bellknap* 7 *Johns. Rep.* 300.

65 A person under recognizance to appear at a court of general sessions of the peace, while attending that court, was arrested on a capias out of this court, and held to bail; and this court ordered him to be discharged, on filing common bail, unless the plaintiff elected to waive the arrest, and take out a new process. *Bours* v. *Tuckerman.* 7 *Johns. Rep.* 538.

66 Where a writ of error is brought on a judgment in a court of common pleas, and no attorney is employed by the defendant in error, in this court, the service of the assignment of errors, and notice to join in error, must be served on him personally, either by delivering the same to him, or leaving them at his dwelling-house, or in such other mode as the court might specially direct, under the circumstances of the case. *Clement* v. *Crossman.* 8 *Johns. Rep.* 287.

67 In a suit against an attorney of this court, the *bill* is in the nature of a process, and must be served on him *personally*, or by some other service, which the court, under circumstances, may consider equivalent. Service on the agent of the attorney is not sufficient. *Backus* v. *Rogers.* 8 *Johns. Rep.* 346.

68 Service of a notice in vacation of a motion to be made in term, on the *agent* of the attorney in *Utica* is sufficient. *Chapman* v. *Raymond.* 8 *Johns. Rep.* 360.

69 Service of a notice on an attorney or his clerk in his office at 10 o'clock in the evening, is good. *Cooper* v. *Carr.* 8 *Johns. Rep.* 360.

70 Where no attorney is employed by the defendant in error, the assignment of errors need not be served on the party; but only a notice to join in error. *Verney* v. *Benedict.* 8 *Johns. Rep.* 360.

71 To entitle the plaintiff to judgment by default, the service of a summons *on the person* of the defendant, as well as if left at his house, must be ten days before the return. 1 *Dallas*, 154.

72 How a subpœna may be served on a witness out of the county, where the court sits. 2 *Dallas*, 101.

73 What is reasonable time for serving a subpœna, and to move for an attachment. 2 *Dallas*, 333, 4.

74 The marshal must serve attachments on witnesses for not obeying a subpœna wherever they reside, in the district. 2 *Dallas*, 335.

75 Rule for serving process issuing against a state. 3 *Dallas*, 335, 339 to 342.

76 Process of subpœna in suits in equity to be served 60 days before the return day; and if defendant does not appear, the plaintiff may proceed *ex parte*. 3 *Dallas*, 333, 342.

77 To support a judgment on a collector's bond at the return term, it must appear by the record, that the writ was executed 14 days before the return day. *Dobynes* v. *United States.* 3 *Cranch*, 241.

XXIV. *Trial, proceeding to, and as to notice of, &c.*

1 If on an old issue, notice of trial be given before the first day in full term, it is sufficient, and it need not be given before the essoign day. *Harvey* v. *Porter.* 1 *Str.* 211.

2 Ruled that if the plaintiff should

not enter his issue, or if it is entered, and he will not carry down the cause to trial, the defendant may by rule compel him to enter it; and if it is entered, the defendant may carry it down by proviso. *Anon.* 3 *Salk.* 362.

3 Trial not put off on the general affidavit of the absence of material witnesses, where the case is suspicious and the witnesses are foreigners never likely to return to *England*. *The King* v. *D'Eon.* 1 *Black.* 510. 3 *Burr.* 1513.

4 Trial put off till a commission should go to examine a material witness, who was out of *England*, and refused to attend the trial. *The King* v. *Belinda Williams*, cited *in The King* v. *D'Eon.* 1 *Black.* 512.

5 Trial on collateral issues, though in capital cases, shall not be put off, unless the defendant makes oath of the truth of his plea. *The King* v. *Charles Radcliffe.* *See also* 1 *Black.* 4, 512.

6 Affidavit to put off trial for absence of material witness; that *A.* is a material witness in the cause, and is major of a regiment, which regiment is beyond sea, at such a place; held bad; though perhaps it might have done if there had appeared to have been merits. *Zoffani* v. *Jennings.* *Lofft*, 187.

7 Trial at bar will not be granted where the party applying refuses to consent to the usual terms of mutual justice and convenience. Granted; and will be granted out of an issuable term upon proper occasion. *Anon.* *Lofft*, 159.

8 Verdict set aside for want of notice of trial within a year after issue joined. *Hatchell* v. *Griffiths.* 2 *Salk.* 645.

9 Trial refused to be put off till suit in the spiritual court determined. *Salisbury* v. *Proctor.* 2 *Salk.* 646.

10 Two days' notice to be given after *ne recipiatur* at sittings. *Highmore* v. *Walker.* 2 *Salk.* 653.

11 Trial put off upon account of a libel published with intention to influence the jury. *Rex* v. *Martha Gray.* 1 *Burr.* 499—510.

12 If a cause had laid at issue four terms, and no proceedings, there must have been a full term's notice of trial, excluding the term wherein issue was joined. *Ashwin* v. *Corbill.* 2 *Salk.* 650.

13 If the principal cause be within the jurisdiction, and an issue depending on foreign laws arises, it may be tried in the next county, and foreign laws given in evidence. *Way* v. *Yally.* 2 *Salk.* 651.

14 In *assumpsit* for money won at play, the trial shall not be stayed till an indictment pending for the cheat be tried. *Anonymous.* 2 *Salk.* 649.

15 Subsequent declaration of the jury shall not vitiate a verdict given according to the merits of the case. *Clark* v. *Stephenson.* 2 *Black.* 803.

16 Notice of trial is necessary, though the trial is put off by rule of court to a day certain. *Ellis* v. *Trusler.* 2 *Black.* 798.

17 A continuance of a void notice of trial, given within the regular time, may operate as a new notice. *Tyte* v. *Steventon.* 2 *Black.* 1298.

18 There must be a rule before any trial by proviso. *Dobson* v. *Taylor.* 2 *Str.* 1055.

19 If a prosecutor removes an indictment from the sessions into K. B. the defendant cannot carry it down to trial at the assizes next after the removal; and a trial thereupon will be void, though the attorney general shall grant a *nisi prius*.

'Tis not a sufficient reason for a trial at bar, that the prosecution on an indictment for an assault in the queen's palace, whilst the queen was sitting in council there, unless it is carried on by the direction of the crown. *The Queen* v. *Banks.* 2 *L. Raym.* 1082. 2 *Salk.* 652.

20 The traverser of an inquisition for the king is to be considered as a defendant upon such a traverse; therefore in the case of lunacy, the pros-

ecutor of the commission has a right to make up the record and carry it down to trial. *The King* v. *Roberts.* 2 *Str.* 1208.

21 Affidavit to put off trial for want of a material witness must be full to the cause, and shew that you have such a witness who is material to the cause, and there are reasonable hopes of producing him if the trial be put off. *Anon. Lofft*, 653.

22 And you should be ready to admit necessary facts that only are of form to be proved by witnesses. *Anon. Lofft*, 769.

23 When a cause has been supended a year after it was at issue, the defendant is entitled to a term's notice of trial; but not when he himself has suspended the cause by an injunction. *Hayley* v. *Riley.* 1 *Doug.* 71, 72, *and n.*

24 An issue, joined upon a fact locally confined to another county than that in which the venue is laid in the declaration, ought to be tried in the county to which the fact is so confined; but a trial in the county in which the venue is laid in the declaration, cannot be objected to after verdict. *Sir Richard Leving* v. *Lady Calverly.* 1 *L. Raym.* 330.

25 Evidence of partiality must be extremely strong to change the place of trial in a criminal information. *The King* v. *Harris.* 1 *Black.* 378.

26 The cause was tried upon a day to which it was continued by a second countermand; and the defendant making no defence, the verdict was set aside, it laying only in the plaintiff's power to continue his notice once in a term. *Green* v. *Gifford.* 2 *Str.* 1119.

27 *Take notice of trial at the next assizes*, good on the back of the issue; not otherwise. *Henbury* v. *Rose.* 2 *Str.* 1237.

28 On notice of trial, the distance from *London* is taken by the computed miles. *Osgood* v. *Lyon.* 2 *Str.* 1216.

29 Motion to supersede or quash any writ whatever, cannot be made without giving notice of it. *Anon.* 1 *Wils.* 30.

30 Where a witness will be absent 18 months, a special case is requisite to put off a trial, for want of his evidence. *Lord* v. *Cooke.* 1 *Black.* 436.

31 It was settled, on consideration, that when a term's notice of trial is required upon an old issue, the notice must be given before the essoign day, and that is a full term. *Bogg* v. *Rose.* 2 *Str.* 1164.

32 Notice of trial six months after issue joined, prevents necessity of giving a term's notice till a year after that. *Green* v. *Gauntlett.* 1 *Str.* 531.

33 A countermand in town must be four days before the assizes. *Mendapace* v. *Humphreys.* 2 *Str.* 1073.

34 If a defendant who is sued by a landlord in the name of his tenant procure a release from the nominal plaintiff, the court will order the release to be delivered up, and permit the landlord to proceed in the action. *Payne* v. *Rogers.* 1 *Doug.* 407.

35 The grounds for granting a trial at bar are, great value, probable length, and probable difficulties in the trial; and the court may lay the party applying for a trial at bar under the terms of paying bar costs, and receiving only *nisi prius* costs. *Holmes* v. *Brown.* 2 *Doug.* 437.

36 Court refused a motion to make a person defendant where it appeared a trick to put off the trial. *Fenwick's Case.* 1 *Salk.* 257.

37 Miles distance from *London* is to be computed, as to notice of trial, by the usual mode of computation, and not by admeasurement. *Bates* v. *Pettipher.* 2 *Str.* 954.

38 Where the defendant resides forty miles from *London*, there must be fourteen days' notice of trial, though he was arrested, and the venue laid in town. *Brind* v. *Torris.* 2 *Black.* 1205.

39 If a party refuse to consent to the

examination of a witness to an essential fact by commission, when his presence cannot be compelled, or to admit the fact, the court will assist the other party by putting off the trial. *Furly* v. *Newnham*. 2 *Doug*. 419, 420.

40 Time of trial will be enlarged where a witness cannot be come at, and the other party, though the witness was abroad before the action commenced, and not returned since, refuses to admit the effect of his evidence. *Anon*. *Lofft*, 282.

41 The plaintiff is not bound by the practice of the court of K. B. to give notice of trial till the term after that in which issue is joined. *Hall* v. *Buchanan*. 2 *Term Rep*. 734.

42 It was said, by the court of C. P. that where issue is joined early in a term, (e. g. within the first six days) notice of trial must be given in the same term. *Frampton* v. *Payne*. 4 *H. Black*. 65.

43 Where issue is joined in the vacation, the court of C. P. allows the plaintiff the whole of the next term to proceed to trial in. *Barker* v. *Newman*. 1 *H. Black*. 123.

44 To support, in the next term after that in which issue is joined, a rule for judgment as in case of a nonsuit, for not proceeding to trial, the affidavit must state, that issue was joined early enough in the preceding term for the plaintiff to have proceeded to trial in that term. But in the third term a general affidavit, stating that issue was joined in the former term, is sufficient. *Woulfe* v. *Sholls*. 1 *H. Black*. 282.

45 And in a subsequent case under such general affidavit, the court held that judgment, as in case of a nonsuit for not proceeding to trial, could, in no case, be moved for till the *third* term after that in which issue is joined. *Da Costa* v. *Ledstone*. 2 *H. Black*. 558.

46 If issue in a *London* cause be joined early enough in a term to enable the plaintiff to give notice of trial for the sittings after that term, the defendant is not entitled to judgment as in case of a nonsuit for not proceeding to trial, unless the plaintiff has in fact given notice of trial. *Munt* v. *Tremamondo*. 4 *Term Rep*. 557.

47 If one of several defendants reside within forty miles of *London*, it is not necessary to give the ten days' notice of trial required by statute 14 G. 2, c. 17, s. 3. *Per Ashhurst* J. *Perry* v. *Jackson*. 4 *Term Rep*. 520.

48 Where a defendant residing in town at the issuing of the writ changes his residence permanently to the country, at the distance of above 40 miles from town, before the delivery of the issue, he is entitled to 14 days' notice of trial. *Spencer* v. *Hall*. 1 *East*, 600.

49 The venue was in *London*, and verdict for plaintiff without defence, which was set aside because only eight days' notice of trial was given, the defendant residing in *India*. *Douglas* v. *Ray*. 4 *Term Rep*. 562.

50 Where a plaintiff has carried a record down for trial once, the court of K. B. refused to give judgment, as in case of a nonsuit, for not carrying it down a second time, even though it were made a *remanet* the first time. The defendant should have carried the record down by proviso. *Newburn* v. *Langley*. 3 *Term Rep*. 1.

51 So, where a plaintiff had once proceeded to trial, the court of C. P. refused a rule for judgment, as in case of a nonsuit, for not proceeding to a new trial. *Porzelius* v. *Maddocks*. 1 *H. Black*. 101.

52 If a cause be made a *remanet*, no new notice of trial need be given: *aliter* where the trial of the cause is put off to the next sittings or assizes by rule of court (B. R.) *Jacks* v. *Mayer*. 3 *Term Rep*. 245.

53 And even when a plaintiff gives a peremptory undertaking to try at the next sittings or assizes, there also a new notice of trial must be given. *Dict. p. Cur. K. B.* 3 *Term*

Rep. 246, *n.* *Monk* v. *Wade, cited.* *Ibid.*

54 Although the plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet the defendant is not bound to attend and be prepared with witnesses, counsel, &c. without having had notice of trial. *Ifield* v. *Weeks & al.* 1 *H. Black.* 222.

55 Nor will the prothonotary allow him the costs of such attendance and preparation, though he obtain judgment as in case of a non-suit, on account of the plaintiff's not proceeding to trial. 1 *H. Black.* 222.

56 The court will permit a defendant to carry a record of an issue, directed by chancery, down to trial, on a suggestion that the plaintiff intends to delay. *Humpage* v. *Rowley.* 4 *Term Rep.* 767.

57 Where the defendant carries down the record by proviso, it is sufficient if he obtain the usual rule for trial by proviso any time before trial, even though it be obtained after he has given the plaintiff notice of trial. *King* v. *Pippet.* 1 *Term Rep.* 695.

58 A defendant in a case where the king is a party cannot carry down the *nisi prius* record to trial by proviso. *Rex* v. *Dyde.* 7 *Term Rep.* 661. *Rex* v. *M'Leod.* 2 *East*, 202. And see a *qu.* as to prosecutions by private persons; and a general note on the trial by proviso. 2 *East*, 206, *n.*

59 Where short notice of trial is to be accepted in country causes, such notice shall be given at least four days before the commission-day, one day exclusive, and the other inclusive. *Reg. Gen.* 3 *Term Rep.* 660.

60 It is not necessary to give a term's notice of trial after proceedings in the cause have been suspended for a year, if within the year the plaintiff gave notice that he should proceed again; but the common notice of trial is sufficient. *Richards* v. *Harris.* 3 *East*, 1.

61 The granting of a trial at bar is in the discretion of the court, and must depend upon the particular circumstances of the case. *Rex* v. *Amery.* 1 *Term Rep.* 363.

62 The court of C. P. will not permit the mise joined in a writ of right, to be tried by a jury instead of the grand assize, though both parties desire it. *Galton* v. *Harvey.* 1 *Bos. & Pull.* 192.

63 Where a fair trial cannot be had in the county where the matter arises, the trial will be awarded in the next English county where the king's writ of *venire* runs. 1 *Term Rep.* 363.

64 Therefore where the action arose in the city of *Chester*, and a fair trial could not be had there, the *venire* was awarded into the county of *Salop.* 1 *Term Rep.* 363.

65 But in a subsequent case, the court declared that this opinion was founded on a mistake; and, upon a suggestion entered by leave of the court upon the roll that a fair and impartial trial could not be had in the county of the city of *Chester*, the court awarded the trial to be had *in the adjoining county-palatine.* *Rex* v. *St. Mary on the Hill, Chester.* 7 *Term Rep.* 735.

(And see the notes there.)

66 *Chester* is one of the places excepted out of stat. 38 G. 3, c. 52, for regulating trials in towns corporate, &c. 7 *Term Rep.* 735, *n.*

67 The court of C. P. will not put off a trial at the instance of the defendant, on account of the absence of a material witness, if he has conducted himself unfairly, or been the cause of any improper delay. *Saunders* v. *Pittman.* 1 *Bos. & Pull.* 33.

68 The court of C. P. will not, by putting off a trial, or other indirect means, compel a party to consent to a commission for the examination of witnesses in *Scotland.* Where contradictory verdicts have been found on a policy of insurance, and a third action brought against another underwriter, the court will not put off the trial to enable him to ob-

tain a commission from a court of equity for the examination of witnesses in *Scotland*, to the same facts which were given in evidence on the last trial; at least if he has obtained time to plead on the usual terms. *Colland* v. *Vaughan*. 1 *Bos. & Pull.* 210.

69 That court refused to put off a trial on account of the absence of a material witness, by whose evidence the defence of slavery was to be established. *Robinson* v. *Smyth*. 1 *Bos. & Pull.* 454.

70 The affidavit of an attorney's clerk to put off a trial must state that he is particularly acquainted with the circumstances of the cause, and has the management of it. *Sullivan* v. *Magill*. 1 *H. Black.* 637.

71 If a defendant die on the night before the trial of a cause at the sittings in term, a verdict obtained in such cause, and the judgment entered up thereon, will be set aside upon application to the court. *Tyler* v. *Harris*. 3 *Bos. & Pull.* 549.

72 No cause shall be tried by a special jury in *Middlesex* or *London*, unless the rule for such special jury be served, and the cause marked in the marshal's book as a special jury on or before the day preceding the adjournment day in *Midlesex* and *London* respectively. *Regula Generalis*. 10 *East*, 1.

73 Where the plaintiff was under a stipulation to try a cause at the next circuit in *New-York*, or be nonsuited, the prevalence of an epidemic fever in *New-York*, was held a sufficient excuse for not proceeding to trial, and to prevent a nonsuit. *Torrey* v. *Morehouse*. 1 *Johns. Cases*, 242.

74 If the defendant neglects to give notice of a motion for a commission to examine witnesses, until after the cause is noticed for trial, he must pay the costs of the notice. *Burr* v. *Skinner*. 1 *Johns. Cases*, 591.

75 Where an attorney appears for the defendant, the service of a copy of the declaration, by putting it up in the office with a notice to plead in 20 days, is sufficient. *Graves* v. *Hassenfrat*. 1 *Johns. Cases*, 591.

76 To change the *venue* in a cause, it is not enough that material witnesses reside in another county, but the party must show that there is some material fact happening in the county to which he wishes the *venue* to be changed. *Gourley* v. *Shoemaker*. 1 *Johns. Cases*. 392.

77 Costs were granted against the plaintiff for not proceeding to trial pursuant to notice, though the defendant's objecting to the jury process was the reason, that the cause was not tried. *Dill* v. *Wood*. 1 *Johns. Cas.* 394.

78 A trial by *record* is to be brought on by motion, pursuant to a notice of four days, as in case of special motions. *Knapp* v. *Mead*. 2 *Johns. Cases*, 111.

79 Where the demandant in a real action enters into a stipulation to try the cause, or be nonsuited, he must pay the costs of the last circuit or settings, in the same manner as plaintiffs in other causes, for not proceeding to trial. *Philips* v. *Peck*. 2 *Johns. Cases*, 101.

80 Where the plaintiff stipulates to try the cause at the next circuit, but does not, and the defendant neglects to move for judgment, as in case of nonsuit, at the next term after such default, it is a waiver of the default; and the plaintiff will be entitled to stipulate anew, if the motion is made at a subsequent term. *Haskins* v. *Sebor*. 2 *Johns. Cases*, 217.

81 Where a material witness for the plaintiff unexpectedly went abroad, so that he could not be *subpœnaed* at the trial, it was held a sufficient excuse for the plaintiff for not proceeding to trial pursuant to the stipulation. *Nixon* v. *Hallet and Bowne*. 2 *Johns. Cases*, 218.

82 The insolvency of the defendant is a sufficient excuse for not proceeding to trial, pursuant to a notice,

and the plaintiff may discontinue without costs. *Hart* v. *Storey*. 1 *Johns. Rep.* 143.

83 Either party may give notice of bringing on the argument of a case; and if the cases are not ready to be delivered by the party whose right it is to make them up, when the cause is moved by the opposite party, he may have judgment by default. *Malcolm* v. *Bayard*. 1 *Johns. Rep.* 316.

84 If the plaintiff consent to go to trial on a bad plea, he cannot afterwards set aside the verdict, because the judge admitted evidence under it, not authorized by the plea. *Meyer* v. *M'Lean*. 1 *Johns. Rep.* 509.

85 If the plaintiff does not proceed to trial, on account of the absence of a material witness, who had been duly *subpœnaed*, he is not obliged to stipulate, to prevent a nonsuit. *Marseles* v. *Clopper*. 2 *Johns. Rep.* 480.

86 Where the defendant, in an action for a *libel*, pleaded not guilty, and gave notice of certain facts, to be given in evidence at the trial, and afterwards moved for leave to strike out the notice, the court refused to grant the motion, unless he would make affidavit of the falsehood of the matters stated in the notice. *Clinton* v. *Mitchell*. 3 *Johns. Rep.* 144.

87 Where the copy of the declaration and notice of rule to plead are served upon the defendant personally, and he afterwards employs an attorney, who gives notice of his retainer, the declaration and rule to plead need not be served *de novo*, on the attorney; but he must put in his plea in 20 days after service of the first notice. *Kleecke* v. *Styles*. 3 *Johns. Rep.* 250.

88 A rule for a commission to examine witnesses abroad, is not granted until after issue is joined in the cause. *Jackson ex dem. Aikins* v. *Bancraft*. 3 *Johns. Rep.* 259.

89 The party demurring must make up the paper books, and bring on the cause to argument. *Littlefield* v. *Story*. 3 *Johns. Rep.* 425.

90 The rule adopted, in regard to causes to be brought to trial at the sitting, in the city of *New-York*, that if it is made to appear that the cause could not have been tried, had it been noticed, shall excuse the plaintiff from stipulating to bring it to trial at the next court or be nonsuited, does not apply to causes to be tried at the country circuits. *Ross* v. *Vaughan*. 3 *Johns. Rep.* 442.

91 In an action against a *sheriff*, where, on a motion for a nonsuit, the plaintiff stipulates to try the cause at the next circuit, or be nonsuited, he is not bound to pay *double* costs. *Talcot* v. *Woodruff*. 3 *Johns. Rep.* 448.

92 Where a representative in congress is libelled, in respect to his official conduct, a special jury may be awarded. *Thomas* v. *Rumsey*. 4 *Johns. Rep.* 482.

93 A special jury will not be allowed, in an action for a libel on a person who is a public officer, unless the libel relates to his official conduct. *Thomas* v. *Croswell*. 4 *Johns. Rep.* 491.

94 Special pleas must be signed by counsel. *Dubois* v. *Philips*. 5 *Johns. Rep.* 235.

95 Where a plea was sent to the plaintiff's attorney, but miscarried, and a judgment by default was entered for want of a plea, the court, on an affidavit of merits, allowed the defendant to come in and plead, and go to trial; but ordered the judgment to stand as security, as the party had lost a trial. *Fenton* v. *Garlick*. 6 *Johns. Rep.* 287.

96 Where the defendant, after an appearance, entered a rule in vacation, to declare before the end of the next term, which was served on the agent of the plaintiff's attorney; it was held, that the service of the notice of the rule might be at any time before the term, and if the plaintiff did not declare before the

end of the term, his default might be entered, though *forty days* had not elapsed from the time of the serving the notice on the agent. *Denizen and Wife* v. *Bates*. 7 *Johns. Rep.* 537.

97 Where any difficulty arises is making up a *feigned issue*, ordered by the court, it must be settled before a judge, at his chambers. *Richards* v. *Brown*. 7 *Johns. Rep.* 320.

98 The court will take notice of a *parol* agreement between attornies, even as to bringing on a cause to trial at the circuit. *Parker* v. *Root*. 7 *Johns. Rep.* 320.

99 The defendant, by mistake of his attorney, had notice of trial for the 17th instead of the 13th, and not appearing on the 13th. judgment was entered by *non sum informatus;* but afterwards, on proof of the mistake, the judgment was opened. 1 *Dallas*, 241.

100 A third person fully acquainted with the circumstances, is admissible to make the affidavit of a defence, when the party himself, from extreme sickness is incapable of making it. 1 *Dallas*, 248.

101 The plaintiff, after stating the want of a material witness who had been subpœnaed, put off the trial; but the court, notwithstanding, granted the defendant a rule for trial next term or *non pros.* 1 *Dallas*, 251.

102 Rule for trial, or *non pros;* but afterwards a plea added, and particular facts referred: It was ruled, that, by this, the rule for trial or *non pros* was virtually vacated. 1 *Dallas*, 405.

103 Rule for trial or *non pros* in *September* term, and notice at bar; and the cause continued generally till *January* term: It was determined that the rule for trial, or *non pros* was continued; and that a new trial was necessary. 1 *Dallas*, 410.

104 The affidavit of one who was landlord to the defendant in ejectment, admitted on motion to put off the trial of the cause. 1 *Dallas*, 81.

105 On affidavit of the absence of a material witness, the court put off the trial, refusing to enquire what his testimony would be. 1 *Dallas*, 135.

The affidavit of a person eventually interested in the suit, proving the want of a material witness, is sufficient to put off the trial. *Ibid.*

106 The court will not in one action enquire, upon motion, into the merits of another. 1 *Dallas*, 127.

107 In what cases the court will continue a cause, if witnesses or even parties do not attend, and grant a rule for taking depositions *de bene esse*. 2 *Dallas*, 45, 94, 108, 9.

108 And that notwithstanding the act of congress. 2 *Dallas*, 383.

109 How notice of trial must be given in the country. 2 *Dallas*, 95, 6.

110 When a rule for trial or *non pros* will be granted, refused or enforced. 2 *Dallas*, 105, 6, 143.

111 A rule for trial by proviso cannot be granted against the commonwealth; but under a peremptory rule to try at the next term, the court will order the jury to be qualified. 2 *Dallas*, 109, 110.

112 A rule to file the plaintiff's warrant of attorney, must be moved for before plea is pleaded. 2 *Dallas*, 142.

113 Wherever a landlord means to make defence in ejectment, he ought to make himself a party on the record. 2 *Dallas*, 150, 1.

114 Notice of trial given to the defendant in ejectment is sufficient; it need not be given to the landlord. *Ibid.*

115 If an issue is joined, and the defendant submits to a rule for trial or *non pros*, before the declaration is filed, he cannot elude the opperation of the rule at a subsequent term. 2 *Dallas*, 156.

116 Proof of defendant's being dangerously ill, is not cause for putting off a trial. 2 *Dallas*, 182.

117 A subpœna need not be taken out, to ground a motion for putting off a trial, where the witness was an

attorney and had promised to attend. *2 Dallas*, 183.

118 The trial of a misdemeanor put off on affidavit of the absence of a material witness; but declared not to be a precedent. *1 Dallas*, 9.

The court would not force the crown to a trial, or discharge the defendant from bail, without some appearance of oppression. *Ibid.*

119 The statute 28 Edw. 3, c. 13, granting trials *per medietatem linguæ* to foreigners, is in force in *Pennsylvania*. *1 Dallas*, 73.

120 Under what circumstances the court will grant, or refuse, a motion to continue a cause. *3 Dallas*, 303, 500.

121 A statement of the case must be furnished to the court by the counsel on each side of a cause. *Rules of Court xvii. 1 Cranch.*

122 The court will require a statement of the points of a case before argument. *Faw* v. *Marsteller*. *2 Cranch*, 10. *Reily* v. *Lamar et al. 2 Cranch*, 349.

123 If statements of the case are not furnished according to the rule of the court on that subject, the cause will be dismissed or continued. *Peyton* v. *Brooke*. *3 Cranch*, 93.

124 If the plaintiff in error does not appear, the defendant may either have the plaintiff called and dismiss the writ of error *with costs*, or he may open the record and go for an affirmance. *Montalet* v. *Murray*. *3 Cranch*, 249.

XXV. *Judgments, when set aside, &c.*

1 Upon payment of costs, the court will set aside a judgment, though it be regularly entered, if the plaintiff had not lost a trial; and so is the common course in C. B. *Sisted* v. *Lee*. *1 Salk.* 402.

2 Judgment set aside though strictly regular, in order to try the merits. *Wood* v. *Cleveland*. *2 Salk.* 518.

3 A regular judgment not to be called a snapping judgment, where there is no fraud. *Anon. Lofft*, 145.

4 In all real actions, one cannot enter judgment upon a peremptory rule without motion; and so in mixed actions; otherwise in personal; but this extends not to pleas in abatement, because final judgment is not given on them. *Cooke* v. *Cooke*. *1 Salk.* 399.

5 Judgment may be after plaintiff's death, provided it be within two terms after verdict. *Duke of Norfolk's Case*. *1 Salk.* 401.

6 Court will set aside a regular judgment on putting the plaintiff in as good a condition. *Fox* v. *Glass*. *2 Str.* 823.

7 If a single judge receives, and files *exceptions* to his opinion, and thereupon the action is continued to the next term; and the same judge then deeming the exceptions frivolous, enters judgment and awards execution, the court will not set aside the judgment upon motion, but will put the party to his writ of error. *Brown* v. *Bull*. *3 Mass.* 211.

8 Informality in the service of a writ is no cause for arresting judgment, if the defendant has answered. *Gilbert et al.* v. *Nantucket Bank*. *5 Mass.* 79.

9 If upon a petition for a review the court perceive, upon inspection of the papers, that the judgment complained of would be reversed upon error, they will not grant a review. *Hart* v. *Huckins*. *5 Mass.* 260.

10 Judgment will not be arrested after verdict for the plaintiff, if a sufficient title to the action be set forth, although it be defectively declared. *Moor* v. *Boswell*. *5 Mass.* 306.

11 Of the cases proper to arrest judgment, and for a new trial. *Root* v. *Henry*. *6 Mass.* 504.

12 After a judgment has been arrested, if the plaintiff wishes to bring a writ of error on the decision of the court, on the motion in arrest, the court will order judgment to be entered for the defendant, for the insufficiency of the declaration, and if the defendant's attorney does not make up the record of such judg-

ment, in 20 days, the plaintiff's attorney may make it up without costs. *Bayard* v. *Malcolm & Malcolm.* 2 *Johns. Rep.* 101.

13 Where there are several counts in a declaration, and after interlocutory judgment, damages were assessed upon each, and judgment arrested on the first count, no objection being made to the others, the plaintiff was allowed to enter a *nolle prosequi* on the first count, and take judgment on the others. *Livingston* v. *Livingston.* 3 *Johns. Rep.* 189.

14 Where there was a special count and several money counts in a declaration, and after interlocutory judgment for want of a plea, damages were separately assessed on each count, and judgment was, afterwards, arrested on the first count, the inquisition, &c. on the other counts was set aside, and the defendant allowed to plead on terms. *Livingston* v. *Executors of Livingston.* 3 *Johns. Rep.* 254.

15 On the return of a writ of error from a court of common pleas to this court, the record itself is removed, and this court, on a reversal of the judgment below, may award a *venire de novo*, returnable at a circuit or sittings. But where it appeared that the sum demanded was so small, that the plaintiff, if he recovered, would be obliged to pay costs, the court refused to grant a *venire de novo*. *Brown* v. *Clark.* 3 *Johns. Rep.* 413.

16 A regular judgment by default, for want of a plea, will be set aside, on payment of costs, if the defendant swears to a defence on the merits, and an opportunity for a trial, has not been lost. *Davenport* v. *Ferris.* 6 *Johns. Rep.* 181.

17 Where it appeared that the bond on which a judgment was entered by confession, was given for a *gaming* debt, and the counter affidavits were equivalent or evasive, the court refused to award an issue to try the fact; but set aside the judgment and declared the warrant of attorney void, so as to leave the party to his remedy, by action on the bond. *Everett* v. *Knapp.* 6 *Johns. Rep.* 331.

18 Where judgment is given for the plaintiff in the court below, and that judgment is reversed in the court above, on error, the plaintiff in error recovers no costs. *Pease and another* v. *Morgan.* 7 *Johns. Rep.* 468.

19 When the reversal is in favour of the defendant upon a bill of exceptions, a new trial must be awarded by the court below. *Hudson* v. *Guestier.* 6 *Cranch*, 281.

XXVI. *Summary interference, otherwise than for irregularity.*

1 If by abuse of the process of one of the courts at *Westminster*, a sheriff's officer extort a promisory note from a suitor, and declare upon it in another of the courts of *Westminster*, the latter court cannot interfere summarily to punish the officer under the 32 G. 2, c. 28, s. 11. *Ex parte Evan Evans.* 2 *Bos. & Pull.* 88.

2 If a party proceed by action and indictment for the same assault, the court (of C. P.) will not compel him to make his election. *Jones* v. *Clay* 1 *Bos. & Pull.* 191.

3 Nor will they stay proceedings in an action on the ground of a bill depending in chancery for the same cause. *Murphy* v. *Cadell.* 2 *Bos. & Pull.* 137.

4 If *A.* sue *C.*, the printer, and *B.* sue *D.* the proprietor of a newspaper for two libels, and respectively recover judgments; and then *A.* commence an action against *D.*, and *B.* against *C.* for the same libels, the court will not set aside the proceedings in the latter actions. *Martin* v. *Kennedy and Bunning* v. *Perry.* 2 *Bos. & Pull.* 69.

5 After judgment on the defendant for a libel, the court refused to make an order on the prosecutor, to deposit the original libellous papers, with the officer of the court. *Rex* v. *Cator.* 2 *East*, 361.

6 The court refused to proceed summarily against a steward, who was an attorney, to compel him to account before the master for receipts and payments in respect of a mortgaged estate, and to pay the balance to his employer, and to deliver up, upon oath, all deeds, writings, &c. relative to the estate; this being the proper subject of a bill in equity, and not a case for a mandamus to compel a steward of a manor to deliver up court rolls, &c., in lieu of which this summary mode of proceeding has been adopted where the steward of the court is an attorney. *Cocks* v. *Harman.* 6 *East*, 404.

7 The court would not stay judgment and execution, on a summary application, because the plaintiffs after verdict became alien enemies. *Vanbrynen* v. *Wilson.* 9 *East*, 321.

8 Where a writ was served on *Sunday*, and the sheriff returned *cepi corpus*, on which the plaintiff proceeded, and obtained a judgment by default against the defendant and issued execution, the court set aside all the proceedings, on condition that no action should be brought against the sheriff for a false imprisonment. *Rob and Neilson* v. *Maffatt.* 3 *Johns. Rep.* 257.

XXVII. *Notice, other than under the aforesaid Divisions.*

1 If the plaintiff's attorney receives notice of a retainer from two attornies of the defendant, he ought to inform the second attorney of the first notice from the first attorney, in order to prevent a surprise. *M'Nealy* v. *Morison.* 1 *Johns. Cases*, 28.

2 Where the attorney of a party dies, actual notice or warning must be given to him to appoint another attorney. A notice put up in the clerk's office, or a notice of the proceedings in the cause, is not sufficient. *Hildreth* v. *Harvey.* 3 *Johns. Cases*, 300.

3 In notices of rules to plead, &c. one day is inclusive and the other exclusive, so as to give to the party the full number of days. *Hoffman* v. *Duel.* 5 *Johns. Rep.* 232.

4 A party is not bound to produce a paper, unless the opposite party has given him notice to that purpose. *Waring* v. *Warren.* 1 *Johns. Rep.* 340.

5 In a suit brought by *A.* against *B.* on implied warranty as to the title of a horse sold to him by *B.* it appeared that *A.* gave notice to *B.* of a suit brought against him by the real owner of the horse, and *B.* attended at one court, but *A.* did not give another notice of the time of trial; the first notice was held sufficient to entitle *A.* to give in evidence the record of recovery against him by the owner of the horse. *Blasdale* v. *Babcock.* 1 *Johns. Rep.* 517.

6 Where the defendant gave notice to the plaintiff to produce a certain lease in his possession, *at the trial* of the cause, and the cause was not tried at the next circuit; it was held that the notice was not confined to the circuit next after the notice; but extended to the time of *trial* whenever it should take place; and it not being produced at a subsequent circuit, the defendant was allowed to give *parol* evidence of its contents. *Jackson ex dem. Burr and another* v. *Sherman.* 6 *Johns. Rep.* 19.

7 On whom notice to produce deeds and papers, shall be served; but if they are on record the court will not indulge the party with a rule to produce them, merely as a cheap mode of procuring evidence. 2 *Dallas*, 332.

XXVIII. *Affidavits, &c.*

1 The court will grant a rule to shew cause why a writ of review should not be quashed, upon the affidavit of the defendant stating, that he had no notice of the application for the writ. 1 *Mass.* 120.

2 The court will require an affidavit of the facts stated in petition for a review, before making a rule to shew cause. *Willard* v. *Ward.* 3 *Mass.* 24.

3 The affidavit of a petitioner for a review is not received except as to facts exclusively known to himself, or to obtain an order of notice. *Rogers* v. *Hill.* 4 *Mass.* 349.

4 A copy of the affidavit on which a special motion is to be made, must always be regularly served on the opposite party. *Fitzroy* v. *Card.* 1 *Johns. Cases,* 30.

5 Where the plaintiff's attorney resided in the city of *New-York*, and had six days notice of a motion to be made at the court, at *Albany*, and made affidavit that he had not time to prepare to oppose the motion, it was held a sufficient excuse for not opposing the motion on the first day of the term. *Torrey* v. *Morehouse.* 1 *Johns. Cases,* 242.

6 On the affidavit of the defendant, of the absence of a material witness abroad, the meeting of referees was postponed for two months. *Bird* v. *Sands.* 1 *Johns. Cases,* 294.

7 If the defendant's attorney swears that he sent a plea to the plaintiff's attorney by mail, and that he believes that it was received, the court will presume that it was received by the plaintiff's attorney, unless the contrary be shown. *Stafford* v. *Cole and Spaulding.* 1 *Johns. Cas.* 413.

8 The affidavit on which a motion is made for a commission, ought to state that there are material witnesses to be examined at the place to which the commission is to be directed. A general affidavit that material evidence is to be obtained in the cause is not sufficient. *Franklin* v. *The United Ins. Co.* 2 *Johns. Cases,* 68.

9 An affidavit, on which a motion is made for a commission to examine witnesses, may be made by a third persons, not a party to the suit. *Demar* v. *Van Zandt.* 2 *Johns. Cases,* 69.

10 A default for not pleading will be set aside, on affidavit of merits, if the defendant also shows a satisfactory excuse for not pleading. *M'Instry* v. *Edwards.* 2 *Johns. Cases,* 113.

11 An affidavit of service on a clerk of an attorney, must state that the clerk was, at the time, in the office of the attorney. *Paddock* v. *Bebee.* 2 *Johns. Cas.* 117.

12 On an application to set aside a writ of inquiry, and subsequent proceedings, in an action of slander, on the ground that the defendant had since discovered new evidence, amounting to a justification, the affidavit ought to state the names of the witnesses, and what the party expects to prove by them. *Richardson* v. *Backus.* 1 *Johns. Rep.* 59.

13 An inquest taken by default, was set aside, on the affidavit of the attorney of the defendant, that from the representations made to him by the defendant, and from the paper he had examined he verily believed that the defendant had a legal defence. *Philips* v. *Blagge.* 3 *Johns. Rep.* 141.

Counter affidavits are not allowed to be read in opposition to such a motion. *Ibid.*

14 On an affidavit that the bond and warrant of attorney, on which a judgment had been entered up were *forged*, the court awarded a *feigned issue* to try the fact of forgery. *King* v. *Shaw.* 3 *Johns. Rep.* 142.

15 The affidavit, on which a motion is made to remove a cause into the circuit court of the *United States*, must expressly state that one of the parties is a *citizen of another state. Corp* v. *Vermilye.* 3 *Johns. Rep.* 145.

16 Where a motion is made to set aside an inquest taken by default, the affidavit must state, that an inquest was taken, *by default*, in the cause. *Fink* v. *Bryden.* 3 *Johns. Rep.* 244.

17 Where the defendant, on an affidavit of merits, moved to set aside an inquest taken by default, and stated also that the verdict was taken for more than was due, and the opposite party offered to relinquish the surplus, the court refused the motion, but gave the defendant until a subsequent day in term to produce a further affidavit in explanation of the former. *Fink, jun.* v. *Bryden.* 3 *Johns. Rep.* 215.

18 Counter affidavits may be read as to the sufficiency of an excuse, for not giving notice of a motion for the first day of the term. *Quin* v. *Riley.* 3 *Johns. Rep.* 249.

19 Objections to commissions made to take the examination of witnesses abroad, will not be received upon mere suggestion; but there must be an affidavit of the grounds of objection. *Biays* v. *Merrihew.* 3 *Johns. Rep.* 251.

20 An affidavit of the defendant's attorney, "that he was informed and verily believed that the defendant had a substantial defence on the merits," is not sufficient to set aside default, entered in the cause. *Briggs* v. *Adm. of Briggs.* 3 *Johns. Rep.* 258.

21 On a motion to set aside proceedings in a bail bond suit, for irregularity, the affidavit is well entitled in the bail bond suit. *Pell* v. *Jadwin.* 3 *Johns. Rep.* 418.

22 On a motion to set aside an inquest, taken by default, an affidavit that the defendant had a good and substantial defence in the cause, was held to be a sufficient affidavit of merits. *Briggs* v. *Briggs.* 3 *Johns. Rep.* 449.

23 If an affidavit begins with the deponent's name, without being subscribed by him, it is sufficient. *Jackson ex demise Kenyon* v. *Virgil.* 3 *Johns. Rep.* 540.

24 What is a sufficient affidavit of a cause of action, on a motion to discharge a defendant, on common bail. *Watkinson* v. *Laughton.* 4 *Johns. Rep.* 307.

25 In order to prevent an inquest by default, the affidavit of merits by the defendant should state, as he is advised by counsel, and a copy of it should be served on the plaintiff's attorney, before trial. *Cannon* v. *Titus.* 5 *Johns. Rep.* 355.

26 An affidavit of the service of a copy of a declaration, and notice of rule to plead must be positive and sufficient, at the time the default is entered thereon, for not pleading; it cannot be made good, by a subsequent knowledge of the fact, that the notice was served by the defendant's attorney at the time. *Executors of Doolittle* v. *Executors of Ward.* 5 *Johns. Rep.* 259.

27 When the defendant, on a motion to set aside a default, sets forth in his affidavit, the facts which constitute the merits of his defence, so that the court can judge of them, it is sufficient, without saying as he is advised by counsel. *Wilkes* v. *Hotchkiss.* 5 *Johns. Rep.* 360.

28 On a motion to change the *venue* in a cause, the defendant, in his affidavit, stating that he has a defence on the merits, need not say, as he is advised by counsel. *Metcalf* v. *Clark and Watkins.* 5 *Johns. Rep.* 361.

29 Where a judge at his chambers on a rule to show cause of action, allowed the plaintiff to make supplementary affidavits, on which the defendant was held to bail; and the defendant, afterwards, moved the court for an *exoneretur*, on the ground of irregularity in the judge's order; it was held, that it was an original application, and that counter affidavits, on the part of the plaintiff were admissible. *Hart* v. *Faulkener.* 5 *Johns. Rep.* 362.

When the first affidavit of the plaintiff, on showing cause of action, is insufficient, whether a supplementary affidavit, in order to hold to bail is admissible? *Quere.* *Ibid.*

30 On a motion to set aside proceedings on a bail bond suit, the affidavit must be entitled in that suit, and

not in the original action. *Executors of Phelps* v. *Hall.* 5 *Johns. Rep.* 367.

31 Where an affidavit was made by an attorney on which to obtain the allowance of a *certiorari*, within 30 days after the judgment below, a supplementary affidavit was allowed to be made after the 30 days, to show the reason why the original affidavit was not made by the party himself, or to explain a collateral fact, but not as to the merits. *Dickson* v. *Seelye.* 6 *Johns. Rep.* 327.

32 Where a motion to refer a cause is repelled by an affidavit that questions of law will arise, such affidavit must also state what the points of law are, to enable the court to judge of the propriety of granting the application. *Salisbury* v. *Scott.* 6 *Johns. Rep.* 329.

33 Although the words that "the defendant has not been *resident* in the state for twelve months before the writ issued," are inserted in an affidavit to found a *capias* against a freeholder, yet the court will enquire into the circumstances of the case, and relieve him from arrest, if they think he was *entitled* by the act to be exempted. 1 *Dallas*, 246.

34 On affidavit that material witnesses for the defendant (who was in confinement) were about to leave the state, the court granted a rule to take their depositions, though the writ was not returnable till next term. 1 *Dallas*, 164, 251.

35 The defendant pleaded in abatement, that the plaintiff was a feme covert, without filing an affidavit of the facts; and on motion at a subsequent term, the plea was struck off. 2 *Dallas*, 184.

36 The plaintiff in error may show by *affidavit*, that the matter in dispute exceeds the value of 2,000 dollars. *Rules of Court xviii.* 1 *Cranch.*

XXIX. *Motions and Orders.*

1 A motion for a new trial, upon exceptions for the misdirection of the judge, pursuant to the statute, is within the rule established at March term, 1806, in *Suffolk.* 2 *Mass.* 116.

2 A motion to set aside the report of referees will be heard, though the report is not filed, it having been delivered to the defendant's attorney who kept it in his pocket. *Thompson* v. *Tompkins.* 1 *Johns. Cases*, 238.

3 The court will not set aside a judgment entered on a verdict, where a cause is made, nor hear the motion for a new trial, unless an order to stay proceedings has been obtained. *Van Rensselaer* v. *Dole.* 1 *Johns. Cases*, 239.

4 After a judgment is entered up on a verdict, the court will not hear a motion to set it aside, unless there has been a certificate of a judge, or an order to stay proceedings. *Case of Shepard.* 1 *Johns. Cases*, 245.

5 After a demurrer is put in and withdrawn, by the plaintiff, it is too late for him to move that the defendant elect and abide by one of his pleas. *Dole* v. *Moulton.* 1 *Johns. Cases*, 246.

6 If a plaintiff voluntarily suffers a nonsuit, and then bring a second action, without paying the costs of the first, the defendant may at any time before trial, move for a stay of proceedings until the costs of the first suit are paid. *Cuyler* v. *Vanderwerk.* 1 *Johns. Cases*, 247.

7 Where, after a verdict, and within the two days allowed for making a case, the defendant's attorney applied to the plaintiff's attorney for certain papers which had been read in evidence at the trial, and which were necessary to be inserted in the case, but which were refused by the plaintiff's attorney, and the defendant's attorney for that reason could not make up the case; the court ordered the plaintiff's attorney to furnish the paper's to the defendant's attorney, or permit him to take extracts, and that the proceed-

ings should, in the mean time, be stayed. *Jackson ex dem. Martin* v. *Platt.* 2 *Johns. Cases*, 71.

8 Where the proceedings against bail were irregular, but they suffered two terms to elapse, after a knowledge of the irregularity, before they applied to set aside the proceedings, the motion was denied, as being too late. *Jones* v. *Dunning and Doe.* 2 *Johns. Cases*, 74.

9 Where plaintiff, after he had assigned a judgment to a third person, entered up satisfaction on the record, the court, on motion, ordered the satisfaction to be vacated. *Wardell* v. *Eden.* 2 *Johns. Cases*, 126.

10 Where a motion was made, on the usual affidavit, to examine the *Portuguese* secretary of state at *Lisbon*, in an action on a policy of insurance where the loss happened on the coast of *Brazil*, the court refused a commission, unless the party would disclose the nature and object of the evidence he wished to obtain, and show how it was material. *Vandervoort* v. *The Columbian Ins. Co.* 3 *Johns. Cases*, 137.

11 Motion to set aside the report of referees must be made at the next term after they have made their report. *Comstock* v. *Rathbone.* 1 *Johns. Rep.* 138.

12 If the defendant, after verdict, tender the amount recovered, with costs, up to the time, the court will order further proceedings to be stayed. *Hatfield* v. *Brown.* 1 *Johns. Rep.* 506.

13 On motion for a judgment as in case of a nonsuit, for not proceeding to trial in the cause, the affidavit must state in what county the *venue* is laid. *Walsh* v. *Hill.* 3 *Johns. Rep.* 416.

14 An order to stay proceedings in a cause, and a certificate of probable cause, are the same in effect, and require the same practice as to service of notice of motion, and copies of affidavits, in order to prevent further proceedings. *Bailey* v. *Voorhees and Caldwell.* 3 *Johns. Rep.* 451.

15 A motion to set aside a verdict for irregularity, and also on the merits, is an enumerated motion. *Foden and Slater* v. *Sharp.* 4 *J. Rep.* 183.

16 Where a judgment was obtained in the justice's court in *New-York*, on which a *certiorari* was brought to this court, and the defendant being taken on a *ca. sa.* in the court below, paid the money into that court, and was discharged: and, afterwards, the judgment below being affirmed in this court, the attorney for the defendant in error, issued a *ca. sa.* on the judgment in this court, against the plaintiff in error, for the amount of the damages and costs recovered in the court below, and the costs in error, which were paid to the sheriff; this court ordered the money to be refunded, with costs to be paid by the attorney, and a satisfaction to be endorsed on the *ca. sa.* *Hoyt* v. *Peterson.* 4 *Johns. Rep.* 188.

17 Where the defendant in a suit in a court of common pleas, obtained his discharge under the insolvent act, on the same day that a judgment was rendered against him, in that court, and being brought up on a *ca. sa.* the court of common pleas discharged him, it was held to be regular. A party entitled to relief by an *audita querela*, may be relieved on motion. *Baker* v. *The Judges of Ulster.* 4 *Johns. Rep.* 191.

18 On a motion to set aside a nonsuit, the court will not take notice of objections to the sufficiency of the declaration: they properly arise on a motion in arrest of judgment. *Van Vechten* v. *Graves.* 4 *Johns. Rep.* 403.

19 The *venire* was laid in *Philadelphia* county, and judgment being there obtained, execution was immediately issued into *Bucks*; but upon motion the writ was quashed, the court being of opinion, that the plaintiff ought to have proceeded by *testatum*. 1 *Dallas*, 330.

20 A motion for a new trial should not be made after a motion in arrest of judgment. 2 *Dallas*, 121.

21 Within what time a motion in arrest of judgment must be made. 2 *Dallas*, 229.

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XXX. *Endorsement of Writ.*

1 A treasurer may be substituted as endorser upon a writ brought upon a probate bond in the name of the judge, in place of his predecessor, who had originally endorsed the same. 2 *Mass.* 136.

2 The endorsement on a writ brought on a probate bond must specially designate the character of the endorser as heir, legatee or creditor. 2 *Mass.* 149.

3 A writ of replevin must be endorsed. *Gould* v. *Barnard.* 3 *Mass.* 193.

4 If the defendant pleads the want of an endorser in abatement of the writ, without any suggestion entitling him to the possession of the goods, and the writ is abated, he shall have judgment for his costs, but not for a return. *Ibid.*

5 If one endorse a writ in his name only, without adding the capacity in which he acts, he will be estopped from denying that he endorsed it as the plaintiff's agent. *Gilbert et al.* v. *Nantucket Bank.* 5 *Mass.* 79.

The defendant must make his exception to the sufficiency of the endorsement of the writ at the return term, or he will be considered as waiving it. *Ibid.*

6 The endorser of an original writ is not chargeable to the defendant for his costs, unless an execution be sued out within the year against the plaintiff; and he avoid it, or be committed to prison upon it; one of which facts must be alleged in the *scire facias* sued against the endorser for such costs. *Ruggles et al.* v. *Ives.* 6 *Mass.* 494.

7 An original writ, prosecuted by a corporation, was endorsed thus, "The —— Corporation by *A. B.*," and it was held a sufficient endorsement; and the same remedy may be had against the endorser, as if he had written his name only. *The Middlesex Turnpike Co.* v. *Tufts.* 8 *Mass.* 266.

8 Where the plaintiff had endorsed the original writ and had afterwards absconded and left the state, a new endorser was ordered to be furnished. *Oystead* v. *Shed et al.* 8 *Mass.* 272.

9 An endorser of an original writ is not answerable to the defendant for costs taxed pursuant to the statute of 1803, c. 155, s. 5, where the plaintiff having appealed recovers judgment for a less sum than fifty dollars, and costs are given the defendant. *Fairbanks* v. *Townsend.* 8 *Mass.* 450.

XXXI. *Rules and Practice of the courts on various other Points, general and special.*

1 After judgment by default, promissory note set out in the declaration need not be proved. *Bevis* v. *Lindsell.* 2 *Str.* 1149.

2 Where a party is ordered to attend, the court permitted counsel to examine him, but would not swear him. *Dyson* v. *Ironmonger et ux.* 2 *Str.* 1197.

3 Where the process is against two on a joint cause of action, and one only appears, the other must be outlawed before there can be any further proceedings. *The King* v. *Carter and another.* 1 *Str.* 473.

4 Courts cannot take notice *ex officio* of private acts of parliament. An act of pardon is a private act. In debt upon a bond, a plea of *plene administravit* must shew that the defendant had administered before the commencement of the plaintiff's action. A plea to an action by bill, that after the commencement of the plaintiff's action, *J. S.* exhibited a bill, and recovered a judgment against the defendant as executor,

&c. and that before the exhibiting of the said bill of the said *J. S.* the defendant had fully administered, does not. *Ingram* v. *Foot.* 1 *L. Raym.* 708, 390.

5 The courts cannot take notice judicially of a private statute. A statute to enable insolvents of a particular description to compound their debts is a private one. If a statute enacts, that an agreement for a composition with two thirds in number and value of a man's creditors shall oblige his other creditors to accept a like composition, and points out a mode to ascertain the real creditors, a replication to a plea under the statute, that two thirds of the creditors in number and value did not agree, is argumentative; but after a verdict for the plaintiff, unobjectionable. If an immaterial issue is taken, and a verdict found for the plaintiff on a plea confessing, but not sufficiently avoiding the cause of action, the plaintiff shall have judgment. If on a plea going in discharge of the plaintiff's action, there shall be a repleader. *Pitts* v. *Polehampton.* 1 *L. Raym.* 390. 3 *Salk.* 305.

6 Master's report upon interrogatories of contempt cannot be moved for the last day of the term, without previous leave of the court, unless upon extraordinary cases and personal service of notice. *The King* v. *Wheeler.* 1 *Black.* 311.

7 When a party against whom an attachment is prayed, positively denies the charge by affidavit, the king's bench always refuses the attachment, without entering into the merits or the credit of the parties. *The King* v. *Vaughan.* 2 *Doug.* 516.

The court of chancery in such cases goes into the truth of the charge. *Ibid.*

8 Notice that attorney for plaintiff might give an account of his client on affidavit that defendant did not know him, refused. *Braceby* v. *Dalton.* 2 *Str.* 705.

9 B. R. will not judicially take notice who are the judges of C. B. *Skipp* v. *Hooke.* 2 *Str.* 1080.

10 When a rule is made absolute, you cannot answer it, but must move to have it discharged, if you want to be clear of its effects, and have sufficient grounds. *Anonymous. Lofft*, 265.

11 Cause made a remanet at *Nisi Prius* for want of praying tales. *Jenkins* v. *Purcell.* 2 *Str.* 207.

12 Rules designed to prevent fraud shall never be applied to the purpose of effecting it. *Anon. Lofft*, 620.

13 Service of a rule on the under-sheriff's agent in town, is not good service. *Rex* v. *Coles.* 2 *Doug.* 420.

But service at the offices of the agents for the under-sheriffs of *London*, *Middlesex*, and *Surry*, is, because they are considered as the offices of the under-sheriffs. *Ibid.*

14 On a rule to return the paper book on a particular day, it must be returned some time in that day, otherwise the other party may sign judgment, without waiting till the opening of the office till the morning following. *Haselar* v. *Ansell.* 1 *Doug.* 197.

15 The court never orders a poll to be produced without a particular reason, as a copy is evidence. *Brocas* v. *The Mayor and Aldermen of the city of London.* 1 *Str.* 307.

16 When you move for a rule to shew cause the day before the last of the term, the rule must be drawn specially for the last day. *Anon. Lofft*, 436.

17 *Mandamus* must have 14 days between the test and return, one inclusive and the other exclusive, except within 40 miles of *London*, then eight days. *The King* v. *Mayor of Dover, &c.* 1 *Str.* 407.

18 The court will order a warrant to confess judgment to be delivered up if obtained by fraud, before any use has been made of it. *Duncan* v. *Thomas.* 1 *Doug.* 196.

19 In a civil action, the character of the defendant cannot be gone into. *Anon.* *Lofft*, 321.

20 On *non assumpsit*, an usurious contract may be given in evidence. *Lord Bernard* v. *Saul.* 1 *Str.* 498.

21 Where an action is vexatious, the defendant discharged on common bail. *Cox* v. *Chubb.* 2 *Black.* 809.

22 The courts will take notice on what day the king dies. *Henry* v. *Cole.* 2 *L. Raym.* 811.

23 A case cannot be sent by the committee of appeals of the Privy Council for the opinion of the courts of law. 1 *Doug.* 344, *n.*

Nor by the Master of the Rolls. *Ibid.*

Though in the case of *Coulson* v. *Coulson*, that seems to have been done. *Ibid.*

24 The court will take notice of the beginning and end of a moveable term. The court of king's bench cannot be represented to have been held at *Westminster* in vacation time. *Estwick* v. *Cooke.* 2 *L. Raym.* 1557.

25 Roll of preceedent term ought to be filed. *Thompson* v. *Leach.* 2 *Salk.* 565.

26 Court will take notice of the end of Trinity term. *Ball* v. *Rowe.* 1 *L. Raym.* 4.

27 The plaintiff cannot enter a *remittit* in another term. *Wray* v. *Lister.* 2 *Str.* 1110.

28 Copy of indictment not granted after pleading. *Cooke's case, at the Old Bailey.* 2 *Salk.* 634.

29 Defendant ought to remove with cause; plaintiff may without. *Anon.* *Lofft*, 520.

30 Infant by guardian sues, the plaintiff's attorney, must give notice of the guardian's place of abode. *Tomlin* v. *Brookes.* 1 *Wils.* 246.

31 Proceedings will not be stayed because the cause of action is *infra dignitatem curiæ*, upon the mere affidavit of the defendant. *Oulton* v. *Perry.* 3 *Burr.* 1592.

32 Side-bar rule to discontinue on payment of costs discharged, because obtained after bail had justified. *Belchier* v. *Gansell.* 4 *Burr.* 2502.

33 Every court should have such a regard to its own proceedings, as not to suffer them to be eluded by an application to another. *Grosvenor* v. *Gape.* *Lofft*, 160.

34 The court declared, that on the last day of the term, there cannot be a motion to answer the matters of an affidavit, any more than a motion for an attachment: they held it to be contrary to the practice. *Jacob's case.* 4 *Burr.* 2502.

35 The defendant is not bound by a consent to rejoin *gratis*, if the replication affords cause of demurrer. *Dewey* v. *Sopp.* 2 *Str.* 1185.

36 When either party will suggest any special matter about awarding the *venire* out of the common course a copy must be given to the opposite party, and they must have a reasonable time to consider it, before you enter a *nient dedire.* *Brocas* v. *Civit, London.* 1 *Str.* 235.

37 It was holden, that as the defendant must move to change the venue before plea pleaded, so the plaintiff must in like manner move to discharge the rule on undertaking to give material evidence before replication or plea. *Dickinson* v. *Fisher.* 2 *Str.* 858.

38 A writ by journey's accounts is a continuance of a former writ, and cannot be brought but by a person who was party to such former writ; it cannot be sued out until such former writ is returned; it must be of the same species as the first, and must import to be brought by journey's accounts. A *clausum fregit* does not lie against an executor. The commencement of an action within the time limited by the statute of limitations, is an answer to a plea upon that statute, though such action abated by the act of God, if the action to which such plea is put in, was commenced within a reasonable time after the abatement. A year is a reasonable time. A *clausum fregit* may be the commence-

ment of an action of *assumpsit*, if it is returned and continued. *Kinsey* v. *Hayward*. 1 *L. Raym.* 432. *Salk.* 420.

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39 By the general rule and course of the king's bench, the bill is the commencement of the suit; and the *latitat*, except where it is replied to the statute of limitations, or to avoid a tender, or where it is given in evidence to support a penal action, in point of time, is considered but as a process. *Foster* v. *Bonner*. 2 *Cowp.* 454.

Therefore, the time of suing it out, except in the cases above mentioned, is immaterial. *Ibid.*

It may bear teste before the cause of action; and if a trespass or injury be proved before the bill filed, it is sufficient. *Ibid.*

But in the excepted cases above stated, the time of suing out a *latitat* immaterial. As, where upon an action brought upon the statute 8 G. 1, c. 19, (which directs all prosecutions upon it to be brought before the end of the next term after the offence committed) it was manifest upon the face of the declaration, that it was out of time, the memorandum being of Trinity term, and the declaration stating that the defendant, after the first day of Hilary term, and before the exhibiting the plaintiff's bill, viz. on 27th Jan. kept a lurcher, yet on proof at the trial, that the *latitat* was sued out within time, it was holden sufficient. *Ibid.*

In all cases, the defendant is entitled as well as the plaintiff to shew the true time of the *latitat* issuing. *Ibid.*

40 Though *St. Barnabas* does not seem to be a legal holiday at the Seal-office, yet the court cannot upon motion give damages to a plaintiff for the loss he has sustained in not sealing his writ on that day. *Figgins* v. *Willie*. 2 *Black.* 1186.

41 Determined to be no holiday. *Sparrow* v. *Cooper*. 2 *Black.* 1314.

42 There must be 15 days between the return of the first *scire facias* against bail, and the return of the second. The return day of the first will be the teste of the second, and there must be 15 days between teste and return. *Peale* v. *Watson and others*. 2 *Black.* 922.

43 In all continued writs, the *alias* must be tested the day the former was returnable. *Touchin's case*. 2 *Salk.* 699.

44 A stander-by if not duly subpœna'd may refuse to be sworn as a witness. *Bowles* v. *Johnson*. 1 *Black.* 37.

45 *Capias*, where a term intervenes between the teste and return, is absolutely void and null. *Parsons* v. *Lloyd*. 2 *Black.* 846.

46 There must be 15 days between the teste and return of a *capias ad respondendum*. *Atkinson* v. *Taylor*. 2 *Wils.* 117.

47 Side bar rule not suffered to stand when obtained without disclosing the whole circumstances of the case. *Symonds* v. *Parmenter and Barrow*. 1 *Wils.* 86.

48 A *latitat* may be taken out before the cause of action accrues. *Ward* v. *Hendymond*. 1 *Doug.* 61.

49 A writ of *latitat* runs into *Wales*. *Penry* v. *Jones*. 1 *Doug.* 213. *Lloyd* v. *Jones*. 1 *Doug.* 213, *n.*

50 None but the defendant can demand the plaintiff when neither counsel, attornies, parties or witnesses appear. *Arnold* v. *Johnson*. 1 *Str.* 267.

51 Where the debt was paid after an *alias pluries* writ issued, the defendant cannot object at the trial that the *latitat* was not returned; for at any rate if the alias pluries were the commencement of the action, it is only an irregularity, which, though a ground for application to the court to set aside the proceedings, yet, having been once waived, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid the defendant had no notice of any action commenced, or costs incurred. *Toms* v. *Powell*. 7 *East*, 536.

52 A defendant indicted here for misdemeanors committed by him in the *West-Indies*, in a public capacity, under statute 42 G. 3, c. 85, is not entitled under that statute, upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of mandamus to the courts, &c. abroad to examine witnesses; which are directed to be issued in such cases at the *discretion* of the court of K. B.; but he must lay before the court such special grounds by affidavit, as may reasonably induce them to think "that the witnesses sought to be examined are material to his defence." But the prosecutor in such case is of course entitled to writs of mandamus for the like purpose. *The King* v. *Jones*. 8 *East*, 31.

53 An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the statute 3 H. 7, c. 10, which is confined to judgments recovered by *plaintiffs* below, and affirmed on a writ of error. Neither is such defendant in error entitled to his costs on the statute 8 and 9 W. 3, c. 11, s. 2, which is confined to judgments for defendants on demurrer. *Golding* v. *Dias*. 10 *East*, 2.

54 In the case of a defendant charged in execution, the *committitur* must be filed of the same term as the marshal's acknowledgment. *Cunningham* v. *Cogan*. 10 *East*, 46.

55 An appeal lies to this court from the court of common pleas, although they arrested the judgment after verdict. 2 *Mass.* 141.

56 Upon an appeal from a decree of the *probate court* granting letters of administration to *A. B.* the court may reverse the decree as to the appointment of *A. B.* and affirm it as to the residue; and in such case the papers are remitted to the judge of probate, who is directed to grant administration to *C. D.* or *E. F.* *Dexter et ux.* v. *Brown*. 3 *Mass.* 32.

57 It is not necessary to except from such command the articles freed from attachment by statute 1805, c. 100. *Cooke* v. *Gibbs*. 3 *Mass.* 193.

58 An action of debt does not lie upon an award of damages by a committee of the sessions for locating an highway, although the report is accepted by the sessions. *Gedney* v. *The Inhabitants of Tewksbury*. 3 *Mass.* 307.

59 The treble damages given by the provincial act of 1 G. 2, c. 4, are to be sued for in an action of trespass. *Prescott* v. *Tufts et al.* 4 *Mass.* 146.

60 One *non compos mentis* defends in an action by his guardian, and dies pending the suit; the guardian can no longer appear in the defence, but the executor or administrator of the *non compos*, if the cause of action survives against him, must defend. *Whitney* v. *Whitman*. 4 *Mass.* 508.

61 Exceptions to a verdict under the statute of 1808, c. 93, s. 5, must be filed and allowed at the same term at which the verdict is rendered. *Pease* v. *Whitney et al.* 4 *Mass.* 507.

62 An appeal lies to this court, not only from a judgment of the common pleas, on which an execution may issue, but from any final determination in that court, whether it be by order or judgment. *Tappan* v. *Bruen*. 5 *Mass.* 193.

63 Where in a transitory action one of several plaintiffs, and the defendants live within the state, the writ must be sued out in the county, where such plaintiff, or one of the defendants lives, although one or more of the plaintiffs live out of the state. *Day et al.* v. *Jackson et al.* 5 *Mass.* 237.

64 Where an appellant from the probate court enters his appeal, and afterwards becomes nonsuit, the adverse party must file a complaint for affirmation and costs. *How* v. *How*. 5 *Mass.* 375.

65 Where the plaintiff amends his de-

claration, the defendant may replead, if the amendment shall vary his defence; but he may not plead double unless the several pleas proposed are necessary to his defence; and he may plead the statute of limitations, after the amendment, if he will waive his former plea. *Green* v. *Gill, Ex.* 5 *Mass.* 379.

66 Where in *assumpsit* the plaintiff declares on a special agreement, a *quantum meruit*, and a general *indebitatus assumpsit*, and on trial he fails to prove the special agreement, as laid in the declaration, but proves a different one, he may still recover on his general count, if his evidence will support it. *Keyes* v. *Stone.* 5 *Mass.* 391.

67 Where in *assumpsit* against three defendants, each pleaded to issue severally, they were not allowed to tax costs for each. *Meagher* v. *Bacheldor et al.* 6 *Mass.* 444.

68 Where a verdict is found for the plaintiff on some counts, and for the defendant on others, the plaintiff is entitled to costs as the prevailing party. *Fowler* v. *Shearer.* 7 *Mass.* 14.

69 In trespass *quare clausum fregit* by husband and wife, for a trespass on the lands of the wife, after a verdict for the defendant, and before judgment, the wife died, and the defendant had judgment for his costs against the husband. *Fowler et ux.* v. *Shearer.* 7 *Mass.* 31.

71 The court will not hear a cause referred to them upon an agreed statement of facts, by which only a preliminary question will be settled, leaving the merits undecided. *Austin* v. *Wilson et al.* 7 *Mass.* 205.

71 By the practice of the courts in this state, judgment is presumed to be entered on the last day of term; unless on motion it be in fact entered previously, in which case the time is minuted; and the thirty days, during which goods and estates attached on mesne process are held, are to be reckoned accordingly. *Herring & al.* v. *Polly.* 8 *Mass.* 113.

72 In *assumpsit* for not paying a sum of money in bank notes, the defendant pleaded a tender, and a *profert* of the notes into court; after issue joined on the tender and found for the defendant it appearing that the notes had not been brought into court, the plaintiff had judgment *non obstante veredicto*. *Claflin* v. *Hawes* 8 *Mass.* 261.

73 Where a counsellor and attorney of this court held a paper delivered to him by his client, which the grand jury were desirous of seeing, the court held him not bound to produce it. *Anon.* 8 *Mass.* 370.

74 If a writ of right be not returned on the *quarto die post*, and the tenant means to put the demandant out of court, he should enter a *ne recipiatur*. *Sacket* v. *Lothrop.* 1 *Johns. Cases*, 249.

75 When a verdict is taken, subject to the opinion of the court, on points reserved, the plaintiff must make up the case and have it settled, and cannot have judgment because no case is made. *Eagle* v. *Almer.* 1 *Johns. Cases*, 332.

The right of proposing amendments to a case made, does not authorise the party to substitute a new case. *Ibid.*

76 Where the defendant was sued on a note before it was due, and put in bail, and pleaded in chief, it was held, that it was too late, afterwards, to make the objection. *Crygier* v. *Long.* 1 *Johns. Cases*, 393.

77 Where the tenant in a writ of right, demands a *view*, it is the duty of the demandant to sue out a writ of view, and if he does not, he will be nonsuited. *Scofield* v. *Lodie.* 1 *Johns. Cas.* 395.

78 Under a consolidation rule, after judgment in one cause the defendants in the other causes have eight days to pay the money, after the judgment and taxation of costs; and if the judgment is rendered in *Albany*, and the defendants live in *New-York*, they have 14 days for that purpose, and so, *vice versa*; but the

plaintiff may, for his own security, enter up judgments in the other causes immediately, but the costs are to be deducted if the money is paid in time. *Earl* v. *Lefferts.* 1 *Johns. Cases*, 395.

79 Where the defendant having put in bail, which was excepted to, tendered the money due to the plaintiff who did not ask for a trial, the court refused to fix the sheriff by an attachment. *Post* v. *Van Dine.* 1 *Johns. Cases*, 412.

80 The sickness of bail, was admitted as a sufficient excuse for not surrendering the principal within the eight days. *Boardman and Hunt* v. *Fowler.* 1 *Johns. Cases*, 413.

Special bail may depute another person to make the surrender of the principal, *ex necessitate.* *Ibid.*

81 Where a court of common pleas refuses to give judgment in a cause, this court will not grant a *mandamus*, until after a rule to show cause has been first granted for that purpose. *The People* v. *Judges of Cayuga*, &c. 2 *Johns. Cases*, 68.

82 Where a rule for a joinder in error to a *certiorari* is obtained, the party must apply at the next term for the effect of this rule; if a term intervenes, he will be presumed to have waived the rule. *Sealy* v. *Shattuck.* 2 *Johns. Cases*, 69.

83 Where a party sues out a commission to examine witnesses, and does not use due dilligence to get it returned in proper time, or the return is not properly made, the court will permit the trial to proceed, notwithstanding the commission. *Rush* v. *Cobbett.* 2 *Johns. Cases*, 70.

84 If a court of common pleas, on a recovery by administrators, of damages for less than 25 dollars, give judgment for the damages, but not for the costs, this court will not grant a *mandamus* to compel them to give judgment also for costs, but leave the party to seek his remedy by writ of error. *Janson and others* v. *Davison.* 2 *Johns. Cas.* 72.

85 A justice cannot move to quash a *certiorari* directed to him. He must obey at his peril, and return what is legally required of him, and not take notice of what he is not bound by law to return. *Van Patten* v. *Ouderkirk.* 2 *Johns. Cases*, 108.

86 Where the trial of a cause is put off, on payment of costs, the plaintiff may demand the costs immediately, and if not paid, may proceed in the cause, or he may have the costs regularly taxed, on due notice, and if, after service of the taxed bill, the costs are not paid, he may take out an attachment, *instanter.* *Jackson ex demise Lewis and others* v. *Larroway.* 2 *Johns. Cases*, 114.

87 The two days allowed by the rule of *January* term, 1799, for making up a case cannot be enlarged by the order of a judge. *Jackson ex dem. Low* v. *Hornbeck.* 2 *Johns Cases*, 115.

88 Where a verdict is found for the plaintiff, and the judgment is *arrested*, and the plaintiff wishes to bring a writ of error, the proper course is for the plaintiff to move the court below, for judgment for the defendant against himself, for the insufficiency of the declaration, on which judgment a writ of error will lie, but not on arrest of judgment. *Fish* v. *Weatherwax.* 2 *Johns. Cases*, 215.

If the court below refuses to give such judgment, on the prayer of the party, this court will grant a *mandamus* to compel them to give judgment. *Ibid.*

89 A rule regularly obtained, in the absence of the counsel of the other party, will not be vacated at a subsequent term. *Hildreth* v. *Harvey.* 2 *Johns. Cases*, 221.

90 Where the attorney for the defendant suffered an inquest to be taken by default, at the sittings, supposing there was no defence, the court refused to set aside the default, to let the defendant in to prove *usury* as a defence. *Crammond* v. *Roosevelt.* 2 *Johns. Cases*, 282.

91 After a rule for judgment on a de-

murrer, it is too late to apply at the next term for leave to withdraw the demurrer. *Seaman* v. *Haskins.* 2 *Johns. Cases*, 284.

92 In an action of debt on a bond, conditioned for the performance of covenants, the plaintiff must assign breaches, and have the damages assessed, and may then enter judgment for the penalty *pro forma*, and issue execution for the damages and costs; and if the damages are assessed at six cents, he will be entitled to nominal damages for the detention of his debt, and may enter up judgment for the penalty, so as to recover full costs. *Hodges* v. *Suffelt.* 2 *Johns. Cases*, 406.

93 The granting of commissions to examine witnesses abroad, rests in the sound discretion of the court. *Vandervoort* v. *The Columbian Ins. Co.* 3 *Johns. Cases*, 137.

94 In *trover*, the court will not order articles which have been tendered to the plaintiff and refused, to be struck out of the declaration. *Shotwell* v. *Wendover.* 1 *Johns. Rep.* 65.

95 Where a bill of exceptions, on a special verdict is taken, and a case is also made, the party must make his election to proceed on one or the other, and will not be allowed to argue both. *Sleght* v. *Rhinelander.* 1 *Johns. Rep.* 192.

96 After an assignment of errors, it is too late to move for an amendment to a *certiorari*. *Rue* v. *Sprague and Consaulis.* 1 *Johns. Rep.* 493.

97 A writ of error may be brought before judgment is entered up. *Richardson* v. *Backus.* 1 *Johns. Rep.* 493.

98 In order to bring a party into contempt, for the nonpayment of costs, the person serving the taxed bill, &c. must show to the party his authority to receive the costs. *Jackson ex demise Lawe* v. *Virgil.* 3 *Johns. Rep.* 138.

99 Rules by consent, or arguments between the parties or their attornies, are not binding, unless entered in the book of common rules, or reduced to writing by them, or by some person authorised for that purpose. *Dubois* v. *Roosa.* 3 *Johns. Rep.* 145.

100 After a judgment by default, the court may assess the damages without the intervention of a jury. *M'Collum* v. *Barker.* 3 *Johns. Rep.* 153.

101 Where an executor or administrator brings a wrong action, by mistake, he will be allowed to discontinue without costs. *Phœnix Administrator* v. *Hill.* 3 *Johns. Rep.* 249.

102 An issue to try the fact of usury, on a judgment, will not be awarded, unless the usury be denied, or the fact be put in doubt. *Hewit* v. *Fitch.* 3 *Johns. Rep.* 250.

103 Where a judge's order has been obtained to stay proceedings on a verdict, the party in whose favour the verdict was given, may, nevertheless, enter a rule *nisi* for judgment, on the fourth day of the next term. *Hackley* v. *Hastie and Patrick.* 3 *Johns. Rep.* 253.

104 Where the defendant in a cause, has enlisted as a *soldier* in the army of the *United States*, the court will not grant leave to discontinue, without paying costs, if it appears that the sum to be recovered is more than 20 dollars. *Reynolds* v. *Lammond.* 3 *Johns. Rep.* 445.

105 Where the defendant, having been surrendered by his bail, and lain more than three months in prison without being charged in execution, obtains a rule to show cause why a *supersedeas* should not be awarded, if the plaintiff, after service of a rule, and before the time to show cause, issues an execution to charge the defendant, he may show that for cause, and it will be sufficient to prevent a *supersedeas*. *Minturn and Champlin* v. *Phelps.* 3 *Johns. Rep.* 446.

106 After judgment on a demurrer, it is too late, at the next term, to move for leave to withdraw the demurrer. *Currie & Whitney* v. *Henry.* 3 *Johns. Rep.* 140.

107 Where a lease was assigned, and by a bond executed at the same time, the assignment was declared to be made to secure a debt, it was held to be a mortgage, and the mortgagor entitled to notice to quit. *Jackson ex dem. Carr* v. *Green.* 4 *Johns. Rep.* 186.

108 A confession of a judgment must be for a certain specific sum. *Nichols* v. *Hewitt.* 4 *Johns. Rep.* 423.

109 It seems, that where a sheriff is plaintiff, he may serve his own writ. *Bennet* v. *Fuller.* 4 *Johns. Rep.* 436. Where the defendant, in such case, was under a mistake as to the arrest, a default entered for want of a plea, was set aside, on affidavit of merits. *Ibid.*

110 Before an attachment issues against a sheriff, the proceedings are to be entitled, in the names of the parties in the suit; but after the granting the attachment, the proceedings must be entitled in the name of *the people.* *Folger* v. *Hoogland.* 5 *Johns. Rep.* 235.

111 In cases not provided for by the rules of this court, the practice of the court of K. B. in *England*, is followed. *Dubois* v. *Philips.* *Ibid.*

112 Where a judgment was given for the defendant and the plaintiff wished to bring a writ of error, the defendant was ordered to make up the record in eight days, or that the plaintiff have leave to do it for him. *Yates* v. *Lansing.* 5 *Johns. Rep.* 367.

113 In actions of debt, where a default is obtained, the plaintiff need not issue a writ of inquiry, to ascertain the interest or damages, but the same may be ascertained by the clerk, and taxed with the costs. *Fenton* v. *Garlick.* 6 *Johns. Rep.* 287. The plaintiff, however, must give notice to the defendant of the taxation, before the clerk; but if he neglects to give notice, the court will not set aside the judgment, but order a retaxation of the costs on proper notice; and if any deduction is made on the retaxation, the amount is to be credited on the execution. *Ibid.*

114 An interlocutory or final judgment cannot be entered in vacation, unless on a *cognovit actionem.* *Hogeboom* v. *Genet.* 6 *Johns. Rep.* 325.

115 Where a rule expires on *Sunday*, the last day is not reckoned, and the party has all the next day to do what is required. *Cock* v. *Bunn.* 6 *Johns. Rep.* 326.

116 The rule *nisi* for judgment after verdict, may be entered on any day in term. *Rose* v. *Roek.* 6 *Johns. Rep.* 330.

117 No fees for the attendance or travel of witnesses, can be taxed, without an affidavit of their actual attendance and travel. *Jackson ex dem. Kincard* v. *Scott.* 6 *Johns. Rep.* 330.

118 Payment of money into court admits the cause of action as stated in the plaintiff's declaration. *Johnston* v. *The Columbian Insurance Co.* 7 *Johns. Rep.* 318.

119 Whether after bail is put in the arrest and proceedings may be set aside on motion, for irregularity, must depend on the practice of the court. This court will not interfere with the proceedings of an inferior court in this respect. *In the matter of W. Livingston.* 8 *Johns. Rep.* 351.

120 Where a rule to set aside a default and subsequent proceedings was granted *on payment of costs*, and the costs were regularly demanded of the defendant, but not paid, and the plaintiff, afterwards issued an execution on the judgment, the court refused to set aside the execution. *Pugsley* v. *Van Allen.* 8 *Johns. Rep.* 352.

121 Where a rule is granted on payment of costs, it is conditional, and is of no force, unless the costs be paid *instanter*; and the party who is to pay costs, must seek and tender them to the other party. *Pugsley* v. *Van Allen.* 8 *Johns. Rep.* 35.

122 When a deed is produced in evi-

dence, it must be shewn *in hoec verba*, upon demurrer. 1 *Dallas*, 20.

123 Whenever a writ issues fairly, if delivered first, it shall take preference. 1 *Dallas*, 22.

The proceedings on a *hab. corp.* are *denovo;* but on a *certiorari*, the court proceed on the state returned. *Ibid.*

124 Auditors shall be appointed only where there is a dispute about the depreciation. 1 *Dallas*, 248.

The court will grant a rule to take the depositions of going witnesses, *de bene esse*, before the return of the writ. 1 *Dallas*, 251.

125 A case in *term reports*, being a determination upon general mercantile law, is of authority here. 1 *Dallas*, 272.

126 After a judgment has been regularly entered in a *foreign attachment*, it is too late to move to quash it. 1 *Dallas*, 294.

127 On an appeal from the determination of the regulators of party walls, &c. a feigned issue can only decide, whether the regulators have done right or not; it cannot decide the title and finally settle the matter; and, therefore, it is proper to try the question by *ejectment*. 1 *Dallas*, 308.

128 The privilege of a freeholder to be sued by summons, extends to actions of trespass *vi et armis*. 1 *Dallas*, 310.

129 The rule is, that unless exceptions to the report of referees are filed within four days the judgment *nisi* becomes absolute. 1 *Dallas*, 312.

A distringas will lie against a sheriff *while in office*, upon a return of levied to the value, &c., but under particular circumstances, it would be hard to issue it, without moving the court. *Ibid.*

130 A capias will not lie against a freeholder, although the attorney directs his appearance to be accepted. 1 *Dallas*, 318.

131 On motion, and positive affidavit of the debt at the first term, a shallop attached under a *foreign attachment*, was ordered to be sold, as a perishable commodity. 1 *Dallas*, 379.

132 It has been the practice of the sheriff to hold an inquest, as well after as before the return of a *fi. fa.* 1 *Dallas*, 379.

133 On a libel for a divorce, notice ought to be given that between two specific dates, acts of cruelty, &c. were intended to be proved. 1 *Dallas*, 409.

134 Upon affirmance of judgment in a cause removed by *certiorari* from before a justice of the peace, execution may issue at once out of the supreme court. 1 *Dallas*, 410.

135 It is only from the disagreement of the writ with the declaration, that it becomes necessary to enter the continuances to shew it issued for the same cause of action, in order to prevent the bar of the statute of limitations. 1 *Dallas*, 411, 450.

136 The writs of *capias* and *summons* in *Pennsylvania*, always specify the nature of the actions to be declared in, and are, therefore, similar, in respect of entering continuances, to the *originals* out of chancery, and the *attachment of privilege* in the common pleas. 1 *Dallas*, 411.

137 What is a reasonable time to renew an action; or to prosecute it upon the foundation of the old writ. where there has been no actual abatement. 1 *Dallas*, 412.

138 The practice of entering verdicts on the issue of *non solvit*. 1 *Dallas*, 462.

139 It is questionable whether the supreme court can issue writs of attachment for not obeying a subpœna, into another county. 2 *Dallas*, 45.

140 Under the pleas of non-assumpsit and payment, it is not necessary for the plaintiff, an executor, to produce his letters testamentary. 2 *Dallas*, 100.

141 A special court may be granted on the application of one of several joint defendants, though the others

are not about to depart. 2 *Dallas*, 111.

142 Amendment allowed in a *qui tam* action. 2 *Dallas*, 143.

143 What is a good, or a defective execution and return of a commission to examine witnesses abroad. 2 *Dallas*, 148, 4. 157, 192.

144 Notice of a motion for a new trial, when to be given. 2 *Dallas*, 150.

145 It is never too late to grant a rule for security for costs, when it will not delay the trial. 2 *Dallas*, 179.

146 After error brought, the court allowed the plaintiff to enter a *remittitur*, of surplus damages, beyond what was laid in the declaration. 2 *Dallas*, 184.

147 The defendant, on a submission to an indictment, may be heard without oath, but not upon his own affidavit, in mitigation of the fine. 2 *Dallas*, 189.

148 The regular way to remove a record of the orphan's court is by *certiorari*, and nothing else can stay the proceedings below. 2 *Dallas*, 190.

149 A *procedendo* granted because the action was removed after the referees had entered on the business, under a rule of reference. 2 *Dallas*, 191, 2.

150 Under what circumstances the court will refuse a writ of restitution; though they reverse the judgment, under which possession was obtained. 2 *Dallas*, 205.

151 In what case the court will grant the plaintiff leave to enter a verdict, given generally, on the proper count. 2 *Dallas*, 229.

152 Executions issued in the case of judgments affirmed on writ of error, may include interest from the date of the original judgment. 2 *Dallas*, 238.

153 Judgment the first day of September term; *test. fi. fa.* to *Allegheny* county, founded on a *fi. fa.* to *Philadelphia* county, returnable to the last day of the same *September* term, never taken out, but minuted on the roll; held to be good within the act of assembly. 2 *Dallas*, 269.

154 What variances between the declaration and evidence are immaterial. 2 *Dallas*, 301.

155 Under what circumstances, injunctions will be issued, continued, or dissolved. 2 *Dallas*, 362, 402, 415.

156 An *alias capias* must be tested of the term to which the original was returnable, and be made returnable the next immediately ensuing term. 2 *Dallas*, 372, to 380.

157 *Quere.* What is the regular form of proceeding after the return of the writ, where only one defendant is taken on a capias against several defendants. 2 *Dallas*, 372, to 380.

158 Agreement to enter judgment on a promissory note "for what may be due," there having been several partial payments, the amount must be settled before the plaintiff can issue execution; or the court will stay proceedings. 2 *Dallas*, 380, 1.

159 The supreme court of the *United States* will not award a commission to examine witnesses till the commissioners are named. 2 *Dallas*, 401.

160 Whether a *distringas* is the proper mode to compel the appearance of a state. *Ibid.*

161 Rule on the marshal to return a summons issued against a state. 2 *Dallas*, 402.

162 General rules relative to the practice of the supreme court of the *United States*. 2 *Dallas*, 399, 400, 411.

163 Rules for entering judgment by default against a state. 2 *Dallas*, 415.

164 Though a district judge is on the bench, if he does not sit in the cause, he is absent in contemplation of law. 3 *Dallas*, 33, 6.

165 Where the supreme court are equally divided on a question of jurisdiction, though the majority are for reversing the judgment of the court below, a *venire facias denovo* cannot be awarded. 3 *Dallas*, 41, 2.

166 When a mandamus will issue to the judges of an inferior court, and when not. 3 *Dallas*, 42 to 53.

167 Where there is a prayer for general relief, it is sufficient to warrant the court in giving damages, though damages are not expressly prayed for. 3 *Dallas*, 86 7, 103, 118.

168 The appeal itself suspends the decree of the inferior court; but a writ of inhibition is proper and necessary to enable the court of appeal to punish the inferior court for contempt, in case of disobedience; which the appeal does not do, as it is the act of the party, and not of the superior court. 3 *Dallas*, 87, 103, 6.

169 The want of a monition to appear, is cured by actual appearance. 3 *Dallas*, 87.

170 Whatever could be brought forward by way of defence in a court of appeals, must be brought forward there, or the party can never take advantage of it after. 3 *Dallas*, 87, 88, 102.

171 Where the award of damages should be joint, and where it should be several. 3 *Dallas*, 88, 104, 115.

172 Where there has been erroneously a joint award of damages in the inferior court, but the facts appear on the record, the superior court will sever the damages, and so apportion them as to effectuate substantial justice. 3 *Dallas*, 88, 107, 120.

173 Rule for computing interest on a decree of reversal or affirmance, in the superior court. 3 *Dallas*, 88, 103, 338, 356.

174 How far the facts, on which the decree of the circuit court is founded, must appear on the record, upon a writ of error. 3 *Dallas*, 184, 321, to 330, 336, 7.

175 What will amount in a decree to a statement of facts, conformably to the directions of the judicial act. 3 *Dallas*, 321, to 330, 336, 7.

176 The supreme court modified and reduced the amount of a decree of the circuit court, having the necessary documents before them on the record. 3 *Dallas*, 331, 2.

177 If a record is transmitted with the evidence, but without a statement of facts by the court, the evidence cannot be considered as a statement in compliance with the judicial act; and, of course, there can be no error. 3 *Dallas*, 336, 7.

178 The costs of a printed state of the cause for the use of the court, refused to be allowed. 3 *Dallas*, 338.

179 A judgment of the high court of appeals of *Maryland*, being reversed, and the judgment of the general court affirmed, the mandate for execution must issue to the latter; and the plaintiff in error is entitled to costs in both those courts, as well as in the supreme court. 3 *Dallas*, 342, 3.

180 How far the laws and practice of the respective states shall govern the decision of the supreme court on a writ of error. 3 *Dallas*, 344, to 356.

181 What will amount to a discontinuance by the pratice of *Rhode-Island*. *Ibid.*

182 How writs of error and *certiorari* may be returned by the clerk of the proper court. 3 *Dallas*, 356, 360, *in note.*

183 No record to be taken from the clerk's office but by consent of the court. 3 *Dallas*, 377.

184 What is the rule for computing the value of the matter in dispute between the parties, on a question of jurisdiction. 4 *Dallas*, 401, to 408.

185 The court will not take cognizance of a cause which is not brought before them by regular process. 3 *Dallas*, 409, 10.

186 An attorney's name transferred from the roll of attornies to the list of counsel. 3 *Dallas*, 410, 11.

187 In what cases a *certiorari* will not lie to remove a cause from a circuit court, on an allegation that it is virtually a suit between two states. 3 *Dallas*, 411, to 415.

188 Whether a *venire* can be awarded by the supreme court to summon a jury from another state, than that in which a cause is pending, upon a suggestion that the state and its citizens are interested. *Qu.* 3 *Dallas*, 411, to 415.

189 When it is necessary for a judge to acknowledge his seal to a bill of exceptions. 3 *Dallas*, 419, *n.*

190 What is the regular mode of issuing and returning a *venire* in a capital cause. 3 *Dallas*, 515.

191 Rule as to injunction. 4 *Dallas*, 1, 3.

192 A removal from the circuit to the supreme court, must be by writ of error; not by appeal. 4 *Dallas*, 22.

193 An appeal dismissed, it not appearing that the orphan's court had pronounced a definitive decree. 4 *Dallas*, 160.

194 If issue is joined on the pleas of *non-assumpsit*, and payment, whether the defendant may strike out the former plea at the time of trial. 4 *Dallas*, 295, 25.

195 A plea to debt on arbitration bond, entering into the merits of the original controversy, is bad. 4 *Dallas*, 284.

196 When a *certiorari* shall be allowed for the removal of an indictment from the quarter sessions, into the circuit court. 4 *Dallas*, 302.

197 A *certiorari* to remove an indictment from the quarter sessions to the circuit court, was directed to the justices of the common pleas; and, for that reason, judgment arrested. 4 *Dallas*, 316.

198 An action may be removed by *hab. corp.* on or before the first day of the term next after that, to which the original writ is returnable. 4 *Dallas*, 433.

199 In *Virginia*, after the first term next following an office judgment, it is a matter of mere discretion in the court whether they will admit a special plea to be filed to set aside that judgment. *Resler* v. *Shehee*. 1 *Cranch*, 110.

200 Process shall be in the name of the *President* of the *United States*. 1 *Cranch*. *Rules of Court*, xvi.

201 The practice in the supreme court of the *United States* is to be conformable to that of the king's bench and chancery in *England*. *Rules of Court*, *xvii*. 1 *Cranch*.

202 When the defendant in error fails to appear, the plaintiff may proceed *ex parte*. *Rules of Court*, *xviii*. 1 *Cranch*.

203 If an appeal is prayed in the court below at the same term in which the decree is rendered, a citation is not necessary. *Reily* v. *Lamar*. 2 *Cranch*, 349.

204 In a bill in equity by executors it is not necessary to set forth their letters testamentary. *Telfair* v. *Stead*. 2 *Cranch*, 408.

205 An appearance of the defendant, by attorney, cures all irregularity of process. *Knox* v. *Summers*. 3 *Cranch*, 496.

206 In *Virginia*, if the defendant die after interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded. *M'Knight* v. *Craig's administrator*. 6 *Cranch*, 183.

207 This court will not direct the court below to allow the proceedings to be amended. *Sheehy* v. *Mandeville*. 6 *Cranch*, 254.

208 It is too late to question the jurisdiction of the court below, after the cause is sent back with a mandate to cause the decree of this court to be executed. *Skillern* v. *May*. 6 *Cranch*, 267.

PRACTICE IN COURTS OF ERROR.

1 On an appeal from an interlocutory order of the court of chancery, directing an issue to be tried at law, the court of errors will hear and decide on the whole merits of the cause. *Le Guen* v. *Governeur and Kemble*. 1 *Johns. Cases*, 436.

2 On an appeal from an order of the

court of chancery, postponing the hearing of a cause, for want of proper parties, this court will not hear nor decide on the merits of the cause. *Deas* v. *Thorne and others.* 3 *Johns. Rep.* 542.

On an appeal from an interlocutory order of the court of chancery, this court will not hear and decide on the merits of the cause unless the merits have also been heard in the court below. *Ibid.*

On an appeal, this court will not permit evidence to be read, which was not read in the court below. *Ibid.*

3 No costs are allowed the appellant in this court, on a *reversal* of the decree in the court below. *Farquharson* v. *Mabee.* 3 *Johns. Rep.* 553.

4 Where, a writ of error was brought on a bill of exceptions from the supreme court, and the cause was decided in favour of the plaintiff in error, and a *venire de novo* awarded, and on the new trial of the cause below a second bill of exceptions was taken on the same point, and a second writ of error brought thereon, this court ordered the second writ of error to be quashed. *Hartshorne and others* v. *Sleght and Sleght.* 3 *Johns. Rep.* 554.

5 Where, on a petition of appeal, the appellant omitted to state the reasons of the appeal, and the respondent answered the petition, it was held that the respondent was too late, afterwards, to object for any defects in the petition in matters of form. *Rogers* v. *Cruger.* 3 *Johns. Rep.* 561.

6 No appeal lies from a temporary order of the court of chancery granting an injunction to stay the trial of a suit at law. *Trustees of Huntington and others* v. *Nicoll.* 3 *J. Rep.* 566.

On an appeal from an order of the court of chancery, granting an injunction to stay proceedings at law, this court will not hear or decide on the merits of the cause, if the merits have not been heard in the court below, before granting the order. *Ibid.*

7 No appeal lies from an order of the court of chancery, for the examination of the *guardians* of the complainant, who was an infant, as witnesses for him; such examinations being always taken, *de bene esse*, and saving all just exceptions; and, if inadmissible on account of the incompetency of the witness, may be suppressed at the hearing before the chancellor, or, if admitted, and the witnesses are incompetent, it may then become the ground of appeal. *Trustees of Huntington and others* v. *Nicoll.* 3 *Johns. Rep.* 566.

8 After an assignment of errors, and joinder thereon, this court will not send the transcript of the record back to the supreme court to be amended, by the record in that court which had been amended by that court, since the joinder in error in the court of errors. *Cheetham* v. *Tillotson.* 4 *Johns. Rep.* 499.

All defects, or errors properly amendable, may be amended in the court of errors, who will disregard all defects or errors in matters of form which may be amended, or which are cured by the statute of *jeofails. Ibid.*

If a party wishes to have a transcript amended, the proper course is to allege diminution and pray a *certiorari* to the court below. *Ibid.*

After the defendant in error has pleaded *in nullo est erratum*, he cannot allege diminution, for by his plea he admits the record to be perfect; so that after a joinder in error, neither party can allege diminution, or pray a *certiorari. Ib.*

9 An appeal lies to this court from an order of the court of chancery, for continuing an injunction and awarding costs against the defendant. *M'Vickar and others* v. *Walcott and others.* 4 *Johns. Rep.* 510.

10 Where a bill in chancery was fi-

ed by creditors to set aside the deeds of a bankrupt, on the ground of fraud, it was held, that the property was not to be placed in the hands of a master to be distributed; but was to be disposed of by the assignees of the bankrupt, according to the bankrupt law of the *United States*. *Sands and others* v. *Codwise and others*. 4 *Johns. Rep.* 536. On appeal, this court will decide on those parts only of the decree of the court below, which are complained of in the petition of appeal. *Ibid.*

PREROGATIVE.

1 The king may try either issue first, where several are joined. *The King* v. *Hare and Mann*. 1 *Str.* 266.

2 The king cannot by charter authorize the trial of crimes out of the county where they are committed. *Rex* v. *Gough*. 2 *Doug.* 791.

3 The king when party to a suit may, by his prerogative, waive any of his pleadings, and plead *de novo*; but no other person, though he may set up a title under the king, can. *Earl of Hereford* v. *Syly*. 1 *L. Raym.* 211.

4 The king has a legislative authority over a conquered country; but he precludes himself from the exercise of that authority by a proclamation, stating that he has commissioned the governor of the country to call an assembly for the purposes of enacting laws. *Campbell* v. *Hall*. *Cowp.* 204.

5 The crown hath not a prerogative or power to grant the printing of almanacs to the Stationers Company, exclusive of any other persons. *Stationers Company* v. *Carnan*. 2 *Black.* 1004.

6 The rule that the half-blood shall not inherit, does not affect the succession to the crown. *Anon.* *Lofft*, 396.

7 Will never prejudice justice, or the rights of the subjects. *Golightly* v. *Reynolds*. *Lofft*, 88.

8 The king, by letters patent, may enlarge the boundaries of a city. K. B. has concurrent jurisdiction with the sessions about repairing bridges. *The King* v. *Inhab. of the city of Norwich*. 1 *Str.* 177.

9 The power of the crown to pardon a forfeiture, and to grant restitution, can only be exercised where things remain in *statu quo*, but not so as to affect legal rights vested in third persons. *R.* v. *Amery*. *Term Rep.* 569.

10 A pardon, if pleaded, must be averred to be under the great seal: (except a statute pardon, or what amounts thereto.) *Bull* v. *Tilt*. 1 *Bos. & Pull.* 199.

11 The king, by virtue of his prerogative, is exempted from the payment of taxes collected *personally* from the subject, and not mingled with the price of the commodity before it is known by whom it is to be made use of; therefore an express sent upon government service is not liable to pay the duty on post-horses imposed by 25 G. 3, c. 51, s. 4. *Rex* v. *Cook*. 3 *Term Rep.* 519.

12 If, after a grant of a next presentation to a living, the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the king's presentee. *Calland (or Caillaud)* v. *Troward*; 2 *H. Black.* 324: affirmed in K. B. 6 *Term Rep.* 439; and the judgments of both courts affirmed in *Dom. Proc.* 6 *Term Rep.* 778.

13 Where the grant of a *rectory* by the crown contained an exception of all *churches* and *vicarages* thereto *belonging*, a *perpetual curacy belonging to the rectory* passed by the grant, not being included in the exception. *Arthington & al.* v. *Chester Bp. & al.* 1 *H. Black.* 418.

PRESCRIPTION.

1 This country has now been settled long enough to allow of the time necessary to prove a prescription. *Rust* v. *Law et al.* 6 *Mass.* 90.

2 Prescription does not give the right of erecting a building on the land of another. *Cortelyou* v. *Van Brudt.* 2 *Johns. Rep.* 357.

PRESENTATION.

1 In equity the mortgagor presents to a living. *Gally* v. *Serjeant Selby.* *In Chanc.* 1 *Str.* 403.

2 If *A.* and *B.* coparceners of an advowson do not agree to present on a vacancy, *A.* the eldest, or her assigns, may present to the first turn, and *B.* or her assigns, to the next. *Barker* v. *The Bishop of London.* *Willes*, 659.

And if, when *A.* and *B.* do not agree, *C.* (a stranger) implead *A.* only by *quare impedit* on a vacancy, and recover, it is a bar to a *quare impedit* brought by *B.* against *C.* for that turn. *Ibid.*

3 Where the incumbent is likewise patron and dies, his heirs, and not his executor, shall present. *Holt* v. *Bishop of Winton.* 3 *Salk.* 280.

4 Presentation may destroy impropriation, but not a donative. *Ladd* v. *Widdows.* 2 *Salk.* 541.

5 Where an advowson is in common, so that the patrons are to present by turns, a prerogative presentation of the crown doth not pass for the turn of the otherwise rightful patron. *The Warden and Commonalty of the Mystery of Grocers of the city of London* v. *the archbishop of Canterbury and Backhouse.* 3 *Wils.* 231.

PRESENTMENT.

1 A caption, representing a presentment to have been made at a court capable of taking, is good, though it states that such court was held with a court incapable. If a caption states the year of the king in which it was taken, it need not state the year of our Lord, and an improper statement of it will be only surplusage. A statement of it in *English* figures is improper. *Rex* v. *Everard.* 1 *L. Raym.* 638. *Salk.* 195.

2 Presentment must be in Latin. *The King* v. *Scott.* 2 *Str.* 870.

PRESIDENT OF THE UNITED STATES.

1 A commission is not necessary to the appointment of an officer by the executive. *Marbury* v. *Madison.* 1 *Cranch*, 178.

The president cannot authorize a secretary of state to omit the performance of those duties which are enjoined by law. *Ibid.* 160.

A justice of the peace in the district of *Columbia* is not removeable at the will of the president. *Ibid.*

2 The instructions of the president of the *United States*, if not warranted by law, will not justify the commander of a ship of war of the *United States* in executing them. *Little* v. *Barreme.* 2 *Cranch*, 170.

PRINTS.

If a proprietor of a mezzotinto or other print will entitle himself to the benefit of the statute 8 G. 2, c. 13, and secure his property, he must engrave both his name and the day of the first publishing thereof on the plate, and print the same on the print. *Sayer qui tam* v. *Dicey and another.* 3 *Wils.* 60.

PRIORITY.

When the commonwealth is not entitled to a priority. 1 *Dallas*, 150.

PRISON-BREAKING.

If a prisoner confined in a county prison for *petit larceny*, break prison, it is a felony, for which he may be sentenced to the state prison, for a period not exceeding 14 years. *People* v. *Duell.* 3 *Johns. Rep.* 449.

PRISONER.

I. *Attorney, his presence when necessary to a prisoner.*
II. *Weekly payments to.*
III. *Supersedeas.*
IV. *Other points relative to.*

I. *Attorney, his presence when necessary to a prisoner.*

1 One in execution may confess a new judgment without the presence of an attorney. *Watkins* v. *Hanbury.* 2 *Str.* 1245.

2 Warrant of attorney to confess a judgment by one in *custody* under an *execution* is good, though no attorney be present on his behalf at the time of its being executed. Vide 2 *Str.* 1245. [And 1 *Term Rep.* 715. 7 *Term Rep.* 19.] *Fell* v. *Riley.* *Cowp.* 281.

3 No warrant of attorney from prisoner good, but where there is an attorney *pro def.* present. *Regula Generalis.* 2 *Str.* 902.

4 A warrant of attorney shall not be set aside on account of its being given by a defendant in custody, without an attorney present on his part, if executed by the defendant purposely to cheat plaintiff. [See 1 *Bos. & Pull.* 97.] *Gillman* v. *Hill.* *Cowp.* 141.

5 The court held that the presence of an attorney of C. P. at the execution of a warrant to enter up judgment in B. R. was sufficient. *Bland* v. *Pakenham.* 1 *Str.* 530.

6 Necessity of attorney for defendant in warrant of attorney, to confess judgment, limited to particular causes, upon which party is in custody. *Holcombe* v. *Wade.* 3 *Burr.* 1792.

7 A man in custody of the sheriff at the suit of one person, may give a warrant of attorney to confess a judgment to another, without having an attorney on his part present. *Finn* v. *Hutchinson.* 2 *L. Raym.* 797.

8 A defendant, lodging within the rules of the Fleet, at the house of the officer who arrested him, and who was his security to the warden, is so far a prisoner, that he cannot execute a warrant of attorney to confess judgment, without the presence of one who is *bona fide* his own attorney. *Warakar* v. *Gascoyne.* 2 *Black.* 1297.

9 When a defendant in custody executes a warrant of attorney to confess a judgment, there must be an attorney present on his part; the presence of the plaintiff's attorney is insufficient, though the defendant consent to his acting as his attorney also. *Hutson* v. *Hutson.* 7 *Term Rep.* 7.

10 But when a defendant is *in execution* his attorney need not be present. *Birch* v. *Sharland.* 1 *Term Rep.* 715. *Crompton* v. *Steward.* 7 *Term Rep.* 19.

11 Or if he be in custody at the suit of a third person, and not of the plaintiff. *Smith* v. *Burlton.* 1 *East*, 241.

12 Interlocutory judgment having been signed against a prisoner in custody of the marshal; the plaintiff's attorney took a *cognovit* from him for 200l., with a *defeasance* on paying 49l. (the real debt and the costs; but no attorney was present on the part of the defendant; though this case was not strictly within the rule of court, (made 15 Car. 2,) which only mentions prisoners in the custody of the *sheriff's officers*, yet the court interfered for the relief of a prisoner. *Parkinson* v. *Caines*, 3 *Term Rep.* 616.

13 But at the plaintiff's request they permitted him to alter his judgment

to the real debt, on paying the costs. *Ibid.*

14 A warrant of attorney to confess judgment, executed by a prisoner in custody on criminal process, is good, though he have no attorney present. *Charlton* v. *Fletcher.* 4 *Term Rep.* 483.

15 If a defendant in custody, being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and thereupon produces a person as such, in whose presence he executes the warrant of attorney; the court will not set aside the proceedings thereon, because the person so produced by the defendant was not an attorney. *Jeyes one, &c.* v. *Booth.* 1 *Bos. & Pull.* 97.

II. *Weekly Payments to.*

1 The court of K. B. on a first application gave an opinion that the notes for the weekly payments of 3s. 6d, under the *Lord's* act must be stamped. *Pitman* v. *Haynes.* 7 *Term Rep.* 530.

2 But afterwards, on mature deliberation, they held that such a note need not be stamped. *Tekell* v. *Casey.* 7 *Term Rep.* 670. And see *Bowring* v. *Edgar*, in C. P. 1 *Bos. & Pull.* 270.

3 A note for groats must be signed by all the creditors in the suit; and a defendant was discharged, though he had received some payments under a note signed only by one of the parties. *Rex* v. *Wilkinson.* 7 *Term Reports*, 156.

4 But where a debtor was in execution at the suit of several plaintiffs on a joint debt, and one of them gave a note for the weekly payments signed by him alone "for himself and partners;" this was held to be good. *Melix & al.* v. *Humphrey.* 8 *Term Rep.* 25.

5 When several executors are plaintiffs, the note must be signed by all of them. *Lepine & al.* v. *Bayley.* 8 *Term Rep.* 325.

6 If a note for payment of the allowance to a prisoner under the Lord's act be dated on a *Sunday* and delivered on a *Monday*, and contain a general promise to pay the allowance weekly, the prisoner is entitled to be discharged. *Constantine* v. *Pugh.* 3 *Bos. & Pull.* 184.

7 *Qu.* Whether such a note ought not to contain an express promise to pay the allowance on a *Monday*, although it be dated on that day of the week. *Ibid.*

8 If a note for the weekly allowance to a prisoner in execution at the suit of a corporation, be sealed with the corporation seal, it is a sufficient compliance with the words of the Lord's act; which require it to be signed with the name or mark of the plaintiff. *Doe d. Cutler's Company* v. *Hogg.* *New Rep.* 306.

9 The note cannot be signed by the creditor's attorney if the creditor be dead. 1 *Bos. & Pull.* 336.

10 The court of C. P. held, that they could not, under the words of 37 G. 3, c. 8, s. 2, moderate the sum to be paid weekly to a prisoner on his being remanded, but that a note must be signed for the full sum directed by that act. *Rex* v. *Davis.* 1 *Bos. & Pull.* 336.

11 An insolvent debtor has a right to his discharge if his groats be not paid before 10 o'clock at night of the day on which they are payable: and this right is not waived by the turnkey on the felon's side accepting them after that time. *Fisher* v. *Bull.* 5 *Term Rep.* 36.

12 But if the turnkey accept a *French* half crown of the creditor in payment of the groats, although the prisoner afterwards refuse it, that is a sufficient discharge as to the creditor. 5 *Term Rep.* 36. *n.*

13 Payment of the weekly allowance to a prisoner under the Lord's act, to the person who opens the door of the prisoner is a sufficient payment

to the prisoner, within the meaning of the act. *Parsons* v. *Salomon.* *New Rep.* 111.

III. *Supersedeas.*

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1 A defendant is not supersedeable for want of declaration, till the end of the term after that in which the process is returnable, not that in which he is arrested. *Law* v. *The Bishop of Lincoln and others.* 2 *Black.* 1242.

2 A prisoner shall be discharged on common bail for want of declaration in two terms. The writ was sued out in *Easter*, returnable in *Trinity*, and the arrest in *Easter*, and no declaration till after the end of *Trinity*. *Pullen* v. *White.* 3 *Burr.* 1448.

3 Prisoner discharged, on common bail in action, on the judgment after the expiration of the two terms. *Maud* v. *Branthwaite.* 2 *Str.* 943.

4 Defendant who surrenders himself in discharge of his bail, to be discharged for want of being charged in custody within two terms. *Russell* v. *Stewart.* 3 *Burr.* 1787.

5 Prisoner is not bound to give plaintiff notice of his removal to another prison, to entitle him to a supersedeas. *Filkes* v. *Allen.* 2 *Str.* 1153.

6 Time of negotiation for a compromise (set on foot by the defendant himself) not to be computed upon an application for a *supersedeas.* *Walter* v. *Stuart.* 2 *Black.* 918.

7 If *committitur* is not entered on record within two terms, prisoner is entitled to his discharge. *Fotterel* v. *Philby.* 3 *Burr.* 1841.

8 Defendant in custody supersedeable, if final judgment be not signed within three terms inclusive after declaration delivered. *Knight* v. *Parker.* 2 *Black.* 759.

9 A plaintiff shall have every day in the second term to charge a prisoner in execution. *Garratt* v. *Mantell, a Prisoner.* 2 *Wils.* 380.

10 If after judgment the defendant is superseded for want of being charged in execution; if debt be brought on that judgment, and judgment recovered thereon, the defendant may be taken in execution on such second judgment. *Ismay* v. *Dewin.* 2 *Black.* 982.

11 Final judgment against a prisoner in *Michaelmas* term last; the plaintiffs being then bankrupts, assignees could not charge him in execution in *Hilary* term last, being prevented by the defendant's plea to their *scire facias*; supersedeas refused. *Bibbins and others* v. *Mantell, a Prisoner.* 2 *Wils.* 378.

12 One in custody of the sheriff entitled to his discharge, for want of proceeding in like manner as if in custody of marshal. *Holland* v. *Serjeant.* 1 *Salk.* 98.

13 Convict for perjury not to be discharged as insolvent debtor. *Rex* v. *Norris.* 4 *Burr.* 2142.

14 A prisoner must sign the petition for a day rule before he goes at large. *Anon.* 1 *Str.* 503.

15 The court of K. B. held that the rule that a prisoner who is once supersedeable always continues so, only holds so long as he remains in *the same custody, and under the same process.* *Rose* v. *Christfield.* 1 *Term Rep.* 591.

16 So that if a prisoner on mesne process were supersedeable for any irregularity, he cannot take advantage of that after he is charged in execution, if he had any opportunity of applying on that ground before he was charged in execution. *Ibid.*

17 The court of C. P. (*Heath* and *Rooke*, J. J. abs. *Buller*, J.) held, that if a defendant be supersedeable for want of judgment being entered up in time, but not actually discharged, he cannot be detained in an action on the judgment. *Pierson* v. *Goodwin.* 1 *Bos. & Pull.* 361.

18 Defendant discharged out of the custody of the marshal, because there was no acknowledgment by him of the defendant's being in custody in the term in which he was

charged in execution. *Fisher* v. *Stanhope*. 1 *Term Rep.* 464.

IV. *Other Points relative to.*

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1 The high-bar money does not belong to the poor prisoners on the common side of the prison of the court of K. B. *Case of the poor Prisoners on the Common Side.* 2 *Burr.* 867.

2 A prisoner under criminal process in the house of correction cannot be brought up by *habeas corpus ad respondendum*, for the purpose of being charged with a declaration on a bailable writ, and recommitted to his former custody so charged; for the court have no power to make the gaoler of such prisoners liable for the escape of a prisoner under civil process. *Brandon* v. *Davis.* 9 *East*, 154.

Aliter in the case of a sheriff or gaoler of the court. *Ibid.*

PRIVILEGE.

I. *Arising from Office, or Profession.*

II. *Arising from other Circumstances.*

I. *Arising from Office or Profession.*

1. An officer of any of the courts at *Westminster* may plead his privilege, without producing at the time his writ of privilege under the seal of the court; but if he does produce it, his privilege cannot be traversed. In the beginning of a plea to the jurisdiction, the defendant need not insist that the court ought not to have cognizance. A defendant is not entitled to costs upon a judgment in his favour on a demurrer to a plea in abatement. *Thomee* v. *Lloyd.* *L. Raym.* 836. *Salk.* 194.

2 Clerk to a prothonotary, not a good plea to a privilege. *Willis* v. *Battershell.* 3 *Salk.* 283.

3 A plea of privilege by an officer of any of the courts of *Westminster* need not state the custom of the court which entitles him to his privilege, it is sufficient if it shews that the defendant is an officer, and that his attendance on the court is necessary. *Hopkins* v. *Squibb.* 1 *L. Raym.* 702.

4 The clerks of a prothonotary of C. P. are not entitled to privilege. *Payne* v. *Fry.* 1 *Str.* 546. *Sed Qu.*

5 The privilege of a clerk of a prothonotary in C. P. is to be sued by writ; of an attorney, to be sued by bill. *Baker* v. *Swindon.* 1 *L. Raym.* 399. 3 *Salk.* 282.

6 Plea of privilege for a 60th clerk in chancery ought to allege, that defendant is actually attendant on the office; that being the ground of the privilege: and held bad for want of such allegation. *Goldsmith* v. *Baynard.* 2 *Wils.* 228.

7 There are two sorts of privilege in the common pleas; the one is of the officers of that court, to be sued there by bill; and the other is of their clerks, to be sued there, and not elsewhere, by originals. *Ogle* v. *Norcliffe.* 3 *Salk.* 283. 2 *L. Raym.* 869.

8 Privilege legal of attorney well pleaded, though not in practice, so long as the name on the roll. *Ruth* v. *Weddall.* 3 *Salk.* 285.

9 Privilege may be pleaded *per attornatum* in an action against an attorney of C. P. and K. B. where the fact of attorney, or not, is traversed and he answers over. *Edwards* v. *Copland.* 3 *Salk.* 283.

10 This court is competent to decide on a plea of privilege, pleaded by a member of the house of representatives, in bar to an action for slander. *Coffin* v. *Coffin.* 4 *Mass.* 1.

11 The freedom of deliberation, speech and debate, secured by the declaration of rights to each house of the legislature, is rather the privilege of the individual members, than of the house as an organized body: being derived from the will

of the people, the members are entitled to it, even against the will of the house. *Ibid.*

12 The article securing this freedom ought to be construed liberally, that its full design may be answered: and it extends to every act resulting from the nature of the member's office, and done in the due execution of it; and exempts him from prosecutions for every thing said or done by him as a representative, whether according to the rules of the house or not. *Ibid.*

13 So if he is sitting on a committee in a lobby, or in a convention of the two houses out of the representative's chamber. *Ibid.*

14 A representative is not answerable in a prosecution for defamation, if the words charged were uttered in the execution of his official duty, although spoken maliciously; nor if not uttered in the execution of his official duty; and not spoken maliciously, or with intent to defame. *Ibid.*

15 A member of the assembly is not entitled to his privilege, after he has reached home, though within the 14 days allowed for his return. *Colvin* v. *Morgan.* 1 *Johns. Cases*, 415.

16 A member of congress is privileged from arrest only while *at* congress, or *actually* going to or returning from congress. *Lewiss* v. *Elmendorf.* 2 *Johns. Cas.* 222.

17 A lieutenant of another county who comes to *Philadelphia*, to take out the commissions of some militia officers, is not privileged from arrests while here. 1 *Dallas*, 295.

A sheriff elect who comes from another county to solicit counsel for his appointment, is not privileged from arrests while here. *Ibid.*

18 A member of assembly, or of a state convention, is privileged from being arrested, or served with a summons, during the sitting of the assembly or convention. 1 *Dallas*, 302.

19 A consul residing abroad and having entered into partnership with another person, is not privileged from being sued. 1 *Dallas, in not.* 305.

20 Privilege of members of congress from arrest on mesne process, or execution. 3 *Dallas*, 478.

21 Privilege of a member of assembly and when to be claimed. 4 *Dallas*, 107.

22 Privilege of a foreign minister. 4 *Dallas*, 321.

II. *Arising from other circumstances.*

1 *H.* came to confess an indictment, and the court held that he had no privilege *eundo* and *redeundo*, because there was no process against him. *Anon.* 2 *Salk.* 544.

2 Clergyman not obliged to be expenditor of sewers. *Case of the Vicar of Dartford.* 2 *Str.* 1107.

3 No writ of privilege against a justice's being constable. *Mr. Delamotte's case.* 2 *Str.* 698.

4 Privilege does not take away privilege. *Hetheringtun one, &c.* v. *Lowth.* 2 *Str.* 837.

5 A defendant, illegally in custody at the suit of one plaintiff, is not privileged from arrests at the suit of another, unless there be some collusion. *Crowden* v. *Walker.* 2 *Black.* 823.

6 A party who has attended his cause all day in court, and in the evening retires to dine with his attorney and witnesses at a tavern in *Palace yard*, is privileged from arrests, *causa redeundi.* *Lightfoot* v. *Cameron.* 2 *Black.* 1113.

But false imprisonment does not lie for such arrest. *Ibid.* 2 *Black.* 1196.

7 Though the affidavit to ground a *capias* against a freeholder contains the words, that "he has not been resident, &c." the court are not precluded, and will inquire into the circumstances of the case, in order to ascertain, whether the non-residence comes within the meaning of the act of assembly. 1 *Dallas*, 246.

8 A freeholder who quits the state for a particular purpose *animus revertendi*, leaving his family behind him, does not lose his privilege of being sued by summons. 1 *Dallas*, 348.

9 A person attending court is not privileged from being arrested upon a *ca. sa.* 1 *Dallas*, 356.

10 Judgment before a justice of the peace, is sufficient to defeat a freeholder's privilege of being sued by summons. 1 *Dallas*, 438.

11 Privilege of a witness and a party, in a suit. 4 *Dallas*, 329, 386.

12 No privilege against a *subpœna*. 4 *Dallas*, 341.

PRIZE.

1 When there is a joint capture by several privateers, they are to share in proportion to the number of men in each. *Roberts* v. *Hartley*. 1 *Doug.* 311.

2 A captain of marines who happens to be on board a man of war when she takes a prize, but does not belong to her complement, shares only as a passenger. *Wemys* v. *Linzee*. 1 *Doug.* 324.

3 The admiralty court may give reparation in damages for personal injuries received on occasion of a capture as a prize. *Le Caux* v. *Eden*. 2 *Doug.* 594.

4 When a capture is made at land by the assistance of a fleet, all questions concerning the property captured belong exclusively to the jurisdiction of the admiralty court. *Lindo* v. *Rodney*. 2 *Doug.* 613, *n.*

The common jurisdiction of the admiralty is limited to things done *super altum mare*. *Ibid.*

But, in matters of prize, the jurisdiction depends not on locality, but on the subject matter, which is governed by the *jus belli*, and not by the rules of the common law. *Ibid.*

5 A flag officer of the *Cape of Good Hope* sends a ship of his squadron within the limits of another flag officer's command in the *Asiatic* seas, for the special purpose of getting her repaired; and after the ship's going there and completing her repairs in the manner directed by the latter officer, and receiving an order from him to convoy certain ships on her return to her former station; while executing such order, being accidentally separated from her convoy, took a prize within the limits of the flag officer's command in the *Asiatic* seas, but in the course of rejoining her original flag officer at the Cape: Held that the latter was not entitled to the flag officer's 1-8th share of the prize; his command over the ship being suspended while she was out of the limits of his own, and within the limits of another command. *Holmes* v. *Rainer*. 8 *East*, 502.

PRIZE MONEY.

1 *Qu.* Whether an officer under arrest and suspension on board the fleet for an offence of which he is afterwards acquitted, is entitled to prize money taken during such arrest and suspension? *Johnstone* v. *Sutton*, *in error*. *Exch. Ch.* 1 *Term Rep.* 493.

[This question came incidentally before the court in an action by the officer suspended, against his superior officer for a malicious prosecution.]

2 In consequence of a trial, directed by the court of chancery, the court of K. B. declared their positive opinion, that the captain of a ship, actually on board at the time of a capture, was entitled to prize money though under arrest at the time, and though another officer had been sent on board to command the ship. *Lumley* v. *Sutton*. 8 *Term Rep.* 224.

3 A flag officer, who, after giving orders to one of the ships under his command to sail on a cruise, received an appointment to another

command, is not entitled to share in a prize taken (after his accepting the new appointment) by the ship so sent out by him to cruise, the ship not being actually under his command at the time of the capture. *Johnstone* v. *Margetson.* 1 *H. Black.* 261.

4 Where a ship belonging to a squadron under the command of an admiral, sails by his orders on a cruize, but before any prize is taken he is superseded in his command by another admiral, and afterwards a prize is taken by the ship which so sailed; though it should be doubtful to which of the admirals the share of admiral would belong; clearly the captain of the ship taking the prize is not entitled to it. *Taylor* v. *Lord H. Pawlett, coram Lord Mansfield, nisi prius, a.* D. 1759. 1 *H. Black.* 264, *n.*

5 But under such circumstances, the admiral who succeeds to the command, i. e. who is *actually in command at the time when the prize is taken*, is entitled. *Pigot* v. *White.* 1 *H. Black.* 265, *n.*

6 By the 4th article of the king's proclamation of 1797, respecting the distribution of prize, as to flag officers, it is directed, that a chief flag officer, *returning home* from a foreign station, shall have no share of the prizes taken by the ships *left behind to act under another command*: this applies as well to another *command devolving* by seniority, as to another chief flag officer *appointed* by express commission to succeed the officer *returning home*: and such returning home, &c. means the commencement in fact of a commander in chief's departure from the local station of his command for the purpose of returning home, leaving his fleet behind, i. e. leaving it for all effective purposes under the control of another competent, under the terms of the proclamation, to command in his stead. Therefore, where a flag officer, commander in chief in the *Mediterranean*, returned to *England*, by leave of the admiralty for the recovery of his health, leaving the fleet under the command of the next flag officer in seniority, but having before his departure dispatched one of the fleet on a cruise who made captures within the limits of the station, after the departure homewards of such commander in chief out of those limits, but before any new orders given by the next flag officer on whom the command of the station had devolved: held, that the right to the 1-8th, or commanding flag officer's share of prize, belonged to the *present acting* flag officer in command on the station, and not to the chief flag officer *returning home*; although the latter still retained the title, pay, and table money of commander in chief after his return home, and did not resign his commission as such till after the prize taken, and had official correspondence with the admiralty in that character till his resignation, and made appointments in the fleet as such: the governing principle of his majesty's proclamation being, that the reward of prize should be to the present effective commander on the station, and not to the nominal one who returns home, leaving ships behind to act under another command. *Lord Nelson* v. *Tucker, in error.* 4 *East*, 288.

Note. The action was brought in C. P., and after two arguments upon a special verdict found, the court was equally divided, but judgment was given *pro forma* for the defendant. 3 *Bos. & Pull.* 257.

7 And the doctrine in the preceding case will hold, though the superior officer, before his departure, directed the inferior to take under his command those ships only *by name*, which continued with him at the principal station, and the detached squadron *when they returned to the same place* after the particular service performed, for the performance of which he had before limited a

time; and though such superior officer's commission was to command in chief a squadron upon a *particular service*, and not merely upon a particular station. At least the superior is not entitled to recover such share of prize from the inferior who had received it. *Lord Keith* v. *Pringle*. 4 *East*, 262.

8 One of the ships of a squadron is detached by the commanding flag officer to lie off a certain place within the limits of the station, from whence the captain, *without any further orders* for that purpose, though he had written for such to his superior officer and waited for them some time, takes upon him, *on his own responsibility*, (though from laudable motives which were afterwards approved of by the admiralty) to depart and to proceed as convoy with the homeward-bound trade, and in the course of the voyage home, out of the limits of his station, (but nothing turned on the question of limits) he takes a prize: held, that the superior flag officer who had before the capture succeeded the one by whom the order for being detached had been originally issued, (admitting him to stand in the same situation in point of right) was not entitled to share the flag officer's share of 1-8th given by the king's proclamation to a flag officer *directing or assisting* in a capture by a ship under his command. *Sir Henry Harvey, Knt.* v. *Cooke*. 6 *East*, 220.

9 Every instrument by which a seaman or mariner conveys his prize-money or wages in the hands of the public officers, must be in the form prescribed by the statute 26 G. 3, c. 63, and the other statutes to which it refers. *Turtle* v. *Hartwell*. 6 *Term Rep.* 426.

PROBATE.

A prerogative probate, where there are no *bona notabilia*, is not void, but only voidable. *The King* v. *Loggen and Froome*. 1 *Str.* 73.

PROBATE BOND.

In debt on a bond made by a guardian of two minors to the judge of probate, it appeared that the guardian had been cited to settle his guardianship account, but had neglected so to do; after the suit was commenced on the bond, the accounts were settled, and a balance found due from the guardian to one of the wards, and from the other ward to the guardian; the bond was adjudged to be forfeited, and execution awarded for the first ward for the balance found due him, and for the other for nominal damages only, and a third execution for the costs for the use of the two wards jointly. *Dawes, Judge, &c.* v. *Bell et al.* 4 *Mass.* 106.

PROCEDENDO.

1 *Procedendo* may be awarded after filing the return of *habeas corpus*. Record not removed by *habeas corpus*. *Fazacharly* v. *Baldo*. 1 *Salk.* 353.

2 Two partners sued in the sheriff's court *London*, one sues out *habeas corpus procedendo* against the other. *Fry* v. *Carey*. 1 *Str.* 527.

3 *Habeas corpus* after interlocutory judgment, and then defendant died, *procedendo* awarded. *Anon.* 1 *Salk.* 352.

4 Though *habeas corpus* was not delivered to the sheriff's court in *London*, till after interlocutory judgment, and notice of inquiry, yet *procedendo* denied. *Cox* v. *Hart.* 2 *Burr.* 758.

5 *Procedendo* denied to a borough court, who had tried a cause without the presence of an utter barrister of three years' standing. *Fairley* v *M'Connell*. 1 *Burr.* 548.

6 *Procedendo* granted to quarter ses-

sions, because *certiorari* had not issued till after the defendants had confessed the assault below. *Rex* v. *Gwynne et al.* 2 *Burr.* 749, 752.

7 If an indictment for felony has been removed here from an inferior court, in order to issue process of outlawry upon it, and the party accused come in, this court will award a *procedendo* to carry the record back. *Rex* v. *Perry.* 5 *Term Rep.* 478.

8 If, after a *procedendo* to carry back a cause to an inferior court, the plaintiff recover, and then sue out a *scire facias* against the bail below, and they remove the proceedings against them into this court by *habeas corpus*, this court will award a *procedendo* in the suit against the bail. *Dixon* v. *Heslop.* 6 *Term Rep.* 365.

9 A cause was removed from an inferior court by an *habeas corpus cum causa*, to which a return was made, stating a custom under which the defendant was sued and arrested; the defendant who removed the cause not having proceeded in it here, the court awarded a *procedendo*, though error was suggested on the face of the proceedings below; this court saying they would leave the defendant to his writ of error. *Horton* v. *Beckman.* 6 *Term Rep.* 760.

PROCLAMATION.

The rights of the holders of military warrants, issued under the British proclamation of 1763, as recognized by the laws of *Virginia*. 3 *Dallas*, 425, to 466.

PROCURATION.

Procurations are due of common right to the ordinary or his vicar, the arch-deacon, although the church be a rectory impropriate, without a vicarage endowed, and they are properly sueable for in the ecclesiastical court. *Sanderson* v. *Clagget.* 1 *Str.* 421.

PROHIBITION.

I. *Respecting Ecclesiastical Suits and courts.*
II. *To the Courts of Admiralty.*
III. *Respecting Suits in other Courts.*

I. *Respecting Ecclesiastical Suits and Courts.*

1 A prohibition cannot be granted to a spiritual court merely because it has no power to try one of the facts stated in the pleadings, unless such fact is denied. The spiritual court cannot try the existence of a custom. A man may be sued in the spiritual court for not saying divine service in a chapel. *Jones* v. *Stone.* 1 *L. Raym.* 578. *Salk.* 550.

2 A woman libelled in the ecclesiastical court against another for these words, "You are a brandy-nosed whore; you stink of brandy." Mr. *Earle* moved for a prohibition, insisting they rather charged intemperance than incontinence; but the court denied a prohibition. *Aceberry* v. *Barton.* 2 *Salk.* 693.

3 Mr. *Carthew*, moved for a prohibition to be directed to ———, to stay a suit against *Dart* for tithes of an old mill, viz. for every tenth toll-dish, upon a suggestion, that it was an old mill. But *per Holt*, chief justice, the plaintiff ought, in his suggestion, to lay a prescription in *non decimando*, and also bring an affidavit to the truth of the fact. *Dart* v. *Hall.* 1 *L. Raym.* 441.

4 Where the foundation and principal subject of a suit is an ecclesiastical matter, and the temporal right only an incident, the ecclesiastical court shall proceed as long as they will try the matter as the common law would have done in such a case, in respect of that which is temporal (for there is no defect of original

jurisdiction,) but if they refuse to try it as the common law would have it tried, a prohibition shall issue. *Lofft.*

5 Where the right of tithes is admitted, and a question arises between the rector and vicar to whom they are payable, that question is triable in the spiritual court, and consequently the common law courts will not grant a prohibition. *Cheeseman* v. *Heby.* *Willes*, 680.

Whether or not the spiritual court has jurisdiction over a cause, depends not on the parties being ecclesiastical persons, but on the nature of the question in dispute. *Ibid.*

6 The register of a spiritual court cannot sue there for his fees. A judge cannot commit a man for refusing to pay court fees. *Pollard* v. *Gerard.* 1 *L. Raym.* 703. *Salk.* 333.

7 Prohibition to the spiritual court to stay proceedings on 5 & 6 Ed. 6, c. 4, s. 2, for smiting or laying violent hands, denied. *Wilson, Clerk,* v. *Greaves.* 1 *Burr.* 240.

8 Prohibition granted to the spiritual court to stay their proceedings in a cause relative to the will of a married woman, who had power by settlement to make a will. *Jenkins* v. *Whitehouse and another.* 1 *Burr.* 431.

9 A parish clerk may execute the office by a deputy, without licence of the ordinary. *Peak* v. *Bourn.* 2 *Str.* 942.

10 Prohibition shall not go to the spiritual court after sentence, unless defect of jurisdiction appears upon the face of the libel. *Paxton* v. *Knight.* 1 *Burr.* 314.

11 A prohibition is not to be granted to the spiritual court to stay a suit for a mortuary upon a suggestion that there is no custom for its payment; for that fact ought to be pleaded in the spiritual court. *Johnson* v. *Oldham.* 1 *L. Raym.* 609.

12 Where there is a legacy to the executor, the spiritual court cannot entertain a suit for distribution of the surplus among the next of kin, under the statute. *Hatton* v. *Hatton.* 2 *Str.* 865.

13 Suit may be in the spiritual court for a presentation where the title made to it in the libel is general, although the plea put in is, that there was no prescription. *Dr. Goche* v. *The Bishop of London.* 2 *Str.* 879.

14 A prohibition was granted to a suit for these words, spoken by one clergyman of another; "You are an old rogue and a rascal, and a contemptible fellow, despised and hated by every body." *Musgrave* v. *Bovey.* 2 *Str.* 946.

15 A man cannot be sued in the spiritual court for soliciting a woman's chastity, if the solicitation was accompanied with force; at least he cannot after conviction on an indictment for assaulting her with intent to ravish her, if the assault and solicitation were at the same time. *Gallisand* v. *Rigaud.* 2 *L. Raym.* 809. 2 *Salk.* 552.

16 Prohibition to a suit in spiritual court for marrying without banns or licence. *Campbell* v. *Aldrich.* 2 *Wils.* 79.

17 Argued, whether a prohibition lay to the ecclesiastical court in a suit for teaching school without licence, from the ordinary, before the act for preventing the growth of schism. *Matthews* v. *Burdett.* 2 *Salk.* 672.

18 If a suit is entitled, in a spiritual court, for a rate, part of which is bad, the court will grant a prohibition for the whole. The parishioners, not the churchwardens, ought to asses the rate to repair the church. The parish ought to repair the nave of the church. *Pease* v. *Prouse.* 1 *L. Raym.* 59.

19 *Quere.* Whether a prohibition will lie to court christian after a *modus* pleaded, so as no proceeding is had since the plea. *Graham* v. *Potts,* 1 *Black.* 295.

20 Prohibition for trying the right of naming a churchwarden in court

christian. *Williams* v. *Vaughan.* 1 *Black.* 28.

21 Prohibition to a suit for calling *H.* knave. *Hawkin's Case.* 2 *Salk.* 548.

22 On moving for a prohibition to the spiritual court for refusing a plea, the party ought to offer an affidavit of the truth of the facts in the plea. *Burdett* v. *Newell.* 2 *L. Raym.* 1211.

23 Prohibition for calling the person a drunkard. *Brown* v. *Tanner.* 3 *Salk.* 288.

24 Prohibition *quoad* annulling marriage and bastardizing issue. *Harris* v. *Hicks.* 2 *Salk.* 548.

25 Prohibition to the spiritual court for words. *Anon.* 3 *Salk.* 288.

26 Prohibition touching a pew in the church. *Witcher* v. *Cheslam.* 1 *Wils.* 17.

27 Where the spiritual court hath not an original jurisdiction, it is never too late to move for a prohibition. *Parker* v. *Clarke.* 3 *Salk.* 87.

28 Prohibition shall not go for a *modus* or other foreign matter unless it be pleaded below. *Anon.* 2 *Salk.* 551.

29 Prohibition to a suit for a legacy for refusing proof of payment, by one witness. Temporal incident must be tried according to rule of the common law. *Shotten* v. *Friend.* 2 *Salk.* 547.

30 A prohibition shall not be granted to proceedings in the spiritual court for tithe of wood not titheable, unless it appears upon the proceedings there not to be titheable. *Dike* v. *Brown.* 2 *L. Raym.* 835.

31 Prohibition cannot be granted upon process before libel and appearance. *Fraser* v. *Watson.* 1 *Salk.* 35. 2 *L. Raym.* 931.

32 A prohibition is not to be granted to a suit in the spiritual court for calling a woman "whore," in *London*, on suggestion of the custom of *London*, unless the offender lives within the jurisdiction of *London*. *Johnson* v. *Bewick.* 1 *L. Raym.* 711.

33 Prohibition lies to a spiritual court to stay proceedings for calling woman whore in *London*. *Brand* v. *Roberts.* 4 *Burr.* 2418.

34 Words tantamount to whore are within the custom of *London*. *Vicars* v. *Worth.* 1 *Str.* 471.

35 No prohibition after sentence, though the word whore appears to be spoke in *London*. *Argyle* v. *Hunt.* 1 *Str.* 187.

36 To support prohibition to consistory court of *London*, for calling whore in *London*, there must be affidavit of custom, and that the words were spoken there. *Theyer* v. *Eastwick.* 4 *Burr.* 2032.

37 Prohibition to the spiritual court to stay proceedings for restoring a parish clerk, granted. *Tarrant* v. *Haxby.* 1 *Burr.* 367.

38 No fees due for burials unless by custom. *Dean and Chapter of Exeter's Case.* 1 *Salk.* 334.

39 A prohibition shall not be granted to a suit in the spiritual court for brawling and striking in the belfrey, upon a suggestion that the party went thither as a peace-officer to suppress a riot. *Wentworth* v. *Collins* 2 *L. Raym.* 850.

40 No fees due for christening or burying, unless by custom, and then the duty must be done. *Bourdeaux* v. *Dr. Lancaster & another.* 1 *Salk.* 332.

41 Prohibition to a suit for building charity-school in church yard. *The Rector, &c. of St. George, Hanover Square* v. *Stewart.* 2 *Str.* 1126.

42 Prohibition lies to the spiritual court in any suit for denying a copy of the libel; but not to admiralty. *Anon.* 2 *Salk.* 553.

43 The ordinary has no jurisdiction to compel churchwardens to be sworn. *Stutter* v. *Freston.* 1 *Str.* 53.

44 The court will grant a prohibition if a proctor or other officer of the spiritual court sue there for his fee. *Pearson* v. *Campion.* 2 *Doug.* 629.

45 Prohibition to the spiritual court of *Bristol*, for calling a woman a

strumpet in the city of *Bristol*. *Power* v. *Shaw*. 1 *Wils*. 62.

46 Prohibition granted to a suit for fees for swearing churchwardens. *Goslin* v. *Ellison*. 1 *Salk*. 330.

47 Prohibition to probate of will of lands and goods, upon suggestion of *non compos*, denied. *Partridge's Case*. 2 *Salk*. 552.

48 No prohibition for calling a woman jilt and strumpet. *Ferguson* v. *Cuthbert*. 2 *Str*. 823.

49 Where the ordinary hath a power and executes it, it shall not be repealed. *Sir George Sand's Case*. 3 *Salk*. 22.

50 Prohibition to settling churchwardens' accounts. *Adams* v. *Rush*. 2 *Str*. 1183.

51 Prohibition shall not be granted to the spiritual court, they having pronounced sentence. *Symes* v. *Symes*. 2 *Burr*. 813.

52 Prohibition may be granted after sentence where cause is not of spiritual conusance; otherwise for citing out of the diocese. *Gardner* v. *Booth*. 2 *Salk*. 549.

53 No prohibition for *you* are a bawd. *Lockey* v. *Dangerfield*. 2 *Str*. 1100.

54 After sentence, prohibition shall not go, unless want of jurisdiction below appears upon the face of the proceedings. *Buggin* v. *Bennett*. 4 *Burr*. 2035.

55 Register of spiritual court cannot sue there for fees. Denial of just fees is a disseizin. *Ballard* v. *Gerard*. 1 *Salk*. 333.

56 Suit for fees in the ecclesiastical courts, prohibited. *Gifford's Case*. 1 *Salk*. 333.

57 Prohibition to a suit by a clerk of a parish for fees. *Pitts* v. *Evans*. 2 *Str*. 1103.

58 Prohibition to stay a suit in the spiritual court for taking bills. *Starkey and the Churchwardens of Watlington in Sussex*. 2 *Salk*. 547.

59 Where the question is, whether the rector or vicar be entitled to tithes, no prohibition lies. *Drake* v. *Taylor*. 1 *Str*. 87

Where a *modus* is pleaded in an ecclesiastical court, a prohibition may be granted any time *before final sentence*. *Darby* v *Cozens*. 1 *Term Rep*. 552. And *Notley* and *Cozens*. S. P.

61 Prohibition to a spiritual court will be granted after sentence, if it appear on their proceedings that they have exceeded their jurisdiction. *Leman* v. *Goulty*. 3 *Term Rep*. 3.

62 Therefore, though they may compel churchwardens to *deliver in* their accounts, yet as they cannot *decide on* the propriety of the charges, a prohibition will be granted if they do. 3 *Term Rep*. 3.

63 Prohibition was granted to stay a suit in the spiritual court for breaking open a chest in the church, and taking away the title deeds to the advowson. *Gardner* v. *Parker*. 4 *Term Rep*. 351.

64 Calling a person *whore* is libellous in the spiritual court. 2 *Term Reports*, 173.

65 If the spiritual court hath cognizance of part of the charge only, and not the rest, the court, after sentence below, would not grant a prohibition. 2 *Term Rep*. 473.

66 A prohibition issued to the bishop of *Chichester*, who claimed a right to present by lapse, under pretence of his visitorial authority, to the office of a canon residentiary of his church; it being a freehold office, and the right of election thereto in the dean and chapter. *The Bishop of Chichester* v. *Harwood & al*. 1 *Term Rep*. 650.

67 If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant, who is entitled to costs; but if any *modus* be found, though different from that laid, that is a ground for the court to refuse a consultation. *Brock* v. *Richardson*. 1 *Term Rep*. 427.

68 *Quere*, Whether the misinterpretation of a statute by an inferior court, the consideration of which arises incidentally in the course of

a proceeding which is confessed to be within its jurisdiction, be a ground for a *prohibition*? Whether it be not rather a matter of appeal? But clearly in such a case a prohibition will not lie, unless it be made appear to the superior court, that the party applying for the prohibition, has in the course of the proceedings in the inferior court alleged a ground for a contrary interpretation of the statute, on which he applies for the prohibition, and that the inferior court has proceeded notwithstanding such allegation. 2 *H. Black.* 533.

69 Where the spiritual court incidentally determines any matter of common law cognizance, such as the construction of an act of parliament, otherwise than as the common law requires, prohibition lies after sentence; although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below. *Gould* v. *Gapper, Clerk.* 5 *East*, 345.

70 The court of C. P. has no power to issue an original writ of *prohibition* to restrain a bishop from committing waste in the possessions of his See; at least at the suit of an uninterested person. *Semb.* That no court of common law has that power. *Qu.* If the court of chancery has not. *Jefferson* v. *Durham*, (*Bishop of*,) *& al.* 1 *Bos. & Pull.* 105.

71 Where a rector was cited in the episcopal consistorial court to shew cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church, against which it was proposed to erect a monument, to the granting of which the rector dissented; notwithstanding which the court below were proceeding to grant the faculty with the consent of the ordinary; held to be no ground for a prohibition, but mere matter of appeal, if the rector's reasons for dissenting were improperly over-ruled. *Bulwer, Clerk*, v. *Hase.* 3 *East*, 217.

72 After sentence in the ecclesiastical court in a matter of tithe, where the question turned upon the construction of an act of parliament, upon a doubt raised whether that court had not misconstrued the act, this court directed the plaintiff to declare in prohibition, for the more solemn adjudication of the question, whether supposing the court below to have misconstrued the act, a prohibition should go after sentence in a matter in which the court below had original jurisdiction, or whether it were only a ground of appeal? *Gare* v. *Gapper, and Gould* v. *Gapper.* 3 *East*, 472.

72 Prohibition granted on affidavit, that the defendant (to a libel for tithes in kind in the spiritual court) *answered on oath, or pleaded a modus*; without its appearing that the *modus* was regularly pleaded below, so as to be put in issue there. *French* v. *Trask.* 10 *East*, 348.

II. *To the courts of admiralty.*

1 A prohibition shall not be granted after a sentence to a suit in the admiralty, upon a contract, because the contract does not appear to have been made within the jurisdiction of the admiralty, if it stated to have been made *infra fluxum et refluxum maris infra jurisdictionem admiralitatis.* *Philpot* v. *Wharton.* 2 *L. Raym.* 1452.

2 Prohibition to the admiralty denied, unless the defendant would appear and give bail. *Wharton* v. *Pitts.* 2 *Salk.* 548.

3 No prohibition to a suit in the admiralty for wages, on a suggestion that the place of arrival was not a delivering port. *Brown* v. *Benn et alios.* 2 *L. Raym.* 1247.

4 A prohibition does not lie to the admiralty court for refusing the copy of a libel. *Anon.* 1 *L. Raym.* 442.

5 Prohibition shall go to the admiralty court, in a suit there for seamen's wages, if agreement be specific or under seal. *Howe* v. *Nappier*. 4 *Burr.* 1944.

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6 Where the deed comes in by incident, the admiralty may try whether it was fraudulent. *Buck* v. *Atwood*. 2 *Str.* 761.

7 Prohibition to the admiralty, in which one part owner sued against the other. *Dimmock* v. *Chandler*. 2 *Str.* 890.

8 A prohibition will be granted to a court of appeal, where it appears that they have no jurisdiction over the subject-matter, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that court. 1 *Term Rep.* 552.

9 Courts-martial, courts of admiralty, and courts of prize are all liable to the controling authority of the courts at *Westminster*; the general ground of prohibition being an excess of jurisdiction, when they assume a power in matters not within their cognizance, or act contrary to the rules of an act of parliament made to limit their authority. That they have decided wrong, or that there is error in the proceedings, may be a ground of appeal on review, *but not of prohibition*, there being no ground for the interference of the courts at *Westminster* where the matter is clearly within the jurisdiction of such inferior courts. 2 *H. Black.* 100, 101, 107.

10 The prize court of appeals has jurisdiction to decree that one who was co-agent of the captors, in whose hands the proceeds of the prize after condemnation and sale were placed, should, after a decree of restitution with interest pronounced against the captors, pay *interest* on such proceeds while in his hands to the claimant. And B. R. will not grant a prohibition to the prize court to restrain it from executing such decree, either on the ground that it did not appear on the proceeding below that the agent was a *registered* agent under the statute 38 G. 3, c. 66; because that court has original jurisdiction in *rem* and its incidents independent of the statute; nor on the ground that the court below were restrained by the 32d clause of the act from decreeing restitution of more than the *net proceeds* of the sale, awarded upon condemnation; because *interest* made of such *net proceeds* in the hands of the holder are to be deemed part of the proceeds; nor on the ground that it was not alleged that *interest* had *in fact* been made by such agent; because that was a fact for the court below to decide upon, and they must be presumed to have decided on satisfactory evidence. *Willis* v. *The Commissioners of Appeals in Prize Causes*. 5 *East*, 22.

11 A prohibition issued to the district court, in the case of a libel for damages, upon the capture of a vessel as prize, by a belligerent power, though she was alleged to be neutral *American* property; the vessel having been carried *infra præsidia* of the captors. 3 *Dallas*, 121 to 152.

III. *Respecting Suits in other Courts.*

1 If the defence stated on the proceedings below is such as, if true, ousts the inferiour court of its jurisdiction (as where the party sets up a *modus* in answer to a suit for tithes,) although there has been an interlocutory sentence against the defendant; and on an appeal that sentence has been confirmed and costs awarded, the party sued may have a prohibition both to the original court and to the court of appeal, to stay execution for the costs. *Darby* v. *Cosens*. 1 *Doug.* 378, n.

2 In prohibition the contempt is but form, and the jury need not give any verdict about it. The quantity of land demanded by the plea may

be two entire parts, without saying thirds or fourths. Though the prayer of the plea extends to lands not mentioned in the libel, yet there may be a general award of a consultation, for it depends upon the libel. *M. Statford* v. *Neale.* 1 *Str.* 482.

8 A defendant cannot move for a prohibition before he has appeared in the court to which he prays the prohibition. The garnishee, upon a foreign attachment in an inferior court, may plead that the cause of action against the principal arose out of the jurisdiction. A simple contract debt may be attached upon a foreign attachment, though it arose out of the jurisdiction of the court from which the attachment issues. *Cook* v. *Licence.* 1 *L. Raymond*, 246.

4 In prohibition, the issue laid upon the plaintiffs, who did not appear at the trial, the defendant put in his record, entered into the merits, and took a verdict, held irregular; for the plaintiff ought to have been called and nonsuited. *Gardner* v. *Davis.* 1 *Wils.* 300.

A nonsuit at *nisi prius* cannot be recorded in bank. *Ibid.*

5 A prohibition shall not be granted to a court because it has no power to try one of the facts stated in the pleadings, unless such fact is denied. A man may libel in the spiritual court for disturbance in a pew he claims in a church by prescription, or of which he has a bare possession only, if the party against whom the suit is instituted has no title to the seat. *Jacob* v. *Dallow.* 2 *L. Raym.* 755. 2 *Salk.* 551.

6 Leave to declare in prohibition, only granted when the court inclines to prohibit; not when it inclines to the contrary. *The King* v. *The Bishop of Ely.* 1 *Black.* 81.

7 Prohibition denied where the matter of suggestion is *dehors* the proceedings, unless verified by affidavit. *Caton* v. *Burton.* *Cowp.* 330.

8 Prohibition granted to a suit of equity for discovery of matters to make the defendant forfeit his freehold. *Sir Basil Firebrass's Case.* 2 *Salk.* 550.

9 A prohibition is not to be granted to the court of chancery to stay a sequestration of land, on the application of a person claiming as purchaser of the land, before the sequestration issued against the person on whose default it issued. *Davy's Case,* 1 *L. Raym.* 531.

10 The exchequer cannot serve process out of their jurisdiction, nor make a supplemental order to supply this defect, nor proceed when part is out of their jurisdiction. *Rowland et al.* v. *Hockenhulle et al. Exchequer.* 1 *L. Raym.* 698.

11 The court will not put the party to declare in prohibition, if they are clearly of opinion against granting the prohibition, because the same application may be made to the other courts. *Lindo* v. *Rodney.* 2 *Doug.* 620.

12 After rule to declare, defendant may submit and stay proceeding. *Gegge* v *Jones.* 2 *Str.* 1149.

13 A prohibition does not lie after sentence, unless the want of jurisdiction appear on the face of the proceedings. *Blaquiere* v. *Hawkins.* 1 *Doug.* 378.

14 Prohibition to the plaintiff in chancery, who had brought a bill on an *indebitatus assumpsit.* *Aston* v. *Adams.* 3 *Salk.* 82.

15 Prohibition to a suit in *Wales,* where the process was served out of the jurisdiction. *Vaughan* v. *Evans.* 1 *Str.* 630.

16 The ancient course of proceedings on a prohibition. *Anon.* 3 *Salk.* 289.

17 Prohibition shall not be granted where it is not material. *Butterworth* v. *Walker.* 3 *Burr.* 1689.

18 Where an inferior court hath no original jurisdiction, prohibition will not lie after sentence. *Anon.* 3 *Salk.* 289.

19 Prohibition to the court of honour. *Chambers* v. *Jennings.* 2 *Salk.* 553.

20 Costs are to be given in prohibition, from the time of declaring. *Sir Harry Haughton* v. *Starkey*. *Exchequer*. 1 *Str*. 82.

21 Oath ought to be made of the truth of a plea in that very court whose jurisdiction is devised to warrant prohibition. *Sparks* v. *Wood*. 3 *Salk*. 178.

22 No prohibition shall be granted upon a suggestion, any part of which is false. The commissioners of appeals from the commissioners of excise must examine the witnesses *de novo*; they cannot proceed upon the evidence given before the commissioners of excise. *Breeden* v. *Gil*. 1 *L. Raym*. 219.

23 Where the subject of a suit in an inferior court is within the jurisdiction of that court; though in the proceedings a matter be stated which is out of its jurisdiction, yet unless it is going on to try such matter, a *prohibition will not lie*. *Dutens* v. *Robson*. 1 *H. Black*. 100.

24 The court of C. P. refused to grant a prohibition to prevent the execution of the sentence of a court-martial, passed against *A*., who had *received pay as a soldier* (but assumed the military character merely for the purpose of recruiting in the usual course of that service,) though the proceedings of the court martial appeared to be in some instances irregular. *Grant* v. *Sir Charles Gould*. 2 *H. Black*. 69.

25 Prohibition denied after sentence, where the party applying had permitted the question of fact, whether the land for which tithe was claimed, were natural meadow or not, *to be tried below*. *Stainbank* v. *Bradshaw*. 10 *East*, 349.

PROMISE.

1 A promise to pay damages by a third person, in case the plaintiff will withdraw his record, is not within the statute of frauds. *Read* v. *Nash*. 1 *Wils*. 305.

2 Note of hand in the name of two, but signed by one only, promising to pay on death of *G. H.* "provided he leaves either of us sufficient to pay the said sum," or "if we shall be otherwise able to pay it," is not a negotiable note. *Roberts* v. *Peake*. 1 *Burr*. 323.

3 Where one through a mistake of the law, acknowledges himself under an obligation, which the law will not impose upon him, he shall not be bound thereby. *Warder et al.* v. *Tucker*. 7 *Mass*. 449. *Freeman et al.* v. *Boynton*. 7 *Mass*. 483.

PROPERTY.

1 A bank note, though stolen, becomes the property of him who gives a valuable consideration for it, having no notice or knowledge of the robbery. *Miller* v. *Race*. 1 *Burr*. 452.

2 A man has the property *ratione loci* in animals, which are *feræ naturæ*, on his land; but this property ceases when they quit, or are hunted off the land. *Sutton* v. *Moody*. 1 *L. Raym*. 250. 2 *Salk*. 556.

3 Where *A*. contracted with *B*. to build a vessel, and *A*. was to furnish the timber requisite to complete the frame of the vessel, and *B*. was to advance money to *A*., and also to furnish the materials for the joiners' work; and the vessel while standing on land hired by *A*. and in an unfinished state, was seized under a *fieri facias*, issued against *A*. and sold by the sheriff to *C*. who afterwards completed the vessel and sold her to *D*. In an action of trover, brought by *B*. against *D*. it was held, that the property in the vessel was in *D*. and that *B*. could not have any property in the vessel, under the contract, until she was completed and delivered to him. *Merrit* v. *Johnston*. 7 *Johns. Rep*. 473.

When the materials of *John* are united with the materials of *Richard*,

by the labour of *Richard*, who furnishes the principal materials, and those of *John* are only accessory, the right of property in the whole belongs to *Richard* by right of accession. *Ibid.*

4 A purchase at a constable's sale at auction, is not enough to prove property, in an action of trespass, unless the authority of the officer be also shown; for a sale by him without authority, would give no title to the purchaser. *Carter* v. *Sampson.* 7 *Johns. Rep.* 535.

Vide tit. Bees.

5 What acts, between the chapman and a shopkeeper, do not amount to a change, or transfer, of the property. 1 *Dallas*, 170.

PROPRIETORS.

Under an authority given by an ancient statute of the colony to proprietors of common and undivided lands to dispose of their estates, the principal construction has been that they have power to sell any part of them to a stranger: the court will not now make a different construction. 2 *Mass.* 475.

PROSECUTOR.

1 The act of assembly does not intend that a prosecutor should be indorsed on all indictments; but only where a prosecutor really exists. 1 *Dallas*, 5.

2 The defendant is not a competent witness to prove the person prosecuting, it must be proved by indifferent witnesses. 1 *Dallas*, 6.

3 The judge who tries the cause, not being authorised by the act of assembly to certify, so as to exempt the informer from costs, he cannot do it. 1 *Dallas*, 63.

PROTECTION.

1 A writ of protection is not necessary to one whose duty brings him to court, whether as juror, witness, or party: and it will not protect one who is not lawfully entitled to it. *Case of Archibald M'Neal.* 3 *Mass.* 288.

2 A party to an action, referred to the decision of the court upon a case stated, is privileged from arrest during his attendance upon the court. *Ex parte M'Neal.* 6 *Mass.* 245.

3 Where one attends the court as a witness without being summoned, he is not privileged from arrest, although he has a writ of protection. *Ex parte M'Neal.* 6 *Mass.* 264.

PUBLIC TEACHER.

1 A person, who in the character of a public protestant teacher of piety, religion and morality, demands the taxes paid by his hearers for the support of public worship, &c. must be the teacher of an incorporated society. *Barns* v. *First Parish in Falmouth.* 6 *Mass.* 401.

2 One claiming ministerial taxes must be the public teacher of one society, and that society must be an incorporated one. *Turner* v. *The 2d Precinct in Brookfield.* 7 *Mass.* 60.

3 When one would have his ministerial taxes paid over to his own teacher he must notify the parish of his election, and his teacher must demand the money within a year after the taxes are assessed. *Lovell* v. *The Parish of Byefield.* 7 *Mass.* 230.

Such teacher must be the teacher of an incorporated society. *Ibid.*

4 A person officiating as a reader in an episcopal church, without ordination, is a public teacher within the constitution. *Sanger* v. *3d Parish in Roxbury.* 8 *Mass.* 265.

Nor is it any objection to his recovering taxes paid by his hearers to another teacher, that he was engaged by contract for part of a year on-

ly, provided such contract was renewed and continued for a whole year. *Ibid.*

PURCHASOR.

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1 If one, knowing of a judgment, purchase, though for a valuable consideration, the purchase is fraudulent and void against the judgment creditor. *Devon* v. *Watts.* 1 *Doug.* 86.

2 A contractor for the purchase of a real estate, to which the title proves (without collusion) defective, entitled to no satisfaction for the loss of his bargain. *Flureau* v. *Thornhill.* 2 *Black.* 1078.

3 The word *purchase*, implies a purchase in fee. 1 *Dallas*, 20.

4 The purchaser of land from a collector of taxes must show the authority of the collector to sell. *Stead* v. *Course.* 4 *Cranch*, 403.

Q.

QUAKERS.

1 A Quaker's affirmation entitles him to admission into the *Turkey* company, without taking the oaths. *Rex* v. *Turkey Company.* 2 *Burr.* 943.

2 The court refused to receive the affirmation of a Quaker, on a motion for an attachment for non-performance of an order of court. *Skipp* v. *Harwood.* *Willes*, 291.

It cannot be received when the object of the prosecution is criminal, even though the proceeding be civil in form, unless against a quaker. *Ib.*

But where the object is of a civil nature, though the proceedings be in the name of the king, the affirmation of a Quaker may be received. *Ibid.*

3 A rule to shew cause why an appointment of overseers for *Cirencester* should not be quashed, was served by a Quaker, and on his affirmation made absolute; not being looked on as a criminal prosecution. *The King* v. *Turner and another.* 2 *Str.* 1219.

4 Quaker's solemn affirmation not allowable in criminal cases. *Hilton* v. *Byron.* 3 *Salk.* 248.

5 The affirmation of a Quaker cannot be read in support of a criminal charge, nor in resisting a criminal charge, unless it be by the defendant himself. *Rex* v. *John Gardner.* 2 *Burr.* 1117.

6 Criminal case not within the statute for the ease of Quakers. *Hylton* v. *Byron.* 3 *Salk.* 133.

7 It was denied to read a Quaker's affirmation on a motion for an information for a misdemeanor. *The King* v. *Wych.* 2 *Str.* 872.

8 Quaker cannot exhibit articles of the peace without oath. *The King* v. *Green.* 1 *Str.* 527.

9 No rule to answer on the affirmation of a Quaker. *Oliver* v. *Lawrence.* 2 *Str.* 946.

QUARE IMPEDIT.

1 In a *quare impedit* the crown as well as the subject must allege a presentation. A *commendum retinere* does not amount to one. But where the verdict finds that the crown was seized in fee *ut de uno grosso*, it cures the want of the allegation. *The King* v. *Episcopum Landaff.* 2 *Str.* 1006.

2 In *quare impedit* by the king for the next return of a living void by promotion, defendant pleads that the crown presented *D.* who is since dead, and that he himself is now presented, &c. parson, imparsonee with a traverse, that the church is still vacant by the promotion; this is a confession and avoidance, and the traverse being therefore bad, it may be passed over, and issue taken upon the avoidance. Where the declaration having set forth that *B.* the late archbishop was seized as of fee in right of his arch-

bishoprie of the advowson of *A.* &c. and the archbishop, by his plea admits this seizin and the vacancy by promotion, as alleged, but pleads further, that the crown, by patent, granted to *D.* the deanery of *A.* with all its rights &c., by virtue whereof he was possessed of the church of *A.* as a member of the deanery, &c. this is ill, as it neither shews a presentation, or that the church is a member of the deanery. *The King* v. *Archbishop of Armagh and Whalley.* 2 *Str.* 937.

8 Upon the creation of a bishop the king has a prerogative to fill all the presentive benefices he vacates; this prerogative is not satisfied by a temporary *commendum retinere*, which expires in the lifetime of the bishop; nor barred by a statute directing that the several patrons should present in particular turns. *The King and Queen* v. *Episcop. Londin. and Dr. Birch.* 1 *L. Raym.* 23. 2 *Salk.* 540.

4 Where the ordinary refuses, *quia insufficiens in literatura*, he must shew in what particular. *Hele* v. *The Bishop of Exeter.* 2 *Salk.* 539.

5 In case of a prerogative turn, the writ is general, *quæ ad nostram spectat donationem. The King and Queen* v. *The Bishop of London and Dr. Lancaster.* 2 *Salk.* 559.

6 A *quare impedit* may be brought for a church and an hospital. *The Mayor &c. of Bedford* v. *The Bishop of Lincoln. Willes.* 608.

7 In *quare impedit*, nonsuit after appearance is peremptory. *Berkely* v. *Hansard.* 2 *Salk.* 559.

8 Tenants in common must join in *quare impedit*. In *quare impedit* for a united church, after the patron has had a presentation, he may declare that he was seized of every second turn as in gross. In *quare impedit* for an united church whether the patron must shew a presentation, either to the united church or to one of the old churches? In that case a presentation need not be shewn. *Reynoldson* v. *Blake and the Bishop of London.* 1 *L. Raym.* 192.

9 Judgment for defendant, patron of an incumbent, on demurrer, he claiming under a term never created, is turned into a right in plaintiff who levied a fine, when *nil habuerunt* gave no title. *Wallwyn* v. *Bishop of Landaff and others.* 2 *Wils.* 233.

10 In *quare impedit*, the declaration may describe the church with an *alias*, though the writ did not. A covenant between joint tenants of an advowson in gross to present by turns, amounts to a partition, and will enable each of them individually in his turn to maintain a *quare impedit*, even against a stranger. A bishop defendant in a *quare impedit* cannot, after insisting on a right by lapse, and confessing and avoiding a presentation stated by the plaintiff, object to the sufficiency of the right set out in the declaration to present. *Bishop of Salisbury* v. *Philips.* 1 *L. Raym.* 535. *Salk.* 48.

11 If the right of nomination be in one, and of presentation in another, and either impede the other in his right, a *quare impedit* lies. 3 *Term Rep.* 646.

12 Where the right of nominating is in *A.* and of presenting in *B.*, *B.* is to judge of the qualification of the person nominated, in the same manner as a bishop does; but if the person presenting object to the nominee on the ground of immorality, that must be tried by a jury. 3 *Term Rep.* 646.

13 In pleading a right in coparceners to present to an advowson by turns, it is good to state that the right arose because they *did* not agree to present, which is synonimous to saying they could not agree. 1 *H. Black.* 376.

14 If three coparceners of an advowson do not agree to present on a vacancy, the eldest (or her assigns) may present to the first turn; and the second and third (or their assigns to the next turns, according to

the order of the birth of the coparceners. 1 *H. Black.* 412.

15 *A.*, *B.*, and *C.*, three sisters, are coparceners of an advowson. *A.* marries *D.*, on whom *A*'s third is settled; *B.* marries *E.*; and *C.* dies, having devised her third to *F.* the son of *B.* and *E.*—*D.*, *E.* and *F.* being thus entitled, under or in right of the several original coparceners, a *quare impedit* is brought by *G.*, a stranger, against *D.* and *E.*—*E.* dies pending the writ, and the share of *B.* (previously deceased) thereupon descends to *F.*, in addition to the share devised to him by *C.*—*D.* suffers judgment by default.—This judgment against *D.* is a bar to a *quare impedit* brought by *D.* and *F.* (in which *D.* is summoned and served,) to recover *the same presentation*; but is not a bar to *F*'s right to recover on the next avoidance in his turn. *Barker & al.* v. *London (Bishop) & al.* 1 *H. Black.* 412; *and Willes*, 659.

16 In *quare impedit* the defendant pleaded that one *M. O.*, under whom he claimed, being seized in fee of one moiety of the advowson to present to one turn in every two turns, presented one *J. O.* in her proper turn; that the church being afterwards vacant, one *J. W.*, under whom the plaintiff claimed, presented in his proper turn; that the church being again vacant, the plaintiff presented; and that the church being the fourth time vacant, it belonged to the defendant to present. On demurrer to this plea, the court held that the defendant had not shewn a title to present, since he had not shewn whether the third presentation was by usurpation or by agreement, and that it could not be presumed that the defendant was intitled to present in the first and fourth turn, and the plaintiff in the second and third, since the plea averred that *M. O.* had presented to the first turn in her proper turn, and *J. W.* in his proper turn. *Birch* v. *The Bishop of Litchfield and Coventry.* 3 *Bos. & Pull.* 444.

17 *Semb.* That if it had appeared by the plea that the plaintiff had presented to the third turn by usurpation, he would still have been entitled to the fourth turn by right. *Ib.*

QUOD PERMITTAT.

A *quod permittat* lies against the owners of the lands, his heirs, or feoffee, in respect of a nuisance levied by a stranger. The time of limitation is fifty years, and a *quod permittat prosternere quædam ædificia*, is good. *Shalmer* v. *Pultney.* 1 *L. Raym.* 276.

QUO WARRANTO INFORMATIONS.

I. *Limitation of time in applying for.*
II. *Other causes for refusing.*
III. *For what offences or purposes grantable; and on whose application.*
IV. *Proceedings and pleadings on.*

I. *Limitation of time in applying for.*

1 *Quo warranto* information shall not be granted after a great length of time, and uninterrupted possession of the persons under whom defendant claims. *Rex* v. *Stephens.* 1 *Burr.* 433.

2 Informations in the nature of *quo warranto* denied, after an acquiescence of near twenty years, with other concurrent circumstances. *The King* v. *Dawes; and the King* v. *Martin.* 1 *Black.* 634. 4 *Burr.* 2120.

3 The discretion of the court, in granting an information in the nature of a *quo warranto within twenty years* is to be guided by circumstances. *Rex* v. *Binsteed & al. Burgesses of Portsmouth. Cowp.* 75.

4 Information in the nature of a *quo warranto* granted where the right

depends upon a matter of *doubtful law*, in order to its being finally determined. The question in this case was, whether an *infant* of nine years old was capable of being elected a burgess. *Rex* v. *Carter*. *Cowp.* 58.

5 Discretion of the court in granting *quo warranto* informations, guided by length of time and other circumstances. *Rex* v. *Dawes*. 4 *Burr.* 2022.

6 Length of time not taken into consideration, because title to franchise clear. *Rex* v. *Wardroper*. 4 *Burr.* 2024.

7 Three years and an half's acquiescence, no bar to information in nature of *quo warranto*. *The King* v. *Lathorp*. 1 *Black.* 470. 3 *Burr.* 1485.

8 Not granting *quo warranto* informations after twenty years, strictly adheared to. *Rex* v. *Rogers*, *Burgess of Helston*. 4 *Burr.* 2523.

9 Where there is an entry of having administered oaths, there must be a recent prosecution, if the fact be false. *The King* v. *Williams*, *Mayor of Helstone*. 2 *Str.* 677.

[See statute 32 G. 3, c. 58, "for the amendment of the law in the proceedings upon information in nature of *quo warranto*;" under s. 1, of which a defendant may plead that he has held or executed his office for six years or more; and on a verdict on such issue shall be entitled to judgment in his favour with costs; and this extends to informations by the attorney general; by s. 2, derivative titles are also protected. Under that act a defendant may plead several pleas even though he do not plead, (in one of them) the limitation imposed by the statute. *Rex* v. *Autridge*. 8 *Term Rep.* 467.

The following cases were determined previous to that act.]

10 The court will consider all the circumstances of the case before they disturb the peace of corporations. *Rex* v. *Stacey*. 1 *Term Reports*, 3.

11 The court determined that they would not grant an information in the nature of a *quo warranto* after 20 years' quiet possession. 1 *Term Rep.* 1.

But even after 20 years' quiet possession, the king might prosecute by his attorney general. 1 *Term Reports*, 3.

12 And it was held that length of time, though less than twenty years, might induce the court to refuse such an information under certain circumstances. 1 *Term Rep.* 3.

13 Fourteen years quiet possession held a sufficient length of time for refusing an information. *Rex* v. *Pike and Braddock*. 1 *Term Rep.* 3, *n.*

14 And in the principal case, a *quo warranto* information against a freeman of the borough of *Winchelsea* was refused after sixteen years' acquiescence under the election of a mayor, (under which the defendant claimed,) where a mere blunder was committed, as to the person who ought to have presided thereat in the absence of the old mayor, whose duty it was. The corporation consisted of a mayor, jurats, and freemen; and the election of mayor was made annually by the body of freemen out of the jurats, which latter have no right to vote; and on that occasion the election appeared to have been held before the new mayor himself, instead of the oldest freeman: but all parties had concurred at the time. *Rex* v. *Stacey*. 1 *Term Rep.* 1.

15 The court said they would in no case grant a *quo warranto* information after twenty years' quiet possession. *Rex* v. *J. Newling*. 3 *Term Rep.* 310.

16 And that applications made within that time might be refused on particular circumstances. 3 *Term Rep.* 310.

17 Such an application refused after fourteen years' quiet possession. *R.* v. *Pike and Prideaux*. 3 *Term Rep.* 311.

18 At length the court resolved to limit their own discretion, and that they would not, under any circumstances, grant an information in nature of *quo warranto* against a person who has been in the peaceable possession of his franchise six years. *Rex* v. *Dickin.* 4 *Term Rep.* 282.

19 And soon afterwards the court determined that they would not grant a *quo warranto* information to impeach a derivative title, if the person claiming the original title has been in the undisturbed possession of his office six years. *R.* v. *G. Peacock.* 4 *Term Rep.* 684.

II. *Other causes for refusing.*

1 Common freemen need not be qualified by taking the test, and information refused. *Borough of Christchurch.* 2 *Str.* 828.

2 No *quo warranto* for a forfeiture by nonattendance. *Lord Bruce's Case.* 2 *Str.* 819.

3 No information for erecting a warren, it being of a private nature. *The King* v. *Sir William Lowther.* 1 *Str.* 637.

4 A private person shall not be permitted to file a *quo warranto* information, in respect of any thing of a private nature. *Lowther's Case.* 2 *L. Raym.* 1409. *Str.* 637.

5 Information in nature of a *quo warranto* will not lie against a whole corporation, as a body, at the relation of a private person, in the name of the clerk of the crown, though leave be asked of the court. *Rex* v. *Corporation of Carmarthen.* 2 *Burr.* 869.

6 No information in nature of *quo warranto* against a corporation for acting as such, but only against individual members. *The King* v. *Carmarthen.* 1 *Black.* 187.

7 Information in nature of *quo warranto*, against the steward of a corporation for acting as a capital burgess refused. *The King* v. *Trelawney.* 3 *Burr.* 1615.

8 Whether the court will grant an information to impeach a derivative title, where the person from whom it was derived died in the undisturbed possession of it? *Qu. Rex* v. *Stacey.* 1 *Term Rep.* 4.

9 Such title shall not be impeached by those who have acquiesced and acted under it. 1 *Term Rep.* 4.

10 After the death of a mayor, *Blackstone*, J. would not suffer his eligibility to be disputed, but merely the fact whether he was mayor or not, which the corporation books shewed; and if he was in fact mayor, it was to be taken that he had been regularly so. *Rex* v. *Spearing*, *Spring Ass. at Westminster*, 1771, *cited in Rex* v. *Stacey.* 1 *Term Rep.* 4, *n.*

11 It was held that possession of a corporate franchise for less than twenty years was not of itself a sufficient objection to an information in nature of a *quo warranto* to try the validity of the title to such franchise. *Rex* v. *Bond.* 2 *Term Rep.* 767.

12 But that the circumstance of the relator's standing in the same situation with the defendant, or its appearing that the corporation must necessarily be dissolved by impeaching the defendant's title, and the title of those who claim under him, would govern the discretion of the court in refusing such an application. 2 *Term Rep.* 767.

13 The fact of the defendant's title having been before attacked by a similar information, which was afterwards abandoned, was not allowed to have any weight. 2 *Term Rep.* 767.

14 The court refused to grant a *quo warranto* information, because the party applying for it had agreed not to enforce a bye law upon which he now grounded his attempt to impeach the defendant's title. *Rex* v. *Martlock.* 3 *Term Rep.* 300.

15 The court refused to grant an information against one who had served the office of mayor twelve years before, when the rule to shew cause was obtained upon an affidavit, that

the relator did not *believe* he had been duly sworn in, and the rule was opposed by an affidavit, which did not expressly allege that he had been duly sworn, but stated that he *appeared by the corporation books to have been sworn in.* 2 *Term Rep.* 310.

16 Refused after eight years, though applied for on an affidavit of the town-clerk that defendant had not taken the oaths of allegiance, &c., it appearing by the corporation books that he had, and it not being a *recent* complaint. *Rex* v. *Mayor of Helleston.* 3 *Term Rep.* 311.

17 In general the title of the electors is not to be brought in question by attacking the title of the person elected by them: but this rule does not apply where there is no method of prosecution by which the title of the electors may be questioned in the first instance. 3 *Term Rep.* 596.

18 There must be an *user* as well as a *claim* of a franchise in order to found an application for an information in nature of a *quo warranto*, stating that the defendant, who was elected to an office, had tendered himself to be sworn in, is not sufficient. *Rex* v. *Whitwell.* 5 *Term Rep.* 85.

19 But a swearing in, though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation: held a sufficient user of the office to warrant an information in nature of a *quo warranto* against him and not like a mere claim of the office. *Rex* v. *Tate.* 4 *East*, 337.

20 Upon a question concerning the validity of an election to a vacant fellowship made by the fellows of Trinity-Hall, *Cambridge*, which was disputed by the master, the court held that an information in nature of *quo warranto* would not lie; but thought the proper remedy in such case was by *mandamus*, or by an action brought by the fellow appointed by the master, to try his right. *Rex* v. *Gregory.* 4 *Term Rep.* 240, *n.*

21 The court will not grant a *quo warranto* information to try the validity of an election to the office of churchwarden, because it is no usurpation on the crown. *Rex* v. *Shepherd.* 4 *Term Rep.* 381.

22 Where an information in nature of *quo warranto* was moved for on the ground of a disputed mode of election, which alone was in controversy at the time of the defendant's election, and which ground was afterwards answered on shewing cause, the court would not, in their discretion, make the rule absolute to try another incidental and secondary question, as to whether there were a sufficient interval of time allowed between the nomination and election of the defendant; no person's right having been set aside by means of such acceleration of the election, if it were accelerated. *Rex* v. *Osbourne.* 4 *East*, 327.

23 Where a corporation was dissolved, and no corporate body existed in fact at the time, the court refused to grant an information in nature of *quo warranto* against an individual for an impertinent claim to be returning officer at an election of members to serve in parliament, by virtue of his having been elected an alderman while the corporation existed in fact; there being no civil right in controversy, but it being rather the ground of a proceeding *in poenam* by the attorney-general. *Rex* v. *Saunders.* 3 *East*, 119.

24 The court will not award an information, in nature of a *quo warranto* against a town officer, who is elected for one year. *Commonwealth* v. *Athearn.* 3 *Mass.* 285.

Upon such an information being demanded the respondent is not entitled to costs. *Ibid.*

25 The court will not give leave to the attorney-general to file an information, in the nature of a *quo warranto* against an officer when it appears that his office will expire

before the inquiry can have any effect. The granting leave to file such information, is a matter of discretion with the court. *The People, ex relat. Teel* v. *Sweeting*. 2 *Johns. Rep.* 184.

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III. *For what Offences or Purposes grantable; and on whose Application.*

1 Information in nature of *quo warranto*, for holding a court of record within a charter borough, and presiding therein, in the absence of the bailiffs, defendant not being one of them, will lie, and judgment of ouster thereon, but not costs. *Rex* v. *Williams*. 1 *Burr.* 402. 1 *Black.* 93.

2 *Quo warranto* will not lie for encouraging the exercise of a franchise. *Qu.* If it will lie for holding a fair or market? *The King* v. *Marsden*. 1 *Black.* 579. 3 *Burr.* 1812.

3 Information for holding a court leet, after long disuser, without deducing a title from the original grantee. *The King* v. *Bridge*. 1 *Black.* 46.

4 *Quo warranto* lies for the office of constable. *The King* v. *Goudge*. 2 *Str.* 1213.

5 *Quo warranto* lies against steward of a court leet. *The King* v. *Hulston*. 1 *Str.* 621.

6 A *quo warranto* information lies in respect of any office which concerns the public. *Rex* v. *Boyles*. 2 *L. Raymond*, 1559. 2 *Str.* 836.

An office touching the government of a vill, and the administration of public justice within it concerns the public. *Ibid.*

7 *Quo warranto* lies for a ferry. *Rex* v. *Sir Thomas Reynell*. 2 *Str.* 1161.

8 No *quo warranto* for office of churchwarden. *Rex* v. *Dawbeny*. 2 *Str.* 1196.

9 Informations in nature of a *quo warranto* have been considered of late years merely as civil proceedings. 2 *Term Rep.* 484.

10 An information in nature of a *quo warranto* granted against a portreeve of a borough and manor, who as such was the *returning* officer of the borough. *Rex* v. *Mein*. 3 *Term Rep.* 596.

11 Information in nature of a *quo warranto* lies against a person claiming to have a right of voting by virtue of a burgages tenement. *Horsham Case*. 3 *Term Rep.* 599, *n.*

12 Information in nature of *quo warranto* lies for the office of bailiff of a court leet, being a prescriptive officer, having a power to summon, and select the jury. *Rex* v. *Bingham, Clerk*. 2 *East*, 308.

13 In considering whether they should give leave to file a *quo warranto* information, the court will judge from all the circumstances who are the real prosecutors. 6 *Term Rep.* 503.

14 It is no objection to an application for an information in nature of a *quo warranto* against a mayor for not having taken the sacrament within the proper time before his election, according to statute 13 Car. 2, statute 2, c. 1; that the relators concurred in the election; because that defect is a latent one, arising from the omission of an act positively required by the legislature. *Rex* v. *Smith*. 3 *Term Rep.* 573.

15 And the court for such an omission will grant an information at the prayer of a mere stranger to the corporation, because it concerns the interest of the whole kingdom. *Rex* v. *Brown*. 3 *Term Rep.* 574, *n.*

16 It is no objection to relators applying for a *quo warranto* information against the defendant for exercising the office of an alderman (his election to which they had opposed,) that they afterwards made no opposition to his election to the principal office of magistracy, (to which the other was a necessary qualification;) or that they afterwards attended at and concurred in corporate meetings whereat he presided or whereat he attended in

his official character; such application being made within the time limited by law, viz. in four years after the defendant's election as an alderman. *Rex* v. *Clarke*, 1 *East*, 36.

17 It seems that though such an information may be granted on the relation of a stranger to the corporation; yet he ought to make out a very strong case for the interference of the court. *Rex* v. *Kemp*. 1 *East*, 46, *n*.

18 Where sufficient appears by the affidavits to draw the merits of an election to a corporate office into question, the court will grant an information in nature of a *quo warranto*; though the fact of the defendant's usurpation no otherwise appeared than by the deponent's swearing to their information and belief, that the defendant was admitted a freeman, and sworn and enrolled accordingly, the defendant not denying the fact when called upon by a rule to shew cause. *R.* v. *Harwood*. 2 *East*, 177.

19 It is no objection to the person applying for an information in nature of a *quo warranto*, which would operate in its effect to dissolve the corporation, that they attended the meeting at which the mayor was elected, whose election they impeached on the ground that the corporation was then dissolved by the loss of an integral part, and that they voted for another candidate, and afterwards attended other corporate meetings at which such mayor presided. *Rex* v. *Morris and Stewart*. 3 *East*, 213.

20 An application for a *quo warranto* information made on the affidavits of several persons, of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avow himself to be the relator. *Rex* v. *Symmons*. 4 *Term Rep*. 223.

21 The court will not permit one corporator to file an information in nature of a *quo warranto* against another for a defect of title which equally applies to his own, or to the title of those under whom he claims. *Rex* v. *Cudlipp*. 6 *Term Rep*. 503.

22 The statute 15 Car. 2, c. 17, creating the corporation of the *Bedford Level* directs that they shall appoint a *registrar*, &c. and other officers at their pleasure; the duty of which registrar is to register titles to land within the level; and he takes an oath of office; held, that an information in nature of *quo warranto* does not lie against such an officer; he being a *mere servant* of the corporation, and his office not affecting any franchise, or other authority holden under the crown. *Rex* v. *Bedford Level Corporation*. 6 *East*, 356.

23 But an information in nature of *quo warranto* was granted against several for exercising the office of commissioners for paving the town of *Taunton*, under an act of the 9 G. 3, to whom a power was given to impose rates and taxes on the inhabitants. *Rex* v. *Badcock & al*. 6 *East*, 359.

24 An information in nature of a *quo warranto* granted in order to try whether a residence in a borough, previous to an election, one of the qualifications for which was residence, were *bona fide* or not. *Rex* v. *Richmond, D*. 6 *Term Rep*. 560.

25 An information in the nature of a *quo warranto* is grantable at the relation of any individual interested in the election or admission of an officer or member of a corporation: But an iformation for the purpose of dissolving the corporation, or of seizing its franchises, cannot be prosecuted, by the authority of the commonwealth, exercised by the legislature, or by the attorney or solicitor general. *Commonwealth* v. *The Union Ins. Co*. 5 *Mass*. 230.

26 If a turnpike company open a road through the land of a person, without making him compensation, pur-

suant to the directions of the act, the court, at the relation of the person injured, will not grant an information in the nature of a *quo warranto*, against the company, but leave him to his remedy, in the course of common law. *The People ex relat. Macey and others* v. *The Hillsdale and Chatham Turnpike Company.* 2 *Johns. Rep.* 190.

IV. *Proceedings and Pleadings on.*

1 No process can issue on informations before recognizance given by informer. *The King* v. *The Mayor and Aldermen of Hertford.* 1 *Salk.* 376.

2 Information *quo warranto*, they admit persons to be freemen who are not inhabitants. *The King* v. *The Mayor of Hertford.* 1 *Salk.* 374. 1 *L. Raym.* 426.

Defendants finable, if guilty, and franchise seized to the king. *Ibid.*

3 Process out of the crown office may be returnable in fifteen days, except of outlawry, which must be *de termino in terminum*. *The King* v. *The Mayor of Hertford.* 2 *Salk.* 699.

4 If defendant upon information, in nature of a *quo warranto*, fails in the title he sets up, judgment must be for the crown. *Rex* v. *Leigh, &c.* 4 *Burr.* 2143.

5 If defendant in such information, discovers before trial, that he has pitched upon the weaker defence, he may upon terms quit it, and insist upon the stronger. *Rex* v. *Blatchford.* 4 *Burr.* 2147.

6 *Quo warranto* information cannot be quashed on motion, though both parties consent. *Rex* v. *Brickell.* 4 *Burr.* 2297.

7 Four informations, in nature of *quo warranto*, were consolidated into one, where the several rights were properly determinable in one information. *Rex* v. *Collingwood Forster, Edward Gallon, George Selby, and Thomas Mills.* 1 *Burr.* 573.

8 Costs not given on information in nature of *quo warranto*, unless on an usurpation of an office or freedom in a corporation. *The King* v. *Williams.* 1 *Black.* 93. But there is judgment of ouster, though the usurpation is not continued till the trial. *Ibid.*

9 In *quo warranto* the court will not set aside, upon motion, a plea (of false additions) in abatement. *The King* v. *The Mayor of Heydon.* 1 *Black.* 34.

10 *Quere.* Whether the rights of electors, *de facto* possessed of the franchise, can be examined in *quo warranto* against the elected? *Ibid.* 471.

11 Where the defendant sets out a bad title to the office, the court will give judgment on the plea, as importing a confession of the usurpation. Where a charter appoints a particular method of electing a mayor, and directs that he shall take an oath to execute the office for a year, and until another shall be chosen; and a subsequent charter, after reciting the former manner and time of election, and of continuance in office under it, and that the corporation had petitioned to alter *quatenus modum et tempus eligendi* of the mayor, and then confirming all their former rights and privileges, abolishes the former manner *eligendi, nominandi, et appunctuandi* the mayor, and appoints his election to be in a different manner, and upon a different day, *pro uno anno integro tunc proxime sequen'*; the right of holding over is thereby taken away. *The King* v. *Philips.* 1 *Str.* 394.

12 Upon an information in nature of *quo warranto* against a mayor, he claims under an election and swearing, pursuant to a *mandamus* in virtue of statute 11 G. 1, c. 4, and shews an election accordingly; then specifies a swearing according to the charter, but not to the directions of the *mandamus* act; replication takes issue on this swearing, which, with eleven others, were

found for the king without evidence (though admitted to have been rightly found;) the court, considering the defendant's whole title as one entire title, were unanimous in setting aside the verdict, upon defendant's payment of costs, and on giving him liberty to amend his plea. *The King* v. *Roger Phillips, Mayor of Carmarthen.* 1 *Burr.* 292.

13 When a proper case has been laid before the court to induce them to grant an information, they have never exercised any controul over it afterwards, as to the manner in which it is to be conducted. 4 *Term Rep.* 276.

14 If the affidavit in support of the rule for such an information omit a material fact, which is stated in the affidavit filed on the other side, the latter affidavit may be read by the prosecutor in support of his rule. 3 *Term Rep.* 596.

15 Where leave had been granted by the court to file an information in nature of a *quo warranto* against a party for claiming to be common council man of *York*, and the relator by his replication attacked also the defendant's title as freeman, which had been stated in the introductory part of his plea, the court refused to strike it out, or direct their officer to enter a *nolle prosequi*. *Rex* v. *Brown.* 4 *Term Rep.* 276.

16 The defendant in a *quo warranto* information derived title under a custom for "*the mayor and burgesses of* N. *in common council assembled, under their various names of incorporation*, from time immemorial till the granting of letters patent by *Q. Elizabeth*, and for *the mayor, bailiffs, and capital burgesses, in common council assembled* since that time," to admit every person of the age of twenty-one whom they chose; after verdict for the defendant establishing this custom, the court held it well pleaded; it appearing to them to have been always exercised by the same body, ss. the *common council*, though constituted of different persons at different times. 4 *Term Rep.* 425.

17 After a defendant in a *quo warranto* information has appeared, the prosecutor must give two four days rules to plead, and after the expiration of the last must also move in term time for a peremptory rule to plead, otherwise the defendant has until the next term to plead. *Rex* v. *Ginever.* 6 *Term Rep.* 594.

18 Whether a prosecutor of an information in nature of a *quo warranto* can demur to part of the defendant's plea, and reply to the rest? *Quere.* *Rex* v. *Ginever.* 6 *Term Rep.* 733.

19 Upon an information in nature of *quo warranto* against one for claiming the office of alderman, if he disclaim, and judgment of ouster be given against him, he is concluded from showing to a second information, for exercising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory *mandamus* from this court. But, *semble*, if the election to the office were good, and only the first swearing in irregular, the first judgment should not have been an absolute judgment of ouster; but either a judgment of *capiatur pro fine* only, for the temporary usurpation, or a judgment of ouster *quousque*, &c. *The King* v. *Clarke.* 2 *East*, 75.

20 A *mandamus* to swear one into an office, confers no title in itself to such office. *Per Lawrence, J. Ibid.* 85. And *The King* v. *The Burgesses of Truro. Ibid.*

R.

RAMSGATE HARBOUR.

No ships but such as sail into the *Downs* are liable to the duties for *Ramsgate* harbour. *Pole* v. *Jonson.* 2 *Black.* 764.

RANSOM.

1 An enemy's ship which has ransomed a *British* vessel, being retaken with the hostage and ransom bill on board, but the bill being secreted, and not delivered up to the recaptor, the original captor may recover in an action of *assumpsit* on the ransom bill. *Cornu* v. *Blackburne*. 2 *Doug*. 640.

2 And it has been holden to be no objection (at least on the plea of *non assumpsit*) that the plaintiff is an alien enemy; but that point was otherwise determined. *Fisher* v. *Anthon*. 2 *Doug*. 650, *n*.

The death of the hostage does not discharge the contract. *Ibid*.

The ransom of *British* ships or goods taken by the enemy is made void, and prohibited under a penalty of 500l. by 22 G. 3, c. 25. *Ibid*.

3 Ransom bills are payable to an alien enemy, though the hostage given with them died in prison. *Ricord* v. *Bettenham*. 1 *Black*. 563.

4 In the case of a ransom bill, the owners are not liable beyond the value of the ship and cargo. *Helly* v. *Grant*. *Cited in Yates* v. *Hall*. 1 *Term Rep*. 76.

5 But a promise by a captain of a ship, on behalf of his owners when the ship was taken, to pay monthly wages to one of the sailors in order to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo. *Yates* v. *Hall*. 1 *Term Rep*. 73.

6 *Qu*. Whether, after a capture and ransom, the owner is liable to pay wages for the time which elapsed previous to the capture? 1 *Term Rep*. 79. See statute 22 G. 3, c. 25.

7 A sentence of condemnation of a *British* ship (which had been captured by a *French* privateer and carried into *Bergen* in *Norway*) by the *French* consul at *Bergen*, is an illegal sentence. If after such a sentence the owner repurchase his ship at a public auction at *Bergen*, he cannot recover the money so paid from the underwriter. Such a contract is a ransom and illegal, under the acts 22 G. 3, c. 25, 35 G. 3, c. 66, s. 37, 8, 9. *Havelock* v. *Rockwood*. 8 *Term Rep*. 268.

8 The statutes prohibiting ransoms, being remedial acts are to be construed liberally. 8 *Term Rep*. 277.

9 A ransom may take place on shore in a neutral country as well as on the high seas. *Ibid*.

10 It is not necessary that an hostage should be given to constitute a ransom. *Ibid*.

RECEIPT.

1 A receipt may be explained by parol evidence. *House* v. *Law*. 2 *Johns. Rep*. 378.

2 *P*. gave the following receipt to a master of a vessel, for goods: "Received of Capt. *Smith*, 50 barrels of provisions, on account of *Daniel C. M'Instry*, 5th *December*, 1803." In an action brought by *M'Instry* against *P*. for goods sold and delivered, it was held, that the receipt was not evidence of a sale of goods, nor that they were received on an account due from *M'Instry*, but rather to sell on commissions, in the usual course of business; and that parol evidence was admissible to show that the goods were, in fact, so received, and so far to explain the written receipt. *M'Instry* v. *Pearsall*. 3 *Johns Rep*. 319.

3 Where *A*. being indebted to *B*. for two quarters rent, gave to *B*. the note of *C*. for part, and paid the residue in money, and *B*. indorsed on the lease, a receipt in full for the rent, and the note not being paid, *B*. afterwards brought his action for the rent; it was held that the receipt, though absolute in terms, was not conclusive evidence of the payment of the rent, and that *parol* evidence was admissible to show that

the note was part of the sum included in the receipt. *Tobey* v. *Barber*. 5 *Johns. Rep.* 68.

Parol evidence is admissible to explain or contradict the terms of a receipt. *Ibid.*

4 A *receipt* in full of all demands, for a book debt, does not preclude the plaintiff from showing the circumstances under which it was given. *Putnam* v. *Lewis*. 8 *Johns. Rep.* 389.

RECITAL.

1 The word "tenor" binds the party to a strict recital. 1 *Mass.* 55, 203.

2 So if a writing is alleged to be "in the words and figures following." 1 *Mass.* 55, 62.

RECOGNIZANCE.

1 Upon removal of an indictment, the defendant enters into a recognizance to try it; yet this is not forfeited, unless the prosecutor gives rules. *The King and Queen* v. *Ball.* 1 *Salk.* 370.

2 A recognizance of bail by the party, that he should not withdraw himself from the execution of the judgment, if judgment shall be given against him, is good; paying the condemnation money is a compliance with the condition of such recognizance. *Read* v. *Charnley*. 2 *L. Raym.* 1224.

3 Where part of the condition of a recognizance is to give a notice to a man, or his clerk, it is a fatal variance to state it to have been to give notice to him and his clerk. *The Queen* v. *Ewer*. 2 *L. Raym.* 756. 3 *Salk.* 369. 2 *Salk.* 564.

4 Recognizance to remove an indictment from the court of Oyer and Terminer at *Hicks's Hall*, is a recognizance at common law, and not within 5 and 6 *W. & M.* c. 11, s. 2, and the same may be discharged with costs. *The King* v. *Fonseca*. 1 *Burr.* 10.

5 To a *scire facias* upon a recognizance entered into in the municipal court by one, who had been adjudged the putative father of a bastard child, the defendants pleaded an award and satisfaction, and upon competent evidence a verdict was taken for them; the plaintiff upon a motion for a new trial, was not allowed to object to the plea. *Dwyer* v. *Brannon et al.* 6 *Mass.* 330. Whether the municipal court can by law take a recognizance in such a case, or is confined to a bond. *Qu. Ibid.*

6 In an action of debt on a recognizance taken by a justice of the peace, conditioned to prosecute an appeal from his judgment to the common pleas, it must be alleged that the recognizance was returned to, and made a record of that court. *Bridge* v. *Ford*. 7 *Mass.* 209.

7 A justice of the peace, taking a recognizance for appearance, must return the recognizance to the court, where the recognizor is to appear: And if such court has not power to award execution upon a *scire facias*, it must certify the recognizance to some court, where such execution can be awarded. *Johnson* v. *Randall*. 7 *Mass.* 340.

8 A justice of the peace can bind the putative father of a bastard child to answer, only by taking a *bond*, and not by *recognizance*. *Ib. Merrill* v. *Prince*. 7 *Mass.* 396.

RECOVERY.

1 A recovery suffered of an advowson in gross, and one acre of land on a writ of entry, *sur disseizin in le post*, is good. *Bayley* v. *The University of Oxford*. 2 *Wils.* 116.

2 A common recovery found by special verdict, without any writ of seizin awarded, is bad, and no bar; as the awarding the writ of seizin cannot be presumed by the court,

and a *te. fa. de novo*, shall not go. *Witham* v. *Lewis ex demiss. Earl of Derby, in error.* 1 *Wils.* 48. 2 *Str.* 1185.

3 Lands pass by a will made before a recovery actually suffered, but after the deed to lead the uses; the recovery being in fact afterwards had. *Selwin* v. *Selwin.* 1 *Black.* 251.

4 The judgment in a common recovery shall not relate back to the first day of the term, when such relation would make it previous to the return of the writ of entry. *Selwin* v. *Selwin.* 1 *Black.* 222, 251.

5 Christian name of vouchee amended by the deed to lead uses and a fine. *Mayre* v. *Coulthard.* 2 *Black.* 1230.

6 The vouchee dying before the return of the writ of summons *ad warrantizandum*, the recovery is void. *Wynne* v. *Wynns.* 1 *Wils.* 35, 42.

7 On error to reverse a common recovery, there must be a *scire facias*, against the terre-tenants. *Hall et ux* v. *Woodcock.* 1 *Burr.* 359.

8 Where a bad deed to make a tenant appears, the court will not presume a good one, though to support and old recovery. *Keene, on the demise of the Earl of Portsmouth, and another* v. *The Earl of Effingham.* 2 *Str.* 1267.

9 To *A.* and his wife for life, remainder to the heirs male of *A.* on the wife begotten; *A.* cannot dock this during the wife's life. *Clithero* v. *Franklin and another.* 2 *Salk.* 567.

10 Recovery suffered by an infant allowed in some special cases. *Sir John St. Alban's Case.* 2 *Salk.* 567.

11 A recovery suffered in a court of ancient demesne with double voucher, is a good bar to an estate tail. *Hunt* v. *Browne.* 3 *Salk.* 34. 1 *Salk.* 57.

12 A recovery in which the tenant in tail is vouched, and vouches, jointly with another person, bars the intail. *Jennings* v. *Rogers.* 2 *L. Raym.* 753.

13 In a writ of error of common recovery, the tenant to the *precipe* in the common recovery was made by a fine, the recovery was suffered, and the fine was reversed, yet it was held a good recovery, for there was a tenant to the *precipe* at the time. *Lloyd* v. *Evelyn.* 2 *Salk.* 568.

14 Recovery amended by inserting a new vill, not mentioned in the deed of uses, but comprised under general words. *Hewgel* v. *Lodge.* 2 *Black.* 747.

15 What is a sufficient description in a common recovery. *Massey* v. *Rice & al. Cowp.* 346.

16 Recovery good, though the tenant to the *precipe* had no freehold at the return of the writ, so long as it is conveyed to him before judgment. Though the tenant in a real action had no estate in the land at the time of the writ, yet if he afterwards acquires one by his own act, he shall not plead non-tenure in abatement; otherwise if the estate comes to him by act in law. *Williams* v. *Lacy.* 1 *L. Raym.* 227 and 475. 2 *Salk.* 569.

17 If the vouchee dies on the return day of the writ of summons, being *Sunday*. *Qu.* Whether the recovery good? *Swan* v. *Broome.* Not good. *M.* 5 G. 3, and in *Dom. Proc.* 1 *Black.* 496, 526, 532. 3 *Burr.* 1595.

18 Deed to lead uses and recovery subsequent, are all one conveyance. Declared in *Roe* v. *Griffiths*, to be the ground of the determination in *Selwin* v. *Selwin.* 1 *Black.* 606.

19 Common recovery may be suffered by tenant in tail, who has power to suffer it; but the remainder man in tail, if not in possession, cannot suffer a recovery, unless the tenant for life surrender to him. *Goodtitle ex demiss. Bridges et al.* v. *Duke of Chandos.* 2 *Burr.* 1065.

20 No amendment allowed of a recovery, by inserting one county for another, where the vouchee had lands in both counties, and ought to have

suffered a recovery in each. *Aston* v. *Baldwyn.* 2 *Black.* 874.

21 To *A.* and the heirs of her body, by one by the name of *Searle*, is an estate tail. A condition that runs with the land cannot be barred by recovery; *aliter* of a condition collateral. Tenant in tail, and he in remainder, may be vouched jointly; if the tenant vouches a stranger, who vouches tenant in tail, and he enters into warranty, it is good; and tenant in tail coming in as vouchee, comes in in privity of all estates he ever had. *Page* v. *Hayward.* 2 *Salk.* 570.

22 The court will amend a recovery whenever it can be done consistently with the rules of law. *Wynne* v. *Thomas.* *Willes*, 563.

But they cannot amend the teste of a writ, where it is not the misprison of the clerk, and where there is nothing to amend by. *Ibid.*

The common vouchee cannot appear by attorney before the day of the return of the writ of summons. *Ibid.*

If the vouchee die before the return of the writ of summons, the recovery is erroneous. *Ibid.*

23 Recovery amended by the deed of uses, by enlarging and particularizing the description; and instead of "the town of *Kingston upon Hull*," making it "in *Myton* in the town and county of *Kingston on Hull*." *Watson* v. *Cox.* 2 *Black.* 1065.

24 Court will not enlarge the return of the writ of summons, so as that a term may intervene between the teste and the return. *Barnard* v. *Woodcock.* *Gibbons* v. *Stevenson.* 2 *Black.* 1201, 1223.

The irregularity how cured. *Ibid.* 1224.

25 If tenant in tail of lands by purchase under a settlement, made by an ancestor *ex parte materna*, with the reversion in fee by descent *ex parte materna*, suffer a common recovery to the use of himself and his heirs, the lands will descend to his heirs *ex parte paterna.* *Martin on the demise of Tregonwell* v. *Strachan and Harrison.* *Willes*, 444. 2 *Str.* 1179. 1 *Wils.* 2, 66.

It would have been otherwise, if he had taken both estates by descent from his mother. *Ibid.*

If *A.* seized in fee by descent *ex parte materna* enfeoff *B.* and then *B.* reenfeoff *A.*, *A.* and his heirs *ex parte paterna* will take (cases referred to in) *Ibid.* 453, *n. b.*

So, if *A.* seized in fee of copyhold lands of inheritance by descent *ex parte materna*, surrender to *B.* in fee, (a mortgagee,) who, on payment of principal and interest, surrenders again to *A.* and his heirs, the descent is broken, and the lands will descend to *A.*'s paternal heirs. *Ibid.*

26 The nature and operation of common recoveries stated and explained at large. *Martin d. Tregonwell* v. *Strachan.* 5 *Term Rep.* 107, *n.*

27 The tenant to the *precipe* must have a freehold in possession, otherwise a recovery suffered by him is invalid. *Roe d. Hale* v. *Wegg.* 6 *Term Rep.* 708.

28 Though the deeds to make a tenant to the *precipe* be not executed till after the execution of the writ of *seizin*, still the recovery will be good by statute 14 G. 2, c. 20, if the deeds be executed in the term in which the recovery is suffered. *Goodright d. Burton* v. *Rigby.* 2 *H. Black.* 46; affirmed in K. B. 5 *Term Rep.* 177.

29 *A.*, tenant for years remainder to *B.* for life, remainder to the first and other sons of *B.* in tail, remainder to *B.* in tail; *A.* and *B.* join in a lease and release to make a tenant to the *precipe*, and suffer a recovery; the estate-tail limited to the sons of *B.* is not divested by the recovery, nor is there any forfeiture of the respective estates of *A.* and *B.* *Smith d. Richards* v. *Clyfford.* 1 *Term Rep.* 738.

30 By such recovery *B.* only barred his remainder in tail, subsequent to the remainder in tail to his first and other sons. 1 *Term Rep.* 738.

31 If a tenant in tail *by purchase* under a settlement, made by his ancestor *ex parte materna*, suffer a recovery, and declares the uses to himself in fee, he takes the fee as a purchaser descendible to his paternal heirs. *Roe d. Crow* v. *Baldwere.* 5 *Term Rep.* 104.

32 If tenant in tail by descent from the maternal ancestor suffer a recovery, and declare the uses to himself in fee, the estate will descend to the heirs *ex parte materna*, whether it be copyhold or freehold. 5 *Term Rep.* 104.

33 It is no objection to the passing a common recovery, that the order of the names of the vouchers in the *precipe* at bar and the dedimus varies, nor that the warrants of attorney of the several vouchees, are on separate pieces of parchment. *Lang & al.* v. *Woodhouse & al.* 1 *Bos. & Pull.* 31.

34 If the different vouchees in a recovery execute, and acknowledge several warrants of attorney, though upon the same piece of parchment, the court will not suffer the recovery to pass. *Jennings* v. *Street.* 3 *Bos. & Pull.* 361.

35 And if under a *dedimus potestatem* to take the acknowledgment of nine persons to a fine, the commissioners take the acknowledgment of six on one piece of parchment, and of three on another, the court will not allow the fine to pass. *Balch* v. *Phelps.* 3 *Bos & Pull.* 366.

36 In every common recovery where the vouchee shall personally appear, the writ of entry shall be sued out, and produced at the time of the recording of the vouchee's appearance at the foot of the *precipe* in such recovery. *Reg. Gen.* 1 *H. Black.* 526, 7.

37 In every common recovery wherein the tenants' or vouchees' warrants of attorney shall be taken under a *dedimus potestatem*, there shall be written on every copy of the *præcipe* and of such warrant of attorney (having the affidavit required by the rule of *H.* 14 G. 3, thereto annexed) the *allocatur* of the L. C. Justice, or some other Justice, in the same manner as on fines taken by *dedimus potestatem*; and the copy of the *præcipe* and warrants of attorney, with the *allocatur* thereon, shall be filed as directed by the said rule: and at the time of signing such *allocatur*, the writ of entry for such common recovery shall be produced before the judge signing such *allocatur*, who may mark such writ with his title, name, or initials; and such writ shall also be produced at the time of the arraignment of such recovery. *Reg. Gen.* 1 *H. Black.* 527.

38 No common recovery (or fine) shall pass unless the taking of the warrants of attornies be before one of the justices or barrons at *Westminster*, or a serjeant, without an affidavit being filed that the commissioners taking the same are either barristers of five years standing, or solicitors or attornies of some of the courts at *Westminster*; the judges of the court of session and exchequer or advocates and clerks to the signet, of five years standing, in *Scotland*. *Reg. Gen.* 1 *Bos. & Pull.* 362.

RECORDARI FACIAS LOQUELAM.

Req. fa. loq. stays all further proceedings in county court, though delivered after interlocutory, if before final judgment. *Bevan* v. *Prothesk.* 2 *Burr.* 1151.

RECORDER.

1 This court has the same power over the proceedings of the recorder of *New-York*, while acting as commissioner, as when acting as *recorder*; but they will not exercise the power where the recorder has a discretion by the act, and has acted

definitively, as in granting a *supersedeas* under the act concerning absconding debtors. The regular course is to bring up the proceedings of the recorder, by *certiorari*, not by an *order* of this court. *Learned and others* v. *Duval.* 3 *Johns. Cas.* 141.

2 The recorder of *Philaphelphia* is not a judge, within the meaning of the constitution. 4 *Dallas*, 229.

RECORDS.

1 Matters of record, pleaded by way of dilatory, if of another court, must be *sub pede sigilli*. *Curwen* v. *Fletcher.* 1 *Str.* 520.

2 Loss of record supplied by a new entry. *King, qui tam*, v. *Bolton.* 1 *Str.* 140.

3 A bill of *Middlesex* is well described as the precept of the king. *Harris* v. *Bernard.* 2 *Str.* 1069.

4 Records found in the proper office, must be intended to have been always in the plight in which they are found; and parol evidence shall not be admitted to prove that it was once wrong, and has since been altered. *Dickson* v. *Fisher.* 1 *Black.* 664. 4 *Burr.* 2267.

5 When all the requisites have been performed which authorize a recording officer to record any instrument, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed. *Marbury* v. *Madison.* 1 *Cranch*, 160.

The keeper of a public record cannot erase therefrom a commission which has been recorded, nor refuse a copy to a person demanding it on the terms prescribed by law. *Ibid.*

REFERENCE.

1 (Rule.) That no reference whatsoever of any cause depending in this court, should stay the proceedings of this court, unless it was expressed in the rule of reference to be agreed, that all proceedings in this court should be stayed. *Anon.* 2 *L. Raym.* 789.

2 Hereafter it is recommended, that where the parties intend to refer all disputes, the tenor of the reference be "of all matters in difference between the parties;" and when the reference is only intended to be of the matter in the particular cause, it be "of all matters in difference in the cause." *Smith* v. *Muller.* 3 *Term Rep.* 626.

3 The court of K. B. refused to make a submission to an award a rule of court, part of the matter agreed to be referred having been made the subject of an indictment. *Watson* v. *M'Cullum.* 8 *Term Rep.* 520.

4 A reference entered into before the judge of probate, by an executor or administrator of any demand which he has, as such, is void. 1 *Mass.* 200.

5 The statement of the demand, upon which a submission of referees is entered into before a justice of peace, must shew on what account, or for what cause, the demand was made. *Jones* v. *Hacher.* 5 *Mass.* 264.

6 A reference of a cause will not be granted, if it appears that law questions will arise. *De Hart* v. *Covenhoven.* 2 *Johns. Cases*, 402.

7 The court will not order a cause to be referred, when it appears that questions of law will arise in the cause. *Adams* v. *Bayles.* 2 *Johns. Rep.* 374.

8 Where a motion to *refer* a cause is repelled by an affidavit that questions of law will arise, such affidavit must also state what the points of law are, to enable the court to judge of the propriety of granting or refusing the application. *Sailsbury* v. *Scott.* 6 *Johns. Rep.* 329.

REFEREES.

I. *Power of.*
II. *Report; confirming, or setting aside.*
III. *Enforcing their report.*
IV. *Other points relative to.*

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I. *Power of.*

1 A justice of the peace who takes the acknowledgment of the parties to a rule of reference cannot himself be one of the referees. 1 *Mass.* 158.

2 Report of referees upon a rule entered into before a justice of the peace must be made to the court of common pleas holden next after the award made. 1 *Mass.* 411.

3 A report of referees appointed pursuant to statute of 1786, c. 21, can be lawfully made respecting no matters not contained in the agreement of submission. *Tudor* v. *Peck.* 4 *Mass.* 242.

4 The report of referees, appointed as aforesaid, must be made to the next court of common pleas after it is agreed upon: and if not so made, the submission is *ipso facto* void. *Mott* v. *Anthony.* 5 *Mass.* 489. *Southworth* v. *Bradford.* 5 *Mass.* 524.

5 Where referees are appointed pursuant to the statute of 1786, c. 21, it is indispensible, that they all hear the parties; although the major part only may make report. *Short et al.* v. *Pratt et al.* 6 *Mass.* 496.

6 Referees appointed pursuant to the statute of 1786, c. 21, have no jurisdiction of questions concerning the title to real estate. *Fowler* v. *Bigelow & ux.* 8 *Mass.* 1.

7 Where the rule of reference in a cause requires the referees to report within a limited time, the power of the referees is at an end, if they do not report within the time limited. *Brower* v. *Kinsley.* 1 *Johns. Cases,* 334.

8 *Quere,* Whether referees have authority to consolidate actions submitted to their discretion? 1 *Dallas,* 145. See 1 *Dallas,* 355.

9 Referees cannot delegate their trust, and authority to others. 4 *Dallas,* 71.

II. *Report; confirming or setting aside.*

1 Where the facts in a case are various and intricate, and the matters involved in doubt and obscurity, a report of referees will be set aside, in order to let in new light, and have the merits reexamined. *Allard* v. *Mouchong.* 1 *Johns. Cases,* 280.

2 Where a cause was referred to three persons, and two of them met, and made a report, without giving notice to the other to attend, the report was set aside, as irregular. *Brower* v. *Kinsley.* 1 *Johns. Cases,* 334.

3 If referees in a cause unreasonably refuse an adjournment requested by a party, to enable him to produce witnesses, the report will be set aside. *Forbes* v. *Frany.* 2 *Johns. Cas.* 224.

4 Where referees in a cause are chosen by consent of parties, and without a rule of court, the court will not listen to any application to to set aside the report. *Miller and Underhill* v. *Vaughan.* 1 *Johns. Rep.* 315.

5 If parties voluntarily submit their cause to referees, the court will not set aside the report, even on an affidavit of merits. *Stevenson* v. *Beeker, survivor, &c.* 1 *Johns Rep.* 492.

6 The report of referees will not be set aside, because the referees made a report in a different county from that in which the *venue* was laid in the plaintiff's declaration. *Newland* v. *West.* 2 *Johns. Rep.* 188.

7 Report of referees set aside for ordering the parties to withdraw, and examining the witnesses in their absence. 1 *Dallas.* 83.

8 Report that "75*l.* was due the 3d

of March last, &c." set aside for incertainty. 1 *Dallas*, 119.

9 Five several actions being referred, and only one report, the report was confirmed, contrary to the opinion of *Shippen*, president. 1 *Dallas*, 145.

10 The admission of an interested witness, will not be sufficient to set aside the report of referees. 1 *Dallas*, 161.

11 Report set aside for allowing *ex parte* evidence to be given for the current price of coachmaker's work, at the time the action was brought. 1 *Dallas*, 187.

12 It is not sufficient to invalidate a report, that the referees sent for the plaintiff alone, and asked him whether he would agree that a quarter's rent, which accrued after the action brought, should be credited to the defendant. 1 *Dall.* 188.

13 Report of referees set aside for the error of the clerk in making out the rule or agreement to refer. 1 *Dallas*, 293.

14 If the court would grant a new trial had the exceptions been made to a verdict, they ought for the same reasons to set aside a report. 1 *Dallas*, 314.

Report of referees set aside, 1st, Because the referees gave interest upon an unliquidated account: and 2dly, Because they allowed a charge of premium and commission for making insurance, without requiring the policy to be produced, or any proof of its being lost. *Ibid.*

The court have always confined themselves to two points on motions to set aside reports of referees: 1st, Whether there is an evident mistake in matter of fact; 2dly, whether the referees have clearly erred in matters of law. *Ibid.*

15 Two actions between the same parties on different promissory notes being referred, the referees made report for one sum; but afterwards, filed a supplementary report distinguishing what was due in each action: and, it was held, that the first report could not be maintained; and that the second was irregular. 1 *Dallas*, 355.

16 Report of referees set aside, because they declined to consider the most material ground of the controversy, upon a mistaken principle, leading to real injustice to one of the parties. 1 *Dallas*, 486.

17 A report set aside because the action was founded on an unlawful contract. 4 *Dallas*, 298.

III. *Enforcing their report.*

1 A rule of reference to report the *next term*, does not authorize issuing executions upon a report *into office* during the vacation, although a term had intervened between the entry of the rule and the appointment of the referees. 1 *Dallas*, 355.

2 Where the report of referees awards money to be paid on one side, and certain other things to be done on the other, if the court cannot enforce both, they will certainly enforce neither. 1 *Dallas*, 364.

But though the court may not be able to do this by execution, yet, if they cannot do it by attachment, the remedies are mutual, though not by the same kind of process. *Ibid.*

An attachment would lie for a contempt in not performing an award of referees at common law, before the statute of 9 and 10 W. 3. *Ibid.*

In all cases, where matters are awarded to be done on both sides, the court will exercise their equitable powers in such a manner, as not to suffer either party to elude the performance of his part of the award. *Ibid.*

3 If any part of an award be impossible to be performed, the court will refuse an attachment for that part. 1 *Dallas*, 365.

IV. *Other points relative to.*

1 The court will not presume that matters in difference submitted to arbitration by an assignee of debts

(and who was made an attorney to receive the same) arose subsequent to the deed under which the assignee was empowered to submit the same; but such matter may be pleaded by way of defence to an action for the money awarded. 8 *Term Rep.* 571.

2 Where parties by bond agree to submit matters in difference between them to arbitration and that the submission should be made a rule of court, it is competent to either, even since the statutes 9 and 11 W. 3, c. 15, to revoke by deed his submission, and notify the same to the arbitrators before their authority be executed: and he cannot be attached for a contempt of court, if after such revocation and notice the arbitrators make an award and the submission be made a rule of court. But it seems, that it would be a contempt to revoke the submission after it had been made a rule of court. *Milne et al. assignees of Rhodes and Justamond, bankrupts*, v. *Gratrix*. 7 *East*, 608.

3 The time limited by the statute 9 and 11 W. 3, c. 15, s. 12, for setting aside awards, made under submission, by virtue of that statute, does not attach on awards made under orders of *nisi prius*. *Synge* v. *Jervoice*. 8 *East*, 466.

4 Where an action brought on administration bond, in the name of the judge of probate for the benefit of legatees is referred, although the reference is void, the report of the referees may be good *prima facie* evidence of the amount due to such legatees upon a hearing in chancery after the bond is adjudged to be forfeited. *Paine, judge*, v. *Ball et al.* 3 *Mass.* 235.

5 An action brought in the name of the judge of probate, upon an administration bond, cannot be referred. 2 *Mass.* 152.

6 A report of referees made pursuant to a submission before a justice of the peace, may be recommitted by the common pleas in the same manner as a report made pursuant to a rule of that court. *Boardman* v. *England*. 6 *Mass.* 70.

7 Upon a rule entered into before a justice of the peace pursuant to statute 1786, c. 21, it is necessary that a demand be annexed to the rule. *Bullard* v. *Coolidge*. 3 *Mass.* 324.

8 And such demand must be subscribed by the party making it. *Mansfield* v. *Doughty*. 3 *Mass.* 398.

10 After a report of referees, appointed by a rule entered into before a justice of the peace, pursuant to the statute of 1786, c. 21, has been made at the next term of the court of common pleas after it was agreed upon, and it is recommitted, the parties to the rule still have day in court, and the amended report may be well made at a succeeding term, *during* which the referees shall have agreed upon it. *Whitney, admin.* v. *Cook*. 5 *Mass.* 139.

Such a rule may be made between *A.* and the administrator of *B.* and *C.* who were partners in trade, and of whom *C.* survived, submitting all demands between *A.* and the deceased partner or either of them. *Ibid.*

If in such case the referees award that a sum of money is due from the estate of *C.* the surviving partner, and that the administrator shall pay the cost of reference, these costs are a charge on the partnership fund. *Ibid.*

11 If the common pleas refuse to accept the report for a defect of authority in the referees, they cannot award costs, but are to order the parties to go without day. *Jones* v. *Hacker*. 5 *Mass.* 264.

12 Where parties have submitted all demands to referees, and the referees have made their report, on all the demands submitted to the common pleas, who have rendered judgment thereon, it is still competent for one of the parties to shew that the particular demand, not being in dispute, was not laid before the referees, and

upon this being proved, an action may be maintained upon such demand. *Webster* v. *Lee.* 5 *Mass.* 334.

13 On the affidavit of the defendant of the absence of a material witness, who had gone abroad, the meeting of referees was ordered to be put off for two months. *Bird* v. *Sands.* 1 *Johns. Cases*, 393.

14 Where referees appointed by the court refuse to report, the proper course is to proceed by attachment against them. *Thompson and Coles* v. *Parker.* 3 *Johns. Rep.* 260.

15 Notice of the time and place of the meeting of the referees, must be served on the party, not his attorney unless the rule so express it. 1 *Dallas*, 81.

16 Where the exceptions to a report of referees arise from the face of the report, and depend on a construction of law, they need not be filed in writing. 1 *Dallas*, 129.

17 What kind of evidence may be admitted before referees. 1 *Dall.* 161.

18 An attorney's agreement to refer, binds his client. 1 *Dallas*, 164.

19 It is an invariable rule not to appoint referees, but in the presence of both parties. 1 *Dallas*, 251.

20 The different kinds of awards in *Pennsylvania*. 1 *Dallas*, 314.

21 The court refused the application of referees for instructions on a point of law. 1 *Dallas*, 347.

22 It is too late to annul the rule for reference, when the referees have investigated the whole transaction, agreed upon their report, and were clear from any imputation of misconduct. 1 *Dallas*, 430.

23 A rule to refer and report next term; after the next term the referees were changed by consent, and report returnable into office: Determined that the rule to report to next term was expired by its own limitation. 1 *Dallas*, 349.

24 The usage of referring ejectments as well as accounts, is very ancient; and it has been the constant usage to confirm awards, though no damages or costs are found. 2 *Dallas*, 157.

25 A report of referees cannot give a right to land, but it may settle a dispute about land, either in ejectment or trespass. 4 *Dallas*, 120.

26 When it is too late for the plaintiff to strike off the rule of reference and discontinue the suit. 4 *Dallas*, 222.

27 An umpire, chosen by referees, must himself hear the parties and examine the witnesses. 4 *Dallas*, 232, 271.

28 Where an award is good. 4 *Dallas*, 284.

29 *Ex parte* communications to referees condemned. 4 *Dallas*, 300, (1.)

REGISTER.

If an American registered vessel be sold while at sea to a citizen of the *United States*, it is not necessary that there should be a bill of sale, or a new register, until the vessel return to some port of the *United States*. *United States* v. *Willings and Francis.* 4 *Cranch*, 48.

REGISTRY OF DEEDS.

1 With respect to the register act 7 Ann. c. 20, though it is positively said, that a registered deed shall take place of unregistered deed, equity will not set it aside in favour of a party who knew of it at the time, because he had that notice which the act of parliament intended he should have. *Doe* v. *Routledge.* 2 *Coup.* 705.

2 Registering an assignment is not registering the lease. *Honeycomb ex demiss. Halpen et ux.* v. *Waldron et al.* 2 *Str.* 1065.

3 A lessee of land in the *Bedford* Level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the statute 15 Car. 2, c. 17, for want of being registered; such act enacting that "no lease, &c. should be of force but from the

time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers, registering their titles before. *Hodson* v. *Sharpe.* 10 *East*, 350.

4 Although a deed of conveyance be not acknowledged or registered, yet the conveyance shall be good against a second purchaser with notice; and such notice may be either express or implied. *Farnsworth* v. *Childs.* 4 *Mass.* 637.

Where a second *bona fide* purchaser had read a prior deed of conveyance, but the grantee neglected for two years to put it on record, and for personal reasons permitted the grantor to remain in the visible possession and occupation of the land, the first purchaser was held not entitled to relief, and the second purchaser entitled to the land. *Ibid.*

RELIGIOUS SOCIETY.

1 *A.* was *called*, in 1793, by the deacons and elders of a church not incorporated, as their minister, who entered into an agreement with him for a stipulated yearly salary. The church became incorporated in 1796, and *A.* was a party to the act of incorporation, and acted as president of the corporation. One half of the elders and deacons were elected annually, and *A.* regularly received his salary from the deacons and elders of the church, for the time being, from 1793 to 1804, when he was dismissed by the consistory, and the payment of his salary refused. *A.* brought an action of *assumpsit* against the surviving elders and deacons who signed the agreement in 1793, in their individual capacity, for the salary due to him after 1804; it was held that the acts of *A.* and of the elders and deacons amounted to a waiver of the original contract of 1793, by a mutual understanding of the parties; that after the incorporation of the church in 1796, the previous contract became extinguished, as a private and simple contract, and the corporation, acting by their seal, having assumed the contract, and became the debtor of *A.* with his assent and concurrence, the defendants were not responsible to him. in their individual capacity. *Van Vlieden* v. *Welles and others.* 6 *Johns. Rep.* 85.

2 Where the members of an incorporated religious society, subscribed a written agreement with the trustees of the society, by which they individually engaged to pay the trustees, or such person as the trustees should appoint, the sums set opposite to their respective names, for the purpose of raising a *salary*, for the support of *S.* a *minister* of the gospel, to be paid annually, so long as *S.* should administer the gospel in the said society, and so long as the subscribers should reside within four miles from the meeting-house in the said society, &c. It was held that this was a valid contract, in law, and binding on the subscribers so long as *S.* continued to administer the gospel, and the subscribers to reside within the distance of four miles, and could not be dissolved but by mutual consent, nor cease to be obligatory, until the minister ceased to render the services stipulated. *Religious Society of Whitestown* v. *Stone.* 7 *Johns Rep.* 112.

RELEASE.

1 A release of all right to the personal estate of an intestate, will not discharge a debt due from him. *Topham* v. *Tollier.* 2 *L. Raym.* 786.

2 A release of all his right, will not release a judgment not executed. *Lacy* v. *Kinnaston.* 3 *Salk.* 298. 1 *L. Raym.* 688.

3 A release can only operate on ex-

isting rights. *Drage* v. *Netter.* 1 *L. Raym.* 65.

4 A general release will not discharge a deodand a man had in right of another, if he had any demand in his own right, upon which the release could operate at the time of making the release. *Hutchinson* v. *Savage.* 2 *L. Raym.* 1306.

5 Growing rent not released by release of all demands. *Stevens* v. *Snow.* 2 *Salk.* 578.

6 What possession of *Flats* is sufficient to enable the tenant to take a release. *Hamblet & ux.* v. *Francis.* 4 *Mass.* 75.

7 A release when neither of the parties to it have any possession, actual or legal, in the land released, passes nothing. *Porter* v. *Perkins et al.* 5 *Mass.* 233.

8 A release of damages by a husband, for the personal abuse of his wife, is a good bar to the joint action by the husband and wife for the same cause. *Southworth* v. *Packard.* 7 *Mass.* 95.

9 A release to one not in possession, if made for a valuable consideration, will be construed to be any lawful conveyance, by which the estate might pass. *Pray* v. *Peirce.* 7 *Mass.* 381.

10 Where one of several partners executed a release of all demands, under his hand and seal, to a debtor of the copartnership, it was held to be binding on the copartnership; and that parol evidence was inadmissible to show that a particular debt was not intended to be released. *Pierson* v. *Hooker.* 3 *Johns. Rep.* 68.

11 Where *A.* and *B.* being joint owners of a hogshead of rum, the sheriff, by virtue of an execution against *B.* seized the whole, and sold it to *C.*, and *A.* brought an action of trover against *C.* for his share, it was held that a release of all actions from *A.* to the sheriff, was no bar to a suit against *C.* and that the sheriff was not a trespasser. *Wilson and Gibbs* v. *Reed.* 3 *Johns. Rep.* 175.

12 Where two are jointly and severally bound, the release of one of the obligors is the release of both; but a covenant with one of the obligors not to sue him, does not discharge the other obligor. *Rowley* v. *Stoddard.* 7 *Johns. Rep.* 207.

A release of one of two joint and several obligors, must be a technical release, *under seal*, in order to discharge both. *Ibid.*

A receipt in full, given to one of two joint and several debtors, on his paying half the debt, is no release of the other debtor. *Ibid.*

13 Where *A.* and *B.* gave a sealed note to *C.* and *A.* afterwards gave a bond and mortgage to *C.* for the amount due on the note, and *C.* covenanted to procure and cancel the note, it was held, that though the bond and mortgage were not an extinguishment of the note, yet the covenant made with *A.* was for the benefit of *A.* and *B.*, and a covenant not to sue, which amounted to a release of the note. *Phelps* v. *Johnson.* 8 *Johns Rep.* 54.

14 Where a special letter of attorney was given to institute a suit, and afterwards a person having a general power, executed a release to the defendant in the suit, the court held the authority to be sufficient, and discharged the party. 1 *Dallas*, 449.

15 Release of one joint debtor, how far a discharge of the other. 4 *Dallas*, 275.

REMAINDER.

1 Remainder may be of a rent *de novo.* *Weeks* v. *Peach.* 2 *Salk.* 577.

2. The right of a remainder man or reversioner will not be barred or taken away by descent cast, or the statute of limitations, during the continuance of the particular estate. *Jacson ex demise Hardenburgh* v. *Schoonmaker.* 4 *Johns. Rep.* 390.

The acts or *laches* of the tenant of the

particular estate, will not effect the party entitled in remainder. *Ibid.*

REMITTITUR.

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If a man avows for more than upon the face of the avowry is due, and obtains a verdict thereon, he may enter a *remittitur* for the excess, and take judgment for the residue and costs. *Morris* v. *Gelder.* 1 *L. Raym.* 317.

RENT.

1 Lessor dying on the day that rent becomes payable before sun set, it shall go to the heir, not the executors. *Rockingham and another* v. *Oxenden and another.* 2 *Salk.* 578.

2 A feefarm rent is a rent granted in fee of at least one fourth the value of the land at the time of the grant. *Bradbury* v. *Wright.* 2 *Doug.* 627, and *n.*

It may either be a rent service, rent seek, or rent charge. 2 *Doug.* 627, *n.*

Though some think the term is properly only applicable to rent service. *Ibid.* 627, *n.*

REPAIRS.

He to whom the use of a thing is granted is bound to repair it, unless there is a stipulation to the contrary. *Taylor* v. *Whitehead.* 2 *Doug.* 748.

REPLEADER.

1 A repleader awarded after an immaterial issue. *Enys* v. *Mohun.* 2 *Str.* 847.

2 Where defendant makes default at *nisi prius*, no judgment can be given for him, nor repleader awarded. In personal actions, the first default before and the second after issue joined, is peremptory. *Staple* v. *Hayden.* 1 *Salk.* 216. 2 *L. Raym.* 922.

3 In a cause in which issue is joined, a repleader cannot be granted until after verdict, for a fault which a verdict might cure. *Staples* v. *Heydon.* 1 *L. Raym.* 707. *Salk.* 579.

4 A bond for payment of money on or before a day certain; plea of payment on the same day; and verdict for plaintiff. A repleader awarded for issue, immaterial, as payment might have been made on a prior day. *Tryon* v. *Carter.* 2 *Str.* 994.

5 Where in an action of *assumpsit* against the corporation of *Albany*, to recover the amount assessed by a jury for ground of the plaintiff taken to widen a street, the plaintiff set forth the proceedings and judgment of the mayor's court, and the defendants pleaded *nul tiel record*, and issue was joined thereon; it was held, after a trial by record, that the issue was immaterial, and a *repleader* was awarded. *Stafford* v. *The Mayor, &c. of Albany.* 5 *Johns Rep.* 1.

REPLEVIN.

1 Where the defendant pleads property, he need not make a suggestion *pro. ret. habendo.* *Butcher* v. *Porter.* 1 *Salk.* 94.

2 Where plaintiff in replevin dies after a declaration and before avowry, no return *habend.* can be issued. *Cutfield* v. *Coney and others.* 2 *Wils.* 83.

3 Declaration for taking cattle at *M.*; defendant pleads *non cepit modo et forma.* Plaintiff proved the cattle were in the defendant's custody at *M.*; defendant proved they were originally taken at *H.* Judgment for the plaintiff. *Walton* v. *Kersop and another.* 2 *Wils.* 354.

4 If plaintiff in replevin be nonsuited for want of a plea in bar, the avowant may sue the sureties on the

bond, and not execute a writ of enquiry for his damages. *Waterman* v. *Yea, in replevin; Lyde, Sheriff of Somersetshire*, v. *Lawrance and two others.* 2 *Wils.* 41.

5 Avowry that defendants were owners and occupiers of certain messuages, and prescribe for common in the *locus in quo*, and avow damage *feasant*, this is a bad prescription; there is a difference between a defective title and a title defectively set forth. *English* v. *Burnell and another.* 2 *Wils.* 258.

6 The court will not grant an attachment against a sheriff for not taking a replevin bond on his granting a replevin. *Telles* v. *Colville.* *Willes*, 375.

But an action will lie against him for not taking a replevin bond. So for taking insufficient pledges. *Ib. n. b.*

In that action the party can only recover to the amount of double the value of the goods distrained. *Ibid.*

7 Whether an action be real or personal depends on the thing to be recovered by it, and not on the nature of the defence. *Eaton* v. *Southby.* *Willes*, 134.

2d. And therefore a replevin is a personal action, though the title to land be brought in question. *Ibid.*

8 An action of replevin to recover damages is an action within the meaning of the statute 24 G. 2, c. 44, which requires a plaintiff to demand a copy of the warrant of the justice under which an officer (defendant) acted before he brings his action. *Pearson* v. *Roberts.* *Willes*, 668.

Goods taken under a distress for a penalty, on a conviction, under an act of parliament, cannot be replevied. *Ibid.*

9 It not appearing in a declaration, by the assignees of a replevin bond, that the plaintiff was the avowant or person making recognizance, the court of themselves referred to the replevin suit, it being of record in this court, and the declaration concluding *prout patet per recordum.* *Barker* v. *Horton.* *Willes*, 460.

10 In a plea in abatement in replevin (except that of property,) the defendant may suggest matter for a return; but that is not traversable. *Foot's Case.* 1 *Salk.* 93.

11 On a nonsuit in replevin, avowant executed a writ of inquiry after a writ of second deliverance; and held good. *Cooper* v. *Sherbrooke.* 2 *Wils.* 116.

12 In replevin, the defendant avowed, and did not set forth any title; not good. *Challoner* v. *Clayton.* 3 *Salk.* 306.

13 In replevin, the place is material when defendant insist upon a return. *Johnson* v. *Wollyer.* 1 *Str.* 507.

14 In replevin, avowry must set out an attornment on a fine to one under a devisee from whom he claims. *Long* v. *Buckeridge.* 1 *Str.* 106.

15 In replevin, upon a plea which goes to the point of the action, the defendant shall have a return without an avowry. *Parker* v. *Millor.* 1 *L. Raym.* 217.

16 In avowries for damage *feasant*, the avowant must shew where the fee is, and how the particular estate is derived. *Freeman* v. *Jugg.* 3 *Salk.* 307.

17 No replevin of goods taken upon a conviction. *The King* v. *Monkhouse.* 2 *Str.* 1184.

18 Replevin for 14 skimmers and ladles, certain enough. *Bourn* v. *Mattaire.* 2 *Str.* 1015.

19 Where defendant pleads *prisal in auter lieu*, he must make suggestion for return. *Anon.* 1 *Salk.* 94.

20 Second deliverance is a *supersede as* to a *retorno habendo*, but not to the writ of inquiry. *Pratt* v. *Rutlidge.* 1 *Salk.* 95.

21 The high and under sheriff and replevin clerk are all answerable to the defendant in replevin for the sufficiency of the pledges *de retorno habendo.* *Richards* v. *Acton.* 2 *Black.* 1220.

22 In replevin, if the defendant sets forth a custom of a lord of a manor to appoint a guardian to the custody of the lands of any of his infant tenants, and avows taking cattle damage feasant, the plaintiff cannot plead that he is guardian in socage. Guardian of the land may avow in his own name. *Wade* v. *Baker and Cole.* 1 *L. Raym.* 130.

23 In replevin, if the defendant had the possession, it is a good bar against the plaintiff if he has no title; but he cannot give a return unless he shews a property in the goods, and it is sufficient if they were delivered to him; for otherwise the judgment must be *quod quereus nil capiat per billam*, but no return. *Parker* v. *Meller.* 3 *Salk.* 54.

24 Whether goods taken under a warrant of distress granted by commissioners of sewers may not be replevied while in the hands of the officer? *Qu.* *Pritchard* v. *Stevens.* 6 *Term Rep.* 522.

25 Whether they may not be replevied by the sheriff or his deputy? *Qu.* *Ibid.*

26 If they be actually replevied, and the proceedings in replevin be removed here, this court will not quash the proceedings on a summary application, but will leave it to the defendant in replevin to put in his objection on the record. *Ibid.*

27 If insufficient pledges *de retorno habendo* be taken by the officer of the court below in replevin, the remedy against him is by action, and this court (C. P.) will not order him to pay the costs recovered by the defendant in replevin. *Tesseyman* v. *Gildart.* *New Rep.* 292.

28 The action on the case against the sheriff for taking insufficient pledges in replevin, ought to be brought by the person making cognizance, where there is no avowant on the record. *Page* v. *Eamer et al.* 1 *Bos & Pull.* 378.

29 In such an action the court of K. B. held that the plaintiff could not recover damages beyond the value of the distress taken, which was not equal to the rent in arrear. *Yea* v. *Lethbridge.* 4 *Term Rep.* 433.

30 But in a similar action it was ruled by the court of C. P. on great consideration, that the plaintiff might recover damages to the extent of the injury which he had actually sustained, though they exceeded *double the value* of the things distrained. *Concanen* v. *Lethbridge.* 2 *H. Black.* 36.

31 In a subsequent case however, (*Eyre*, C. J., *Buller*, J., and *Rooke*, J., having succeeded Lord *Loughborough*, C. J., *Gould*, J., and *Wilson*, J., at the time of the former determination) the court of C. P. declared that the good sense and justice of the case was, that the sheriff should be liable no farther than the sureties would have been if he had done his duty under statute 11 G. 2, c. 19, viz. to the amount of *double the value* of the goods distrained. *Evans* v. *Brandar & al.* 2 *H. Black.* 547.

32 A defendant in replevin is entitled to an assignment of the replevin bond, if the plaintiff in replevin do not appear in the county court and prosecute according to the condition. *Dias* v. *Freeman.* 5 *Term Rep.* 195.

33 And he may sue on the bond as assignee of the sheriff in the superior courts, though the replevin be not removed out of the county court. 5 *Term Rep.* 195.

34 A replevin bond may, under statute 11 G. 2, c. 19, be assigned to the avowant only, and he may bring his action upon it without joining the party making cognizance. *Archer* v. *Dudley.* 1 *Bos. & Pull.* 381, *n.*

35 The court will stay the proceedings in replevin on payment into court of the rent avowed for, and payment also of the costs of the action. *Vernon* v. *Wynne.* 1 *H. Black.* 24.

36 So before avowry, on payment of the rent due and costs up to the time, including those of the appli-

cation. *Hopkins* v. *Shrole.* 1 *Bos. & Pull.* 382.

37 But not upon payment of the rent, and of the costs to the time of a tender which had been made of such rent and costs, after the distress and before the replevin. *Ibid.*

38 Nor upon payment of costs, on the application of the defendant; though no special damage were assigned in the declaration. *Hodgkinson* v. *Snibson.* 3 *Bos. & Pull.* 603.

39 The condition of a replevin bond is not satisfied by a prosecution of the suit in the county court; but the plaint, if removed by *re. fa. lo.* into a superior court, must be prosecuted there with effect, and a return made if adjudged there. *Gwillim* v. *Holbrook.* 1 *Bos. & Pull.* 410.

40 The plea *de injuria sua propria absque tali causa* to cognisance for rent in arrear, is bad upon special demurrer. *Jones* v. *Kitchen.* 1 *Bos. & Pull.* 76.

41 The 11 G. 2, c. 19, respecting avowries in replevin does not extend to an avowry for a rent charge. *Bulpit* v. *Clarke.* *New Rep.* 56.

42 The defendant in replevin having made cognizance for rent service as bailiff of *A. B.* and *C.*, who were lawfully possessed of a certain manor of which the *locus in quo* was parcel, and holden at a certain rent; the plaintiff replied, that *A. B.* and *C.*, were not seized in their demesne as of fee of the manor; held bad on demurrer. *Ibid.*

43 A defendant in replevin is not entitled to move for judgment as in case of a nonsuit under statute 14 G. 2, c. 17, s. 1. *Shortridge* v. *Hiern.* 5 *Term Rep.* 400.

44 One tenant in common cannot avow *alone* for taking cattle *damage feasant*, but he ought also to make cognizance as bailiff of his companion. *Cully* v. *Spearman.* 2 *H. Black.* 386.

45 A judgment in replevin "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," &c. is good either as a judgment at common law, though the return be not judged irreplevisable, or as a judgment under statute 21 H. 8, c. 19, which entitles the defendants to damages and costs. *Gammon* v. *Jones, in error.* 4 *Term Rep.* 509.

46 Where the defendant in replevin made cognizance for two years and a quarter's rent in arrear; and alleged that for a long time, viz. *for two years and a quarter, ending at Christmas,* 1803, the plaintiff *held and enjoyed* the premises *as tenant thereof* to *A. B.* by virtue of a certain demise, &c.; to which the plaintiff pleaded in bar, that he did not *hold and enjoy* the premises as tenant thereof to *A. B.* by virtue of the supposed demise *modo & forma;* it is sufficient to entitle the defendant to a verdict on such issue if he prove that the plaintiff held of *A. B.* from the 23d of *Dec.* 1801; and to recover for *two years* rent. *Forty* v. *Imber.* 6 *East,* 434.

47 Under the plea of *non cepit* the defendant cannot give evidence in justification. 1 *Mass.* 153.

48 If the plaintiff be nonsuited, the defendant recovers six *per cent.* damages on the penal sum of the bond, as well where the taking was on mesne process as on execution. 1 *Mass.* 421.

49 If a writ *de homine replegiando,* in the form prescribed by the statute for one "held without order of law" be brought to the court of common pleas to replevy one committed by a justice of the peace in punishment; upon the appeal, this court will dismiss the action for want of jurisdiction in the court of common pleas. 2 *Mass.* 207.

The defendant, who was the original complainant before the justice, is not entitled to costs in such case. *Ibid.*

50 A part owner of a chattel cannot maintain replevin for his undivided part; and if it appear from the

plaintiff's own shewing that he is but part owner, the court will abate the writ *ex officio*. 2 *Mass.* 509.

51 Goods are attached upon *mesne process*, and replevied out of the hands of the sheriff by a coroner; the creditor in the original suit cannot maintain an action against the coroner for taking insufficient pledges upon the replevin, or for other misfeasances in the service of it; such action lies for the sheriff only, who had a special property in the goods, the general property being in *abeyance*. 2 *Mass.* 514.

52 The action of replevin survives the death of the plaintiff, but not the defendant. *Mellen et al.* v. *Baldwin*. 4 *Mass.* 480.

53 The statute of replevins 1789, c. 26, has prescribed six per cent. on the replevin bond as the measure of the defendant's damages, when the plaintiff shall fail to prosecute his suit; and when goods taken in execution are unlawfully replevied; in all other cases his damages are left to be assessed according to the magnitude of the injury. *Bruce* v. *Learned*. 4 *Mass.* 614.

In replevin a verdict being found for the defendant, and damages assessed, the plaintiff reviews the action, and obtains a reduction of the defendant's damages; the defendant shall notwithstanding recover his costs. *Ibid.*

54 Chattels in the custody of the law cannot be replevied at common law; but by the statute of 1789, c. 26, replevin lies against an officer for chattels attached or seized in execution by him, provided the debtor be not the plaintiff in replevin. *Ilsley et al.* v. *Stubbs*. 5 *Mass.* 280.

55 In replevin issue is joined upon the plaintiff's property in the chattels; the jury find the property of part in the plaintiff, and of part not; each party is entitled to damages and costs. *Powell* v. *Hinsdale*. 5 *Mass.* 313.

56 The action of replevin is not within the statute of 1783, c. 42, s. 7, which authorizes defendants in actions triable before a justice of the peace, to give a special justification or excuse in evidence under the general issue; but the pleadings, verdict, and judgment must pursue the rules of the common law. *Holmes* v. *Wood*. 6 *Mass.* 1.

57 Where the master of a ship has received goods on board, under a contract to deliver them at a certain port, and being with the shipper in a port short of the port of destination, there refuses to proceed with the goods to the port of destination, the shipper may replevy the goods, or maintain trover for them. *Portland Bank* v. *Stubbs et al.* 6 *Mass.* 422.

If after the goods are so replevied from the master, the owners of the ship will again replevy them from the shipper, upon these facts being disclosed in a plea in abatement, such second writ shall abate; otherwise if the master and owners claim by distinct rights. In such second writ of replevin, it is improper to join the officer, who served the first writ as a defendant with the shipper. *Ibid.*

58 The action of replevin is local in its nature, and must be brought in the county where the goods and chattels are taken, or distrained. *Robinson* v. *Mead*. 7 *Mass.* 353.

59 Defendants in replevin cannot stay execution by giving bond to review. *Luckfort* v. *Keene*. 7 *Mass.* 500.

60 In debt on a bond to prosecute a writ of replevin, the plaintiff is entitled to recover the value of the goods replevied, with the damages and costs recovered in the writ of replevin and interest on such damages and costs from the date of the judgment in replevin to the time of rendering judgment on the bond. *Arnold* v *Bailey & al.* 8 *Mass.* 145.

61 The condition of a replevin bond was to prosecute the action at the *county court* next to be holden at, &c. rightly describing the next term

of the common pleas, and held good. *Arnold* v. *Allen & al.* 8 *Mass.* 147.

62 It is no sufficient ground to quash a writ of replevin, that the officer has taken bond for a larger sum than the writ directed. *Clap* v. *Guild.* 8 *Mass.* 153.

63 In replevin, the *avowant* must set forth his title, and allege the estate of which he is seized, or the *avowry* is bad. *Harrison* v. *M'Intosh.* 1 *Johns. Rep.* 380.

Property, in a stranger, is a good plea in bar or abatement, and entitles the party to a return without an *avowry;* and a replication to such a plea, that the defendant entered the house in the *night time*, is bad. *Ib.*

64 If the replication states that the goods were delivered to the plaintiff by *B.* for safe keeping, and that the plaintiff has a *special property* in them, or authority to make the deposit, such replication is bad. *Harrison* v. *M'Intosh.* 1 *Johns. Reports*, 380.

65 Replevin lies for any *tortious* or unlawful taking of goods; and not merely in cases of *distress*. *Pangburn* v. *Patridge.* 7 *Johns. Rep.* 140.

66 There are no replevin in *Pennsylvania*, either under the statute *Marlbridge*, or at *common law;* but only under the act of assembly. 1 *Dallas*, 156.

The act of assembly does not recognize two kinds of replevin, one by plaint, and the others by writ. *Ibid.*

Replevins are made always returnable writs by the act of assembly, and the parties appearance required on the return. *Ibid.*

The act directs replevins to be determined in the common pleas. *Ibid.*

Replevin lies in *Pennsylvania* wherever a man claims goods in the possession of another. *Ibid.*

Judicial writs *de proprietate probanda* cannot be issued in *Pennsylvania*. *Ibid.*

67 The sheriff, in an action of trespass brought against him, cannot justify under a writ of replevin if he refused the defendant in replevin a reasonable time for finding security, on a claim of property, before the goods in question were removed. 1 *Dallas*, 225.

68 As the law gives the remedy of a distress to a landlord, it is incumbent upon the sheriff to see that the security is good, before he returns the property on a replevin. 1 *Dallas*, 341.

The value of the distress at the time of the replevin, and not the amount of the rent due, is the proper measure of damages. *Ibid.*

Goods distrained ought to be valued before they are delivered on replevin. *Ibid.*

69 The sheriff is responsible for the sufficiency of the sureties in a replevin bond, at the end of the suit, when the landlord has established his right to the rent, for which the distress was taken. 1 *Dallas*, 349.

70 No evidence ought to be admitted to contradict the sheriff's return of *elongatur*, after judgment *de retorno habendo* in replevin. 1 *Dallas*, 439.

71 The goods of a stranger, being removed before the distress, cannot be pursued within thirty days. 1 *Dallas*, 440.

72 Where replevying cannot be maintained. 4 *Dallas*, 342.

REPRESENTATION.

If a person proceeds upon the information of another to do an act in his favour, the person in whose favour the act is to be done, is bound, at his peril, to see that the information given is correct. *Fauguier* v. *Hallett.* 2 *Johns. Cases*, 233.

RESCUE.

1 On motion to submit to a fine, the defendants being returned rescuers, affidavits read denying the fact of an arrest. *The King* v. *Minify and another.* 1 *Str.* 612.

2 In case of the rescue of a distress

intended for sale, the plaintiff need not state that he gave notice of the distress. Nor, if the rent became due upon a lease for years, aver occupation. Nor, though the rent was payable only during occupation, shew any more than the lessee entry. The venue may come from the vill where the rescue was, without joining either the vill where the demise was made, or the distress taken. Upon a lease for years, the rent is payable though the lessee never occupies; *contra* upon a lease at will. *Bellasis* v. *Berbriche.* 1 *L. Raym.* 170. 1 *Salk.* 209.

3 In the case of a rescue there are two ways of proceeding. If the rescous is returned to the philazer, and process of outlawry issues, and the rescue is brought into court, he shall not be discharged upon affidavits: but where, upon the return of a rescue, an attachment is granted and the party examined upon interrogatories; upon answering them he shall be discharged. *The King* v. *Belt.* 2 *Salk.* 566.

RESTITUTION.

1 Restitution denied upon quashing inquisition of forcible entry; lease for years standing out. *The King* v. *Joslin and another.* 2 *Salk.* 587.

2 Traverse inquisition of forcible entry is a *supersedeas* to restitution. *The Queen* v. *Winter.* 2 *Salk.* 588.

3 Writ of restitution lies not against any that are not parties to the record. *The King and Queen* v. *Leaver* 2 *Salk.* 587.

4 Where the money recovered in a judgment appears by record to be paid, restitution shall be without a *scire facias*; otherwise where levied only. *Anon.* 2 *Salk.* 588.

5 Under what circumstances the court will refuse a writ of restitution, though they reverse the judgment, under which judgment was obtained. 2 *Dallas*, 205, 6.

RETURN OF WRITS.

1 B. R. will expect a return of a *latitat* to *Durham* on granting attachment. *Chapman* v. *Maddison.* 2 *Str.* 1089.

2 The *venire facias* on a traverse of an inquisition must be returnable at a general return. *The King* v. *Roberts.* 1 *Wils.* 77.

3 *Non sunt inventi* is no good return without *nec eorum aliquis.* *The King* v. *Tucker.* 1 *Str.* 225.

4 Rule on bishop's executor to return *fieri facias de bonis ecclesiasticis.* *Lanquit* v. *Jines.* 1 *Str.* 87.

REVIEW.

1 On a petition for review the petitioner is confined to the allegations in his petition. 1 *Mass.* 99.

2 Rule to shew cause why a writ of review should not be quashed, granted on the affidavit of the defendant in review, which stated that he had no notice of the petition for the writ. 1 *Mass.* 129.

3 The administrator of one who has died pending a writ of review brought on a judgment recovered against him for damages in an action of trespass *qu. clau. freg.* may, under the statute of February 9, 1798, come in and prosecute the writ of review. 1 *Mass.* 159.

4 In a review the original pleadings cannot be altered without consent of the parties. 1 *Mass.* 160, 242.

5 Where the party has the right to review, the court will not grant a new trial unless he relinquish that right. 1 *Mass.* 237.

6 Costs not allowed to the petitioner on a petition to review, where the mistake complained of was a miscalculation of the interest due on a promissory note, although the defendant had notice of the mistake and refused to pay. 1 *Mass.* 467.

7 Judgment in review, where the writ was prosecuted by one of the

defendants in the name of all the original defendants, none of whom appeared except him who prosecuted the writ. 1 *Mass.* 482.

8 Where a defendant against whom a judgment is given, reviews the action and gives bonds to prosecute his review to final judgment, and to pay the damages, and costs, which the original plaintiff may recover upon the review, or the original judgment and interest thereon; and after entering the review becomes nonsuit: in an action upon the bond, the original plaintiff shall recover the amount of the first judgment with interest thereon. But whether the costs of the *nonsuit dubitatur*. *Hicks* v. *Atkins, adm'x.* 4 *Mass.* 103.

9 A writ of review does not lie upon a judgment of the court of common pleas rendered upon the report of the referees appointed pursuant to the statute of 1786, c. 21. *Dickinson* v. *Davis.* 4 *Mass.* 520.

10 Upon a review of an action, in which debt, damages, or land is demanded, the party, in whose favour the error of the former judgment is corrected, is the prevailing party within the provision of the statute of 1784, c. 28, s. 9, and is entitled to his costs. *Bruce* v. *Leonard.* 4 *Mass.* 614.

11 Where a petitioner for a review sets forth a *legal title* thereto, the court will not grant it on his petition. *Byrnes* v. *Piper et al.* 5 *Mass.* 363.

12 But in such case where the petition does not appear to the court vexatious, and the facts alleged therein are not denied by the respondents, the court will not award costs to the respondents. *Ibid.*

13 In an action brought upon a bond to review where it appeared that the jury on the trial by review had affirmed the first judgment for the original plaintiffs, who were the defendants in review, and had added six per cent. interest to the time of their verdict, the court gave an additional six per cent. on the amount of the first judgment to the second verdict, double costs, and interest on the whole from the date of the judgment in review. *Jenkins et al.* v. *The N. E. Marine Ins. Co.* 6 *Mass.* 335.

14 No review lies under the statute of 1786, c. 66, unless there has been an issue to the country tried, and not two verdicts against the party applying for the review. *Perry* v. *Goodwin.* 6 *Mass.* 498.

If there has been but one trial, and a verdict found for him, at which he is aggrieved, he may review. *Ibid.*

No review lies of a judgment by default, whether the damages were assessed by the court or by a jury. *Ibid.*

Where issue in law as well as fact have been decided in an action, and the party aggrieved at the judgment upon the verdict reviews the action, the issue in law may be again tried. *Ibid.*

15 The statutes of 1788, c. 11, and 1791, c. 17, do not authorize the court to grant a second review, after a former one had been granted and prosecuted. *Ruggles et al.* v. *Freeland.* 6 *Mass.* 513.

16 Reviews are only had in actions commenced by writ. *Borden* v. *Bowen.* 7 *Mass.* 93.

17 The affidavit of a petitioner for a review may be used on the hearing of the petition, to prove facts known only to himself. *Coffin* v. *Abbot.* 7 *Mass.* 252.

Depositions of other persons are not received on such hearing, unless taken with the usual forms, as depositions to be used in the trial of the cause. *Ibid.*

Slight evidence is sufficient to sustain such a petition, when the petitioner has had no trial. *Ibid.*

REVOCATION.

Special verdict finding a will of lands, and that afterwards the testator made *aliud testament.*, imports not a

revocation. *Hitchins* v. *Bassett*. 2 *Salk*. 592.

REVOLUTION.

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1 The American revolution worked no forfeiture of previously vested rights in land. *Jackson ex dem. Gansevoort and others* v. *Lunn*. 3 *Johns. Cases*, 109.

2 Where a British subject died seized of lands in this state, in 1752, leaving daughters in England who married British subjects, and neither they nor their wives were American citizens; it was held, that the husbands of the heiresses might be joined in the demise with their wives, in order to maintain an action of *ejectment*, and that even if the marriages were subsequent to the American revolution, such marriages with aliens would not impair the rights of the wives, nor prevent the full enjoyment of the property according to the laws of the marriage state; especially after the provisions contained in the 9th article of the treaty of amity and commerce with Great Britain, of the 9th November, 1794. *Jackson ex demise Gansevoort & others* v. *Lunn*. 3 *Johns. Cas.* 109.

3 Though in case of a purchase, the law will recognize the title of an *alien* in lands, until office found; yet in case of a *descent*, the law takes no notice of an *alien heir*, on whom, therefore, the inheritance is not cast. But where the title to land in this state was acquired by a British subject, prior to the American revolution, it seems that the right of such British subject to transmit the same, by descent, to an heir, in *esse*, at the time of the revolution, continued unaltered and unimpaired; the case of a revolution or division of an empire, being an exception to the general rule of law on this subject. *Jackson ex demise Gansevoort and others* v. *Lunn*. 3 *Johns. Cases*, 109.

RHODE-ISLAND.

1 The superior court of Rhode-Island is the highest court of law of that state, within the meaning of the 25th section of the judicial act: And the general assembly might set aside, but they could not make a decision. 3 *Dallas*, 308 to 318.

2 The practice of the courts of Rhode-Island in relation to discontinuances. 3 *Dallas*, 345 to 356.

3 In what cases ten per cent. damages are allowed in Rhode-Island on protested bills of exchange. 3 *Dallas*, 345 to 356.

4 Where the court and not the jury may assess damages in this state. *Ibid.*

5 The English statute of frauds is in force in Rhode-Island. 3 *Dallas*, 415 to 424.

RICHMOND PARK.

Footways (but not for carriages or for horse people) through *Richmond* gate, and through *East Sheen* gate, across *Richmond* park, established. *Rex* v. *Benjamin Burgess*. 2 *Burr.* 908.

RIOT.

1 Unlawful act to be done, necessary to a riot. *Queen* v. *Soley and another*. 2 *Salk*. 594.

2 If three or more assemble lawfully, and quarrelling, fall upon one of their own company, it is no riot; if on a stranger, it is, but in those only who concur. *The Queen* v. *Ellis*. 2 *Salk*. 595.

3 If four are indicted for a riot, two die before trial, and two are found guilty, the court will intend that evidence was given against one at least of the deceased. *The King* v. *Scott*. 1 *Black*. 291 *and* 350.

4 If a number of people assemble together in a lawful manner, and af-

on a lawful occasion, as for electing a mayor (as it was in the case,) or the like, and during the assembly, a sudden affray happen, this will not make it a riot *ab initio*, but it is only a common affray. But if a number of people assemble in a riotous manner to do an unlawful act and a person who was upon the place before, upon a lawful occasion, and not privy to their first design, comes and joins with them, he will be guilty of a riot equally with the rest. *Holt* chief justice with *Powell* justice, seemed to agree. *Corporation of Grampound's Case.* 2 *L. Raym.* 965.

5 If persons, riotously assembled, in part demolish a dwelling-house, and at the same time, destroy goods and furniture in the house; although the jury should find that such goods and furniture were not destroyed "by means," or "in consequence," of the demolishing of the house, the hundred is liable, under 1 G. 1, stat. 2, c. 5, s. 6, to yield damages for the destruction of the goods and furniture, as well as of the house. *Hyde* v. *Cogan.* 2 *Doug.* 699 to 707.

6 So, if the rioters, in demolishing the house, do damage to the garden, the hundred shall yield damages for the garden. *Wilmot* v. *Horton.* 2 *Doug.* 701, *n.* to 704, *n.*

Qu. If an action will lie on the riot act against the hundred beyond a year from the time when the damage was done? *Ibid.*

A prosecution for the felony under that act must be commenced within the year. *Ibid.*

Qu. If twelve or more must be engaged in the demolishing a house, to entitle the party to an action against the hundred? *Ibid.*

The number of twelve is not necessary to constitute a felony under the act. *Ibid.*

7 The hundred are not liable in an action for damages, brought by the person injured by a mob beginning to pull down his house, &c. unless the riot be of such a kind as to amount to felony within statute 1 G. 1. stat. 2, c. 5. *Reid* v. *Clarke and al.* 7 *Term Rep.* 496.

8 In that case the breaking of the plaintiff's windows by a mob, because he would not illuminate his house on a particular occasion, was held not to be within the act. *Ib.*

9 Where a mob attacked a baker's house, and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves, below the marketable value: held, this was evidence for the jury of a felonious beginning to demolish the house, &c. within the 4th section of the riot act; and that the plaintiff might recover for the damages done to the house, in an action against the hundred on the 6th section, but not for the value of the flour so sold; that not being consequential to the act of demolition; nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house, on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the act, with the view with which it appeared to have been done. *Burrows* v. *Wright.* 1 *East*, 615.

10 Where a mob, after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred on the 6th section of the riot act, 1 G. 1, stat. 2, c. 5, such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may be so recovered. *Greasley* v. *Higginbotham.* 1 *East*, 636.

11 To support an action against the hundred for damages on statute 1 G. 1, statute 2, c. 5, for the riotous demolition of a house, it is not ne-

cessary to prove that twelve rioters were assembled at the time. *Pritchet* v. *Waldron.* 5 *Term Rep.* 14.

12 Such an action is maintainable by a trustee, in whom the legal estate is vested for existing purposes, and (as it seems) even by a bare trustee of a satisfied term. *Ibid.*

13 An order of justices for the levying of money upon the inhabitants of an hundred under the riot act, directing that the money, when levied, shall be paid into the hands of a banker, subject to their further order, is bad. *R.* v. *Inhabitants of the Hundred of Hatfshire.* 5 *Term Rep.* 341.

14 The money should be directed to be paid to the party entitled. *Ibid.*

15 A writ of execution sued out by the party who has recovered damages against the hundred, and delivered by the sheriff to the justices, is a good foundation for an order to levy the amount—*Semb. Ibid.*

16 The order for levying the damages ought to be upon the inhabitants of the "towns, parishes, villages, and hamlets," pursuant to statute 27 Eliz. c. 13, and not upon the inhabitants of the "districts and parishes" within the hundred. *Ibid.*

17 If a mob riotously and by force demolish a gaol, by which the debtors escape, the sheriff or gaoler is answerable in an action on the case to the creditors for their escape. *Elliot* v. *The Duke of Norfolk.* 4 *Term Rep.* 789.

RIVERS.

1 A navigable river is the king's highway for the use of himself and his subjects. *Anon. Lofft.* 556.

2 A right to a track path on each side of the river *Tees* (alternately) for towing, without paying any acknowledgement, found upon a trial at bar. *Pierse* v. *Lord Fauconberg.* 1 *Burr.* 292.

3. The public are not entitled at common law to tow on the banks of ancient navigable rivers. *Ball* v. *Herbert.* 3 *Term Rep.* 253.

The right must be founded either on statute or on usage. *Ibid.*

4 If an act of parliament for inclosing and allotting the common and waste lands of a parish through which a navigable river flows, empower commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not set out shall be deemed part of the lands to be allotted, an ancient towing path on the bank of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction. *Simpson* v. *Scales.* 2 *Bos. & Pull.* 496.

5 The owner of land through which a river runs, cannot, by enlarging a channel of certain dimensions, through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other land owner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel. *Bealey* v. *Shaw.* 6 *East*, 209.

6 Whatever addition is made to the shores of rivers, &c. by alluvion, from natural causes, or from an union of natural and artificial causes, belongs to the owners of the shores. *Adams* v. *Frothingham.* 3 *Mass.* 352.

Low-water-mark is a description of the boundary of land in a judgment in a real action sufficiently certain, to enable the sheriff to execute such judgment by an *Haberee facias Seizinam.* *Ibid.*

ROADS.

The review of roads, though not taken notice of in the act of assembly, has always been granted, and is now become a matter of right. 1 *Dallas*, 11.

ROBBERY.

A larceny committed with actual force and violence or with constructive force, by any assault and putting in fear, is a robbery; and in an indictment for such offence, and allegation of force and violence is sufficient; without alleging that the party robbed was put in fear. *Commonwealth* v. *Humphries*. 7 *Mass.* 242.

ROCHESTER, TOWN OF.

The freeholders and inhabitants of the town of *Rochester* were not made a body corporate, by the patent to *Beckman* and others, in 1703. *Jackson ex dem. Hardenberg* v. *Schoonmaker*. 2 *Johns. Rep.* 230.

A deed from the trustees of the town of *Rochester*, dated 1714, was held to be valid, though the grantors were not trustees in that year, but in 1717, there being a mistake in the date of the deed. *Ibid.*

RULES OF COURT.

1 All enlarged rules to a subsequent term to be fixed to subsequent days therein, and copies thereof to be given the judges the day before the beginning of every term. *Regula Generalis.* 3 *Burr.* 1842.

2 If a man enters into a rule in K. B. not to sue execution upon a judgment, and brings an action of debt upon the judgment, it is a breach of the rule. *Anon.* 2 *Salk.* 596.

3 A rule of court giving specific relief in a case where, by law, the party is not entitled to two different remedies, is a bar to an action for the same cause. *Cameron & al.* v. *Reynolds*. *Cowp.* 406.

4 Rule for one not party to the suit to attend the master. *Elwood* v. *Sir Godfrey Kneller*. 1 *Str.* 477.

5 Explanatory words not to be added to the order when it is made a rule of court; but, if necessary, they must be made a separate rule. *Anon.* *Lofft*, 151.

6 Seals of the supreme court, and circuit courts of the *United States*, established. 2 *Dallas*, 399.

7 Rules respecting the admission of counsellors and attornies in the supreme court. 2 *Dallas*, 399, 400.

8 All process of the supreme court shall be in the name of the *President* of the *United States*. 2 *Dallas*, 400.

9 Rule relative to the practice of the supreme court. 2 *Dallas*, 411.

10 If the transcript be not filed by the sixth day of term, either party may have a continuance. 3 *Cranch*, 239.

If judgment below be 30 days before the sitting of this court, the record must be filed within the first six days of the term. *Ibid.*

In all cases from the district of *Columbia*, the record must be filed within the first six days of the term. *Ibid.*

If errors are not assigned according to the general rule, the writ of error will be *dismissed* with costs. *Ib.*

If the defendant refuses to plead, the court will proceed *ex parte*. *Ibid.*

RULES OF THE KING'S BENCH PRISON.

1 One committed for a contempt cannot have the benefit of the rules. *The Case of Landen Jones*. 2 *Str.* 817.

2 Rules of the prison enlarged till prison repaired. *Case of the prison of the king's bench*. 2 *Str.* 678.

3 One in custody on *excom' cap'* is to have the benefit of the rules. *The King* v. *Buckland*. 1 *Str.* 413.

S

SAILORS.

1 The wages of a sailor not payable

if ship be lost or taken before the end of the voyage. *Hernaman* v. *Bawden.* 3 *Burr.* 1844.

2 Seamen lose their wages where the ship is lost before she comes to a port. *Anon.* 3 *Salk.* 23. 1 *L. Raym.* 639.

3 If a ship is freighted out and home and captured on her homeward-bound voyage, the mariners shall be paid for their outward voyage, and for half the time they stayed at the port of delivery. *Anon.* 1 *L. Raym.* 739.

4 A mariner who is impressed upon his voyage shall recover wages for that part of the voyage he had performed before he was pressed, if the ship out of which he was pressed arrives at her delivering port. If a ship is captured, though she may be ransomed afterwards, the mariners lose their wages. *Wiggins* v. *Ingleton.* 2 *L. Laym.* 1211.

SALES.

1 Sugars, which were in the king's warehouse, under the locks of the king and the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on the 20th of *September*, when samples of half a pound weight from each hogshead, drawn *after* the sugars had been weighed and the duties ascertained at the king's beam, were produced to the bidders assembled; and the auctioneer (having then before him the printed catalogue of sale, containing the lots, marks, and number of hogsheads, and the gross weight of the sugars, and also another written paper containing the *conditions of sale*, which latter he *read* to the bidders as the conditions on which the sugars mentioned in the *catalogue* were to be sold; but (*the two papers were neither externally annexed, nor contained any internal reference to each other*,) wrote down on the catalogue the name of the highest bidder and the sum bid for the particular lots; having first informed the bidders that the duties were not then paid, but would be paid on the morrow by the seller; and after the biddings closed, *the samples* were delivered to and accepted by the purchaser, according to the usual practice at such sales, as part of his purchase, to make up the quantity marked, as weighed at the king's beam. And a fire having consumed the sugars on the 22d *September*, before the duties could be paid, and *without the default of the seller*; held,

1st. That at common law this was a sale to change the property at the time and place of auction, though the goods could not be delivered till the duties were paid, which was known at the time; such being the manifest intent of the contracting parties; and consequently that the loss must fall upon the buyer.

2d. That assuming a sale of goods by auction to be within the 17th section of the statute of frauds 29 Car. 2, c. 3, (which, whether it were, or not, was not now necessary to be decided) and therefore requiring to be evidenced by a memorandum in writing of the bargain, signed by the party to be charged, or his authorized agent, except where the buyer shall receive part of the goods sold; yet, here the delivery to, and acceptance of the *samples* by the buyer; which delivery was made as part of the thing purchased, and upon which the duties were paid; at any rate took the case out of the statute.

3d. It seems that taking sales of goods by auction to be within the 17th section of the statute, the auctioneer or broker, who is middle-man, must be taken to be the agent of both parties, so as to bind the purchaser by his signature. *Hinde* v. *Whitehouse & Galan.* 7 *East*, 558.

2 If *A.* contracts to sell certain goods to *B.* on a credit, provided *B.* shall furnish a surety for the price, and

delivers the goods without such surety furnished, but declaring that he should not consider them as sold until the security should be given, the property remains in *A.* notwithstanding such delivery. *Hussey et al.* v. *Thornton et al.* 4 *Mass.* 405.

3 *A.* purchased a negro slave of *B.* for 200 dollars, for which he gave his bill payable in five months; and it was agreed between the parties, that if *A.* or his wife did not like the slave, *B.* should take him back, if he was returned any time within five months, and refund the purchase money. *A.* offered to return the slave within the five months, and *B.* refused to take him, or refund the purchase money. It was held, that *A.* was entitled to recover the amount, as damages for the non-performance of the agreement. *Giles* v. *Bradley.* 2 *Johns. Cases,* 253.

4 On a sale of lands by trustees, or persons acting in *auter droit*, they are not responsible in case of an eviction of the purchaser, unless there is fraud, or an express warranty. *Murray* v. *Trustees of Ringwood Company.* 2 *Johns. Cases,* 278.

5 Where *A.* contracted to sell a house and lot to *B.* and *C.* purchased of *B.* all his right, &c. it was held that *C.* though a *bona fide* purchaser, without notice, must take the property, subject to all the equity, existing between the original parties, *A.* and *B.* *Murray* v. *Governeur and others.* 2 *Johns Cases,* 438.

6 A crop of wheat *growing* may be sold by *parol.* *Newcomb et al.* v. *Rarmer.* 2 *Johns. Rep.* 421, *n.*

7 *A.* being indebted to *B.* by a promissory note, for 1,167 dollars, it was agreed in writing between them, that *A.* should deliver to *B.* as much *coal*, at ten dollars per chaldron, as would amount to the sum due on the note, the coal to be of the like quality with that purchased by *A.* of *B.* out of a certain ship. No time or place was fixed for the delivery. *A.* having in his coal yard, a large quantity of coal, and sufficient of the quality mentioned, though consisting of different kinds, immediately afterwards, and at different times, tendered to *B.* the coal, in satisfaction of the note, and *B.* made no objection to the place or mode of delivery, but said, at one time, he would send and take them, and at another, that he was not ready to receive them, and finally neglected to take them. In an action afterwards brought by *B.* against *A.* on the note, it was held, that the agreement for the delivery of the coal was valid, and that the tender on the part of *A.* was equivalent to a performance, so as to bar the plaintiff's action, and might be pleaded by way of *accord* and *satisfaction.* *Coit and Woolsey* v. *Houston.* 3 *Johns. Cases,* 243.

8 In an action of *assumpsit* on the sale of goods, for not delivering goods of a certain description, but of a different sort and quality, either and express warranty or fraud must be alleged, and the plaintiff must prove the allegations as laid in the declaration. *Snell, Stagg, & Co.* v. *I. Moses & Sons.* 1 *Johns. Rep.* 97.

9 In *assumpsit* for a fraud in the sale of goods, the declaration should contain either an express warranty, or an averment that the vendor *knew* of the bad quality of the articles, at the time of sale; and the proofs must correspond with the allegations in the declaration. *Perry* v. *Aaron.* 1 *Johns. Rep.* 129.

10 In every sale of personal chattels, there is an *implied warranty* as to the title of the vendor. *Aliter,* as to the quality or soundness of the thing sold. *Defreeze* v. *Trumper.* 1 *Johns. Rep.* 274.

11 Where the parties in the sale of a ship reduced their contract to writing by a *bill of sale*, it was held, that no action would lie on a *parol* warranty made at the time of the sale, and

where no fraud was alleged. *Mumpherd* v. *Mc' Pherson.* 1 *Johnson's Rep.* 414.

12 The *English* law as to sales in *market overt* is not applicable here. *Wheelwright* v. *Depeyster.* 1 *Johns. Rep.* 471.

13 Where the contract of sale is reduced to writing, you cannot maintain an action on an implied warranty, but only for a *deceit.* *Wilson* v. *Marsh.* 1 *Johns. Rep.* 503.

14 *A.* sold a parcel of beef to *B.* who paid him the price, and it was agreed that the beef should remain in the custody of *A.* until it was sent to *N.* Seven or eight months afterwards, *B.* received a part, and sent it to *N.*; but it was returned as bad, and on inspection, the whole was found unmerchantable. In an action brought by *B.* against *A.* for not delivering him merchantable beef, it was held, that on the payment of the purchase money, the property was transferred to *B.* and that it remained afterwards, in the custody of the vendor at the risk of the vendee; and that, as the beef was good when the money was paid, the vendee must bear the loss of its subsequent destruction. *Lansing & Lansing* v. *Turner & Strafford.* 2 *Johns. Rep.* 13.

15 To an action on a bond, given for the consideration of a chattel sold, the defendant cannot plead in discharge, a want or failure of consideration, on the ground of a false representation or warranty, as to the article sold. *Vrooman* v. *Phelps.* 2 *Johns. Rep.* 177.

16 On a sale, on good faith, and without warranty, the buyer takes the risk. *Dorlan* v. *Sammis.* 2 *Johns. Rep.* 179.

17 Where by a private act of the legislature, the property of a person was directed to be sold, without warranty, by the surveyor-general, and the purchase money to be paid to certain creditors, such a sale amounts only to quit claim of any right or interest in the state, and does not take away the rights of third persons. *Jackson ex dem. Gratz* v. *Catlin.* 2 *Johns. Rep.* 248.

18 *A.* sold to *B.* a quantity of paints for good *Spanish-brown* and *white-lead*, and for a full price; the paints proved to be bad, and of no value. It was held there was no warranty in the case, and to make *A.* liable there must be either an express warranty or fraud. *Holden* v. *Dakin.* 4 *Johns. Reports*, 421.

19 A delivery of the key of the warehouse in which goods sold are deposited, is a sufficient delivery of the goods to transfer the property. *Wilkes and Fontaine* v. *Ferres.* 5 *Johns. Rep.* 335.

A delivery of the receipt of the store-keeper for the goods kept in his store, being documentary evidence of title, is tantamount to a delivery of the goods. *Ibid.*

20 Where *A.* bought a waggon of *B.* on sight, and *B.* affirmed it to be worth much more than its real value, it was held that *B.* was not liable to an action of deceit for a false affirmation, there being no express warranty or fraud. *Davis* v. *Meeker.* 5 *Johns. Rep.* 354.

21 *A.* sold to *B.* who was a *maltster* and brewer, a cargo of *Virginia* wheat, and it was known to *B.* to be southern wheat, which is always more or less heated, but not so as to injure it when manufactured into flour, though it renders it unfit for malting. A *sample* of the wheat, taken in the usual manner, from the cargo, was shown to *B.* before the purchase, which, on experiment, he found to *malt.* *B.* received part of the cargo, but finding some of it heated, and unfit for malting, refused to receive the remainder, though it was good merchantable wheat, and equal to any southern wheat. *A.* tendered the residue of the cargo to *B.* and gave him notice, that unless he received and paid for the whole, the residue of the cargo would be sold at public auction, and *B.* held responsible for any deficien-

cy in the amount of sales. It was held, that the sample of the wheat delivered to the vendee was a fair specimen of the quality of the article: that a contract of sale, and delivery of a part, transfered the property to the vendee; and that the subsequent sale of the residue of the wheat, was not a waiver of the contract; the vendor being by the refusal of the vendee to accept the wheat, at liberty to abandon it, or dispose of it, *bona fide*, as agent of the vendee, to the best advantage, by a sale at public auction. *Sands and Crump* v *Taylor and Lovett.* 5 *Johns. Rep.* 395.

22 A stone for grinding bark, affixed to a mill, called a bark mill, is not part of the freehold, but personal property. *Hermance* v. *Vernoy.* 6 *Johns. Rep.* 5.

Every vendor of personal property is considered as warranting the *title* of the thing sold, though there is no express warranty. *Ibid.*

23 A person who has sold personal property is not a competent witness for the vendee of such property, in a suit brought against the vendee for taking it away. *Heermance* v. *Vernoy.* 6 *Johns. Rep.* 5.

24 Where on the sale of goods, the vendor takes the note of a third person, payable at a future day, in payment, at his own risk, and there is a fraudulent representation on the part of the vendee as to the note, the vendor may bring his action immediately, for goods sold and delivered, against the vendee. *Wilson* v. *Force.* 6 *Johns. Rep.* 110.

25 *Assumpsit* is the proper form of action where there is a warranty express or implied in the sale of chattels; but if the plaintiff grounds his action on deceit or fraud in the sale, the deceit or fraud must be substantially alleged. *Evertson's Executors* v. *Miles.* 6 *Johns. Rep.* 138.

26 If a man sells a different interest from that which he pretends to sell, and especially, if the contract is founded in ignorance and fraud, the purchaser of the chattel may return it to the vendor, if he does so immediately after the discovery of the imposition; and thereby rescind the contract. *Ketletas* v. *Fleet.* 7 *J. Rep.* 324.

27 Purchase at a constable's sale is not sufficient to prove property, unless the authority upon which the constable acted be also shown; for a sale by the officer, without authority, would give no title to the purchaser. *Carter* v. *Simpson.* 7 *Johns. Rep.* 538.

28 If a seller will not make an assurance when reasonably demanded, he loses the bargain, and the purchaser is not bound to wait until he is able to convey; and it seems, that after a continued neglect and ability of the seller for six years subsequent to a request and refusal to convey, neither any court of law nor equity would interfere to enforce the performance of the agreement. *Van Benthuysen* v. *Crapser.* 8 *Johns. Rep.* 257.

29 Irregularities and frauds at commissioners sales. 4 *Dallas*, 218.

30 The act of assembly of Maryland which authorizes the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a *single resale* only; and by that resale the power given by the act is executed. *Oneale* v. *Thornton.* 6 *Cranch*, 53.

31 By selling and conveying the property to a *third* purchaser, the commissioners precluded themselves from setting up the second sale, and the second purchaser, by making this defence, affirmed the title of the third purchaser. *Ibid.*

SALVAGE.

1 The commander of a stranded vessel having by the recommendation of the pilot, who came to his assistance, sent to the defendant on shore,

till then a stranger to him, to send all the help, which was necessary; which he accordingly did; and under this direction (but also under the inspection of the custom-house officers attending) the goods were brought on shore, and housed under the joint locks of himself and the collector of the customs: and he paid all the salvors; held that this constituted him the agent of the owners, and took the case out of the statute 12 Ann. st. 2, c. 18, s. 2, for regulating the quantum of salvage by the award of three justices of the peace; which statute only applies to cases, where application is made by the owners, &c. to certain public officers named, and the salvage is made under their orders. *Baring* v. *Day*. 8 *East*, 57.

2 No salvage is due for a rescue or recapture by a neutral, from a friendly power. *Peck* v. *Trustees of Randall*. 1 *Johns. Rep.* 165.

3 Salvage on an American for rescuing a neutral vessel, from a French privateer. 4 *Dallas*, 34.

4 Salvage on an American, for recapture of an American from a French privateer. 4 *Dallas*, 37.

5 *One half* allowed for salvage in Delaware Bay. *Peisch* v. *Ware*. 4 *Cranch*, 347.

Goods saved are not liable to the ordinary revenue laws. *Ibid.*

Quere, Whether they ought to pay duties. *Ibid.* 348.

SCHOOL.

Masters of grammer schools must be licensed by the ordinary, who may examine the party applying for a license as to his learning, morality, and religion. *Rex* v. *The Archbishop of York*. 6 *Term Rep.* 490.

SCHOOL DISTRICTS.

1 Monies voted to be raised by a school district for the erecting of a school house, may be assessed by assessors chosen after the money is voted. *Pond* v. *Negus et al.* 3 *Mass.* 230.

It is not necessary that such assessment be made within thirty days from the date of the certificate of the district clerk. *Ibid.*

If an illegal assessment of such monies be made, the same or succeeding assessors may make a new assessment; for which purpose the district clerk may issue a second certificate. *Ibid.*

The inhabitants of a school district, having voted to raise monies for erecting a school-house, may afterwards, and before the same are assessed, rescind such vote at their discretion. *Ibid.*

2 Towns may alter the limits of, or subdivide any school districts, without changing the limits of all. *Richards* v. *Dagget et al.* 4 *Mass.* 534.

If after the inhabitants of a school district have voted to raise money for building a school house, and before the same is assessed, the town shall set off certain inhabitants, and form them into a separate district, such inhabitants are not liable to be assessed for the money so voted. *Ibid.*

SCIRE FACIAS.

I. *When it may be sued out.*
II. *Proceedings on, &c.*

I. *When it may be sued out.*

1 If a judgment be above ten years standing, the plaintiff cannot sue a *scire facias* without motion in court; if under ten but above seven, he cannot have a *scire facias* without a motion at side bar. Note, if, after such motion and judgment revived by *scire facias*, the defendant dies before execution, the plaintiff must sue a new *scire facias*, but may have it without motion, for the

judgment was revived before. *Hardesty* v. *Barney*. 2 *Salk*. 598.

2 On a judgment on ejectment, a *scire facias* lay at common law against the *terre* tenants. *Proctor* v. *Johnson*. 1 *L. Raym*. 669. *Salk*. 600.

3 On a plea of coverture and verdict for the defendant, the husband cannot have execution for the costs without a *sci. fa*. *Wortly* v. *Rayner*. 2 *Doug*. 637.

4 Plaintiff dying after verdict, but before day in bank, there must be a *scire facias* before execution. *Earl* v. *Brown*. 1 *Wils*. 302.

5 Where execution is stayed by injunction till after the year, plaintiff must sue a *sci. fac*. *Booth* v. *Booth*. 1 *Salk*. 322.

6 In error to reverse a fine, though, in strictness of law, a *scire feci* being returned against the conusees is sufficient, yet, for fear of purchasers and in favour of them, there shall be a *scire facias* against the tertenants. *Tully's Case*. 2 *Salk*. 598.

7 Judgment of 20 years standing may be revived by *scire facias*, but no execution till return of *scire feci*, or affidavit of personal notice to the defendant. *Coysgarne* v. *Fly*. 2 *Black*. 995.

8 In setting out a recognizance of bail on *oyer*, the plaintiff ought to shew in what term it was taken.

But the omission will not entitle the defendant to insist that there is a variance between the recognizance in the declaration and that which is set out upon the *oyer*.

An irregular *capias ad satisfaciendum* is sufficient to warrant proceedings against bail. *Ball* v. *Manucaptors of Russell*. 2 *L. Raym*. 1176. 2 *Salk*. 602.

9 Judgment in ejectment; one dies; execution may be taken by the survivors. It seems you may take out execution in ejectment if the defendant dies within the year, though not in other personal actions, unless execution be taken out in the lifetime of the parties. *Anon*. 3 *Salk*. 319.

10 If the defendant dies after a verdict against him, and before the day in bank, the plaintiff may enter up judgment on the cause as if he were alive; and a *scire facias* thereon against his personal representatives may recite the judgment, as if it had been entered in his lifetime. *Colebeck* v. *Peck*. 2 *L. Raym*. 1280.

11 If a judicial writ is entered on the roll, an *alias* may be sued out thereon before it is returned. An attorney cannot sue out a *scire facias* against bail, under the warrant of attorney in the action against the principal.

And a judgment *inde* without a new warrant is erroneous. *Atwood* v. *Burr*. 2 *L. Raym*. 1252. *Salk*. 89, 603.

12 A *scire facias* is an action. *Winter* v. *Kretchman*. 2 *Term Rep*. 46.

13 A *scire facias* to revive a judgment, entered on a bond securing an annuity, granted before statute 17 G. 3, c. 26, s. 2, commanding that no *action* shall be brought on any judgment already entered, (unless certain requisites were complied with,) is an action within that clause. *Fenner* v. *Evans*. 1 *Term Rep*. 267.

14 A *scire facias* to revive a former judgment is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error in that former action, such agreement shall bind his executors, upon the *scire facias* being brought against them. *Executors of Wright* v. *Nutt, in error*. 1 *Term Rep*. 388.

II. *Proceedings on, &c.*

1 *Sci. fa*. against an administratrix on a judgment against her husband; after two *nihils* returned, a *scire fieri* enquiry is taken out; the award of execution on the former writs is evidence of assets. But where there has been no *scire feci*, and on-

ly two *nihils* returned, the court, on motion, will set aside the award of execution, and admit defendant to plead, if he comes in time; otherwise if he acquiesce upwards of two years. *Wharton* v. *Richardson, Widow.* 2 *Str.* 1075.

2 In C. P. there is but one *scire facias*, and upon *nihil* returned, execution. In the king's bench there are two *scire facias's* and two *nihils* returned, and therefore both were sued out together, by making the teste of the second as if the first were returned; but now the court made a rule that both should not be sued out together, but the first should be duly returned before the second should be tested, the day of the return of the first. *Anon.* 2 *Salk.* 599.

3 *Scire facias* against bail must be in the sheriff's hands a convenient time. *Anon.* 2 *Salk.* 599.

4 *Sci. fa.* in error needs not lie four days in the office before the return. *Millar* v. *Yearaway.* 3 *Burr.* 1723, and *Gross* v. *Nash.* 4 *Burr.* 2439.

5 Fifteen days inclusive between teste of first and return of last, sufficient. *Goodwin* v. *Peek.* 2 *Salk.* 599.

6 Where a *scire facias* is abated by a plea, there shall be no costs. *Aliter* if there had been no plea, and party moves to quash his own writ. *Pocklington* v. *Peek.* 1 *Str.* 638

7 *Scire facias* returnable on such a day, *ubicunq. tunc fuerimus*, not good. *Manning* v. *Bois.* 3 *Salk.* 320.

8 *Scire facias* against bail in K. B. must be brought in *Middlesex*, and not elsewhere. *Shuttle* v. *Wood.* 2 *Salk.* 600.

9 In *scire facias*, 15 days with teste and return, are good. *Hicks* v. *Jones.* 2 *Str.* 765.

10 Against principal *in hac parte*, and bail *in ea parte*. *Lugg* v. *Goodwin.* 2 *Salk.* 599. 1 *L. Raym.* 393.

11 No *scire facias* on recognizance can be tested the day the party makes default. *The King* v. *White and another.* 2 *Str.* 1220.

12 To a *sci. fa.* against bail, a plea of payment by the principal must shew it was made before the return of the first *sci. fa. Guilliam* v. *Hardy.* 1 *L. Raym.* 216. 1 *Salk.* 320.

13 *Scire facias* is a personal action, and therefore requires bail on a writ of error. *Pulteney* v. *Townson.* 2 *Black.* 1227.

14 Judgment against two *scire facias* against one, ill. Return of *sci. feci* against tenants ought to be of all the tertenants *in balliva sua*. *Panton* v. *Hall.* 2 *Salk.* 598.

15 The recovery of a judgment as executor precludes the person against whom such judgment is obtained from contesting the death of the supposed testator; and in *scire fieri* inquiry against him upon such judgment, the plaintiff need not aver that the testator was dead.

If the inquisition upon a *scire fieri* inquiry imports to be taken by virtue of the writ to inquire of the matters therein contained, by the oaths of *A., B.*, &c. and states that the jurors were sworn, and charged, say upon their oaths, that the defendant wasted, it need not allege in terms that the jurors were sworn and charged to inquire of the matters contained in the writ. *Morfoot* v. *Chivers.* 2 *L. Raym.* 1395. *Str.* 631.

16 *Scire facias* may be served immediately before the return is out. *Obrian* v. *Frazier.* 1 *Str.* 644.

17 *Scire facias* returnable *ubicunque* generally, is good without limiting it to *England*. *The King* v. *Hare and Munn, in Chancery.* 1 *Str.* 146.

18 Where a *scire feci* is returned, the court will not set it aside for want of notice. *Barr* v. *Satchwell.* 2 *Str.* 813.

Scire facias not amendable. *Hillier* v. *Frost.* 1 *Str.* 401.

19 In a *scire facias* on a judgment recovered by an executor, the death of the testator need not be shewn.

Moorfoot v. *Chivers and Wife.* 1 *Str.* 631.

20 Where a defendant dies after inquiry executed, and before the return, the *sci. fa.* against his executors must be to shew cause why the damages assessed should not be recovered. *Goldsworthy* v. *Southcott.* 1 *Wils.* 243.

21 *Scire facias* to repeal the grant of a market, not abated by the demise of the crown. *The King* v. *Eyre.* 1 *Str.* 43.

22 In a *scire facias* on a judgment, in a personal action against terretenants. *Qu.* Whether a plea that there are other terretenants in the county not named in the return, can conclude with a prayer that the writ may be quashed? *Adams* v. *The Terretenants of Savage.* 2 *L. Raym.* 854, and 1253. 2 *Salk.* 601, and 3 *Salk.* 321.

23 It was held, that if there be fifteen days between the teste of the first and the return of the second *scire facias* against bail, it is sufficient, without any regard to the number of days between the teste and return of each, and that a *capias ad satisfaciendum* may be taken out against bail, without any *fieri facias* or return of *nulla bona.* *Elliot* v. *Smith.* 2 *Str.* 1139.

24 Upon the return of a *nihil* to an *alias scire facias*, the defendant may appear.

A recognizance in error upon a judgment in debt may be conditioned, that upon a nonsuit, discontinuance, or affirmance, the cognizor should pay, &c.

In a *scire facias inde*, a plea that the plaintiff in error did prosecute the writ with effect, and assigned errors, and that the plea thereon remains undetermined, is good.

In such plea the defendant need not shew whether the plaintiff in error prosecuted by attorney or in person; nor make any conclusion to the record. *Fanshaw* v. *Morrison.* 2 *L. Raym.* 1138. *Salk.* 520.

25 A *scire facias* on the recognizance against bail may be *in hac parte.* The omission of shewing where the king's bench was at the time it gave a particular judgment can only be taken advantage of by a special demurrer. *Bringar* v. *Allanson.* 1 *L. Raymond*, 532.

26 Execution not permitted to issue on a *sci. fa.* to revive an old judgment till a *sci feci* returned, or an affidavit of notice. *Bagnal* v. *Gray.* 2 *Black.* 1140.

27 To a *scire facias* to shew cause why plaintiff should not have execution on a judgment, the defendant pleads that plaintiff ought not to have his action, instead of ought not have execution; and held well enough. *Grey* v. *Jones, Executrix, &c.* 2 *Wils.* 251.

28 Judgment being entered on a bond to secure the quarterly payment of an annuity, and a *fi. fa.* having issued for the arrears of the last half year, a second *fi. fa.* may be taken out for the next quarter, *without reviving the judgment* by *scire facias.* *Scott* v. *Whalley.* 1 *H. Black.* 297.

29 A *scire facias* on a judgment must pursue the terms of the judgment. *Mara* v. *Quin, Executrix.* 6 *Term Rep.* 1.

30 Therefore where an executor pleads *plene administravit*, and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderint*, the *scire facias* on that judgment must only pray execution of such assets as have come to the executor's hands since the former judgment; and if it pray execution of assets generally, without confining it to that time, it cannot be supported. 6 *Term Rep.* 1.

31 A *scire facias* must lie in the sheriff's office the last four days before the return. *Forty* v. *Herimer.* 4 *Term Rep.* 583.

32 An execution delivered to the sheriff, who served the original writ, and a return of *non inventus* by him is sufficient to maintain a *scire fa-*

cias against the bail, although the principal live in another country. *Brown* v. *Wallace.* 7 *Mass.* 208.

33 Where a judgment has lain more than a year, and the defendant, afterwards, consents that an execution be issued, without the judgment being revived by *scire facias*, the execution will not be set aside for irregularity, at the instance of a third person, who alleges, that the judgment has been kept on foot collusively, and the execution issued fraudulently, to injure him, but he must seek relief in the court of chancery, or by bringing the question of fact as to the fraud, to a trial, by an issue at law. *Howland* v. *Ralph.* 3 *Johns. Rep.* 20.

34 A *scire facias*, on a judgment against *C.* issued against *A.* and *B.* as tertenants of *C.* deceased, was returned by the sheriff, that he had given notice to the tenants of the land of which *C.* was seized, &c. to appear, &c. On the 5th *May*, 1807, a rule was entered for the tenants to appear; on the 9th *May*, their defaults were entered, and on the 15th *May*, 1807, a final judgment was entered for the plaintiff. It was held, that the tertenants were too late, after judgment by default, to move to set aside the proceedings on the *scire facias*, on the ground that the heirs and personal representatives of *C.* had not been warned, or because that they were not such tertenants as ought to have been summoned, especially, when no merits are disclosed by them, and the proceedings were regular. *Whitney* v. *Camp and Townley, Tertenants of Crosby, deceased.* 3 *Johns. Rep.* 86.

35 A *scire facias* is a new action, and requires a new warrant of attorney. *Gonnigal* v. *Smith.* 5 *Johns. Rep.* 106.

Where an attorney different from the plaintiff's attorney on record in the original suit issues a *scire facias* to revive a judgment, there is no need for leave to change the attorney. *Ibid.*

36 To a *scire facias*, on a judgment, the defendant cannot plead any matter which he might have pleaded to the original action, or which existed prior to the original judgment; and it makes no difference whether the judgment was entered up by confession on a warrant of attorney, or by default, or on plea; but where the judgment is by *confession*, the proper remedy is by an application to the court for relief, on motion. *M'Farland* v. *Irwin.* 8 *Johns. Rep.* 77.

SCOTCH MANUFACTURES.

Scotch manufactures may be vended in *England* by wholesale, without any licence from the hawker's office. *Maxwell* v. *Mayre.* 1 *Black.* 364, and 3 *Burr.* 1314.

SEAL.

An instrument for the payment of money, executed in *Virginia*, but payable in *New-York*, and which by the manner of its execution, was regarded by the laws of *Virginia*, as a sealed instrument, was, in a suit here, held to be a negotiable note or simple contract. *Warren* v. *Lynch.* 5 *Johns. Rep.* 239.

A scrawl, with the pen, of (L. S.) at the end of the name, is not a seal. *Ibid.*

A seal is an impression upon wax or wafer, or some other tenacious substance capable of being impressed. *Ibid.*

SEAMEN AND THEIR WAGES.

1 Where application had been made for the discharge of an impressed seamen before the two years of his protection by the statute 13 G. 2,

c. 17, were expired; which was then ineffectual, because the facts were not verified with sufficient certainty; yet the doubt being now removed by another affidavit, the court granted a writ of *habeas corpus* for the purpose of liberating him, though the two years were not expired. *Ex parte Bruce.* 8 *East*, 27.

3 Seamen enter into articles to serve for monthly wages on board a ship "bound for the ports of *Madeira*, any of the *West-India Islands* and *Jamaica*, and to return to *London*, and it is agreed that they shall not *demand* or *be entitled to their wages or any part thereof*, until the arrival of the ship at the port of discharge, &c. (meaning *London*:) held that though the ship carried freight upon the delivery of an outward bound cargo at *Madeira*, and of another cargo taken in at *Madeira* and delivered in the *West-Indies*; yet that being lost in her passage home in a storm, the seamen could not recover wages *pro rata* upon the outward voyage, by reason of the express terms of the stipulation respecting wages. *Appleby* v. *Dods.* 8 *East*, 300.

3 The penalty provided in the second section of the act of congress for the government and regulation of seamen in the merchant service is incurred by a desertion previous to the commencement of the voyage: and that provided in the fifth section of the act by a desertion during the continuance of the voyage. *Cotel* v. *Hilliard.* 4 *Mass.* 664.

4 Where there was a contract by the master of a ship in a foreign country for the sale of the ship, and a delivery in pursuance of such contract, with an agreement that the new employers should victual and man her; it was holden that the former owners were not liable for the wages of the seamen accruing after the contract, and before the sale was completed. *Aspinwall, Ad.* v. *Bartlet.* 8 *Mass.* 483.

5 Where the crew of a vessel were permitted by the first mate, in the absence of the master, to go on shore, and the second mate was ordered to return and take care of the vessel at night, but neglected to do so, and some part of the cargo was stolen out of the vessel, it was held, that the crew were not liable to contribute out of their wages, to make good the loss. *Lewis* v. *Davis.* 3 *Johns. Rep.* 17.

It *seems*, that where the loss or embezzlement of goods, can be traced to a particular seaman, the rest of the crew ought not to contribute. *Ibid.*

6 During a voyage from *Greenock* to *New-York*, a ship called the *Sarah*, was, from necessity, abandoned by the crew, who took the boat, bringing away some part of the cargo; the boat with the crew and the articles saved, were afterwards, taken up at sea, by another vessel and brought to *New-York*, and the merchandise was libelled by the crew of the last vessel for *salvage*. In an action brought by the seamen of the *Sarah*, against the master, for wages from *Greenock*, to the time the ship was abandoned, it was held, that no freight was earned, and that they were not, therefore, entitled to wages; though they might have an equitable *lien* on the goods saved for a compensation, in the nature of *salvage*. *Dunnett* v. *Tonnhagen.* 3 *Johns. Rep.* 154.

7 A seaman hired for a voyage from *New-York* to *Bombay*, and from thence to *Canton* and back to *New-York*. The ship was laden with articles contraband of war, and while in the course of the voyage to *Bombay*, the master under a pretence of a want of water, which was not true in fact, deviated, in order to put into the *Isle of France*, which was the real but concealed port of destination; and while proceeding in the rout, to that *Island*, and near it was captured by a *British* cruiser, and afterwards condemned: The

seaman was put on board an *English* frigate, and, afterwards, shipped to *London*, from whence he sailed to *Wilmington, N. C.* and from thence came to *New-York*. In an action brought by him against the owner of a ship, for wages it was held, that he was entitled to his wages, according to the contract, from the time he left *New-York*, until his return there again, deducting such wages as he had earned and received during his absence. *Hoyt* v. *Wildfire*. 3 *Johns Rep.* 518.

8 Seamen's wages are a lien prior to bottomry. *Blaine* v. *Ship Charles Carter*. 4 *Cranch*, 328.

SECRETARY OF STATE.

A secretary of state is not a conservator or justice of peace under 24 G. 2, and has no jurisdiction to grant a warrant to break open doors to search for libellous papers: such was held to be illegal and void. *Entick, clk.* v. *Carrington and three others, Messengers in ordinary to the King*. 2 *Wils.* 275.

SEIZIN.

1 Being born on one part of the premises, and receiving rent from the rest by the hands of his mother and guardian, is a sufficient seizin by a posthumous son (who died at five weeks old) to bar the descent to his sister of the half blood, and convey it to a collateral heir. *Goodtitle* v. *Newman*. 2 *Black.* 938. 3 *Wils.* 516.

2 Livery in the view, though no actual entry by one of two joint tenants, who afterwards married feoffee. *Parsons* v. *Petitt*. 3 *Salk.* 165.

3 *A.* died seized leaving two infant daughters by different venters; held, that an entry generally, by the mother of the youngest daughter as her guardian in socage, constituted a sufficient seizin in the eldest infant daughter to carry the descent of her moiety, on her death, to her heirs. *Doe d. Barnett & al.* v. *Keen*. 7 *Term Rep.* 386.

4 The distinction taken is, that if a father die, his estate being out on a *freehold* lease, that is not such a possession as to induce the *possessio fratris*, unless the elder son live to receive rent after the expiration of such lease; but if the father's estate were out at his death on a lease for *years* only, the possession of the tenant is a sufficient possession of the elder son to constitute the *possessio fratris*. 7 *Term Rep.* 386.

5 The head of a college hath not such an estate in his office as will entitle him to maintain an assize for it; for he hath no sole seizin. 2 *Term Rep.* 355.

6 A writ of right cannot be maintained without shewing an *actual seizin by taking the esplees*, either in the demandant himself, or the ancestor from whom he claims. *Dally* v. *King*. 1 *H. Black.* 1.

7 The demandant in a writ of right must allege in his count that his ancestor was seized *of right*, as well as that he was seized *in his demesne as of fee*. *Dowland* v. *Slade & ux.* 2 *Bos. & Pull.* 570; 5 *East*, 272.

8 *Qu.* Whether if one through whom title is derived be improperly stated to be heir to her brother, who it appears by the record, had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister as heir to her brother, be fatal. *Ib.*

9 In the count of a writ of right, it is not sufficient to state that the lands descended to four women as nieces and co-heirs of *J. S.* without shewing how they were nieces. *Dumsday* v. *Hughes*. 3 *Bos. & Pull.* 453.

10 One in possession of land, claiming to hold it in fee simple, is sufficiently seized to enable him to convey; and if he warrant the land, no action lies against him on his

covenant of warranty, until an eviction of the grantee, or his assigns by a paramount title. *Bearce* v. *Jackson, Adm.* 4 *Mass.* 408.

11 Where one enters on land, claiming a right to it, and gains a seizin by his entry, his seizin extends to the whole parcel, to which he claims a right. *Proprietors of Kennebec Purchase* v. *Springer.* 4 *Mass.* 416.

But when one enters without claiming a right, his seizin cannot extend farther than his visible occupation. *Ibid.*

12 *A.* conveys land to his four sons in fee, who by his deed of the same date mortgage the same land to the father in fee, to secure the payment of a sum of money and also a maintenance for the father during his life; it was held that the two deeds were parts of the same contract, and that the seizin of the sons was not sufficient to entitle the widow of one of them to her dower in the land. *Holbrook* v. *Finney.* 4 *Mass.* 566.

13 A conveyance of land, when recorded, relates back to the time of its execution; and is evidence of a seizin in the grantee from that time, against all persons, except a subsequent purchaser from the grantor without notice. *Pray* v. *Pierce.* 7 *Mass.* 381.

SEIZURE.

1 There is no right to seize goods as contraband in the river, before they are landed or offered to sale. *Smith* v *Reynolds.* 2 *Wils.* 257.

2 If a man, who practices keeping of barley for the purpose of distilling contrary to the prohibition of the statute, mixes wheat with it, he is liable to have both seized; (and was before the statute had made express provisions;) and setting up a mill for colour will not exempt him. *Rex* v. *Sir Joseph Mawbey and others.* *Lofft*, 179.

SEQUESTRATION.

The mode of sequestering the office of marshal or warden for an escape, is by commission. *Duncombe* v. *Church.* 1 *L. Raym.* 233.

2 Debts were not confiscated by the law of South-Carolina, passed during the war. 3 *Dallas*, 4.

3 Debts were sequestered, not confiscated, by the law of Georgia; and therefore revived by the peace as well as by treaty. *Ibid.*

4 No sequestration divests the property in the thing sequestered; and as to British debts the mere restoration of peace, as well as the treaty, revived the creditor's right of action to recover them. 3 *Dallas*, 4, 5, and 199 to 285.

5 The doctrine of confiscation and sequestration fully discussed and considered. 3 *Dallas*, 199 to 285.

SERVANT.

A shoemaker employs a man to make up shoes for him and retains him by the piece; and, his person being hired by another, and leaving this former service, the work unfinished; and action will lie [though not on the statute of Eliz.] for seducing him from that his former service. *Anon.* *Lofft*, 493.

SESSIONS.

I. *Power and jurisdiction of.*
II. *Other points relative to.*

I. *Power and jurisdiction of.*

1 Sessions on appeal cannot send to a third place, not party. *The case of the parish of Amner.* 2 *Salk.* 475.

2 Sessions cannot suppress an alehouse licensed, unless for disorder. *Rex* v. *Randall.* 2 *Salk.* 470.

3 Sessions cannot a refer a matter

to be determined by another. *Rex* v. *Harding*. 2 *Salk*. 477.

4 An order of sessions must adjudge and not state the evidence only. *Rex* v. *Inhab. of Luffington*. 1 *Wils*. 74.

5 Sessions must either affirm or reverse an order. *Rex* v. *Inhab. of Werisley*. 3 *Salk*. 234.

6 Order of sessions quashed, because it concerned one of the justices named in the stile of court. *The case of Foxham Tithing in Com. Wilts*. 2 *Salk*. 607.

7 A quarter sessions once dropped cannot be resumed. *Rex* v. *The Inhab. of Polstead*. 2 *Str*. 1263.

8 The quarter sessions have not power originally to order churchwardens to make a poor's rate. *The Queen* v. *Inhab. of Abberford*. 2 *L. Raym*. 798.

9 Where the sessions quash an order it must appear to be on appeal. *Anon*. 2 *Salk*. 479.

10 The sessions cannot make an order for prosecuting as a barretor at the charge of the county. *The Queen* v. *Savill*. 2 *L. Raym*. 871. 2 *Salk*. 605.

11 After an order of bastardy by two justices has been discharged upon the merits, they cannot make a fresh order upon the person on whom the former order was made. *The King* v. *Tenant*. 2 *L. Raym*. 1423. *Str*. 716.

12 Sessions may dismiss an appeal for want of such notice as their practice requires. *Anonymous*. 1 *Str*. 315.

13 Sessions may make original order to discharge apprentice. *Rex* v. *Johnson*. 2 *Salk*. 491.

14 Sessions being but one day in law, may alter their judgment and make a new order; but must certify the latter only. *The Parishes of St. Andrew, Holborn, and St. Clement Dane's*. 2 *Salk*. 494, 606.

15 Sessions cannot be entered as setting three days together. *The Parishes of Lingfield and Battle*. 2 *Salk*. 605.

16 After defendant is discharged at sessions, a new order of bastardy cannot be made. *The King* v. *Tenant*. 2 *Str*. 715.

17 Justices at Sessions are proper judges whether to oblige *H*. to take an apprentice or not. *Mincheamp's Case*. 2 *Salk*. 491.

18 Order upon appeal, without saying the party grieved, good. *The King* v. *Inhab. de Almanbury in Com. Ebor'*. 1 *Str*. 96.

19 Sessions cannot discharge apprentice on account of sickness. *Rex* v. *Inhabitantes de Hales Owen*. 1 *Str*. 99.

20 Sessions cannot discharge constables appointed at the leet. *The case of the constables of Limington*. 2 *Str*. 798.

21 The sessions cannot set aside the assignment of an apprentice bound out by the justices. *Rex* v. *Barnes*. 1 *Str*. 48.

22 Order upon surveyors of highways to pass their accounts and pay over monies, cannot be made originally by the general quarter sessions. *Rex* v. *Hartshorn et al'*. 2 *Burr*. 745.

23 Sessions cannot amend orders by adding new averments. *The King* v. *The Inhabitants of Great Bedwin*. 2 *Str*. 1158.

24 Sessions may affirm or quash, but not supersede an original order or make a new one. *Between the inhabitants of the Parishes of Oswell and Woking*. 2 *Salk*. 472.

25 Sessions cannot meddle with overseers' accounts till allowed by two justices. *The King* v. *Bartlett and another*. 2 *Str*. 983.

26 Quarter sessions has jurisdiction over conspiracies. *Rex* v. *Rispal*. 3 *Burr*. 1320. 1 *Black*. 368.

27 Sessions has no original jurisdiction over overseers' accounts. *Rex* v. *The Overseers of Portsmouth*. 1 *Black*. 395.

28 Sessions has no jurisdiction as to new offences, without express words. *Rex* v. *James and another*. 2 *Str*. 1256.

29 Sessions has an original jurisdiction

to discharge apprentices. *Rex* v. *Gill.* 1 *Str.* 143.

30 Sessions have no jurisdiction but by appeal. *Tudy* v. *Padstow.* 3 *Salk.* 257.

31 The sessions of particular liberties have the determination of appeals about the poor, and not the county sessions. *Rex* v. *Coningsby and another.* 2 *Str.* 1222.

32 The sessions may make an order for the payment of wages to any servant in husbandry.

But such an order cannot be made upon the servant's oath, and an order appearing to be made on his oath shall be quashed. *The Queen* v. *Cecill.* 2 *L. Raym.* 1305. *And the Queen* v. *Gouch*, 820, and 2 *Salk.* 411.

33 The sessions cannot commit a man for disobeying an order of filiation and maintenance made by two justices.

Though such order was confirmed at the sessions.

Though a man is improperly committed for disobeying a justice's order, if the order is removed into K. B. the court of K. B. will, on discharging, oblige him to enter into a recognizance for his appearance in K. B. until the validity of the order shall be ascertained. *The Queen* v. *West.* 2 *L. Raym.* 1157.

34 Upon an act of parliament empowering the mayor, aldermen, and commonalty in common council assembled, to take certain steps for the compulsive purchase of lands wanted for a road, an order of sessions stated these steps to have been taken by the mayor, commonalty, and citizens; and it was held bad, though the latter is the name of the corporation at large, and therefore in fact includes the former body. *Rex* v. *Croke.* 1 *Cowp.* 29.

35 The sessions may, by virtue of 43 Eliz. charge parishes out of the hundred towards the maintenance of the poor within that hundred, before two justices have adjudged that the hundred is not able. *The King* v. *Percival and another.* 1 *Str.* 56.

36 Justices, upon appeal from a rate to the quarter sessions, cannot make a new, but only quash the subsisting rate. *Rex* v. *St. Andrew, Holborn, and St. George the Martyr.* 3 *Burr.* 1458.

37 On appeal and order confirmed at the sessions, they afterwards made an order of review to quash the former; but held ill. *Between the inhabitants of Cockfield and Bockstead.* 2 *Salk.* 477.

38 The quarter sessions may proceed by *information* on the statute 5 Eliz. c. 4, for exercising a trade, not having served an apprenticeship for seven years. *Farren qui tam* v. *Williams*, *Cowp.* 369.

39 Where an appeal does not lie, the sessions may do all acts which two justices are empowered to do. A constable can only make a rate upon the parish of which he is constable, to reimburse himself what he may have expended in relieving, conveying, &c. rogues, vagabonds, and sturdy beggars. *Rex* v. *Inhabitantes Parochiæ Boughton in Kent.* 1 *L. Raym.* 424.

40 Whether, when the sessions state facts fully and particularly, from which they infer fraud, the court of B. R. can draw their own conclusion from these facts, without regard to the adjudication of the sessions? *Rex* v. *Woodland Inhab.* 1 *Term Rep.* 261.

[That the court will in no case presume fraud. See 2 *Term Rep.* 711; per *Kenyon*, C. J.]

41 If the sessions draw a conclusion of fact that the taking of a tenement is fraudulent, or that it does not amount to 10*l.* per annum, it is decisive here; though they state all the facts; and refer the consideration of those questions to the court. *Rex* v. *Llanwinio Inhabitants.* 4 *Term Rep.* 473.

42 When the session adjudge a place to be a vill by reputation, as a substantive fact, this court is precluded

from going into the question, notwithstanding the sessions state all the evidence particularly, on which they formed their opinion. *Rex* v. *Ronton Abbey Inhab.* 2 *Term Rep.* 207.

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43 Justices at sessions appointed a committee of twelve magistrates to inspect the state of the county bridge, and to make any new contract for repairing or rebuilding, to be executed by the clerk of the peace, on behalf of the county; afterwards they made an order, adopting a contract for rebuilding, proposed by the committee, and directed to be prepared by the clerk of the peace, which contract having been afterwards executed by the clerk, the justices at a subsequent sessions confirmed all the resolutions of the committee, and ordered the clerk to perform their directions in respect to the contract; the acts of the committee so confirmed are the acts of the sessions, and the authority given to the committee, and exercised by them, is not such a delegation of power by the sessions as will invalidate their orders. *Rex* v. *The Justices of Glamorganshire.* 5 *Term Rep.* 279.

44 The sessions have no jurisdiction over the offender of forgery at common law, nor can they take cognizance of it as a cheat. *Rex* v. *Micah Gibbs.* 1 *East*, 173.

45 Therefore they cannot hold cognizance of an indictment charging that the defendant being a person assessed to certain duties granted upon income, by certain commissioners, and under pretence of being aggrieved, having appealed to certain other commissioners, and contriving and intending to deceive the said last mentioned commissioners, and to induce them to believe that the particulars of his income delivered in, and the deductions claimed by him to be allowed, had been inquired into, examined, and approved by one *Richard Elfe*, then being clerk to the first mentioned commissioners, and with fraudulent intent to give effect to his appeal, and to evade the duty at the bottom of a paper purporting to be a schedule of the defendant's income, did forge, &c. the letters *R. E.* purporting to be the initials of the said clerk, and did exhibit to the commissioners of Appeal the said paper, &c. against the peace, &c. *Ib.*

46 But it was not denied that they had jurisdiction over cheats in general, and in *R.* v. *Brayne*, *Mich.* 12 G. 1, and *R.* v. *Beale*, *East.* 38 G. 3, the court of B. R. gave judgment as for a cheat, on indictments respectively removed from the sessions by *certiorari*. *Ibid.* 183.

47 To solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting; and such offence is indictable at the sessions, having a tendency to a breach of the peace. *Rex* v. *Higgins.* 2 *East*, 5.

48 The sessions have cognizance of all offences which tend to a breach of the peace; except forgery and perjury. *Per Lord Kenyon.* 2 *East*, 18.

II. *Other Points relative to.*

1 The court will intend an order late served where the order on appeal is made at the next sessions but one. *Between the Parishes of Road in Somersetshire and North Bradley in Wilts.* 2 *Str.* 1168.

2 Where an indictment is found at an adjourned sessions, it must appear the sessions began in time. *Rex* v. *Fisher et Saunders.* 2 *Str.* 865.

3 Application to remove an order of sessions by *certiorari* must be in six months. *Anon.* *Lofft*, 544.

4 Order to pay so much money generally shall be intended in husbandry. *The Queen* v. *London.* 3 *Salk.* 261.

5 Appeal given to quarter sessions does not preclude an action at law. *Leader* v. *Moxon.* 2 *Black.* 926.

6 Order for making one parish contributory to the poor of another, good. *The Inhabitants of Limchurch and Eastchurch.* 2 *Salk.* 480.

7 The sessions need not set forth the reasons of their judgment. *The Inhabitants of the parishes of South Cadbury in Braddon, in Com. Somerset.* 2 *Salk.* 607.

8 Order of sessions for appointing overseers for the divisions of a large parish, able to reap the benefit of 43 Eliz. *Peart* v. *Westgarth.* 3 *Burr.* 1610.

9 History of the sessions in *Middlesex.* *Busby* v. *Watson.* 2 *Black.* 1051.

10 Sessions books open to the inspection of every one. *Herbert* v. *Ashbourne.* 1 *Wils.* 297.

11 At the general sessions, instead of the quarter sessions, ill. *Purnall's Case.* 2 *Salk.* 475.

12 In order for payment of servants' wages, if it do not appear in what service the court will intend it husbandry. *The Queen* v. *London.* 2 *Salk.* 442.

13 What orders are final betwen two parishes. *Between the parishes of Osgathorpe and Diseworth.* 2 *Str.* 1256.

14 Sessions is merely ministerial as to registering meeting-houses under the act of toleration. *The King* v. *The Justices of Derbyshire.* 1 *Black.* 606. 4 *Burr.* 1994.

15 The court of B. R. ordered the sessions to inquire into a fact, which appeared doubtful on the original order of removal, even though the sessions state no case for the opinion of the court. *Rex* v. *Margam.* 1 *Term Rep.* 775.

16 The court will not send a case down to the sessions to be restated, on a mere formal objection, if enough appear to enable them to decide according to the merits of the case. *Rex* v. *Middlezoy Inhab.* 2 *Term Rep.* 41.

17 The sessions should state as a fact (in a settlement case) whether the master dispensed with the service before the end of the year, or whether there were a dissolution of the contract by mutual consent. *Rex* v. *St. Peter, Norwich Inhab.* 8 *Term Rep* 477.

18 If a court of general quarter sessions, next after an order of bastardy, quash the order, this court will not intend that a court of general sessions intervened; and, unless that appear, the order of sessions will be confirmed. *Rex* v. *Chichester Guardians of the poor.* 3 *Term Rep.* 496.

SET-OFF.

I. *Debts and credits mutual.*
II. *Judgments.*
III. *Bonds.*
IV. *Covenants.*
V. *Unliquidated damages.*
VI. *Pleadings and proceedings in.*

I. *Debts and credits mutual.*

1 Where an executor sues in his own name for money due to the testator in his life-time, but received by the defendant afterwards, the defendant cannot set off a debt due to him from the testator. *Shipman* v. *Thompson.* *Willes*, 106.

But a debt due to the defendant as surviving partner may be set off against a demand on him in his own right. *Ibid. n.*

So a debt due from the plaintiff as surviving partner to the defendant, may be set off against a debt due from the defendant to plaintiff in his own right. *Ibid. n.*

2 A demand against a bankrupt cannot be set off in an action of trover by his assignees, for a conversion subsequent to the bankruptcy. *Wilkins* v. *Carmichael.* 1 *Doug.* 101 to 105.

But a demand in trover, when for a liquidated amount, may be proved

under a commission of bankruptcy. 1 *Doug.* 168, *n.*

3 The statute of set-off extends to assignees under a commission of bankruptcy. *Ridout and another ass.* v. *Brough.* *Coup.* 133.

4 The statue of set-off does not extend to assignees under a commission of bankrupt. *Ryall and others, assignees of Harvest* v. *Larkins.* 1 *Wils* 155. *Sed Qu.*

5 Mutual credit may be constituted though the parties do not mean particularly to trust each other; as if a bill of exchange accepted by *A.* get into the hands of *B.*, and *B.* buy goods of *A.*, there is mutual credit between *A.* and *B.*, which may be set off by *B.*, though *A.* did not know when he let *B.* have the goods that such bill was in his hands. *Hankey* v. *Smith.* 3 *Term Rep.* 507, *n.*

6 A debt due to a defendant, as a surviving partner, may be set off against a demand on him in his own right. *Slipper* v. *Stidstone.* 5 *T. Rep.* 493. *French* v. *Andrade.* 6 *Term Rep.* 582, S. P.

7 The same point was stated *arguendo* by *Buller, J. in Smith* v. *Barrow.* 2 *Term Rep.* 478.

8 If a factor, who sells under a *del credere* commission, sell goods as his own, and the buyer know nothing of the principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. *George* v. *Clagett.* 7 *Term Rep.* 359.

9 Where the defendant lent his acceptance to the bankrupt on a bill, which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set off the same under the words "mutual credit" in statute 5 G. 2, c. 30, s. 28. *Smith* v. *Hodson.* 4 *Term Rep.* 211.

10 Where *B.* a debtor of an insolvent who had assigned all his estate to his trustees, for the benefit of his creditors, purchased a promissory note of the insolvent. after the assignment, it was held, that *B.* could not set off the note purchased by him against a debt due by him to the insolvent, in a suit brought by the trustees. *Johnson* v. *Bloodgood.* 1 *Johns. Cases*, 51.

11 In an action on a promissory note, by the indorsee against the maker, the defendant pleaded payment as to all, except 40 cents, and payment of the 40 cents to the payee of the note, before the note was indorsed, and gave notice of a set-off of large sums of money due to him from the payee, it was held, that the defendant could not set off more than the sum pleaded; and that payment to a payee of a note cannot be set off by the maker in an action against him by the indorsee. *Prior* v. *Jacocks.* 1 *Johns. Cas.* 169.

12 In what case a set-off will not be allowed, against the assignee of a stock contract. 3 *Dallas*, 505.

What claim is not to be a subject of set-off. *Ibid.*

II. *Judgments.*

1 A judgment in the King's Bench may be set off against a judgment in the common pleas, so as to narrow the execution to the real balance due. *Barker* v. *Braham.* 2 *Black.* 869. 3 *Wils.* 396.

2 A judgment obtained by a defendant against the plaintiff, after the declaration delivered and before plea pleaded may be pleaded as a set-off. *Reynolds* v. *Beerling.* 1 *Doug.* 112, *n.* And that, although it do not appear that the cause of action on which the defendant's judgment was obtained arose prior to the commencement of the plaintiff's action. *Ibid.*

3 But that point has been since overruled. *Evans* v. *Prosser.* 1 *Doug.* 112, 113, *n.*

4 Verdict against plaintiff in *prior*

action may be set off against present demand, even where the causes come to trial on the same day. *Baskerville* v. *Brown, et e contra.* 2 *Burr.* 1229. 1 *Black.* 293, S. C.

5 Costs of one judgment may be set off against the debt and costs of another. *Thrustout, on the demise of Barnes,* v. *Craster.* 2 *Black.* 826.

6 Where there were three defendants, one went to trial and obtained a verdict, but the two others suffered judgment by default. The court of C. P. permitted the costs and damages, on the judgment by default, to be deducted from the costs taxed on the postea to the defendant who had a verdict; and in answer to the objection that this tended to deprive the attorney of his legal lien, the court said that the attorney could only have such a lien on the costs as was subject to the equitable claims of the parties in the cause. *Schoole* v. *Noble & al.* 1 *H. Black.* 23.

7 And that court affirmed this doctrine, in a case where several actions brought on two policies of assurance, underwritten by the same parties, (among whom were *A.* and *B.*) were respectively consolidated. In one of the causes, which went to trial, *A.* was defendant, in the other *B.*; the plaintiff became entitled to costs in one action, and the defendant in the other. The costs taxed and allowed to the defendant were set off against those taxed and allowed to the plaintiff. *Nunez* v. *Modigliani.* 1 *H. Black.* 217.

8 *A.* having obtained a verdict against *B.* for a small sum, and *B.* having previously recovered judgment against *A.* for a larger sum and taken him in execution, the court (of C. P.) permitted the sum recovered by *A.* by the verdict and the costs, to be deducted from the amount of the judgment of *B.*, and satisfaction to be entered for so much, notwithstanding *A.* was insolvent, and no means of paying his attorney's *bill*, but by the sum for which he obtained the verdict. *Vaughan* v. *Davies.* 2 *H. Black.* 440.

9 That court also allowed the costs recovered by *A.* against *B.* in one action, to be set off and deducted from the damages and costs recovered by *B.* against *A.*, *C.*, and *E.* in another action; notwithstanding the attorney of *B.* swore that he believed *B.* to be insolvent, and that there was no fund out of which the attorney's costs could be paid, but the damages and costs so recovered by *B.* *Dennie* v. *Elliot & al.* 2 *H. Black.* 587.

10 That court also allowed the costs of two actions between the same parties, though in two different courts, to be set off against each other, notwithstanding the attorney's lien; but *L. Eldon,* C. J., strongly expressed his opinion of the propriety of reconsidering the practice of the court in this particular. *Hall* v. *Ody.* 2 *Bos. & Pull.* 28.

11 In a subsequent case, nevertheless, the court allowed the costs upon a nonsuit to be set off against costs due from the defendant upon the removal of an indictment against him from the sessions to the court of K. B., notwithstanding the attorney's lien; and declared that as the attorney acts upon the credit of his client, his lien cannot be allowed to interfere with the equitable arrangement of costs between the parties to the suit. *Emden* v. *Darley.* *New Rep.* 22.

12 If an execution be set aside with costs, as having been sued out after the allowance of a writ of error, the court will not permit the costs of the application to be set off against the costs of the action, but will compel the plaintiff to pay them forthwith. *Hill* v. *Tebb.* *New Rep.* 311.

13 Where *A.* recovered against *C.*, and *C.* recovered against *A.* and *B.* the court of K. B. permitted *C.*, on motion, to set off the damages which

he had recovered against those obtained by *A.* on his undertaking that the bill of *A.*'s attorney in the first action should be satisfied, that court holding that he had a general lien on the judgment for his costs. *Mitchell* v. *Oldfield.* 4 *Term Rep.* 123: and see *Randall* v. *Fuller.* 6 *Term Rep.* 456.

14 The court of K. B. also permitted three defendants to set off a judgment, recovered by them against the plaintiff, against a judgment obtained by the plaintiff, against them jointly; (subject to the attorney's lien,) though the plaintiff had also a separate demand on one of the defendants. *Glaister* v. *Hewer.* 8 *Term Rep.* 69.

15 A judgment recovered by *A.* against *B.* and *C.*, will not be set off on application to the general jurisdiction of the court, against another judgment recovered against *A.* by the assignees of *B.* under an insolvent debtors' act; the interest of third persons intervening, who have peculiar trusts by the statute. *Doe* v. *Darnton.* 3 *East*, 149.

16 *A.* brings an action against *B.*, the expences of defending which are borne by *C.* and *D.*, but *A.* is nonsuited. Afterwards *C.* brings an action against *A.* in which *D.* is interested as well as *C.*, and *C.* is nonsuited. The costs of the one nonsuit were allowed by the court of C. P. to be set off against the other. *O'Conner* v. *Murphy.* 1 *H. Black.* 657.

17 No action will lie in the courts at *Westminster* to recover costs ordered to be paid by a rule of an inferior court, in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. But such an action having been brought, the court of C. P. ordered the costs awarded to the plaintiff in the inferior court to be deducted from those allowed to the defendant in the action. *Emerson* v. *Lashley.* 2 *H. Black.* 247.

18 But though it be clear that the mere order of another court is not a good ground of action; yet an agreement between parties to a suit in chancery binding themselves, their executors, and administrators, made an order of that court, and acted upon therein as such, may be the ground of an *assumpsit* at law. *Smith* v. *Whalley.* 2 *Bos. & Pull.* 482.

19 Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards set aside on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jaques* v. *Withy.* 1 *Term Rep.* 557.

20 The court will not set off one judgment against another between the same parties, when it appears that others than the nominal creditors are interested by assignment of the demand, on which one of the judgments is rendered. *Makepeace* v. *Coates.* 8 *Mass.* 451.

21 Where a judgment of reversal had been obtained in this court of a judgment of the court of common pleas, and a restitution awarded, and afterwards a second judgment was obtained in favour of the plaintiff, in a new action between the same parties, for the same cause, in the court of common pleas, this court would not allow the judgment of reversal in this court, to be set off against the second judgment in the common pleas; considering the latter as having power to make it. *Brewerton* v. *Harris and Harris.* 1 *Johns. Rep.* 144.

22 Where there were three suits between the same parties, and the plaintiff recovered against the defendant in two of them, and the defendant against the plaintiff in the other, the damages recovered in the

last suit, were allowed to be set off against the two other suits, but not against the costs. *Devoy* v. *Boyer.* 3 *Johns. Rep.* 217.

23 Where an attorney in this court was sued in November 1809, for 25 dollars and 93 cents, and had a set-off of 20 dollars and 25 cents, and the plaintiff recovered five dollars and 68 cents, it was held that the defendant was entitled to recover costs; but that the plaintiff might set off the amount he had recovered against so much of the costs. *Willett* v. *Starr.* 8 *Johns Rep.* 123.

24 Where the plaintiff in an action of trespass *quare clausum fregit*, &c. recovered less than 50 dollars damages; and the defendant recovered costs, the defendants taxed costs were allowed to be set off against the damages recovered by the plaintiff who was *insolvent*. The *lien* of the plaintiff for his costs, in this case, extends only to the balance due, after deducting the defendant's charges, and does not affect the equitable right of set-off between the parties. *Porter* v. *Lane.* 8 *Johns Rep.* 357.

III. *Bonds.*

1 Under the statute 8 G. 2, c. 24, no debt on bond can be set off unless it be on a bond for securing the payment of money. *Hutchinson* v. *Sturges.* *Willes*, 261.

Consequently a bail bond cannot be set off under that act. *Ibid.*

Nor can such a bond (given to an officer of the palace court,) be set off under the statute 2 G. 2, c. 22, to an action brought against that officer. *Ibid.*

But a bail bond assigned over to the party may be set off to an action brought by that party. *Ibid.*

2 Set-off may be pleaded to an action of debt on bond, the condition of which is for payment of an annuity or growing sum. *Collins senior* v. *Collins junior.* 2 *Burr.* 820.

3 In an action of *debt* on an arbitration bond; the defendant was allowed to set off a promissory note. *Burgess* v. *Tucker.* 5 *Johns. Rep.* 105.

In an action on an *award* of arbitrators made in pursuance of a submission by bond, the defendant may set off a debt due to him from the plaintiff. *Ibid.*

An *award* for the payment of a sum of money, may be set off against the demand of the plaintiff. *Ibid.*

Notwithstanding the set-off allowed in an action on an arbitration bond; the penalty of the bond will remain as security for all future breaches. *Ibid.*

The statute allowing a set-off, is not strictly confined to bonds for the payment of money. *Ibid.*

The penalty of a bond cannot be set off; nor is the obligor of a penal bond, in an action against him, required to set off his demands against the penalty. *Ibid.*

4 In an action of *assumpsit*, brought by *A.* against *B.*, the defendant may set off a *bond* given by *A.* to *C.* and *assigned* by *C.* to *B.* before the commencement of the suit. *Tuttle* v. *Bebee.* 8 *Johns. Rep.* 152.

IV. *Covenants.*

The whole penalty of a covenant cannot be pleaded as a set-off to an *indebit. ass.* *Mcdriffe* v. *Hogan.* 2 *Burr.* 1024.

V. *Unliquidated Damages.*

1 In covenant, unliquidated damages arising from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of set-off. *Howlet & al.* v. *Strickland.* *Cowp.* 56.

2 Damages not yet recovered cannot be set off. *Freeman* v. *Hyett.* 1 *Black.* 394.

3 There can be no set-off to an avowry for rent. *Sapsford* v. *Fletch-*

er. 4 *Term Rep.* 511; and *Graham* v. *Fraine*, and *Laycock* v. *Tuffnell.* 4 *Term Rep.* 128, *n.*

4 To an action of covenant for rent by a landlord, the defendant cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the covenants in the lease. *Weigall* v. *Waters.* 6 *Term Rep.* 488.

5 Where an agreement was made between one, who afterwards became a bankrupt, and the defendant, that a loss upon cotton, which the latter had sustained by means of the former, should be fixed at 1900*l.*; and that in satisfaction of that sum the bankrupt should for four years recommend certain parcels of cotton to the defendant, which he should purchase by notes at three months date, the clear produce on the sale of which the bankrupt undertook should amount to that sum, in default of which he was to make good the deficiency, if living; it was held such sum could not be set off by the defendant against a demand made by the assignees of the bankrupt. *Hancock* v. *Entwistle.* 3 *Term Rep.* 435.

6 If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished at the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by an obligee in an action brought against him by the obligor who executed. *Fletcher* v. *Dyche.* 2 *Term Rep.* 32.

VI. *Pleadings and Proceedings in.*

1 A set-off reducing the plaintiff's demand under 40*s.* does not effect the jurisdiction of the court. *Pitts* v. *Carpenter.* 1 *Wils.* 19. 2 *Str.* 1191.

2 Two parts of a plea of set-off are as two counts in a declaration; and if one part be good, a general demurrer to the whole is bad. *Dowsland* v. *Thompson.* 2 *Black.* 910.

3 A plea of set-off that the plaintiff was indebted to the defendant *at the time of the plea pleaded*, is bad; it should state that he was indebted *at the commencement of the action.* *Evans* v. *Prosser.* 3 *Term Rep.* 186.

4 It is no objection to a plea of set-off that the defendant has brought an action against the plaintiff for the same sum in which the plaintiff has paid the amount of the demand into court. 3 *Term Rep.* 186.

5 In an action on a bond, the defendant must set forth in the plea what is really due on the bond, before he is entitled to set off any cross demand under statute 8 G. 2, c. 24, s. 5; and such averment is traversable. *Symmonds* v. *Knox.* 3 *Term Rep.* 65; and *Grimwood* v. *Barrit.* 6 *Term Rep.* 460.

6 A broker with a commission *del credere* cannot prove under a notice of set-off a loss upon a policy, happening before a bankruptcy, in an action by the assignees of the bankrupt for premiums upon policies underwritten by him, and for which he had debited the broker; but such a loss may be set off under the general issue. *Grove* v. *Dubois.* 1 *Term Rep.* 1 2

7 Where a bankrupt has underwritten a policy to a broker acting under a commission *del credere*, and a loss upon the policy happens before, but is not adjusted till after the bankruptcy, the broker may deduct the amount of the loss from the debt which he owes to the estate of the bankrupt. *Bize* v. *Dickason.* 1 *Term Rep.* 285.

8 *A.* first purchased one and afterwards another parcel of goods of *B.*, each at six months credit; when the first sum became due, *A.* lodged in *B.*'s hands a bill of exchange for

a larger amount than the value of the goods in order to pay for them, *B.* engaging to return to *A.* the overplus when the bill should be paid; *B.* received the amount of the bill, and then *A.* became a bankrupt, not having paid for the second parcel of goods; held, in an action brought by *A.*'s assignees for the surplus of the bill that *B.* might retain it to satisfy his demand on *A.* for the second parcel of goods. *Atkinson* v. *Elliott.* 7 *Term Rep.* 378.

9 To an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant cannot set off cash notes issued by the bankrupt payable to bearer, bearing date before his bankruptcy, unless he shew further that such notes came to his hands before the bankruptcy. *Dickson* v. *Evans.* 6 *Term Rep.* 57.

10 But if the notes had been made payable to the defendant himself, that would have been reasonable evidence of their having come to his hands at the time they bore date 6 *Term Rep.* 57.

11 *C.*, by virtue of an order from *B.* to receive all money due to him on a particular account, obtains three out of four instalments due from *A.* to *B.* on that account; these payments are afterwards questioned by *B.*, who brings his action against *A.* for the whole sum, and at the same time *C.* demands his fourth instalment; an application to the court of C. P., by *A.* to stay proceedings in an action against him by *B.*, on his paying the fourth instalment to such person as the court should appoint, was refused by C. P. *Macdonald* v. *Pasley.* 1 *Bos. & Pull.* 161.

12 In *assumpsit* for goods sold and delivered, defendant pleaded a set-off of more money due to him from the plaintiff. A replication, that the goods were agreed to be paid for in *ready money*, was holden bad on demurrer, being no answer to the plea. *Eland* v. *Karr.* 1 *East*, 375.

13 But in estimating the plaintiff's damages in such case, the jury should take into their consideration, the loss he had sustained by non-payment of ready money. *Ibid.* 377.

14 Set offs under our statute are confined to transactions between the parties in the suit; therefore in an action brought on a check which had been assigned to the plaintiff, the defendant was not allowed to set off a negociable note made by the drawer of the check, and indorsed to the defendant. *Holland* v. *Makepeace.* 8 *Mass.* 418.

15 Where by reason of an account filed by way of set-off, the plaintiff's damages are reduced below twenty dollars, he is still entitled to full costs—*aliter*, where the items in the account are proved to have been delivered and received in part payment of the plaintiff's demand in the action. *Barnard Adm.* v. *Curtis.* 8 *Mass.* 535.

16 Where a defendant, after a writ issued against him of which he had notice, and before he was actually arrested, purchased a promissory note, made by the plaintiff, which was indorsed to him, for the avowed purpose of setting it off against the plaintiff's demand; it was held that the set-off was not admissible. *Carpenter* v. *Butterfield.* 3 *Johns. Cases*, 145.

A debt or demand, to be set off under the statute, must be an existing debt or demand, at the time of the commencement of the plaintiff's suit. *Ibid.*

17 In an action by an *indorsee* of a promissory note against the maker, the latter will not be allowed to prove a *set-off* against the original payee, unless he previously show that the note was transferred after it became due, or for the purpose of defrauding the maker of his *set-off*. *Hendricks* v. *Judah.* 1 *Johns. Rep.* 319.

18 A set-off to an open policy of insurance, is not allowable. *Gordon* v. *Bowne.* 2 *Johns. Rep.* 150.

19 Where the defendant pleads pay-

ment, and gives notice of a set-off, in general terms, for goods sold and delivered, money paid, &c. the plaintiff may require him to specify and deliver the *particulars* of the set-off. *Mercer* v. *Sayre.* 3 *Johns. Rep.* 248.

20 In an action of *assumpsit*, brought in this state, the defendant may set off demands, against the plaintiff, arising when both parties resided in another state, and which if sued for there would be barred by the statute of limitations of that state, provided six years have not elapsed since the plaintiff came into this state. *Ruggles* v. *Keeler.* 3 *Johns. Rep.* 263.

21 Where a set-off of a debt due from the defendant in a foreign attachment to the garnishee, will not be allowed on the *scire facias.* 4 *Dallas*, 291.

22 In an action brought by the commonwealth, the defendant has no right of set-off. 4 *Dallas*, 303.

23 A commission of bankruptcy is legal notice, to effect the subsequent assignee of a promissory note, with the statute right of set-off. 4 *Dallas*, 370.

24 If a suit be brought by the assignor of an open account in his own name for the use of the assignee, the defendant may set off his claims against the assignee. *Winchester* v. *Hackley.* 2 *Cranch*, 342.

The defendant cannot offset bad debts made by the misconduct of the plaintiff in selling the defendants goods as factor. *Ibid.*

SEWERS.

1 Sewer rates may be made to reimburse charges. *Case of the Level of Hull.* 2 *Str.* 1127.

2 Objections to orders removed must be argued before they are filed. *The King* v. *Sir Robert Cann.* 2 *Str.* 1263.

3 The commissioners of Sewers have jurisdiction over a sewer communicating with a navigable stream, or with the sea above the point where the tide ebbs and flows, if it be useful for navigation, and if the place over which the jurisdiction is exercised is or is not likely to be benefited by it. *Dore* v. *Gray.* 2 *Term Rep.* 358.

4 *Callis's* Readings are good authority on the subject of sewers. 2 *Term Reports*, 365.

5 If a sea-bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the commissioners of sewers may order a new one (even in a different form, if necessary) to be erected, at the expence of the whole level. *Rex* v. *Somersetshire Commissioners of Sewers.* 8 *Term Rep.* 312.

6 By statute 23 H. 8, c. 5, the jury by whom a presentment is made to commissioners of sewers, concerning what lands are within a level and subject to certain rate, ought to be summoned by the sheriff *from the body of the county*, in pursuance of a precept delivered to him from the commissioners for that purpose. And a presentment made by a standing jury, constituted according to ancient usage, originally returned by the sheriff, at the commencement of every new commission of sewers, from certain parishes or districts, composed of land owners there, interested in disclaiming the general charges of the level, which jurymen acted for life, unless removed for cause, and only the *foreman* of whom was summoned by the sheriff on the particular occasion, which foreman thereupon convened the other jurymen; is illegal, and void; and the want of jurisdiction of such presenting jury cannot be waived by traversing their presentment and going to trial before another jury properly returned from the body of the county, by whom such presentment was confirmed. The presenting jury, after being sworn and

charged, must also prosecute their inquiry upon hearing evidence on oath before the commissioners *in curia*, and make their presentment thereon, and not upon information collected in *pais* without oath. *The King* v. *The Commissioners of Sewers for the County of Summerset.* 7 *East*, 71.

7 The statute 23 H. 8, c. 5, s. 17, having directed that "*Laws, acts, decrees, and ordinances*" made by commissioners of sewers shall stand good and be put in execution *so long time as their commission endureth, and no longer*, except "the said laws and ordinances" be engrossed in parchment and certified under the seals of the commissioners into chancery, and have the royal assent; and the statute 13 Eliz. c. 9, having directed all commissioners of sewers to continue in force for 10 years, unless sooner determined by supersedeas, or any new commission; and that all "laws, ordinances, and constitutions" made by force of such commission, *being written in parchment, indented, and under seals, &c.* shall without such certificate or royal assent, continue in force notwithstanding the determination of the commission by supersedeas, until repealed or altered by new commissioners; and that all such *laws, ordinances, and constitutions* written in parchment, indented, and *sealed*, &c. shall, without certificate or royal assent, continue in force *for one year* after the expiration of such commission by lapse of 10 years from its date; held,

1st. That the *laws, acts, decrees, and ordinances*, mentioned in the statute of H. 8, mean the same as the *laws, ordinances, and constitutions*, mentioned in that of Eliz. And,

2d. That a *decree* made by commissioners under a former commission which had expired by lapse of ten years, directing a sea-wall to be refounded, which had been destroyed by a violent tempest and inundation, and the sums necessary for its construction to be advanced by those who were before bound to sustain it *ratione tenuræ* (and who did advance the money accordingly) and that a rate should be made on the level for their reimbursement, (although such decree had been written in *parchment, indented, and sealed*; which this was not,) could not be enforced by commissioners under a new commission, issued more than a year after the expiration of the former commission; as to so much of it as remained unexecuted: though good to the extent to which it had been executed; and therefore this court refused a mandamus to the new commissioners to direct a rate to be levied on the level for the reimbursement directed by the decree. *The King* v. *The Commissioners of Sewers, Somerset.* 9 *East*, 109.

SHERIFF.

I. *For what acts liable, whether of himself or Bailiff, or Deputy.*
II. *Exemption.*
III. *Fees.*
IV. *Return of Writs, &c.*
V. *Other points relative to.*

I. *For what acts liable, whether of himself or Bailiff, or Deputy.*

1 Sheriff cannot refuse to obey process for non-payment of fees. *White* v. *Haugh.* 2 *Str.* 1262.

2 A sheriff, or his officer, is not liable to an action for arresting a certificated bankrupt, a peer, a discharged insolvent debtor, or a person who took the benefit of 20 G. 3, c. 61, although the party is privileged from arrests. *Turlton* v. *Fisher.* 2 *Doug.* 671.

3 Sheriff answerable for the acts of his deputy. *Anon. Lofft*, 81.

4 A bailiff may justify an act under any warrant he had at the time he did it; and a traverse that he did it by virtue of that warrant, is bad.

A power to examine, hear, and punish, makes a man a judge; a power to punish by fine and imprisonment, a judge of record. No action lies against a man for what he does as judge. In a justification by the censors of the college of physicians under the conviction of a practiser in physic by them for *mala praxis*, it is sufficient to state generally that the party administered unwholesome medicines; and the disorder under which his patients laboured need not be shewn. A neglect in an inferior jurisdiction to examine upon oath, will not make its judgment void. An arrest and imprisonment includes an assault. *Groenvelt* v. *Burwell*. 1 *L. Raym.* 454. *Salk.* 200, 354, and 396.

5 *Qu.* In what cases taking levy-money, besides poundage, in executing a *fi. fa.* may be justifiable? *Savage* v. *Smith*. 2 *Black.* 1102.

6 Held, that on circumstances an arrest might be good to detain the party in custody, though the officer might be punishable for trespass or contempt. *Anon. Lofft*, 433.

7 Under sheriffs held in contempt, and fined and imprisoned for not properly executing that part of the sentence of the court which condemned the defendant to the pillory. *Rex* v. *Beardmore, under-sheriff of Middlesex*. 2 *Burr.* 792.

8 The court will not stay goods taken by *fi. fa.* in the hands of the sheriff, till a dispute between the plaintiff and a stranger concerning the property is decided, unless for the protection and at the request of the sheriff. *Shaw* v. *Tunbridge*. 2 *Black.* 1064.

9 If the justices at the quarter sessions make an order by virtue of 2 W. and M. c. 15, for the discharge of poor prisoners, which order is not warranted by the stat. (as if the prisoner was in execution for more than 100l.) and the sheriff discharged the prisoner accordingly, he shall not be liable to an escape. *Orby* v. *Hales*. 1 *L. Raym.* 3.

10 If a bailiff on a *fi. fa.* against the goods of *A.* take those of *B.*, an action of trespass lies against the sheriff. *Ackworth* v. *Kempe*. 1 *Doug.* 40 to 48.

The sheriff is answerable for the official acts of his under-sheriff. 1 *Doug.* 43, *n.*

11 Where a special bailiff is nominated by the plaintiff or his agent, the sheriff is not bound to return the writ. *Hamilton* v. *Dalziel*. 2 *Black.* 952.

12 Officers arresting a person not described in their warrant, not justifiable under the statute of 24 G. 2. *Money* v. *Leach*. 1 *Black.* 563. 3 *Burr.* 1692 and 1742.

13 The court will not take notice of a commission of bankrupt, so as to stay proceedings against a sheriff on an action for a wilfully false return, pending which he pays over money (levied by execution and kept in his hands above a year) to assignees, under a commission sued out since the action was brought against him, on an act of bankruptcy previous to the execution. *Timbrell* v. *Mills*. 1 *Black.* 205.

14 All actions for *breach of duty* of the office of sheriff must be brought against the high sheriff, though by default of the under-sheriff or bailiff. *Cameron & al.* v. *Reynolds, under-sheriff*. *Cowp.* 403.

An action does not lie against the sheriff upon a promise to execute a bill of sale to the plaintiff's nominee. The legal mode of compelling a sale is by a writ of *venditioni exponas*. *Cowp.* 406.

15 Indemnity given for a year to secure the sheriff against the acts of his bailiff. Afterwards, the person undertaking gives notice, disliking the person employed, that if the warrants are delivered to that person he will not abide by his indemnity; this notice left at the office of the under-clerk to the under-sheriff.

Held, that the sheriff was not bound and that the person who had given this indemnity could not discharge himself, unless by the consent of those in whose behalf it was given. *Anon. Lofft*, 225.

16 Trespass will lie against the high-sheriff for his bailiff's taking the goods of *A.* instead of *B.* under a *fi. fa. Sanderson and Baker* v. *Martin.* 2 *Black.* 832. 3 *Wils.* 309.

17 A rescue of one brought out of gaol by habeas corpus, between judgment and execution, by any but common enemies, will not excuse the sheriff. *Crompton* v. *Ward.* 1 *Str.* 429.

18 No action lies against the sheriff for taking insufficient bail. *Grosvenor* v. *Soame.* 3 *Salk.* 57.

19 For all *civil* purposes the act of the bailiff is the act of the sheriff. 2 *Term Rep.* 148.

20 In an action of trespass against the sheriff for a wrongful act of the bailiff, it is not enough, in order to affect the sheriff, to prove that he is a general bailiff, and had given a bond of indemnity to the sheriff as such, and to prove a copy of the warrant under which he entered and seized the plaintiff's good; but the privity between the bailiff and the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution from the sheriff to the bailiff, or at least by proving notice to produce it, so that in case of its not being produced, secondary evidence of its contents may be let in. *Drake* v. *Sykes.* 7 *Term Rep.* 113.

21 The sheriff having directed a warrant to *A.* and all his other officers to arrest *B.*, *A.* afterwards inserted the name of *C.*: held, that the warrant was illegal, and the arrest by *C.* consequently void. *Housin* v. *Barrow.* 6 *Term Rep.* 122.

22 It seems that an action may be maintained against the sheriff for the penalty given by statute 29 Eliz. c. 4, for the acts of his bailiff. 2 *Term Rep.* 155—8.

23 The sheriff and bailiff are not both answerable in an action for a penalty for the same act. 2 *Term Rep.* 712.

24 If the sheriff appoint a special bailiff at the plaintiff's request, the latter cannot rule the sheriff to return the writ. *De Moranda* v. *Dunkin.* 4 *Term Rep.* 119.

25 But the sheriff is even in such case, responsible for the defendant after an arrest made, though in another suit. *Taylor* v. *Richardson.* 8 *Term Rep.* 505.

26 A return made by the sheriff that the person arrested was rescued out of the custody of the bailiff, is bad; it should be out of *his* custody. *Woodgate* v. *Knatchbull.* 2 *Term Rep.* 155.

27 If a sheriff's officer on an arrest take an undertaking for the appearance of the party, instead of a bail-bond, without the plaintiff's assent, and bail above is not duly put in, the sheriff is liable to an action for an escape, and the court will not relieve him by permitting him to put in and justify bail afterwards. *Fuller* v. *Prest.* 7 *Term Rep.* 109.

28 And the court of C. P. refused to permit *the defendant* to justify bail, after an action for an escape commenced, where no bail bond had been taken. *Webb* v. *Matthew.* 1 *Bos & Pull.* 225.

29 But if the sheriff permit the defendant to get at large without taking a bail-bond, he may retake him before the return of the writ. *Atkinson* v. *Matteson.* 2 *Term Rep.* 172, and vide 7 *Term Rep.* 109.

30 The sheriff having arrested a party, permitted him to go at large without taking a bail bond, returned *cepi corpus*, and before the expiration of the rule to bring in the body put in bail: held that he was not liable either to an action of escape, or false return. *Pariente* v. *Plumbtree.* 2 *Bos. & Pull* .35.

31 If after the commencement of an action of escape against the sheriff for not taking a bail bond good bail be put in and justified in the room of bail before put in, who by the practice of the court were a mere nullity, the plaintiff cannot recover. *Allingham* v. *Flower.* 2 *Bos. & Pull.* 246.

32 After a party arrested on civil process has been discharged, on giving a bail bond to the sheriff for his appearance at the return of the writ it is optional in the sheriff whether he will accept the surrender of the party in discharge of the bail bond before the return of the writ; and therefore, though notice of such surrender were given to the sheriff, and the gaoler in whose custody the party then was at the suit of another; after which the party let the gaoler out of custody; yet held that the gaoler was not liable upon his bond of indemnity to the sheriff, as for an escape in the former suit; for the party was not legally in the custody of the sheriff or his gaoler merely by virtue of such notice of surrender. *Hamilton* v. *Wilson.* 4 *East*, 383.

33 The security to the sheriff under 23 H. 6, c. 9, must be in the particular form marked out by the statute, otherwise it is void; and this statute requires the bond to be given to the *sheriff*, as such, for the *appearance* of the party, and for no other purpose. *Rogers* v. *Reeves.* 1 *Term Rep.* 421, 2.

34 The obligation being given to the sheriff's bailiff is bad, for it must be to such officer as has the return of process. 1 *Term Rep.* 421, 2.

35 Trespass *vi et armis* lies against a sheriff for the acts of his deputy. 1 *Mass.* 520.

36 If the sheriff permit a debtor, who has been surrendered by his bail in a civil action, and by the court committed to the custody of the sheriff, to go at large, before the expiration of the thirty days, he shall be chargeable for an escape, although he was not furnished with a copy of the order of court committing such debtor. 2 *Mass.* 540.

37 After demand and refusal to pay money received, whether before or after the return day of the execution, he is liable to the creditor in an action for the money and interest at the rate of thirty per cent. *Wakefield* v. *Lithgow.* 3 *Mass.* 249.

38 If a sheriff sell goods upon an execution, without legally advertising the sale, and return that he advertised, and sold them according to law, he will be liable to an action of the case for a false return, but the judgment debtor cannot maintain trover for the goods. *Livermore, assignee,* v. *Bayley.* 3 *Mass.* 487.

39 A sheriff is answerable *civiliter* for the malfeasance or nonfeasance of his deputies in the duties enjoined on them by law, but not for the breach of contract, made with a plaintiff, to do what by law they are not obliged to do. *Marshall* v. *Hosmer.* 4 *Mass.* 60.

40 In an action against a sheriff for not seizing upon execution chattels, which he had attached on the original writ, it is a good defence, that such chattels were the property of strangers, and not of the debtor. *Fuller* v. *Holden.* 4 *Mass.* 498.

41 If a coroner, having an execution against a deputy gaoler, arrest him, and the sheriff is not at the gaol, nor any keeper authorized by him; the coroner leaving his prisoner at the gaol-house is discharged, and the sheriff is guilty of an escape. *Colby* v. *Sampson.* 5 *Mass.* 310.

42 Where a sheriff has reason to doubt whether goods are the property of a debtor, he may insist on the creditor's shewing them to him, and also on being indemnified for any mistake he may make, in conforming to the creditor's direction, either in attaching such goods, or in seizing them upon execution. *Bond* v. *Ward.* 7 *Mass.* 123.

43 But if he, without making any such claim, undertakes to execute

the precept as well as he can, he is answerable for not attaching the debtor's goods when in his power, if the creditor be injured by his neglect. *Ibid.*

If the goods of a stranger are in the possession of a debtor, and so mixed with those of the debtor, that the officer on due inquiry cannot distinguish them, the owner can maintain no action against the officer for taking them until notice, and a demand of his goods, and a refusal or delay of the officer to redeliver them. *Ibid.*

44 Where an officer had attached goods on an original writ, and pending the action the defendant died, and his administrator took upon him the defence of the action; judgment was rendered against the administrator, and execution thereon delivered to the officer, who delivered up the goods to the administrator. This latter included them in his inventory of his intestate's estate, and on settling his account of administration, the judge of probate assigned to the widow of the intestate all the effects that remained after paying funeral charges, &c. No representation of insolvency was made. It was held that the officer was liable to the judgment creditor for the value of the goods attached by him. *Rockwood* v. *Allen, ex'r.* 7 *Mass* 254.

45 If an officer, having lawfully seized goods by virtue of a warrant of distress, wantonly removes them to a great distance before the sale, whereby the owner is injured, an action of the case may be maintained against him; but he is not for that cause a trespasser *ab initio*. *Purrington* v. *Loring*. 7 *Mass.* 388.

Where an officer returned a warrant of distress, that he advertised the goods distrained twenty-four hours before the sale, he was not permitted to give parole testimony, in an action of trespass against him for taking the goods, that he in fact advertised them forty-eight hours before the sale. *Ibid.*

46 A sheriff is answerable to a judgment creditor for the thirty per cent. interest, giving by the statute of 1783, c. 44, s. 3, when his deputy refuses to pay over monies received on execution, as well as when the sheriff himself refuses. *Esty et al.* v. *Chandler.* 7 *Mass.* 464.

47 Where a defendant is taken in execution, and the sheriff suffers the prisoner voluntarily to escape, he cannot afterwards retake or detain him, without a new authority from the plaintiff; nor will the voluntary return, or assent of the prisoner, prevent the sheriff's liability for the escape. *Lansing* v. *Fleet.* 2 *Johns. Cases*, 3.

After a voluntary escape, the sheriff cannot lawfully retake or detain the prisoner, though he may, after a negligent escape. *Ibid.*

48 A bond taken by the sheriff, that a person in execution shall remain a true and faithful prisoner, is void. *Dole* v. *Bull & Porter.* 2 *Johns. Cas.* 239.

If a bond be taken by the sheriff for the ease and convenience of the prisoner, so that he may go at large within the walls of the prison, and conditioned that he shall remain a true and faithful prisoner it is not a bond for *ease and favour*, nor void, though not taken in the manner directed by the act relative to gaol liberties. *Ibid.*

49 In an action against a sheriff for an escape, if it be averred, or found on the record, that the sheriff *permitted* the prisoner to *escape*, it is equivalent to a finding of a *voluntary* escape. *Holmes and another* v. *Lansing.* 3 *Johns. Cas.* 73.

50 A sheriff has no authority to act under a *fi. fa.* after the return day thereof. *Vail* v. *Lewis and Livingston.* 4 *Johns. Rep.* 450.

If a sheriff levy a *fieri facias* after the return has expired, by the direction of the plaintiff's attorney, he and

the attorney are both trespassers. *Ibid.*

51 If a new sheriff receives a prisoner from his predecessor, he is answerable for his escape, though a voluntary escape may have existed in the time of his predecessor. *Rawson v. Turner.* 4 *Johns. Rep.* 469.

But the plaintiff has his election either to consider the prisoner in execution, and so charge the new sheriff for the last escape, or, as out of execution, and charge the old sheriff. *Ibid.*

If the plaintiff has once made his election and sued the old sheriff, and recovered judgment against him, it is conclusive, and a bar to any action against the new sheriff. *Ibid.*

52 Where a prisoner in execution admitted to the *gaol liberties*, went beyond the limits, knowingly and voluntarily, on the pretence of avoiding a bank of snow which obstructed his usual walk, it was held to be an *escape* for which the sheriff was liable. *Bissel v. Kip.* 5 *Johns. Rep.* 89.

Where the liberties of a gaol were not marked by *visible* boundaries, and a prisoner went beyond them and staid an hour in a building reputed to be within the limits, and then returned, it was held, to be an *escape*, for which the sheriff was liable. *Ibid.*

That the liberties are vaguely defined, will not justify and excuse an *escape*, for the sheriff is not bound to grant the liberties to a prisoner, until they are defined by clear and *visible* boundaries, according to the directions of the statute. *Ibid.*

In an action against the sheriff for an escape, he pleaded that the prisoner inadvertently and without any intention to escape, went 16 feet beyond the liberties, and returned in an hour; it was held that the plea was bad, in not stating that the return was before action brought. *Ibid.*

In an action against the sheriff for an escape, he cannot take advantage of a variance between the judgment and the execution. *Ibid.*

53 A sheriff who had a prisoner in his custody on an attachment for non-payment of costs, discharged him, under an order of a court of common pleas, on the act for the relief of debtors with respect to the imprisonment of their persons; it was held, that as the person was in custody merely to be brought up to answer, and not on a conviction for a contempt, the discharge was void, and the sheriff liable for the costs. *Jackson v. Smith.* 5 *Johns. Rep.* 115.

54 Where a prisoner arrested on *mesne process*, after judgment in the suit, but before execution was issued, escaped, but voluntarily returned, on the same day; it was held that the sheriff was liable. *Stone v. Woods.* 5 *Johns. Rep.* 182.

It makes no difference in such case whether the escape was voluntary or negligent. *Ibid.*

If the sheriff after an arrest on *mesne process* has the body of the defendant at the return day of such process, it is sufficient. *Ibid.*

The act giving *double* costs in suits against sheriffs and officers, does not extend to the cases of judgment on *a demurrer*. *Ibid.*

55 Where a *ca. sa.* on a judgment against a sheriff was delivered to the *coroner*, who arrested the sheriff, and delivered him in the gaol, to the custody of the under-sheriff and gaoler, and the sheriff was immediately after set at large; it was held that the coroner was liable for an *escape*. *Day and Whittlesey v. Brett.* 6 *Johns. Rep.* 22.

The sheriff is not privileged from arrest and imprisonment of debt; and when arrested, the *coroner* is bound to make his own house the gaol, for the purpose of keeping him in custody; this being a *casus omissus* in the statute-book, and the coroner is left to the rule of common law, by

which the sheriff might make his own house or any other place a prison. *Ibid.*

56 An action of debt for an *escape* will not lie against a sheriff, unless the prisoner was in custody on execution, that is, on *ca. sa.* *Van Slyck* v. *Hogeboom.* 6 *Johns. Rep.* 270.

57 An action lies against a sheriff for the act of his deputy, for taking more fees on levying an execution, than is allowed by law; and whether the sheriff recognized the act of his deputy, or not, need not be shown. *M'Intyre* v. *Trumball.* 7 *Johns Rep.* 35.

58 In an action against a sheriff for an escape of a prisoner charged in execution, it is sufficient evidence, *prima facie*, on the part of the plaintiff, to entitle him to recover, that the prisoner was seen at large walking in the street. *Stewart* v. *Kip.* 7 *Johns. Rep.* 165.

59 In an action on the case against a sheriff for an *escape on mesne process*, the plaintiff can recover damages only for what he has lost by the escape; and the jury may find such damages as they may think the plaintiff has sustained, under all circumstances. *Russell* v. *Turner.* 7 *Johns. Rep.* 189.

If the plaintiff, having real and competent security for his debt, from the defendant, relinquishes it, after knowledge of the *escape*, the sheriff, in an action against him, may avail himself of this fact in mitigation of damages; and where the jury in such a case, gave the plaintiff *nominal* damages only the court refused to set aside the verdict. *Ibid.*

Whether, if the plaintiff had retained the security for his debt, the sheriff could have availed himself of that fact, in his defence to an action for the escape? *Dubitatur.* *Ibid.*

60 Where, after an *escape* of a prisoner on execution, and return into custody, the sheriff went out of office, and assigned the prisoner to his successor, and while in his custody, the prisoner applied to the court for his discharge, under the act for the relief of debtors, &c. and the plaintiff, not knowing of the escape, opposed the application. in consequence of which the prisoner remained in custody; it was held, that this was not such an election to affirm the debtor in custody as amounted to a waiver of the plaintiff's remedy against the former sheriff for the *escape.* *Dash* v. *Van Kleeck.* 7 *Johns. Rep.* 477.

The act of the 28th of *April*, 1810, (33d ses. c. 187,) is no bar to an action brought against a sheriff, prior to the passing of that act, for the previous *escape* of a prisoner in his custody, and who had been admitted to the gaol liberties, on giving bonds pursuant to the act of the 30th of *March*, 1801, (24th sess. c. 91, s. 6.) *Ibid.*

61 An inquisition made by a sheriff's jury, to ascertain whether the property in the goods, taken on a *fieri facias*, is in the defendant, or not, if found not to be in him, is a justification to the sheriff for returning *nulla bona*, and a conclusive defence in an action against him for a *false return*, unless it be shown that he did not act with good faith. *Bayley* v. *Bates, Sheriff, &c.* 8 *Johns. Rep.* 185.

But if an adequate indemnity is tendered to the sheriff, and he should unreasonably refuse it, *it seems* that he is bound to proceed and sell the goods, or be liable for a false return. *Ibid.*

62 After an *escape* by the defendant from custody on a *ca. sa.* the plaintiff may proceed against the sheriff for the *escape*, and at the same time take out a *fiere facias* against the property of the defendant, for the remedies are not inconsistent with each other. *Jackson ex dem. Mc'Crea* v. *Bartlett.* 8 *Johnson's Rep.* 361.

63 In an action of trespass brought against a sheriff, he cannot justify under a writ of replevin, if he has

refused the defendant in replevin a reasonable time to find security on a claim of property, before he removed the goods in question. 1 *Dallas*, 225.

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64 A *distringas* will lie against a sheriff while in office, upon a return of levied to the value, &c. 1 *Dallas*, 312.

65 The sheriff, under a vend. exp. must sell not merely to the *highest*, but to the best bidder. 1 *Dallas*, 419.

66 An *under sheriff* may depute a person to serve a writ, or to do a particular act. *Hunt* v. *Burrell*. 5 *Johns. Rep.* 137.

[See also *under Sheriff*. 5 *Johns. Rep.*]

67 If the court has not jurisdiction, the officer executing its process is a trespasser. *Wise* v. *Withers*. 3 *Cranch*, 330.

II. *Exemption.*

1 No action lies against the representatives of a sheriff on account of the escape of a prisoner out of his custody.

If a sheriff discharges a prisoner in execution, upon a security for the payment of the debt, the prisoner, in contemplation of law, escapes; and though the debt is afterwards paid to the sheriff, it cannot be recovered, by his representatives. *Langton* v. *Wallis*. 1 *L. Raym.* 899.

2 Trover will not lie against a sheriff for the wrongful seizure of goods under an extent. *Rex* v. *Woolward*. 1 *L. Raym.* 736.

3 Where a sheriff behaves fairly, and requests the assistance of the court, he shall not be put to try a question of the bankruptcy of the defendant between his assignees and the plaintiff, at his own expence. *Raines* v. *Nelson*. 2 *Black.* 1181.

4 An officer need not be present at the spot where an arrest is made, nor actually within sight, provided that he came with a purpose to arrest, and that it was made under his authority and direction. *Fenton's Case*. *Lofft*, 524.

5 The payment of the fine fixed by statute 9 G. 1, c. 9, s. 3, to be discharged from serving the office of sheriff of *Norwich*, does not exempt the person paying it for more than a year, unless the corporation agree that he shall be discharged for a longer time. *Rex* v. *J. Woodrow*. 2 *Term Rep.* 731.

6 An action lies against the sheriff for taking insufficient bail. 2 *Mass.* 188.

It is not necessary in such action to aver that the sheriff knew the bail to be insufficient. *Ibid.*

Proceeding of the plaintiff against the bail is not to be considered as a waiver of his right of action against the sheriff. *Ibid.*

7 The sheriff is not a trespasser by serving an execution upon a person, whose addition of place is mistaken. The defendant in the original action should have pleaded it in abatement. 1 *Mass.* 76.

8 A sheriff is not obliged to bring money into court, which he has received on execution; but may retain it till demanded. *Wakefield* v. *Lithgow*. 3 *Mass.* 249.

9 An officer having an execution against one, may lawfully enter the close of the debtor, and cut down, seize, and sell as personal estate, corn or other product of the soil there growing when ripe, and in a fit state to be gathered. *Penhallow* v. *Dwight*. 7 *Mass.* 34.

10 A sheriff is answerable only for the act of his deputy, done while the relation between them continues; therefore, where the deputy of a former sheriff had attached goods on mesne process, and afterwards, being the deputy of the present sheriff, refused to serve the execution upon them, the former sheriff was not liable. *Blake* v. *Shaw*. 7 *Mass.* 505.

If a deputy sheriff has attached goods on mesne process, and afterwards

the creditor, having obtained execution, require the deputy sheriff to deliver the goods attached, to him, so that he may procure his execution to be levied upon them, the deputy is not bound to deliver them, he being himself accountable for them. *Ibid.*

11 Where one who had obtained a judgment and execution upon a fraudulent contract, sues the sheriff for a false return of the execution upon his having paid money of the judgment debtor to another creditor upon execution, and having returned the first execution unsatisfied; it is competent to the sheriff to shew such fraud in his defence, in favor of the other creditor, who has indemnified him. *Pierce* v. *Jackson.* 6 *Mass.* 242.

12 A sheriff is not liable to an attachment for a contempt, in not executing process, which did not come to his personal knowledge, nor was left in his office, but delivered to a deputy. *The People* v. *Waters.* 1 *Johns. Cases*, 137.

13 A sheriff may permit a prisoner in execution, to go within the liberties of the gaol, without taking security; and, if the prisoner, without his knowledge, goes beyond the limits, but returns again before suit brought, the sheriff is not liable for an *escape*. *Peters and Gedney* v. *Henry.* 6 *Johns. Rep.* 121.

Where no bond, or security is taken by the sheriff his right of recaption remains in full force; and a voluntary return before suit brought is equivalent to a recaption, which will purge a negligent escape. *Ibid.*

The *limits*, or liberties of the gaol, are considered as an extention of the walls of the prison. A return within the limits is the same as a return within the gaol. *Ibid.*

14 Where a person is surrendered by his bail to the custody of the sheriff, and a judgment is obtained; but the defendant is not taken in execution, and the defendant *escapes*, an action of *debt* will not lie against the sheriff; the proper remedy being an action *on the case*. *Van Slyck* v. *Hogeboom.* 6 *Johns. Rep.* 270.

15 Where a defendant had been surrendered by his bail, and was permitted by the sheriff to go at large within the liberties of the gaol, on giving security by bond according to the statute, and a *ca. sa.* at the suit of the plaintiff was afterwards delivered to the sheriff, who did not take a new bond, and the defendant on the next day went beyond the liberties; it was held, in an action for an escape, on the execution, that the mere delivery of the *ca. sa.* was not, *ipso facto, et eo instanti*, an arrest, so as to place the defendant in custody on execution, and that the sheriff was not liable. *Tracy and another* v. *Whipple.* 8 *Johns. Rep.* 379.

16 An action for false imprisonment will not lie against a sheriff, who refuses a discharge to a prisoner within the liberties, who has obtained a *supersedeas*, but continued within the limits, voluntarily, because the sheriff refused his discharge, until his fees were paid. *Warne* v. *Constant.* 4 *Johns. Rep.* 32.

17 In *February* 1807, a sheriff arrested a person on a *capias ad resp.* returnable in *May* term following, and the defendant was detained in custody until *March*, when a new sheriff was appointed, and the prisoner was assigned over to the new sheriff; the writ, however, was returned by the old sheriff, *cepi corpus in custodia*. Soon after the assignment of the prisoner, he was discharged by the new sheriff, on giving a bail bond. The plaintiff new of the taking of the bail; but proceeded to judgment, and took out a *ca. sa.* which being returned *non est inventus*, he brought an action against the new sheriff for an escape. It was held, that the new sheriff was bound to discharge the prisoner at any time before the return of the

capias ad resp. on his tendering sufficient bail, and that he was not liable for an *escape*. *Richards and others* v. *Porter, Sheriff*. 7 *Johns. Rep.* 137.

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The old sheriff, after he was out of office, had no right to return the writ, but should have delivered it to the new sheriff, with the assignment of the prisoner, so that the new sheriff might return it with his indorsement of the discharge of the defendant on bail, by which the plaintiff would have known the situation of the defendant. The new sheriff was not bound to give notice to the plaintiff of his having let the defendant to bail. *Ibid.*

Whether the new sheriff would be responsible in such a case, without a delivery of the writ to him by the old sheriff? *Quere, Ibid.*

18 Where the bounds of the *liberties* of the gaol were marked by no visible monuments, and the survey of them, as appointed by the court of common pleas, was, in some parts, vague and uncertain; and a prisoner who had given a bond to the sheriff for the liberties, without intending to go beyond them, went into a house within the reputed limits, but which proved not to be within the acknowledged *actual* liberties, and returned within the actual liberties before suit brought; it was held, that this being an inadvertent and involuntary escape, and return before suit brought, the sheriff was not liable for an escape. *Ballou* v. *Kip*. 7 *Johns. Rep.* 175.

Do not the reputed liberties, in such a case afford the best evidence of the actual liberties of the gaol? *Ib.*

19 In case against the sheriff for the neglect of his deputy in the service of an execution issued by a justice of the peace, in the plaintiff's favour, upon a recognizance taken in pursuance of the statute of 1782, c. 21, by which the plaintiff lost his debt; where the execution misreeited the recognizance, both as to the sum in the recognizance, and as to the time of entering into it, it was held, that no action lay against the sheriff. *Albee* v. *Ward*. 8 *Mass.* 79.

III. *Fees.*

1 Execution out of inferior courts not within the statute 29 Eliz. c. 4. *Brockwell* v. *Lock*. 1 *Salk.* 331.

2 Not entitled to poundage till the goods are sold. *Anon. Lofft*, 433.

3 Officer cannot detain for fees. *Mason* v. *Cutterson*. 1 *L. Raym.* 4.

4 Sheriff not entitled to pundage if judgment irregular. *Anon. Lofft*, 253.

5 If an erroneous writ be delivered to the sheriff and he executes it, he shall have his fees, though the writ be erroneous. *Earl* v. *Plummer*. 1 *Salk.* 332.

6 The stat. 29 Eliz. c. 4, does not extend to real executions, but only to executions in personal actions; therefore it does not extend to an *habere facias seisinam* or *possessionem*. Upon a *capias ad satisfac.* the sheriff shall not have his fees for the whole debt. *Peacock* v. *Harris*. 1 *Salk.* 331.

7 Under-sheriff cannot refuse to execute process till he has his fees. *Hescott's case*. 1 *Salk.* 330.

8 If it appear by the sheriff's return of a writ of execution that greater fees have been taken for the levy than are allowed by stat. 29 Eliz. c. 4, the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved. *Woodgate* v. *Knatchbull*. 2 *Term Rep.* 148.

9 Under that statute the sheriff cannot take any other charge but that for the poundage. 2 *Term Rep.* 148.

10 An action brought on stat. 29 Eliz. c. 4, for fees, must be brought by the sheriff and not by the bailiff. 2 *Term Rep.* 155—8.

11 If a sheriff levy under a *fi. fa.* he is entitled to poundage, though the parties compromise before he sells

any of the defendant's goods. *Alchin* v. *Wells*. 5 *Term Rep.* 470.

12 And if after such compromise either party rule the sheriff to return the writ, the court will discharge that rule with costs, to be paid by the party obtaining it. 5 *Term Rep.* 470.

13 The court of (K. B.) directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money; there being no practice to warrant it; and referred him to his action, if he were supposed to have a right to it under the statute 23 H. 6, c. 9. *Rex* v. *Palmer*. 2 *East*, 111.

14 When a sheriff has arrested a debtor in execution, and committed him to prison, and the debtor afterwards takes the benefit of the poor prisoner's act, the sheriff is entitled to demand and receive his fees of poundage and travel of the creditor. *Boswell* v. *Dingley*. 4 *Mass.* 411.

15 Where a jury was summoned for a circuit, but the sheriff was out of office before the return of the *venire*; it was held that he was entitled to the fees of summoning the jury, but not for the return of the *venire*. *Woods* v. *Gibson*. 6 *Johns. Rep.* 125.

IV. *Return of Writs, &c.*

1 Under a writ for the delivery of *seizin* of the third part of certain manors, the lands which the sheriff says in his return he has delivered shall *prima facie* be taken to be part of those manors, and to contain a third part only. But if any of the lands mentioned in the return are not part of the manors, the execution as to them is void, and cannot be set up against an ejectment for them. If an ejectment is brought under a recovery in dower, the recovery will estop the tenant, and all who claim under him, from insisting upon a prior outstanding term. *Booth* v. *The Marquis of Lindsey*. 2 *L. Raym.* 1293.

2 By the true construction of 20 G. 2, c. 37, a sheriff is not liable to be called upon to return process, unless within six lunar months after the expiration of his office; and the day on which he goes out of office is to be reckoned part of the six months. *Rex* v. *Adderly*. 2 *Doug.* 463 to 465.

3 And the only way to call upon him (so as to subject him to an attachment) is by a rule of court. *Rex* v. *Jones*. 2 *Doug.* 463, *n.*

4 Bailiff of a liberty concluded by the sheriff's return. *Shaw* v. *Simpson*. 1 *L. Raym.* 184.

5 Sheriff's to return their writs within four days. *Regula Generalis*. 3 *Burr.* 1921.

6 The return of *non est inventus*, with the name of sheriffs of the last year, is a false return by the sheriffs of the present year. *Anon. Lofft*, 83.

7 The court not so strict upon the returns of inferior courts as formerly. *Anonymous*. *Lofft*, 429, 433. Distinction between returns on *mesne* process and returns in execution. *Ibid.*

8 A *latitat* issued out of the king's bench to the sheriff, to arrest a man, and the sheriff returned that the man was listed according to the act 4 Ann c. 10, *et ea occasione capere non possum*, held a good return. *Sheriff of Middlesex's case*. 2 *L. Raym.* 1246.

9 When the sheriff is ruled to bring in the body, he has four days exclusive. *Anon. Lofft*, 631.

10 Sheriff's return not traversable; but you may have an action for a false return. *Anon. Lofft*, 372.

11 A return to a *capias* that the sheriff's bailiff arrested the defendant, and had him in the sheriff's custody, until *J. S.* rescued him from the custody of the bailiff, is repugnant and bad. *Anon.* 1 *L. Raymond*, 589. *Salk.* 586.

12 Return of two *nihils* and judgment thereupon, is not good without real notice where it is to change an execution with assets. *Lord Mexborough* v. *Sir John Delaval*. *Lofft*, 805.

13 Where the sheriff is ruled to bring in the body, he must put in and perfect special bail, though the same are not excepted to. *Poole* v. *Peate*. 2 *Black*. 1206.

14 Where he is plaintiff, a *latitat* directed to himself is ill. *Weston* v. *Coulson*. 1 *Black*. 506.

15 *Nulla bona* is a good return to *fi. fa.* sued out against a trader's goods returnable within two months, but not actually returned till after he had lain in prison two months, and thereby become bankrupt. *Coppendale* v. *Bridgen and another*. 2 *Burr*. 814.

16 All writs must be returned by the sheriff on the day on which the rule for returning the same expires, and in default thereof the plaintiff is at liberty to move for an attachment on the next day. *Reg. Gen.* 4 *Term Rep.* 496.

17 The court upon the application of the sheriff enlarged the time for his making a return to the writ of *fi. fa.* upon a suggestion of a reasonable doubt whether the goods seized under the writ were not covered by an extent afterwards issued at the suit of the crown for malt duties under the stat. 28 G. 3, c. 37, s. 21, for the purpose of inducing the plaintiff to go into the court of exchequer and there contest the question of right with the crown. *Wells* v. *Pickman*. 7 *Term Rep.* 174.

18 The court of C. P. refused to grant an attachment against the sheriff for returning to a writ of *venditioni exponas*, that part of the goods levied, remained in his hands for want of purchasers. *Leander* v. *Davis*. 1 *Bos. & Pull.* 359.

19 The same sheriff, by whom any writ directed to him is executed while in office, ought to make his return to the same, and hand over such writ and return to the new sheriff who comes into the office before the return day; and such new sheriff will return the writ with the old sheriff's return thereon. And if the old sheriff, after arresting a defendant, suffer him to escape, and go out of office before the return day, he alone is answerable for the escape. *R.* v. *The late Sheriff of Middlesex*. 4 *East*, 604.

20 Yet if the new sheriff by mistake return *cepi corpus* to a writ directed to the old sheriff, after the latter, who arrested the defendant upon it, had permitted an escape, and an attachment afterwards issue against the old sheriff who was ruled to bring in the body, the irregularity may be waived by not moving in reasonable time to set aside the attachment. *ibid.*

21 The authority of the sheriff in relation to property seized under an execution, ceases with the return of the execution satisfied. *Jackson ex. dem. Jones* v. *Stricker*. 1 *Johns. Cases*, 284.

22 Where the sheriff returns that he has a certain sum made, by virtue of an execution, ready to deliver to the party entitled, this is a sufficient evidence of a receipt of the money to charge him with the amount, though, in fact, no money was actually received by him. *Doty* v. *Turner, Sheriff of Rensselaer*. 8 *Johns. Rep.* 20.

23 Where a sheriff justifies under a *fieri facias*, it is not necessary that he should shew that it is returned, nor will the want of an indorsement on the execution, of the time it was received by the sheriff render it inadmissible in evidence; for the statute is merely directory to the sheriff, on this point; and the time of receiving it may be shewn by *parol proof*, or otherwise. *Beals* v. *Guernsey*. 8 *Johns. Rep.* 52.

V. *Other points relative to.*

1 An inquisition taken before two

under-sheriffs extraordinary, set aside; for the high-sheriff can appoint no more than one under-sheriff extraordinary. *Demy* v. *Trapnell.* 2 *Wils.* 378.

2 Where two persons are sheriffs, and one is challenged, the venire shall be directed to the other. *The King and Queen* v. *Warrington and another.* 1 *Salk.* 152.

3 A sheriff may be sued out of his county for misfeasance in office. 2 *Mass.* 569.

4 Where an action against a sheriff arises partly from matter of record, and partly from matter *in pais*, in different counties, the plaintiff may bring his action in either county at his election. *Marshall* v *Hosmer.* 3 *Mass.* 23.

5 If a creditor indorses on an original writ a direction to the officer to attach sufficient estate of the debtor or hold him to bail, it seems that the officer has an election to execute the writ in either way. *Marshall* v. *Hosmer.* 4 *Mass.* 60.

But if the creditor notwithstanding such direction indorsed, on delivering the writ, gives verbal orders to the officer to attach certain specified property, he is bound to conform to such orders. *Ibid.*

The creditor is not bound to go with the officer making the attachment; but if he direct goods to be attached not in possession of the debtor, or about which there is a dispute, he must give the officer an indemnity. *Ibid.*

6 The sheriff's bond to the treasurer of the commonwealth is intended for the benefit of individuals, who may suffer by the malfeasance of the sheriff or his deputy, as well as for the benefit of the commonwealth: and the treasurer is the mere trustee of the bond for the use of those who may suffer by a breach of its condition, whether it be the commonwealth, or private persons. *Skinner, treas.* v. *Phillips, et al.* 4 *Mass.* 68.

7 A sheriff may lawfully take a bond from his deputy, conditioned to pay over one quarter part of *all fees* which he shall receive as deputy sheriff. *Mattoon* v. *Kidd et al.* 7 *Mass.* 33.

8 In an action against the sheriff for a misfeasance of his deputy, the defendant can give nothing in evidence which the deputy could not, were he the defendant; and the deputy could not either by evidence or in pleading be permitted to falsify his own return. *Gardner* v. *Hosmer.* 6 *Mass.* 325.

9 Where the highest bidder at a sheriff's sale refuses to take and pay for the article he bid off, the sheriff may set it up again, and sell it to the highest bidder on such second attempt. *Winslow* v. *Loring.* 7 *Mass.* 392.

10 A coroner, who is also a deputy sheriff, may serve process upon another deputy of the same bailiff. *Colby* v. *Dillingham et al.* 7 *Mass.* 475.

11 A sheriff cannot be admitted, in a suit between other parties, to change the description of land in his return of an attachment, made by him in a former action, so as to make the description apply to other lands of the debtor. *Williams et al.* v. *Brackett.* 8 *Mass.* 240.

12 A warrant of attorney given by a prisoner and another to the sheriff, to confess judgment on a bond given to the sheriff for the liberties of the prison, was held to be void. *Dole* v. *Moulton et al.* 1 *Johns. Cases,* 129.

13 An incorrect return to an execution by a sheriff will not affect the title of the purchaser under it. *Jackson ex dem. Kane* v. *Sternbergh.* 1 *Johns. Cases,* 153.

A sheriff's deed to a person who purchases at a sale under a *fi. fa.* as agent for the plaintiff, creates a *resulting trust* for the plaintiff. *Ibid.*

14 In an action for *an escape* and *false return* on *mesne process* against a sheriff, the plaintiff can recover no more damages than he might have done in the original action; nor ought he to recover more than he

has actually lost by the escape. *Potter* v. *Lansing*. 1 *Johns Rep.* 215.

15 It *seems*, that where a sheriff is plaintiff in a cause, he may serve his own writ. *Bennet* v. *Fuller*. 4 *Johns. Rep.* 486.

16 Where a sheriff takes a bond from his deputy for the due execution of the office of deputy, it continues in force as long as he is sheriff and the other party is deputy; and where a person was appointed sheriff in 1801, and his commission was renewed in 1803, it was held, that there was no necessity of the renewal of the bond in 1803, but the deputy remained liable on the bond, as well for all acts done since 1803, as before, as long as the sheriff's authority was continued, and uninterrupted, and the other party continued to act as deputy. *Hughes* v. *Smith and Miller*. 5 *Johns. Rep.* 168.

17 The sheriff is entitled to *poundage* on a *ca. sa.* on serving the execution; and he has a right to call on the attorney for such *poundage*, without resorting to the party. *Adams* v. *Hopkins*. 5 *Johns. Rep.* 252.

18 A sheriff is bound to bring up a person in his custody on execution to testify, in a civil suit, on being tendered the expences for bringing up, and returning the prisoner. *Noble* v. *Smith*. 5 *Johns. Rep.* 357.

19 Where an action is brought against the sheriff, for the escape of a prisoner, admitted to the liberties of the gaol, the court will stay execution on the judgment against him, to allow him a reasonable time to bring his action on the bond taken for the liberties. *M'Intire* v. *Woods*. 5 *Johns. Rep* 357.

The sheriff is not bound to pay interest during the time the proceedings are so stayed. *Ibid.*

20 A sheriff who had taken a bond with sureties, for the liberties of the gaol granted to a prisoner in execution, was sued for an *escape*, and a judgment recovered against him. He gave notice to the sureties of the suit which was regularly defended by him and sureties. The sheriff, afterwards, brought an action on the bond, for his indemnity, and it was held, that the recovery in the former suit was conclusive evidence in the suit on the bond, and that the defendants could not on the trial of the suit against them on the bond, controvert the fact of the escape. *Kip* v. *Brigham et al.* 6 *Johns. Rep.* 158.

21 Where an under sheriff took a bond to indemnify him for all costs and damages for not taking N. P. (against whom the sheriff held a *ca. sa.* at the suit of L.) to prison as surety for the debt; the bond was held to be void, as taken for ease and favour, or by colour of his office, and in other form than that prescribed by the statute. *Lane* v. *Palmer et al.* 7 *Johns. Rep.* 159.

22 In an action brought by a sheriff, on a bond taken for his security, on granting the liberties of the gaol to a prisoner on execution, against the sureties, the record of a judgment of recovery against the sheriff for an *escape* of the prisoner, is conclusive evidence for the plaintiff. *Kip* v. *Brigham et al.* 7 *Johns. Rep.* 168.

And where a verdict was recovered against the sheriff for the escape of a prisoner, who had given security for the liberties of the gaol, it was held that the postea was evidence without the judgment (in an action by the sheriff on the bond) to prove the recovery and actual damage, at least, if not the escape. *Ibid.*

The sheriff is entitled to recover against the sureties on the bond for the gaol liberties, not only the amount of the debt and costs in the original suit, but also the costs of defending the suit against himself for the escape. *Ibid.*

23 A person, who has given security for the liberties of the gaol, is bound at his peril, and at the risk of his sureties, to keep within the liberties; and though the limits estab-

lished by the court of common pleas are in any part vague and indefinite, it is the duty of the prisoner to keep in places clearly defined, and within the limits; for he is bound to know and observe the limits. It is not the duty of the sheriff to ascertain the bounds of the liberties; but he is required to let the prisoner on execution go at large within the liberties when established by the court of common pleas. *Kip* v. *Brigham et al.* 7 *Johns. Rep.* 168.

24 Where a gaoler discharged a defendant taken on execution, on his executing to him a bond and warrant of attorney for the amount of the debt, and additional charges; the court set aside the judgment entered up on the bond so that the defendant might avail himself of any defence at law. *Richmond* v. *Roberts.* 7 *Johns. Rep.* 319.

Whether such a bond, taken by a sheriff, or gaoler, is not against the statute, as taken for ease and favour, and by colour of office? *Quere. Ibid.*

25 A sheriff cannot, with his own money, pay the plaintiff on the execution, and afterwards levy the execution out of the property of the defendant; nor can he take a bond or other security, and detain the execution in his hands, and use it, afterwards, to enforce the payment of the money advanced by him. *Reed* v. *Pruyn and Staats.* 7 *Johns. Rep.* 426.

26 Assumpsit lies against a deputy sheriff upon an express promise to pay money collected by him on an execution, to the plaintiff; but the promise must be clear and absolute. *Tuttle* v. *Love.* 7 *Johns. Rep.* 470.

27 Where a deputy sheriff, instead of taking a bail bond from *A.* whom he had arrested, took from him a negotiable note, made by *B.* which *A.* indorsed in blank to the deputy sheriff, for his security; and the deputy sheriff afterwards brought an action, as indorsee against the maker of the note, it was held, that the assignment or transfer of the note to the deputy sheriff was illegal and void, being contrary to the statute; and that the maker might avail himself of this fact to defeat the action. *Strong* v. *Tompkins et al.* 8 *Johnson's Rep.* 98.

28 It *seems*, that a special action on the case will not lie against a *gaoler*, at the suit of the *sheriff*, for a negligent escape; but that the gaoler is answerable to the *sheriff* only in an action of *assumpsit*, on his implied undertaking to serve the sheriff with diligence and fidelity. *Kain et al. exrs. of Rhea* v. *Gistrander.* 8 *Johns. Rep.* 207.

29 A purchaser at a sheriff's sale cannot be affected by any matter subsequent to the sale, arising between the parties to the judgment to which he is a stranger. *Jackson ex dem. McCrea* v. *Bartlett.* 8 *Johns. Rep.* 361.

30 A seizure of lands by a sheriff, under a *fieri facias*, does not divest the estate of the debtor; nor does a sale at auction, by the sheriff, unless the purchase money is paid, and a deed delivered. *Catlin* v. *Jackson ex dem. Gratz, in error.* 8 *Johns. Rep.* 520.

A sheriff's sale of lands is within the statute of frauds. *Ibid.*

Where a sheriff executed a deed for land sold by him at auction, under a *fi. fa.*; and delivered it to the attorney of the plaintiff, to be delivered to the grantee on the payment of the purchase money, it was held, that no estate passed by the deed, until the purchase money was paid, or condition performed. *Ibid.*

A sheriff may deliver a deed, as an *escrow*, but the money must be paid at a day certain, and within a reasonable time, or the sale will be void; and what is reasonable time depends on circumstances; but it seems that it cannot extend beyond the return day of the *venditioni exponas*, or at most, the next vacation. *Ibid.*

SHIP.

1 Freighters of ships under the charter-parties of the *East-India* company are not answerable for damage or loss to the cargo happening by the act of God. *Hotham* v. *The East-India Company.* 1 *Doug.* 272. "Ship damage," in those charter-parties, means damage from negligence, insufficiency, or bad stowage in the ship, exclusive of what is occasioned by storm or other sea hazard. *Ibid.*

2 Trading to a *French* port as an adopted ship makes a neutral ship lawful prize, not barely having *French* produce on board. *Berens* v. *Rucker.* 1 *Black.* 314.

3 A delivery of the grand bill of sale of a ship at sea is equivalent to a delivery of the ship itself. *Atkinson* v. *Maling.* 2 *Term Rep.* 462.

4 Where a ship was mortgaged at sea, with a proviso that the mortgagor, should continue in possession till failure of payment of the mortgage money on demand, but the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival; he may maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees. 2 *Term Rep.* 462.

5 Notwithstanding the statute 26 G. 3, c. 60, s. 17. enacts that a bill of sale of a ship shall be absolutely void, unless the certificate of the registry be truly and accurately inserted therein, (see *Rolleston* v. *Hibbert*, 3 *Term Rep.* 406,) yet the court of K. B. held, that a mere clerical mistake will not vitiate it. *Rolleston* v. *Smith.* 4 *Term Rep.* 161.

6 And the court of C. P. held that the indorsements on such certificate of registry need not be recited in the deed of assignment of a ship. [See now 34 G. 3, c. 68. s. 15.] *Capadose* v. *Codnor.* 1 *Bos. & Pull.* 483.

7 *A.* and *B.* being joint owners of a ship, *A.* conveyed his moiety to *B.*: but in the bill of sale the certificate of registry was not truly recited; *B.* took possession, and afterwards mortgaged the whole ship to *A.* who did not take possession; then *B.* ordered *C.* to repair the ship; afterwards *B.* conveyed one part of the ship to *A.*, and the other to *D.*; held, that the first bill of sale was an absolute nullity under the statute 26 G. 3, c. 60, s. 17, and that *A.* was liable to *C.* for the repairs of the ship in an action for work and labour brought by *C.*; *A.* not having pleaded in abatement that *B.* ought also to have been sued. *Westerdell* v. *Dale.* 7 *Term Reports*, 306.

8 Under the ship register acts (26 G. 3, c. 60, and 34 G. 3, c. 68.) a bill of sale transferring the property to a trustee, in trust for the underwriters not named, is at most only void (if at all) as to the objects of the trust, but sufficient to convey the legal title to the trustees. And such bill of sale of a ship at sea is valid, notwithstanding the omission of the officer at the outport to which the ship belonged, to indorse the entry of the transfer on the oath on which the original certificate of registry was obtained, and to make a memorandum thereof in the book of registry, and to give notice of the same to the commissioners in *London*, as required by section 16 of the 34 G. 3, c. 68; such acts to be done by the public officer being only directory. But the delivery of a copy of the bill of sale of a ship at sea for the purpose of making such entry and memorandum and giving such notice, being an act required to be done by the party himself to whom the transfer is made, for want of which the statute avoids the sale, must be complied with in order to convey the property; and therefore the purchaser under such circum-

stances, having omitted to do so, cannot make a title to the ship *per saltum*, by getting her registered *de novo*, in another port where he resided at the time; for whatever may amount to a transfer of a ship to another port, within the meaning of the statutes, at all events such transfer cannot be made by one who has no interest in the ship. *Heath* v. *Hubbard*. 4 *East*, 110.

9 The ship register acts do not apply to a transfer of property by operation of law, such as from the commissioners, to the assignees of a bankrupt. *Bloxam & al. Assignees* v. *Hubbard*. 5 *East*, 407.

10 Under the ship register acts 7 and 8 W. 3, c. 22, s. 21, and 26 G. 3, c. 60, s. 3, 4, 5, 16, and 34 G. 3, c. 68, s. 15, 16, in order to make title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described, and a copy of such indorsement be delivered by the vendee to the persons authorized to make registry, (which officers are *directed* to make an entry thereof, to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and to give notice thereof to the commissioners of the customs;) and it is not sufficient for the vendee to register such ship *de novo*, in another port, where he resided, though he removed the ship thither, and she never returned to her original port after the sale. *Ib.*

11 An indorsement of a transfer of a ship in the same port made upon the certificate of the registry, and bearing date at the time of the transfer, but not signed by the vendor till three years after such certificate had been delivered up and cancelled, and had remained dormant during all the intermediate time: held, not to convey a title to the ship under the register act 34 G. 3, c. 68, s. 15, and other acts; such certificate having been so cancelled and delivered up upon occasion of the vendee's obtaining a register *de novo*, (issued without authority,) which recited the cancellation of the former certificate. For the object of the register acts in requiring such indorsement, is in order to notify the change of property to the public; and therefore it is required to be made on an existing acknowledged certificate, in use at the time: and consequently no title passed to the assignees of the vendee, who had become bankrupt between the time of the original transfer to him, and the signing of such indorsement by the vendor; the vendee having also before his bankruptcy, conveyed away the ship to third persons for a valuable consideration, who were in possession of it. But *quære*, whether any title could be made under such register *de novo*, issued without authority, upon a transfer of the ship in the same port? And therefore the vendees of the bankrupt only held their possession on such defect of title in the assignees of the bankrupt. *Moss & al. ass.* v. *Mills*. 6 *East*, 144.

12 A foreign-built ship, *British*-owned, is not required to be registered. *Long* v. *Duff*. 2 *Bos. & Pull.* 209.

13 Such a ship may therefore sail without convoy, being within the exception of the convoy act 38 G. 3, c. 76, s. 6. *Ibid.*

14 *A.*, the owner of a ship, executes an *absolute* bill of sale of it to *B.*, and by another deed of the same date, assigns other property to *B.*; which deed of assignment (reciting that the bill of sale was for the better *securing a sum of money* lent by *B.* to *A.*, and also reciting a bond and warrant of attorney *to secure the same sum*,) declares that those "several deeds and instruments were made to enable *B.* by sale of *all the things* comprised in them, to raise the sum lent, without the concurrence of *A.*, *at any time* before the

money should be paid off; but in this deed there is a covenant that upon repayment of the money, "*B.* shall *reconvey* to *A.*, but so as not to prevent *B.* from selling, &c. *at any time before the full payment.* &c." under these conveyances, *B.* is not absolute owner of the ship, but only mortgagee; and therefore, is not liable *for necessaries provided for the ship before he takes possession. Jackson* v. *Vernon.* 1 *H. Black.* 114.

15 The mortgagee of a ship cannot maintain an action for freight against a third person before he takes possession. *Chinnery* v. *Blackburne.* 1 *H. Black.* 117, *n.*

16 But *qu.* whether a mortgagee, out of possession, be not liable for repairs. *Westerdell* v. *Dale.* 7 *Term Rep* 306.

17 A ship bound for *London*, after taking in her cargo, but before breaking ground, was cut out of her port of lading in *Jamaica* by a *French* privateer; but was afterwards recaptured and carried into another port in the same island, where the cargo was sold by order of the court of admiralty, for the benefit of the freighters: held, that the owners of the ship were not entitled to any part of the freight, though by the usage of trade, the ship was freighted at their expence. *Curling* v. *Long.* 1 *Bos. & Pull.* 634.

18 If *A.* let his ship to *B.* for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship; and for the safety of the ship it becomes necessary during the voyage to put into a port to refit; the expence of refitting must be born entirely by *A.*; and *B.* is not liable to contribute to it in proportion to his interest in the cargo, as for a general average. *Jackson* v. *Charnock.* 8 *Term Rep.* 509.

19 The plaintiff contracted to carry the defendant, his family, and luggage from *Demarary* to *Flushing*; and in the course of the voyage, within four days sail of *Flushing*, the ship was captured by an *English* ship of war, and brought into *England*, and the ship and cargo libelled for prize in the court of admiralty, and the cargo condemned, and proceedings still pending against the ship; but the defendant, and his family, were liberated, and their luggage in fact restored to their possession. Held that, however the question might be as to the plaintiff's right to recover passage-money upon an implied *assumpsit, pro rata itineris*, if the ship were restored, yet pending the proceedings against the ship as prize in the admiralty court, no such action could be maintained; for *non constat*, but that the ship might be condemned, and the freight decreed to the captors. *Mulloy* v. *Backer.* 5 *East*, 316.

20 *A.* and *B.*, merchants abroad, ship tobacco for *Liverpool*, consigned to *A.* himself there, to whose order the bills of lading are made; one of these bills is sent inclosed in a letter from the shippers to *C.* at *Liverpool*, advising him of such consignment to *A.*, and that *A.* intended to proceed to *Liverpool*, but in case he should not arrive in time desiring *C.* to do the best for them. The tobacco having arrived in a damaged state before *A.*, is required to be landed, and is deposited in the king's warehouse pursuant to the statute; and afterwards *C.* acting as agent for *A.* within the knowledge of the captain, makes an entry of it in his own name in the custom-house, to avoid seizure; held, that this was not such an acceptance of the cargo by *C.* as would make him liable to the captain for the freight. *Ward* v. *Felton.* 1 *East*, 507.

21 Foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, and thereby agree, among other things, not to institute any suit against the master in foreign countries, or cite

him before any judge or magistrate, but *that they will abide by the maritime code of their own country, and the adjudication of their own courts.* Having made this agreement in their own country, they cannot maintain an action in *England* against the master for wages; though the ship and cargo be confiscated in an *English* port, and the voyage thereby ended. *Gienar* v. *Meyer.* 2 *H. Black.* 603.

23 A seaman belonging to a merchant ship, which is articled for a certain voyage, is prevented from performing the whole voyage, by being disabled by an accident happening in the course of his duty; he is entitled to wages for the whole voyage. *Chandler* v. *Grieves.* 2 *H. Black.* 606, *n.*

23 If a sailor, hired for a voyage take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage; and before the ship's arrival he die, no wages can be claimed, either on the contract, or on a *quantum meruit.* *Cutter* v. *Powell.* 6 *Term Rep.* 320.

24 A seaman having contracted to go a voyage from *A.* to *B.* and back again, with a stipulation that he should not be entitled to his wages till the end of the voyage, cannot maintain a general *indebitatus assumpsit* to recover his wages *pro rata* as far as *B.*; though he were there wrongfully dismissed by the defendant, the captain; but his remedy is either for the breach of the special contract, or for such *tortious* act of the captain's whereby he was prevented from earning his wages. *Hulle* v. *Heightman.* 2 *East*, 145.

25 The 37 G. 3, c. 73, s. 3, having prohibited more than double monthly wages, being given to seamen coming from the *West-Indies*, unless the captain be specially licenced to give a greater rate by the chief officer of the port; a general licence by such chief officer to a captain "to procure men on such terms as he can," is void. *Rogers* v. *Lacy.* 2 *Bos. & Pull.* 57.

26 A sailor, in addition to the wages contained in the ship's articles, sued for the average price of a negro slave, for which he had agreed with the captain, though no mention of such perquisite was made in the articles: held, that the contract for the avarage price of a negro slave was void: such additional perquisite being in fact wages, and therefore only to be recovered where included in the articles according to 2 G. 2, c. 36. *White* v. *Wilson.* 2 *Bos. & Pull.* 116.

27 A seaman who quits his ship, after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of the whole of his wages under the 2 G. 2, c. 36, s. 3. *Frontine* v. *Frost.* 3 *Bos. & Pull.* 302.

28 To entitle the master to deduct a month's wages for the benefit of *Greenwich* hospital under the 2 G. 2, c. 36, s. 6, and 9, it is incumbent on him to shew that the seamen quitted his ship without leave in writing. *Ibid.*

29 And such a deduction cannot be set off by the master in an action for wages by the seamen, unless the master has previously debited himself to *Greenwich* hospital for the amount in a book kept according to the direction of the statute. *Ibid.*

30 If a sailor execute the articles prescribed by 37 G. 3, c. 73, and serve accordingly, and during the voyage part of the cargo be plundered, but by whom cannot be ascertained, he does not, in consequence of such plunderage, forfeit his wages. *Thompson* v. *Collins.* *New Rep.* 347.

31 And *semb.* That in such case he is not even liable to a proportionable deduction from his wages, in common with the other sailors, on account of such plunderage. *Ibid.*

32 *Assumpsit* lies to recover wages by the master of a vessel against his owners which accrued during the

detention of a vessel under a hostile embargo in a foreign port, when the crew were made prisoners, but were finally released, together with the vessel, and afterwards completed the voyage; it appearing that freight was received. *Pratt* v. *Cuff*. Sittings at *Guildhall* after *H.* term 1798, cor. Lord *Kenyon*, C. J. cited in *Thompson* v. *Rowcroft*. 4 *East*, 43.

83 A foreign prince, under pretence of precaution against a supposed act of aggression, of our government, made a hostile seizure of *British* ships in his ports, and imprisoned our seamen on shore; and after six months they were released, and resumed and concluded their voyage, and the owners received their freight; held, that such seizure, however hostile in the manner, so far partook of the nature of an *embargo* in its result, and not of a capture, that it did not put an end to the contract of a mariner for wages, even during the time of such detention and imprisonment. But even considering it as a temporary capture, yet like the case of a capture and recapture, the mariner was still entitled to his wages; for a mariner's title to wages depends on the ship's earning her freight on the voyage, and the performance of his stipulated duty; and her freight for the voyage was ultimately earned; and the mariner was guilty of no breach of duty; for his stipulation *not to be on shore under any pretence, without leave, before the voyage was ended*, must be understood of his being on shore *by the party's own unauthorized act*. And even if such imprisonment on shore could be so considered, yet the master's having afterwards received him again on board without objection, amounted to a dispensation of the service in the interval, and intitled him to wages, according to his original contract. *Beale* v. *Thompson, in error from* C. P. 4 *East*, 546.

Note. The judges in C. P. were equally divided upon this case. See 3 *Bos. & Pull.* 405, 434.

34 S. P. in the case of foreign seamen. *Johnson* v. *Broderick*. 4 *East*, 566.

35 Where the captain of a ship has accounted upon oath to the collector of the port for a sum of money as the wages due to a deceased seaman, and paid the same to *Greenwich* hospital under 37 G. 3, c. 73, the representatives of such seamen may still sue the captain for any wages due beyond the sum so paid. *Armstrong* v. *Smith*. *New Rep.* 299.

36 A ship being in danger, and the captain and part of the crew having made their escape; a passenger, at the request of the rest of the crew, took the command, and brought the ship safe into port. The merits of the passenger in saving the ship were acknowledged by the owner in a letter to one of the underwriters, wherein he expressed his desire to make him a compensation. Held, that the passenger was entitled to sue the owner for the salvage. *Newman* v. *Walters*. 3 *Bos. & Pull.* 612.

37 The statute 34, G. 3, c. 68, s. 15, reciting that by the laws in force, upon any alteration of property in any vessel *in the same port* to which she belongs, an indorsement on the certificate of registry is required to be made; enacts that such endorsement shall be made in the form therein expressed, and shall be signed by the vendor, &c. and a copy of such indorsement shall be delivered to the registering office; or otherwise the sale shall be utterly null and void; and such officer is required to make entries thereof on the affidavit on which the original certificate was obtained, and in the book of registry, and to give notice thereof to the commissioners of customs. Then s. 16 provides that if any vessel shall be at sea, *or absent from the port, to which she belongs*, when such alteration in the property shall be made; *so that* an endorsement

on the certificate cannot be made; of assuming that the certificate is always with the ship;) then it substitutes a bill of sale to be made in lieu of the indorsement on the certificate; requiring the same delivery of a copy, and the same entries and notice thereof, as were required for the indorsement of the certificate by the prior section; but that within ten days after the vessel's return to her port, the endorsement on the certificate, &c. shall be made; as before required. Held that the provisions of the two sections comprehended *every* transfer of property in a ship; and that a bill of sale executed by a sole owner of a vessel belonging to the port of *Sunderland* to a vendee residing in *London*, at a time when the vessel was in the port of *London*, was void, for want of complying with the requisites of one or other of those sections; neither of them having been complied with; and that it was not sufficient for the vendee to have complied with the requisites of the statute 7 & 8 W. 3, c. 22, s. 21, which requires a registry *denovo* upon *any transfer of property to another* port, and that the former certificate shall be delivered up to be cancelled. *Hayton* v. *Jackson*. 8 *East* 511.

38 The master of a ship has no lien on it for money expended, or debts incurred by him for repairs done to it on the voyage. *Hussey* v. *Christie*. 9 *East* 426.

39 The vice admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be sea-worthy, or repairable so as to carry the cargo to its place of destination, but at an expence exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to sell the ship under such circumstances, as to put an end to the adventure by such discretionary act of his own, when in fact he might have repaired the ship, and continued the voyage. But supposing he has such authority exercised *bona fide* in a case of necessity; still the vessel subsisting as such, and capable of being used for the purposes of navigation, and so used in fact after some repair on the spot, can only be conveyed by the captain in the form prescribed by the register acts; and the requisites of those acts not having been complied with, the sale in question was held to transfer no property to the vendee. *Reid* v. *Darby*. 10 *East* 143.

40 A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of a vessel is not transferred to the vendee by a bill of sale of the ship, made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter party. *Splidt* v. *Bowles*. 10 *East* 279.

41 Where in a charter party freight was to be paid at so much per ton, *on a right and true delivery of the homeward bound cargo*, from *Honduras Bay* to *London*, and the ship and cargo, after capture and recapture, having been wrecked at *St. Kitts*, into which they were carried by the recaptors, a sale of the cargo was directed by the vice-admiralty Court there, on the application of the master, acting *bona fide* for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners; held that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight *pro rata itineris*. For such form of action, for the proceeds of an illegal sale of goods, is only a waiver of any claim for *damages* for the tortious act; taking the actual proceeds of the sale as a value of

the goods (subject to the legal consequences of considering the demand as a debt; which admits of a set off, &c.) but does not recognize the right of the vendor so to convert the goods. And here the act of conversion (for such it must be taken to be) being made by the master, who is the general agent of the ship owners; (and not, as in *Baillie* v. *Modigliani*, by the act of a Court of competent jurisdiction;) was unlawful, and discharged the claim of the ship owners for freight *pro rata itineris*. *Hunter* v. *Princep*. 10 *East* 378.

42 But the plaintiff could not recover against the ship owners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject matter by a contract not under seal, and signed by their master only, and not by themselves. *Hunter* v. *Princep*. 10 *East*, 378.

43 The owner of a ship, carrying goods on freight upon a circuitous voyage, is bound to put her into a state of repair at every port where she may be; and must answer to the freighter for any damage arising to his goods for want of such repairs, and this whether the defect in the ship be known or unknown to the ship owner. *Putnam* v. *Wood*. 3 *Mass*. 481.

Upon a shipment of an adventure, where the shipper assumes the perils of the seas, and the ship owner is to receive a portion of the profits in lieu of freight, &c. if damage arise to the adventure from the perils of the sea, the loss is to be deducted out of the profits, and thus be sustained by the ship owner and freighter jointly. *Ibid.*

44 When a ship at sea is transferred the purchaser takes her subject to all incumbrances upon her, and to all lawful contracts made or to be made by the master, before notice of the transfer, respecting the employment of the ship. *Portland Bank* v. *Stubbs et al.* 6 *Mass*. 422.

45 A regular bill of sale is not essential to transfer the property in a ship or vessel; but the same passes by delivery, like any other chattel. *Wendover et al.* v. *Hogeboom et al.* 7 *Johns. Rep*. 308.

The law of the *United States* requiring the register to be inserted in the bill of sale, on every transfer of the vessel, does not effect the validity of the transfer, but only the character and privilege of the vessel, as an *American* ship. *Ibid.*

46 A *mortgagee* of a ship, *out of possession*, is not liable for repairs or necessaries furnished the ship. *M'Intyre and Bradford* v. *Scott*. 8 *Johns. Rep*. 159.

47 What shall be deemed the destruction, or casting away of a ship, at sea, with design to injure the insurers. 4 *Dallas*, 412.

SHIP OWNERS.

1 The master and owners of a ship are responsible for the goods which they have undertaken to carry, if stolen or embezzled by the crew or any other person, though no fault or negligence may be imputable to them. *Schieffelin et al.* v. *Harvey*. 6 *Johns. Rep*. 170.

Where goods were shipped at *New-York*, and on the arrival of the ship, the goods were refused admission, being prohibited by the laws of *England* and the consignee and master agreed that the goods should remain on board, and be returned to the shippers in *New-York*, at their risk, they paying the freight from *London*, and an indorsement was made to that effect, on the bill of lading; it was held, that the ship owner was responsible for the embezzlement of any part of the goods, between the

time of the first shipment at *New-York*, and their return there, though *English* custom house officers were on board during the time the vessel lay at *London*, and though they may have embezzled the goods, and not the master or crew, or any person with their knowledge. *Ibid.*

2 Where a person supplies stores to a ship, of which there were several owners, on the order of one of them, who acted as ship husband, and took his note in payment, and gave a receipt in full, it was held to be no discharge of the other owners, especially, as it did not appear, that the plaintiff knew, at the time, that there were other owners. *Schemerhorne* v. *Loines et al.* 7 *Johns. Rep.* 311.

SHIP REGISTER.

Contracts in violation of the registering act cannot be enforced. 4 *Dallas*, 269, 298, 308, 342.

SHORE.

The shore is that land, which is between high and low water mark. *Storer* v. *Freeman.* 6 *Mass.* 435.

SIMONY.

1 *Qu.* Whether a bond of resignation with condition to reside, to resign for the patron's son to be presented, and to keep the premises on the living in repair, be not good in law? *Partridge* v. *Whiston.* 4 *Term Rep.* 359.

2 In an action for use and occupation by an incumbent against a tenant of the glebe lands, who has paid him rent, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title. *Cook* v. *Loxley.* 5 *Term Rep.* 4.

SLANDER.

I. *What shall be, and how to be charged.*
II. *Evidence.*
III. *Justification or Mitigation.*

I. *What shall be, and how to be charged.*

1 Words held actionable to say of a tradesman, you are a sorry, pitiful fellow, and compounded your debts for 5*s.* in the pound. *Stanton* v. *Smith.* 2 *Str.* 762.

2 Strumpet tantamount to whore in *London*. *Cook* v. *Wingfield.* 1 1 *Str.* 535.

3 Discrediting the plaintiff's skill in his trade, by an advertisement, a libel actionable. *Harman* v. *Delany.* 2 *Str.* 898.

4 To call a justice a rogue, actionable. *Kent* v. *Pocock.* 2 *Str.* 1168.

5 To say of a magistrate in the execution of his office, you are a "rascal, a villain, and a liar," actionable. *Ashton* v. *Blagrave.* 1 *Str.* 617.

6 Charging a member of parliament with a want of sincerity and breaking his word, not actionable. *Onslow* v. *Horne.* 2 *Black.* 750. 3 *Wils.* 177.

7 It is actionable to say of a tradesman, "he is a sorry, pitiful fellow, and a rogue; he compounded his debts at 5*s.* in the pound," though there is no colloquium of his trade. *Action upon the Case for Defamation*, *Stanton* v. *Smith.* 2 *L. Raym.* 1480. *Str.* 762.

8 Thou art one of those that stole my lord *Shaftesbury's* deer, held not actionable; for though imprisonment be the punishment in those cases, yet *per Holt*, C. J. it is not a scandalous punishment. *Turner* v. *Ogden.* 2 *Salk.* 696.

9 You stole my boxwood, and I will prove it; actionable. *Baker* v. *Pierce.* 2 *Salk.* 695. 2 *L. Raym.* 959.

10 Do not vote for him, for he is a jacobite, and for bringing in the prince of *Wales* and popery to destroy our nation, spoken of a justice of peace and deputy lieutenant, held actionable.

In offices of profit, words imputing want of ability are actionable; otherwise in offices of honour. *How* v. *Prinn.* 2 *Salk.* 694. 2 *L. Raymond*, 812.

11 Simply saying to another "*you are a swindler*," held by the court of C. P. not to be actionable. *Savile* v. *Jardine.* 2 *H. Black.* 531.

12 A servant cannot maintain an action against his former master for words spoken, or a letter written by him in giving a character of the servant, unless the latter prove the malice as well as falsehood of the charge, even though the master make specific charges of fraud. *Weatherstone* v. *Hawkins.* 1 *Term Rep.* 110.

13 Although a master be not in general bound to prove the truth of a character given by him to a person applying for the character of his servant, yet if he officiously state any trivial misconduct of the servant to a former master, in order to prevent him from giving a second character, and then himself upon application for a character, give the servant a bad character, the truth of which he is not able to prove, the jury may, from these circumstances, infer malice against the master, in an action against him by the servant. *Rogers* v. *Clifton.* 3 *Bos. & Pull.* 587.

14 In an action for consequential damage from slander, imputing incontinence to the plaintiff, it is enough to state, that he was occasionally employed to preach to dissenters at a certain licenced chapel, from which he derived considerable profit, and that, by reason of the scandal, "the persons frequenting the said chapel refused to permit him to preach, and had discontinued the emoluments which they would otherwise have given him;" without saying who those persons were, or by what authority they excluded him, or that he was a preacher qualified under statute 10 *Anne*, c. 2. *Hartley* v. *Herring.* 8 *Term Rep.* 130.

15 Where special damage is necessary to sustain an action of slander, it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damages must be a legal and natural consequence of the slander. *Vicars* v. *Wilcocks.* 8 *East*, 1.

16 In slander the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him in the court of exchequer by the defendant, (but did not proceed to aver any colloquium respecting that answer, with reference to which the words were spoken;) and then alleged that the defendant said of him that he was *foresworn; innuendo*, that the plaintiff had perjured himself, in what he had sworn *in his aforesaid answer to the bill so filed against him:* held that this innuendo could not, without the aid of such colloquium enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in. *Hawkes* v. *Hawkey.* 8 *East*, 427.

17 The rule of construction as to slanderous words is to construe them in their plain and proper sense, such in which an ordinary hearer would have understood them at the time they were spoken. And therefore the defendant saying of the plaintiff that "he was under a charge of a prosecution for perjury; and that *G. W.* (an attorney of that name) had the attorney general's directions to prosecute the plaintiff for perjury" is actionable. For after verdict (by which the jury, who are to judge of the intent of the

speaker, must be taken to have negatived that he meant to speak of a prosecution for a perjury which the plaintiff had *not* committed;) the words not having been justified, must be taken to be *false;* and being unqualified by any context, and unexplained by any occasion to warrant them, the law infers *malice* from the *falsehood* of an accusation which in the common acceptation of the words, impute *perjury* to the plaintiff. *Roberts* v. *Camden.* 9 *East*, 93.

18 Where new matter introduced by an innuendo, without any antecedent colloquium to which it can refer to support it, is not necessary to sustain the action, it may be rejected as surplusage. And therefore an *innuendo* that the attorney general spoken of meant the attorney general for the county palatine of *Chester*, was so rejected. *Ibid.*

19 Where one said, *he would venture any thing the plaintiff had stolen the book*, the words being proved to be spoken maliciously, were held to support the verdict for damages. *Nye* v. *Otis.* 8 *Mass.* 122.

A general count in an action for defamation, as for charging the plaintiff with stealing, is good. *Ibid.*

20 The following words spoken of a person, who was a justice of the peace, "*Squire Oakley* is a damned rogue" were held not to be actionable, not being spoken of him in his official capacity. *Oakley* v. *Farrington.* 1 *Johns. Cases*, 129.

21 Where words, otherwise actionable, were explained at the time by a reference to a known transaction, they are to be construed accordingly, and being explained, they were held not to be actionable. *Van Rensselaer* v. *Dole.* 1 *Johns. Cases*, 279.

22 Words spoken of a person in relation to his office of sheriff, and amounting to a charge of mal-practice, are actionable. *Dole* v. *Van Rensselaer.* 1 *Johns. Cases*, 330.

23 If words actionable in themselves, be spoken between members of the same church in the course of their religious discipline, and without malice, no action will lie; and the jury are to decide whether there be malice, or not. *Jarvis* v. *Hatheway.* 3 *Johns. Rep.* 180.

24 To say to a witness, while he is giving evidence in a cause in court, to a point material to the issue, "that is false" (meaning what the witness said was false) is actionable; for when spoken maliciously, the words are equivalent to a charge of perjury. *M'Laughry* v. *Wetmore.* 6 *Johns. Rep.* 82.

25 In an action of slander, the declaration stated that the plaintiff was a justice of the peace, and that the defendant meaning to injure him, and expose him to prosecution, for corruption, &c. in a certain discourse, &c. said of the plaintiff, in his office of justice; "*Lindsey* (meaning the plaintiff) had been feed by *A. W.* (meaning *A. W.* who lately had a cause pending, and determined before the plaintiff) and that he (the defendant) could do nothing when the magistrate was in that way against him." On motion, in arrest of judgment, the declaration was held sufficient. *Lindsey* v. *Smith.* 7 *Johns. Rep.* 359.

Though an *innuendo* cannot supply the place of a *colloquium*, yet if there be a *colloquium* sufficient to point the application of the words to the plaintiff, if spoken maliciously, he must have judgment. *Ibid.*

26 To say of a person "he has sworn falsely," or, "that he has taken a false oath in *'squire Jamison's* court," or, "that he has falsely and maliciously charged on me the crime of perjury," is not actionable. *Ward* v. *Clark.* 2 *Johns. Rep.* 10.

27 Words charging a married woman with adultery, are not actionable in themselves; but the plaintiff must allege, and prove, some special damage, in consequence of the speaking of the words. *Buys and Wife* v. *Gillespie.* 2 *Johns. Rep.* 115.

28 To say of a person "*she is a common prostitute, and I will prove it*," or, that "*she was hired to swear a child on me; she had a child before she went to Canada; she would come damn'd nigh going to the state prison*," is not actionable without shewing special damages. *Brooker* v. *Coffin*. 5 *Johns. Rep.* 188.

The rule in case of slander, seems to be, that where a charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject him to an infamous punishment, then the words are, in themselves actionable. *Ibid.*

29 To say of an attorney or counsellor in a particular suit, "*F.* knows nothing about the suit, he will lead you on until he has undone you, is not actionable, without alleging and proving special damage. *Foot* v. *Brown*. 8 *Johns. Rep.* 64.

30 In an action of *slander*, it is sufficient to prove the substance of the words laid in the declaration. Where the defendant said, "my watch has been stolen in *M.*'s bar room, and I have reason to believe that *T.* took it, and that her mother, *M.* concealed it," it was held that these words were actionable. *Miller* v. *M. Miller*. 8 *Johns. Rep.* 74.

31 Where the defendant in an action of slander said his watch had been stolen, and that, he "had reason to believe that *T.* took it," it was held that this was a sufficient charge of a crime; and that the words were actionable. *Miller* v. *T. Miller*. 8 *Johns. Rep.* 77.

32 To say of a person, "he has sworn false, or has taken a false oath," is not actionable; and the meaning of the words cannot be enlarged by *innuendo*; yet these words may be aided so as to support the declaration, if the defendant, in his *plea* of justification, allege or confess that he spoke the words by reason of a false oath taken by the plaintiff in a court of competent jurisdiction. But if the defendant plead the general issue, and give notice of his justification, the notice will not help the declaration, for it is not considered as a special plea, nor does it form any part of the record. *Vaughan* v. *Havens*. 8 *Johns. Rep.* 109.

33 In an action of slander, it was held, that after a judgment on demurrer to a declaration, containing several counts, and an assessment of damages, the plaintiff cannot enter a *nolle prosequi* as to one of the counts, and take judgment on the others, but should obtain leave of the court for that purpose, before awarding the writ of inquiry; one of the counts being held bad, and the assignment of damages considered as applying to all the counts, the judgment below was reversed. *Backus* v. *Richardson, in error*. 5 *Johns. Rep.* 476.

To say of a merchant, "you keep false books and I can prove it," is actionable. *Ibid.*

34 The sense in which words are received by the world, is the sense which courts ought to ascribe to them on trials for slander. 2 *Dallas*, 59.

35 What amounts to a charge of perjury, as foundation for an action of slander. 2 *Dallas*, 59.

II. *Evidence.*

1 In an action for slander the defendant may, under the general issue, give in evidence the occasion and manner of speaking the words. *Smith* v. *Richardson*. *Willes*. 20.

2 But he cannot give evidence of the truth of the fact on the general issue where the words import felony or treason. *Ibid.* 25, *n.*

3 Though all the actionable words laid in any one count are not proved, yet if some are, the plaintiff shall have a verdict. *Compagnon* v. *Martin*. 2 *Black.* 790.

4 In case for words, by which he lost the custom of *J. S.* and several others, the plaintiff shall only be ad-

mitted to prove the loss of *J. S's* custom particularly. *Browning* v. *Newman*. 1 *Str. Rep.* 666.

5 The truth of words cannot be given in evidence on not guilty. *Underwood* v. *Parks*. 2 *Str.* 1200.

6 A count for slanderous words spoken affirmatively, is not supported by proof that they were spoken by way of interrogation. The words must be proved as they are laid. *Barnes* v. *Holloway*. 8 *Term Rep.* 150.

III. *Justification, or Mitigation.*

1 It is no justification to an action of slander to plead that *A. B.* told the slander to the defendant. *Davis* v. *Lewis*. 7 *Term. Rep.* 17.

2 But if the person repeating the slander at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former. 7 *Term. Rep.* 17.

3 In a justification of slander, that the defendant named the original author of it at the time, it is not sufficient to allege that the original slanderer used such and such words *or to that effect*; although in the libel declared on the defendant stated that another had spoken the same slanderous words of the plaintiff, *or words to that effect*; but the defendant must give the very words used, though it be only necessary to prove some material part of them. *Maitland* v. *Goldney*. 2 *East*. 426.

4 When in an action of slander the defendant pleads the truth of the words spoken in justification, he shall not be permitted to give evidence of common report, that the plaintiff had been guilty of the crime which the words import, nor that *A.* and *B.* had charged him with the commission of the crime. *Wolcott* v. *Hall*. 6 *Mass.* 514.

SLAVES.

1 No man can have property in the person of another while in *England*; therefore trespass will not lie, unless with a *per quod*, for taking a negro slave in *England*. Trespass lies for the taking an apprentice. Trover lies not for a negro slave. *Chamberlain* v. *Harvey*. 1 *L. Raym.* 146. 2 *Salk.* 666. *Smith* v. *Brown and Cooper*.

2 Slavery cannot be supported by moral or political reasons, and in this country can be no further maintained than positive law will support it. *Somerset* v. *Stewart*. *Lofft*, 1.

The only species of slavery which can now exist in *England* is, if a man will confess himself a villian in gross in a court of record. *Ibid.*

A slave in another country is not a slave in *England*, and the judges will not, from analogy to any species of slavery that ever did exist in *England*, construe him to be a slave in a certain qualified degree; for the country knows of no slavery in any degree, not expressly limited and prescribed by the positive law of *England*. *Ibid.*

3 *A.* the owner of a slave in *New-Jersey*, removed into this state (*New-York*) with the slave, and entered into an agreement with *B.* in this state, by which he put the slave to service with *B.* until the parties or their executors should mutually agree to annul the agreement. This was held to be a sale of the slave in this state, within the meaning of the act concerning slaves, passed the 2d *February*, 1788. *Sable* v. *Hitchcock*. 2 *Johns. Cas.* 79.

N. B. This case was affirmed in the court of errors. *Ibid.* 488.

4 But such an agreement or sale made in the course of administration, or by persons acting in *auter droit* (as executors, assignees of absent or insolvent debtors, sheriffs

and trustees) would not be within the act so as to subject the vendors to the penalty, or make the slave free. *Ibid.*

6 Where a slave, aged 25 years, ran away from his master in *New-Jersey*, and came to *New-York*, and the master followed him to *New-York* and there entered into an agreement by which he let the slave to a person in *New-York* for twenty years, for the consideration of 250 dollars; giving to the person full power to correct, imprison, and exercise all authority over the slave, which he could lawfully do, it was held to be an importation and sale within this state, within the meaning of the act, and that the slave was, therefore free. *Fish* v. *Fisher*. 2 *Johns. Cases*, 89.

β Where *A.* the owner of a slave, gave him a certificate in writing, stating that from and after the decease of *A.* he manumitted the slave; it was held that the slave at the death of *A.* was entitled to his freedom, notwithstanding *A.* after giving the certificate, in his life time, had sold and delivered the slave to *B.* for a valuable consideration. Case of *Tom*, a negro-man. 5 *Johns. Rep.* 355.

7 The owner of a slave gave a written promise, to manumit such slave, in eight years, on condition of his faithful service during that period; it was held to be a conditional manumission, obligatory on the master, and of which the slave might avail himself, on the performance of the condition. *Ketletas* v. *Fleet*. 7 *Johns. Rep.* 324.

8 After giving such a written covenant which was delivered to the custody of a third person, the master sold the slave absolutely, for his full value, though he was informed at the time of the sale, that the slave had been promised his freedom in eight years, but did not know of the written covenant until after the purchase, when he returned the slave to the vendor, and rescinded the contract. In an action brought by the vendor against the vendee to recover the purchase money, it was held, that the vendee being ignorant of the existence of the written covenant, at the time of sale, the concealment was a fraud, and vacated the contract. *Ketletas* v. *Fleet*. 7 *Johns. Rep.* 324.

9 If the owner of a slave, removing into *Virginia*, shall take the oath required by the act of assembly, within sixty days after the removal of the owner, it shall prevent the slave from gaining his freedom, although he was brought into *Virginia* by a person claiming and exercising the right of ownership over him, eleven months before the removal of the *true* owner; and although the person, who brought him in never took the oath; and although the slave remained in *Virginia* more than one year; and although the true owner never brought him in. *Scott* v. *Negro London*. 3 *Cranch*, 324.

10 The right to freedom, under the act of *Maryland*, which prohibits the bringing of slaves into that state, is not acquired by the neglect of the master to "prove to the satisfaction of the naval officer or collector of the tax, that such slave had resided three years in the United States," although such proof be required by the act. *Scott* v. *Ben*. 6 *Cranch*, 3.

11 The act of Congress of the 28th of *February*, 1803, respecting the importation of slaves, is not in force in the territory of Orleans. *Amiable Lucy* v. *United States*. 6 *Cranch*, 330. (*See* 5 *Cranch*, *Limitation* 2. *Fraud* 3; *and* 4 *Cranch*, *Gift* 2, 3.)

SLAVE TRADE.

1 Prosecutions under the act of Congress, against the slave trade must be commenced within two years after the offence committed. *Adams q. t.* v. *Woods*. 2 *Cranch*, 336.

2 The question of forfeiture of the vessel under the act of Congress, against the slave trade, is a question of admiralty and maritime jurisdiction. *United States* v. *Schooner Sally*. 2 *Cranch*, 406.

SMUGGLING.

1 If one smuggler has no arms, he is not within the statute, though the others have arms. *The King* v. *Fletcher*. 2 *Str*. 1166.

2 By statute 24, G. 3, c. 47, and the excise laws, the forfeiture of a vessel attaches the moment an act of smuggling is done; so as to avoid mesne incumbrances or alienations between that time, and the time of condemnation. *Lockyer* v. *Offley*. 1 *Term Rep*. 260.

3 But the crown is not entitled to the intermediate earnings of the vessel. *Ibid*.

4 Neither is the actual property of the vessel altered till after the seizure, though it may be before condemnation. *Ib*.

5 Custom-house officers may seize for the forfeiture within three years after the act committed; and the attorney general may file an information at any time whilst the ship is in being. 1 *Term Reports*, 261.

6 An inhabitant of *Guernsey* cannot recover in the courts of this country, the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into *England*, and gave him assistance for that purpose, as in the mode of packing the goods. *Clugas* v. *Penaluna*. 4 *Term Rep*. 466.

7 If goods, prohibited from being sold in this country by 11 & 12 *W*. 3, c. 10, are taken out of a ware-house and put on board a vessel as if for exportation, but in fact, with a view to be re-landed; they are liable to be seized, though before any actual attempt to reland them has been made. *Wilson* v. *Saunders*. 1 *Bos*. & *Pull*. 267.

SOLDIERS.

1 A person, after being listed, shall be taken to be doing duty, and discharged upon common bail. *Bayley* v. *Jenners*. 1 *Str*. 2.

2 The gunner in a train of artillery is the same as a common soldier, and common bail sufficient. *Johnson* v. *Louth*. 1 *Str*. 7.

3 Rule *nisi* for discharging an impressed soldier, discharged upon the merits, but without costs. *Rex* v. *Thomas Dawes*. 1 *Burr*. 636.

4 Rule *nisi* for discharging an impressed soldier, made absolute on the merits, but without costs. *Rex* v. *Andrew Kessel*. 1 *Burr*. 637.

5 A high constable may, by either himself or deputy, billet soldiers under the mutiny act. *Medhurst* v. *Wayte*. 1 *Black*. 350.

6 Though an officer's half-pay is not assignable at law, being a *chose* in action, yet the use of it is assignable in equity; and, when so assigned, the assignor cannot maintain an action on the case for it as money had and received to his use. *Stuart* v. *Tucker*. 2 *Black*. 1137.

7 Horses employed in drawing the artillery are billetable under the mutiny act, whether they belong to the ordnance or are furnished for the service by contract. *Read* v. *Willan*. 2 *Doug*. 422.

8 A soldier in actual service may be committed to prison for want of sureties, under statute 6, G. 2, c. 31, for being the father of a bastard child. *Rex* v. *Archer*. 2 *Term Rep*. 270; and *Rex* v. *Bowen*. 5 *Term Rep*. 156.

9 *Qu*. Whether the court will grant a *certiorari* to remove an order of session by which a soldier is continued in custody under such a charge? *Ibid*. 156.

10 The clause in the mutiny act, s. 68, which exempts soldiers from arrest in cases where the demand is under 20l., is confined to civil ac-

tions. 2 *Term Rep.* 274: 5 *Term Rep.* 156.

11 Whether ale-house keepers, who have no stables, are bound to receive *horses* as well as soldiers? *Qu. Rex* v. *Dimpsey.* 2 *Term Rep.* 98.

12 The foot guards may be billetted all over the kingdom, as well as the other troops. *Rex* v. *Calvert.* 7 *Term Rep.* 724.

13 The *receiving pay* as a soldier, subjects the receiver to military jurisdiction under the mutiny act. *Grant* v. *Sir C. Gould.* 2 *H. Black.* 69.

14 By the mutiny act the king may make articles of war, and constitute courts martial, with power to try and punish, as well in *Great-Britain, &c.* as in *Gibraltar, &c.* By a subsequent clause no soldier shall, by such articles of war, be subject to the punishment of death, or loss of limb, within *Great-Britain, &c.* (omitting *Gibraltar,*) for any crime not expressed to be so punishable by the act. Then, by the articles of war, persons found guilty by a court martial at *Gibraltar*, of theft, robbery, &c. *or of having used violence, or committed any offence against the persons or property* of others, "shall suffer death, or such other punishment, *according to the nature and degree of the offence,* as by the sentence of such court martial shall be awarded;" held, that the court martial have a discretionary power by such words, and are not restricted to pass such sentence on a delinquent as would be warranted by the law of *England.* But supposing they were, yet that a return to a *habeas corpus*, stating that upon a certain charge exhibited against the defendant before such a court, for certain offences alleged to have been committed by him at *Gibraltar*, such proceedings were had, that the court martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods named, from the warehouse of *W.* (at *G.*) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to transportation for fourteen years, is good. For such a sentence would be warranted here by the statute 4 G. 1, s. 11, if the principal were convicted of the felony, and the receiver were indicted as accessary after the fact. *Rex* v. *Suddis.* 1 *East*, 306.

15 A soldier in the *New-York* line of the *American* army, became entitled to land, and died in 1778, without issue. Letters patent were issued 1798, for the land, in his name. The father died in 1790, leaving five sons and three daughters. The eldest brother sold and conveyed the land, in 1801, to *H.* In an action of ejectment brought by *H.* to recover the possession of the land against *W.* who claimed under a person who was in possession at the time the deed was given to *H.*, it was held, that the deed from the elder brother was good; and that the land, by the provision contained in the 8th section of the act, of the 5th *April*, 1813, became vested in the father of the soldier, on the death of the patentee. *Jackson ex dem. Miller et al.* v. *Winslow.* 2 *Johns. Rep.* 80.

16 Where the defendant in a cause, has enlisted as a soldier in the army of the *United States*, the court will not grant leave to discontinue, without paying costs, if it appear that the sum to be recovered is more than twenty dollars. *Reynolds* v. *Lammond.* 3 *Johns. Rep.* 446.

17 Where a person obtained a judgment before a justice of the peace for eleven dollars, and enlisted as a soldier in the army of the *United States*, and the judgment was afterwards reversed in this court, with costs amounting to more than twenty dollars, it was held, that the costs referred back to the original judgment, and that the defendant in error was not entitled to be discharged from an execution issued

for the costs on the judgment of reversal. *Reynolds* v. *Lammond.* 3 *Johnson's Rep.* 540.

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SOUTH-SEA COMPANY.

1 Where a statute directs that contracts of a particular description, entered into before the making of the statute, shall be registered, and that the registry shall express the names of the parties for whose benefit the contracts were made; if it appears from any part of the act that the main object of the direction was to ascertain who had the right of suing on the contract, it is sufficient if the registry expresses who was beneficially interested in the contract at the time of the registry. *Wilkinson* v. *Meyer.* 2 *Raym* 1350. 1 *Str.* 585.

SPECIAL OCCUPANT.

If an estate *per auter vie* be limited in trust for a man, his heirs, executors, administrators, and assigns, and be not devised, it descends to the heir as a special occupant, chargeable according to the statute of frauds (29 Car. 2, c. 3;) and therefore the administratrix of the person last seized cannot recover the title deeds thereof from the heir. *Atkinson* v. *Baker.* 4 *Term. Rep.* 229.

SPECIFICATION.

On a trial in an action on a bond, if the bond was admitted by the pleas, the plaintiff need not prove the specification. *Puered* v. *Duncombe.* 2 *L. Raym.* 852.

SPIRITUAL COURT.

1 The spiritual court may take a bond for a due administration where it is *cum testamento annexo.* *Folkes* v. *Docminique.* 2 *Str.* 1137.

2 A parish-clerk is a spiritual officer, and the spiritual court may deprive him for a temporal offence, but cannot punish him for it in any other way. A parish clerk is intitled to hold the office for life, though the time for which he shall have it is not mentioned upon his nomination. *Townsend* v. *Thorpe.* 2 *L. Raym.* 1507.

3 The spiritual court cannot compel an executor to distribute of his testator's estate. *Petit* v. *Smith.* 1 *L. Raym.* 86.

4 The spiritual court cannot try the existence of a custom. The reason is, because it allows as customs what the common law does not allow as such. Therefore a decree against the existence of a custom can be no ground for a prohibition. *Churchwardens of Market Bosworth* v. *The Rector of Market Bosworth.* 1 *L. Raym.* 435.

5 Pension issued out of an appropriation by prescription, suable in the spiritual court. *Smith* v. *Wallis.* 1 *Salk.* 58. 1 *L. Raym.* 587.

6 Bounds of the church-yard not triable in the spiritual court. *Pew* v. *Creswell and another, Churchwardens of St. Mary, Rotherhithe.* 2 *Str.* 1013.

7 *Qu.* Whether *H.* be suable in the ecclesiastical court for not going to his parish church? *Britton* v. *Standish.* 1 *Salk.* 166.

8 Spiritual court obliged to deliver out a will of land on security to return it. *Morse* v. *Roach and another in chancery.* 2 *Str.* 961.

9 Parish officers of a donative are subject to the spiritual court. *Castle* v. *Richardson.* 2 *Str.* 715.

10 The spiritual court may revoke an administration if obtained by surprize. *Harrison* v. *Weldon.* 2 *Str.* 911.

11 The spiritual court may award a commission of appraisement before granting administration with the

will annexed. *The King* v. *Bettesworth.* 2 *Str.* 956.

12 If executor becomes bankrupt, spiritual court cannot commit administration; otherwise if he becomes *non compos.* *Hill* v. *Mills.* 1 *Salk.* 36.

13 Contract *per verba de præsenti*, or *de futuro*, equally cognizable in the spiritual court, and their sentence binding. *Jesson* v. *Collins.* 2 *Salk.* 437.

14 A person residing within a particular archdeaconry, cannot in general be sued in the bishop's court; but where the archdeaconry is not particular, the bishop and archdeaconry have concurrent jurisdiction. *Robinson* v. *Goodsalve.* 1 *L. Raym.* 123.

15 A parish clerk is a spiritual officer, and may be there deprived. *Townsend* v. *Thorpe.* 2 *Str.* 776.

16 *Donatio causa mortis* not suable in spiritual court. *Thompson* v. *Hodgson.* 2 *Str.* 777.

17 The spiritual court is to try a thing of temporal nature in the same way as it should have been tried at law. *Freeman* v. *Stotter.* 3 *Salk.* 288.

18 A clergyman cannot sue a man in the spiritual court for defamation, charging him with ignorance or knavery. *Coxeter* v. *Parsons.* 1 *L. Raym.* 428. *Salk.* 692.

19 A man is not suable in the spiritual court for calling another *Belzebub.* *Anon.* 1 *L. Raym.* 397.

20 Citation may be served by fixing on the church door on *Sunday.* *Allen* v. *Brookbank.* 2 *Salk.* 625.

21 A woman may sue in the spiritual court for defamation, charging her with whoredom. These words, "She never was married, and what is her hopeful son?" Amount to a charge of whoredom. *Smith* v. *Plass.* 1 *L. Raym.* 508.

22 The spiritual court cannot try the existence of a vicarage. A prohibition cannot be granted upon a suggestion which is false. *Smith* v. *Wallet.* 1 *L. Raym.* 587.

23 The spiritual court may compel the payment of a tax for the repairs of a church. *The Churchwardens of St. Ann's Westminster.* 1 *Lord Raymond* 512.

24 A woman may sue in the spiritual court for defamation, charging her with whoredom.
These words: "You are a brandy-nosed whore; you stink of brandy;" are a charge of whoredom. *Aubery* v. *Barton.* 2 *L. Raym.* 1136.

25 An apparitor cannot sue in the spiritual court for his fees. *Pearson* v. *Campion.* 2 *Doug.* 629.

26 The spiritual court has no jurisdiction where the right to freehold comes in question. *Hillard* v. *Jefferson.* 1 *L. Raym.* 212.

27 Libel by a vicar to have his vicarage augmented. Where the endowment is lost, the tithes must be paid according to custom. *Lutton* v. *King.* 3 *Salk.* 378.

28 To call *H.* whoremaster is suable in the spiritual court. Impudent brazenfaced Beelzebub not suable. *Smith* v. *Wood.* 2 *Salk.* 692.

29 Spiritual court hath not jurisdiction to decide on inventory. *Catchside* v. *Ovington.* 3 *Burr.* 1622.

30 Pimping punishable in the spiritual court. Scandalous words used adjectively, if they import an act done, are actionable; if they import an inclination only, not. *Osborn* v. *Poole.* 1 *L. Raym.* 236.

31 A suit cannot be maintained in the spiritual court for words which are actionable at common law. *Braithwaite* v. *Matthews.* 1 *L. Raym.* 212.

32 In a suit in spiritual court *ex officio* the party is intitled to have a copy of the articles. *Anon.* 2 *L. Raym.* 991.

33 A suit for subtraction of tithes cannot be brought in any spiritual court out of the diocese in which the tithes are payable. A man may be cited out of the diocese in which he lives in causes which could not have been maintained against him in that diocese. *Machin* v. *Molton.* 1 *L. Raym.* 452. 2 *Salk.* 549.

14 A debt upon which the statute of limitations has attached, will enable the creditor to compel an administrator to account in the spiritual court. *Wainford* v. *Barker*. 1 *L. Raymond*, 232.

SPRINGETSBURY MANOR.

The manor was duly surveyed and returned, before the 4th *July*, 1776. 4 *Dallas*, 402.

SPRINGFIELD PATENT.

What is the true construction of the *Springfield Patent*. The third course given in the description of this patent, is to be run so as to strike the *Otsego* lake, at the nearest point, at the *distance* given, without regard to the *course* taken, so as to preserve the subsequent courses. *Jackson ex dem. Staats et al.* v. *Carey*. 2 *Johns. Cases*, 350.

STAMPS.

1 *Distringas* stamped after trial, good. *Taylor* v. *Lake*. 1 *Str.* 575.

2 How to authenticate an admission that is not stamped at the time. *The King* v. *Reeks*. 2 *L. Raym.* 1415. 1 *Str.* 716.

3 Want of stamps does not avoid a deed, but only hinders its being given in evidence until stamped. *Goodright* v. *Gregory*. *Lofft*, 339.

4 A deed is good, though executed before stamped. *The King* v. *The Bishop of Chester*. 1 *Str.* 624.

5 9 & 10 Will. 3, c. 15. To authenticate an admission that it is not stamped at the time, the penalties must be paid, and the proper stamps added. *The King* v. *Reeks*. 2 *Str.* 716.

6 If the admissions of several persons to the freedom of a corporation are entered on one stamp, the admission only of the first is good. *Gilby* v. *Lockyer*. 1 *Doug.* 217.

7 A broker, when he bought goods for his principal, agreed for an half *per cent.* to indemnify him from any loss on the re-sale; it was held that this *agreement*, if reduced to writing, need not be stamped under statute 23, G. 3, c. 58, it being a *contract relating to the sale of goods*, which by s. 4. of that statute is exempted. *Curry* v. *Edensor*. 3 *Term. Rep.* 524.

8 But an executory agreement for the making and putting up of certain machines in the party's house is required to be stamped like any other agreement, not being within the exception. *Buxton* v. *Bedall*. 3 *East*, 303.

9 So a written agreement for the sale of all the hops which shall be grown upon a certain number of acres of land, to be delivered in packets at a certain place must be stamped, not being within the exception. *Waddington* v. *Bristow*. 2 *Bos. & Pull.* 452.

10 A mere *cognovit* need not be stamped. *Ames* v. *Hill*. 2 *Bos. & Pull.* 150.

11 But if it contain any terms of agreement it must. *Ibid.* and *Reardon* v. *Swaby*. 4 *East*, 188.

12 An agreement to confess judgment for 30*l.* to secure 5*l.* and costs, is not an agreement for more than 20*l.* within the 23 G. 3, c. 58, s. 4, and therefore need not be stamped. 2 *Bos. & Pull.* 150.

13 An indorsement on an annuity deed containing a clause of redemption, if made subsequent to the execution of it, must be stamped, otherwise it cannot be received in evidence. *Schumann* v. *Weatherhead*. 1 *East*, 537.

14 A schedule of goods referred to in a deed, to which it was annexed, must have the proper deed stamp by statute 37, G. 3, c. 90, s. 7 according to the number of words and sheets, and not merely the single schedule stamp of 2*s.* 6*d.* imposed

by the first section of the act. *Lake* v. *Ashwell.* 3 *East*, 326.

15 A warrant of attorney to confess judgment being liable as a deed to a stamp duty of 10s. by various statutes prior to the 37 G. 3, c. 111, which imposes an additional duty of 10s. on all deeds, with an *exception* of bonds and *letters of attorney*, is within such exception, and therefore liable only to a duty of 10s. as before that statute. *Barrow* v. *Mashiter.* 4 *East*, 431.

16 An award in writing, and under seal, need not have a deed stamp, unless *delivered as a deed*; but being only delivered *as an award*, it is sufficient if it have the award stamp of 10s. *Brown* v. *Vauser.* 4 *East*, 584.

17 A draft on a banker, post-dated and delivered before the day of the date, though not intended to be used till that day, requires to be stamped by the statute 31 G. 3, c. 25. *Allen* v. *Keeves.* 1 *East*, 435. *Whitwell* v. *Bennett.* 3 *Bos. & Pull.* 559.

18 An unstamped draft drawn on *A. B.*, bricklayer, is not within the exception of 23 G. 3, c. 49, s. 4, in favor of drafts drawn on persons acting as bankers within ten miles of the place where the draft is drawn; and if at the bottom of such draft there be an acknowledgment of the drawee, that a third person paid it for him, that acknowledgment cannot be received in evidence; because, if received it would give effect to the draft. *Castleman* v. *Ray.* 2 *Bos & Pull.* 383.

19 The assignment of a lease in writing without seal, did not require a stamp before the 44 G. 3, c. 98. If a parol warranty and agreement to assign be reduced into writing, but not stamped, and the assignment be afterwards legally executed, the warranty cannot be proved by parol. *Hodges* v. *Drakeford.* *Nev. Rep.* 270.

20 A letter written by a son who managed his mother's trade for her to a creditor of her's, containing a promise to pay her debt, need not be stamped by statute 23, G. 3, c. 58, as falling within the exception in statute 32 G. 3, c. 51 by which letters between *persons carrying on trade* are exempted from the duty. *Mackenzie* v. *Banks.* 5 *Term. Rep.* 176.

21 Articles of agreement under seal cannot be given in evidence, unless stamped with a deed stamp; although the agreement stamped is of the same value but differently formed. *Robinson* v. *Drybrough.* 6 *T. Rep.* 317.

22 A promissory note, written upon a stamp of greater value than the proper stamp required, cannot be received in evidence, though the stamp were applicable to the same kind of instrument. *Farrer* v. *Brice* 1 *T. Rep.* 55,

23 So a promissory note, drawn before the 37 G. 3, c. 136, upon a receipt stamp of equal value with that required for such promissory note, is not valid. *Chamberlain* v. *Porter.* *New. Rep.* 30.

24 The proper stamp for a promissory note of 45*l.* is 1*s.* 6*d.* composed of three different sums, applicable to different funds under three acts of parliament. But such a note on a 2*s.* stamp composed of three different sums applicable to the same funds, though in larger proportions to each than was required, was holden valid. *Taylor* v. *Hague.* 2 *East*, 414.

25 The court of common pleas refused to make a rule on a plaintiff, who brought an action on a bond, to allow an officer of the stamp duties to inspect the bond because the defendant suspected it to be forged. *Chetwind* v. *Marnell.* 1 *Bos. & Pull.* 271.

26 A promissory note for 100*l.* payable to the plaintiff, or order, and originally expressed to be *for value received*, generally, being altered the next day, upon the suggestion of one of the parties, by the addition of the wards, *for the good-will*

of the lease, and trade of Mr. K. deceased, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill* v. *Williams*. 10 *East*, 431.

27 The courts of this state do not take notice of the laws of a foreign country in regard to stamps or matters of revenue. *Randall* v. *Ranselaer*. 1 *Johns. Rep.* 95.

28 A note not stamped according to the directions of the act of congress of the 6th *July*, 1797, cannot be read in evidence, in an action brought upon it, since the repeal of that act, unless the holder has complied with the provisions of the repealing act, by paying the duty of ten dollars. *Edeep* v. *Banner*. 2 *Johns. Rep.* 423.

STATE LAWS.

The courts of the *United States* will respect the construction given to the laws of the several states by the courts of such states. *Higginson* v. *Mein*. 4 *Cranch*, 419. *Pollard* v. *Dwight*. *Ibid.* 429.

STATE PRISONERS.

1 A rule for access of counsel to a state prisoner denied. *The King* v. *Radcliffe*. 1 *Black.* 4.

2 A person committed by a secretary of state, having been imprisoned two years without prosecution, discharged without bail. *The King* v. *Fitzgerald*. 1 *Wils.* 254.

STATE NAVY.

Decision respecting the clothing supplied to the officers of the state navy during the war, and their allowance of half pay. 2 *Dallas*, 206.

STATE SOVEREIGNTY.

The individual states having submitted their territorial claims to the *judiciary* of the *United States*, are to be so far considered as having ceded their sovereignty, and as corporations; and their right to transfer land must be judged of by the same rules of common law, as the rights of other persons, natural or politic. *Woodworth and another* v. *Jones and others*. 2 *Johns. Cases*, 417.

STATUTES.

I. *Rules as to the construction of, &c.*
II. *Points on particular Statutes.*

I. *Rules as to the construction of, &c.*

1 If the words of the enacting part of a statute be doubtful, they may be explained by the title or preamble. *Colehan* v. *Cooke*. *Willes*, 395. But the plain words of an enacting clause are not to be restrained by the title or preamble.

2 Every law introducing a capital punishment ought to be construed strictly. *The King* v. *Harvey*. 1 *Wils.* 164.

3 Statutes on the same subject are to be construed together. *Anon. Lofft*, 371.

4 All statutes in *pari materia* are to be construed as one law. *Earl of Aylesbury* v. *Patteson*. 1 *Doug.* 30.

5 Unmarried person hired for a year gains a settlement, after the act 8 and 9 W.; not before. *The Parishes of Beckenham and Camberwell*. 2 *Salk.* 525.

6 Statutes in favour of the liberty of the subject ought to be liberally construed. *Anon. Lofft*, 649.

7 Title of a statute is no part of the law. *The King* v. *Williams* 1 *Black.* 95.

8 Title no part of statute, but if set

out wrong is fatal. *Mills* v. *Wilkins*. 2 *Salk*. 609.

9 Where a sentence is made final by act of parliament or otherwise, it is to be understood with the reserve if it be not palpably unjust or illegal upon the face of it. *Anon*. *Lofft*, 189.

10 Where a statute directs a thing of public nature, *may* is understood as *shall*. *The King and Queen* v. *Barlow*. 2 *Salk*. 609.

11 *Near* in a penal law construed strictly, yet not equivalent to next. *The King* v. *Harvey*. 1 *Black*. 20.

12 No proceedings can be pursued under a repealed statute, though commenced before the repeal, unless by special exception. *Miller's Case*. 1 *Black*. 451.

13 If an act of parliament makes certain provisions in favour of persons who shall have absconded, it is sufficient for a man who would avail himself of it to shew that he absconded before the making of the act. *Clarkson* v. *Bussey*. 2 *Lord Raymond*, 967.

14 A man who persuades another to kill deer, and lends him any thing for that purpose, is liable to the penalties of a statute made in terms against persons killing deer, or persons aiding or assisting therein. *The Queen* v. *Whistler*. 2 *L. Raymond*, 842. 2 *Salk*. 642.

15 The statute of Q. Eliz. against the extortion of sheriffs' officers, is really 28 Eliz. and not 29 Eliz. as printed in the statute book. *Savage* v. *Smith*. 2 *Black*. 1102.

16 If an act of parliament be revived, all acts explanatory of that so revived are revived also. *Williams* v. *Rougheedge, a prisoner in execution*. 2 *Burr*. 747.

17 Butter exported from *Ireland* to *Lisbon* and from *Lisbon* into this kingdom, is not to be considered as included in the statutes prohibiting the importation of it from *Ireland* into this kingdom. *Rex* v. *Bell*. 2 *Burr*. 1173.

18 *Qu*. Whether 23 H. 6, c. 9, (relative to sheriffs' bonds) is a public or private act? 1 *Doug*. 96, 97, and *n*.

Determined to be a public act. *Samuel* v. *Evans*. 1 *Doug*. 97, *n*.

19 Leases by parol for less than three years from the making, to commence at a future day, are not within statute of frauds. *Ryley* v. *Hicks*. 1 *Str*. 651.

20 An act of parliament for the consolidation of endowed rectories and vicarages, binds the crown though not named. *The King* v. *The Archbishop of Armagh*. 1 *Str*. 516.

21 The exceptions of a statute shall relate to the day from which the purview takes effect, under a power to inquire, and hear, and determine by inquisition, presentment, bill, or information before them exhibited, and by examination of two witnesses, or by any of the same ways and means. Justices of the peace may try by jury. *Rex* v. *Gall*. 1 *L. Raym*. 870.

22 Though the preamble be generally a key to the statute, yet it does not always open all the parts of it, but sometimes the legislature, having a particular mischief in view to prevent which was the first and immediate object of the statute, recites that in the preamble, and then goes on in the body of the act to provide remedy for general mischiefs of the same nature but of different species, not expressed in the preamble, nor perhaps then in contemplation. *Mace* v. *Cammel*. *Lofft*, 782.

23 The courts cannot take notice officially of the wording of a private act of parliament. 3 *Salk*. 330. In actions in which it is not necessary to show the very day on which the cause of action accrued, the defendant may shew that it is a material point whether it accrued before the day mentioned in the declaration, and aver that it accrued on a precedent day; but he must traverse that it accrued afterwards. A plea not answering all it imports is bad. *Platt* v. *Hill*. 1 *L. Raym*. 381.

24 If a statute imposes a regulation upon contracts for the performance of particular acts after a certain day, a contract under which the act might have been performed before the day, is not within the statute, though the performance is delayed until after the day. *Smith* v. *Westall.* 1 *L. Raymond*, 316.

25 Where a statute imposes a pecuniary penalty, upon conviction by a justice for an offence, and directs that it shall be levied by warrant from such justice. if the conviction is removed into K. B. by *certiorari*, and there confirmed; a *levari facias* may be sued out of K. B. for the penalty. Execution cannot be upon a judgment sued out by one that was not party to it. *The Queen* v. *Ford.* 2 *L. Raym.* 768.

26 Presumption of a general meaning not expressed, nor naturally implied, is very unfavourable, and not to be received, at least upon a penal statute. *Whitebread* v. *Brooksbanks. Lofft*, 529. *Cowp.* 66.

27 If a statute limits a proceeding against a party to six months, a year, &c. after an act done; the day on which the act was done is to be reckoned in the six months, year, &c. *Rex* v. *Adderley.* 2 *Doug.* 463.

28 A charter or statute, directing that particular persons shall be sued in a particular court, will not, if such persons were before suable generally any where, extend to persons particularly privileged elsewhere. *Jolliffe* v. *Longston.* 1 *L. Raym.* 342.

29 A statute, authorising the dean, steward, or burgesses of *A.* to hear and punish incontinencies, according to the custom of a place, in which the constable of a part may act through the whole, does not authorise a constable of a part of *A.* to act without a warrant from the dean, &c. of *A.* out of that part. A constable cannot, of his own authority, take up any person within his own district without just ground of suspicion. It is a sufficient provocation to make the killing of a man manslaughter, only that he is assisting in unlawfully detaining a third person in prison. *The Queen* v. *Tooley.* 2 *L. Raym.* 1296.

30 The construction of private acts of parliament is to be governed by the principles of common law, applied to the subject in a manner analagous to the rules of interpretation in a private deed or conveyance. *Bernard and others* v. *The Bishop of Winchester. Lofft*, 401, 416.

31 Acts of parliament *prima facie* relate to the first day of the sessions. The same name repeated upon the pleadings, though without reference, shall *prima facie* be intended to mean the same person. *Quidam* has the same import with *alius.* Where an exception is incorporated with a clause, he who pleads the clause must take notice of and answer the exception. *Jones* v. *Axen.* 1 *L. Raym.* 119.

32 Though an act of parliament, on authorizing the performance of a particular act, nominates a quorum, it is not necessary that the persons mentioned in it should expressly consent to it, it is sufficient if they are present when it is done. An officer *ad libitum* shall have a peremptory *mandamus* if an insufficient cause of removal is returned; and it must be directed as the first was. *Regina* v. *The Bailiffs, &c. of Ipswich.* 2 *L. Raym.* 1232. 2 *Salk.* 434.

33 Where the words of a statute are doubtful, general usage may be called in to explain them; but where they are clear, the usage of a particular place cannot controul them. *R.* v. *Hogg.* 1 *Term. Rep.* 728.

34 Though the preamble of an act cannot controul the clear and positive words of the enacting part, it may explain them if ambiguous. *Crespigny* v. *Wittenoom.* 4 *Term Rep.* 793.

35 The clauses of reference in the excise laws to former laws can only be taken to extend to the general

powers and provisions of such acts, and not to every special clause. *2 Term Rep.* 510.

36 The distinction is between the laws of excise, properly so called, and those acts for raising inland duties under the management of the commissioners of excise. *2 Term Rep.* 510.

37 Acts of parliament relating to trade in general are public acts, but an act which relates to a certain trade only is a private one. *Kirk* v. *Nowell.* 1 *Term Rep.* 125.

38 An act empowering a bankrupt patentee, his executors, administrators, and assigns, to assign the patent right to a greater number of persons than allowed by the letters patent, and declared to be a public act, does not enable either the bankrupt or his assigns to make a better title than they could before the act. *Hesse* v. *Stevenson.* 3 *Bos. & Pull.* 565.

39 Statutes allowing certain privileges to the members of the universities are confined to those of the two *English* universities, unless otherwise expressed. *Jones* v. *Smart.* 1 *Term Rep.* 49.

40 Where an exception is *in the enacting clause* of a statute giving a right or a forfeiture, the party suing for the right or forfeiture must negative the exception in his declaration. *Gill* v. *Scrivens.* 7 *Term Rep.* 27.

41 Therefore in a *sci. fa.* on a judgment against a person who had been twice a bankrupt, under statute 5, G. 2, c. 30, s. 9, which says, "the future estate and effects of such person shall be liable to his creditors *unless* the estate shall produce sufficient to pay 15*s.* in the pound, &c." it is necessary for the plaintiff to averr that the bankrupt's estate has not paid 15*s.* in the pound. *7 Term Rep.* 27.

42 The bare recital in a subsequent statute is not sufficient to repeal the positive provisions of a former one. *Dore* v. *Gray.* 2 *Term Rep.* 365.

43 Where a subsequent act shall not be said to repeal a former one, though the terms of it be extensive enough.

44 Where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect be expressed. *Warren q. t.* v. *Windle.* 3 *East*, 205.

45 If a statute expire, and afterwards be revived again by another statute, the law derives its force from the first. *Shipman q. t.* v. *Henbest.* 4 *Term Rep.* 109.

46 And therefore statute 21, Jac. 1, c. 4, extends to statutes made since, which revive statutes made before. 4 *Term Rep.* 109.

47 A contract declared by statute to be illegal, is not made good by a subsequent repeal of the statute. *Jacques* v. *Withy.* 1 *H. Black.* 65.

48 An act of parliament which is to take effect "from and after the passing of the act," operates by legal relation from the first day of the session. *Latless* v. *Holmes.* 4 *Term Rep.* 660.

49 The annuity act (17 G. 3, c. 26,) is of this description. 4 *Term Rep.* 660.

(But see now statute 33 G. 3, c. 13, by which the operation of every statute is to commence from the time of receiving the royal assent, unless any other period is appointed in the act.)

50 By s. 1, of statute 39 & 40, G. 3, c. 104, the jurisdiction of the court of requests in *London*, is enlarged from debts of 40*s.* to 5*l.* from the 30th *September*, 1800; and by s. 12, if any action *shall be commenced* in any other court to recover any debt not exceeding 5*l.* within the jurisdiction, the plaintiff shall not recover any costs, &c: held, that the words "*shall be commenced*" must by necessary construction be res-

trained to the date of the 30th *September*, and not to the passing of the act, which was on the 9th of *July* preceding. *Whitborn* v. *Evans*. 2 *East*, 135.

51 If the judgment of commissioners of appeal in certain cases be declared final by statute, it cannot be questioned in an action of trespass. *Radnor* v. *Reeve*. 2 *Bos. & Pull.* 391.

52 The construction of statutes, though relating to matters of an ecclesiastical nature belongs to the superiour courts of common law. *Gould* v. *Gapper*. 5 *East*, 345.

53 Private statutes, made for the benefit of particular citizens or corporations, ought not to be construed to effect the rights or privileges of others; unless such construction result from express words or necessary implication. *Coolidge* v. *Williams*. 4 *Mass*. 146.

54 A statute is not to be construed to operate *retrospectively*, so as to take away a vested right. *Dash* v. *Van Kleeck*. 7 *Johns. Rep.* 477.

It is a principle of legislation, that laws, civil or criminal, must be *prospective*, and are not to have a *retroactive* operation. *Ibid.*

55 Conveyances by statute pass no other or different right than that which the party before possessed. *Jackson ex dem. Cooper and others* v. *Corey*. 8 *Johns. Rep.* 385.

56 If a statute gives a remedy in the affirmative, without any negative, express or implied, for a matter which was actionable at common law, the party may sue at common law, as well as upon the statute. *Almy* v. *Harris*. 5 *Johns. Rep.* 175.

57 The words of a statute if dubious ought to be taken most strongly against the law makers. *United States* v. *Heth*. 3 *Cranch*. 413.

58 A long and uninterrupted practice under a statute, is good evidence of its construction. *McKeen* v. *Delancey*. 5 *Cranch*, 22.

II. *Points on particular Statutes.*

1 *Near*, in a penal law, construed strictly, yet not held equivalent to *next*. *The King* v. *Hervey*. 1 *Black*. 20.

2 Money borrowed to pay a stock-jobbing contract, though of a partner in the transaction, is not within the statute, but recoverable. *Faikney* v. *Reynous and Richardson*. 1 *Black*. 638.

3 Court not bound by statute 29 Eliz. c. 4, concerning sheriff's poundage. *Lake* v. *Turner*. 4 *Burr*. 1981.

4 Timber carriages, laden only with one piece, not excepted out of the turnpike acts. *Stevens* v. *Duffty*. 4 *Burr*. 2258.

5 Duty imposed by statute 22 G. 2, c. 40, not payable by vessels not going through the *Downs*. *Matson* v. *Scobel*. 4 *Burr*. 2258.

6 The separated companies of surgeons and barbers are under some regulations as before their seperation. *Sharp qui tam* v. *Law*. 4 *Burr*. 2133.

7 *Qu.* Who are the essential constituents of the assembly in pursuance of statute 7 G. 3, c. 42, so that their absence would invalidate the acts of the assembly? *Rex* v. *Pettiward*. 4 *Burr*. 2452.

8 Journeymen not liable to penalties of exercising a trade without having served an apprenticeship thereto. *Beach qui tam*. v. *Turner*. 4 *Burr*. 2449.

9 Embroidery made up in wearing apparel, and seized on landing, held not within the statute of 22 G. 2, so as to be liable to the penalty. *The King* v. *Vilters*. *Lofft*, 199.

10 The words "dues and profits" in statute 10 Ann. c. 11, s. 16, include surplice fees as well as strick fees. *Sellon* v. *Parry*. 5 *Burr*. 2762.

11 Statute 9 G. 3, c. 37, respecting the stamp duties, bars only future actions, but does not discharge verdict before obtained. *Couch qui tam, &c.* v. *Jeffries*. 4 *Burr*. 2460.

12 Statute 11 G. 1, c. 28. does not extend to party walls between stables. *Rex* v. *Pratt.* 4 *Burr.* 2298.

13 Single act of selling does not make a man a hawker so that he ought to take out licence before he trades as such. *Rex* v. *Little.* 1 *Burr.* 60.

14 A parol loan of money to play with, is not void. *Barjeau* v. *Walmsley.* 2 *Str.* 1249.

15 Held, that the defendant could not have the benefit of the act of grace on an information in the crown-office. *Howell qui tam* v. *James.* 2 *Str.* 1272.

16 A house in *St. Catharine's* let out in separate rooms, not a cottage within the statute 31 Eliz. c. 7. *The King* v. *Pattle.* 1 *Str.* 405.

17 Hound not within 5 Aun. c. 14. *Hooker* v. *Wilks.* 2 *Str.* 1126.

18 Explanation of statute of 9 and 10 W. 3, c. 36, for the increase and preservation of timber in New Forrest, *Hampshire.* *Biddlecombe* v. *Kervell.* 2 *Burr.* 1117.

19 Borrowing of stock, not within the suspending act. *Adams* v. *Verells.* 1 *Str.* 497.

20 Statute 10 G. 3, c. 50, extends to all writs of *distringas.* *Raban* v. *Plaistow.* 5 *Burr.* 2726.

21 Construction of statute relating to the piloting of ships. *Pierce* v. *Hopper.* 1 *Str.* 249.

22 Exercising a trade by others is within the statute 5 Eliz. *Hobbs qui tam* v. *Young.* 2 *Salk.* 610.

23 The *præmunire* clause in the bubble act leaves a power in the court to moderate the judgment. *The King* v. *Caywood.* 1 *Str.* 472.

24 Where the trade is averred to be a trade at the time of the act, the court cannot intend it not within it. *The Queen* v. *Harper.* 2 *Salk.* 611. 2 *L. Raym.* 1188.

25 *Per cur.* Upon the indictments on the statutes 5 Eliz. in evidence, we allow following the trade for seven years to be sufficient, without any binding, this being a hard law. *The Queen* v. *Maddox.* 2 *Salk.* 613.

26 Commission of sewers extends only to navigable streams, unless within two miles of *London.* *Yeaw* v. *Holland.* 2 *Black.* 717.

27 The inhabitants of a market town, or of a city, borough, or town corporate, are not prohibited by 1 and 2. P. and M. c. 7, from selling woollen cloth, &c. in other market towns, cities, &c. by retail, and not in open fair. *Lee* v. *White.* 1 *Doug.* 256.

28 The statute 7 and 8 W. 3, c. 7, giving an action for a false return of members of parliament, is a remedial act. *Myddelton* v. *Wynn,* *Ex. Chamber.* *Willes,* 599.

29 Indenture need not be stamped according to the 8 *Anne,* c. 9, s. 32, where sixpence only given with an apprentice. *Baxter* v. *Foulams.* 1 *Wils.* 129.

30 Held, that the statute of *W.* aids only in case of remainders, and not in that of a posthumous son. *Anon.* *Lofft,* 398.

31 A devise is not a purchase within the meaning of 9 G. 1, c. 7. *Rex* v. *Wivelingham.* 1 *Doug.* 767 to 770.

32 On motion to set aside a judgment entered up on a warrant of attorney not stamped, though part of the paper of a bond duly stamped, the court refused, saying there might be reasons to refuse such a warrant in evidence, but more to make all void, for there was nothing in the stamp act that imports that. *Anon.* 2 *Salk.* 612.

33 The act for making landlords defendants in ejectments, intended to put the landlord in the place of the tenant. *Jones* v. *Edwards.* 2 *Str.* 1241.

34 *H.* may let coach horses and coachman without a licence under 5 & 6 W. and M. c. 22. *Billings* v. *Eads.* 2 *Salk.* 612. 2 *L. Raymond,* 1214.

35 Under a statute imposing a penalty upon any person who shall make a button of wood only, a wooden button is to be considered as a button of wood only, though it has a

shank not made of wood. *Dunn qui tam, &c.* v. *Hinchley.* 2 *L. Raym.* 1275. 2 *Salk.* 612.

36 Justices cannot discharge a prisoner if he owes more than 100l. to one man. *Winter* v. *Price.* 3 *Salk.* 330.

37 Offences against the black act may be prosecuted in any county at the prosecutor's option. *King* v. *Mortis.* 2 *Black.* 788.

38 Horses and cattle are within the black act. *King* v. *Patty.* 2 *Black.* 721.

39 Justices, &c. have authority, if the defendant was not in custody such a day. *Flower* v. *Parker.* 3 *Salk.* 330.

40 A common gaol is a house within the statute against arson. *The King* v. *James Donnevan.* 2 *Black.* 683.

41 Deputy high constable, appointed by parol only, may billet soldiers under the mutiny act. *Medhurst* v. *Waite.* 3 *Burr.* 1259. 1 *Black.* 350.

42 The penalty for having naval stores in custody, marked with the broad arrow, may be mitigated at the discretion of the judges. *Anon. Lofft,* 27. *Q.*

43 The words "then and there" refer to the time and place last before mentioned. *Garret* v. *Johnson.* 1 *L. Raym.* 576.

44 Baking puddings and pies, and such things, for dinner on *Sunday*, not an offence within 29 Car. 2, c. 7. *Rex* v. *Benjamin Cox.* 2 *Burr.* 785.

45 Penalty on the stamp act of 1 *Anne*, stat. 2, c. 22, incurred by erasing names and dates upon letters of attorney, made in *England*, to collect debts in *Newfoundland*, without restamping. *Stonelake* v. *Babb.* 5 *Burr.* 2673.

46 *Latitat* is the true commencement of actions brought by bill of *Middlesex*, within the meaning of the statute of limitations. *Johnson and another, Assignees of Hargreaves a Bankrupt* v. *Smith, widow Executrix of Thomas Smith.* 2 *Burr.* 950.

47 *Certiorari* cannot be taken away by any general words in a statute, but only by express negative ones. *King* v. *Reeve.* 1 *Black.* 231. 2 *Burr.* 1040.

48 Act for determining differences by arbitration, was made to put submissions, where no cause was depending, upon same foot as where there was, and is only declaratory of what the law was before in the latter case. *Lucas ex demiss. Dr. Markham et al.* v. *Dr. Wilson.* 2 *Burr.* 701, 702.

49 Where there is no appropriation of a statute penalty, it is a debt to the crown, and suable for in a court of revenue, and not by indictment. *The King* v. *Malland.* 2 *Str.* 828.

50 Power of jointure to make leases not being expressed, cannot be implied under a private act of parliament. *Roe, ex dem. Duke of Bolton* v. *Grantham.* 3 *Burr.* 1259.

51 The description of a place where deer have been usually kept, in 3 *W. & M.* c. 10. does not refer to the words forest, chace, &c. *The King* v. *Calcutt and Monk.* 2 *Str.* 1119.

52 The price of barley at the *port* is the rule of the bounty upon the exportation of strong beer, under statute 1, G. 3, c. 7, s. 6, and not the average price of *barley* throughout the *kingdom*. *Whitebread* v. *Brooksbank.* 3 *Cowp.* 66. *Lofft.* 529.

53 Navigation not to be obstructed by throwing rubbish or by unlading ballast in havens, roads, channels; and the intent to throw ballast, so as to obstruct the channel of a river, is within the acts 34, 35, H. 8, c. 9, and 19 G. 2, c. 22. *Bruckles-bank* v. *Smith, Esq.* 2 *Burr.* 656.

54 An importer of wines in pipes and hogsheads sells to three persons, at several times, a dozen of quart bottles thereof, unmeasured, which were carried away by them, and drunk in their own houses; that is a selling by retail within 12 Car. 2, c. 25, and 15 Car. 2, c. 14.

Haswell qui tam v. *Chalie.* 2 *Str.* 1124.

55 21 Hen. 8. c. 13, s. 26, enacts, that every spiritual person promoted to a dignity or benefice, with a parsonage or vicarage, shall be personally resident in, at, and upon his dignity and benefice, or one of them; and if he absents himself wilfully one month together, or two months in all, in any one year, he shall forfeit 10l.; half to the king, half to the prosecutor. Resolved, if there be a parsonage he must reside in it; his residing in any other house, though it be in the parish, is not sufficient.

If there be no parsonage house, he must reside somewhere in the parish. There being no house belonging to the dignity, is no excuse for not residing in the house belonging to the parsonage. *Wilkinson* v. *Colley.* 5 *Burr.* 2694.

56 The statute 21, Hen. 3, c. 13, s. 26, as to residences, has been thus construed; 1st, That if there be a parsonage, rector must reside in it; his residing in any other house, though it be in the parish, is not sufficient. 2d, That if there be no parsonage house, he must reside somewhere within the parish. 3d, That there being no house belonging to the dignity, is no excuse for not residing in the house belonging to the parsonage. *Law q. t.* v. *Ibbetson.* 5 *Burr.* 2722.

57 In actions against the hundred for firing barns, &c. under the Black act, the offence need not be laid to be done unlawfully, wilfully, or maliciously; the statute, with respect to this offence, not having expressed any of those adjuncts. *Allen and Simpson, and the Hundreds of Kirton and Ashwardhern.* 2 *Blackstone* 842. 3 *Wils.* 318.

58 Only one horse licence requisite for hawkers, pedlers, and petty chapmen, travelling with several beasts. *Rex* v. *Robotham.* 3 *Burr.* 1472.

But a conviction for having traded as such, *without* having a licence, good. *Rex* v. *Smith. Ibid.* 1475.

59 If a temporary statute give the subject certain benefits which can only be accomplished by regular proceedings which require time; in case those proceedings be regularly commenced, but not completed when the statute is repealed, they shall be allowed to be completed, as if the statute were still in force. *The insolvent Debtor's case, or Young* v. *Diego Aimes.* 2 *Burr.* 901.

60 The words "enormous crimes" will not generally include the crime of "soliciting the chastity of women;" but in a statute taking notice of adultery as an enormous crime, they will. *Oswald* v. *Everard.* 1 *L. Raym.* 637.

61 If an act of parliament unites two trading fraternities, and directs that they shall choose annually four masters, two to be expert in the one trade and two in the other; though each fraternity had, before the act, power to admit persons not of the trade, and continue the practice afterwards, none of such persons can be masters. *Rex* v. *Barber-Surgeons.* 1 *L. Raym.* 584.

62 If a statute imposes a regulation upon contracts for the performance of particular acts after a certain day, a contract to do one of the acts upon request is not within the statute, if the request is made before the day. On a contract for making a transfer to a man, or his order, it is sufficient to assign, by way of breach, that the transfer was not made to the man. *Mitchell* v. *Broughton.* 1 *L. Raym.* 673.

63 *Qui tam* action on statute 1, Jac. 1, c. 22, about cut leather, good, though it did not allege defendant to be a person occupied in the cutting of leather, the words of the act s. 38, are "that every person." *Russell qui tam &c.* v. *Kitchen.* 1 *Burr.* 497.

64 If a statute provides that any per-

son, convicted of a particular offence, shall be liable to such fines, &c. as persons convicted of nuisance are liable to, and moreover shall incur and sustain any further pains, &c. as were ordained and provided by a particular statute, the court has a discretionary power of inflicting all or a part only of the pains, &c. ordained by the statute. *The King* v. *Cawood.* 2 *L. Raym.* 1361.

65 If the defendant pleads three years possession in stay of restitution upon an inquisition of forcible entry, according to the 31 Eliz. c. 11, and it is found against him; but must pay costs, for the statute has given costs in express words. *The Queen* v. *Goodenough.* 2 *L. Raym.* 1036.

66 The additional toll to be paid by waggons overweight, must be according to the *progressive* proportions named in the statute 14, G. 3, c. 82, s. 2, not a *gross* charge at the *highest* additional toll incurred upon the gross overweight. *Chamberlin & al* v. *Songhurst.* *Cowp.* 866.

67 The statute 28, Ed. 1, c. 20, which prohibits the making silver plate under the standard alloy, is not repealed by any of the subsequent statutes against the same offence; they only add accumulative penalties. *R.* v. *Jackson.* *Cowp.* 297.
It is a general rule, that subsequent statutes, which only add accumulative penalties, do not repeal former statutes. *Ibid.*

68 If a statute provides, that no person shall be elected into a particular office, who shall not have complied with a certain requisite upon the issue, whether *J. S.* was elected or not, it is incumbent on the party who insists that he was, to shew that he had complied with the requisite. If *J. S.* were a candidate for the office and obtained a *mandamus* to swear him in, being duly chosen upon a return that he was not duly chosen, and an issue thereon, it would be incumbent on him to prove that he had complied with the requisite; though it was required of him at the election, and he had no notice that it would be required of him at the trial. *Tufton* v. *Nevinson.* 2 *L. Raym.* 1354.

69 The statute 23, Hen. 6, c. 9, relating to bail bonds is a public act; therefore the court will take notice of it though it be not pleaded. *Samuel* v. *Evans.* 2 *Term Rep.* 569.

70 And if it appear in a declaration by the assignee of a sheriff on such bond, that the bond is void by the provisions of that statute, the court on motion will arrest the judgment after verdict against the defendant upon a plea of *non est factum.* 2 *Term Rep.* 569.

71 A curate of an augmented curacy by Queen *Anne's* bounty is not liable to the penalties of statute 21, Hen. 8, c. 13, for non-residence. *Jenkinson q. t.* v. *Thomas.* 4 *Term Rep.* 665.

72 That act only extends to parsonages and vicarages. *Ibid.*

73 After a creditor has distrained for rent the goods of his debtor, who was also under engagement with the creditor's agent for the sale of his goods, for the purpose of discharging the rent, and also certain book debts due to such creditor and his agent, the debtor confessed judgment to the defendant, another creditor, for a large nominal sum, with a defeazance that execution should only issue for such an amount as would cover the debt of the defendant, and all the other creditors, amongst whom a ratable distribution was to be made; held, that such judgment confessed, being in fact made *bona fide*, and upon good consideration, was not covenous or fraudulent within the statute 13 Eliz. c. 5, although its effect might be to delay or hinder such first mentioned creditor from recovering the whole amount of his demands. Neither could it be said to delay or hinder at all his recovering the rent due to him, and for which he had distrained; such distress hav-

ing a legal priority. But it seems that the penalty given by the third clause of the statute attaches as well upon a covenous judgment as a covenous bond, though the latter alone be named in that part of the clause. *Meux q. t.* v. *Howell.* 4 *East*, 1.

74 The statute 1 Jac. 1, c. 22, s. 40, which gives a penalty of 5l. against any person resisting the searchers appointed by that act, in searching for and seizing goods made of leather ill-tanned or wrought, does not attach upon a tradesman who purchases such goods ready made, though with intent to sell again, but only upon the original makers of such ill-wrought goods. *Mason q. t.* v. *Middleton.* 3 *East*, 334.

75 Whether the statute 1, Jac. 1, c. 27, (as to killing game) be repealed by the statute 22 & 23, Car. 2, c. 25? *Qu. R.* v. *J. A. Harris.* 7 *Term Rep.* 238.

76 The statute 16 & 17, Car. 2, c. 8, which says that judgment shall not be arrested for want of the words *vi et armis*, or *contra pacem*, in actions of trespass, only applies to those cases that appear on the face of the declaration to have been evidently intended to be actions of trespass; and not to a case where the memorandum is of "an action of trespass on the case." *Savignac* v. *Roome.* 6 *Term Rep.* 125.

77 The statute 8 & 9 W. 3, c. 31, s. 1, which directs the form to be pursued in a writ of partition, applies only to cases where the tenant does not appear. *Dyer* (*dem.*) v. *Bullock & al* (*ten.*) 1 *Bos. & Pull.* 344.

78 By statute 10 & 11, W. 3, c. 8, the proprietors of navigation shares in the river *Tone*, are created a corporation with certain funds, directed to keep an account of their receipts and disbursements, which shall every year be *examined*, *stated*, *corrected* and *allowed*, by the Bishop of *Bath* and *Wells*, and the justices of the peace for the county of *Somerset*, or any five or more, at their first general-quarter-sessions after a certain day, at which time they are to direct a distribution of the surplus profits, if any; held, that the sessions in one year have no authority to revise or correct any errors in the accounts, upon which a balance was struck and allowed, at the sessions in any preceding year. *R.* v. *the conservators of the River Tone.* 8 *Term Rep.* 286.

79 If manifest injustice has been done by the allowance of the accounts in any former year, the only remedy is in chancery. 8 *Term. Rep.* 291.

80 In *March* 1812, the statute 3 G. 2, c. 26, s. 13, giving a penalty against dealers in coals within the metropolis, and ten miles round, for not justly measuring coals sold by the chaldron, according to the lawful bushel directed by the statute 12 *Anne*, statute 2, c. 17, s. 11, was a subsisting law; and held that evidence of such coals proving short upon remeasurement was admissible to prove the charge of their not having been *justly measured*. But *Qu.* Whether the statute 3 G. 2, c. 26, were a subsisting law after *July* 1802, when the statute 26 G. 3, c. 108, was revived by the statute 42 G. 3, c. 89? *Warren qui tam* v. *Windle.* 3 *East*, 205.

81 A dealer in coals by the chaldron who sold to another *by the chaldron* a certain quantity *as and for* 10 *chaldrons of coals, pool measure*, without justly measuring the same with the lawful bushel of queen *Anne*, is liable to the penalty of 50l. imposed by the 13th section of the statute 3 G. 2, c. 26, upon such defaulters who sell coals *by the chaldron or lesser quantity* without measuring them. *Parish qui tam* v. *Thompson.* 2 *East*, 525.

82 The statute 5 G. 3, c. 20, which inflicts a penalty of 20l. on persons piloting ships *down the Thames*, &c. only extends to vessels sailing *on foreign voyages*, and not to those which having performed their voyages, are steered from one wharf to

another on the river, for the purpose of unloading their cargoes. *Rex* v. *Lambe.* 5 *Term Rep.* 76.

83 In a subsequent case the court of B. R. recognized this judgment; and held generally, that under this statute it is only necessary to have a regular pilot when a vessel is sailing on the *Thames in the course of her voyage in or out;* up or down the river. *Rex* v. *Neale.* 8 *Term Rep.* 211.

84 Jobbing in *omnium* is within the statute 7 G. 2, c. 8. 7 *Term Rep.* 630.

85 The plaintiff being possessed of 3000l. 4 *per cent.* stock, empowered defendant to sell the same for his own benefit; in consideration of which defendant agreed to transfer at the next opening 3000l. 4 *per cent.* into the plaintiff's name; held that this was not a case prohibited by 7 G. 2, c. 8, but that on failure of the defendant's engagement, the plaintiff might maintain an action against him to recover the value of that stock on the day appointed for the transfer. *Sanders* v. *Kentish.* 8 *Term Rep.* 162; and see *Tate* v. *Wellings.* 3 *Term Rep.* 531.

86 In an action on the stock jobbing act, 7 G. 2, c. 8, s. 6, to recover damages against one who had refused to accept and pay for stock agreed to be sold to him, it is necessary to prove an actual transfer of the stock to some other person before the action brought; and proof alone of a contract to sell to such other person *before* the action brought, though followed up by an actual transfer *afterwards*, is not sufficient to maintain the action. *Heckscher* v. *Gregory.* 4 *East*, 607.

87 It is an offence within the statute 7 G. 2, c. 19, to mix the vapour of sulphur and brimstone with hops. *Rex* v. *Pack.* 6 *Term Rep.* 374.

88 Tumbling is not an entertainment of the stage within the meaning of statute 10 G. 2, c. 28. *Rex* v. *Handy.* 6 *Term Rep.* 286.

89 One, not a general trader in silver plate, who sells a piece of plate in a particular instance for a price above the value of old silver, is not therefore *a vender of plate* within the statute 31 G. 2, c. 32, s. 6, which enacts that all persons using the trade of selling plate, &c. shall be *deemed* traders in, sellers, or venders of plate, &c. and shall take out a licence. *Rex* v. *Buckle.* 4 *East*, 346.

90 A sheriff's officer is not liable to the penalties of 32 G. 2, c. 28, s. 1, for carrying a person taken in execution to prison within twenty-four hours; that clause only relating to persons arrested on mesne process. *Evans* v. *Atkins.* 4 *Term Rep.* 555.

91 By statute 3 G. 3, c. 15, no person claiming to vote at an election of members of parliament *as a freeman* can vote unless he has been admitted to his freedom for 12 months; this extends to *burgesses*, who vote at such elections, as well as freemen. *Williams* v. *Evans.* 8 *Term Rep.* 246.

92 That branch of s. 19, of statute 13 G. 3, c. 78, (the general highway act) which directs that "when any highway *hath been* diverted above 12 months, &c. if a new highway *hath been* made in lieu thereof, and the same *hath been* acquiesced in, &c. every such new highway shall, from *thenceforth*, be the public highway," is *retrospective* only; and it is not extended by s. 7, of 34 G. 3, c. 74, incorporating all the clauses and provisions of the act 13 G. 3. *Waite* v. *Smith.* 8 *Term Rep.* 133. Another part of s. 19, of statute 13 G. 3, c. 78, provides for the diverting of highways for the future. *Ib.*

93 By statute 19 G. 3, c. 74, the clerk of assize on each circuit, is entitled to receive a certain fee for every person convicted of a transportable offence, (except petty larceny,) and senteneed to transportation, hard labour or confinement in the house of correction; and for persons capitally convicted, who afterwards

have received the king's pardon on condition of being transported or imprisoned. *Fleetwood* v. *Finch.* 2 *H. Black.* 220.

On the *Norfolk* circuit, that fee is one guinea. 2 *H. Black.* 220.

94 A commitment in execution of a rogue and vagabond under statute 28 G. 3, c. 88, should state that the defendant was apprehended with the implements of house breaking upon him *at the time of such apprehension, &c.* *Rex* v. *Brown.* 8 *Term Rep.* 26.

95 An excise officer seizing soap in the execution of his office *at any distance from the sea*, is within the protection of 24 G. 3, stat. 2, c. 47, s. 15. *Rex* v. *Brady & al.* (*in Cam. Scac.*) 1 *Bos. & Pull.* 187.

96 Nothing but a power of attorney or will, complying with the provisions of statutes 26 G. 3, c. 63; 32 G. 3, c. 34, will warrant the payment to third persons, of money due from the public to sailors and marines. *Semble*, 1 *Bos. & Pull.* 161.

97 The time for ships engaged in the southern whale-fishery to be out on their voyage, in order to gain their premiums under statute 28 G. 3, c. 20, is fourteen *lunar* months from the time of their *clearing out*, without regard to the time of their actual sailing. *Lacon* v. *Hooper.* 6 *Term Rep.* 224.

98 It is an offence within the statute 28 G. 3, c. 38, s. 31, to press together *yarn* made of wool; and a declaration or information on this act need not aver that *it was in such a state as might be reduced to and used as wool again.* *Dyer* v. *Hainsworth.* 8 *Term Rep.* 611.

99 *Semble*, Such averment is only necessary in the case of a prosecution for "*pretended manufactures.*" 8 *Term Rep.* 611.

100 No hawker can expose goods for sale in any part of a market-town but the public market-place, by statute 29 G. 3, s. 26, s. 16, 17. *Rex* v. *Redfearne.* 4 *Term Rep.* 273.

101 The unlawful administering, by any associated body of men, of an oath to any person, purporting to bind him not to reveal or discover such unlawful combination or conspiracy, nor any illegal act done by them, &c. is felony within the statute 37 G. 3, c. 123, though the object of such association were a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. *Rex* v. *G. Marks.* 3 *East*, 157.

102 The statute 42 G. 3, c. 90, s. 61, enables a magistrate to make an order for payment of servants' wages in certain cases; and directs, that in case of *refusal* or *non-payment* of any sum so ordered for 21 days after such determination, he may issue his warrant of distress; but it gives an appeal to the sessions; held, that 21 days having elapsed between the making of such order before the appeal, and also 21 days after such appeal dismissed before the warrant of distress issued, the magistrate was warranted in issuing such order of distress without proof of any demand subsequent to the appeal. *Wootton* v. *Harvey.* 6 *East*, 75.

103 A statute introductive of a new qualification as to the subject matter, though penned in the affirmative, repeals a former statute concerning the same matter. Therefore the statute 13 G. 2, c. 28, s. 5, exempting from the impress service any harpooner, &c. *seaman*, &c. in the *Greenland* trade, is impliedly repealed by statute 26 G. 3, c. 41, s. 17, which exempts such harpooner, &c. *whose name shall be inserted in a list* required to be delivered on oath by the owner of the vessel to the collector of the customs; and which also exempts any *seaman* entered on board any ship intended to proceed on the said fishery in the following season, *whose name shall be inserted in a list to be delivered as aforesaid*, and who shall have given *security*, &c. to proceed and shall proceed accordingly; for the latter

statutes superadd the insertion of the seaman's name in such list as a condition precedent to the exemption. *Ex parte Caruthers.* 9 *East*, 44.

104 The statute 42 G. 3, c. 38, forbids corn making into malt to be wetted, while it is a-floor, before 12 days from the time when it is emptied out of the cistern. The stat. 46 G. 3, c. 139, s. 1, repeals the provision generally, and enacts (s. 3,) that the corn in that state shall not be wetted till nine days, &c. after the 1st of *Aug.* 1806. Then s. 14, enacts that *this act* shall commence and take effect, as to all matters whereof no special commencement is thereby provided, from the 1st of *August* 1806, and shall continue in force till the 25th of *March* 1807. Held, that incorporating the 14th with the 1st section, this law only operated as a repeal of the former one during the time limited in the 14th section; after which the first resumed its operation during the interval between the 25th of *March* 1807, and a subsequent act reviving and continuing the 46 G. 3. *The King* v. *Rogers.* 10 *East*, 569.

105 Statutes of bankruptcy of one of the *United States* do not bind the creditors of the bankrupt, who lives out of *such* state, unless the contract were made *there.* 1 *Mass.* 198.

106 The *English* statute of 8 and 9 of *W.* 3, respecting actions on bonds conditioned for performance of covenants, has never been adopted in this commonwealth. 2 *Mass.* 541.

107 The provisions of the third section of the statute of 1807, c. 74, called the *limitation and settlement act*, extend to the case, where a tenant in a real action claims to hold under a title, which proves defective, as well as where he holds by virtue of a possession and improvement only. *Bacon* v. *Callender.* 6 *Mass.* 303.

108 The acts prescribing the limits of counties and towns are public acts, of which the court will judicially take notice. *Commonwealth* v. *The Inhab. of Springfield.* 7 *Mass.* 9.

109 The limitation and settlement act (statute 1807, c. 74,) does not extend to actions tried on review. *Hart* v. *Johnson.* 7 *Mass.* 472.

110 Where the legislature had set off one with his estate from one parish in a town, and annexed them to another parish, it was held that the effect of the act ceased at the death of the person so set off, and that the land owned by him, with its occupants, then reverted to the former parish. *Kingsbary* v. *Slack et al.* 8 *Mass.* 154.

111 The statute of 1808, c. 92, respecting the limits of prison-yards, militates with no provision of the constitution of the *United States*, or that of this Commonwealth. *Walter* v. *Bacon et al.* 8 *Mass.* 468.

112 In an action *qui tam*, &c. for the penalty given by the 7th section of the act regulating inns and taverns, for retailing strong liquors, without a licence, it was held that the license granted by two of the commissioners of excise, without the presence or consent of the supervisor, and when they were not assembled for the purpose of granting licences, was illegal and void; and such a licence, though regular on the face of it, is no justification to the tavern keeper, who is liable for the penalty. *Palmer qui tam, &c.* v. *Doney.* 2 *Johns. Cas.* 346.

But a tavern keeper who has a legal and competent licence, is not liable to the penalty for retailing liquors after his licence has expired, and before the time of the next meeting of the commissioners of excise, for the purpose of granting licences. *Ibid.*

113 Proceedings under the 11th section of the act to regulate highways are to be in a summary way, the overseer is the judge of the delinquency of the party, and the justice in issuing a warrant, acts ministerially, and is not bound to give the party notice of the complaint, or to

summon him to appear, or shew cause against the charge. *Bouton* v. *Neilson.* 3 *Johns. Rep.* 474.

114 In an action of debt for the penalty given by the *act to lay a duty*, &c. and regulating inns and taverns (24 ses. c. 164) if the defendant pleads in bar a former conviction for the same offence, he must give in evidence to support his plea, a conviction drawn up in the *form* prescribed by the 8th section of the act for the recovery of debts to the value of 25 dollars (31 ses. c. 304,) *Beadleston* v. *Sprague.* 6 *Johns. Rep.* 101.

The person who first *commences a qui tam* action for the penalty, not the person who first recovers judgment, is entitled to the penalty. *Ibid.*

115 Where a person in custody on a *ca. sa.* has been discharged under the *act for the relief of debtors, with respect to the imprisonment of their persons* (24 ses. c. 66) the plaintiff may issue a *fieri facias* against his goods, &c. at any time, afterwards, though more than a year has elapsed, without a previous *scire facias* to revive the judgment. *Gonnigal* v. *Smith.* 6 *Johnson's Rep.* 106.

116 Where a person purchased land, at a sheriff's sale, in 1774, and a deed was delivered to a third person, to be delivered to the grantee, on payment of the purchase money, and the purchaser did not pay the money, but was afterwards attainted in 1779, it was held that the state could not, by paying the money, perform the condition so as to devest the estate of the original debtor or his heirs; and that a private act of the legislature, passed on the petition of the judgment creditor, directing the land to be sold, and the money to be paid to the creditor, did not take away the right or interest of the debtor, or of his heirs, or effect any person not a party to the act. *Catlin* v. *Jackson ex dem. Gratz, et al. in error.* 8 *Johns. Rep.* 520.

117 Where a sheriff had a person in custody on an attachment for non-payment of costs, and the sheriff discharged him, by an order made by the court of common pleas, pursuant to the act for the relief of debtors with respect to the imprisonment of their persons; it was held, that the order for his discharge was void, as he was not in custody on a conviction for a contempt, but only to be brought up to answer on interrogatories; and the sheriff was held liable. *Jackson* v. *Smith.* 5 *Johns. Rep.* 115.

118 The act concerning distresses, does not apply to a case of a levy on personal property, made by an officer, under a warrant in the nature of an execution. *Rogers* v. *Brewster.* 5 *Johns. Rep.* 125.

119 A person having a right to a ferry, granted under the act to regulate ferries within this state, cannot maintain an action on the case, for the disturbance of his right. His only remedy is for the penalty given by the statute. *Almy* v. *Harris.* 5 *Johns. Rep.* 175.

120 The act to settle disputes concerning titles to lands in *Onondago* county, is a constitutional act. *Jackson ex dem. Lepper* v. *Griswold.* 5 *Johns. Rep.* 139.

121 Under the *act for giving relief against absent and absconding debtors*, the creditor cannot maintain a suit at law, for his debt against the *trustees* appointed pursuant to the act, before the demand has been proved, or adjusted, and the dividend declared. The proper remedy is by petition to the equity powers of the court, under which the proceedings are instituted, who will either compel the trustees to do their duty, or advise them in case of doubt, or difficulty. The trustees under this act, may plead the statute of limitations in the same manner as the debtor himself could have done. *Peck* v. *The Trustees of Randall.* 1 *Johns. Rep.* 165.

122 The act for the inspection of flour intended for exportation, does not

require that flour once inspected and shipped, and afterwards damaged by sea water, should be again inspected before it is exported. *Griswold* v. *The New-York Ins. Co.* 1 *Johns. Rep.* 205.

123 An act of the legislature, contrary to the treaty between *Great-Britain*, and the *United States*, of 1794, was held to be inoperative. *Jackson ex dem. Folliard and Wallace* v. *Wright.* 4 *Johns. Rep.* 75.

124 An act of assembly of the late province was not deemed to be repealed by the king and council till notification here. 1 *Dallas*, 9.

125 It is fairly to be inferred from the general tenor of the act of assembly for the revival of the laws, that the legislature thought, that the seperation from *Great-Britain*, worked a disolution of all government. 1 *Dallas*, 58.

126 The confiscation acts of *Georgia*, are not repugnant to its constitution. 4 *Dallas*, 14.

127 The law against *Connecticut* intruders is constitutional. 4 *Dallas*, 255.

128 The *English statute of frauds and perjuries* does not extend to *Pennsylvania*. 4 *Dallas*, 152.

129 The *English* statute, respecting collateral warrantees (4 Ann. c. 16, s. 21,) does not extend to *Pennsylvania*. 4 *Dallas*, 168.

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April 2, sess. 33 c 121, Militia, *ibid*, 157
28, sess. 33 c 187, Escape, 7 Johns. Rep. 477

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STOCK.

Stock in the public funds cannot be sued for by the name of money. *Nightingale* v. *Devisme*. 2 *Black*. 684. 5 *Burr*. 2589.

STONE ARABIA PATENT.

Lot No. 50, in the second allotment of *Stone Arabia Patent*, is to be held according to the survey of the patent, made by *Henry Frey*, in 1754, and as designated and described by that survey. *Jackson ex dem. Casselman* v. *Lepper and Dillenback*. 3 *Johns. Rep.* 12.

STOPPAGE IN TRANSITUE.

1 Where a merchant in pursuance of a previous general agreement, had shipped goods to one on credit, who after the shipment became insolvent, the shipper had still a right to stop the goods *in transitu*; the credit contemplated being predicated on the supposed ability of the consignee to pay at the expiration of the term of credit. *Stubbs* v. *Lund*. 7 *Mass*. 453.

2 The right of stopping *in transitu* goods shipped on the credit and risk of the consignee, remains until they come into his actual possession at the end of the voyage; unless he shall before have sold them, and assigned the bills of lading to the purchaser. *Ibid*.

3 And in all cases, where an actual possession of the consignee, after the end of the voyage, is provided for in the bills of lading, the right of stopping *in transitu* remains after the shipment, whether the consignee be the hirer, or owner of the ship, or the shipment be made on a general ship: But if the goods are shipped for a foreign market, and are not to be transported to the consignee, the right of stoppage ceases on the shipment. *Ibid*.

STREET.

A waggoner, occupying one side of a public street in a city, before his warehouses, in loading and unloading his waggons for several hours at a time, both day and night, and having one waggon at least usually standing before his warehouse, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded, by cumbrous goods lying on the ground ready for loading, is indictable for a public nuisance; though there were room for two carriages to pass on the opposite side of the street. *Rex* v. *Russell*. 6 *East*, 427.

SUBPŒNA DUCES TECUM.

The writ of *subpœna duces tecum* is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the court, and not the witness, is to judge. And in an action against the sheriff's bailiff for disobeying such writ, who having been subpœnaed on a former action by the plaintiff against another, to produce the warrant under which he acted, he neglected so to do, whereby the plaintiff was nonsuited; his ability

to produce the warrant, and his want of just excuse for not producing it are sufficiently alleged by stating, that he could and might in obedience to the said writ of subpœna have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary. *Amey* v. *Long*. 9 *East*, 473.

SUGGESTION.

Where treble costs are to be recovered against a prosecutor for a matter not appearing on the *postea*, the court will give leave to suggest the special matter. *The King* v. *Poland*. 1 *Str*. 49.

SUNDAY.

1 *Sunday* appears to be not a good day for the appointment of overseers. *Anon*. *Lofft*, 618.

2 *Sunday* a day in rules, unless the first or last. *Anon*. 1 *Str*. 86.

SUPERSEDEAS.

1 *Audita querela* is no *supersedeas*. *Langston* v. *Grant*. 1 *Salk*. 92.

2 The *committitur* must be actually entered on record before the end of the second term to prevent a *supersedeas*. *Unwin* v. *Kirchaffe*. 2 *Str*. 12, 15.

3 After a *supersedeas* to a *ca. sa.* the prisoner in execution need not have a formal discharge from the sheriff; and if he stays within the limits, because the sheriff refused to give him a discharge, he cannot maintain an action for false imprisonment against the sheriff. *Warne* v. *Constant*. 4 *Johns. Rep*. 32.

4 Whether a *certiorari* operates as a *supersedeas*. 4 *Dallas*, 214.

SUPERVISORS OF COUNTIES.

1 *A*. in 1791, granted a lot of land to 'the people of the county of *Otsego*' on which a court house and gaol were built by the sepervisors in 1792, and used by the county in 1806, by an act of this legislature, the supervisors were authorised to sell the court house and gaol with the lot of land on which they stood; and they accordingly sold the land to *B*. In an action of ejectment against *B*., it was held, that the people of the county had no capacity to take by grant, and the deed was void. *Jackson ex dem. Cooper* v. *Cory*. 8 *Johns. Rep*. 385.

The act of the legislature (sess. 24 c. 180) enabling supervisors of counties to take conveyances of land, applies only to conveyances made to the supervisors by name. The act of the legislature, in 1806, did not authorize the supervisors to sell any thing more than such right or title as they had. *Ibid*.

2 *A*. granted to the supervisors of the county of *Oneida*, a parcel of land upon trust, that they should ereect and hold on one part of it, lying *east* of a certain street, a court *house* and *gaol*, and that they should suffer that part lying *west* of the same street to be appropriated for the building a *church* and *school house*, for the *use of the inhabitants of Rome*. It was held, that if the supervisors of the county were a *corporation*, they had no capacity to take and hold lands, as supervisors, for the use of the inhabitants of *Rome*, or for any other use or purpose than that of the county which they represented. *Jackson ex dem. Lynch* v. *Hartwell*. 8 *Johns. Rep*. 422.

The supervisors are a corporation with special powers; and it is very questionable whether, prior to the act passed 8th *April*, 1801, (sess. 24 c. 180,) they were competent to take a grant of land. *Ibid*.

SUPPLETORY OATH.

The suppletory oath in a matrimonial cause alleged in case of *semiplena probatio*, and adjudged right on appeal to the delegates. *Williams* v. *Lady Bridget Osborne, before the Delegates.* 1 *Str.* 80.

SURETY.

1 If a ship is seized and set at large upon security, the security shall not be discharged on account of the neglect of the prosecutor of an information in support of the seizure, to try it according to notice, if he declares he intends to try it the term after the application of the discharge.

The bail for the defendant in a cause cannot have costs on account of the neglect of the plaintiff to proceed to trial according to notice, though they may bar the costs of the defence. *Jenkins qui tam, &c.* v. *Horne.* 2 *L. Raymond*, 1311.

2 A contract cannot be carried beyond the strict letter of it, as against a surety. 2 *Term Rep.* 360.

3 A person who merely as assurety enters into a rule of reference before a justice of the peace does not thereby become a debtor of the adverse party, but the debt, as to the surety, must be considered as arising from the rendition of the judgement on the award. 1 *Mass.* 134.

4 Surety who has paid the debt of his principal cannot maintain an action against him therefor, for money had and received; but can for money laid out and expended, although the money was paid upon an usurious contract made by the principal or his agent. 1 *Mass.* 139.

5 *Quere*, If a person who signs a promissory note with another, beginning in the singular number "I" and at the end of his signature adds the word "surety" is jointly holden with the other, or whether his undertaking is *collatteral.* 1 *Mass.* 156.

6 A surety, *qua* surety, cannot call on his principal at law, until he has actually paid the money. And where no promise to indemnify was proved, nor the payment of any money by the surety, though he had been sued and charged in execution for the debt of the principal, but afterwards discharged under the insolvent act, he was held not entitled to recover in an action against the principal. *Powell* v. *Smith.* 8 *Johns. Rep.* 249.

7 In an action brought against a surety on a bond, given for the faithful discharge of his duty as an officer, under the act (19 sess. c. 40) it was held, that the surety might set up in his defence the *laches* of the supervisors of the county, in not discharging, and prosecuting the loan officer for his first default, but suffering him to continue after repeated defaults, for upwards of ten years, when the loan officer became insolvent, and without prosecuting the loan officer, as required by the act. *The People* v. *Jansen et al.* 7 *Johns. Rep.* 332.

And where no notice was taken of the defaults of the principal, until after the death of the surety, this *laches* of the supervisors was held to be a good defence, especially in a suit against the heirs of the surety. *Ib.*

8 If a surety to a bond, executed by one of several partners, pay the money, he cannot maintain an action for money paid against the other co-partners, though the bond was given for the partnership account; but his right of action is only against the person who signed the bond. *Tom* v. *Goodrich et al.* 2 *Johns. Rep.* 213.

9 The responsibility of sureties of the state treasurer, how limited. 4 *Dallas*, 282.

SURGEON.

Understanding the *Latin* tongue, is a previous qualification necessary to

being even apprentice to a *London* surgeon. *Rex* v. *Master and Wardens of the company of Surgeons in London.* 2 *Burr.* 892.

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SURPLUSAGE.

1 *Prædictus*, where it has an antecedent surplusage. A traverse of a fact confessed and avoided, bad; even on a general demurrer. A right under a paramount conveyance is no answer to the claim of an estate by feoffment, but it is to a claim by any other mean. *Lambert* v. *Cook.* 1 *L. Raym.* 237.

2 If a man, in describing the date of a bond, offers to state the year of the king as well as that of our Lord and mentions as that of the king a year until which the king did not reign, the year of the king shall be considered as surplusage. In an action on several bonds, it is sufficient, by way of breach, to state, that the sums contained in all of them were not paid, without adding that none of them were. A writ to remove proceedings before a mayor, aldermen, bailiffs, and citizens, will not remove proceedings upon a plaint levied at a court held before the deputy mayor and bailiffs only. *Watson* v. *Huddleston.* 1 *L. Raym.* 703.

SURRENDER.

1 Conditional surrender of a prebend's lease, good to warrant a renewal. *Wilson on the demise of Eyre Clerk*, v. *Carter and another.* 2 *Str.* 1201.

2 Surrender vests the estate in the surrenderee, without the express acceptance. *In the Case of Thompson and Leach.* 2 *Salk.* 618.

3 A surrender of a lease for years, may be by writing without a deed, or sealing, or stamp duty paid. *Farmer, of the demise of Earl* v. *Rogers.* 2 *Wils.* 26.

4 The surrender of the copyhold must be construed as a deed. A limitation to the surrenderer of a copyhold to the use of *A.* and his wife, *pro et durante termino vitarum*, and *heredum* and *assignatorum A.* and *uxoris, and pro defectu talis exitus* to the use of the right heirs of the father of *A.* passes an estate in fee-simple to *A.* and his wife. *Idle* v. *Cooke.* 2 *L. Raym.* 1144. 2 *Salk.* 620.

5 *John Leland*, surrendered a copyhold in the occupation of him, *John Leland*, to the use of *Joseph Leland* and *John Leland* his son, for their lives and the life of the survivor; remainder to the heirs of the body of the said *John Leland son of Joseph Leland*; remainder to the right heirs of the said *John Leland*; held, that the ultimate remainder was meant for the right heirs of *John* the surrenderor; as well because *John* the surrenderee is before described with the addition of the *son of Joseph*; as of the manifest futility of giving *John the surrenderee* an estate tail, and afterwards a *fee* in succession. Though if the construction had even been left doubtful, the ultimate remainder would have continued in the surrenderor. *Roe et Hucknall* v. *Foster.* 9 *East*, 405.

SURVEYOR OF HIGHWAYS.

1 Surveyor of highways may recover against his town damages happening to him through a defect in the highways within his own district, unless the defect arose from his own negligence. *Wood* v. *Waterville.* 4 *Mass.* 422.

2 A surveyor of highways is obliged by law effectually to repair the ways within his district; and when the town does not make sufficient provision, he has his remedy against the inhabitants. *Wood* v. *Waterville.* 5 *Mass.* 294.

3 A surveyor sustaining damage from

a defect in the highway within his district, and which arises from his own neglect, has no remedy against the town for such damage. *Ibid.*

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SURVIVOR.

The surviving obligee of joint bonds is entitled to the possession of the joint securities to recover the amount. 4 *Dallas*, 354.

SUSQUEHANNAH LANDS.

1 Where notes were given for the purchase-money, on a contract for the purchase of *Susquehannah lands*, within the jurisdiction of *Pennsylvania*, under the *Connecticut* claim to those lands, the sale was held to be illegal, and the notes given for the consideration money, void. *Whitaker* v. *Cone.* 2 *Johns. Cases*, 58.

2 A sale and purchase under title derived from the *Connecticut Susquehannah company*, of lands lying in *Pennsylvania*, and claimed by that state as well as *Connecticut*, is *maintenance* in selling a pretended title; but both parties being in *pari delicto*, a court of equity will not afford relief to the purchaser, to prevent the negotiation of notes given for the purchase money, or to recover back money paid. *Woodworth et al.* v. *Jones et al.* 2 *Johns. Cas.* 417.

T.

TAVERN LICENSES.

If three or a majority of the commissioners of the excise present, sign a license to keep a tavern, &c. it is sufficient though the supervisor refuse to sign it; for it is not indispensible that he should sign the license. *Orvis* v. *Thompson, qui tam. &c.* 1 *Johns. Rep.* 500.

TAXES.

1 Determined by the court, that the king by his prerogative might, before the proclamation of 7th *October*, 1763, promising a legislative assembly as soon as circumstances would admit, have laid an impost upon *Grenada*, as a conquered country, without the consent of parliament, or act of the people of *Grenada*, in their assembly or otherwise. But after the said proclamation, and before the patent of the 20th *July*, 1764, for carrying on an impost, the king had precluded himself from so doing. *The cause of the Island of Grenada. Campbell* v. *Hall. Lofft.* 655.

2 Taxes in general, mean parliamentary. *Brewster* v. *Kitchel.* 2 *Salk.* 615.

3 A house within the limits of an hospital, appropriated to an officer of the hospital for the time being, is not assessable to the land tax. *Harrison* v. *Bulcock et al.* 1 *H. Black.* 68.

4 Houses built on land embanked from the *Thames* in pursuance of statute 7, G. 3, c. 37, which vests those lands in the owners, free from taxes, are not liable to be assessed to the general land tax imposed by 27 G. 3, though the latter is conceived in general terms, and is subsequent in point of time to the act creating the exemption. The land tax acts, though in form annual, being considered in fact, as permanent. *Williams* v. *Pritchard.* 4 *Term Rep.* 2.

5 Nor are they liable to be assessed to the rates for paving, &c. of *London*, made under statute 11, G. 3, c. 29. *Eddington* v. *Borman.* 4 *Term Rep.* 4.

6 But occupiers of such houses are not exempted from the payment of the house and window duties imposed by statute 38 G. c. 40. *Perchard* v. *Heywood.* 8 *Term. Rep.* 468.

7 The owner of stables in *Marybone* which were rented by the colonel, of a troop of horse, for the use of the troop, (by the authority of the king,) is liable to be assessed for them to the rates made under statute 10 G. 3, c. 23, for paving &c. *Marybone* parish. *Eckersall* v. *Briggs*. 4 *Term. Rep.* 6.

8 The Masters in Chancery are not rateable as occupiers of their respective apartments in *Southampton Buildings* under the paving act, 11 G. 3, c. 22, *Holford* v. *Copeland*. 3 *Bos. & Pull.* 129.

9 The letting of a horse to hire for the purpose of going upon business from one town to another and back again in the compass of a day's journey, is not a letting to hire for the purpose of *travelling post* within statute 25 G. 3, c. 51. *R.* v. *A. Tooley*. 3 *Term Rep.* 69.

10 The words "travelling post" in that act are to be construed according to the popular acceptation of them. 3 *Term Rep.* 69.

11 A person who lets an horse to hire to carry a *private* express, must take out a licence under that statute. *R.* v. *J. Webber*. 3 *Term Rep.* 72.

12 *Secus* in the case of a *public* express. *R.* v. *J. Cook*. 3 *Term Rep.* 519.

13 In an action for penalties brought by the farmer of the tax, on statute 27, G. 3, c. 26, (whereby the duties on post horses leviable under the said statute (25 G. 3, c. 51,) were transferred from the king to the farmers of the tax) the offence may be laid to have been committed *with intent to defraud the farmer*, and not his majesty. *Radford q. t.* v. *M'Intosh*. 3 *Term. Rep.* 633.

14 If the offence charged be the letting and not accounting for divers, *to wit, eight* horses, proof that defendant let and did not account for *five* will support the declaration. 3 *Term Rep.* 632.

15 The statute requires that the account shall contain the number of horses and miles, and the names of the drivers, but no penalty is inflicted for not inserting *the amount of the duties* received by the post master; therefore if the declaration only charge that the defendant made *false* accounts, to wit, *by not inserting the amount of duties received*, judgment may be arrested after verdict for the plaintiff. 3 *T. Rep.* 632.

16 *Semb.* it would not have been sufficient to state generally that the defendant had been guilty of delivering *a false account*, without specifying in what particular. 3 *T. Rep.* 632.

17 In such an action it is not necessary for the plaintiff to give in evidence his appointment by the lords of the treasury or the commissioners of the stamp duties authorized by them; proof that the defendant has accounted with him *a farmer* for the duties is sufficient. 3 *Term Rep.* 632.

18 In an action against such farmer for a neglect of duty, it is necessary to aver that he is the farmer appointed under and by virtue of that act; alleging that he is the collector of the rates and duties *recited* in that act, is not sufficient. *Short* v. *Pruen*. 6 *Term Rep.* 163.

19 A person cannot be convicted of a penalty under the said statute (25 G. 3, c. 47,) for not delivering to the assessors a list of his horses liable to the duty, &c. "until after the expiration of fourteen days from the time of giving notice by the assessors, and until a demand made by the assessors." *R.* v. *Benwell*. 6 *Term Rep.* 75.

20 The owner of a cart who does not reside within the bills of mortality, or within five miles of *Temple Bar*, need not enter his name and place of abode with the commissioners of hackney coaches (under statute 24 G. 3. st. 2, c. 27, s. 8.) or have his name or any number upon the cart, though it be driven within those limits. *R.* v. *Powell*. 4 *Term Rep.* 572.

21 An appeal against a conviction on

statute 24, G. 3, statute 2, c. 31, for not entering horses, &c. must be to the quarter sessions next after the *conviction*, and not after the *execution*. *Prosser* v. *Hyde*. 1 *Term Rep.* 414.

22 If a constablewick consist of several hamlets, and two collectors of the duties on houses, &c. are appointed for each hamlet, and the collector or collectors of any one hamlet fail in duly paying over the money collected, the particular hamlet only where the collector or collectors have failed, is liable to a re-assessment under 20 G. 2, c. 3, and not the whole constablewick. *Barris* v. *Digby*. *New Rep.* 281.

23 Taxes on the unimproved lands of non-resident proprietors, are not a personal charge; but only alien upon the lands. 1 *Mass.* 47.

24 So on the improved lands of proprietors living without the Commonwealth. 1 *Mass.* 47.

25 The tenant in the actual occupation of land is liable to be assessed for it in parish taxes, and not the owner of the land, who lives in another town. *Martin* v. *Mansfield et al.* 3 *Mass.* 419.

26 Assessors of parishes must make a list and valuation of the taxable property, before assessing a tax, in default of which the assessment will be illegal and void. *Thurston* v. *Little et al.* 3 *Mass.* 429.

27 Perhaps if the assessors of the town, in which the parish lies have made such list and valuation, and the parish assessors refer to them, it might be sufficient. *ibid.*

28 One living in the town of *A.* and hiring a store in the town of *B.* in which he deposited a cargo of salt for sale, and also owning and fitting vessels in *B.*, is liable to be taxed therefore in *B.*; But for his business done there as an underwriter, and for his shares in banks, insurance companies, and other incorporated funds of that kind managed in *B.* he is taxable in the town of *A.* *Little* v. *Greenleaf, et al.* 7 *Mass.* 286.

29 Taxes mean a contribution in money, not labour or personal services. *Overseers &c. of Amenia* v. *Overseers &c. of Stanford.* 6 *Jons. Rep.* 92.

30 The tax on carriages for the conveyance of persons is not a direct tax. 3 *Dallas* 171 to 184.

31 The constitutional rule for laying taxes on the principle of uniformity, or by apportionment according to the census, considered. *Ibid.*

TENANCY.

1 Where an acknowledgment of tenancy, on the part of the defendant in ejectment, has been proved, he will not be allowed to give evidence to disprove or contradict the title of his land-lord. *Johnson ex dem. Van Allen et al.* v. *Vosburgh.* 7 *Johns. Rep.* 186.

2 Whether there be a tenancy or not, is a matter of fact, and parol evidence may be received to disprove it. *Ibid.*

3 A new tenancy in common may be created in the distribution of an intestate estate among the heirs. 1 *Mass.* 323.

TENANTS IN COMMON.

1 The words "equally to be divided," make tenancy in common in a will but not in a deed. Surrender of copy-hold to be construed as a will. *Fisher* v. *Wigg.* 1 *Salk.* 391. 1 *L. Raym.* 622. *Sed Qu.*

2 The words "equally to be divided," in a deed of uses, make a tenancy in common. *Goodtitle, ex dem. Hood* v. *Stokes.* 1 *Wils.* 341.

3 Tenants in common, though several, are but as one person or party in law. *Bernard and others* v. *the Bishop of Winchester. Lofft*, 401. *S. C.* 2 *Black.* 936. 3 *Wils.* 483.

4 Tenant in common may disseise his companion. *Reading's case.* 1 *Salk.* 392.

tions; but not so where the possession of one has been adverse to the title by tenancy. *Taylor* v. *Fisher and others.* *Lofft*, 766.

6 Tenants in common cannot make a joint lease. *Heartherley, on dem. of Worthington and another*, v. *Weston and others.* 2 *Wils.* 232.

7 If one tenant in common hinder the entry of the other it is an ouster. 1 *Mass.* 323

8 In Vermont, tenants in common may maintain a joint action of ejectment. *Hicks* v. *Rogers.* 4 *Cranch* 165.

TENANT BY THE CURTESY.

1 *A.* a *feme covert*, died seized of lands in *June*, 1795, leaving a husband, and two sons and three daughters. The husband continued *seised* as *tenant by the curtesy*, until his death, in 1798. *B.* the eldest son, died abroad, in 1784, an infant intestate and without issue. C. the other son, on the death of his father, entered as heir to his mother. It was held, that the descent was suspended, during the tenancy by the *curtesy*, and that *A.* being last seised, was the stock of descent; and as she died before the statute of descents, *C.* the second son, took the inheritance as sole heir to his mother. *Jackson ex dem. Gomez et al.* v. *Hendricks.* 3 *Johns. Cas.* 214.

2 Where a *feme covert* is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed, so as to enable her husband to become a *tenant by the curtesy*. *Jackson ex dem. Beekman* v. *Sellick.* 8 *Johns. Rep.* 262.

3 An actual entry or *pedis possessio* by the wife or husband, during the coverture, is not requisite to the completion of a tenancy by the curtesy. *ibid.*

4 Lands descended to *A.* a *feme covert*, who had a daughter *C.* born in 1756. *A.* died in 1764, and *B.* her husband died in 1783. An adverse possession was taken of the land in 1772, it being then vacant and uncultivated; and *C.* after the death of her husband, in 1807, brought an action of ejectment; it was held that *B.* being tenant by the curtesy, no right of entry accrued to *C.* until after the death of *B.* in 1784, and that *C.* being then a *feme covert* was not bound to bring her action in twenty years thereafter, but was protected by the statute during her coverture. *Ibid.*

5 Whether a tenancy by the curtesy *initiate*, is forfeited on attainder of the husband for treason. 3 *Dallas* 479.

6 Tenant by the curtesy conveys in fee by deed recorded, this is not a forfeiture of his estate. 3 *Dallas* 486.

TENANT IN TAIL.

1 Tenant in tail of the gift of the crown, the reversion in the crown suffers a common recovery before the 34 Hen. 8, he gains a bare fee descendable and alienable, so long as there is issue in tail, and the reverson is still in the crown. *Neal ex dem. duke of Athol*, v. *Wilding and another.* 1 *Wils.* 275.

2 Tenant in tail may, since the 11 & 12 W. 3, suffer a recovery to the use of himself in fee, though he is a papist. *Ratcliff's case*, before the Delegates. 1 *Str.* 267.

3 A lease made by the tenant in tail with a fee expectant, on the determination of a lease for ten years, shall bind the issue, though he die before the ten years expired. *Simmons* v. *Cudmore.* 3 *Salk.* 335.

4 Tenant in tail may by lease or release, or by bargain and sale, pass a bare fee; a defeazible estate to the releasee or bargainee, voidable by the issue in tail. *Goodright* v. *Mead.* 3 *Burr.* 1703.

5 The possession of one tenant in common is the possession of the other, and will prevent a bar being incurred under the statute of limita-

5 A conveyance by tenant in tail by lease and release neither bars the issue in tail, nor works a discontinuance; but it passes a bare fee, voidable by the issue in tail by entry. *Doe d. Neville* v. *Rivers.* 7 *Term Rep.* 276.

6 *A.* and *B.* being tenants in tail under a devise. *A.* conveyed his moiety to *B.* in fee, by lease and release, with a covenant to levy a fine; this creates a base fee in *B.* which estate was afterwards confirmed by the fine, though that was not levied till after the death of the releasee. *Doe d. Gregory* v. *Whichelo.* 8 *Term Rep.* 214.

7 Tenant in tail by lease and release, previous to her marriage conveyed to trustees to the use of herself till the marriage, then to the husband for life, then to herself for life, then to the first and other sons of the marriage, &c.; tenant in tail died before the husband, leaving a son; held that the husband was not entitled to a life estate either under the settlement, or by the curtesy. 7 *Term Rep.* 276.

TENANT AT WILL.

1 After a sale of land by a sheriff under a *fi. fa.* the defendant becomes, *quasi* a tenant at will to the purchaser. *Jackson et. Kane* v. *Sternbergh.* 1 *Johns. Cases*, 153.

2 A tenant at will is considered as holding from year to year, only for the purpose of a notice to quit; but he has no right to such notice, after he has determined his will, by an act of voluntary waste. *Philips* v. *Covert.* 7 *Johns. Rep.* 1.

TENDER.

1 In a plea of tender, the defendant must say he was always ready to pay; ready from the time of the tender is not sufficient. *Haldenby* v. *Tuke.* *Willes*, 632.

To a plea of tender the plaintiff replied a demand and refusal before suing out the writ; rejoinder that before suing out the writ the defendant tendered, &c.; traversing that at any time after the tender and before suing out the writ, the plaintiff requested him to pay, &c.; rejoinder bad. *Ibid.*

2 To constitute a good tender of stock, the buyer must be called on opening the books. *Thornton* v. *Moulton.* 1 *Str.* 533.

3 Tender of stock must be on the very day. *Bullock* v. *Noke.* 1 *Str.* 579.

4 The tender of stock must be at the last part of the day that it can be accepted. *Duke of Rutland*, v. *Batty.* 2 *Str.* 777.

5 In tender of stock, the usual hours of transferring must be set forth. *Bowles* v. *Bridges and Markwick.* 2 *Str.* 832.

6 In a tender of stock, plaintiff must do every thing in his power to make it good. *Clark* v. *Tyson.* 1 *Str.* 504.

7 To a general *assumpsit*, tender and refusal must be pleaded with a *tout temprist*, which cannot be after imparlance. *Giles* v. *Hart.* 2 *Salk.* 622. 1 *L. Raym.* 254.

8 On tender pleaded, the money must be paid into court, or the plaintiff may sign judgment. *Pether and another*, v. *Shelton.* 1 *Str.* 638.

9 In pleading tender in debt, the defendant prays judgment *de dampnis*; but in case, *de ulterioribus dampnis.* *Sweatland* v. *Squire.* 2 *Salk.* 623.

10 In pleading a tender of a sum of money according to a defeazance, which is in a different instrument from the original deed, it is necessary either to plead, that the party has always been and still is ready to pay, or to bring the money into court. *Trevett* v. *Aggus.* *Willes* 110.

Aliter, if the defeazance be in the same deed. *Ibid.*

11 A tender of bank notes is good, unless specially objected to on that

account at the time. *Wright* v. *Reed.* 3 *Term Rep.* 554.

12 Bank notes are not made a legal tender by the 37 G. 3, c. 45. *Grigby* v. *Oakes.* 2 *Bos. & Pull.* 526.

13 Where defendant came into possession of goods wrongfully, no tender is necessary of freight, &c. paid by him in order to enable plaintiff to maintain his action. *Lempriere* v. *Pasley.* 2 *Term Rep.* 485.

14 If *A.*, *B.*, and *C.* have a joint demand, and *C.* has a separate demand on *D.*, and *D.* offer *A.* to pay him both the debts, which *A.* refuses without objecting to the form of the tender, on account of his being entitled only to the joint demand; *D.* may plead this tender in bar of an action on the joint demand, and should state it as a tender to *A.*, *B.*, and *C.* *Douglas* v. *Patrick.* 3 *T. Rep.* 683.

15 A defendant cannot plead *non assumpsit* as to the whole, and a tender as to part. *Maclellan* v. *Howard.* 4 *Term Rep.* 194.

16 A defendant in an action on a bond cannot plead *non est factum*, and a tender as to part. *Jenkins* v. *Edwards.* 5 *Term Rep.* 97.

17 It is no answer to a plea of tender before the exhibiting of the plaintiff's bill, that the plaintiff had, before such tender, retained an attorney and instructed him to sue out a *latitat* against the defendant, and that the attorney had accordingly applied, before the tender, for such writ, which was afterwards sued out. *Briggs* v. *Calverly.* 8 *Term Rep.* 629.

18 To make a legal tender, there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. Therefore where the defendant on departing from home, left 10*l.* with his clerk for the plaintiff; of which the clerk informed the plaintiff when he called and demanded a larger sum; and the plaintiff said he would not receive the 10*l.* nor any thing less than his whole demand; but the *clerk did not offer the* 10*l.*; this was held to be no tender. *Thomas* v. *Evans.* 10 *East.* 101.

19 Tender on a bond with a penalty, is no bar to an action on the bond. *Murry* v. *Harris.* 2 *Johns. Rep.* 24.

20 *A.* having, distrained the goods of *B. to wit. horses*, and house hold furniture, for rent, *C.* promised to deliver the goods to *A.* in six days, or pay 400 dollars, and the goods were left in the possession of *C.* *A.* demanded the goods within the six days, but did not designate any place at which they were to be delivered, and immediately after, and within the six days, went with *C.* to the house of *B.* where the goods were; and *C.* then tendered the goods to *A.* who said he was not ready to receive them, but that if *C.* would carry the goods to *D.*, *A.* would receive them, but *C.* refused to do so. In an action of *assumpsit* by *A.* against *C.*, it was held, that the reply of *A.* to the offer of *C.* to deliver the goods to *A.* at *B's* house, dispensed with any further tender, or delivery on the part of *C.* especially as the articles were bulky and numerous. *Slingerland* v. *Morse.* 8 *Johns. Rep.* 474.

21 There is a difference, in regard to tender, between things portable and things ponderous. If no place be appointed for performance or payment, a tender to the person, who is to receive is sufficient. *Ibid.*

22 Such a tender and refusal are a complete bar to the suit on the contract; and the plaintiff must resort to the person in whose possession the goods are, and who holds them as his bailee, and at his risk. *Ibid.*

23 Where a promissory note was given payable in *produce*, to be delivered on a certain day at the makers house; and in an action on the note, the defendant pleaded payment, and proved that he had *hay* in his barn at the day, ready to deliver to the plaintiff, without shewing the quan-

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lity or value, it was held not to be proof of a tender, or payment. *Newton* v. *Galbraith*. 5 *Johns. Rep.* 119.

24 The act of assembly of the 29th of *January*, 1777, declares, that a tender shall amount to an actual payment, and discharge; whereas a tender at common law, only suspends the interest till a subsequent demand and refusal. 1 *Dallas*, 406, 7, 8.

25 Therefore a tender in continental money, emitted by Congress *before the 29th January*, 1777, is tantamount to payment. *Ibid.*

26 But a tender in bills of credit emitted subsequent to the 29th of *January*, 1777, has only the effect of a tender at common law. *ibid.*

27 A mere offer to pay is not, in legal strictness, a tender; nor is the defendant entitled to take advantage of a tender, unless he pleads it, and brings the money into court. 2 *Dallas*, 190.

TERM.

Term created for a special purpose, after that determined, is attendant on the inheritance in equity, land agreed to be sold, shall go as money, and money agreed to be laid out in land, as land. *Best* v. *Stamford*. *In chan.* 1 *Salk.* 154.

TIMBER.

Beech being admitted to be timber by the custom of the county of Bucks, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at 20 years growth; and therefore upon an issue whether certain beech trees in that county (which after being felled had been distrained for payment of a poor's rate, to which it was contended that they were liable,) were or were not *timber* according to the custom of the county, the enquiry is confined to the nature of the wood, and the period of its growth, whether of 20 years; and no evidence can be received to qualify its character of *timber* by shewing that it was not deemed to be such in the county, unless the tree contained ten feet of solid wood. And the jury having found a general verdict for the plaintiff on that issue, affirming such trees of 20 years growth and upwards, though not containing ten feet of solid wood, to be *timber* by the custom; and also upon another issue negativing them to be *saleable underwood* within the statute 43 Eliz. c. 2; the court refused to grant a new trial. *Aubrey* v. *Fisher*. 10 *East*, 446.

TIME, COMPUTATION OF

1 Commencement *a datu*, includes the day of the date. *Haths* v. *Ash*. 2 *Salk.* 413.

2 From the first of *June*, for three years, begins on the second and ends on the first. *Anon*. *Lofft*, 276.

3 When the computation of time is from or after an act done, the day when the act was done is to be included. *Rex* v. *Adderley*. 2 *Doug.* 463.

4 Insurance of *H.*'s life for a year; *H.* died on the last day insurable; liable. *Sir Robert Howard's case*. 2 *Salk.* 625.

5 *Sunday* not included in the four days to move in arrest of judgment. *Hales* v. *Owen*. 2 *Salk.* 625.

6 In contract for stocks, the computation must be by lunar months. *Jocelyn* v. *Hawkins*. 1 *Str.* 446.

7 Change-alley computation is to be taken by calendar months. *Titus* v. *Lady Preston*. 1 *Str.* 652.

8 Note of 2d *November*, to pay on the 31st of *December* next, means the first *Dec.* following the making of the note. *Carbonel* v. *Davies*. 1 *Str.* 394.

9 The time of plea pleaded is to be

reckoned from the date of the entry of the plea on the record, not from the time of its being delivered to the plaintiff. *Sullivan* v. *Montague.* 1 *Doug.* 109, to 113.

10 A month's time to plead, is a lunar month. *Talbot* v. *Linfield.* 1 *Black.* 450.

In temporal cases, time is computed by lunar months, in ecclesiastical by solar. *Ibid.*

11 A computation of time from the doing of an act commences the instant the act is done. A computation from the day on which the act is done, not until the subsequent day. *Anon.* 1 *L. Raym.* 480.

12 If certain figures are put after the day of a particular month which can be supposed to refer to the year of Christ, it shall be intended that they do refer to it. The court will take notice of the correspondence between the dominical year and the year of any king's reign; therefore, a deed which really is dated according to the dominical year only, may be represented to bear date in the year of the reign of the king with which that dominical year corresponds. *Holman* v. *Burrow.* 2 *L. Raym.* 791. 2 *Salk.* 658.

13 *Sundays* and holidays computed for acts to be done out of court. *Ashmole* v. *Goodwin.* 2 *Salk.* 624.

14 If a man binds himself to do a thing for *J. S.* and in an action thereon, the breach is, that he did not do it for the said *J. S.* though two persons of that name are before mentioned on the pleadings, the words in the breach shall refer to him for whom it was to have been done. *Fitzhugh* v. *Dennington.* 2 *L. Raymond,* 1094.

15 One born at eleven at night the first of *February*, reckoned of age in his twenty-first year the last of *January*, at one o'clock in the morning, so as to make his will. *Anon.* 1 *Salk.* 44.

16 If a writ be made returnable on the octave, &c. of another day, that day shall be included in the computation. *The King* v. *Gumley and another.* 2 *Str.* 811. 2 *L. Raym.* 1528.

17 Where computation of time is to be made from an act done, the day on which the act is done is to be included in the reckoning. *Castle* v. *Burditt.* 3 *Term Rep.* 623.

18 Therefore, when the law requires that a month's notice of an action be given, the month begins with the day on which the notice is served. 3 *Term Rep.* 623.

19 And where the statute 21 Jac. 1, c. 19, s. 2, enacts that a trader, lying in prison two months (i. e. lunar months) after an arrest for debt shall be adjudged a bankrupt, that includes the day of the arrest. *Glassington* v. *Rawlins.* 3 *East,* 407.

20 When the word *month* is used in a statute, without the addition of *calendar*, or any other words to shew that the legislature intended *calendar*, it is understood to mean a lunar month. *Lacon* v. *Hooper.* 6 *Term Rep.* 224.

TITHES.

1 Parson not obligod to take tithe of grass the day it is cut, but may let it lie there long enough to make it into hay; but though the declaration demands damages from the day of cutting, it is well enough. *South* v. *Jones.* 1 *Str.* 245.

2 A new inclosed common shall not be exempted from specific tithes, from which the lands to which it was appurtenant were exempted before the inclosure. *Moncaster* v. *Watson.* 1 *Black.* 402.

3 Nine *moduses* overruled in the exchequer, six of them as too rank, without directing any issue to try their existence. *Torrians* v. *Legge, exchequer.* 1 *Black.* 420.

4 *Qu.* If a prohibition will lie to a court *christian* after a *modus* pleaded, so as no proceeding is had since

the plea? *Graham* v. *Potts*. 1 *Black*. 295.

5 A *modus decimandi*, which in any instance exempts the party from paying either tithe or recompence, is void. A modus for one species of tithe can be no ground for a *modus de non decimando* as to another. *Norton* v. *Brigs*. 1 *L. Raym*. 242.

6 *Modus* set up since the 13 Eliz. binds not the successor. *Anon. Lofft*, 66.

Temporary composition requires notice to determine. *Ibid.*

Endowment of tithes, without usage, fails. *Ibid.*

Mispleader of a *modus*, it seems, produces a decree in kind, but without prejudice. *Ibid.*

7 The rankness of a *modus* is a question of fact, and not of law. *Pyke* v. *Dowling*. 2 *Black*. 1257.

8 Tithe is not payable for milk used in the owner's house, unless the owner's house is out of the parish. No tithes for wood to fence arable land, if in the same parish. *Scoles* v. *Lowther*. 1 *L. Raym*. 129.

9 Action for double damages for tithes, used as a method of trying the right, and not considered as a penal action. *Holloway* v. *Hewit*. *Lofft*, 232.

10 Method of proceeding for subtraction of tithes, discussed both at bar and bench. *Rex* v. *Owen*. 4 *Burr*. 2095.

11 Tithes lie in grant. *Chave* v. *Calmel*. 3 *Burr*. 1873.

12 In debt on statute 2 and 3 Ed. 6, c. 13, for not setting out tithes, where the declaration stated that they were, within forty years next before the statute, *of right yielded and payable* and yielded and paid, evidence that the land had always been remembered to be in pasture, and had never within living memory paid any tithe, is not sufficient to defeat the action. *Mitchell* v. *Walker*. 5 *Term Rep*. 260.

13 But where the declaration only stated that the tithe had been yielded and paid forty years before the statute, and there was no evidence of its ever having been paid at all: held that the plaintiff could not recover. *Lord Mansfield* v. *Clerke*. 5 *Term Rep*. 260, 264, *n*.

14 Evidence, that the parishioners have treated with the proprietor for a composition, is not, alone, sufficient to establish his possession of the tithes; in an action on the statute. 1 *Bos. & Pull*. 458.

15 By a grant of all tithes arising out of, or in respect of *farms*, *lands*, &c. the tithes arising out of, and in respect of rights of common appurtenant to such farms or lands will pass. *Lord Gwydir* v. *Foakes*. 7 *Term Rep*. 641.

16 Hops are by law tithable after they are gathered from the bind; and a custom to set out the tithes by the tenth row, or by the tenth hill, where the rows are unequal, leaving the binds uncut, and the poles standing, cannot be supported. *Knight* v. *Halsey*. 7 *Term Rep*. 86.

[Affirmed in *Dom. Proc*. 19 *June*, 1800. 2 *Bos. & Pull*. 172, *Parl. Ca*. 8vo. vol. 8, *App*.]

17 A custom to pay only a part of the tithe without substituting any thing else in lieu of the remainder, is bad. 7 *Term Rep*. 93.

18 But a custom to pay less than the whole tithe may be good, where something in lieu of, and as a compensation for the rest is paid to the parson. 7 *Term Rep*. 93.

19 No evidence is sufficient to support a real composition, unless it have reference to a deed of composition. 2 *Bos. & Pull*. 206.

20 If a composition for tithes is made by *A*. as proprietor, and he leases them to *B*. whose interest is afterwards put an end to by *A*. before any alteration is made in the composition, *A*. cannot determine it without six months' notice. *Wyburd* v. *Tuck*. 1 *Bos. & Pull*. 458.

21 If *A*. execute a lease of tithes to *B*. on a day subsequent to their severance, but previous to their being carried away by the land holder,

B. cannot maintain an action on 2 and 3 Ed. 6, c. 13; as the right to the tithe vested in *A.* immediately on the severance. 1 *Bos. & Pull.* 458, *n.*

22 Though the proprietor of tithes leave them on the land more than a reasonable time after they are set out, and after he has notice thereof, the owner of the land cannot justify in trespass turning in his cattle upon the land to depasture it in the usual course of husbandry, whereby the cattle consumed the tithes; but his remedy is either by distress of the tithes as *damage feasant*, or by action. *Williams* v. *Ladner.* 8 *Term Rep.* 72.

23 In an action on the statute 2 and 3 Ed. 6, c. 13, for the treble value of tithe corn omitted to be set out, it is not enough for the defendant to shew the existence *in fact*, of a custom in the parish to set out the 11th instead of the 10th mow; for the validity as well as the existence of such a custom is properly triable in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him. *Phillips* v. *Davies.* 8 *East*, 178.

24 At common law grass is titheable in grass cocks, after having been tedded in the course of process of making it into hay. *Newman* v. *Morgan.* 10 *East*, 5.

25 The tithe of turnips drawn to feed cattle held to be properly set out by being thrown aside, as drawn, on a ridge opposite for the parson, without being set out in heaps for him; the farmer not putting the nine parts into heaps for himself. *Blaney* v. *Whitaker.* B. R. cited. 10 *East*, 12.

26 Compositions for tithes ceases on the death of the incumbent with whom they were made, at least as to his successor; but if the successor continue to receive the next payment due after the death of his predecessor, he can only be accountable to the executors for such portion of it as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death, would have amounted to, and not *pro rata*, according to the time which had run before his death from the last payment. *Williams* v. *Powell, Clerke.* 10 *East*, 269.

TITLE.

1 A memorandum was made at the bank, on transferring stock, of a *suspected* defect in the title, which ought not to have been allowed: for a secret trust, as against the party who has open legal title, does not effect the bank. Lord *Mansfield* added, "I won't say a word against the holder of the stock having his action against the bank for disparaging his title." *Lord Mayo's Case. Lofft*, 65.

2 If the title is an appointment to be curate of the rector's church till otherwise provided of some ecclesiastical preferment, or for fault by him committed lawfully removed, the party cannot be removed without cause while the grantor remains rector of that place. *Martyn* v. *Hind.* 1 *Doug.* 143.

And he may bring *assumpsit* against the rector for the salary. *Ibid.*

But if the rector is *bona fide* preferred to another living, the obligation ceases. *Ibid.*

A readership is not ecclesiastical preferment within the meaning of such a title. *Ibid.*

3 A subsequent title, which is both legal and equitable, destroys a prior title in equity only. *Hagshaw* v. *Yates, in chancery.* 1 *Str.* 240.

TOLL.

1 Prescription as lord of the manor for toll of all goods landed *within* the *manor*, in consideration of re-

pairing a *wharf* within the manor, not confining it to the wharf, is good. *Colton* v. *Smith*. *Cowp*. 47. In toll traverse no consideration is necessary. *Cowp*. 48.

2 For toll traverse a consideration must be laid. *Bolton* v. *Smith*. *Lofft*, 468.

Where a consideration is laid, you must prove it as laid, even in cases where it was not necessary to have laid any. *Ibid*.

Consideration of being bound to repair, good, without alleging actual reparation. *Ibid*.

After verdict, consideration will be presumed either the same as laid or a good one. *Ibid*.

3 A prescription to take toll for passing on an ancient navigable river, through the plaintiff's manor, is bad in law. *The Mayor, &c. of Nottingham*, v. *Lambert*. *Willes*, 111.

A prescription for toll thorough cannot be supported, unless a consideration for it be shewn. *Ibid*.

Aliter of a toll traverse; there a consideration is implied. *Ibid*.

4 Toll for corn; malt shall be considered as corn, because the acts of parliament have so considered it, otherwise the specification makes it a new thing; and therefore flour was not liable. *Anon*. *Lofft*, 72.

5 Toll is not incident to a fair. *Holloway* v. *Smith*. 2 *Str*. 1171.

6 Post toll requires a consideration to be shewn, in order to support the demand of it. *Mayor of Yarmouth*, v. *Eaton*. 3 *Burr*. 1402.

7 A general *indebitatus assumpsit* will lie for tolls. *Seward* v. *Baker*. 1 *Term Rep*. 616.

8 If the grantee of a market under letters patent from the crown, suffer another to erect a market in his neighbourhood and use it for the space of 23 years without interruption; he is by such use barred of his action on the case for disturbance of his market. *Holcroft* v. *Heel*. 1 *Bos. & Pull*. 400.

9 If a person claiming a toll for passing over an highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the tolls were, before the time of legal memory, in the same hands, though severed since, it will be presumed that the soil was originally granted to the public in consideration of the tolls; and such original grant is a good consideration to support the demand. *Ld. Pelham* v. *Pickersgill*. 1 *Term. Rep*. 660.

10 In a turnpike act, imposing tolls on horses, &c. "cattle going to, or returning from pasture," and 'horses attending cattle returning from pasture,' were exempted; it was held that a horse ridden by the owner of the cattle at pasture in order to fetch them from pasture, did not come within either of the exceptions. *Harrison* v. *Brough*. 6 *Term Rep*. 706.

11 *British* ships, in passing by the *Eddystone*, and other light houses in the channel, sailing from foreign port to foreign port, and not touching at any place in *Great Britain* or *Ireland*, are not liable to pay the light house duties to the trinity house, under statutes 4 Anne, c. 20, & 8 Anne c. 17. *Trinity-house* v. *Sorsbie*. 3 *Term Rep*. 768.

12 The court of C. P. on a trial at bar, held, that the writ *de essendo quietum de theolonio* is not merely prohibitory, but remedial, on which the parties may plead to issue, on a question of right. And that freemen of the city of *London* have a right to be exempt from the payment of all tolls and port duties throughout *England*, (except the prisage of wines,) in whatever place they reside, and though they have obtained their freedom by purchase. *London* (*Corp*.) v. *King's Lynn* (*Corp*.) 1 *H. Black*. 206.

13 This judgment was reversed in the court of K. B. that court holding that an action would not lie on this writ, until the plaintiff's goods

were distrained for toll. 4 *Term Rep.* 130.

14 But this latter judgment was reversed in *dom. proc.* upon the ground, that though toll be merely *claimed* of the individual members of a corporation exempt from toll, an action will lie on this writ in the name of the corporation. *Dom. Proc. May 2d*, 1796. 6 *Term Rep.* 778. 1 *Bos. & Pull.* 487.

15 The question as to the right of exemption claimed on behalf of *non-resident* freemen was not determined. It seems that they have not any such right. *London* (*Corp.*) v. *Liverpool* (*Corp.*) 1 *Bos. & Pull.* 522, *n.*

16 Whether a right to take toll on goods sold by sample in a market can be supported? *Qu.* 4 *Term Rep.* 107.

17 Whether if no specific toll be granted, the grantee of a market be entitled to any toll; and whether in such case, he can support any action for an injury to his market? 1 *Bos. & Pull.* 400.

18 Where it appeared in evidence upon an action of *indebitatus assumpsit* for toll that a corporation were entitled by a general grant of toll, explained by usage to be due for all commercial goods passing in and out of their city, on horses, or in carts, or waggons, (that is, at the rate of 1d. for every horse load, and 2d. for every cart-load drawn by one horse, and 2d. more for each additional horse;) held that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage coaches, instead of carts or waggons, could not vary the right of toll in the proportion of 2d for each horse drawing the coach, although the number of horses were estimated by the weight of passengers rather than of goods. *Mayor, &c. of Carlisle* v. *Wilson.* 6 *East* 2.

19 An action on the case by the owners of a market, who had a prescriptive right of toll on all corn *brought into the market* to be sold and there sold; alleging that the defendant intending to deprive them of their toll *fraudulently* bought corn *in the market by sample*, knowing that the commodity was not there in bulk at the time of the sale, whereby the plaintiffs were prevented from taking their toll; is not sustained by evidence of the mere fact of such purchase by sample in the market, though with knowledge of the plaintiffs' claim of toll, coupled with the fact of not paying the toll on demand afterwards when the corn was delivered to the defendant in the same borough but *out of the market*; for *non constat* that the corn would otherwise have been brought into the market, or that the defendant did any act to induce the owner of it not to bring it there in the first instance. Neither will the fact of such purchase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn *brought into market, and there sold. The Bailiffs, &c. of Tewkesbury* v. *Diston.* 6 *East* 438.

20 Toll gate keepers sued for acts done under statute 25, G. 3, c. 51, need not be sued in the county where the fact was committed, as they must be under statute 13, G. 3, c. 78, s. 81. *Basing* v. *Skelton.* 5 *Term Rep.* 16.

TOLT.

Qu. If a tolt lies for the defendant, without cause shewn, to remove a plaint from the court baron to the county court? *The King* v. *Morgan, &c.* 1 *Black.* 397.

TOWN.

An act of the legislature, extending the bounds of towns over the adjacent navigable waters, does not

thereby grant the land covered by the water, to the owners, but is merely for the purposes of civil and criminal jurisdiction. *Palmer* v. *Hicks.* 6 *Johns. Rep.* 133.

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TOWN MEETING.

A meeting of a town for the choice of representatives, and for the transaction of ordinary business of the town, may be called by one warrant, distinguishing the different classes of voters. *Craigie* v. *Mellen, et. al.* 6 *Mass.* 7.

TRADE.

1 A man may exercise as many trades as he has worked at or served to seven years. *French qui tam* v. *Adams.* 2 *Wils.* 168.

2 An indictment upon 5 Eliz. c. 4, for exercising a trade without serving an apprenticeship, cannot be preferred at the sessions of a borough. *The Queen* v. *Taylor.* 2 *L. Raym.* 767.

3 Exercising a trade seven years, without any prosecution with effect, a sufficient qualification for the future. *Wallen qui tam* v. *Holton.* 1 *Black.* 233.

4 One not qualified to exercise a trade himself by having served an apprenticeship, entering into partnership with a qualified person, and only sharing the profits, and standing the risks of the partnership, without ever interfering in the trade personally, is not within statute 5, Eliz. c. 4. *Raymond* v. *Chase.* 1 *Burr.* 1. 2 *Wils.* 40.

5 How far trading with an enemy is illegal in a subject? *Qu. Gist* v. *Mason.* 1 *Term Rep.* 84.

6 By the maritime law it is cause of confiscation in a subject, provided he is taken in the act, but it does not extend to a neutral vessel. 1 *T. Rep.* 81.

7 Trade is not transmissible, but is put an end to by the death of the trader. *Barker* v. *Parker.* 1 *T. Rep.* 295.

8 The statute 43, G. 3, c. 153, s. 15, having enabled the king by order in council to licence the importation of certain goods being *British* or neutral property, from the enemy's country in neutral ships; a contract made by *A.* and *B. British* subjects, (the plaintiffs) for the purchase of brandy from a house of trade in *France*, (an enemy) to be shipped from thence in a neutral, on account of *A.* and *B.*; which contract was made in *contemplation of obtaining a licence* for that purpose; which licence was accordingly obtained soon after the making of such contract, and before it was begun to be executed; is a legal contract, and may lawfully be guaranteed in the first instance by *C.* and *D.* other *British* subjects (the defendants.) And after such licence obtained, the guarantees are liable in damages for the non-shipment of the goods by the house in *France*, on board a neutral sent there for that purpose. Though it were objected to the licence legalizing such trade, that it was not made out to *A.* and *B. by name*, but only to *C.* and *D.* and other *British merchants*; and that neither *C.* and *D.* nor even *A.* and *B.* had any property in the goods; whereas the licence required the goods to be imported to be *the property of the said persons or some of them*; and, until shipment, the property continued in the house in *France*. For neither the act of parliament, nor the king's licence required the owners of the property to be *individually named*; and even if the licence were to be so construed, as it only required the goods imported to be the property of "the said persons or some of them," as may be specified *in their bills of lading*;" and as no bills of lading were made out, which might have been made in the name of *C.* and *D.* and if so, would

have conveyed to them a legal or special property in the goods; the defendants *C.* and *D.* were still liable to answer in damages, upon their guarantee, as for the non-performance of a legal contract. *Timson* v. *Merac.* 9 *East*, 35.

TREASON.

1 Words of persuasion or consultation an overt act of treason in compassing the king's death. *Charnock's case, Old Baily.* 2 *Salk.* 631.

2 Commitment for treason, in aiding the escape of *H.* committed for treason, ought to specify the treason for which *H.* was committed. *The King* v. *Kendal and Roe.* 1 *Salk.* 347. 1 *L. Raym.* 65.

A secretary of state may commit for high treason. *Ibid.*

Attainder of treason reversed for want of an *allocatus* before judgment. *The King and Queen* v. *Geary.* 2 *Salk.* 630.

Judgment in high treason reversed, because the court did not demand of the defendant what he had to say. *The King* v. *Speke.* 3 *Salk.* 358.

Private persons may rise to quell a treasonable riot. *The King* v. *the Inhabitants of Wigan.* 1 *Black.* 47.

Warrant for treason executed in court on leave. *The King* v. *Kelly.* 1 *Str.* 530.

One attainted of treason may be charged with a civil action. *Ramsden and another* v. *Mac Donald.* 1 *Wils.* 217.

A traitor was arraigned twice, and two juries sworn to try him, the former jury having been withdrawn on his own consent. *The King* v. *Kinloch.* 1 *Wils.* 157.

A party indicted for high treason is intitled to a copy of the indictment and lists of the witnesses for the crown, and of the jurymen who are to be returned on the pannel, ten days before his arraignment. *Rex* v. *Lord George Gordon.* 2 *Doug.* 590, 591, & *n.*

It is high treason to attempt by intimidation and violence to compel the repeal of a law. *Ibid.*

The method of procedure on a trial at bar for high treason. *Ibid.*

3 On an indictment for high treason in sending intelligence to the enemy, a letter sent by one of the conspirators in pursuance of the common design, with a view of reaching the enemy, is evidence against all engaged in the same conspiracy. *R.* v. *W. Stone.* 6 *Term Rep.* 527.

4 Any intelligence sent to the enemy in order to serve them in shaping their attack or defence, though its object be to dissuade them from an invasion, is high treason. *R.* v. *W. Stone.* 6 *Term Rep.* 529.

5 A commitment for *treasonable practices* is legal. *R.* v. *Despard.* 7 *Term Rep.* 736.

6 A person accused of high treason, shall have a copy of the indictment, a reasonable time, not less than one day, before the trial; and also, within the same time, a copy of the pannel of the jurors. *Respublica* v. *Malin.* 1 *Dallas.* 33.

Adherance to *American* troops though in consequence of mistaking them for the enemy, cannot be treason. *Ibid.*

Words indicating the defendants' intention to join the enemy, are proper testimony, to explain the motives upon which that intent was afterwards carried into effect. *Ibid.*

Evidence may be given of an *overt act* committed in another county, after an *overt act* is proved to have been committed in the county where the indictment is laid. *ibid.*

7 Evidence that the defendant had a power to let people in and out of the city, when in possession of the enemy, ought to be received; but not as conclusive proof of his holding a *commission* under them. *Respublica* v. *Abraham Carlisle.* 1 *Dallas* 35.

But evidence of his seizing salt, or

disarming the *Americans*, does not apply to that species of treason; though it may prove his having joined the armies of the enemy. *Ibid.*

It is enough to lay in the indictment, that the defendant sent intelligence without setting forth the particular letter or its contents. *Ibid.*

The charge of levying war, is not, of itself, sufficient; but assembling, joining, and arraying, with the forces of the enemy, is a sufficient *overt act* of levying war. *Ibid.*

8 There must be an actual enlistment of the person *persuaded*, in order to make it treason in the persuader. *Respublica* v. *John Roberts.* 1 *Dallas*, 39.

If an *overt act* has been proved where the indictment is laid, the defendants confession may be given in evidence to corroborate that proof. *Ibid.*

9 Treason is a crime known at common law. *Respublica* v. *Samuel Chapman.* 1 *Dallas*, 53.

10 Treason which is nothing more than a criminal attempt to destroy the government, may be committed before the different qualities of the crime are defined, and its punishment declared by possitive law. *Ibid*, 57.

11 When the confession of a party shall be evidence on a trial for high treason. *Respublica* v. *M'Carty.* 2 *Dallas*, 86, 7.

Enlisting, or procuring any persons to be enlisted, in the service of the enemy, is clearly an act of treason. *Ibid.*

12 Nothing will excuse the act of joining an enemy, or levying war, but the fear of immediate death. *Ibid.* See also *United States* v. *Vigol.* 2 *Dallas*, 347.

13 The obscure passage in the clause relating to misprisons of treason, would be rendered perspicuous and intelligible, without the addition of any words, by expunging the semicolon, and the monosyllable *or*. *Respublica* v. *Weidle.* 2 *Dallas*, 88.

The words charged must be spoken with a malicious and mischievous intention in order to render them criminal, as misprison of treason; but drunkenness is no excuse or justification. *Ibid.*

14 The number of jurors that may be returned, and the form of the pannels on trials for high treason. The *United States* v. *The Insurgents of Pennsylvania.* 2 *Dallas*, 335 to 342.

A copy of the *caption* of the indictment as well as of the indictment itself, must be delivered to the prisoner. *Ibid.*

What is a sufficient addition, and what a sufficient definition of the places of abode, of jurors and witnesses. *Ibid.*

15 A reasonable time shall be allowed, after the list of the names of the witnesses is furnished to the prisoner, for the purpose of bringing testimony from the counties in which those witnesses live. *United States* v. *Stewart*; and same v. *Wright.* 2 *Dallas*, 343, 4.

16 What constitutes treason by levying war against the *United States*, and how to be proved. *United States* v. *Vigol.* 2 *Dallas*, 346, 7; and *United States* v. *Mitchell.* 2 *Dallas*, 348 to 356.

If the overt act of treason is proved, and laid before the charge was presented, it is sufficient, and whether committed by the number of insurgents specified in the indictment, is immaterial. *Ibid.* 347.

17 Attainder for treason does not forfeit the estate of tenant by the curtesy initiate. 4 *Dallas*, 168.

18 To constitute a *levying of war* there must be an assemblage of persons for the purpose of effecting *by force* a treasonbble purpose. *Enlistment* of men to serve against government is not sufficient. *Ex parte Bollman and Swartwout.* 4 *Cranch*, 75.

When war is levied, all those who perform any part, *however minute*, or *however remote* from the scene of action, and who are actually *leagued*

in the general conspiracy, are traitors. *Ibid.*

Any assemblage of men for the purpose of revolutionizing *by force* the government established by the *United States* in any of *its territories*, although as a step to, or the means of executing some greater projects, amounts to levying war. *Ibid.*

The travelling of *individuals* to the place of rendezvous is not sufficient, but the meeting of particular *bodies of men*, and their marching from places of *partial* to a place of general rendezvous, is such an assemblage as constitutes a levying of war. *Ibid.*

19 To levy war, is to *raise*, *create*, *make*, or *carry on war*. *Appendix. United States* v. *Aaron Burr.* 4 *Cranch*, 470.

If an army be actually raised for the avowed purpose of carrying on war against the *United States*, and subverting their government, a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplies that army with provisions is guilty of an overt act of levying war. *Ibid.*

So is a recruiting officer, who, though never in camp, executes the particular duty assigned to him. *Ibid.*

The term "*levying war*" is used in the constitution of the *United States* in the same sense it was understood in *England* and in this country to have been used in the statute of 25 Ed. 3, from which it was borrowed. *Ibid.*

All those, who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may be said to levy war. *Ibid.* 472.

Those, who *perform a part* in the prosecution of the war, may be correctly said to levy war. *Ibid.*

But *quære*. whether he who counsels and advises, but performs no act in prosecution of the war; or he who, being engaged in the conspiracy, fails to perform his part, can be said to levy war? *Ibid.*

20 If the war be actually levied, if the accused has performed a part, but is *not leagued in the conspiracy*, and *has not appeared in arms* against his country, he is not a traitor. *Ib.* 474.

21 *Constructive treason* is where the direct and avowed object is not the destruction of the sovereign power. Appendix, *United States* v. *Aaron Burr.* 4 *Cranch*, 475, 6, 7, 8.

22 Where a body of men are *assembled* for the purpose of making war against the government, *and are in a condition to make the war*, the assemblage is an act of levying war. *Ibid*, 475.

23 The assemblage of men which will constitute levying *war*, must be a warlike "assemblage," carrying the appearance of force, and in a situation to practice hostility. *Ibid*, 480.

24 An assemblage of men, with a treasonable design, *but not in force*, nor in a condition to attempt the design, nor attended with warlike appearances, does not constitute the fact of levying war. *Ibid*, 482.

25 To assemble an army of 7,000 men is to place those, who are assembled *in a state of force*. *Ibid*, 484.

26 The travelling of several individuals to the place of rendezvous, either separately or *together*, but not in *military form*, would not constitute levying war. The act must be unequivocal, and have a warlike appearance. *Appendix*, *United States* v. *Burr.* 4 *Cranch*, 485.

27 War can only be levied by the employment of *actual force*. Troops must be embodied; men must be *openly* assembled. *Ibid*, 487.

28 Arms are not an indispensable requisite to levying war; nor the actual *application of force to the object*. *Ibid*, 488.

29 It is not sufficient that an indictment for treason allege generally that the accused had *levied war*, against the *United States*.

The charge must be more particularly specified by laying an *overt act of levying war*, and this overt act must be proved as laid. *Ibid*, 490.

A person may be concerned in a treasonable conspiracy, and yet be *legally* as well as actually *absent* while some one act of the treason is perpetrated. *Ibid.*

30 Every one concerned in a treasonable conspiracy is not constructively present at every overt act of the treason committed by others not in his presence. *Ibid.*

31 A man may be legally absent who has counselled or procured the treasonable act. *Ibid*, 491.

32 The prisoner can only be convicted upon the overt act laid in the indictment. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged. *Ibid*, 493.

33 A person cannot be constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to afford assistance if necessary. *Ibid*, 494.

If the particular overt act of treason charged, be advised, procured, or commanded by the accused, he is guilty *accessorily* and not *directly* as principal. *Ibid.*

A person in one part of the *United States* cannot be considered as *constructively present* at an overt act committed in a remote part of the *United States*. *Ibid.*

34 The presence of a party, where presence is necessary to his guilt, is part of the *overt act*, and must be proved by two witnesses. *Appendix. United States* v. *Burr*. 4 *Cranch*, 500.

An indictment charging a person with being present at an overt act of treason, cannot be supported by proving only that the person accused caused the act to be done by others in his absence. No presumptive evidence, no facts from which presence can be inferred, will satisfy the constitution and the law. *Ibid.*

35 The part which a person takes in the war constitutes the overt act, on which alone he can be convicted. *Ibid*, 502.

Quære. Whether he who procures an act may be indicted as having performed that act? *Ibid.*

36 If proof of procurement is admissible in *England*, to establish a charge of *actual* presence, on an indictment for *levying war*, it is only by virtue of the operation of the *common law* upon the statute of Edward 3. *Ibid*. 503.

Quære, Whether there be in this country a similar operation of the *common law*. *Ibid.*

If proof of procurement be admissible upon a charge of presence, such procurement must be proved in the same manner, and by the same kind of testimony as would be required to prove actual presence. *Ibid.*

37 The conviction of some one, who has *committed the treason*, must precede the trial of him who has advised or procured it; and the right of the prisoner to call for the record of conviction is not waived by pleading to the indictment. *Ibid*, 505.

Quære. Whether the crime of advising or procuring a levying of war be within the constitutional definition of treason? *Ibid.*

38 If the overt act be not proved by *two witnesses*, so as to be submitted to the jury, all other testimony is *irrelevent*. *Ibid*, 506, 7.

39 *Levying war*, is an act compounded of law and fact, of which the *jury*, aided by the court, must judge. *Ibid*, 507.

Appearing at the head of an army would be an *overt act of levying war*. So also detaching a military corps from it, for military purposes. *Ib.*

TREATY.

1 Of the right of *British* subjects to hold and to convey lands in the *United States* under the treaty of 1794.

Commonwealth v. *Sheafe*. 6 *Mass.* 441.

2 Under the treaty of amity, commerce, and navigation between *Great-Britain* and the *United States* of *America*, confirmed by statute 37 G. 3, c. 97, (see s. 22, 23, of that act, and also 37 G. 3, c. 117,) it is not necessary that the trade from *America* to the *British* settlements in the *East-Indies* should be direct; it may be carried on circuitously by the way of *Europe* and of *Great-Britain* in particular. *Wilson* v. *Murry et al.* 3 *Term Rep.* 31. *Affirmed in cam. scac.* 1 *Bos. & Pull.* 430.

3 After the peace, the court would not sustain a suggestion filed by the attorney-general, against one who was attainted in pursuance of a proclamation issued during the war, as a proceeding of that kind would contravene an express article in the treaty of peace with *Great-Britain*. 1 *Dallas*, 233.

4 No foreign power can institute any kind of judicature in the *United States*, unless warranted by treaty. 3 *Dallas*, 16.

The admiralty jurisdiction exercised by the consuls of *France*, not being warranted by the treaties with *France*, is not of right. *Ibid.*

5 What evidence is requisite for issuing a warrant to apprehend a *French* deserter, under the 9th article of the consular convention. 3 *Dallas*, 42, to 54.

6 Debts due to *British* subjects before the war, though sequestered, or paid into the state treasurers, revived by virtue of the treaty of peace, and the creditors are entitled to recover them from their original debtors. 3 *Dallas*, 4, 5, 199, to 285.

7 Whether an alien can take and hold real estate by devise, under the protection of the treaty of peace with *Great-Britain*. *Quere*. 3 *Dallas*, 305, 6, *in n.*

8 What is a lawful repair of a *French* privateer under the 9th article of the treaty with *France*. 3 *Dallas*, 319.

TRESPASS.

I. *In what cases maintainable.*
II. *Justification; what shall be, and how to be pleaded.*
III. *Evidence, Verdict, &c.*

I. *In what cases maintainable.*

1 Trespass lies against an excise officer for breaking and entering the plaintiff's house, under a warrant of the commissioners of excise, obtained upon the defendant's own information that he suspected teas were concealed in or about the plaintiff's house, where no such goods are found. *Bostock* v. *Saunders*. 3 *Wils.* 434. 2 *Black.* 912.

2 Trespass for *mesne* profits lies where one tenant in common recovers against another in ejectment by default. *Goodtitle* v. *Tombs*. *Wils.* 118.

3 Trespass does not lie for taking an excessive distress. *Lynne* v. *Moody*. 2 *Str.* 851.

4 Trespass lies for fishing *in libera piscaria*, and taking his fish. *H.* who hath free warren, may bring trespass against any but the owner of the soil for hunting there. *H.* having *libera piscaria* hath property in the fish. *Smith* v. *Kemp*. 2 *Salk.* 637.

5 Bankruptcy is not a bar to trespass for *mesne* profits. *Goodtitle* v. *North*. 2 *Doug.* 584, 585.

6 Trespass in a common to dig up coney burrows in a common. *Cope* v. *Marshall and another*. 2 *Wils.* 51.

7 A man who lets land excepting the trees, cannot maintain trespass against the lessee for letting his cattle bark the trees. *Glenham* v. *Hanby*. 1 *L. Raym.* 739.

8 A tree belongs to the person or persons in whose land the root

grows. One of several tenants in common of a tree may maintain an action against the others for cutting it down. *Waterman* v. *Soper.* 1 *L. Raym.* 737.

9 Trespass and false imprisonment lies in *England* by a native *Minorquin*, against a governor of *Minorca*, for such injury committed by him in *Minorca*. *Mostyn* v. *Fabrigas.* *Cowp.* 161.

10 Taking *bona et catalla* is too general in trespass; declaration must specify what the goods taken were. *Wyat* v. *Effington.* 1 *Str.* 637.

11 Wife *de facto* only may bring trespass for assault by husband. *Westbrook* v. *Strutville.* 1 *Str.* 79.

12 Trespass *vi et armis* lies against the sheriff for taking the goods of *A.* instead of the goods of *B.* by his bailiff, upon the sheriff's warrant upon a *fieri facias*. *Sanderson* v. *Baker and another.* 3 *Wils.* 309. 2 *Black.* 832.

13 An officer attaching goods, and continuing possession of the house, or keeping the goods therein for a long and unreasonable time, without removing them to a place for safe custody, is a trespasser *ab initio*. *Reed* v. *Harrison.* 2 *Black.* 1216.

14 Trespass lies for procuring by awe, fear, and influence, contrary to his own inclination, a sovereign, independent, and absolute foreign prince to imprison the plaintiff. *Rastel* v. *Verelst.* 2 *Black.* 1055.

15 Trespass will not lie for an imprisonment which was merely in consequence of the capture of a ship as prize, although the ship shall have been acquitted. *Le Caux* v. *Eden.* 2 *Doug.* 591, to 613.

Qu. If it will lie for unnecessary personal severity by the captor. *Ibid.*

The defendant may avail himself of the defence of capture as prize, on the plea of the general issue. *Ibid.*

16 *Qu.* If trespass will lie for procuring a foreign prince to imprison the plaintiff, unless such procurement amounts to command or compulsion. *Rafael* v. *Verelst.* 2 *Black.* 983.

17 Trespass will lie against the sheriff if his officer take the goods of *A.* on a *fi. fa.* against those of *B.* *Ackworth* v. *Kempe.* 1 *Doug.* 40, to 43.

18 *Messuagium sive tenementum*, is well in trespass. *Vice* v. *Burton.* 2 *Str.* 891.

19 A declaration in trespass for taking goods must specify what the goods taken were. *Wiatt* v. *Effington.* 2 *L. Raym.* 1410. *Str.* 637.

20 Baron may bring trespass for entering his house and beating his wife. *Dix* v. *Brookes.* 1 *Str.* 61.

21 It is a trespass to set tables in a market-place for the sale of goods thereon, without leave of the owner of the soil. *The Mayor of Norwich* v. *Swan.* 2 *Black.* 1116.

22 Trespass for entering the plaintiff's house and assaulting him. Assaulting and menacing his servants may be laid by way of aggravation, but must not make several counts of it. *Newman* v. *Smith and another.* 2 *Salk.* 643.

23 Trespass will not lie against the sheriff, or his officer, for arresting a certificated bankrupt, a peer, a discharged insolvent, &c. *Turlton* v. *Fisher.* 2 *Doug.* 671 to 677.

24 Trespass lies for an accidental hurt. *Underwood* v. *Hewson.* 1 *Str.* 596.

25 Whatever trespass may be repeated, may be laid with a *continuando*, therefore hunting may be laid with a *continuando*. *Monckton* v. *Pashley.* 2 *L. Raym.* 974. 2 *Salk.* 638.

26 Trespass lies against an officer of customs for a wrong seizure, notwithstanding probable cause. *Leglise* v. *Champante, at Guildhall.* 2 *Str.* 820.

27 Trespass and false imprisonment lies against a justice for committing upon a conviction for destroying game, where there was no attempt to distrain first. Warrant, a sufficient justification to a constable in

a matter within the justice's jurisdiction; *secus* where it is plainly out of it. *Hill* v. *Bateman & another.* 2 *Str.* 710.

28 Where distress escapes, distrainer cannot bring trespass, unless it be shewn to be wholly without his default; otherwise, if it had died. *Vasper* v. *Eddows.* 1 *Salk.* 248. 1 *Lord Raymond*, 719.

29 Condemnation of goods in the exchequer is so conclusive, and so alters their property, that trespass will not lie against the officer who seized them, to try the point of forfeiture again. *Scott and Shearman.* 2 *Blaçk.* 977.

30 The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land, cannot put up spouts to collect that rain, and discharge it upon such land in a body.

For an act immediately injurious, trespass is the proper remedy; for an act consequently so, case. Fixing a spout so as to discharge water upon the land of another, is only consequentially injurious.

If a man has a right to use a yard in common with the owner, he will not be a trespasser by entering it to do an act which must be consequentially injurious to the owner of the yard. *Reynolds* v. *Clarke.* 2 *L. Raym.* 1399. *Str.* 634.

31 Trespass *vi et armis* will lie wherever there is an exclusive right. *Wilson* v. *Macreth.* 3 *Burr.* 1826.

1st. As an exclusive right to dig turf in a certain moss in a waste. *Ibid.*

2d. So, a right to a sole and separate pasture for a time. *Ibid.*

3d. But not for a right in common with others. *Ibid.*

32 If *H.* requests another to take goods, he is a trespasser. In trespass for taking goods the officer need only shew a writ of execution; otherwise of a common person, unless in aid of the officer by his command; the command is traversable. *Britton* v. *Cole.* 1 *Salk.* 408. 1 *L. Raymond*, 805.

33 Trespass for impounding the plaintiff's mare; the defendants plead damage feasant to the king in his forest of *Waltham*; the plaintiff replies and shews his right of common in the place in which, &c.; the defendant rejoins that the mare was mangy and doing damage, and therefore they took and impounded her, because she was wrongfully and unlawfully in the forest; the plaintiff surrejoins, and traverses that the mare was wrongfully and unlawfully in the forest; the defendants take issue on the traverse, demurrer and rejoinder. The defendant's rejoinder is a departure from their plea. Faults in both pleadings; but whoever makes the first default shall have judgment against him. *Palmer* v. *Stone and another.* 3 *Wils.* 96.

34 Trespass for entering his house and taking *separal claves pro apertione ostiorum domus*, &c. good, without shewing number. *Layton* v. *Grindall.* 2 *Salk.* 643.

35 Trespass *vi et armis* maintained against the person who originally throws a squib, which, after being thrown about in self defence by other persons, puts out the plaintiff's eye. *Scott an Infant, by his next friend* v. *Shepherd an Infant, by his Guardian.* 3 *Wils.* 403. 2 *Black.* 892.

36 Trespass lies against the assignees under a commission of bankruptcy, sued out against a victualler, or any other person not liable to be a bankrupt. *Perkins* v. *Proctor and Green.* 2 *Wils.* 382.

37 *Contra pacem* is substance, must be taken advantage of on special demurrer. *Incledon* v. *Burgess.* 2 *Salk.* 636.

38 Trespass for taking two Does *ipsius querentis*, bad. *Mallock* v. *Eastley.* 3 *Salk.* 291.

39 Trespass in cutting down such a number of trees cannot be continued, but a general *continuando* shall be applied to what may be contin-

ed after verdict. *Brook* v. *Bishopp.* 2 *Salk.* 639. 2 *L. Raym.* 823.

40 Trespass for taking fish, and did not say *suos*, not good. *Gibbs* v. *Wooliscott.* 3 *Salk.* 291.

41 Trespass will not lie either against the party or the officer for an arrest upon process out of an inferior court, in an action, the cause of which arose out of the jurisdiction of the inferiour court. *Truscott* v. *Carpenter and Mann.* 1 *L. Raym.* 229.

42 Where in entering *H.*'s close there is only force in law, *H.* cannot lay hands on the trespasser before requested to depart; otherwise where there is actual force. *Green* v. *Goddard.* 2 *Salk.* 641.

43 Trespass by lessee of a copyholder for life, for cutting down by the lord of the manor, held maintainable in K. B. and affirmed in exchequer chamber, but reversed by the lords. *Ashmead* v. *Ranger.* 2 *Salk.* 638. 1 *L. Raym.* 551.

44 Trespass against customhouse officers for entering plaintiff's house and searching for prohibited goods, where they found none. The jury find 200l. damages against them, though they did very little or no damage; and a new trial refused. *Redshaw* v. *Brook and others.* 2 *Wils.* 405.

45 To entitle a man to bring trespass, he must, *at the time* when the act was done which constitutes the trespass, either have the *actual possession* in him of the thing which is the object of the trespass, or else he must have a *constructive possession* in respect of the right being actually vested in him, as in the case of an estray or wreck *before* seizure by the lord. *Smith* v. *Milles.* 1 *Term Rep.* 480.

46 An executor's right is derived from the will, the probate is only evidence of it; therefore he has a constructive possession from the testator's death. 1 *Term Rep.* 480.

47 *A.* having let his house ready furnished to *B.* cannot maintain *trespass* against the sheriff for taking the furniture under an execution against *B.* though notice were given that the goods belonged to *A.*; because trespass is founded on a *tort* done to the possession, which was not in *A.*, at the time. *Ward* v. *Macauley.* 4 *Term Rep.* 489.

48 *A.* demised to *B.* the milk of twenty-two cows to be provided by *A.*, and to be fed at *A.*'s expence on certain closes belonging to *A.*; *A.* covenanting that *B.* might turn out a mare, and that no other cattle should be fed there; held that the separate herbage and feeding of those closes passed to *B.*, and that *B.* might distrain other cattle of *A.* doing damage there. *Burt* v. *More.* 5 *Term Rep.* 329.

49 In such case *B.* might maintain trespass against strangers. 5 *Term Rep.* 333.

50 Where a person has *vesturam terræ*, or *herbagium terræ*, he may maintain trespass *quare clausum fregit.* 5 *Term Rep.* 335.

51 One who has contracted with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass *qu. cl. fregit* against any person entering the close and taking the grass, even with the assent of the owner. *Crosby* v. *Wadsworth.* 6 *East.* 602.

52 Trespass will not lie in this country for entering a house in *Canada*, because the cause of action is local. *Doulson* v. *Matthews.* 4 *Term Rep.* 503.

53 Trespass lies, and not case, for working an estray, although the original taking be admitted to be lawful. *Oxley* v. *Watts.* 1 *Term Rep.* 12.

54 Officers doing their duty shall not be trespassers by relation. 1 *Term Rep.* 480, 1.

55 A sheriff or his officers shall not be trespassers by relation, if the first taking were lawful. *Ibid.*

56 Trespass does not lie against excise officers who enter into a person's house by virtue of a legal warrant to search for smuggled goods, although none such be found therein. But case lies for maliciously obtaining or executing the warrant. *Cooper* v. *Boot, in error.* 1 *Term Rep.* 535, *n.*

57 Trespass lies against the searchers of leather, (appointed by statute 2 Jac. 1, c. 22,) for seizing leather sufficiently dried, in order to carry it before other officers called triers, though in their judgment it is sufficiently dried. *Warne* v. *Varley.* 6 *Term Rep.* 443.

58 Trespass lies against a landlord, who on making a distress for rent turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress. *Etherton* v. *Popplewell.* 1 *East*, 139.

59 Where a justice of the peace maliciously grants a warrant against another without any information laid before him, upon a supposed charge of felony, the remedy against the justice, is trespass and not case. *Morgan* v. *Hughes.* 2 *Term Rep.* 225.

60 If *A.*, having been robbed, suspect *B.*, to be guilty, and take him and deliver him into the charge of a constable present; *B.*, if innocent, may maintain trespass against *A.* *Stonehouse* v. *Elliott.* 6 *Term Rep.* 315.

61 A father may maintain trespass for breaking, &c. his house, and debauching his daughter, *per quod servitium amisit*, though the daughter be above 21 years of age, where acts of service are proved, though there be no contract for service. *Bennett* v. *Alcott.* 2 *Term Rep.* 166.

62 Where this kind of offence is accompanied with an illegal entry of the father's house he has his election either to bring trespass for the breaking, &c. and lay the debauching of the daughter and loss of her service as consequential; or he may bring the action on the case merely for debauching the daughter, *per quod servitium amisit.* 2 *Term Rep.* 166.

63 Licence to enter the plaintiff's house, if pleaded, is a bar to the former action; but it cannot be given in evidence under the general issue. *Ibid.*

One in possession of glebe land under a lease void by the statute 13 Eliz. c. 20, by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrong doer. *Graham* v. *Peat.* 1 *East*, 244.

64 To trespass for breaking and entering, &c. and pulling down and taking away certain buildings. &c. The defendant as to the breaking and entering suffered judgment by default, and pleaded not guilty as to the rest. Held that such plea was sustained by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises on a foundation of brick, for the purpose of carrying on his trade, and that he still continued in possession of the premises at the time when, &c. though the term was then expired. *Penton* v. *Robart.* 2 *East*, 88. (And see 3 *East*, 38.)

65 Trespass laid with a *quod cum* is bad on a general demurrer. 1 *Mass.* 96.

66 Trespass will not lie for a consequential injury. 1 *Mass.* 145.

67 Trespass *vi et armis* lies against a sheriff for the act of his deputy. 1 *Mass.* 530.

68 An action of trespass *vi et armis* does not lie against assessors for an error in judgment, in omitting to assess some taxable estate; provided they have been duly chosen and qualified, the tax legally ordered, the assessment made and the warrant issued in due form of law, and the poll or estate of the plaintiff be legally taxable. *Dillingham* v. *Snow et al.* 5 *Mass.* 547.

69 A having entered the close of *B.*

and cut a quantity of cord wood, sells the same to *C.* who hires *D.* the master of a coasting vessel to go in company with *C.* and transport the wood to the market; *D.* was held liable for the value of the wood in an action of trespass *quare clausum fregit* brought by *B.* although it was agreed that he was ignorant of the original trespass committed by *A. Higginson et al.* v. *York.* 5 *Mass.* 341.

70 Where a justice of the peace, after a *certiorari* from this court was delivered to him, proceeded to try the issue of traverse on an indictment under the act to prevent forcible entries and detainers, and the defendant being found guilty, the writ of *restitution* was awarded, and the defendant turned out of possession; it was held, that the proceedings of the justice, after the *certiorari*, were *coram non judice*, and void, and that he was liable to an action of *trespass*, at the suit of such defendant. *Case* v. *Shepherd.* 2 *Johns. Cases*, 27.

Where an entry is followed by an *ouster*, the party can recover damages only for the mere entry or trespass; but if he makes a reentry, and lays his action with a *continuando*, he may then, recover damages for the mesne profits, or subsequent acts, as well as for the trespass. *Ibid.*

71 Where a justice of the peace under the *ten pound* act, issued an execution voluntarily, and without any authority from the plaintiff, against the body of a defendant who was by law privileged from imprisonment, it was held that the justice was liable to an action for false imprisonment. *Percival* v. *Jones.* 2 *Johns. Cases*, 49.

72 Where a judgment was recovered before a justice, who asked the defendant if execution should issue, and the defendant said he did not care how soon, and did not state that he was a freeholder and had a family, or claim any exemption from imprisonment; and the justice thereupon, without any directions from the plaintiff, who was not present, issued an execution against the body of the defendant, on which he was imprisoned 30 days; in an action brought by him against the justice, for an assault and battery and false imprisonment, it was held, that the justice was not liable. *Hess* v. *Morgan.* 3 *Johns. Cases*, 84.

73 A *lessor* cannot maintain trespass *quare clausum fregit* against a stranger, for cutting down and carrying away trees, while there is a tenant in possession. The action can only be brought by the tenant in actual possession. *Campbell* v. *Arnold.* 1 *Johns. Rep.* 511.

74 If *A.* say to *B.* I give you the corn growing in yonder field, belonging to *A.* and when the corn is ripe *B.* enter, and cut and carry it away, he will be considered a trespasser, for the gift is not valid without an immediate delivery. *Noble* v. *Smith.* 2 *Johns. Rep.* 52.

75 Where the owner of lands agrees with another, that he may sow the land on shares, they may maintain a joint action of trespass against a third person, who cuts and carries away the corn. *Foot and Litchfield* v. *Colvin et al.* 3 *Johns. Rep.* 216.

76 A lessor cannot maintain an action of trespass *quare clausum fregit* against a sub-tenant at will of the lessee, for taking down and carrying away a house, erected by him on the demised premises, during the lease. *Toby* v. *Webster.* 3 *Johns. Rep.* 468.

77 If a person having *possessory* title to land enters *by force* and turns out a person, who has a naked possession only, the latter cannot maintain trespass against the person so entering under colour of title. *Hyatt* v. *Wood.* 4 *Johns. Rep.* 150.

If a person having legal right of entry on land, enters *by force*, though he may be indicted for a breach of the peace, yet he is not liable to a

private action of trespass, at the suit of the person who has no right, and is turned out of possession. *Ib.*

Where a tenant holds over the term, and the landlord enters *by force*, and turns him out, he cannot maintain trespass against the landlord. *Ibid.*

78 Where *A.* having been in possession of the land about ten years, afterwards on the 7th of *November*, sold all his right, interest and improvement to *B.* and promised to deliver up the possession on the 1st day of *March* following, and acknowledged that he held possession under *B.* it was held that *A.* was the tenant of *B.* and having continued in possession after the 1st of *March*, he became a tenant at sufferance, and that by the entry of *B.* an end was put to the tenancy, so that *B.* might maintain trespass, *quare clausum fregit* against one claiming to hold under *A.* *Wood* v. *Hyatt.* 4 *Johns. Rep.* 313.

Such title in *B.* is sufficient to support the plea of *liberum tenementum* in an action of trespass against him. *Ibid.*

79 Where a person died possessed of land, before occupied by his ancestors, leaving a widow, and three infant children, and the widow entered and kept possession; it was held that she might maintain trespass; and that having again married, her husband must be joined in such action. *Byrne* v. *Van Hoesen.* 5 *Johns. Rep.* 66.

80 Where *A.* let a house except one inner room which he reserved to himself, and occupied separately; and the outer door of the house being open, a constable broke open the door of the inner room, occupied by *A.* in order to arrest him, it was held trespass would not lie, at the suit of *A.* against the constable. *Williams* v. *Spencer.* 5 *Johns. Rep.* 352.

81 *A.* the owner of land brought an action of trespass against *B.* for entering his land, and cutting down trees, &c. The action was compromised and *B.* paid the damages to *A.* which was equal to the value of the trees, which *B.* had served and split into shingles. *A.* afterwards took away the shingles, and *B.* brought an action of trespass against him, for taking and carrying them away. It was held, that the compromise of the trespass by *B.* and paying the damages to *A.* to the value of the trees, &c. did not transfer the property in the trees to *B.* nor did *B.* by converting the trees into shingles change the right of property. *Betts and Church* v. *Lee.* 5 *Johns. Rep.* 348.

82 *A.* brought an action of trespass against *B.* before a justice of the peace, for cutting down wood on the land of *A.* and making it into coal; and the value of the wood cut down, and a countermand of *B.* for the coals, were submitted to a jury, who found a verdict for the plaintiff. *B.* afterwards brought an action of trover against *A.* for the coals, which still remained on the land of *A.* and the question was again submitted to a jury; it was held, that *B.* being a wilful trespasser, could acquire no property in the coals, which remained in the possession of the owner of the timber. *Curtis* v. *Groat.* 6 *Johns. Rep.* 168.

88 Where a trespasser takes a chattel into his own possession, and the owner sues for and recovers damages for the specific chattel, so taken and detained, the property is by the operation of law, changed, and transferred to such trespasser. *Ibid.*

Where *A.* delivered to *B.* a number of cows and sheep which *B.* promised to redeliver, within one year with the natural increase, and to pay for such as should be lost or destroyed, and not redelivered; this was held a letting of the chattels for a year, for a valuable consideration, and not a naked bailment, and that *A.* could not maintain *trespass* against

a person, who took them out of the possession of *B.* *Putnam* v. *Wyley.* 8 *Johns. Rep.* 432.

84 If *A.* enters on the land of *B.* to take a chattle belonging to *A.* without the consent of *B.* it is a trespass. *Heermance* v. *Vernoy.* 6 *Johns. Rep.* 5.

85 In an action of trespass brought by an officer who has seized goods under an execution against a third person, for taking them away; it was held, that the possession of the officer, by virtue of the execution, was sufficient to enable him to maintain *trespass* or trover; and that proof of the seizure by virtue of the execution, was sufficient, without producing the judgment. *Barker & Knapp* v. *Miller.* 6 *Johns. Rep.* 195.

86 Trespass lies against a tenant at *will*, for a voluntary waste, as in cutting timber; for the injury amounts to a determination of the tenancy. *Phillips* v. *Covert.* 7 *Johns. Rep.* 1.

87 A person who finds a tree on the land of another containing a swarm of bees, and marks it with the initials of his name, does not thereby acquire any property in the bees, so as to enable him to maintain trespass against a person for cutting down the tree and carrying away the bees. *Gillet* v. *Mason.* 7 *Johns. Rep.* 16.

88 Where *A.* the owner of land, wrote a letter dated the 27th *March*, 1804, to *B.* saying "I will consent to your taking my timber upon the terms proposed in your letter, but restricting you to that which has been injured by fire, in the first place, preferring that you should begin between *Baxter's* lot and the creek," &c. and on the 31st *March*, 1806, he executed a power of attorney to *C.* with authority to revoke the permission given to *B.* and which on the 6th of *July*, 1806, was shewn to *B.* who was forbidden to cut any more timber. It was held, that the letter to *B.* was a mere license to cut timber, and revocable; and that *B.* was liable to an action of trespass for all the timber cut by him, after notice of the revocation; and that if the letter of *A.* was founded on any propositions of the defendant, so as to make a contract, which might justify the trespass, it was incumbent on the defendant to shew such proposition. *Tillotson* v. *Preston.* 7 *Johns. Rep.* 285.

89 Letting land upon shares, for a single crop, does not amount to a lease of the land, and the owner alone can bring *trespass.* *Bradish* v. *Schenck.* 8 *Johns. Rep.* 151.

If one of two tenants in common brings an action of trespass, the omission to join the other can only be taken advantage of by a plea in abatement. *Ibid.*

90 Where a trespass is committed on lands reserved by the state for the support of the gospel and schools, or on lands belonging to the state, the suit must be brought in the name of the *overseers of the poor* of the town in which the trespass is committed, in order to entitle the plaintiff to recover *treble damages*, under the act of the 25th of *April*, 1805, (sess. 28, c. 94.) If the suit is brought by the *supervisors*, under the act of the 5th of *February*, 1810, (sess. 33, c. 5,) or the act passed 11th of *April*, 1808, (sess. 31 c. 18) the plaintiff is not entitled to *treble damages.* In order to recover *treble damages*, in cases where the party is entitled to them, the declaration of the plaintiff should refer to the act, that the defendant may be appraized of the extent of his demand, and the jury must find him guilty of the trespass alleged, and assess the single value of the timber or trees cut, and this finding of the jury must be endorsed on the *postea*, on the return of which the *court* will, on motion, treble the damages. *Newcomb* v. *Butterfield.* 8 *Johns. Rep.* 342.

91 A person cannot maintain trespass for goods, unless he has actual or *constructive possession* at the time.

He must have, at least, such a right as to be enabled to reduce the goods to his possession when he pleases. *Putnam* v. *Wyley*. 8 *Jons. Rep.* 432.

92 Trespass lies against the officer, who executes the process of a court not having jurisdiction. *Wise* v. *Withers*. 3 *Cranch* 331.

93 Five years' adverse possession of a slave in *Virginia*, gives a good title upon which trespass may be maintained. *Brent* v *Chapman*. 5 *Cranch* 358.

94 After a recovery in ejectment by *default*, against the *casual ejector*, the lessor of the plaintiff may maintain trespass for the *mesne* profits, against the tenant, and may also recover the costs of the action of ejectment; and the defendant is not allowed to offer any thing in evidence against the demand of the plaintiff which might have been set up in the original action. *Baron* v. *Abeel*. 3 *Johns. Rep.* 481.

95 Where an action for *mesne profits* will not lie, after a recovery in ejectment. 3 *Dallas* 425 to 466.

96 An action will lie for mesne profits, after a recovery in ejectment, though the plaintiff has since conveyed the premises by deed with special warranty to the defendant. 2 *Dallas* 156.

II. *Justification; what shall be, and how to be pleaded.*

1 In justifying under a writ, it is not enough to shew where returnable, but must shew whence it issued. *Gray* v. *Hart*. 2 *Salk.* 517.

2 Justification under process must shew that it was returned. *Middleton* v. *Price and others*. 1 *Wils.* 17. 2 *Str.* 1184.

3 *Son assault demesne* a good plea in maihem, where the first assault was violent. *Cockecroft* v. *Smith*. 2 *Salk.* 642.

4 Where the trespass is transitory, the plaintiff cannot pretend a right to the place; therefore the defendant may justify by possession only. *Anon.* 2 *Salk.* 643.

5 Goods levied in execution upon a *levari facias* out of a hundred court, cannot be delivered to the plaintiff. *Horne* v. *Hunter*. 1 *L. Raym.* 674.

6 A man may justify on his possession, without shewing a title, where the matter is collateral to the title. *Searle* v. *Bunnion*. 3 *Salk.* 220.

7 Plea not answering the declaration but only part of it, yet good. *Bringloe* v. *Morrison*. 3 *Salk.* 271.

8 A justification upon a possession is not good. *Londford* v. *Webber*. 3 *Salk.* 356.

9 In trespass for entering his close called *H.* at the parish of *B.* and seizing the cattle there found, the word "there" refers to the parish, not the close. A traverse cannot be taken of matters not alleged; but no objection can be taken to it on a general demurrer. *Neville* v. *Packman*. 1 *L. Raym.* 121.

10 An action of assault is transitory, and the defendant may, in a transitory action, plead a local justification arising at another place than that in which the action is laid; and without a traverse the plaintiff may answer the local justification. *Serle* v. *Darford*. 1 *L. Raym.* 120.

11 Under a right of way over a close to a particular place, a man cannot justify going beyond that place. Therefore if a defendant justifies passing along a private way, under a right of way to a close called *A.* the plaintiff may reply he went beyond *A.* *Lawton* v. *Ward*. 1 *L. Raym.* 75.

12 Where a defendant justifies taking a distress by virtue of a bye-law made under a customary right, if the bye-law ordains the distress he need not shew a customary right to distrain. *Lambert* v. *Thornton*. 1 *L. Raym.* 91.

13 Justification under a judgment in an inferior court by *taliter processum*, good. *Mackareth* v. *Pollard*. 1 *L. Raym.* 80.

14 In trespass defendant justified under a presentment in a leet; and good. Negative pleas need not be averred where *hoc paratus est verificare* is good. *Matthews* v. *Carey.* 3 *Salk.* 52. 1 *Salk.* 197.

15 Justification by 1 Eliz. c. 17. ill. for want of shewing a warrant. *Atkinson* v. *Crouch.* 1 *Salk.* 407.

16 A merely accidental involuntary trespass may be justified, but a voluntary one cannot. *Beckwith* v. *Shordike.* 4 *Burr.* 2092.

17 Impounding in another county does not make a trespasser. *Gimbart* v. *Pelah.* 2 *Str.* 1272.

18 A justification must admit a cause of action in the plaintiff. In trespass for taking goods, a justification which denies the plaintiff's right of property, must shew that he was possessed. A hundred court cannot prescribe to grant replevins out of court. *Hallet* v. *Birt.* 1 *Lord Raymond* 218. 1 *Salk.* 394. 3 *Salk.* 272. 2 *Salk.* 580.

19 A defendant in trespass, who justifies under process of an inferior court, admits the trespass by pleading that he delivered the warrant to the officers to whom it was directed, to be executed. *Rowe* v. *Tutte.* *Willes*, 15.

20 A bailiff of a borough court is not necessarily a bailiff of the borough. If an officer justifies as such under process he must shew that he was authorized to execute it by its direction. *Watkins* v. *West.* 2 *Lord Raym.* 1530.

21 A battery cannot be justified by an arrest only. *Williams* v. *Jones.* 2 *Str.* 1049.

22 A collector of the taxes cannot justify imprisoning a man under the general printed warrant. *Masters* v. *Butcher.* 1 *L. Raymond* 740.

23 Justification (in trespass) under a custom for all the inhabitants of a town to walk and ride over a close of arable land at all seasonable times in the year, was holden bad, because it appeared in the plea that the trespass was committed when the corn was standing, though the defendant averred that it was a seasonable time. *Bell* v. *Wardell.* *Willes*, 202.

24 Wife may justify assault in defence of her husband; servant of his master; but not *vice versa*. *Leeward and Wife* v. *Basilee.* 1 *Salk.* 407. 1 *L. Raym.* 62.

25 In trespass for taking goods or replevin, if the defendant makes conusance, traverse of the command is sufficient; *aliter* in *clausum fregit.* *Trevilian* v. *Pyne.* 1 *Salk.* 107.

26 In justification as bailiff to a court leet, for levying an amercement, some estreat of the court, or warrant of the steward, must be shewn. *Matthews* v. *Carew.* 1 *Salk.* 107.

27 In justification by abatement of a nuisance, it need not be shewn that he did it, doing as little hurt as could be. *Lodie* v. *Arnold.* 2 *Salk.* 458.

28 In imprisonment, justification under order of the court of conscience, to carry plaintiff to the compter, ill; because imprisonment confessed, and not shewn to be in the compter. *Swinstead* v. *Lyddal.* 1 *Salk.* 408.

29 Every justification must confess a cause of action; therefore a plea in action of assault and battery, that the defendant was on horseback, and his horse, on a sudden fright, ran away with him; that he called to the plaintiff to get out of the way, and upon his neglect the horse ran over him against the defendant's will, is bad. *Gibbons* v. *Pepper.* 1 *L. Raym.* 38. 2 *Salk.* 637.

30 The servant may justify an assault in defence of his master, if done to prevent the assault on his master, and not after. *Barfoot* v. *Reynolds and another.* 2 *Str.* 953.

31 Upon not guilty in trespass, excise officers executing a body warrant issued by the commissioners, may give the special matter in evidence. *Wood* v. *Chessall.* 3 *Black.* 1251.

32 Amends not pleadable to a voluntary trespass. *Bailee* v. *Vivash.* 1 *Str.* 549.

33 On not guilty, cannot give evidence of taking the goods as a deodand. *Dryer* v. *Mills and another.* 1 *Str.* 61.

34 Justification of process of the university of *Oxon*, held ill; and where those who might justify join those who have not a good justification, it is bad as to all. *The King* v. *Dr. Bouchier and another.* 2 *Str.* 993.

35 Serjeant at mace justifies under precept on a plaint in replevin, out of the sheriff's court; ill for want of shewing it was returned. Where a principal officer justifies under a returnable writ, he must shew it was returned; *secus* of subordinate officers. *Freeman* v. *Blewitt.* 1 *Salk.* 409. 1 *L. Raym.* 632.

36 In trespass for taking plaintiff's hog, and converting same to defendant's use, the conversion is only matter of aggravation, and need not be justified or answered; for the conversion is not a trespass *vi et armis*. *Dye* v. *Leatherdale and Simpson.* 8 *Wils.* 20.

37 Where a judgment is vacated for irregularity, the plaintiff is not justified, as he is where it is reversed for error. Where one officer joins in defence with one for whom the warrant is no justification, he forfeits the benefit of it. *Philips* v. *Biron and another.* 1 *Str.* 509.

38 The defendants justified, in trespass, under a right of common of pasture; the plaintiff replied, an inclosure and improvement of the place where, &c. by the lord of the manor, averring a sufficiency of common left for the defendant, "and all other persons of right having and using common, &c." The defendant traversed the sufficiency in those words, and, after verdict for the plaintiff on an issue on that traverse, the court refused to grant a repleader, saying those words meant, "all persons having a right to use the common." *Farnham* v. *Pacey.* *Willes*, 532.

39 If to trespass for driving away a commoner's cattle from the common, the lord justifies, under an approvement of the commoner, alleging that he left sufficient common of pasture for his tenants; and the plaintiff replies, that he was also entitled to common of turbury; that therefore the lord wrongfully inclosed, &c., and that he (plaintiff) put in his cattle to enjoy his common of pasture; and the defendant demurs; it will be taken that the lord did leave sufficient common of pasture. *Fawcett* v. *Strickland and others.* *Willes*, 57.

40 A defendant must admit the trespass in order to justify it. *Rowe* v. *Tutte.* *Willes*, 15.

A defendant in trespass who justifies under process of an inferiour court, admits the trespass by pleading that he delivered the warrant to the officers to whom it was directed, to be executed. *Ibid.*

A defendant may justify an assult and battery, by pleading *mollitur manus imposuit*, &c. in order to arrest, &c. *Ibid.*

41 And *Titley* v. *Foxall.* *Willes*, 690.

So he may justify a battery in defence of his possessions of lands or goods, by pleading *molliter manus imposuit.* *Ibid. n. b.*

Or even without pleading *molliter manus imposuit*, if actual force be used by the plaintiff. *Ibid. n. b.*

42 To action of trespass for breaking, entering, and digging up plaintiff's close, and filling up and spoiling the coney-burrows there, under a right of common, the defendant pleaded that the coney-burrows were wrongfully, unlawfully, and injuriously, newly erected and kept up there, by reason whereof the said common was surcharged and spoiled, so that defendant could not enjoy the common as of right he ought, and that he entered and dug up in order to abate the said nuisance; but this was held no justification

Cooper v. *Marshall.* 1 *Burr.* 259. 2 *Wils.* 51.

43 In trespass the defendant may in all cases give evidence of title under the general issue. *Dodd* v. *Kyffin.* 7 *Term Rep.* 354.—*Argent* v. *Durant.* 8 *Term Rep.* 403.

44 In justifying the use of a crane in a public quay, it is sufficient to say, that "it is a public and open lawful quay," without claiming the right by immemorial usage. *Bolt* v. *Stennett.* 8 *Term Rep.* 606.

45 The public have a right to use the cranes erected on public quays paying the *customary compensation.* 8 *Term Rep.* 606.

46 A person may justify a trespass in following a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox, because they are noisome animals. *Gundry* v. *Feltham.* 1 *Term Rep.* 334; and see *Nicholas* v. *Badger,* 37 & 38 Eliz. 3 *Term Rep.* 259, *n.*

47 A private person may justify breaking and entering the house of another, and imprisoning his person, in order to prevent him from committing murder on his wife. *Hancock* v. *Baker.* 2 *Bos. & Pull.* 260.

48 In trespass for breaking and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process if he had it in fact at the time, though he declared then, that he entered for another cause. *Crowther* v. *Ramsbottom.* 7 *Term Rep.* 654.

49 In an action for breaking and entering the plaintiff's house, a sheriff's officer cannot justify having entered under a writ of *quare clausum fregit,* and continuing till he received a sum of money as and by way of surety for the plaintiff's appearance under that writ. *Moore* v. *Beamont.* 6 *Term Rep.* 137.

50 *Qu.* If the officer can attach the defendant's goods or money under such a writ? 7 *Term Rep.* 137.

51 *Semb.* That a sheriff's officer acting under civil process, may justify breaking the inner doors of the defendant's house, though he be not therein at the time. *Ratcliffe* v. *Burton.* 3 *Bos. & Pull.* 223.

But in such case he must first demand admittance. *Ibid.*

52 A justification, by bail above, for breaking and entering the house of *A.* the outer door being open, in which the principal resides, in order to seek for him, for the purpose of rendering him, is good, without averring that the principal was in the house at the time. *Sheers* v. *Brooks.* 2 *H. Black.* 120.

53 And in such a plea an averment that the defendants "duly became bail and entered into a recognizance," is sufficient; without stating that the principal was delivered to their custody. 2 *H. Black.* 120.

54 A plea of justification by an officer (to trespass for taking the goods of *A. B.*) that he took them under a distringas against *C. B.* (meaning the said *A. B.*) to compel an appearance, cannot be supported; though it be averred that *A. B.* and *C. B.* are the same person, unless *A. B.* appeared in that action, and omitted to plead the misnomer in abatement. If he did appear in that action, and omitted to plead in abatement, he is concluded by it. *Cole* v. *Hindson.* 6 *Term Rep.* 234.

55 A defendant in an action of trespass for false imprisonment, pleading a justification under *mesne process* sued out by him in a cause in which he was plaintiff, may state that the writ issued upon an affidavit to hold to bail, without setting forth the cause of action; for if a party be arrested maliciously and without any cause of action, his remedy is by an action for maliciously holding him to bail. *Belk* v. *Broadbent.* 3 *Term Rep.* 183.

56 In pleading the taking of a term under a *fi. fa.* it is sufficient to state that the party was possessed of *a certain interest in the residue of a*

certain term of years. 3 *Term Rep.* 292.

57 In trespass for breaking and entering the plaintiff's house and expelling him therefrom, the breaking and entering are the gist of the action, and the expulsion is merely aggravation; therefore a justification as to the breaking and entering will cover the whole declaration. *Taylor* v. *Cole.* 3 *Term Rep.* 292.

58 If the plaintiff mean to insist on the expulsion, as making the defendant a trespasser *ab initio*, he should new assign it. 8 *Term Rep.* 292. (Affirmed in *Cam. Scac.* 1 *H. Black.* 535.)

58 The second count in trespass, (being a general one) does not always avoid the necessity of a new assignment; it is added in order to avoid the locality. But there cannot be a new assignment except where there is a general plea; and if the case be such, that on a special plea the plaintiff may be driven to a new assignment, he may give the matter in evidence under the second count on not guilty. *Smith & al. Assignees* v. *Milles.* 1 *Term Rep.* 479.

60 Where a declaration for false imprisonment against *A.* and *B.* contained two counts, to both of which the defendants pleaded not guilty, and justified the first under mesne process, *A.* as the plaintiff in that action, and *B.* as the bailiff; and the plaintiff, by a new assignment, admitting the arrest to be lawful, replied that *B.*, with the consent of *A.*, voluntarily released him, and that they afterwards imprisoned him for the time mentioned in the first count; the plaintiff having failed in proving the new assignment, by not shewing the consent of *A.*, shall not be permitted to prove the same trespass against *B.* under the other count. *Atkinson* v. *Matteson.* 2 *Term Rep.* 172.

61 If to an action of trespass for pulling down and carrying away a gate the defendant plead a right of way, and that the gate being wrongfully erected across the same, he took it down and deposited it in a convenient place *for the use of the plaintiff*, to which the plaintiff replies a subsequent conversion; proof that the defendant put the gate upon his own premises, from whence the plaintiff might have taken it if he had pleased, will not sustain the replication. *Houghton* v. *Butler.* 4 *Term Rep.* 364.

62 To trespass for an assault and battery the defendant may plead that the plaintiff, with force and arms, and with a strong hand endeavoured forcibly to break and enter the plaintiff's close; whereupon the defendant "did then and there resist and oppose such entrance, and did then and there defend his possession as it was lawful for him to do;" and if any damage happened to plaintiff it was in the defence of the possession of the said close. *Weaver* v. *Bush.* 8 *Term Rep.* 78.

63 A plea of *molliter manus imposuit* in order to turn the plaintiff out of the defendant's house, where she continued against his will, is no answer to a charge against the defendant for striking the plaintiff repeated blows, and with great force and violence several times knocking her down. *Gregory & Ux.* v. *Hill.* 8 *Term Rep.* 99.

64 A defendant in trespass cannot justify under the general issue, the cutting the posts and rails of the plaintiffs, though erected upon the defendant's own land; there being no question raised as to the property remaining with the plaintiff. *Welch* v. *Nash.* 8 *East*, 394.

65 In trespass *qu. clau. freg.* adverse possession cannot be set up to defeat the plaintiff's action unless the possession was open, visible, and continued. 1 *Mass.* 483.

66 A purchaser of real estate under a *fieri facias*, may enter and take possession of the premises in a peace-

able manner, though some goods of the former proprietor be left on the premises, and though they may be occasionally occupied by his servants. *M'Dougall* v. *Sitcher et al.* 1 *Johns. Rep.* 42.

67 In trespass by a stranger, against a sheriff for seizing goods under a *fieri facias*, the sheriff, in order to justify the seizure, must produce the judgment as well as the writ; but if the court is satisfied, that there is fraud, and that the plaintiff is intitled to recover, they will not award a new trial, where there has been a verdict for the defendant, merely because the record of the judgment was not produced by the defendant at the trial. *High* v. *Wilson.* 2 *Johnson's Rep.* 46.

68 If the defendant in an action of *trespass quare clausum fregit*, pleads *liberum tenementum*, the plaintiff cannot reply *de injuria sua propria*, but must traverse the title; otherwise, where the defence is set up by way of excuse, and not in justification. *Hyatt* v. *Wood.* 4 *Johns. Rep.* 150.

69 In an action of trespass *quare clausum fregit*, brought before a justice's court the defendant interposed a plea of *title*, and the same was removed into the court of common pleas, and from thence into this court; and it was held under the 7th section of the act (31 sess. c. 204) the defendant, at the trial, might shew a title in himself, or a title in a third person, or a possession out of the plaintiff; and where the defendant in such action proved that he was, and had been, in possession of the *locus in quo* for more than six years, and the plaintiff had never been in possession; this was held sufficient to entitle the defendant to a verdict. *Douglass* v. *Valentine.* 7 *Johns. Rep.* 278.

70 A recovery of nominal damages in *ejectment* is no bar to a subsequent action for *mesne profits*. *Van Alen* v. *Rogers.* 1 *Johns. Cases*, 281.

The entry of a *remittitur damna* on the record, in an action of *ejectment* is merely a matter of form, and if no *remittitur* is entered, and the plaintiff enters judgment for the damages and costs, it will not bar the plaintiff's action for the *mesne profits*, to which he is entitled from the time of the demise laid in the declaration. *Ibid.*

71 After a recovery in ejectment, the plaintiffs brought an action for the *mesne profits*, but before it was tried, the defendant brought an action of ejectment against the former plaintiffs (who had been put into possession of the premises) and recovered, and then pleaded the recovery in bar of the plaintiffs action for the *mesne profits*, but it was held, that the plaintiff after a recovery in ejectment, is entitled to his *mesne profits*, though it should appear that the defendant had a better title. *Benson et al.* v. *Mutsdorf.* 2 *Johns. Rep.* 369.

72 In an action of *trespass* for taking the plaintiff's goods, the defendant justified, as a *constable*, under an appointment of three justices pursuant to the 6th section of the act (sess. 24, c. 78) relative to the duties and privileges of towns passed 27th *March*, 1801, and that he took the goods as constable by virtue of an execution issued against the goods of the plaintiff, &c. It was held, that the appointment made by the justices was a judicial act; and being within their jurisdiction, was conclusive, and valid, until set aside or quashed, on a *certiorari*, and could not be quashed in a collateral action. *Wood* v. *Peake.* 8 *Johns. Rep.* 69.

III. *Evidence, Verdict, &c. in.*

1 *Quod cum* in trespass well enough after verdict, and error and common pleas. *Douglass* v. *Hall, in error.* 1 *Wils.* 99.

2 *In usum suum proprium converterunt*, is not ill in trespass against

baron and feme. *Smalley* v. *Kerfoot and Wife.* 2 *Str.* 1094.

3 It is not necessary to enter a *capiatur* upon a judgment for the plaintiff in an action of trespass. *Westbrooke et al.* v. *Andrews.* 2 *Lord Raymond*, 927.

4 No objection can be taken after verdict to a count in trespass, for taking two packs of flax and two packs of hemp, on account of the uncertainty. *Thornton* v. *Bernard.* 2 *L. Raym.* 991.

5 Trespass for entering a messuage and tenement, unexceptionable, at least after verdict; but trespass for taking away a parcel of barley, even after verdict, bad for the uncertainty. *Copleston* v. *Piper.* 1 *L. Raymond*, 191.

6 If trespass for an act in the reign of one king is stated to have been *contra pacem* of another, it will be bad upon demurrer; but unobjectionable after verdict. *Day* v. *Muskett.* 2 *L. Raym.* 985. 2 *Salk.* 640.

7 A claim of common in a field *a tempore fractionis campi*, is bad, even after a verdict establishing a claim, on account of the uncertainty of the word *fractionis*. *Hockley* v. *Lamb.* 1 *L. Raym.* 645.

8 Where a justification in trespass is bad in point of law, the court will order the judgment to be entered up for the plaintiff, notwithstanding a verdict for the defendant on the plea of justification. *Broadbent* v. *Wilkes.* *Willes*, 364.

9 In trespass and false imprisonment, defendant justifies under a process *quæ est eadem*, &c. and traverses, being guilty, *aliter*, &c. it is ill on special demurrer. *Courtney* v. *Satchwell.* 2 *Str.* 691.

10 *Nec non de eo quod*, after a *quod non*, is a positive charge. *Dobs* v. *Edmonds.* 2 *Str.* 681.

11 Where the defendants confess the trespass, the damages cannot be severed. *Onslow* v. *Orchard.* 1 *Str.* 422.

12 *Qu.*—Whether, in an action of trespass for assaulting and beating the plaintiff's niece, *per quod servitium amisit*, the jury can take into their consideration the injury sustained by the niece herself, in having been deflowered? *Edmonson* v. *Machell.* 2 *Term Rep.* 4.

13 In these actions the court will not readily grant a new trial on account of excessive damages. 2 *Term Reports*, 166.

14 In trespass for assault and battery, and not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault and battery with a view to reduce the verdict below the amount of the damage actually sustained, if those circumstances could have been pleaded. *Watson* v. *Christie.* 2 *Bos. & Pull.* 224.

15 Where the defendant justified, in trespass, under a custom which was bad in law, and the issue on it was found for him, the court set aside the verdict on that issue, and entered a verdict for the plaintiff with nominal damages. *Selby* v. *Robinson.* 2 *Term Rep.* 758.

16 If a declaration in trespass contain two counts, and the defendant plead to one, and suffer judgment by default on another, and on the trial of the first the plaintiff only prove one act of trespass which is covered by the second count, he is not entitled to a verdict on the first count. *Lee Compere* v. *Hicks.* 7 *Term Rep.* 727.

17 Under certain circumstances the court will stay the proceedings in an action of trespass for seizing goods, on the defendant's restoring the goods, or paying the full value of them, with the costs of the action. *Pickering* v. *Truste.* 7 *T. Rep.* 53.

18 In an action for assault and battery none but obviously probable effects of the battery can be given in evidence, unless stated in the declaration. *Avery* v. *Ray et al.* 1 *Mass.* 12.

19 In such an action the defendant may give in evidence, in mitigation

of damages, provocations which took place at the time of the assault, but not previous provocations. *Ibid.*

20 In an action of trespass against a collector of the customs for seizing and detaining the plaintiff's vessel, for a pretended breach of the laws of the *United States*, relative to the registering of ships, the vessel having been restored, it was held, that the difference between the price at which the vessel would have sold, at the time of seizure, and the price she actually sold for at public auction, immediately after her restoration, together with the actual expences incurred, with interest on the amount, constituted a just and proper measure of damages as assessed by a jury. *Woodham* v. *Gelston.* 1 *Johns. Rep.* 134.

21 In trespass *quare clausum fregit*, the defendant pleaded, in justification, a right of way over the land of the plaintiff, and a verdict was found for the plaintiff for six cents damages; and it was held, that the plaintiff was entitled to full costs under the statute. The certificate of the judge need not be given *at the trial*; it is sufficient if it be given afterwards, and even after the clerk has taxed the costs. *Heaton* v. *Ferris et al.* 1 *Johns. Rep.* 146.

22 If separate suits be brought against several defendants for a joint trespass, the plaintiff may recover seperately against each, but he can have but one satisfaction; and he may elect *de melioribus damnis*, and issue his execution against one of the defendants; and the others must pay the costs of the suits against them respectively. *Livingston* v. *Bishop et al.* 1 *Johns. Rep.* 290.

23 In trespass against three defendants, two were taken, and the other returned not found. The plaintiff declared against the two defendants taken *simul cum*, the other; the two defendants pleaded not guilty, and the jury found a general verdict of guilty. The defendants who pleaded, moved in arrest of judgment, on the ground, that the plaintiff could not proceed until all the defendants were brought into court; but it was held, that *torts* being joint or several, the plaintiff might at his election, proceed against one or more of the defendants; and that the declaration, though informal, was good after verdict. *Rose* v. *Oliver and Stevens who are impleaded with Russel.* 2 *Johns. Rep.* 365.

24 It *seems* that a voluntary trespass is not, *per se*, wilful and malicious, within the meaning of the act, relating to costs; but it should appear to be done *male fide*, or with an intention to injure or vex the plaintiff, or with a consciousness of violating right. *Heath* v. *M'Inroy.* 6 *Johns. Rep.* 277.

25 In actions of trespass, it is in the discretion of the judge, at the trial, to certify whether the trespass was wilful and malicious, so as to entitle the plaintiff to full costs. The court will not interfere, on an appeal from his decisions. *Heath* v. *M'Inroy.* 6 *Johns. Rep.* 277.

26 The plaintiff in an action of trespass for mesne profits, shall not give evidence of the annual value of the premises, beyond the time of the lease mentioned in the declaration in ejectment. *Shortwell* v. *Boehm.* 1 *Dallas.* 172.

TRIAL AT BAR, &c.

1 A criminal prosecution carried on at the expence of a private prosecution, not triable *de jure* at bar; otherwise where there is an authority from the king to prosecute. *The King* v. *Robert Hales.* 2 *Str.* 816.

2 If *H.* would have a trial at bar in *Easter* term, he ought to move for it in *Hilary* term; if in *Michaelmas* term, he ought to move for it in *Trinity* term; except where lands lie in *Middlesex*; and anciently there was no other notice given of such trial, but the rule in the office;

but now there must be fifteen days' notice. *Turner* v. *Barnaby*. 2 *Salk.* 649.

3 Special trial in trover must confess a conversion. *Hartford* v. *Jones*. 2 *Salk.* 654. 1 *L. Raym.* 393.

4 In covenant, after a verdict for the plaintiff, the defendant moved for a new trial, suggesting that he was an alien, and that the sheriff had returned twelve of the jury, but that there was not an alien amongst them; and refused. *Anon.* 3 *Salk.* 362.

5 No trial at bar before issue joined. *Case of the Borough of Christ's Church.* 2 *Str.* 696.

6 No new trial on an indictment for perjury. *Anon.* 3 *Salk.* 362.

7 Trial at bar ordered in a misdemeanor. *The King* v. *Johnson.* 1 *Str.* 644.

8 New trial for omission of the party, refused. *Wits* v. *Polehampton.* 2 *Salk.* 647.

9 Indictment for libel, defendant acquitted, and new libel denied. *The King* v. *Bear.* 2 *Salk.* 646. 1 *L. Raym.* 414.

10 Lessor brought trover against the lessee for trees cut down; yet because the lessee did it in trenching, and the plaintiff had thereby granted advantage, though the jury found for the defendant, yet the court would not grant a new trial. *Starr* v. *Wade.* 2 *Salk.* 647.

11 Where there is value or difficulty, we are bound in common right to grant trials at the bar. *Sandwich's Case.* 2 *Salk.* 648.

12 Trial at bar last paper-day granted *Bellamount's Case.* 2 *Salk.* 625.

13 Murders and felonies in any part of *Wales* may be tried in the next *English* county. *The King* v. *Athoe senior and junior.* 1 *Str.* 553.

14 Trial at bar granted upon consideration of the consequences of a conviction upon an information. *The King* v. *Foley and Harley.* 1 *Str.* 52.

15 No new trial for want of notice after defence made. *Thermolin* v. *Cole.* 2 *Salk.* 646.

16 A cause cannot be tried at bar where action is laid in *London*, by reason of their charter. *Anon.* 2 *Salk.* 644.

17 Trial at bar granted where one title to several different tenements of small value. *Preston* v. *Lingen.* 1 *Str.* 479.

18 Suing out a *venire facias* tested the last day of term, not a proceeding within term as to notice of trial. *Lazier* v. *Dyer.* 2 *Salk.* 650.

19 Trial not put off for suit pending in the ecclesiastical court on the same matter. *Anon.* 2 *Salk.* 649.

20 Trials at bar not denied to officers of the court or barristers. *Sir Samuel Astrey's Case.* 2 *Salk.* 651.

21 New trial not granted for defect of preparation. *Ford* v. *Tilly.* 2 *Salk.* 653.

22 The decision of the judge at the trial, that the sentence of a foreign court of vice-admiralty is conclusive evidence of the facts alleged in it, does not militate with the rights of parties to a trial by jury, as secured by the fifteenth article of the declaration of rights. *Baxter et al.* v. *N. Eng. Marine Ins. Co.* 7 *Mass.* 275.

23 When the court will not grant a trial in a capital case in the county in which the offence is charged to have been committed. *The United States* v. *The Insurgents of Pennsylvania.* 3 *Dallas*, 513.

24 The finding of an indictment is a part of the trial, and afterwards the court cannot transfer the trial to another place. *United States* v. *Fries.* 3 *Dallas*, 515.

25 The clause of the 8th section of the act of Congress, for the punishment of certain crimes against the *United States*, respecting the place of trial when crimes are committed out of the jurisdiction of any particular state, applies only to offences committed in some river, *haven, basin, or bay* not within the jurisdiction of a particular state, and not

to the *territories of the United States*, where regular courts are established, competent to try those offences. *Exparte Bolman and Swartwout.* 4 *Cranch*, 77.

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TROVER.

I. *Who may bring the action, and in what cases.*
II. *Conversion, &c.*
III. *Against whom the action may be brought.*
IV. *Declaration, Plea, Evidence, &c.*

I. *Who may bring the action, and in what cases.*

1 Trover is good to recover where a felon has stolen goods, and changed them into notes, if the notes clearly appear to be the product of the specific goods; and the owner of the goods, who has prosecuted to conviction, and has omitted to pray restitution, shall recover them in trover, though seized into the hands of the king, by an action against the sheriff. *Lofft*, 88.

2 *A.* assigns to *B.* and *C.*, *B.* sells to *D.* who gives a promissory note, payable at fourteen days; after this *D.* assigns to *E.* all his goods. The note never having been paid, *B.* refuses to deliver. The possession of the seller, after the agreement and note, is the possession of the buyer, and trover will lie for the goods, especially as *B.*, being desired by *D.* to take back the goods, said, "I will not; I will have payment;" which affirmed the sale. *Atkinson* v. *Barnes.* *Lofft*, 325.

3 The finder of a jewel may maintain trover against a person not interested. *Armory* v. *Delamire.* 1 *Str.* 505.

4 Where a man may have a property in a dog, trover will lie for whelps. *Chambers* v. *Warkhouse.* 3 *Salk.* 140.

5 Declaration of a trover in *Middlesex*, and proof of one in *Ireland*, good. One joint tenant, &c. cannot bring trover against his companion, but may against a stranger, and it is only pleadable in abatement. *Brown* v. *Hedges.* 1 *Salk.* 290.

6 *Goldsmith* has lottery tickets of *A.* and *B.*, and delivers *A*'s. tickets to *B.* for his own. *A.* may maintain trover against *B.* *Goldsmith*'s note to pay is evidence of his receiving money. *Ford* v. *Hopkins.* 1 *Salk.* 283.

7 Trover lies upon a special property. The bailee of a bond may maintain trover for it. Describe it as his writing obligatory. *Arnolds* v. *Jefferson.* 1 *L. Raym.* 275. 2 *Salk.* 654.

8 *A.* buys plate of *B.* the defendant, and gives him a draft, for which *A.* gives receipt as for cash. *A.* pawns the plate to *C.* the plaintiff, who was a pawnbroker, shewing him the receipt as evidence of his title; on which *C.* took the goods in pawn. The draft turned out afterwards to be a bad one; for *A.* had no money with the banker. *A.* was tried on the statute for procuring under false pretences, on an indictment preferred by the defendant *B.*; he was convicted, *C.* the plaintiff producing the goods. *B.* the defendant upon this took and detained them. *A.* brought this action of trover thereupon. And held, "that he should recover;" for that the property was not changed as against the right owner, either at common law or by the statute of James respecting pawnbrokers. *Davis* v. *Morrison*, *Lofft*, 185.

9 If the plaintiff agrees to exchange the *Folly*, his own vessel, with the *Boker*, the defendant's, and to give 25 guineas to boot, and if the *Folly* was lost in the voyage, 30 guineas besides. The plaintiff paid a guinea earnest. Defendant wrote, to excuse himself, that he could not make the exchange, because he had sold the vessel. Plaintiff tenders 24 guineas, deducting one for earnest; defendant refuses. After-

wards, in another voyage, the *Folly* is lost; and plaintiff brings the action for the value. Held, the action will lay, for the delivery was complete by payment of the earnest, and the defendant's detention of the vessel afterwards was tortious. *James* v. *Price*. *Lofft*, 219.

10 Trover must be founded in the property of the plaintiff. 1 *Term Rep.* 56.

11 And he must have the right of possession as well as of property. *Gordon* v. *Harper*. 7 *Term Rep.* 9.

12 Therefore where furniture, which had been leased with the house was wrongfully taken in execution by the sheriff, it was ruled that the landlord could not maintain trover pending the lease. 7 *Term Rep.* 9.

13 A trader on the eve of bankruptcy makes a collusive sale of his goods to *A.*, the assignees cannot maintain trover for them against *A.* without proving a demand and refusal. *Nixon* v. *Jenkins*. 2 *H. Black.* 135.

14 Where the owner of goods on board a vessel directed the captain not to land them on the wharf, against which the vessel was moored, which he promised not to do, but afterwards, delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf; held, that the owner upon demand and denial might maintain trover against the captain, unless the latter could establish the wharfinger's right. *Syeds* v. *Hay*. 4 *Term Rep.* 260.

15 *A.* entrusted *B.* with goods to sell in *India*, agreeing to take back from *B.* what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. *B.* not being able to sell the goods in *India* himself, left them with an agent to be disposed of by him, directing the agent to remit the money to him (*B.*) in *England*. Held that *A.* could not maintain trover against *B.* for the goods. *Bromley* v. *Coxwell*. 2 *Bos. & Pull.* 438.

16 And it seems that he could not maintain any action. *Ibid.*

17 An action of trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate. *Pyne* v. *Dor*. 1 *Term Rep.* 55.

18 Certain lands, together with the woods, &c. were conveyed under a marriage settlement to *A.* and *B.* their heirs and assigns during the life of *S. W.* in trust, to pay the rents and profits, as the said *S. W.* should appoint, during her life: and after her decease, to the use of such child or children of the marriage, and in such shares as the said *S. W.* should appoint: and for want of appointment to the use of the children equally, &c. and the heirs of their bodies, with cross remainders; and in default of such issue, to the use of the right heirs of *S. W.* for ever; held, that *A.* and *B.* could not maintain trover against the defendant, a stranger, for certain trees which had been cut down by the order of the husband of *S. W.*, and carried away by the defendant. *Blake* v. *Anscombe*. *New Rep.* 25.

19 A member of an amicable society, intrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person, who take it from him. *Holliday* v. *Camsell*. 1 *Term Rep.* 658.

20 An uncertificated bankrupt may maintain trover for goods acquired by him since his bankruptcy, as against all the world but his assignees. *Webb* v. *Fox*. 7 *Term Rep.* 391.

21 Where a ship was mortgaged at sea, with a proviso that the mort-

gagor should continue in possession till failure of payment of the mortgage money on demand, but the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival; he may maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees. *Atkinson* v. *Maling*. 2 *Term Rep.* 462.

22 Trover and not trespass lies by the assignees of a bankrupt against a sheriff, for taking the goods of the bankrupt in execution after an act of bankruptcy, though before the issuing of the commission, where he sells them after the issuing of the commission, &c. and has notice from the provisional assignee not to sell. *Smith & al. Assignees* v. *Milles*. 1 *Term Rep.* 475.

23 Where defendant came into possession of goods wrongfully, no tender is necessary for the amount of freight, &c. paid by him, to enable the plaintiff to maintain his action of trover. *Lempriere* v. *Pasley*. 2 *Term Rep.* 485.

24 If goods be obtained from *A.* by fraud, and pawned to *B.* without notice, and *A.* prosecute the offender to conviction, and get possession of his goods, *B.* may maintain trover for them; for this is distinguishable from the case of felony, where the owner's right of restitution is given by positive statute. *Parker* v. *Patrick*. 5 *Term Rep.* 175.

25 But, if a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrongdoer. *Shipwick* v. *Blanchard*. 6 *Term Rep.* 298.

26 Under a contract of sale whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much per cwt. by bill at two months; which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and 14 days were to be allowed for the delivery; and the vendor gave a note to the vendee, addressed to the warehouse keeper, directing him to *weigh and deliver* to the vendee *all his starch*; held, that under this contract the absolute property in the goods did not vest in the vendee *before the weighing*, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor might, notwithstanding such part delivery upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse, in the name and at the expense of the vendor. *Hanson & al. Assignees* v. *Meyer*. 6 *East*, 614.

27 When an agent compromises a demand of his principal by receiving from the debtor a negotiable note endorsed specially to the agent, the principal cannot maintain trover for the note; but the agent becomes immediately answerable for the amount of the liquidated damages, as for so much money received by him to the use of his principal, whose proper remedy is an action of *assumpsit*. *Floyd* v. *Day*. 3 *Mass.* 403.

28 One joint owner of a chattle may bring trover, or trespass for his share or interest, and the defendant cannot at the trial, take advantage of the others not being joined, but should plead it in abatement. *Wheelwright* v. *Depeyster*. 1 *Johns. Rep.* 471.

29 *A.* and *B.* being joint owners of certain carding machines, *A.* sold his half to *C.* and *B.* and *C.* agreed to work them together. Afterwards *B.* delivered the machines to a sheriff, who took and sold them on an execution against *A.* In an action of *trover*, brought by *C.* against *B.* for his half of the ma-

chines, it was held, that the sale from *A.* to *B.* did not sever the tenancy in common, and that trover would not lie. *St. John* v. *Standring.* 2 *Johns. Rep.* 468.

30 Where goods were taken on an execution, which was, afterwards, set aside for irregularity, the execution being a nullity, an action was held to lie on the first taking. *Read* v. *Markle.* 3 *Johns. Rep.* 523.

31 Trover or detinue will lie for a promissory note in the hands of a third person. *Todd* v. *Crookshanks.* 3 *Johns. Rep.* 432.

Trover will not lie against the payee of a promissory note, for the note, by the maker, after he has paid it. *Ibid.*

32 An *American* ship was captured by a *French* privateer, and carried into *Portorico*, a *Spanish* port, and from thence to *Samana*, where she was put in requisition by the *French* government, and sent to *Barracoa*, where she was dismantled and abandoned. The vessel having stranded on the beach, was, some months after, sold at auction by the commanding officer of the port, and purchased by an *American*, who, afterwards repaired her at a great expense, and brought her to *New-York*, where she was claimed by the original owner. In an action of *trover* brought by the original owner, it was held, that the vessel being abandoned and a wreck, and having been sold by the government of *Barracoa*, according to the laws of *Spain*, in cases of wreck or dereliet, the property was transferred by the sale to the purchaser, who thereby acquired a valid title against all the world. *Grant and Swift* v. *Mc'Lachlin.* 4 *Johns. Rep.* 34.

33 Where *A.* contracted with *B.* to build a vessel, and *A.* was to furnish the *timber* requisite to complete the frame of the vessel, and *B.* was to advance money to *A.* and also to furnish the materials for the joiners' work; and the vessel, while standing on land hired by *A.* and in an unfinished state, was seized under a *fieri facias* issued against *A.* and sold by the sheriff to *C.* who afterwards, completed the vessel, and sold it to *D.* in an action of *trover* brought by *B.* against *D.* it was held, that the property in the vessel was in *D.* and that *B.* could not have any property in the vessel, under the contract, until she was completed and delivered to him. *Merritt* v. *Johnston.* 7 *Johns. Rep.* 473.

34 Whether an action of trover will lie for a ship and cargo taken on the seas. *Quære?* *Taxier et al.* v. *Seveet et al.* 2 *Dallas*, 81.

II. *Conversion, &c.*

1 Trover does not lie for a negro. Where several damages are given for several injuries, the judgment may be arrested as to some of them only. *Smith* v. *Gould.* 2 *L. Raym.* 1274. 2 *Salk.* 666.

2 Trover supposes a lawful coming by the goods demanded, and an unlawful conversion. *Golightly* v. *Reynolds.* *Lofft*, 88.

Detention against lawful demand presumes conversion. *Ibid.*

3 If a horse is given in exchange for another which is warranted sound, and proves unsound, trover will not lie for the horse given in exchange. *Power* v. *Wells.* 1 *Doug.* 24, *& n.*

4 Goods taken in intestate's life, and kept till his death, though used afterwards, is a trover and conversion in the intestate's life. *Crossier and Ogleby.* 1 *Str.* 60.

5 Taking part and spoiling the rest is a conversion of the whole. *Richardson* v. *Atkinson.* 1 *Str.* 576.

6 That which makes a man a trespasser may not amount to a conversion so as to maintain trover. *Bushel* v. *Miller.* 1 *Str.* 128.

7 It is a conversion of bankrupt's effects to take them and raise money on them, though that be immediately paid over to bankrupt's wife.

Parker & another v. *Godin.* 2 *Str.* 813.

8 Conversion is the gist of the action. *Fuller* v. *Smith.* 3 *Salk.* 366.

9 A sale of a ship, (which was afterwards lost at sea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal. *Hoaxham & al. Assignees* v. *Hubbard.* 5 *East*, 407.

10 *Semb.* That a sale of the whole of a ship by one who is only a part-owner, in exclusion of the right of another, who is tenant in common with him, is not equivalent to the *destruction* of the subject-matter mediately or immediately, so as to enable his co-tenant to maintain trover against him for it. *Heath* v. *Hubbard.* 4 *East*, 110.

11 Taking the property of another, by assignment from one who had no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse by way of pledge from a broker who had purchased it there, in his own name for his principal; and refusing to deliver it to the principal, after notice, and demand by him; none other than the person in whose name it is warehoused being able to take it out; is a conversion. *Mc'Combie* v. *Davis.* 6 *East*, 538.

12 In action of trover for a horse, it was held, that a demand of the horse from the wife or servant of the defendant, and a refusal, was no evidence of a conversion; that the defendant having purchased the horse at a constable's sale, under execution, acquired the legal property. *Storm* v. *Livingston.* 6 *Johns. Rep.* 44.

There must be a conversion proved before the commencement of the action; a sale afterwards by the defendant will not avail. *Ibid.*

13 To constitute a conversion sufficient to support the action of trover, it is not necessary to shew a manual taking of the thing in question, nor that the defendant has applied it to his own use; but the assuming the right to dispose of it, in exercising a dominion over it, to the exclusion, or in defiance of the plaintiff's right, is a *conversion.* *Bristol* v. *Burt.* 7 *Johns. Rep.* 254.

14 In an action of trover, proof that the defendant promised to return the goods to the plaintiff, and that he had not returned them, is sufficient evidence of a conversion, and a previous demand and refusal need not be proved. *Durell* v. *Mosher.* 8 *Johns. Rep.* 415.

15 If the defendant in trover admits that he had the goods of the plaintiff, and that they are lost, this is sufficient evidence of a conversion. *Le Place* v. *Dupoix.* 1 *Johns. Cas.* 406.

A demand of payment or satisfaction generally for the goods, is a sufficient demand in trover. *Ibid.*

16 *A.* shipped goods by *B.* the master of a vessel, at *London*, for *New-York*, and the consignee assigned the bill of lading to *C.* who demanded the goods, and tendered a sum of money for the freight, but whether enough, did not appear. *B.* refused to deliver the goods, assigning as a reason, that he was ordered by the ship-owners not to deliver them, and made no objection to the tender of the freight. In an action of trover brought against *B.* it was held, that he had waived a tender of the freight, and that his refusal to deliver the goods was evidence of a conversion. *Judah et al.* v. *Kemp.* 2 *Johns. Cases*, 411.

III. *Against whom the action may be brought.*

1 Goods that are not imported by way of merchandize, no duty, and trover lies against the officer who seizes and carries them away. *Chapman* v. *Lamb.* 2 *Str.* 943.

2 Trover lies against a servant who

disposes of goods, the property of another, to his master's use, whether he has any authority or not for doing so. *Perkins Assignee* v. *Smith.* 1 *Wils.* 328.

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3 Trover lies against officers of the revenue for making a wrongful seizure of goods. *Tinkler* v. *Poole & another.* 3 *Wils.* 146. 5 *Burr.* 2657.

4 Trover for a bank bill will lie against a person finding it, but not against his assignee. *Anon.* 1 *Salk.* 126.

5 Trover lies not against a carrier for negligence, as for loosing a box; but it does for an actual wrong: as if he broke it to take out goods, or to sell it. *Anon.* 2 *Salk.* 655.

6 Trover lies against master for goods delivered to the apprentice. *Mead* v. *Hamond.* 1 *Str.* 505.

7 Plaintiff claiming a right to cut rushes on a common, cuts five or six loads, which defendants carry away; trover. *Rackham* v. *Jessup and Thompson.* 3 *Wils.* 332.

8 Trover lies against one for taking in execution of the bankrupt's goods without joining the officer. *Rush and another Assignees of Ryland* v. *Baker.* 2 *Str.* 996.

9 Trover lies for a dog which was lost, and which the defendant refuses to deliver, unless paid for his keeping. *Binstead* v. *Buck.* 2 *Black.* 1117.

10 Trover lies against a carrier for refusing to deliver goods given him to carry; but trover will not lie against him for refusing to deliver goods given to his servant, unless he has been guilty of an actual conversion. *Taylor* v. ———. 2 *L. Raym.* 792.

11 But if the subject-matter be actually destroyed by one tenant in common, trover will lie against him by his co-tenant. And where it appeared that one tenant in common forcibly took a ship out of the other's possession, and secreted it from him, so that he knew not where it was carried, and changed the name of it, and it afterwards got into a person's hands, who sent it on a foreign voyage where it was lost, Lord C. J. *King*, left it to the jury, whether under the circumstances the destruction was not by the defendant's (the tenant in common's) means; and the jury finding in the affirmative, the court on motion for a new trial, approved of the Chief Justice's direction, and refused to set aside the verdict. *Barnardiston* v. *Chapman*, *cited.* 4 *East*, 121.

12 Where one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for an unlawful conversion of the horse. *Wheelock* v. *Wheelwright.* 5 *Mass.* 104.

13 *A.* and *B.* being joint owners of a hogshead of rum, the Sheriff, by an execution against *B.* seized the whole, and sold it to *C.* who afterwards, sold it by retail. In an action of trover brought by *A.* against *C.* for his part of the rum, it was held, that if one tenant in common of a chattle, sell it, trover will lie against him by the other co-tenant. *Wilson & Gibbs* v. *Reed.* 3 *Johns. Rep.* 175.

14 A raft of timber belonging to *A.* was taken out of his possession by *B.* who professed to act as a *Bailiff*, under process of attachment, at the suit of *C.* and while the timber was in the possession of *B.* and his agents, a storm came and carried away part of the raft, which was lost. In an action of trover by *A.* against *C.* it was held, that the timber while in the possession of *B.* being in the custody of the law, the defendant was not answerable for the loss of it happening without the negligence of the officer. *Jenner* v. *Joliffe.* 6 *Johns. Rep.* 9.

15 Where the goods of *A.* in the custody of the agent of the state prison, were, by the direction and command of *B.* one of the inspectors of the prison refused to be delivered to *A.* on demand; it was held, that *B.* was liable to an action of trover, for

the goods so detained by his command and authority. *Shotwell* v. *Few.* 7 *Johns. Rep.* 302.

IV. *Declaration, Plea, Evidence, &c.*

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1 In trover by an administrator, on the possession of the intestate, the defendant cannot give in evidence, upon a general issue, that the supposed intestate made a will and executor, and that the executor is living. In trover, on the possession of the administrator, he may. *Marsfield* v. *Marsh.* 2 *L. Raym.* 824.

2 A gelding is a horse. Evidence of the trover and conversion of a gelding will support a count in trover for a horse. *Gravely* v. *Ford.* 2 *L. Raym.* 1209.

3 Trover for "old iron," without saying what quantity, good after verdict. *Talbott* v. *Spear. Wils.* 70.

4 In trover, if the value of the thing be uncertain, or the plaintiff insists on going on to recover special damages, the court will not stay proceedings on delivering up the thing sued for, with costs. *Whitten and Wife* v. *Fuller.* 2 *Black.* 902.

5 *Qu.* If plaintiff can recover in trover when the conversion is after the first day of the term in which the declaration is delivered, though before the true time of suing out the writ? *Morris* v. *Harwood and Pugh.* 1 *Black.* 312.

6 Trover for a suit of child-bed linen and a muff, unexceptionable after verdict. *Helyng* v. *Jennings.* 1 *L. Raym.* 133.

7 In trover for money the court gave leave to bring the whole money declared for into court, but said they could do it only in this case, and not in trover for goods. *Anonymous,* 1 *Str.* 142.

8 A *piece of tepee* well in trover. *Radley* v. *Rudge.* 2 *Str.* 738.

9 A recovery in trover vests the property in defendant. *Adams* v. *Broughton.* 2 *Str.* 1078.

10 In trover for a parcel of pack cloths, wrappers, and cords, no objection can be taken on account of the uncertainty of the word "parcel," after judgment by default. *Bottomley* v. *Harrison.* 2 *Str.* 809. 2 *L. Raym.* 1529.

11 Laced head cannot be brought into court. *Bowington* v. *Parry.* 2 *Str.* 822.

12 Trover for a parcel of diamonds, good. *White* v. *Graham.* 2 *Str.* 827.

13 In trover the defendant cannot bring the goods and costs into court. *Olivant* v. *Berino.* 1 *Wils.* 23. 2 *Str.* 1191.

Qu. *Long* v. *Miller,* same page; *vide* 2 *Str.* 1191.

14 Application to discharge defendant arrested in trover on filing common bail, denied. *Catlin* v. *Catlin.* 1 *Wils.* 23. 2 *Str.* 1192.

15 In trover the defendant cannot justify detaining goods till money, laid out upon them without authority, is paid; but it may be deducted in damages. *Stone* v. *Lingwood.* 1 *Str.* 651.

16 In trover, evidence may be given to shew the real time of suing out the writ, so as to avoid the relation to the first day of the term. *Morris* v. *Harwood and Pugh.* 1 *Black.* 320.

17 Trover for so many ounces of cloves, mace, and nutmegs, without specifying the quantity of each, good after judgment by default. *Hartfort* v. *Jones.* 1 *L. Raym.* 588. *Salk.* 654.

18 Trover for 400 pieces, &c. of ends of boards, good. *Knight* v. *Barker.* 2 *L. Raym.* 1219.

19 Plea of general release sufficient in bar of trover. *Anon. Lofft,* 323.

20 Affidavit "that the defendants have possessed themselves of divers goods belonging to the plaintiff, and have refused to deliver them up; and that they or some of them have converted or disposed of them to their own use," is sufficient to hold to bail in trover. *Charter* v. *Jacques and others. Cowp.* 529.

21 The specific thing demanded in trover may in some cases be brought into court, or delivered to plaintiff; and costs paid to time of motion. *Fisher* v. *Price*. 3 *Burr*. 1363.

22 Trover will not lie for goods *irregularly sold* under a distress; the statute 11, G. 2, c. 19, s. 19, having declared that the party selling should not be deemed a trespasser *ab initio*; and having given an action on the case to the party grieved by such sale. *Wallace* v. *King*. 1 *H. Black*. 13.

23 In trover the writ abates by the defendant's death; and the executor is not compelled to come in and defend. *Barnard* v. *Harrington*. 3 *Mass*. 228.

24 Machines and tools of a man's trade are not allowed to be brought into court in an action of trover. *Shotwell* v. *Wendover*. 1 *Johns. Rep*. 65.

25 Infancy is not a bar to an action of trover. *Vase* v. *Smith*. 6 *Cranch*, 226.

TRUST AND TRUSTEES.

1 Trustee, buying in debts for less than is due, shall not be allowed for the whole; otherwise of one purchasing in his own right. *Anon. In chancery*. 1 *Salk*. 155.

2 If the owner of an estate conveys it to trustees by lease and release, to the use of himself for years, remainder to trustees for years, remainder to heirs male of his body, remainder to his own right heirs, no use can result to him for life. *Adams* v. *Terre tenants of Savage*. 2 *L. Raym*. 854.

3 Land settled in trust to pay debts is discharged as soon as the money is raised, though misapplied by the trustees. *Anon*. 1 *Salk*. 153.

4 A surviving trustee of lands, in a deed assuring the same to *A*. and *B*. and their heirs, in trust for *C*., her heirs and assigns, (who held the same as heir to her father,) to the intent that she might, without her husbands concurrence, dispose thereof to such use as she by will or other writing should appoint; if *C*. dies without making such appointment, and without heirs *ex parte paterna*; shall hold the said lands to his own use, against the heirs *ex parte materna* and the crown, who claimed by escheat. *Burgess* v. *Wheate*. 1 *Black*. 186.

5 Where a man purchases lands in the name of another, it is a resulting trust. *Lade* v. *Lade*. 1 *Wils*. 21.

6 On a contract for stock, the party who has the difference in his hands is receiver of so much to the other's use. *Dutch* v. *Warren*. 1 *Str*. 406.

7 Where money is paid, and the thing contracted for not delivered, it is money received to his use. *Anon*. 1 *Str*. 407.

8 Contract for a purchase, and before the conveyance made he dies; the vendor is a trustee for the vendee. *Darris's case*. 3 *Salk*. 85.

9 A devisee of all the devisor's lands in trust to sell and pay all the devisor's debts, &c. cannot be sued under the statute, 3 & 4, W. & M. c. 14. *Gott* v. *Atkinson*. *Willes*, 521.

10 A trustee cannot vary the mode of sale, nor the security prescribed. *Anon*. *Lofft*, 492 & 66.

11 Trustees join to bar a contingent remainder; it is a breach of trust. *Pye* v. *George*. *In chancery*. 2 *Salk*. 680.

12 Trustees shall not recover possession from or dispute it with their *cestui qui trust*. *Armstrong* v. *Peirse*. 3 *Burr*. 1898.

13 A clause in a marriage settlement, "that the trustees should not be chargeable with, or accountable for, any money arising in execution of the said trusts, but what the person or persons so to be accountable should actually receive," does not bind the trustees generally as a *covenant*, but is a clause of indemnity to take away that responsibility

which each would otherwise be subject to for the acts of the others; and only leaves each of them accountable for what he actually receives, as for a simple contract debt. *Bartlett* v. *Hodgson.* 1 *Term Rep.* 42.

14 If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial, he must take it to himself only. *Ex parte Grace.* 1 *Bos. & Pull.* 270.

15 A deed of trust conveyed the lease of a farm, and all the grantor's effects and all debts due to him, to trustees in consideration of a certain sum to be paid to him by one of the trustees; in trust, to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustees' demands upon him; and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper; the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was) as a separate maintenance for her, in consequence of a separation between them on account of her husband's ill usage; held, that such deed was not fraudulent or void against creditors, it appearing to have been made *bona fide* at the time, and that all the creditors of the grantor known at the time, had upon application to the trustees, received payment of their debts; held also that the wife was not liable, as executrix *de son tort*, after the death of her husband intestate, on account of her possession of this property under the deed of trust. *Munn & al.* (*Assignees*) v. *Wilsmore, Executrix.* 8 *Term Rep.* 521.

16 *A*, tenant for life, remainder to his son *B.* in tail, *reversion to himself in fee*, agreed with *B.* in order to relieve themselves from their debts, to bar the entail; and in 1773, they conveyed estates in *N.* and *L.* to the use of trustees and their heirs, in trust to sell the *N.* estates and pay the debts &c.; and as to the *L.* estates (the only one in question) in trust that the trustees should, with the consent of *A.* and his wife, and of *B.* or the survivor, sell *the inheritance* in fee, and apply the purchase-money on the trusts after mentioned; with a *proviso*, that the *rents, issues* and *profits* should, until the sale of the *inheritance*, be received by such person and for such uses as they should have been if the deed had not been made and no fines levied. And as to the money arising from the sale of *L.* estate, in trust to invest the same, with the like consent, in the purchase of other lands in fee to be settled, subject to certain charges, on *A.* for life, *remainder to B. in fee.* Held,

1st, That the use of the *L.* estate was immediately executed in the trustees, even before any consent given to the sale of it by *A.* &c.; and that, notwithstanding the proviso, which stipulated only for the receipt by the party before entitled, of the *rents, &c.* as contradistinguished from the legal estate of the *inheritance*, which was left in the trustees. And that this was not a mere *power of sale* in the trustees attacked to the legal estate of the owner.

2d, That though *A.* who survived his wife and *B.* continued in possession of the *L.* estate down to 1795, when he sold it, and died sometime after; and though, after the sale of the *N.* estate in 1774, for the payment of the debts, the trustees of the *L.* estate never interfered in further execution of the trust during *A*'s lifetime, but brought ejectment after his death; yet that no presumption could be made at the trial in favour of the defendants, who purchased from *A.* in 1795, for a valua-

ble consideration, without notice either that the trustees had reconveyed the legal estate to *A.* in his lifetime, as upon a satisfied trust, according to the old uses; or had conveyed a new estate to him as a purchaser under a sale by them in execution of their trust. For a court of law will never presume a reconveyance by trustees where such reconveyance would be a breach of their trust; which would be the case here upon a supposition that *B.* the son, was a purchaser for a valuable consideration of the remainder in fee, which was to be limited to him upon the settlement of the new estate to be acquired with the purchase money of the *L.* estate. Nor is such a presumption to be made in the first instance, even in the case of a doubtful equity, before a court of equity has declared in favour of the equitable title of the party for whom such presumption is required. Nor was there any evidence to support a presumption that *A.* had purchased a new estate of the trustees.

3d, That *A*'s possession and receipt of the rents, issues and profits of the *L.* estate, though for above twenty years after the creation of the trust, without any interference of the trustees, did not shew his possession to be adverse to their title, so as to bar their ejectment against his grantees; such possession and receipt being consistent with and secured to him by the deed of trust. *Keen* v. *Deardon.* 8 *East*, 248.

17 Where a purchase was made by a person at a sheriff's sale, as agent for the plaintiff, and the land was conveyed to the agent, the deed was held to create a *resulting trust* for the plaintiff, which might be proved by *parol*. *Jackson d. Kane* v. *Sternbergh.* 1 *Johns. Cas.* 153.

18 Where a trust is executed for the benefit of a person, without his knowledge at the time, he may affirm the trust, and enforce its execution. *Nelson* v. *Blight.* 1 *Johns. Cas.* 205.

19 Trustees, and persons acting in *auter droit* who execute conveyances for lands held in trust, are not responsible, in case the purchaser is evicted, unless there is fraud or an express warranty. *Murry* v. *Trustees of Ringwood Company.* 2 *Johns. Cases*, 278.

20 In an action of debt on a bond against the surety of two guardians, appointed by the court of chancery, conditioned for the faithful performance of their trusts, where one of the guardians died, it was held that the trusts survived, and that the surety was responsible for the acts of the surviving guardian; the bond being co-extensive with the trusts. *The People* v. *Byron.* 2 *Johns. Cases*, 53.

21 If *A.* buys land with the money of *B.* and takes a conveyance to himself, he is a trustee for *B.* and an implied or resulting trust is not within the statute of frauds, but may be proved by parol; and the land may be seized and sold under an execution against *B.* the *cestui que trust.* *Foot and Litchfield* v. *Colvin et al.* 3 *Johns. Rep.* 216.

22 Where two trustees for the sale of an estate joined in a conveyance, and both acknowledged the receipt of the consideration money, but the money went into the hands of one of the trustees only; it was held, that the other was not answerable for the money so received by his co-trustee, and misapplied. *Kip's Administrators* v. *Deniston.* 4 *Johns. Rep.* 23.

23 If the payee of a note hold it in trust, his bankruptcy will not take away his power to endorse it over to *cestui que trust.* *Wilson* v. *Codman.* 3 *Cranch*, 193.

TURNPIKE.

1 An order of sessions for digging materials in private soil, by virtue

of the turnpike act of 29 Geo. 2, c. 67, quashed for want of specifying that the materials were not to be found on the wastes and commons, and also for not specifying what kind of materials, and where they were to be found in the private soil. *Rex* v. *Manning*. 1 *Burr.* 377.

2 A turnpike act imposing a toll on every carriage and on every horse passing through the gate, and exempting any person from paying more than once in a day for passing or repassing with the same carriage, or horse, exempts the traveller from paying a second time in the day for the passage of the *same carriage*, though drawn by *different horses*, being the same in number. And another clause providing that in all cases of *carriages travelling for hire*, the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages passing with a different traveller or passenger, does not extend to stage coaches, the *carriage itself* not being there *hired* by the respective passengers, but only a conveyance by it; and therefore such stage coaches are freed of toll under the former clause by one payment in the day, although returning with different passengers and different horses, the horses being the same in number. *Williams* v. *Sangar*. 10 *East*, 66.

3 A statute establishing a turnpike road, authorises a gate to be erected at such a place near *A.* as the justices of *C. C. P.* shall determine; and the justices determine it shall be erected at *B.* near *A.* or at any place between *B.* and *C.* at the election of the proprietors, this is not an execution of the power delegated to the justices by the statute. 2 *Mass.* 102.

4 The proprietors of a turnpike road may not erect a gate upon an existing highway, unless specially authorised by the legislature. 2 *Mass.* 48.

5 If a member of a turnpike corporation expressly promise the corporation to pay his proportion of the legal assessments, such promise is valid, and an action may be maintained for the breach of it, notwithstanding the general remedy provided by the statute of 1804, c. 125, defining the general powers and duties of turnpike corporations. *Worcester Turnpike* v. *Willard*. 5 *Mass.* 80.

6 *A.* agrees in writing with a turnpike corporation, *to let them have his land* for the turnpike, they paying at the rate of 100 dollars per acre, making a wall, &c. And *B.* in behalf of the corporation engages to fulfil their part of the contract; this was held to be a contract to sell the corporation a perpetual easment over the land; and *B.* was held to answer personally on the contract. *Tucker* v. *Bass*. 5 *Mass.* 164. *Vide Assumpsit* XII, 35.

7 When the members of a turnpike corporation have expressly agreed to pay the assessments that may be made by the corporation an action lies to recover the assessments; but if there be no such agreement, the sole remedy for the corporation is by the sale of the shares of the delinquent members. *The Andover and Medford Turnpike Corporation* v. *Gould*. 6 *Mass.* 40.

8 Where a member of a turnpike corporation declared, at a public meeting of the corporation, that he would spend half his estate, when speaking of the expense of making the proposed turnpike; it was held that such a declaration was no evidence of an express promise to pay the assessments on his shares, and that no action lay thereon against him for the assessments. *Andover, &c. Turnpike* v. *Hay*. 7 *Mass.* 102.

9 Where a turnpike road was authorised by the legislature, to be located and made from *Bowdoin College* to a certain place in *Bath*, and the sessions laid out the road acc-

enteen rods distant from the college buildings, and eight rods from the land appropriated for the use of the college, the road was held to be well laid out, within the intent of the legislature. *Stanwood* v. *Pierce.* 7 *Mass.* 458.

10 Where one engages to take a certain number of shares in a turnpike, no action lies against him for the corporation, to recover the assessments laid for the purpose of making the turnpike. *New-Bedford, &c. Turnpike* v. *Adams.* 8 *Mass.* 138.

11 Where the directors of a turnpike corporation, with the assent of the corporation, procured an act of the legislature, altering the course of the turnpike road, one who before such alteration had subscribed for a share, and had expressly promised to pay all assessments, was held not to be answerable in an action for the assessment. *Middlesex Turnpike* v. *Locke.* 8 *Mass.* 268.

12 No action lies for a turnpike corporation, for the assessments, against one who had subscribed a promise to take shares, and to pay assessments thereon, after a part of the turnpike was completed, no act of the corporation either previously authorising, or afterwards ratifying his subscription. *Essex Turnpike* v. *Collins.* 8 *Mass.* 292.

13 No action lies against a toll-gatherer, for the penalty, under the 18th section of the act to establish a turnpike corporation, for providing and making a road from *Salisbury*, in the state of *Connecticut*, to *Susquehannah* river, at or near *Jericho*, for detaining and taking toll from a person exempted from the payment of toll. The section does not apply to persons, who have a right to pass toll-free. *Conklin* v. *Elting.* 2 *Johns. Rep.* 410.

14 In an action against the *Susquehannah Turnpike company*, for the value of a horse killed by the fall of a bridge on the road, it was held that the defendants were bound to bestow ordinary care and diligence in the construction of their bridges, and keeping them in repair; but are not responsible for accidents, which do not arise from their neglect, or want of ordinary care and skill. *Townsend* v. *Susquehannah Turnpike Company.* 6 *Johns. Rep.* 90.

15 According to the true construction of the act relative to the *Mohawk turnpike bridge company*, passed 29th *March*, 1809, (32 sess. c. 189,) the corporation cannot legally exact more than *half-toll* or six and one fourth cents for crossing the bridge at *Schenectady*, with a waggon and horses, &c. from the inhabitants of the city of *Schenectady*, or from persons going to or from mills, &c. *Hearsey* v. *Pruyn.* 7 *Johns. Rep.* 179.

The discretion given the corporation in such cases to mitigate the rate of toll, is to be exercised only in reducing them below one half. *Ibid.*

The words in the act "going to and from mills," comprehend *saw* mills as well as *grist* mills. *Ibid.*

An action lies against the *toll-gatherer*, who has received the excess of *toll*, if he has notice not to pay it over, or if he has not actually paid it over, if he had sufficient notice of the plaintiff's claim. *Ibid.*

It seems, that the right of the corporation to take toll may be tried in an action against the toll-collector, where notice has been given him not to pay it over. *Ibid.*

16 The privilege granted by the second section of the act (33 sess. c. 189) incorporating the *Mohawk turnpike and bridge company*, to the inhabitants of *Schenectady*, going to market with the produce of their farms and returning from market, of paying only *half* toll, is *personal*, and is waived, if the person carries to, or brings back from market, the goods of others; and though he carries the produce of his own farm to market; yet, if on his return, his waggon is loaded in part with his

own goods, and in part with the goods of others, he must pay full *toll* for the return load. *Hearsey* v. *Boyd*. 7 *Johns. Rep.* 183.

17 Under the act (sess. 22, c. 30, s. 11) and the act (sess. 31 c. 213) a person is exempt from paying *toll* on the first great western turnpike, when going to mill in a town different from that in which he resides, if it appears that he usually went to such mill, when there was no grinding in his own town, and that he went for no other purpose than to have his corn ground. *Chesiney* v. *Coon*. 8 *Johns. Rep.* 150.

U.

UNITED STATES.

1 From the moment of the association of the *United States*, they necessarily became a body corporate; for there was no superior from whom that character could otherwise have been derived. 1 *Dallas*, 41.

2 It was agreed in congress, when the *Brit ish* army evacuated *Philadelphia*, that all the public property of the enemy, such as cannon, &c. should belong to the *United States*, and the private property of individuals to *Pennsylvania*. 1 *Dallas*, 71.

3 Congress during the late war, might lawfully direct the removal of any articles that were necessary to the maintenance of the continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this is a natural and necessary incident. 1 *Dallas*, 362.

4 To entitle the *United States*, to a preference over other creditors, it must be shown that the debtor was insolvent, and had voluntarily assigned *all* his property for the benefit of his creditors, or that an attachment had been taken out against his property, as an absent or absconding debtor, and prosecuted to effect. *Mc'Lean* v. *Rankin and Heyer*. 3 *Johns. Rep.* 369.

If an attachment be taken out against a person as an absent or absconding debtor, and afterwards, withdrawn, by consent, without any proceedings under it, it is inoperative, and gives no right of preference to the *United States*. *Ibid.*

5 A consignment of goods by a debtor abroad, though insolvent, with directions to have them sold, and the proceeds paid to his creditors, in *New-York*, is not such an assignment as will entitle the *United States* to a preference. *Ibid.*

6 In all cases of insolveney of their debtor, the *United States* are entitled to a priority of payment out of his effects. *United States* v. *Fisher et al.* 2 *Cranch*, 358.

See also, *Harrison* v. *Sterry*. 5 *Cranch*, 289.

UNIVERSITY.

The court will have an eye to the discipline of a university, where it takes cognizance of a cause from it, as out of its jurisdiction. *Anon. Lofft*, 42.

USAGE.

1 Usage good to explain doubtful words in a charter. *Rex* v. *Johns. Lofft*, 76.

2 Where a conveyance to uses enures by way of transmutation of possession, the uses may be declared or revoked without deed by writing. *Jones* v. *Morley*. 2 *Salk.* 677. 1 *L. Raym.* 287.

3 If lease and release be pleaded to *A.* and his heirs, and no consideration appears, not said to whose use it was, it shall be intended to be to the use of the releasee and his heirs. *Qu.* Whether there can be a resulting use upon a conveyance by lease and

release? *Shortridge* v. *Lamplugh*. 2 *Salk*. 678. 2 *L. Raymond*, 798.

4 Fine levied and common recovery suffered wherein conusee was tenant, and no uses of the fine declared, intended to be to the use of the conusee, in order to make a tenant of the freehold. *Anglesey* v. *Altham*. 2 *Salk*. 676.

5 A conveyance to uses is to be construed like a common-law conveyance. *Tapner, d. Peckham* v. *Merlott*. *Willes*, 180.

USE AND OCCUPATION.

1 Debt will lie for use and occupation generally, without setting forth the particulars of the demise. *Wilkins* v. *Wingate*. 6 *Term Rep*. 62.

2 Or stating the place where the premises lie. *King* v. *Frasier*. 6 *East*, 348.

3 An action for use and occupation may be maintained by a grantee of an annuity, after a recovery in ejectment against a tenant who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee, and down to the day of the demise, in the ejectment, but not afterwards. *Birch* v. *Wright*. 1 *Term Rep*. 378.

4 A tenant from year to year of a house at a yearly rent becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year. The lessor cannot maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving their *special instance and request* for the bankrupt to occupy, during the time that elapsed before his bankruptcy. *Naish* v. *Tatlock*. 2 *H. Black*. 329.

5 If *A*. agree to let lands to *B*. who permits *C*. to occupy them, *A*. may recover the rent in an action against *B*. for use and occupation. *Bull* v. *Sibbs*. 8 *Term Rep*. 327.

USURY.

1 A real *bona fide* wager, not at all intended as a loan, is not an usurious contract. *Lanego* v. *Gould*. 2 *Burr*. 715.

2 One lends a 100*l*. and takes 6*l*. 5*s*. for the interest thereof for three months by way of advance, at the time of lending: the penalty is that instant incurred, and the action must be brought within a year next after that time. *Lloyn qui tam* v. *Williams*. 3 *Wils*. 250. 2 *Black*. 792.

3 Contract to pay double for money borrowed, on the event of the borrower surviving another, not deemed usurious, because the sum lent was at hazard. *Executors of the Hon. John Spencer* v. *Sir H. James, in chancery*. 1 *Wils*. 286.

4 Usury cannot be pleaded to *scire facias* on a judgment, but it may be brought on by motion to vacate the judgment. *Bush and others Assignees of Jones* v. *Gower*. 2 *Str*. 1043.

5 Discounting notes beyond legal interest held usurious. *Moffa* v. *Dawling*. 2 *Str*. 1243.

6 Bond in the penalty of 200*l*. conditioned for the performance of articles of partnership; held not to be an usurious contract. *Morisset* v. *King*. 2 *Burr*. 891.

7 *A*. in consideration of advancing 45*l*. for which he takes the borrower's note of hand *payable on demand*, stipulates to have half of the profits upon a resale of certain goods intended to be purchased by the borrower with the money. Two hours after the purchase, *A*. demands payment of the note, and the same night puts a man into possession jointly for himself and the borrower. The net profits upon a resale were 5*l*. The bargain is unconscionable, and *A*. shall not recover his share of the profits. *Justins* v. *Brooke*. 793.

8 Computation upon a usurious contract held good from the time of

payment, to take the cause of action out of the statute of limitations. *Hodges* v. *Lovat*. *Lofft*, 50.

9 One *sells* goods at three month's credit, but stipulates, in case the money is unpaid, that the vendee shall allow him a *halfpenny* an *ounce* per month, till the debt is discharged. This allowance was according to an usage in that particular branch of trade, but above the legal rate of interest. The contract being a *bona fide* sale is *not* usurious. Otherwise, if it had been merely *colourable*, to cover a loan and evade the statute. *Floyer* v. *Edwards*. 3 *Cowp*. 112. *Lofft*, 595.

10 Purchase of an annuity for the life of the vendor, 32 years old, at six years' purchase, is not usurious, notwithstanding it is made redeemable at the option of the vendor, at the end of five years for five years and a half's purchase, and by mistake of the scrivener it is styled a loan in the recital of the deeds. *Murray* v. *Harding*. 2 *Black*. 859. 3 *Wils*. 390.

11 The obligor was bound in a bond of 300l. conditioned to pay 22l. 10s. premium at the end of the first three months after the date, &c. and sixpence in the pound at the end of six months, as a farther premium, together with the principal itself, in case the obligor be then living; but if he die within that time, then the principal to be lost; adjudged, this is an usurious contract, because there was a possibility that the obligor might live so long; and there is an express provision to have the principal again. *Mason* v. *Adley*. 3 *Salk*. 390.

12 Equity will assist the borrower on an usurious contract to retain all but the legal interest. 2 *Doug*. 697, *n*. Or to recover back what has been paid on such a contract above the principal and legal interest. 2 *Doug*. 698, *n*. For which also an action will lie. 2 *Doug*. 697, *n*.

And if a party pawn goods on an usurious loan, he cannot recover back the goods in trover, unless he has first tendered the money really advanced, and legal interest. *Fitzroy* v. *Gwillim*. 2 *Doug*. 698, *n*.

13 It is not usury for a country banker in discounting bills to take, over and above the *5 per cent*. discount, a commission, agreeable to the usage, on the amount of the bill. *Benson* v. *Parry*. 1 *Doug*. 236, *n*.

14 If there is an agreement to pay legal interest, and a premium is paid down, over and above the interest, the agreement is usurious and void. *Fisher* v. *Beasley*. 1 *Doug*. 235 to 237.

But the penalty under 12 *Anne*, stat. 2. c. 16, is not incurred, if the premium itself does not exceed legal interest, nor till more than legal interest actually received; therefore, an action may be brought for the penalty, though more than a year has elapsed since the payment of the premium, if it is not a year since what has been paid exceed legal interest. *Ibid*.

15 When, upon a negociation for a loan of money the lender says, he cannot advance the money, but will furnish goods, which the other takes and sells, if the security given is for a sum of money made payable at a future day, greatly exceeding the value of the goods and *5 per cent*. interest; this is an usurious loan, and the security and contract are both void. *Lowe* v. *Waller*. 2 *Doug*. 736.

16 If the borrower of money give a bond for the principal and interest at five *per cent*. and covenant at the same time also to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with another person, this is an usurious contract, and the obligee cannot recover on the bond; for though he was to gain by the profits, he was not to stand to the losses of the trade. *Morse* v. *Wilson*. 4 *Term Rep*. 353.

17 The loan of money produced by the sale of stock, on an agreement that the borrower shall replace this stock on a certain day, or *repay the money* on a subsequent day, with such interest in the mean time as the stock itself would have produced, is not usurious, though the interest exceed 5*l*. *per cent.* unless the transaction be colourable, and a mere device to obtain more than legal interest. *Tate* v. *Wellings.* 3 *Term Rep.* 531. And see *Sanders* v. *Kentish.* 8 *Term Rep.* 162.

18 A memorandum indorsed on a bond, which was conditioned for the payment of 100*l*. by quarterly payments of 5*l*. each, and interest at 5*l*. *per cent.*, "that at the end of each year *the year's interest due* was to be added to the principal, and *then* the 20*l*. received in the course of the year was to be deducted, and the balance to remain as principal," was held not to be usurious. *Le Grange* v. *Hamilton.* 4 *Term Rep.* 613. Affirmed in *Cam. Scac.* 2 *H. Black.* 144.

19 Where it appeared to be the usage of country bankers in discounting bills to receive, over and above the common interest of 5*l*. *per cent.* for the time the bills had to run, the further sum of 5*s*. *per cent.* on the gross sum for commission; such charge was held to be legal. *Winch q. t.* v. *Fenn.* 2 *Term Rep.* 52, *n.*

20 *A.* being a banker in the country, discounts bills at four months for *B.* and takes the whole interest for the time they have to run; *B.* on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash, and part by bills in *London*, some at three, some at seven, and some at thirty days sight; and held not to be an usurious transaction, since the surplus of interest taken by *A.* might be referrable to the expences of remittance. *Hammett & al.* v. *Yea, Bart.* 1 *Bos. & Pull.* 144.

21 But an agreement on discounting a bill, that the plaintiff should take in part payment another bill which had time to run as cash, although the full discount was taken, is usurious. *Parr* v. *Eliason.* 1 *East*, 92.

22 The acceptor of bill, dated 4th of *July*, and due 7th of *September*, taking a premium of 6*d*. in the pound from the indorsee and holder for payment of the bill on the 20th of *August* before it was due, is not guilty of usury; there being no loan or forbearance. *Barclay q. t.* v. *Walmsley.* 4 *East*, 55.

23 To make usury there must either be a direct loan, and a taking of more than legal interest for the forbearance of payment; or there must be some device for the purpose of concealing or evading the appearance of a loan and forbearance, when in truth it was such. *Ibid.*

24 The grantor of an annuity having agreed with the grantee to redeem, drew a bill of exchange for 5000*l*. at three years, which the grantee discounted in the following manner; he took 4083*l*. 6*s*. 8*d*. as the amount of the purchase money and arrears, advanced 166*l*. 13*s*. 4*d*. to the grantor in cash, and took 750*l*. as interest for three years upon 5000*l*. Held that the transaction was usurious. *Marsh* v. *Martindale.* 3 *Bos. & Pull.* 154.

25 If a promissory note be given for repayment of a sum lent with usurious interest, and the note when due be taken up and another note substituted for it, the offence of usury is not thereby committed, nor is the penalty incurred, until the latter note is paid. *Maddock q. t.* v. *Hammett.* 7 *Term Rep.* 184.

26 *A.* lent *B.* 500*l*. and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deed *B.* gave *A* 50*l*. and paid interest at the rate of 5 *per cent.* on the 500*l*. for five years, at the end of which time an action was brought against *A.* for usury; held, that the

action was not barred by lapse of time, for that the loan was substantially for no more than 450l., and consequently the interest at the rate of 5 *per cent.* on the 500l. received within the last year was usurious. *Scurry q. t.* v. *Freeman.* 2 *Bos. & Pull.* 381.

27 Upon a contract to forbear 600l. for a year, reserving interest at the rate of 5l. *per cent.* for which a premium was paid in the first instance, the usury is complete upon the lender's receiving any part of the growing interest within the year. *Wade q. t.* v. *Wilson.* 1 *East*, 195.

28 The contract may be laid as for a forbearance to *A.* alone, who was the real debtor, although *B.* had joined with him in the security given to the lender. *Ibid.*

29 If *A.* be indebted to *B.* and *B.* to *C.* and *C.* agree for an usurious consideration to accept *A.* for his debtor instead of *B.*; this may be laid to be for an usurious loan of so much from *C.* to *A.* *Ibid.*

30 If more than legal interest be taken for forbearance on a note given to *A.* by *B.* as a collateral security for money lent to *C.*, such money is well described to be forbearance of money lent by the defendant to *B.* *Manners qui tam* v. *Postan.* 3 *Bos. & Pull.* 343.

31 If *A.* for an usurious consideration give his promissory note to *B.*, who transfers it to *C.* for a valuable consideration, without notice of the usury, and afterwards *A.* gives a bond to *C.* for the amount, the bond is valid. *Cuthbert* v. *Haley.* 3 *Term Rep.* 390.

32 But if *A.* had given *B.* his bond in consideration of such note, the bond would have been void. *Ibid.*

33 A *bona fide* debt is not destroyed by being mingled with an usurious contract relating to it. *Gray* v. *Fowler.* 1 *H. Black.* 462.

34 A bill of exchange payable to *A.* or order, which was legal in its inception, was by him indorsed to *B.* for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to *B.*'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate; held that the indorsement of *A.* to *B.* on an usurious account, did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury, and that *B.*'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against *A.* though as between *A.* and *B.* the security was void. *Parr* v. *Eliason.* 1 *East*, 92.

35 The statute 14 G. 3, c. 79, relates solely to securities on *land* in *Ireland* and the colonies; and therefore where *A.* contracted with *B.* for the sale of an estate in the *West-Indies*, and it was agreed that part of the purchase money should remain secured by the bond of *B.* and *C.*, and that bond was afterwards cancelled, and another executed in *England* by *B.* and *D.*, reserving 6l. *per cent.* interest (in the same manner as the former one;) such contract was held to be usurious. *Dewar* v. *Span.* 3 *Term Rep.* 425.

36 A *post-obit* bond is a security of a doubtful nature. 1 *H. Black.* 95.

37 The court of C. P. set aside a warrant of attorney and judgment given to secure a loan which was sworn to be usurious, in order to bring the question of usury before a jury; but refused to order a bill of exchange to be delivered up which had been given to procure the defendant's release out of execution on the judgment. *Edmonson* v. *Popkin.* 1 *Bos. & Pull.* 270.

38 The defendant being indebted to the plaintiff in 486l. 4s. 6d. for which he was sued; and the plaintiff wishing to invest the amount of the debt in stock on the 19th of *November*, 1803, when the same would have purchased 908l. 16s. 7d. stock; in consideration of forbearing his action and demand till the 19th *November*, 1804, takes bond

from the defendant, conditioned for the transfer by him to the plaintiff on that day of 908l. 16s. 7d. stock with such interest as the same would have produced, as such stock, in the mean time; held that this was neither usurious, nor in the prohibition of stock jobbing act, 7 G. 2, c. 8. *Maddock* v. *Rumball.* 8 *East*, 304.

39 To entitle one to the moiety of the penalty for usury, it must appear on the record, that he prosecuted, complained or sued for it; and this within a year after the offence committed. *Commonwealth* v. *Frost.* 5 *Mass.* 53.

The offence of usury is completed, if more than legal interest be paid at the time of the loan, whether the principal sum be ever repaid or not. *Ibid.*

If the lender on usury acts as agent for another, this will be no excuse for him, especially if he does not disclose the fact at the time of the transaction. *Ibid.*

40 *A.* conveyed to *B.* land of the value of 1600 dollars, for the consideration of 300 dollars; *B.* at the same time agreeing to reconvey it upon payment of 522 dollars 97 cents at two instalments, the last within three years from the date of the contract; no part of 522 dollars 97 cents were paid: It was held that *B.* was not liable to a *qui tam* action for taking usurious interest. *Thomes* v. *Cleaves.* 7 *Mass.* 361.

41 It is not usurious in a banking company to take their notes payable in *Boston* bills, and upon a renewal of the loan to take a premium equal to the difference between those bills, and other bills current at the place of the bank. *Portland Bank* v. *Storer.* 7 *Mass.* 433.

Nor is such a transaction within a prohibition in the charter of such company to use their monies, &c. in trade or commerce. *Ibid.*

42 Where more than legal interest has been taken on a loan of money, the mortgage or other security for such loan is not therefore void; unless the same was originally reserved thereon; although the party may be liable to an indictment or an action for the forfeiture given by the statute. *Gardner* v. *Flagg.* 8 *Mass.* 101. S. P. *Thompson Ad.* v. *Woodbridge.* 8 *Mass.* 256.

43 Where at the making of a promissory note bearing legal interest from its date, an extra premium was also paid, the note was held to be usurious and void. *Thompson Ex.* v. *Thompson.* 8 *Mass.* 135.

44 Where by the terms of the contract the party may, by payment at a day certain, avoid any stipulated penalty, such contract is not usurious. *Cutler* v. *How.* 8 *Mass.* 257.

45 *A.* owing *B.* a sum of money gave his promissory note payable in six months in a specific commodity at a lower rate than its current value; the note not being paid at the time it fell due, the creditor put it in suit and afterwards adjusted the suit by taking a new note for the balance of the former, at the low rate of the commodity, and made the new note also payable at a given day in the specific commodity at a lower rate than its current value, this last note was held to be usurious and void. *Cutler* v. *Johnson.* 8 *Mass.* 266.

46 An absolute deed of conveyance of real estate, upon trust, will not be set aside on the ground of usury. *Denn ex dem. Wilkinson* v. *Dodds.* 1 *Johns. Cases*, 158.

47 *A.* made a note payable to *B.* which was indorsed by him to *C.* and *D.* and sent by *A.* to *E.* a money broker, in order to raise money, and *E.* advanced the money on the note, deducting a premium of 2 per cent per month. In an action brought by *C.* against *B.* as first indorser, it was held, that the note was usurious and void; and *E.* the broker, was a competent witness to prove that the note had been sold to *E.*

for no more than the principal and legal interest. *Jones* v. *Hake.* 2 *Johns. Cases*, 60.

48 The proper way to try the truth of an allegation of usury, in regard to a judgment entered up on a bond and warrant of attorney, is to retain the judgment, and award a feigned issued to try the fact; but where a judgment had been assigned to a *bona fide* purchaser, and notice thereof given to the defendant, the court refused to award an issue, considering the judgment as not within the statute against usury; and having reason to suspect a *collusion* between the plaintiff and defendant to defeat the claims of the assignee of the judgment. *Wardell* v. *Eden.* 2 *Johns. Cas.* 238.

49 Where there is colour for the allegation, that the bond, on which a judgment has been entered up on a warrant of attorney, is usurious, the court will award a feigned to try the fact. *Gilbert* v. *Eden.* 2 *Johns. Cases*, 280.

50 The court refused to set aside a regular inquest by default, taken at the sittings, in order to let in the defendant to prove usury, as a defence. *Crammond* v. *Roosevelt.* 2 *Johns. Cases*, 282.

51 *A.* residing in the state of *Massachusetts*, and owning lands in the state of *New-York*, entered into a contract in *Massachusetts*, with *B.* an inhabitant of *New-York*, for the sale of the lands to him. *B.* gave his bond to *A.* for the consideration money, payable in four years, and also four promissory notes, payable in one, two, three, and four years, for the interest on the *bond* at the rate of *six and a half per cent*: and *A.* executed to *B.* a bond conditioned to execute a conveyance to him of the land on the payment of the bond, and notes. In an action brought by *A.* against *B.* on three of the notes, the defendant pleaded usury, and it was held that the notes were *usurious*, and that the law of *Massachusetts* was to govern. *Van Schaick* v. *Edwards.* 2 *Johns. Cas.* 370.

52 Where *A.* made a note, payable to *B.* who indorsed it merely for the accommodation of *A.* who passed the note to *C.* to raise money on it, by having the same discounted in the market, and *C.* discounted the note at a premium of three and one fourth *per cent* per month, and after deducting the discount applied the proceeds to the payment of money lent by him to *A.* and afterwards, in the course of his business, passed the note to *D.* who brought an action against *B.* the first endorsor; it was held, that the note, though endorsed by *B.* for the accommodation of *A.* passed immediately from *A.* to *C.* and that the transaction, in its inception was usurious, and the note therefore void. *Wilkie* v. *Roosevelt.* 3 *Johns. Cas.* 66.

53 In an action on a promissory note, the defence was *usury*, and the judge at the trial charged the jury that the note was *usurious*, and that they ought to find for the defendant; but the jury found a verdict for the plaintiff; and the court afterwards set aside the verdict and granted a new trial. On the second trial, the jury on substantially the same evidence, notwithstanding the opinion of the court, found a verdict for the plaintiff, and the court set aside the verdict as against law, and granted a third trial. *Wilkie* v. *Roosevelt.* 3 *Johns. Cas.* 206.

If a promissory note is given for an *usurious* contract, it is absolutely void, even in the hands of an innocent person, who has taken it in the fair and regular course of trade, without knowledge of the usury. *Ibid.*

54 In an action of debt on a bond, where the defendant pleaded usury, which was alleged to consist in including in the bond 183 dollars and 72 cents, for forbearance of payment; and it appeared that the plaintiff was to deliver to the defen-

dant a horse of the value of 100 dollars, and which made part of the sum of 183 dollars and 72 cents. It was held, that the evidence of the usury, given at the trial, varied from what was alleged in the pleadings, and that any variance in the sum alleged to be usurious, or in the consideration, stated to be given for the forbearance, was fatal to the plea, and that such evidence ought to be rejected. Whether usury or not, is a question of fact for the jury to decide. *Smith* v. *Bush.* 8 *Johns. Rep.* 84.

55 In an action by a *common informer*, on the 2d section of the *act to prevent usury*, (sess. 10, c. 13) the plaintiff must declare specially, and state the usury, &c. The general form of declaring mentioned in the act is given only to the *borrower*. *Morrell qui tam* v. *Fuller.* 8 *Johns. Rep.* 218.

56 In an action of debt on bond, dated *October* 20, 1808, conditioned to pay 1.087 dollars, the defendant pleaded that it was *corruptly* agreed between the plaintiff and defendant, that the plaintiff should lend the defendant 687 dollars, to be repaid on the 1st *November*, 1811; and that the plaintiff should forbear and give time for the payment of the 687 dollars to the 1st *November*, 1811, and for such forbearance the defendant should purchase of the plaintiff 16 shares of turnpike stock, to be delivered, &c. for 400 dollars, when, in truth and in fact, the shares were worth only 250 dollars, and that in pursuance of such agreement, the defendant did purchase the shares, &c. and executed the bond, as well for the 687 dollars lent, as the 400 dollars to be paid for the shares, and for the forbearance of the 687 dollars, &c. On a demurrer to this plea, the bond was held to be *usurious* and void. *Roe* v. *Dickson.* 7 *Johns. Rep.* 196.

57 To a plea of the statute of *usury*, the plaintiff may reply directly that it was not corruptly agreed in manner and form, &c. without a traverse, and conclude to the country. *Waterman* v. *Haskin.* 7 *Johns. Rep.* 283.

58 In an action *qui tam*, &c. brought by a common informer, under the 2d section of the statute for preventing *usury*, the declaration must state that the party aggrieved neglected to sue within one year, in order to give the plaintiff a right of action. *Morrell* v. *Fuller.* 7 *Johns. Rep.* 402.

59 In *Pennsylvania*, where usurious interest is included in a note, &c, the whole amount cannot be recovered; but the plaintiff is intitled to a verdict for the just principal, and lawful interest. 2 *Dallas*, 92.

60 A man who takes usurious interest incurs a forfeiture; but in an action for the loan, the defendant is not entitled to a verdict. 2 *Dallas*, 92.

61 Any security for the payment of money may be purchased at any rate without incurring the penalties for usury. *Ibid.*

62 Where partial payment is made and received, on account of a note given for the payment of money borrowed at usurious interest, the usury is complete. 1 *Dallas*, 216.

63 Proof of a note given by one of two partners, for the payment of money borrowed on usurious interest, and afterwards paid will not support a count, stating the usurious contract to have been with the partners jointly. *Ibid.*

64 Although no money is actually paid, the usury is complete, when new notes are taken in satisfaction of old ones given for the payment of money borrowed at an usurious interest. *Ibid.*

65 A fair purchase may be made of a bond or note, even at 20 or 30 *per cent* discount, without incurring the danger of usury. 1 *Dallas*, 217.

66 If *A.* lend money to *B.* who puts it out at usurious interest, and agrees to pay *A.* the same rate of in-

terest which he is receiving upon *A*'s. money, this is usury between *A*. and *B*., and an endorsor of *B*'s. note to *A*. may avail himself of the plea of usury. *Levy* v. *Gadsby*. 3 *Cranch*, 180.

67 If an agent, who has by permission of his principal, sold eight *per cent* stock, apply the money to his own use, and being pressed for payment, give a mortgage to secure the repayment of the amount of the stock with eight per cent interest thereon, it is usury. *Debutts* v. *Bacon*. 6 *Cranch*, 252.

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V.

VAGRANT.

1 Child of two years old cannot be a vagrant. *The King* v *Inhabitants de King's Langley*. 1 *Str*. 631.

2 A common soldier cannot be a vagrant within the meaning of statute 17, Geo. 2. 1 *Wils*. 331.

3 A person must be idle as well as disorderly to be committed for a vagrant. *The King* v. *Miller*. 2 *Str*. 1103.

4 By the vagrant act 17, G. 2, c. 5, after a rogue and vagabond has been committed to the sessions, and they adjudging him to be *a rogue and vagabond*, order him to be further imprisoned and kept to hard labour for six months, and to be publicly *whipped* during that time, and that after the expiration of his imprisonment he should be *sent and employed in his Majesty's service pursuant to the statutes*, &c.; held that the whole forms one sentence; and such order being defective in the latter part, for want of adjudicating whether the party were to serve his majesty by *sea* or *land* as discriminated in the statute, the conviction shall be quashed, though the former part of the sentence, adjudging *the rogue and vagabond* to be *whipped*, be valid. *R.* v. *Patchett*. 3 *East*, 339.

VARIANCE.

I. *Between the declaration, or plea and the writ, or the proof produced.*
II. *In Indictments.*
III. *In records, or reciting them.*
IV. *How to be taken advantage of.*

I. *Between the declaration or plea, and the writ or the proof produced.*

1 In an action against the sheriff for not leaving a year's rent, if the demise is particularly set forth, and not proved as laid, it is fatal. *Bristow* v. *Wright*. 2 *Doug*. 665.

A promise being declared on to deliver "good merchandizable wheat," and the evidence being of a promise to deliver "good second sort of wheat,"—the variance is fatal. *Ib.*

Upon an issue "whether *A*. devised to *B*. and his heirs," it is a fatal variance if the evidence is of a devise, "to *C* for years, remainder to *B*. in fee." *Ibid.*

In debt for rent, the declaration being on a demise, "for 15*l*. rent," under a power "to make leases for 21 years," and the evidence being of a demise for "15*l*. rent, and three fowls," under a power "to make leases for 21 years in possession, and not in reversion, rendering the ancient rent, and not dispunishable of waste," the variance is fatal. *Ibid.*

2 Bond to *A*. in 40*l*. *solvend*. to his attorney, declared on as payable to *A*., and no variance. *Roberts* v. *Harnage*. 2 *Salk*. 659. 2 *L. Raym*. 1043.

Between the original and the declaration aided by verdict. *Anon*. 3 *Salk*. 370.

3 *Capias* at the suit of the plaintiff generally, and the declaration *qui tam*, held well enough. *Lloyd* v. *Williams*. 2 *Black*. 732. 3 *Wils*. 141.

4 *Certiorari* to remove conviction, &c. against *A*. and wife, and return-

ed against *A.* only; held a variance, and quashed. *Anon.* 1 *Str.* 116.

5 *Segrave* in one place and *Seagrave* in another, no variance. *Williams* v. *Ogle.* 2 *Str.* 889.

6 In debt where the quantity of the duty depends upon the deed, variance is fatal, and cannot be helped by *remittitur*; otherwise, where matter extrinsic. 1 *Salk.* 139. *Incledon* v. *Crips.* 2 *Salk.* 658. 2 *L. Raym.* 814.

7 In an action by a landlord against his tenant, for negligently keeping his fire, if the declaration is of a demise for a term of years, and the evidence of a lease from year to year, it is fatal.

8 So in an action on 11 G. 2, c. 19, s. 18. for double rent, if the plaintiff declare on a demise for three years, and prove a lease from year to year. *Shute* v. *Hornsey.* 2 *Doug.* 668, *& n.*

9 Information for a libel, variance in the word *nor* for *not* held fatal upon evidence.

In declaring for words spoken, *various* in omission or addition not material if the words proved are actionable; otherwise, in tenor of words written.

In pleading, a libel may be set forth in *hæc verba*, or by the sense or substance of it. *The Queen* v. *Drake.* 2 *Salk.* 660.

10 Recognizance in C. P. taken at a judge's chambers, pleaded as taken in court, variance. Recognizance of bail in C. P. binds from the caption in K. B. from the entry only. *Chetley* v. *Wood.* 2 *Salk.* 659.

11 In replevin, the writ was *quare cepit averia?* and the declaration was *quare cepit unam equam?* *Et per Powell:* This variance between the writ and declaration is naught, even after a verdict, which *Treby*, chief justice, denied; it is true it is naught upon a demurrer, but it is cured by the *Oxford* act after a verdict. *Anon.* 3 *Salk.* 370.

12 In an action on recognizance, if it is stated to have been taken in court, and upon production it appears to have been taken before a judge at chambers, the variance is fatal. *Phettle* v. *Wood.* 2 *L. Raym.* 966. 2 *Salk.* 564, 659.

13 On cause shewn against a rule "to set aside the proceedings for a variance between the declaration and the process," the process was "to answer the plaintiff, *qui tam pro domino rege, quam pro seipso sequitur;*" the declaration was in his own name only, omiting the *qui tam* part. *Canning* v. *Davis.* 4 *Burr.* 2117.

14 In an action of debt on a simple contract the declaration is good, though it specify *a less sum* in the several counts, than is demanded in the recital of the writ, and yet assigns as a breach the non-payment of the sum demanded in the writ. *M'Quillin* v. *Cox.* 1 *H. Black.* 249.

15 In such action the plaintiff may prove and recover a less sum than is stated to be due. *Ibid.*

16 A variance between the writ and count, (the *ac etiam* being in *case or promises*, but the declaration *in debt*) is not a ground for entering an *exoneretur* on the bail piece, where the sum sworn to is under 40*l.* *Lockwood* v. *Hill.* 1 *H. Black.* 310.

17 Where the declaration set forth the precept from the sheriff to the portreeve of a borough, the improper insertion of the word "*if*" in such precept, viz. "and *if* the said election so made," &c. is not a fatal variance, but is to be rejected as surplusage. *King* v. *Pippett.* 1 *Term Rep.* 235.

18 In an action against the sheriff for taking goods without levying a year's rent, the plaintiff undertaking to set forth the particulars of the demise, (which was unnecessary,) and not proving them as laid, must be nonsuited. *Bristow* v. *Wright.* *Doug.* 642. 1 *Term Rep.* 236, *n.*

19 In an action by the bailiff of *Westminster* against the defendant, in the nature of an escape, the decla-

ration stated a *latitat* against *Donner* and *J. Doe*, with an *ac etiam* against *Donner*, for 30l. The writ produced *in evidence* was against *Donner* and two others, and not against *J. Doe*. Lord *Mansfield* held this to be good, it being a sufficient writ to warrant the arrest. *Hendray* v. *Spencer*, *sittings after Michaelmas*, 1773, *at Westminster*. 1 *Term Rep.* 238, *n.*

20 In an action for non-residence, the parish was styled in the declaration *St. Ethelburg*; the real name appeared in evidence to be *St. Ethelburga*; held a fatal variance. *Wilson qui tam* v. *Gilbert*. 2 *Bos. & Pull.* 281.

21 But where three parish churches have been united by 22 Car. 2, c. 11. the benefice may be described in pleading as one rectory. *Wilson qui tam* v. *Van Mildert*. 2 *Bos. & Pull.* 394.

22 If a bill drawn by *John Crouch* be declared upon as drawn by *John Couch*, the variance is fatal. *Whitwell* v. *Bennet*. 3 *Bos. & Pull.* 559.

23 In an action for bribery, the declaration stated the precept to be directed to the *mayor* only; but the precept proved was directed to the *mayor and burgesses*; which was held to prove the declaration. *Cuming* v. *Sibley*. 1 *Term Rep.* 239, *n.*

24 So where the precept declared on was to the bailiffs and jurats, and that proved was directed to the bailiff and jurats. *Warr* v. *Harbin*. 2 *H. Black.* 113.

25 In an action for an amercement in a court-leet, if the declaration state the court to have been holden before the *steward* of the manor, but the evidence prove it to have been holden before the *deputy steward*, it is a fatal variance. *Wyvill* v. *Shepherd*. 1 *H. Black.* 162.

26 *S. P.* Where the declaration stated that the defendant was summoned to serve on the jury of the court-leet and court-baron, but the summons was to serve on the jury of the court-leet only. *Gery* v. *Wheatly*. 1 *H. Black.* 163, *n.*

27 Evidence that the homage have been accustomed to assess a certain sum of money *as a heriot* upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for a *heriot in kind* upon alienation. *Parkin* v. *Radcliffe*. 1 *Bos. & Pull.* 393.

28 On a justification by the lord of a manor, under a custom that the lord should have the best beast on the tenant's death, the custom proved was that the lord should have the best beast *or good*, and the whole court of C. P. held the variance fatal. *Adderley* v. *Hart*. 1 *Bos. & Pull.* 394, *n.*

29 In an action on a bail bond, the special original being returnable *coram domino rege ubicunque tunc fuerit in Anglia*, the omission of the word *ubicunque* was held not fatal, for the writ is to compel appearance before the king *in his court*, and not *in person*, and therefore it could not, as was objected, be to compel appearance out of *England*. *Shuttleworth* v. *Pilkington*. (2 *Str.* 1155.) 1 *Term Rep.* 240, *n.*

30 In cases upon contracts it is necessary to set out the contract truly; and a difference in any part is fatal, because the contract is entire. 1 *Term Rep.* 240.

31 Where the contract declared upon was, that the defendant should deliver to the plaintiff all his tallow at 4*s.* *per* stone; and the contract proved was, that the defendant should deliver it at 4*s.* *per* stone, *and so much more as the plaintiff paid to any other person*; this was held a fatal variance. *Churchill* v. *Wilkins*. 1 *Term Rep.* 447.

32 Declaration by a sailor for wages, and the average price of a negro slave for a certain voyage (to wit,) "*from the port of London to the coast of Africa, and from thence to the*

West-Indies;" in the articles it was called a voyage "from the port of *London* to the coast of *Africa*, from thence to the *West-Indies* or *America*, *and afterwards to London in Great-Britain, or to her delivering port in Europe;*" held that the variance was fatal, notwithstanding the *scilicet*, and although the voyage was in fact put an end to in the *West-Indies;* and that the contract for the price of a slave, not being included in the articles pursuant to 2 G. 2, c. 36, was void. *White* v. *Wilson.* 2 *Bos. & Pull.* 116.

33 Declaration for 52l. 10s. for run-money; evidence, a note for 52l. 10s. for run-money, with an additional stipulation written after signature of the note, for a pint of rum *per* day; and held no variance. *Baptiste* v. *Cobbold.* 1 *Bos. & Pull.* 7.

34 In a declaration on an agreement for a wager, this indorsement on the agreement; "N. B. to start, P. P., in 15 days from this date," was not noticed; the omission was held to be immaterial; "P. P." being considered merely insensible letters. *Whaley* v. *Pajot.* 2 *Bos. & Pull.* 51.

35 An avowry for an increased rent on a demise for every acre of the land which should be converted into tillage, is supported (under 11 G. 2, c. 19,) by the evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted *during a part of the term e. g.* for the last three years. *Roulston* v. *Clarke.* 2 *H. Black.* 563.

36 Evidence of an agreement to deliver goods to the defendant is a variance from a count on an agreement to deliver them to another person. *Leery* v. *Goodson.* 4 *Term Rep.* 687.

37 Under a count for money had and received by three defendants, the plaintiff cannot give in evidence money had and received by them and by a fourth partner who is now dead. *Spalding* v. *Mure* and *two others.* 6 *Term Rep.* 363.

38 Plaintiff covenanted to build two houses for 500l. by a certain day, and averred in an action of covenant for the money, that the houses were built in the time; evidence that the time had been enlarged by *parol* agreement, and the houses finished within the enlarged time, will not support the declaration. *Littler* v. *Holland.* 3 *Term Rep.* 590.

39 An agreement declared on to sell oats at so much *per* bushel must be taken to mean the *Winchester* bushel, and will not be proved by evidence of an agreement to sell by some other bushel. *Stockin* v. *Cooke.* 4 *Term Rep.* 314.

40 A corrupt agreement for the forbearance of money *till one or the other of two days*, at the option of the borrower, must be pleaded according to the fact, in the *alternative*; and if it be stated as an absolute forbearance till *one* of those days, the evidence will not support the plea. *Tate* v. *Wellings.* 3 *Term Rep.* 531.

41 In an action for the penalty of the statute 12, Anne c. 16, the declaration stated a specific sum of money to have been lent, (in which the usury consisted;) but the evidence was, that the loan was part in money and part in goods, (i. e. gold) of a known definite value, which the party receiving the loan *agreed to take as cash.* This was good evidence to support the declaration. *Barbe q. t.* v. *Parker.* 1 *H. Black.* 283.

42 In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff alleged in his declaration that the defendant undertook to deliver, &c. in consideration of the hire to be paid *by the plaintiff*, and proved that the hire was to be paid by the *consignee* it was held not to be a variance, the consignor being liable by law.

Moore v. *Wilson.* 1 *Term Rep.* 659.

48 In an action on a policy of insurance the declaration stated that *after* the making of the policy the ship sailed; the evidence was that she sailed *before;* held that the variance was immaterial. *Peppin* v. *Solomons.* 5 *Term Rep.* 496.

44 Proof that defendant's boat run down the plaintiff's in the half way reach in the *Thames* will support an allegation that the boat was run down in the *Thames, near* the half way reach, in an action on the case for negligence; because the place is not material: *Aliter*, if the place be material; as where a justification is local. *Drewry* v *Twiss.* 4 *Term Rep.* 558.

45 So where an action on the case was brought upon an agreement that the defendant would procure the plaintiff a booth at the horse race on *Barnet* common; and the declaration alleged *Barnet* common to be in *Middlesex*, whereas it was in *Hertford*, yet held to be surplusage, because it was immaterial to the agreement whether *Barnet* common lay in *Middlesex* or *Hertford.* *Frith* v. *Gray.* 4 *Term Rep.* 561, *n.*

46 Evidence of a house situate in the parish of *M.* will support an averment of a house "at *S.*," *S.* being extra-parochial, and both places usually going by the name of *S. Burbice* v. *Jakes.* 1 *Bos. & Pull.* 225.

47 In an action against the defendant for negligence as an attorney, in not prosecuting a debtor of the plaintiff's to judgment; the return of the writ on which the debtor was arrested being laid to be in the 25th year of the reign, &c. and the writ itself appearing to be returnable in the 24th year, this was held to be a fatal variance, even though the day of the return was alleged in the declaration under a *videlicet.* *Green* v. *Rennett.* 1 *Term Rep.* 656.

48 An allegation in a plea that "*A.* by his writing sold the aftermath of land to *B.*," was held not proved by evidence that (under a statute enabling *A.* to sell by writing) at an auction held for the purpose of selling it, *B.* was the purchaser; that *B.* gave a promissory note for the sum, and that *B.*'s name was written (by *A*'s. agent) in the printed catalogue as the buyer. *Symonds* v. *Ball.* 8 *Term Rep.* 151.

49 A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Cellar-beer* field, instead of the *Aller-beer* field, being considered a part of the description of the deed declared on; though the plaintiff waived going for damages on the breach of that covenant; is fatal. *Pitt* v. *Green.* 9 *East*, 188.

50 Where the plaintiff in an action *quare clausum fregit*, declared by the name of *William Robinson*, and in the deed under which he claimed title, he was named *William T. Robinson*, the variance was held immaterial, as the letter *T* formed no part of his name, the law recognizing only one christian name. *Franklin* v. *Tallmadge.* 5 *Johns. Rep.* 84.

51 Where the plaintiff declared on a contract by which the defendant agreed to pay him a certain sum, for *half* the land taken for a certain road; and the contract produced at the trial was, that the defendant was to pay for all the land, the variance was held fatal. *Crauford* v. *Morrell.* 8 *Johns. Rep.* 253.

See *Smith* v. *Bush.* 8 *Johnson's Rep.* 84.

52 A variance between the date of the bond as stated in the declaration, and as it appears on *oyer*, is a matter of *substance*, and fatal on the plaintiff's special demurrer to the defendant's bad rejoinder. *Cooke* v. *Graham.* 3 *Cranch*, 229.

II. *In Indictments.*

1 Where a word is misrecited and mutilated in an indictment, and the party has bound himself to a literal recital, it is fatal, if the mutilated

word is itself a word, though it do not make sense with the context; but not, if it is not a word. *Rex* v. *Beech.* 1 *Doug.* 194, *n.*

Yet "*Austrialia*" in the name of the *South Sea* company, instead of *Australia*, has been held to be fatal in an action. *Ibid.*

2 Declaration of an indictment at the general quarter sessions, which was in fact at the general sessions, no material variance, the word quarter being surplusage. *Busby* v. *Watson.* 2 *Black.* 1050.

3 Where the omission or addition of a letter does not change the word so as to make it another word, such a word is not material in indictment for perjury. Undertood for understood, not fatal. *Rex* v. *Beach.* *Cowp.* 229.

4 Variance between the indictment and the *certiorari*, fatal. *Anon.* 3 *Salk.* 80.

5 *Undertook* for *understood*, in an indictment for perjury, held an immaterial variance. *Rex* v. *Beach.* *Cowp.* 229. *Cited.* 1 *Term Rep.* 237.

6 An indictment for an assault had these words, "whereby his life was greatly despaired of;" an indictment for perjury committed on that trial, setting forth the former indictment, omitted the word, "*despaired*," which was supplied by the court. *Rex* v. *May.* (*Doug.* 183.) *Ibid.*

7 An indictment for perjury stated the bill in chancery to be directed to *Robert* Lord *Henley*, &c. whereas it was to Sir *Robert Henley*, Knt. &c., and the objection was over-ruled. *Rex* v. *Lookup, cited.* 1 *Term Rep.* 240.

III. *In Records, or reciting them.*

1 *Scire facias pro non performatione cujusdam promissionis et assumptionis*, and in the record several promises, held a variance. *Baynes* v. *Forrest.* 2 *Str.* 893.

2 Variance between judgment and writ of error, the addition in the writ being "Esquire," and, in the judgment, "Gentleman." *Anon.* *Lofft*, 272.

3 Variance between writ and order, fatal. *Anon.* 1 *Salk.* 145.

4 On *nul tiel* record; and upon producing of the record, it agreed with the record pleaded *in omnibus*, only in the words *apud Westmonasterium*, instead of which, there was the word *ubicunque*; held no failure of the record. *Roberts* v. *Price et al.* 1 *L. Raym.* 702.

5 On an information, under a private statute, a misrecital of the commencement of the parliament is fatal, after verdict on the plea of not guilty. *Boyce* v. *Whitaker.* 1 *Doug.* 97, *n.*

6 The introduction of an unmeaning word in the recital of any instrument in a declaration (as of "if" in setting forth the sheriff's precept to the returning officer in an action for bribery) is not a fatal variance. *King* v. *Pippet.* 1 *Doug.* 194, *n.*

7 In an action founded on a statute of P. & M. it is a fatal mistake in the description, to declare upon it as of the same year of both. *Rann* v. *Green.* 1 *Doug.* 402.

8 No material difference between costs and damages. *Davenant* v. *Rafter.* 3 *Salk.* 214.

9 Earl, a sufficient description, though the christian name be mistaken. *Ingoldby* v. *Martin.* 1 *Str.* 316.

10 Judgment against the inhabitants of part of three parishes, and writ of error of a judgment against the inhabitants of the three parishes, quashed for variance. *The King* v. *The Inhabitants of All Saints, in Derby, and another.* 2 *Str.* 1110.

11 The record in an action for false imprisonment set forth a few of the first words in a bill of *Middlesex*, and then added an &c., the &c. was held by *Lee*, C. J. to be no variance from the bill of *Middlesex*, when read at the trial. *Wilson* v. *Mawson, cited.* 1 *Term Rep.* 287.

12 An averment in a declaration, of the day of a former trial must exactly agree with the record to be produced in evidence to support it, though it be laid under a *videlicit*. *Pope* v. *Foster*. 4 *Term Rep.* 590.

13 In an action on a judgment, if the declaration state the judgment to have been recovered in a term different from that which appears on the record, it is a failure of record. *Rastall* v. *Stratton*. 1 *H. Black.* 49.

14 It is also a variance if the declaration states the judgment against *one* defendant only, when it was against more than one. *Ibid.*

15 By statute 28 Eliz. c. 4, sheriffs are liable to a penalty for taking more than a certain sum on executions "upon the body, lands, goods, *or* chattels;" a declaration on this act, in reciting the statute, stated it thus, "body, lands, goods, *and* chattels;" and this was held to be a fatal variance in arrest of judgment. *Rex* v. *Marsack*. 6 *Term Rep.* 771.

16 Any material misrecital of a statute in a declaration founded on the statute, is a ground to arrest the judgment. *Ibid.*

17 Whether a mere literal misrecital, not varying the sense, be also a ground to arrest the judgment? *Qu.* 6 *Term Rep.* 776.

18 In an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquital as laid in the declaration, so that it appears to have been before the action brought; and therefore a variance in that respect between the day stated in the record, which was produced to prove the acquital is not material; the day not being laid in the declaration as part of the description of such record of acquittal. *Purcell* v. *Macnamara*. 9 *East*, 157.

19 In an action of debt on recognizance of bail, the declaration laid the *venue* in *Greene* county, and stated that *S. F.* came into the supreme court, and by name of *S. F.* of *K.*, in said county, farmer, became bail, &c., and the bail-piece offered was written "*Delaware*, ss. *J. H.* is delivered to bail to *S. F.* of the town of *K.* in said county, farmer, &c. and was taken before a judge of *Delaware* county common pleas; and the recognizance *roll* stated that *S. F.* of the town of *K.* and county of *D.*, farmer" came into court and became bail, &c. It was held, that there was no material variance between the declaration, and the bail-piece, and recognizance roll, the description in the declaration being set out according to the sense, and not according to the tenor. *Rodman and others* v. *Forman adm. of Forman*. 8 *Johns. Rep.* 26.

20 In a declaration, in an action against a sheriff for an escape, the plaintiff set forth the judgment, and the substance of the execution, but not in *haec verba*; and at the trial, there appeared to be a variance of one cent between the amount of damages in the judgment, and in the execution, it was held, that the execution, notwithstanding, was admissible in evidence. *Bissel* v. *Kip*. 5 *Johns. Rep.* 89.

IV. *How to be taken advantage of.*

1 Variance of the sum in a judgment is not cured by a *remittet*. *Coy* v. *Hayman*. 2 *Str.* 1171.

2 Variance between writ and court not pleaded without craving over of the writ. *Bragg* v. *Digby*. 2 *Salk.* 658.

3 In an action against three on a promissory note, two of whom are stated to be outlawed, the third may take advantage of the misnomer of his companions, upon the general issue, on the ground of a variance between the contract declared upon and that proved. *Gordon* v. *Austin*. 4 *Term Rep.* 611.

4 The court will not, on motion, permit a defendant to take advantage of a variance between the sum men-

tioned in the *ac etiam* part of the *latitat*, and the declaration. *Turing* v. *Jones*. 5 *Term Rep.* 402.

5 Though they will when the variance is in the nature of the action; as where the plaintiff sues out a writ *quare clausum fregit*, and declares in trover. *Ibid.*

6 So when the objection is to the plaintiff's right of suing, as if he sue out a writ in his own name, and declare as executor. 5 *Term Rep.* 402: and *Douglas & al.* v. *Irlam.* 8 *Term Rep.* 416.

7 If the writ be, that the defendant answer in "a certain plea of trespass on the case on promises," and the declaration be in debt for goods sold and delivered, and money borrowed, the court will discharge the defendant on entering a common appearance. *Kerr* v. *Sheriff*. 2 *Bos. & Pull.* 359.

8 The court of K. B. refused to set aside the proceedings for irregularity for a variance between the original writ and the declaration. *Spalding* v. *Mure & others*. 6 *Term Rep.* 363.

9 The court of common pleas refused to set aside proceedings for irregularity, where the *clausm fregit* was against two, and the declaration against one. *Spencer* v. *Scott*. 1 *Bos. & Pull.* 19.

10 The distinction is, that in process *not bailable*, if the writ be joint and the declaration several, it is regular.—*Secus*, in bailable process. *Loveridge* v. *Botham*. 1 *Bos. & Pull.* 49: and 4 *Term Rep.* 697, *n.*: and 4 *East*, 589.

11 But if process be sued out in the name of one *plaintiff*, and the declaration delivered in the name of two, it is bad. *Rogers* v. *Jenkins*. 1 *Bos. & Pull.* 383.

12 Where on report of referees, judgment was entered up in a court of common pleas, for 99 cents more than was reported to be due, the judgment, on a writ of error to this court, was held to be erroneous, and reversed. *Stafford* v. *Van Zandt*. 2 *Johns. Cas.* 66.

13 In action of debt on an *award*, true copies of the award were served, with the declaration, on the defendants, attorney; but the award set forth in the declaration varied from the *oyer*, and from that contained in the *nisi prius* record. The defendant pleaded no such award, and a verdict was found for the plaintiff. It was held that if the defendant meant to avail himself of the *variance* between the declaration and the *oyer*, he should have demurred specially, instead of pleading no award; and that as the proof corresponded with the *nisi prius* record, at the trial, the defendant was too late to take advantage of the variance, nor could the verdict be set aside on the ground of surprise, as the oyer contained a true copy of the award. *James* v. *Walruth*. 8 *Johns. Rep.* 410.

VENDOR AND VENDEE.

Where a vendee of goods orders a particular mode of conveyance, he must stand to the loss, if any happens. *Vale* v. *Bayle*. *Coup.* 294.

VENIRE DE NOVO.

1 Upon an information for printing and publishing a seditious libel, jury found defendant guilty of printing and publishing only; whereupon a *ven. fac. de novo* was ordered. *Rex* v. *Woodfall*. 5 *Burr.* 2661.

2 A *venire de novo* may be granted when there is a general verdict for entire damages, and there was evidence on all the counts, and some of them are bad in law. *Hodgson* v. *Ambrose*. 1 *Doug.* 377.

3 A court of error may grant a *venire de novo*. *Grant* v. *Astle*. 2 *Doug.* 722.

4 But there is no instance of a court of error granting a *venire de novo*

to an inferiour court. *Trevor* v. *Wall.* 2 *Doug.* 732, *n.*

5 The court of king's bench will grant a *venire de novo* to the great sessions in *Wales*. *Davies* v. *Pierce*. 2 *Doug.* 732, *n.*

6 Generally speaking, a court of error cannot award a *venire de novo* when the proceedings originate in an inferiour court. *Trevor* v. *Wall.* 1 *Term Rep.* 151.

7 But where there was a bill of exceptions to the rejection of evidence in the court of great sessions in *Wales*, and upon error in B. R. the evidence was deemed admissible; the court of B. R. thought themselves called on to award a *venire de novo* (into the next *English* county;) as without the intervention of the jury no final judgment could be given on the record. *Davies* v. *Pierce*. 2 *Term Rep.* 125.

[And see the note in p. 126; and also the notes in *Johnstone* v. *Sutton*, 1 *Term Rep.* 528, as to the power of a court of error to award a *venire de novo*.]

8 That the court will only award a *venire de novo* where there is a defective finding in the verdict; see *Goodtit le d. Jones* v. *Jones*. 7 *Term Rep.* 52.

9 Where a fact is not controverted at the trial of a cause, nor litigated before the jury, and the counsel omitted to have it inserted in the special verdict at the time, supposing it might be added afterwards, the court will order a *venire de novo*, to ascertain such fact, unless the opposite party will consent to amend the special verdict by inserting it. *J. & S. Watson* v. *Delafield*. 1 *Johns. Rep.* 150.

VENUE.

I. *Laying.*
II. *Changing.*

I. *Laying.*

1 Where evidence necessary to support the action arises in two counties, plaintiff may lay it in either. *Anon.* 2 *Salk.* 669.

2 Where the cause of action arises in two counties the *venue* shall not be laid in a third. *Shirely* v. *Collis*. 2 *Black.* 940.

3 A peer may lay his action for *scandalum magnatum* against him where he pleases; but on just ground of suspicion that there cannot be a fair trial, the venue shall be changed; otherwise not. *Earl of Sandwich* v. *Miller*. *Lofft*, 210.

4 If a barrister brings a transitory action he may lay the venue in *Middlesex*, and keep it there. *Burroughs* v. *Willes*. 2 *L. Raym.* 1556. *Str.* 822.

5 When the cause of action arises in *Berwick* only, the venue shall be in *Northumberland*, *comme semble*. *Mayor, &c. of Berwick* v. *Ewart*. 2 *Black.* 1036.

6 An attorney, though resident in the country, may lay and retain the venue in *Middlesex*. *Pye* v. *Leigh*. 2 *Black.* 1065.

7 In transitory actions, plaintiff has a right to lay the venue where he pleases. *Slaughter* v. *Bradock*. 4 *Burr.* 2447.

8 Averment of facts in *Middlesex*, either immaterial or repugnant, will not warrant laying the venue in *Middlesex* of an action upon customs arising in *Berwick*. *The Mayor of Berwick* v. *Ewart*. 2 *Black.* 1068.

9 Any officer of the courts of *Westminster* may, when plaintiff in a transitory action, lay his venue in *Middlesex*.

The clerks of assize are officers of the courts at *Westminster*. *Knight* v. *Barnaby*. 2 *L. Raym.* 1253. 2 *Salk.* 670.

10 Where an action is founded upon two dependent matters arising in different counties, the venue may be laid in either. A mis-trial is not aided, unless the venue is laid in the proper county. *Philip* v. *Ketison*. 1 *L. Raym.* 105.

11 Ruled, that the want of a venue is only curable by such a plea which admits the fact for the trial, whereof it was necessary to lay a venue. *Anon.* 3 *Salk.* 381.

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12 A barrister has the privilege of laying the venue in *Middlesex*, although the cause of action arose in another county. *Spelman, Esq. a Barrister* v. ———. 1 *Wils.* 159. 1 *Black.* 19.

13 *A.*, by deed executed in *London* for securing the repayment of money lent to *B.*, is appointed receiver of *B.*'s rents in *Middlesex*, with a pretended salary which enables him to retain usurious interest; he accordingly receives the rents in *Middlesex*, but settles the account in *London*, and *there* pays the balance on which the usurious interest is allowed; the offence is completed in *London*, and the venue in a *qui tam* action for the penalty is properly laid there. *Scott q. t.* v. *Brest.* 2 *Term Rep.* 238.

14 It seems it might be laid in either, for where there are two facts which are necessary to constitute one offence, and they take place in two different counties, the plaintiff may *ex necessitate* lay the venue in either. 2 *Term Rep.* 241.

15 Where there are several facts material to the plaintiff's action arising in different counties, he may bring his action (covenant) in either. *The Mayor, &c. of London* v. *Cole.* 7 *Term Rep.* 583.

16 If a draft be given for usurious interest and a receipt taken for it in the county of *A.* and the draft be afterwards exchanged for money in the county of *B.* the usury is committed in the county of *B.*, and the venue must be laid there. *Scurry q. t.* v. *Freeman.* 2 *Bos. & Pull.* 381.

17 The offence of selling coals of a different description from those contracted for, upon the statute 3 G. 2, c. 26, s. 4, is complete in the county where the coals are *delivered*, and not where they were *contracted* for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. But *the not justly measuring* such coals is a local omission of a local act, required by the 13th section of the act to be performed at the place where the coals are kept for sale, at which place the bushel of queen *Anne* is required to be kept and used for the purpose of measuring the coals into sacks of a certain description, in which they are to be carried to the buyer; and therefore the offence is local, and must be laid in the county where the coals were put into the sacks without having been so *justly measured*. *Butterfield q. t.* v. *Windle.* 4 *East*, 385.

18 A *scire facias* upon a recognizance of bail taken in open court in B. R. is properly suable in *Middlesex*, where the record is; though all the previous proceedings which commenced by original were in *London*. And *semble*, that it could not be sued elsewhere than in *Middlesex*. *Coxeter* v. *Burke.* 5 *East*, 461.

19 The venue in the margin may *assist*, but cannot hurt the plaintiff. *Mellor* v. *Barber.* 3 *Term Rep.* 387.

20 In a plea in abatement that another person ought to have been sued with the defendant, it is not necessary to lay a venue. *Neal* v. *De Garay.* 7 *Term Rep.* 243.

21 And if it be pleaded that such other person is alive, to wit, in *Spain*, it will be considered as pleaded without any venue. 7 *Term Rep.* 243.

22 An action for use and occupation is not *local* in its nature, being founded on privity of contract, not on privity of estate. *Corporation of New-York* v. *Dawson.* 2 *Johns. Cases*, 335.

23 An action of *debt* in this court, on a judgment in a court of common pleas, is a *local* action, and the venue must be laid in the county where the judgment was given. *Barns* v. *Kenyon.* 2 *Johns. Cases*, 351.

II. *Changing.*

1 If the declaration be delivered so early in term, that the defendant has eight days in the term, he cannot move to change the venue the next term. *Asplin* v. *Gray.* 1 *Str.* 211.

2 Venue changed from *London* to *Carmarthen.* *Tindale* v. *Gwyne.* 2 *Str.* 1270.

3 Venue not changed, to lose an assize. *Haworth* v. *Willett.* 2 *Str.* 1180.

4 Venue not to be changed into a county palatine, nor in *scandalum magnatum.* *Lady Falconbridge* v. *Forrest.* 2 *Str.* 807.

5 The plaintiff may amend the venue. *Stroud* v. *Tilly.* 2 *Str.* 1162.

6 Venue changed from *London* to *Middlesex* on motion. *Gifford* v. *Lechmere.* 2 *Str.* 857.

7 Venue changed when it is manifest that there cannot be a fair trial where laid. *The Mayor of Poole* v. *Bennet.* 2 *Str.* 874.

8 Motion to discharge a rule for changing the venue, the action being on a promissory note, but refused *per Cur.* *Anon.* 1 *Wils.* 41.

9 After the venue is changed upon the common affidavit, the court will not alter it again, upon an affidavit that the witnesses live in *Scotland,* and will not come so far as *London,* but are willing to come to *Carlisle.* *Fogoe* v. *Gale.* 1 *Wils.* 162.

10 Venue not changed in an action against a lighterman, &c. for goods lost. *Heathcoat's Case.* 2 *Salk.* 670.

11 The venue cannot be changed but into a county where the whole cause of action arose. *Herring* v. *Durant.* 1 *Wils.* 178.

12 On a motion to change the venue, *per Cur.* take a rule to try it in the next county. ——— *ex dem. Mayor of Bristol* v. ——— 1 *Wils.* 77.

13 Mr. *Fazakerley* moved to change the venue into *Chester*; and it was granted *per Cur.* because this court can send down the record by *mittimus.* *Godfrey* v. *Philpot.* 2 *L. Raym.* 1418.

14 Evidence of partiality must be extremely strong to induce the court to change the venue in a criminal information. *The King* v. *Harris.* 3 *Burr.* 1330. 1 *Black.* 378.

15 If the defendant be a barrister or attorney, he may change the venue to *Middlesex.* *Seaman* v. *Ling.* 2 *Salk.* 668.

16 Venue changed on an action of false imprisonment, through an apprehension of a partial trial. *Mylock* v. *Saladine.* 1 *Black.* 480. 3 *Burr.* 1564.

17 Venue refused to be changed in an action of *scandalum magnatum.* *The Duke of Norfolk* v. *Alderton.* 2 *Salk.* 662.

18 *Per Holt,* C. J. The motion to change a venue ought to be within eight days after the declaration delivered. *Anon.* 2 *Salk.* 663.

19 Venue changed after an order for time to plead. *Bowley* v. *Allen.* *Wils.* 318.

But not where defendant is under terms to plead issuably, and take short notice of trial at the first sittings in *London* or *Middlesex.* *Ibid. n. b.*

20 Venue never changed in debt. *Duplessis* v. *Chalk.* 2 *Str.* 878.

21 The court will not change the venue into the next adjacent county to a *Welch* county, nor into a *Northern* county where the assizes are held but once a year, if moved in *Michaelmas* or *Hilary* term because of delay. *Moore* v. *Fernhaugh.* 1 *Wils.* 138. 2 *Str.* 1258.

22 Venue changed after a judge's order to take notice of trial in *Middlesex.* *Wightman* v. *Thompson.* 1 *Willes,* 245.

23 Not in transitory only, but in local actions, the court will change the venue, if there be an urgent call of justice, not otherwise to be answered. *Anon.* *Lofft,* 49.

24 An action of false imprisonment against the sheriffs of *London* was laid in *Middlesex,* and upon the

common affidavit a rule was made, that the venue should be changed to *London*; but then it was said, that the officer of the counter was subject to the sheriffs, and so there could be no good trial; for which reason it was moved back to *Middlesex*. *Gerard's Case*. 2 *Salk*. 670.

25 Venue not to be changed into a third county without consent. *Southouse* v. *Boak*. 2 *Str*. 1215.

26 The plaintiff has his election in transitory actions; the defendant cannot change to a county where the cause did not arise, except upon special circumstances. *Anon*. *Lofft*, 395.

Change not to be so granted as to cause unnecessary delay. *Ibid*.

27 On motion to change the venue in *Trinity* term, declaration being delivered in *Easter* term *per Cur*. unless it appears upon the face of the declaration, that the plaintiff was not entitled to a plea to enter, we expect an affidavit when the declaration was delivered, that thereby the court may be ascertained. *Crokel's Case*. 2 *Salk*. 670.

28 A venue not to be changed in action on promissory notes. *Downes, one, &c.* v. *Brian*. 2 *Black*. 993.

29 Whether the venue can be changed by the court of king's bench into *Wales*? *Quere*. *Price* v. *Griffith*. 1 *Wils*. 221.

30 It seems that the venue may be changed into *Wales*. *Waddington Thellwell*. 4 *Burr*. 2450.

31 Venue changed from *London* to *Carmarthenshire* in *Wales*. *Freeman* v. *Gwyn*. 2 *Black*. 962.

32 A plaintiff undertaking to give material evidence in *A*. in order to retain the venue there, and failing, must be non-suited. *Santler* v. *Heard*. 2 *Black*. 1031.

33 After plea pleaded, not to move to change the venue. *Anonymous*. *Lofft*. 321.

34 Plaintiff allowed to bring back the venue after plea pleaded. *Bruckshaw* v. *Hopkins*. *Cowp*. 409.

35 Venue changed to the next county, on affidavit that there could not be a fair trial in the proper county. *Mayor of Bristol* v. *Proctor*. 1 *Wils*. 298.

36 Venue refused in an action for a false return. *The King* v. *the Mayor of Oxford*. 2 *Salk*. 669.

37 An affidavit to change the venue from *A*. to *B*. must state that the cause of action arose in *B*., *and not in A*., or elsewhere out of *B*. *Allen* v. *Griffiths*. 3 *Term Rep*. 495.

38 The venue, in an action for a libel, written in one county and sent into another, cannot be changed into the county where written; for the defendant cannot swear that the cause of action arose wholly in that county. *Pinkney* v. *Collins*. 1 *Term Rep*. 571; and *Clissold* v. *Clissold*. 1 *Term Rep*. 647.

39 But the court will change the venue, in an action for a libel, into a county in which it was both written and published. *Freeman* v. *Morris*. 3 *Term Rep*. 806.

40 So if written in *England* and sent by letter out of the kingdom, it may be changed (from *London* where it was laid) to the county where written. *Metcalf* v. *Markham*. 3 *Term Rep*. 652.

41 Where the cause of action arose partly in *Derbyshire* and partly in *Ireland*, the court refused to change the venue from *London* to *Derby*, on an affidavit that the cause of action arose in *Derby* and *Ireland*, and not in *London* or elsewhere than in *Derby* and *Ireland*. *Walker* v. *Wright*. 4 *East*, 495.

42 Rule absolute in the first instance for changing the venue from an *English* to a *Welsh* county, on the usual affidavit. *Hopkins* v. *Lloyd*; and *Hughes* v. *Hughes*. 6 *East*, 355.

43 In debt on bond, the court, upon the application of the defendant, will change the venue to the place where his defence arises, and the plaintiff's as well as the defendant's witnesses reside. *Foster* v. *Taylor*. 1 *Term Rep*. 781.

44 But see several instances where

similar applications were refused, when the defendant's witnesses only, resided in the county. 1 *Term Rep.* 782, *n.*

45 In an action on a promissory note the court of C. P. will not change the venue from *London*, to the county where it was made, on the defendant's stating that all his witnesses live there; but if his affidavit shew the number of his witnesses, and that a serious inconvenience would arise from bringing them up, it will. *Evans* v. *Weaver.* 1 *Bos. & Pull.* 21.

46 Nor will they change the venue in an action on an award, though the declaration contain the common counts; nor oblige the plaintiff to undertake to give evidence on the count upon the award. *Whitburn* v. *Staines.* 2 *Bos. & Pull.* 355.

47 Where the cause of action substantially arises in another county than that in which the venue is laid by the plaintiff, and the convenience and justice of the case require the trial to be had there, where all the witnesses reside, at a great distance from the county where the venue is laid; the court, on the application of the defendant, will change the venue, on his agreeing to admit a particular fact which in point of form exists in the original county. *Holmes* v. *Wainwright.* 3 *East*, 329.

48 The court (C. P.) will not discharge a rule for changing the venue from *A.* to *B.*, upon an affidavit shewing that the cause of action arose partly in *A.* and partly in *B.*; and that all the witnesses reside in *A.*; the plaintiff must undertake to give material evidence in *A.* *Henshaw* v. *Rutley.* *New Rep.* 110.

49 In an action on a deed that court will not change the venue to the county where it was executed on the ground of the witnesses residing there; when from the pleadings it appears not to be necessary to produce many witnesses. *Watt* v. *Daniel.* 1 *Bos. & Pull.* 425.

50 In an action for infringing a patent, the plaintiff cannot change the venue from *Middlesex* to any other county. *Cameron* v. *Gray.* 6 *Term Rep.* 363.

51 It is no answer to an application to change the venue from *London* to *Essex*, on the usual affidavit in an action commenced by assignees, that the commission was issued and the bankruptcy declared in *Middlesex*, and the assignees chosen in *London*, but in such case the plaintiffs can only retain their venue, by undertaking to give material evidence where it is laid. *Clarke & al. Assignees* v. *Reed.* *New Rep.* 310.

52 If the *venue* be changed from *A.* to *B.* on the usual affidavit that the cause of action arose wholly in *B.* when in fact part of the cause arose in another county, the court will order the *venue* to be brought back to *A.* *Cailland* v. *Champion.* 7 *Term Rep.* 205.

53 Though the *venue* be changed by the defendant upon a false affidavit, yet the plaintiff cannot bring it back to the county where it was first laid, without the usual undertaking to give material evidence in that county. *Price* (*Bart.*) v *Woodburne.* 6 *East*, 433.

54 An affidavit of the plaintiff, that the cause of action arose where the *venue* is laid, is not sufficient cause for him to shew against the changing the *venue*. But he must also *undertake to give material evidence* in that place. *French* v. *Copinger.* 1 *H. Black.* 216.

55 An application to change the *venue* from *A.* to *B.* in an action for goods sold and delivered, upon an affidavit that the cause of action arose at *B.* and not elsewhere, may be successfully answered by an affidavit that the goods were sold at *C.* *Collins* v. *Jacobs.* 3 *Bos. & Pull.* 379.

56 Where a rule to change the *venue* in an action of *assumpsit* from *A.* to *B.* has been discharged on the plaintiffs undertaking to give evi-

dence of some matter in issue arising in *A.*, the undertaking is complied with by proving a rule of court in *A.* that the defendant shall be at liberty to pay money into court; though that rule was obtained after the discharge of the rule for changing the *venue*; for the payment of money into court is an admission of the cause of action. *Watkins* v. *Towers.* 2 *Term Rep.* 275.

57 Such undertaking of a plaintiff may be supported by proof of the cause of action being in a foreign country. *Gerard* v. *De Robeck.* 1 *H. Black.* 280.

58 Proving a deed inrolled of record in *A.* is a sufficient compliance with the rule. 2 *Term Rep.* 275.

59 The defendant cannot change the venue after an order for time to plead, on the terms of pleading issuably and taking short notice of trial for the first sittings in *London* or *Middlesex.* *Shipley* v. *Cooper.* 7 *Term Rep.* 698.

60 But merely taking out a summons for time to plead, if defendant do not accept the terms, is no waiver of the right to change the venue. *Wilson* v. *Harris.* 2 *Bos. & Pull.* 320.

61 After plea pleaded the venue cannot be changed. *Talmash* v. *Penner.* 3 *Bos. & Pull.* 12.

62 But if the defendant plead pending a rule *nisi* for changing the venue, the court will, notwithstanding, allow him to change the venue. *Ib.*

63 In covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay; though most of the plaintiff's witnesses reside in the county where the venue was laid. *Hadinott* v. *Cox.* 8 *East*, 268.

64 The venue may be changed in an action for criminal conversation, in the usual affidavit, *that the whole cause of action*, if any, arose in the county to which it is changed; for the whole cause of action is the trespass on the plaintiff's wife; and the venue can only be brought back by the plaintiff's undertaking to give material evidence in the original county. *Guard* v. *Hodge.* 10 *East*, 32.

65 The venue will not be changed on the usual affidavit, unless the plaintiff will stipulate to give material evidence in the county where the venue is laid. 1 *Johns. Cases*, 240.

66 In an action of *assumpsit*, the venue will not be changed, on the general affidavit. *Wheaton* v. *Slosson.* 2 *Johns. Cases*, 111.

67 The venue in a cause in which the corporation of *New-York* was a party, was laid in the city of *New-York*; and the court refused to change it, merely on that account, on the bare allegation that an impartial trial could not be had in the city and county of *New-York*. *Corporation of New York* v. *Dawson.* 2 *Johns. Cas.* 335.

68 An affidavit to change the venue made by the defendant's attorney stating that the plaintiff confessed that the cause of action arose in another county, is sufficient. *Scott* v. *Gibbs.* 2 *Johns. Cases*, 116.

A counter affidavit of the plaintiff, that he believed he could not have a fair trial in the county to which the venue was moved to be changed is not enough. He ought to state the facts on which his belief is founded. *Ibid.*

69 The affidavit of a defendant to change the venue, must be positive; if he swears to his belief, it is not sufficient. *Franklin et al.* v. *Underhill.* 2 *Johns. Rep.* 374.

If the plaintiff stipulates to give material evidence in the county where the venue is laid, or be nonsuited, he may retain it. *Ibid.*

70 In transitory actions, the plaintiff will not be allowed to retain the venue, upon a stipulation to give material evidence in the county where it is laid, if the defendant satisfies the court, that he has material witnesses residing in a distant county; unless the plaintiff

will also swear, that he has material witnesses residing in the county where the venue is laid. *Manning* v. *Downing*. 2 *Johns. Rep.* 453.

An affidavit to change the venue must be direct and positive, that the cause of action arose in another county, and not state it argumentatively. *Ibid.*

The court have an equitable power as to venues, which they will exercise to promote the convenience of suitors, and to save expence to the parties. *Ibid.*

71 Where the cause of action arises in the county where the venue is laid, and the plaintiff has material witnesses residing there, he shall retain the venue, notwithstanding the defendant has material witnesses in a distant county. *Stoutenbergh* v. *Legg and others*. 2 *Johns. Rep.* 481.

72 In an action for a libel, if the defendant swears that the libel was published in a different county from that in which the venue is laid, and that he has a number of material witnesses residing in such county, the venue will be changed. *Nicholson* v. *Lothrop*. 3 *Johns. Reports*, 139.

73 The defendant may move to change the venue after issue joined, and at any time, where there has been no loss of trial, and no delay will be produced. *Kent* v. *Dodge*. 3 *Johns. Rep.* 447.

74 On a motion to change the venue on account of material witnesses residing in another county, the defendant ought to state the number of his witnesses, otherwise the court cannot intend, that he has more than one. *Minor* v. *Garrison and Baker*. 4 *Johns. Rep.* 481.

75 Where the plaintiff undertook to bear all the expences of bringing the defendant's witnesses to the place where the venue was laid, a motion to change the venue was denied. *Worthy* v. *Gilbert*. 4 *Johns. Rep.* 492.

On a motion to change the venue, no costs are allowed on either side. *Ibid.*

76 In an action of *trespass de bonis aspartatis* the venue had been changed, on the usual affidavit, from *Onondaga* county to *Saratoga*, where the trespass was committed; and the plaintiff afterwards applied to bring back the venue to the county of *Onondaga*, on the ground that he had two or more material witnesses residing in that county; but the court refused to grant the motion, unless the plaintiff would *stipulate* to give material evidence arising in the county of *Onondaga*. *Ross* v. *Lown*. 8 *Johns. Rep.* 354.

VERDICT.

I. *Errors, &c. for which a verdict will be set aside.*

II. *Errors cured by verdict, and other points relative to.*

I. *Errors, &c. for which a verdict will be set aside.*

1 A verdict shall be set aside for excessive damages, where the jury have gone out of the case. *Seale* v. *Hunter*. *Lofft*, 28.

2 The court set aside the verdict because one of the jurymen was not returned on the *nisi prius* pannel, but answered to the name of a person who was. *Norman* v. *Beaumont*. *Willes*, 484.

3 Where a plaintiff has stated his title defectively or inaccurately, it is presumed, after verdict, that all circumstances necessary to support his action were proved. *Rushton* v. *Aspinall*. 2 *Doug.* 683.

4 If there is a general verdict, and entire damages, on a declaration containing some counts bad in law, it is error, and not cured by verdict. *Eddowes* v. *Hopkins*. 1 *Doug.* 377. *And Grant* v. *Astle*. 2 *Doug.* 730.

5 An *indebitatis assumpsit* in an inferior court must state the consideration of the promise to have arisen

within the jurisdiction; otherwise it will be even after verdict, bad. ——— v. *Lee.* 1 *L. Raym.* 211.

6 The false description of a public statute is even after verdict fatal, if the party expressly refers to the statute he has described. Mistaking the place of holding the parliament, at which a statute was made, is a false description of the statute. Where a parliament stated to be held until a particular day, such day is included. The practice of entering recordaturs to prevent the alterations of records is out of use. *Birt qui tam* v. *Rothwell.* 1 *L. Raymond*, 210.

7 A consent to be bound by verdict in one cause out of several upon the same question, means such a verdict as ought to stand. *Hodson* v. *Richardson.* 3 *Burr.* 1477.

8 A verdict, wrong delivered by the foreman of the jury, set aside. *Cogan* v. *Ebden and another.* 1 *Burr.* 383.

9 Court set aside verdict for smallness of damages when the jury mistook a point of law. *Woodford* v. *Eades and another.* 1 *Str.* 425.

10 Verdict finding the election of a mayor, and that he had not taken the sacrament within the year, not a good election, without a negative finding that there was no prosecution. *Marten* v. *Jenkin.* 2 *Str.* 1145.

11 A verdict must comprehend the whole issue; if it does not, a judgment entered thereon will be erroneous. *Miller* v. *Trets, Exchequer.* 1 *L. Raymond*, 324.

12 Where the jury drew lots, the court set aside the verdict, though it was according to evidence. *Hale* v. *Cove.* 1 *Str.* 642.

13 An action in the *debet* and *detinet*, which ought to have been in the *detinet* only, is objectionable after verdict. An action of debt, by a man as executor, ought to be in the *detinet* only. *Holdin* v. *Sutton.* 1 *L. Raym.* 698.

14 Verdict obtained by trick, set aside, without costs. *Anderson* v. *George.* 1 *Burr.* 352.

15 *A.* and *B.* being indicted for a conspiracy to defraud *C.* the jury found a verdict, that there was an agreement between *A.* and *B.* to obtain money from *C.* but with an intent to return it again. This was held not to be a verdict of acquittal, nor any verdict on which a judgment could be given. *The People* v. *Olcott.* 2 *Johns. Cases*, 301.

16 Where all the counts in a declaration are for the same cause of action, and one of them is good, and the others bad, and a jury find a general verdict, whether judgment can be arrested for the bad counts? *Quære. Bayard* v. *Malcolm et al. in error.* 2 *Johns. Rep.* 550.

17 A verdict will not cure a mistake in the nature of the action. *Insurance Company of Alexandria* v. *Young.* 1 *Cranch*, 332.

18 After verdict, every *assumpsit* in the declaration is to be taken as an express *assumpsit.* 1 *Cranch*, 341.

II. *Errors cured by verdict, and other points relative to.*

1 *Indebitatus Assumpsit* for money received by the defendant for the plaintiff *ad usum* defendant, held well after verdict. *Palmer* v. *Staveley.* 1 *Salk.* 24. 1 *L. Raym.* 669.

2 It is no objection after verdict, that an action for covenant for not repairing, &c. was brought and tried in a foreign county, that defect being cured by the statute 16 & 17, Car. 2, c. 8. *The Bailiffs, &c. of Litchfield* v. *Slater. Willes*, 431.

3 Difference of opinion amongst the jury, and they agree the majority shall decide; verdict good. *Goodwin* v. *Philips. Lofft*, 71.

4 In declaration by administrator, want of alleging by whom administration was committed, is cured by pleading *non est factum*, and a verdict. *Gidley* v. *Williams.* 1 *Salk.* 37. 1 *L. Raym.* 634.

5 Where one of the jurors, whose

christian name was *Harry*, was named *Henry* in the *venire*, *habeas corpora*, and the *postea*, the court refused to set aside the verdict given by him and eleven other jurymen properly named. *Wray* v. *Thorn*. *Willes* 488.

6 The court will not receive the affidavit of a juror respecting the misconduct of the jurymen. *M. a.* 487.

7 If there is a general verdict of "guilty" on an indictment, it is sufficient if one of the counts is good. 2 *Doug.* 730.

8 An action was brought in *Middlesex* on an obligation; the condition was to pay a sum of money at such a place in *London*. The defendant after oyer of the bond and condition pleaded payment at the day, &c.; and on the issue joined, it was tried in *Middlesex* before the lord chief justice *Holt*, and verdict for the plaintiff. And the last day of the term, Mr. *Harris* moved in arrest of judgment, that this ought to have been tried in *London*; but held, that it was aided after verdict. *Maitland* v. *Taylor*. 2 *L. Raym.* 1212.

9 A declaration against a man for causing water to flow through pipes near the foundation of the plaintiff's house, and neglecting to repair them, so that the water flowed through them, and sapped the foundation of the plaintiff's house, is unexceptionable after verdict, though it does not expressly state that the pipes were the defendant's, that he laid them there, or that he is bound to repair them. In such action the plaintiff need not set forth his title to his house; it is sufficient for him to shew that he was possessed of it. *Hoare* v. *Dickinson*. 2 *L. Raym.* 1568.

10 Verdict cures defect in setting out a title, though it cannot cure a defective title. *Small ex de. Baker*, v. *Cole and Skinner*. 2 *Burr.* 1159.

11 If an issue could have been material, it shall be intended after verdict that it was so. The cattle of a stranger may be distrained for a modern rent service the instant they come upon the premises; liable to the distress if they came thereon either by the default of the owner, or with his consent. *Kemp* v. *Crews*. 1 *L. Raym.* 167.

12 *Assident damna*, for *assidunt damna*, well on a verdict. *Redwood* v. *Coward*. 1 *Salk.* 328. 1 *Lord Raym.* 147.

13 In case for a false return to a writ against the bailiff of a liberty, if the declaration sets out the substance of the writ, and avers that the sheriff for the execution thereof made his mandate to the defendant, it will, after verdict at least, be good, though it does not state specifically the tenor of the mandate. The bailiff of a liberty cannot execute process unless he has a warrant from the sheriff. *Hamon* v. *Jermyn*. 1 *L. Raym.* 189.

14 Upon a general verdict for the crown on an information for subornation of perjury, though some of the assignments were bad, yet if any of them were good, the court must give judgment for the crown. *The Queen* v. *Rhodes*. 2 *L. Raym.* 886.

15 Desiring a juror to appear in his cause, which was between a miller and a baker, no ground to set aside verdict. *Snell* v. *Timberell*. 1 *Str.* 648.

16 In debt on single bill, and *nil debet* pleaded, the jury find *nil debet* to part, and *debet* to the rest, well after verdict. *Hadley* v. *Stiles*. 2 *Salk.* 664.

17 It is a general rule, that the court will not set aside a verdict in an action for a personal injury, on account of the smallness of the damages. *Mauricet* v. *Brecknock*. 2 *Doug.* 509, 510.

Unless the smallness of the damages arose from a mistake in point of law. *Ibid.*

18 A verdict cures ambiguity, or an imperfect state of the plaintiff's title, but not an omission of what is

the gist of the action. *Rushton* v. *Aspinall.* 2 *Doug.* 683.

19 After verdict, nothing is to be presumed but what is either expressly stated in the declaration, or necessarily implied from those facts which are stated. *Spicers* v. *Parker.* 2 *Doug.* 628. *n.*

20 Damages given in trespass, given at a time not yet come; it shall be intended another time was proved. *Acton* v. *Eels.* 2 *Salk.* 662.

21 In a declaration consisting of several counts upon *indebitatus assumpsit*, if there is a nominative case to the *assumpsit* in the first count, it shall, after verdict at least, if necessary, be extended to the *assumpsit* in the rest. The gist of an action cannot even after verdict be taken by intendment. Though several considerations, some of them which are bad, are mentioned in one *assumpsit*, and general damages given, the plaintiff shall have his judgment. *Roe* v. *Gatehouse.* 1 *L. Raym.* 1452. *Salk.* 663.

22 No objection can be taken after verdict to a traverse on a cognizance for rent, that the defendant was bailiff. *Redding* v. *Lion.* 1 *L. Raym.* 405.

23 Verdict not to be set aside for smallness of damages. *Hayward* v. *Newton.* 2 *Str.* 940.

24 *Et* taken disjunctively after a verdict. *Burgess* v. *Brazier.* 1 *Str.* 594.

25 After a verdict, the court will suppose every thing to be right, unless the contrary appears on the record. *Bull* v. *Steward.* 1 *Wils.* 255.

26 Court will, after verdict, over-rule an objection, which they would have listened to upon demurrer. *Weston* v. *Chapman.* 3 *Burr.* 1725.

27 Declaration claiming under a grant from sir *William Sands*, who was an esquire at the time of the grant, aided after verdict. *The King* v. *The Bishop of Chester.* 3 *Salk.* 236.

28 Though a special verdict mistates a fact, yet, if the mistatement does not affect the merits of the cause, and the correcting it would let in a frivolous objection, it shall not be altered.

After a fact has once been judicially tried and ascertained, a party to the proceeding is estopped from denying its truth. *Trevibam* v. *Lawrence.* 2 *L. Raym.* 1036. 1 *Salk.* 276. 3 *Salk.* 157.

29 If a man agrees to ride without whip or stick, or other arms, an allegation that he rode without whip and stick, or other arms, is unexceptionable as an averment of performance after a verdict for him. *Burgess* v. *Bracher.* 2 *L. Raym.* 1366. 2 *Salk.* 594.

30 If a statute makes the receiver of stolen goods an accessory to the felony, but provides if the principal cannot be taken so as to be prosecuted and convicted, the receiver may be prosecuted as for a misdemeanor; an indictment against him as for a misdemeanor cannot be excepted to after verdict, because it does not shew, that the principal could not be taken so as to be prosecuted and convicted. *The King* v. *Pollard.* 2 *L. Raymond*, 1370.

31 Verdict for less than 40*s.*, the defendant had leave to suggest that he resided in *Middlesex*. *Fitzpatrick* v. *Pickering.* 2 *Wils.* 68.

32 A negative need not be found in a special verdict, except where it is necessary to shew that a person or thing does not come within a particular exception. *The Mayor, &c. of Nottingham* v. *Lambert.* *Willes*, 117.

33 After a verdict, where the defendant's name was put instead of the plaintiff's name, the court will reject the defendant's name as being surplusage. *Richards* v. *Simmonds.* 3 *Wils.* 40.

34 In ejectment on the demise of an heir by descent, the demise was laid on the day his ancestor died; and held well enough after verdict. *Roe, on demise of Wrangham* v. *Hersey.* 3 *Wils.* 274.

35 Where a special verdict concludes

generally, the whole case must appear on the record. *Rex* v. *Calder Navigation.* 2 *Term Rep.* 666.

36 After verdict in ejectment for a messuage *and tenement*, the court will give leave to enter the verdict, according to the judge's notes, for the messuage only, (pending a rule to arrest the judgment) without obliging the lessor of the plaintiff to release the damages. *Goodtitle* v. *Otway.* 8 *East*, 357.

37 Where a promise in one of the counts in a declaration, by reference to the day in the preceding counts, was laid after the breach assigned, the mistake was held to be cured by the verdict. *Allaire* v. *Ouland.* 2 *Johns. Cas.* 52.

38 Though the parties, after the charge of the judge, and before the jury have retired, agree that the jury may deliver a *sealed verdict*, yet when the jury come into court to deliver the sealed verdict, either party may have the jury *polled*; and any of the jurors may dissent from the verdict to which they had previously agreed. *Root* v. *Sherwood.* 6 *Johns. Rep.* 68.

There is no legal verdict but a *public* verdict, delivered openly in court; and until it is received and recorded the jury may alter it. *Ibid.*

39 After a verdict is pronounced in court, by a jury, they may alter it, before it is received and recorded. *Blackley* v. *Sheldon.* 7 *Johns. Rep.* 32.

After a verdict is received, the jurors may be examined by the *poll*, and either of the jurors may disagree to the virdict. *Ibid.*

After a jury have retired, to consider of their verdict, they may return into court and hear evidence, as to any matter of which they have doubts. *Ibid.*

The court may send a jury back to reconsider their verdict, before it is recorded, if there is any mistake. *Ibid.*

40 Strict form in a verdict is not necessary; it need only to be understood what the intention of the jury was, agreeably to which, it may afterwards be moulded into form. 2 *Dallas*, 462.

41 Verdict informally expressed aided by the court. 2 *Dallas*, 211, 212.

42 The first verdict given in dollars in the state court. 2 *Dallas*, 219.

43 In what case the court will allow the plaintiff to enter a verdict, given generally, upon the proper count. 2 *Dallas*, 229.

44 A declaration for foreign money, without an averment of its value, is cured by the verdict finding the value in dollars. 3 *Dallas*, 368.

45 A declaration in the *debet* as well as *detinet*, though the action is for foreign money, will be cured by a verdict finding the value. 3 *Dallas*, 369.

46 A finding by the jury which contradicts a fact admitted by the pleadings, is to be disregarded. *M'Ferran* v. *Taylor.* 3 *Cranch*, 270.

47 A special verdict is defective which does not find whether the abandonment was in reasonable time. *Chesepeake Ins. Co.* v. *Stark.* 6 *Cranch*, 268.

VESTRY.

There may be a select vestry; and what is laid only as a circumstance, need not be proved. *Batson and another* v. *Sayer.* 2 *Str.* 728.

VIEW.

1 A view grantable only where the title is in question. *Kempster* v. *Deacon.* 2 *Salk.* 665.

2 Method of proceeding in case of a view. Before the view is granted, the *venire* must be returned; and then the rule is, that so many of the panel shall view, &c. *Anon.* 2 *Salk.* 665.

3 A tenant in a real action may pray a view either before or after a de-

mandant has counted. *Davis* v. *Lees. Willes*, 344.

A view being a dilatory, is only to be granted in cases where it is necessary. *Ibid.*

And consequently it will not be granted where it appears that the tenant knows what lands are demanded. *Ibid.*

Nor where the tenant is in possession of no other lands in the vill than the demandant sues for. *Ibid.*

And in a counter plea (to a prayer of view) it is not sufficient for the demandant to say that the tenant is in actual possession of the lands demanded; he must add, "and has no other lands in the same vill." *Ibid.*

But the tenant is entitled to a view when he is in possession of more lands in the vill than those demanded. *Ibid.*

4 In an action on a writ of right, the tenant is entitled to a *view* of the premises, as a matter of right, in all cases, except those in which it is restrained by statute. *Inhabitants of Gravesend* v. *Voorhis et al.* 1 *Johns. Cases*, 237.

5 The demandant in a writ of right is entitled to a view, as matter of course. *Haines* v. *Budd.* 1 *Johns. Cases*, 335.

6 Where the tenant, in a writ of right, demands a *view* it is the duty of the demandant, to sue out the writ of *view*, and if he does not, he will be nonsuited. *Scoffield* v. *Lodie.* 1 *Johns. Cas.* 395.

VILL.

1 Where a place which is no vill shall be intended to be a vill, after a demurrer or a verdict. *Booth* v. *Johnson.* 3 *Salk.* 380.

2 Five houses in an extraparochial place do not constitute a vill. *Between the Parishes of Stoke Prior and the Inhabitants of the Manor of Grafton.* 2 *Str.* 1071.

VIRGINIA.

1 The law of Virginia respecting expatriation considered. 3 *Dallas*, 133 to 169.

2 A payment of a *British* debt into the treasury during the war, in pursuance of the *Virginia* act, is no bar to the creditor's recovering from his original debtor after the peace. 3 *Dallas*, 199 to 285.

3 The *Virginia* law of 1748, in relation to bills of exchange, was in force on the 11th of *February*, 1793. 3 *Dallas*, 366 to 368.

4 What finding of a consideration by a jury, will take a bill of exchange out of the *Virginia* statute. 3 *Dallas*, 368.

The value of sterling money, has long been ascertained in *Virginia* by statute. *Ibid.*

5 The rights of holders of military warrants issued under the royal proclamation of 1763, as recognized by the laws of *Virginia*. 3 *Dallas*, 425 to 466.

Operation of the compact for settling the boundaries between *Virginia* and *Pennsylvania*, as to private rights previously acquired. *Ibid.*

VISITOR.

1 Visitor of an ancient college is visitor also of ingrafted foundations unless a special visitor be appointed, notwithstanding a remedy by distress is also provided for by the new founder. *Saint John's College Cambridge* v. *Todington.* 1 *Burr.* 158. 1 *Black.* 71.

2 If the member of a college prevent the visitor from entering into the plan he has appointed for the visitation, the administration of an oath by him elsewhere to the officer, concerning the service of the citation, is a visitorial act. Where the visitor must have the consent of the seven senior fellows to the removal

of particular members, though some of such members may have been suspended, their consent is nevertheless essential to the removal. *Philips* v. *Bury*. 1 *L. Raym.* 5.

3 Offences against the private statutes of a college are not pardoned by the act of grace. *Bently* v. *Episc. Eliensis*. 2 *Str.* 913.

The visitor may punish one man for an act done by him jointly with others. *Ibid.*

But he must in his citation pursue his authority. *Ibid.*

4 *Mandamus* to a visitor, to restore a canon whom he had expelled, refused. *The King* v. *The Bishop of Chester*. 1 *Black.* 22.

If a visitor acts within his jurisdiction, his acts are uncontrollable; if out of it, are void. *Ibid*, 25.

5 Visitor may visit when he pleases. *Ibid.* *And The King* v. *The Bishop of Ely*. 1 *Black.* 26, 56.

No *mandamus* to a visitor to reverse his own sentence. *Ibid*, 26.

Mandamus to a visitor to proceed on an appeal, denied, because his authority, as visitor, was dubious. *Ib.*

The college may interpose to stop it. *Ibid.*

6 Whether, in case a dean and chapter neglect or refuse to appoint a canon residentiary in proper time, the bishop by virtue of his general visitatorial power may appoint *pro tempore* till such election be had? *Qu.* *Chichester, Bishop* v. *Harward & al.* 1 *Term Rep.* 650.

There is no lapse to the bishop in the case of a canonry. *Ibid.*

7 In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the king, to be exercised by his great seal. *Rex* v. *St. Catherine's Hall, Cambridge*. 4 *Term Rep.* 233.

8 If a visitor of a college has heard and decided on an appeal, the court of K. B. has no authority to examine the legality of the judgment. *Rex* v. *Ely Bishop*. 5 *Term Rep.* 475.

And see *Rex* v. *Lincoln Bishop*. 2 *Term Rep.* 338, *n.*

9 The visitor need not hear parol evidence on such an appeal; it is sufficient if he receive the grounds of the appeal, and the answer to it in writing. 5 *Term Rep.* 477.

10 Mr. *Longmire*, who had been a fellow of *Peterhouse, Cambridge*, and had vacated his fellowship by taking a college living, but had continued his name on the college boards, is not entitled to any preference in the election of a master, as being a member of the *domus* or foundation, under these words; "In cujus vero electione hoc imprimis observari volumus, ut ipsius domus atque sociorum ejusdem semper ratio habeatur, ut hi, si qui inter eos ad hoc munus obeundum inveniatur idonei, cæteris præferantur; sin hujusmodi in domo nulli extiterint, tum aliunde assumantur." *Rex* v. *The Bishop of Ely*. 2 *Term Rep.* 290.

11 The fellows having returned two persons to the Bishop of *Ely* as general visitor, for him to choose one, according to the directions of the statutes, to which return the bishop is directed to give *plenam fidem* and to appoint one of them quem magis utilem intellexerit, et præficiat domui et scholaribus, absque mora in magistrum, ne domui et scholaribus dispendium ali quod inferat longa mora; and one of the persons returned being a fellow of the college, and the other a member of a different college, omitting Mr. *Longmire*, who was the third candidate; the bishop cannot on that account declare the election made by the fellows to be null, and appoint another than one of the two returned to him to be master, as claiming by lapse under a provision in the statutes, which declared that in default of appointment by the fellows within a certain time, the bishop should nominate to the mastership. *Ibid.*

12 And therefore the court in such case, on the bishop's refusal, granted a *mandamus* to him to appoint one of the two persons presented to him by the fellows. 2 *Term Rep.* 290.

13 In general the court of *B. R.* will not interfere in the case of a visitor, or review any determination made by him in that capacity; but this was held not to be a case within the bishop's general visitatorial power, his right being restrained to the selection of one of the two persons presented to him by the fellows, who were the judges of their fitness. 2 *Term Rep.* 334, 5.

14 Nor could the appointment of the bishop be said to have been done by virtue of his visitatorial power in this instance, even supposing the case to have been within his general jurisdiction, because he did not cite or hear the parties; and it is a judicial act; and unless there be a general visitation of the college, there must be an appeal to the visitor, and he should proceed on that. 2 *Term Rep.* 336.

15 Where by the statutes of a college the right of appointment to the mastership devolves on a person named, who is also general visitor, on neglect of the fellows to elect, such nominee has not that right as visitor, but by the special appointment of the founder. 2 *Term Rep.* 338.

16 Then as this was not a visitatorial act, the propriety of the election and the bishop's conduct cannot be inquired into by himself as visitor, because that would be to determine on his own right, for he claims an interest and asserts a right, and a visitor cannot be a judge in his own cause, unless that power be expressly given to him; and in all these cases the power of deciding the question, and construing the statutes, devolves on the courts of law. 2 *Term Rep.* 338. 9.

17 Where by the constitution of *Exeter* college, *Oxford*, the bishop of *Exeter* was appointed general visitor, to visit by himself or his commissary once in five years, *ex officio*, unless oftener required by the college; and it was provided that he might deprive the rector or expel the scholars, with this qualification, *si tamen ad deprivationem rectoris, aut expulsionem scholaris alicujus, per episcopum aut ejus commissarium agatur*, then if he cannot make out his innocence he shall be removed without further appeal, *dum tamen ad ejus expulsionem*, there shall be the consent of the seven senior fellows; and then if the rector be removed by the bishop's commissary *etiam consentientibus* four of the senior fellows, he may appeal to the bishop; if the bishop deprive the rector without the consent of the four senior fellows, such deprivation is good notwithstanding; for being general visitor he has the power of deprivation necessarily incident to his office, and it can only be abridged by express words, of which there are none here, for the words *si tamen, &c. dum tamen ad ejus expulsionem, &c.* relate to the fellows and not to the rector; though the words *etiam consentientibus*, &c. do qualify the commissary's power, but not the bishop's. *Per Holt, in Philips* v. *Bury.* 2 *Term Rep.* 346.

18 But if the consent of the four senior fellows had been necessary to the deprivation of the rector, it would not have been sufficient for the bishop, having first suspended some of the senior fellows, to have obtained the consent of the rest; for the suspension made no vacancy of their offices, but was only an impediment to their enjoying any benefit from them. 2 *Term Rep.* 351.

19 Under this constitution of the college the visitor can only visit once in five years, unless called upon oftener by the college: and if he come uncalled within the five years, his visitation would be void, and any sentence he might give a mere nul-

lity, as *coram non judice*. *2 Term Rep.* 348.

20 But if a member of the college, expelled by the rector and fellows, appeal to the bishop as visitor, and the bishop appoint a particular commissary to examine the matter, this is not such a visitation as precludes the bishop from visiting again within five years *ex officio*; for as visitor he has a constant standing authority at all times to hear and redress the grievances of the particular members. *2 Term Rep.* 346, 348.

21 So where the bishop appointed a visitation to be held in the chapel on the 16th *June*, and the rector and fellows refused to open the doors on the day appointed, but protested in the area, and the visitor called over all their names, and swore a person to prove the summons, and went away without doing any more; and afterwards he appointed another visitation in the hall on the 24th *July* following, and called over the names, and registered the act of 16th *June*, notwithstanding a protest against all the proceedings, this visitation is good, and what passed on the 16th *June* was no visitation. *2 Term Rep.* 348, 9, 357.

22 The visitatorial power is an appointment of law, and is not of ecclesiastical origin; where the interest of a charity is vested by the donor in trustees, there the law does not raise a visitor; but where they who are to have the benefit of the charity are incorporated, there the law raises a visitatorial power in the founder and his heirs, unless the founder hath appointed some other person. *2 Term Rep.* 352, 3.

23 And there is no difference in respect of the visitatorial power between a college and an hospital, where the latter is not governed by trustees; both are eleemosynary, and a college imports a corporation. *2 Term Rep.* 353.

24 Spiritual corporations are visited by the ordinary. If he is visitor ordinary, an appeal lies to his superior; if as patron, no appeal lies *Ibid.*

25 Where a visitor has power to deprive, his sentence is not examinable either as to the cause or the truth of the fact in a court of law; so that if a deprivation be pleaded, there is no occasion to shew the cause, nor is it traversable even in a visitation. *2 Term Rep.* 346, 351.

26 Though the statutes of the college enumerate several offences for which the rector shall be deprived, and contumacy is not one of them, yet that doth not tend to abridge the visitor's power of deprivation incident to his office during a visitation, but he may equally deprive for contumacy. *2 Term Rep.* 358.

VOLUNTARY CONVEYANCE.

1 One *after* marriage makes a settlement of certain premises upon himself for life, remainder to his *wife* for life, remainder to their issue in tail; and *three* years afterwards *mortgages* the premises to *B.* who was told there was such settlement. The settlement is a *voluntary* conveyance within the statute *27* Eliz. c. 4, and void as against the mortgagee. *Chapman d. Staverton v. Emery. Cowp.* 278.

[SEE CONVEYANCE.]

2 Under what circumstances a voluntary conveyance of an insolvent debtor, in trust for general creditors, is fraudulent and void as to particular creditors. *4 Dallas*, 76.

3 A creditor cannot sue the voluntary trustees of his debtor, for a dividend, unless he has subscribed the conditions of the trust. *4 Dallas*, 224.

4 Voluntary assignments being executed merely to give jurisdiction to a federal court, the suits dismissed. *4 Dallas*, 330.

VOLUNTEER CORPS.

1 Members of volunteer corps, enrolled under the regulations of the statute 42 G. 3, c. 66, are entitled to resign on due notification of such their intention; not being restrained from such liberty of resignation by the rules of the corps to which they belong, or its conditions of service; and this liberty is not taken away by statute 43 G. 3, c. 96, (the general defence act,) which distinguishes between *volunteer corps*, and *volunteers under that act*; *i. e.* such as offer themselves voluntarily to serve in lieu of the compulsory levy. And the statute 43 G. 3, c. 121. attaches only on corps of volunteers *at the time of an actual invasion*, and has no retrospective operation on those who had ceased to bear that character before actual invasion. *Rex* v. *Dowley*. 4 *East*, 512.

2 Volunteer drill serjeants, &c. though subject to the regulations of the mutiny act for trial and punishment by volunteer courts-martial, according to the statute 44 G. 3, c. 54, s. 21, are not privileged from arrest for debt under 20l. as regular soldiers. *Richman* v. *Studwich*. 8 *East*, 105.

W.

WAGER.

1 Action lies to recover money won upon a wager, "whether a decree of the court of chancery would be reversed, or not, on an appeal to the house of lords?" unless the motive be fraud or other *turpis causa*. *Jones* v. *Randall & all*. *Cowp*. 37.

2 The court will not determine wagers. *Walkhouse* v. *Derwent*. 1 *Black*. 19.

3 Mr. justice *Buller* was strongly inclined to think, that the statute 14 G. 3, c. 48, made *all wagers* void wherein the parties had no interest. 2 *Term Rep*. 616.

4 But in general a wager is legal, if it be not an incitement to a breach of the peace or to immorality; or if it do not affect the feelings or interest of a third person, or expose him to ridicule, or libel him, or if it be not against sound policy. 3 *Term Rep*. 693.

5 A wager that *A*. had purchased a waggon of *B*. is not void at common law, nor prohibited by statute 14 G. 3, c. 48; and an action may be maintained upon it. *Good* v. *Elliott*. *Ibid*.

6 A wager on a horse-race for less than 50l. cannot be recovered in an action; the statute 13 G. 2, c. 19, s. 2, having prohibited such races. *Johnson* v. *Bann*. 4 *Term Rep*. 1.

7 Nor a wager, though for more than 50l., that the plaintiff could perform a certain journey in a post-chaise and pair of horses in a given time. *Ximenes* v. *Jaques*. 6 *Term Rep*. 499.

8 Nor a like wager, that a single horse should go from *A*. to *B*., on the high road, sooner than one of two other horses to be placed at any distance their owner should please; these being transactions prohibited by statutes 16 Car. 2, c. 7, s. 2, and 9 Ann. c. 14 and not legalized by 13 G. 2, c. 19, or 18 G. 2, c. 34, which latter statutes relate to *bona fide* horse racing only. *Whaley* v. *Pajot*. 2 *Bos. & Pull*. 51.

9 No action will lie on a wager respecting the *mode of playing* an illegal game; and if such a cause be set down for trial, the judge at *nisi prius* is justified in ordering it to be struck out of the paper. *Browne* v. *Leesou*. 2 *H. Black*. 43.

10 A wager between two voters with respect to the event of an election of a member to serve in parliament, laid before the poll began, is illegal. *Allen* v. *Hearn*. 1 *Term Rep*. 56.

11 *Qu*. Whether a wager, that war

would be declared against *France* within three months, is void? *Foster* v. *Thackery*. 1 *Term Reports*, 57, *n*.

12 A wager upon the event of a cause in the house of Lords or the courts of justice is void, if laid with a lord of parliament or judge. *Per Lord Mansfield*. 1 *Term Rep*. 60.

13 A wager respecting the amount of any branch of the public revenue is illegal; because it leads to an improper discussion, and is contrary to sound policy. *Atherfold* v. *Beard*. 2 *Term Rep*. 610.

And after verdict for the plaintiff in an action brought on such a wager, the court will arrest the judgment. *Ibid*.

14 For the same reasons an action will not lie on a promissory note given in payment of a wager on the amount of the hop duties. *Shirley* v. *Sankey*. 2 *Bos. & Pull*. 130.

15 *A*. in consideration of 200 guineas, paid by *B*., gave a bond for the payment of an annuity to the latter of 100 guineas, till the hop duties should amount to a certain sum; before this event had taken place *A*. brought an action to recover back the 210l. of *B*; held, that the action was maintainable. *Tappenden* v. *Randall*. 2 *Bos. & Pull*. 467.

But in such action, being for money had and received, only the net sum without interest could be recovered. *Ibid*.

16 If a wager be deposited with a stakeholder, on the event of a battle to be fought by the parties laying the wager, and it be not paid over, though the battle be fought either party may recover from the stakeholder the sum deposited by him. *Cotton* v. *Thurland*. 5 *Term Rep*. 405.

17 It might perhaps be otherwise if the money has been paid over to the winner. *Per Kenyon* C. J. 5 *Term Rep*. 409.

18 In a subsequent case, the court of K. B. held that whenever money has been paid upon an illegal consideration, it may be recovered back by the party who has improperly paid it; and that therefore where the plaintiff had given the defendant 100l. to receive 300l. in case of a peace within a certain time, he might recover back his 100l. though after the event of the wager was decided, by which if the wager had been legal he would have won his 300l. *Lacaussade* v. *White*. 7 *Term Rep*. 535.

19 But where money deposited on an illegal wager had been paid over to the winner by the consent of the loser; that court held that the latter could not afterwards maintain an action against the former to recover back his deposit. *Howson* v. *Hancock*. 8 *Term Rep*. 575.

20 An action for a wager is maintainable at common law; but a wager which is against the principles of sound policy, &c. is void, and cannot be recovered. *Bunn* v. *Riker*. 4 *Johns. Rep*. 426.

21 A wager contract is void, if it is against the principles of public policy. *Mount and Wardell* v. *Waite*. 7 *Johns. Rep*. 434.

The *insurance of lottery tickets* is against public policy, especially since the act of the 7th April, 1807, made to restrain the insurance of lottery tickets, declared it to be a public misdemeanor to insure tickets in lotteries authorized by this state, and the act of the 17th *February*, 1809, has extended the provisions of that act to all lotteries whatever, foreign or domestic; and though the action was on an insurance of tickets in a foreign lottery, and made prior to the act of the 17th *February*, 1809, (sess. 32, c. 36,) the contract was held void. But the insured not having violated any statute, was held not to stand in *pari delicto*, and therefore entitled recover back the *premium* paid for the insurance. *Ibid*.

22 Where a *wager* or *bet* is lost, and the money or property has been fairly paid, or delivered, the court will

not help the plaintiff. *M'Cullum* v. *Gourley*. 8 *Johns. Rep.* 147.

Where *A.* delivered to *B.* two firkins of butter, and agreed that if *P.* was elected governour of the state, *B.* would *pay* a certain price for the butter, otherwise he was to pay nothing; and *P.* was not elected, it was held, that *A.* had no right of action against *B.* for the butter. *Ibid.* (See also *Lansing* v. *Lansing*. 8 *Johns. Rep.* 454.

WAGER OF LAW.

1 Action of debt was brought on a bye-law; the defendant waged his law, and a day was given upon the roll for him to come and make his law; and now upon the last day of term he came, and was set at the right corner of the bar, without the bar; and the secondary asked him if he was ready to wage his law? He answered, yes; then he laid his hand upon the book, and then the plaintiff was called. Then the court admonished him, and also his compurgators, which they regarded not so much as to desist from it. Accordingly, the defendant was sworn that he owed not the money *modo et forma*, as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him were called over, and each held up his right hand, and then laid their hands upon the book and swore that they believed what the defendant swore was true. *Anon.* 2 *Salk.* 682.

2 Wager of law lies not in debt on a bye law, nor any action where wrong is supposed.

Wager lies in account if he received of the plaintiff, not of a stranger; and in *detinue*, whether his receipt was of the plaintiff or a stranger.

In debt, *sur arbitrament*.

In debt for an amerciament in a court baron; but not on a judgment in a court baron.

It lies not in debt for rent, nor in debt by a gaoler for meat and drink. *Mood* v. *Mayor of London*. 2 *Salk.* 683. 1 *Salk.* 397.

WAGES.

A ship on her voyage to *Europe*, taken by a *French* privateer, and carried into *Spain*, after eight months detention is released, proceeds on her voyage, and delivers her cargo. When the owners receive notice of the capture, they abandon to the insurers. A marriner, taken on board the privateer, carried to *France*, imprisoned, afterwards discharged, and returning home, is entitled to his wages until his return, from the original owners, and not from the insurers. 2 *Mass.* 89.

2 A father is entitled to the wages earned by his child while under age. 2 *Mass.* 113.

WALES.

1 The grounds of a judgment in one of the courts of great sessions may be questioned in an action upon the judgment. *Galbraith* v. *Neville*. 1 *Doug.* 6, *n.*

2 Civil proceedings cannot be removed by *certiorari* from the courts of great sessions, without special cause. *Williams* v. *Thomas*. 2 *Doug.* 751, *n.*

WARRANT.

1 A warrant of distress granted by two justices, under statute 9 G. 2, c. 23, on a conviction for selling spirituous liquors without a licence, need not be under the seal of the justices; it is sufficient if it be under their hands. *Padfield* v. *Cabell*. *Willes*, 411.

A warrant only signifies an authority; it does not *ex vi termini* an instrument under seal. *Ibid.*

2 General warrants are illegal and void. *Money* v. *Leach.* 1 *Black.* 555. 3 *Burr.* 1692 and 1742.

3 To break open houses under a general warrant for apprehending the authors, printers, and publishers of a seditious libel, without names of the offenders, is illegal. *Wilkes's Case. Lofft*, 17.

4 A warrant of commitment issued by justices of the peace is *illegal*, unless it state *some good cause certain, supported by oath. Ex parte Burford.* 3 *Cranch*, 448.

WARRANT OF ATTORNEY.

1 Cannot enter judgment on warrant of attorney after the attorney's death. *Wild* v. *Sands.* 2 *Str.* 718.

2 Judgment may be entered on warrant of attorney after the death of the party. *Fuller* v. *Jocelyn.* 2 *Str.* 882.

3 The warrant of one executor is not sufficient to enter judgment against the other. *Elwell* v. *Quash and another.* 1 *Str.* 20.

4 A warrant of attorney by a prisoner and another, to a bailiff, to confess judgment on a bond given for the liberties of the prison is void. *Dole* v. *Moulton and another.* 1 *Johns. Cases*, 129.

5 A warrant of attorney to confess judgment on a bond, is subservient to the bond, and execution cannot be issued till the time given for payment in the condition has elapsed. 1 *Dallas*, 138.

6 *Quere*, Whether a warrant of attorney to confess judgment in the court of *common pleas*, will authorize its being confessed in the *supreme court.* 1 *Dallas*, 288.

WARRANTY.

1 If the first contract with warranty be broken off, the warranty will not extend to a subsequent sale. *Anon.* 1 *Str.* 414.

2 Warranty of a horse to be sound; want of an eye is a breach. *Butterfield* v. *Barroughs.* 1 *Salk.* 211.

3 *Cestui que* use may take advantage of a warranty annexed to the estate. Plaintiff in ejectment may make title by a collateral warranty. Rights of entry are bound by collateral warranty. But, though a warranty binds or bears, it does not extinguish a right. *Smith* v. *Tundall.* 2 *Salk.* 685.

4 Where seller has the possession of chattels, the bare affirming them to be his makes a warranty; otherwise if out of possession. Such affirmance makes no warranty of lands in any case. Judgment to answer over, though the plea prayed. *Jud. de narr. Medina* v. *Stoughton.* 1 *Salk.* 210. 2 *Lord Raym.* 593.

5 General warranty that a horse is sound, is, without exception, of ignorance of the seller at the time of sale. *Anonymous. Lofft*, 146.

6 Where a horse has been sold, *warranted sound*, which it can be clearly proved was unsound at the time of the sale, the seller is liable to an action on the warranty, without either the horse being returned or notice given of the unsoundness. *Fielder* v. *Starkin.* 1 *H. Black.* 17.

7 But where on the sale of a horse there is an *express warranty* by the seller, that the horse is sound, free from vice, &c. coupled with an undertaking on the part of the seller to take the horse again, and pay back the money, if *on trial* he shall be found to have any of the defects mentioned in the warranty, the buyer must in such case return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. *Adam* v. *Richards.* 2 *H. Black.* 573.

8 In such case *trial* means a reasonable trial. *Ibid.*

9 If a horse sold at public auction be

warranted sound, and six years old, and it be one of the conditions of sale that he shall be deemed *sound* unless returned in two days, this condition applies only to the warranty of *soundness*. *Buchanan* v. *Parnshaw*. 2 *Term Rep.* 745.

10 Therefore where a horse sold with such a warranty was discovered to be twelve years old ten days after the sale, and was then offered to the seller who refused to take him, it was holden that an action might be maintained by the buyer against the seller on the warranty, and his right to recover is not affected by his having sold the horse after offering him to the defendant. 2 *T. Rep.* 745.

11 After a warranty of a horse as sound the vendor in a subsequent conversation said, *that if the horse were unsound* (which he denied) *he would take it again and return the money*. This is no abandonment of the original contract, which still remains open; and though the horse be unsound the vendee must sue upon the warranty, and cannot maintain assumpsit for money had and received to recover back the price, after a tender of the horse. *Payne* v. *Whale*. 7 *East*, 274.

12 An action on a covenant of warranty of real estate does not lie till eviction. 1 *Mass.* 464.

13 The collateral warranty of the ancestor operates as an estoppel, the statute of 4 Ann. c. 16, not extending to *Pennsylvania*, 4 *Dallas* 168.

WASTE.

1 There is a distinction to be taken between waste and destruction, in conformity to the practice of the court of chancery. *Paye* v. *Dor*. 1 *Term Rep.* 56.

2 Tenant for life without impeachment of waste has an absolute property in trees as soon as they are cut down. 1 *Term Rep.* 55.

3 The clause "*without impeachment of waste*" will not warrant a tenant for life in unlading an house and pulling down the tiles. *Vane* v. Lord *Barnard*. 1 *Term Rep.* 55, *n.*

4 The court of chancery have also prevented a tenant for life *without impeachment of waste* from cutting down an avenue leading to a house, but not all ornamental timber. *Ibid. n.*

5 But in the case of Sir *Herbert Packington* (3 *Atk.* 215) a court of equity protected trees which were either an ornament or shelter to an house. 1 *Term Rep.* 55, *n.*

6 In *Charlton* v. *Charlton*, mentioned by Lord *Hardwicke* in 3 *Atk.* 216, Lord Ch. *King* prevented a tenant for life without impeachment of waste from felling trees in a park. 1 *Term Rep.* 55, *n.* (*b*)

7 One of two tenants in common, cannot maintain an action on the case in nature of waste, against the other tenant in common, (in possession of the whole, having a demise of the moiety from the first,) for cutting down trees of a proper age and growth, for being cut; but he will be entitled to recover a moiety of the value in another form of action. *Martyn* v. *Knowllys*. 8 *Term Rep.* 145.

8 *Alitor*, if the trees be not fit to cut. *Ibid.*

9 The purchasor of lands, having brought an ejectment against the tenant from year to year, the parties enter into an agreement that judgment shall be signed for the plaintiff, with a stay of execution till a given period. The tenant cannot in the interval remove buildings, &c. (*ex gr.* a wooden stable moveable on blocks or rollers,) from the premises which he had himself erected during his term, and before the action was brought. *Fitzherbert* v. *Shaw*. 1 *H. Black.* 258.

10 Salt pans, necessary to the use of saltworks, and without which they would be of no value, are the prop-

erty of the *heir*, and not of *the executor*; though they might be removed without injuring the buildings. *Lawton* v. *Salmon*. 1 *H. Black*. 259, *n*.

11 A tenant in agriculture, who erected at his own expence, and for the more necessary and convenient occupation of his farm, a beast house, carpenter's shop, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former; that is, where the superincumbent building is erected as a mere accessary to a personal chattel, as an engine; but where it is accessary to the reality, it can in no case be removed. *Elwes* v. *Maw*. 3 *East*, 38.

12 In an action of waste, on the statute of *Glocester*, against tenant for years for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the court will permit the defendant to enter up judgment for himself. *The Keepers and Governors, &c. of Harrow School* v. *Alderton*. 2 *Bos. & Pull*. 86.

13 An action on the case does not lie for permissive waste only. *Gibson* v. *Wells*. *New Rep*. 290.

14 If trees be excepted out of a demise, *waste* cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises. *Goodright* v. *Vivian*. 8 *East*. 190.

WATER BAILIFF.

Water-bailiff may not cut unlawful nets, nor seize fish. *Bulbroke* v. *Goodere*. 1 *Black*. 569.

WAY.

1 A general way and a private way, by prescription, are inconsistent, and cannot be claimed together. *Chichester* v. *Lethbridge*. *Willes* 72.

Prescription for a right of way for *A*. and others (not naming them) is uncertain, and bad even after verdict. *Ibid*. There may be a way of necessity. *Ibid*.

An action will not lie by an individual for an obstruction in the highway, unless he sustain a particular damage; but if the plaintiff state that the defendant obstructed, &c. by a ditch and gate across the road, by which the plaintiff was obliged to go a longer and a more difficult way, and that the defendant opposed him in attempting to remove the nuisance, this is a sufficient damage to maintain the action. *Ibid*.

2 The owner of a private way is bound to repair it. *Taylor* v. *Whitehead*. 2 *Doug*. 745.

And if it is overflowed by an adjoining river, he cannot justify going upon the contiguous land. *Ibid*.

3 As the owner of a close situate within a close belonging to *B*. had a prescriptive right of way through *B*'s. to his own; 24 years ago, *B*. stopped up the old way, and made a new way, which was used ever since until lately, when *B*. stopped it up. In an action brought by *B*. against *A*. for going over the new way, it was holden that *A*. could not justify using the way as a way of necessity, but that he should either have gone the old way, and thrown down the inclosure, or brought an action against *B*. for

stopping up the old way. *Reynolds* v. *Edwards*. *Willes*, 282.

4 Under the grant of a free and convenient way for the purpose of carrying coals among other things the grantee has a right to lay a framed waggon-way. *Senhouse* v. *Christian*. 1 *Term Rep.* 560.

5 Under a grant of a way from *A.* to *B. in, through and along* a particular way, the grantee is not justified in making a transverse road *across* the same. 1 *Term Rep.* 560.

6 One being seized in fee of the adjoining closes *A.* and *B.*, over the former of which a way had immemorially been used to the latter, devises *B.* with the "appurtenances;" the court of C. P. held, that the devisee cannot under the word, "appurtenances" claim a right of way over *A.* to *B.*, as no new right of way, is thereby created, and the old one was extinguished by the unity of seisin in the devisor. *Whalley* v. *Thompson*. 1 *Bos. & Pull.* 371.

7 Where one (even as trustee) conveys land to another, to which there is no access but over the grantor's land, a right of way passes of necessity as incidental to the grant. *Howton* v. *Frearson*. 8 *Term Rep.* 50.

8 If the owner of two closes having no way to one of them but over the other, part with the latter without reserving the way, it will be reserved for him by operation of law. *Semble*. *Ibid.*

9 A claim of a prescriptive right of way from *A.* over the defendant's close unto *D.* is not supported by proof that a close called *C.*, over which the way once led, and which adjoins to *D.* was formerly possessed by the owner of close *A.*, and was by him conveyed in fee to another, without reserving the right of way; for thereby it appears that the prescriptive right of way does not, as claimed, extend unto *D.*, but stops short at *C.*—*Quere*, If the claim had been for a prescriptive right of way over the defendant's close *towards D.* *Wright* v. *Rattray*. 1 *East*, 377.

10 But where in trespass *quare clausum fregit* the defendant prescribed for an occupation way *from* his own close "unto, through, and over" the *locus in quo to and unto* a certain highway, &c. such plea may be sustained, though it appeared that one out of several intervening closes was in the possession of the defendant himself. *Jackson* v. *Shillito, cited*. *Ibid*, 381.

11 Where no evidence appeared to shew that a way over another's land had been used by leave or favor, or under a mistake of an award which would not support the right of way claimed, such a use for above twenty years exercised adversely and under a claim of right is sufficient to leave to the jury to presume a grant which must have been made within twenty-six years, as all former ways were at that time extinguished by the operation of an inclosure act. *Campbell* v. *Wilson*. 3 *East*, 294.

12 An order made by justices of peace, under the statute 13 G. 3, c. 78, s. 19, for stopping up an old foot-way, and setting out a new one, must follow the form prescribed in the schedule annexed to the act, and set forth the length and breadth of the new foot-way, otherwise it is no answer to a justification of a right of way pleaded to an action of trespass, *quare clausum fregit*, brought by the owner of the soil over which the old way led. The statute requires that the form set forth in the schedule "*shall be* used on all occasions, with such additions and variations *only* as may be necessary to adapt it to the particular exigency of the case." Under these words a material variance from the form prescribed is fatal, and may be taken advantage of in a collateral proceeding. *Davidson* v. *Gill*. 1 *East*, 64.

13 One who has a grant of an occupation way may declare in case against the owner of the land over

which the way leads for obstructing it, although it be proved that the public in general had used the way without denial for the last 12 years. *Allen* v. *Ormond.* 8 *East*, 4.

14 The *terminus ad quem*, being laid to be *public highway*, is proved by evidence of a public *foot-way*, though such description of the *terminus* might have been had on special demurrer, as not being sufficiently certain. *Ibid.*

15 If a judgment creditor extends his execution on part of his debtor's land, so as to leave him no passage from the remainder of the land to the highway, the law gives him a way of necessity over the land extended upon. *2 Mass.* 203.

WEIGHTS AND MEASURES.

1 The clerk of the market cannot distrain *ex officio* for using unlawful measures, otherwise than as a franchise. *Burdett's Case.* 1 *Salk.* 327.

2 It is illegal to sell corn by any other than the *Winchester* measure. *Rex* v. *J. Major.* 4 *Term Reports*, 750.

3 The buyer of corn by any other than the *Winchester* measure forfeits the penalty of 40s. besides the value of the corn, by statute 22 and 23 Car. 2, c. 12. *Rex* v. *J. Arnold.* 5 *Term Rep.* 358.

4 If the *reddendum* in an old renewed lease be so many *quarters* of corn it will be understood to mean legal quarters, reckoning the bushel at eight gallons; although the old leases before the statute 22 and 23 Car. 2, c. 12, contained the same *reddendum*; and although, till lately, the lessees paid by composition, reckoning the bushel at nine gallons. *The Master and Brethren of the Hospital of St. Cross* v. *Lord Howard de Walden.* 6 *Term Rep.* 338.

WESTERN INLAND LOCK NAVIGATION COMPANY.

1 If in digging a canal, the natural drains and water courses are stopped up, so that the adjacent land is overflowed, no action lies against the company, if they have proceeded according to the directions of the act of the legislature, in opening the canals. *Steele* v. *The W. I. L. N. Co.* 2 *Johns. Rep.* 283.

2 But an action will lie against them for the damages which may result to the adjacent land, from their neglect in keeping the canal and embarkments in repair. *Ibid.*

WEST-INDIA DOCKS.

1 The statute 39 G. 3, c. 69, s. 184, directs that the *West-India* Dock Company shall sue in the name of their treasurer in all actions by or on behalf of the company, and that he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by the company; and s. 185, after extending the protection of the statute 24 G. 2, c. 44, for privileging justices of the peace in actions brought against them, as such, to the lord mayor and aldermen of *London* acting under this act beyond the limits of the city; directs that "no action shall be commenced against *any person or persons for any thing* done *in pursuance or under colour of this act*, until after 14 days' notice in writing, or after tender of amends," &c.; held that the treasurer of the company is a *person* within the said clause; and being sued for an act done by the company which induced an injury to the plaintiffs was entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts: but *qu.* Whether in assumpsit? *Wallace* v. *Smith*,

Treasurer of the West-India Dock Company. 5 *East*, 115.

2 The statute 39 G. 3, c. 69, s. 137, gives to the *West-India Dock Company* certain rates and duties for all goods imported from the *West-Indies*, which shall be landed, &c. from on board any ship entering into and using the docks; which rates are directed to be "accepted for the use of the docks, and the quays, wharfs, and cranes, and other machines belonging thereto and the land waiters' fees on account of such goods after being unshipped, and all charges, and expences of wharfage, landing, housing, and weighing such goods, and of such cooperage as the same may want after being unshipped, and all rent for warehouse room for twelve weeks, and all charges of delivering the same from the said warehouses." The latter words include a delivery of the goods into lighters in the dock, as well as an immediate delivery from the ware-house into land carriages placed under the cranes of the ware-houses; although for the purpose of such delivery into lighters it be necessary to put the goods upon trucks, in order to carry them across the quay, and afterwards to crane them into the lighters. But it seems that if the owner require any work to be done upon the goods, ultra the mere *transitus* of them from the ware-house to the lighter, the company are entitled to an extra compensation to be settled by convention between the parties, as in other cases out of the act. *Harden* v. *Smith*. 8 *East*, 16.

3 The compensation clause, s. 121, of the statute 39 G. 3, c. 69, directing that in case any ware-house, &c. (used for holding *West-India* produce before that act) should be rendered less valuable by reason of the *West-India* trade being diverted therefrom by the then intended *West-India* docks and works, than they were *before passing the act*; or in case the *yearly* or other receipts of Christ's hospital should be thereby lessened; the owners of such ware-houses, &c. and the governors of the hospital should be compensated; (thereby putting such owners and governors on the same footing) must be construed with reference to the *yearly* profits made of the premises *antecedent* to the passing of the act; and the value of such ware-houses cannot be evidence by the yearly profits made between the passing of the act and the opening of the docks, by which latter the loss was occasioned. *Manning* v. *Commissioners of Compensation under the West-India Dock act.* 9 *East*, 165.

WHARF AND WHARFINGERS.

1 Wharfingers in *London* are not intitled to wharfage for goods unladen into lighters from barges fastened to their wharfs. *Stephen* v. *Coster*. 1 *Black*. 423. 3 *Burr*. 1408.

2 Wharfs must be assigned in open places only. *Case of London Wharfs*. 1 *Black*. 581.

WILL.

1 Wills are more favorably construed than any other deed. *Fisher* v. *Nicholls*. 3 *Salk*. 394.

2 What words in a will discharge the personal estate, and charge the real with the payment of debts. *Walker* v. *Jackson, in chancery*. 1 *Wils*. 24.

3 The attestation good within the statute of frauds, if the testator might see the witnesses sign. *Shires* v. *Glascock*. 2 *Salk*. 688.

4 The attestation of a will need not state that the witnesses subscribed their names in the presence of the testator. *Brice* v. *Smith*. *Willes*, 1.

5 Sealing a will is not a sufficient signing of it within the statutes of

frauds and perjuries. *Smith* v. *Evans, in the exchequer.* 1 *Wils.* 313.

6 Though signing in the devisor's presence is not mentioned in the attestation, yet it may be a good execution. *Croft* v. *Pawlett.* 2 *Str.* 1109.

7 A will of land, attested by three interested witnesses, is duly attested by three credible witnesses, within 29 Car. 2, c. 3, (*the statutes of frauds and perjuries.*) *Windham* v. *Chetwynd.* 1 *Burr.* 414. 1 *Black.* 95.

8 A void deed of covenant to stand seized to uses, being unsealed, shall not operate as a will, nor as a revocation of a former will. *Wright ex dem. Clymer* v. *Littler et al.* 3 *Burr.* 1244. 1 *Black.* 345.

9 A subsequent will of lands which doth not appear but is found by the jury to have contained a different disposition from the former will, but in what particular is not known, shall not be a revocation of the former will. *Goodright, on the demise of Rolfe and wife*, v. *Harwood.* 3 *Wils.* 497. 2 *Black.* 937.

10 A man writes a paper, importing to be his last will and testament, made for fear of mortality, till he should be able to settle it more at large, and delivers it to the only legatee mentioned therein, and afterwards declares that he hath given such legatee a security for the sum, which proves to be the amount of the legacy, assigning as the cause, that he did it for fear of mortality, till he could make a complete will, which he meant to do when his wife should be brought to bed, and dies while his wife is lying in, without making any other will; such paper shall be considered as his will. *Powell* v. *Beresford.* 2 *L. Raym.* 1282.

11 Upon the question of sanity of the testator the burden of proof is with those who are for establishing the will—they open and close. 1 *Mass.* 71, 335.

12 An opinion said to have been expressed by one of the devisors that the testator was insane at the time is not admissible in evidence. 1 *Mass.* 71.

13 To exclude a child from a distributative in the testator's estate it is not necessary a legacy should be given such child—it is sufficient if it appear by the will that the testator has not omitted it from forgetfulness, or inattention. 1 *Mass.* 146.

14 A will must be published. *Quere*, What amounts to a publication? 1 *Mass.* 258.

15 In the construction of a will, the court will give effect to all the words, without rejecting or controling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intention of the testator. *Dawes, judge* v. *Swan et al.* 4 *Mass.* 208. But if a latter clause is repugnant to a former one, the latter clause must prevail, because it is the latter determination of the testator; unless the apparent intention of the testator in other parts of the will leads to a different conclusion. *Ibid.*

16 Of the revocation of a will. *Avery et al.* v. *Pixley.* 4 *Mass.* 460.

17 Upon an appeal from a decree of the probate court approving a will, the will is to be proved in this court, as if the question had originated here; and the appellee, having the affirmative, is to open and close. *Buckminster et al.* v. *Perry.* 4 *Mass.* 593.

18 The three subscribing witnesses to a will must be produced at the probate thereof, if living, and subject to the process of the court. *Chase et al.* v. *Lincoln.* 3 *Mass.* 236.

19 The subscribing witnesses to a will may testify their opinion of the sanity of the testator; other witnesses may testify facts from which the court and jury may form an opinion whether the testator was *compos* or not. *Pool et al.* v. *Richardson.* 3 *Mass.* 330.

20 A judge of probate cannot issue a

dedimus protestatem to take the depositions of the subscribing witnesses to a will until the original will is filed with him. *Amory* v. *Fellowes.* 5 *Mass.* 219.

Where under the statute of 1783, c. 46, s. 4, an issue is joined on the attestation of the witnesses to a will in the testator's presence, the signing by the testator is included in the issue. *Ibid.*

By credible witnesses to a will in the statute of 1783, c. 24, s. 2, competent witnesses are to be understood; and it is sufficient that they are so at the time of the attestation. *Ibid.*

21 On the question of the sanity of the testatrix at the time of executing her will, which was in issue to the country, the physicians were enquired of, whether from the circumstances of the patient, and the symptoms they observed, they were capable of forming an opinion of the soundness of her mind, and if so whether they from thence concluded that her mind was sound or unsound; and in either case they were required to state the circumstances or symptoms from which they drew their conclusions. *Hathorn et al.* v. *King, Ex.* 8 *Mass.* 371.

22 Where the testatrix at 11 o'clock in the morning gave directions to her scrivener as to making her will, which she executed at six in the evening, and died two hours after; the jury were instructed, if at the time of giving the directions she had sufficient discretion for that purpose, and at the time of executing the will she was able to recollect the particulars which she had directed, they might find her of sound mind at the time of executing the will. *Ibid.*

23 If a husband or a wife be a witness to a will containing a devise, or legacy to either, such devise, or legacy is void. *Jackson ex dem. Coader* v. *Woods.* 1 *Johns. Cas.* 163.

24 The record of a will proved under the stat. (sess. 24, c. 9, s. 6,) is not conclusive upon the heir, so as to prevent the admission of evidence to impeach its validity. The record of a *will*, like that of a *deed*, is only *prima facie* evidence of its authenticity. *Jackson ex demise Woodhull* v. *Rumsey.* 3 *Johns. Cas.* 234.

25 A will executed in 1723, and which had been proved by the witnesses, in 1733 and 1744, and recorded, but not in a manner authorized by law, was allowed to be read in evidence, on the trial of an action of ejectment, in 1801, as an *ancient deed*, though actual possession did not follow and accompany the will, that being explained by the peculiar situation of the property in question, and other circumstances shown, to raise a presumption of the existance and genuineness of the will. *Jackson ex dem. Lewis et al.* v. *Laroway.* 3 *Johns. Cases*, 283.

26 Where the witnesses to a will were all dead, and one of them had signed the initials of his name, as his mark, and the testator had also signed his mark, and the hand writing of two of the witnesses was proved, and a witness at the trial, in 1807, swore that he had seen the other witness make his mark, in 1760, to a paper in his possession, and that from a comparison of the two marks, and from the peculiar manner in which the initial letters was made, he believed the mark affixed to the will was made by the witness to it; this was held sufficient evidence of the execution of the will, to permit it to be read to the jury, when accompanied with evidence of possession by the devisee under the will, and the declarations of one of the other witnesses in his lifetime, as to the due attestation by all the witnesses. *Jackson ex demise Van Duzen* v. *Van Duzen.* 5 *Johns. Rep.* 144.

27 The acts and declarations of third persons in possession of lands, are admissible in evidence to prove

a continued possession under an ancient will, so as to make out its formal execution. *Ibid.*

The sanity of the testator is presumed, until the contrary appears. The *onus probandi*, as to his mental incapacity, lies on the party, who alleges the insanity. *Ibid.*

But if a mental derangement has been proved, it is then incumbent on the devisee to shew a lucid interval, or the sanity of the testator, at the time of executing the will. *Ibid.*

29 In *Pennsylvania*, it is not necessary that a will devising real estate should be sealed. 1 *Dallas*, 94.

Nor that all the subscribing witnesses should prove the execution. *Ibid.*

Nor that the proof of the will should be made by those who subscribed as witnesses. *Ibid.*

Nor that the will should be subscribed by the witnesses. *Ibid.*

29 In *Pennsylvania*, two witnesses are necessary to the proof of every testamentary writing, whether for the disposition of real or personal estate. 1 *Dallas*, 286.

30 General rules as to the revocation of wills, and testaments. 2 *Dallas*, 268, 289.

WITNESS.

I. *Competency; general objections to, on account of interest.*
II. *Attorney, Counsel, Agents, &c.; of their being Witnesses.*
III. *Husband and Wife.*
IV. *Parishioners, &c.*
V. *Subscribing Witness.*
VI. *Examination of.*
VII. *Other Points relative to.*

I. *Competency; geneal objections to, on account of interest.*

1 In an action against a sheriff for the misconduct of his officer, the sheriff cannot call the officer as a witness, without giving him a release. *Powell* v. *Hord.* 2 *L. Raym.* 1411. *Str.* 630.

2 If a man marries a second time before his first wife dies, his first wife is not a competent witness to prove his marriage. *Broughton* v. *Harpur.* 2 *L. Raym.* 752.

3 A factor who sells for plaintiffs, and is to have 1s. in the pound, is a good witness to prove the contract and sale. *Dixon and others* v. *Cooper.* 3 *Wils.* 40.

4 An infidel pagan idolater may be a witness. *Ormichand* v. *Barker, in chancery.* 1 *Wils.* 84.

5 The son of a legatee is not, by the spiritual law, a competent witness to prove a will. *Anon.* 1 *L. Raymond*, 85.

6 An uncertificated bankrupt may be a witness to decrease but not to increase the fund. *Butler* v. *Cooke. Cowp.* 70.

7 Creditors were good witnesses to a will of lands, before the statute of 25 G. 2, though the debts are charged on the estate, there being personal assets to pay them, and they being actually paid. *Wyndham* v. *Chetwynd.* 1 *Black.* 95. 1 *Burr.* 414.

Witnesses to devisees subject to the same rules (and no other) as witnesses to other conveyances. *Ibid.* 98.

8 The children of a residuary legatee are not by the spiritual law competent witnesses to prove a will. *Smith* v. *Thwaite.* 1 *L. Raym.* 91.

9 A quaker's testimony on his *affirmation* is admissible in an action of debt, on statute 2 G. 2, c. 24, *against bribery. Atcheson* v. *Everitt. Cowp.* 382.

10 Wife of *procheim amy*, a witness. *Dennison* v. *Spurling.* 1 *Str.* 506.

11 *Procheim amy*, no witness. *Hopkins* v. *Neale and Newman.* 2 *Str.* 1026.

12 Legatee may be a witness against a will. *Oxenden Bar* v. *Penerice, in chancery.* 2 *Salk.* 691.

13 At what age the law will allow an infant to be a witness, seems discretionary, and no distinction in this respect between capital and lesser

offences. *The King* v. *Travers.* 2 *Str.* 700.

14 Son took the father's money and gave it to *H.*, and the son's evidence admitted in trover against *H. Anon.* 1 *Salk.* 289.

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15 One who has acted in breach of an alleged custom, is not a competent witness to disprove the custom. *The Company of Carpenters* v. *Hayward.* 1 *Doug.* 374, 375.

16 Heir at law may be witness of the title, remainder-man not. *Smith* v. *Sir Richard Blackham.* 1 *Salk.* 283.

17 *H.* being cheated, may be a witness to prove the fact on the indictment. *The Queen* v. *Macartney.* 1 *Salk.* 285.

18 A man may be received as a witness who proves his own turpitude; it goes not to his admissibility, but his credit. *Clarke* v. *Johnson and Co. Lofft*, 756.

19 Person liable to be contributory to defendant for damages recovered, is an incompetent witness for him. *French* v. *Foulston.* 5 *Burr.* 2727.

20 The creditor of a bankrupt no witness to prove him a gamester. *Shuttleworth* v. *Bravo.* 1 *Str.* 507.

21 Prosecutor laying a wager that he would convict defendant,—doth not incapacitate for a witness. *The King* v. *Fox.* 1 *Str.* 652.

22 Quaker no witness to ground an attachment for non-performance of an award. *Robbins* v. *Sayward.* 1 *Str.* 441.

23 Party to a usurious contract cannot be called to prove payment. *Shank qui tam* v. *Payne.* 1 *Str.* 633.

24 Goldsmith's servant who overpays money is a witness in action for it again. *Martin and another* v. *Horrell.* 1 *Str.* 647.

25 A creditor allowed to prove debtor not intitled to his discharge on the mint act. *Norcott* v. *Orcott.* 1 *Str.* 650.

26 A man who has only one of two qualifications may be called as a witness to prove that certain privileges belong to such persons as have both; a man who has both cannot. *Stevenson* v. *Nevinson.* 2 *L. Raym.* 1353.

27 No person who is or may be a loser by a forged deed, or who may receive any benefit or advantage by the verdict being found against the defendant, shall be a witness in an information for the forgery. *Watts' Case.* 3 *Salk.* 172.

28 A broker who had his principal bonds stolen out of his pocket, when stopped, gives bond to keep the holder indemnified. Held, that he could not be a witness in this action: and plaintiff recovered. In another action against plaintiff he was admitted. *Ball* v. *Bostock.* 1 *Str.* 575.

29 Guardian on record not a good witness. *Clutterbuck* v. *Huntingtower.* 1 *Str.* 506.

30 Prisoner having escaped may be a witness to prove the escape voluntary, upon traverse of an inquisition for the office, against the gaoler. The nature of the crime and conviction, not of the punishment, makes the infamy. *The King* v. *Ford.* 2 *Salk.* 690.

31 Where the master brings trespass *per quod servitium amisit*, the servant beaten is not witness. *Dunsley* v. *Westbrowne.* 1 *Str.* 414. *Sed Qu.*

32 The original debtor taken as a servant to prove the payment by another. *Brownson* v. *Avery.* 1 *Str.* 507.

33 Defendant in ejectment no witness on indictment for perjury. *The King* v. *Ellis.* 2 *Str.* 1104.

34 Servant witness in action by the master for beating him. *Duel* v. *Harding.* 1 *Str.* 595.

35 Proprietor of note a witness on an indictment for tearing it. *The King* v. *Moise.* 1 *Str.* 595.

36 A correspondent is a sufficient evidence to disprove a man's hand, though he has never seen him write. *Gould* v. *Jones.* 1 *Black.* 384.

37 A corporator who has acted under a bare authority may be a witness to prove the usage under which he

had been appointed. *Rex* v. *Robins.* 2 *Str.* 1069.

38 Where there are two qualifications to an election of an officer, he who has but one only may be witness as to the right. *Stevenson* v. *Nevinson.* 1 *Str.* 583.

39 Party supposed to be defrauded allowed a witness in perjury. No conviction for the perjury on the oath of a single witness. *The King* v. *Thomas Broughton.* 2 *Str.* 1229.

40 Sheriff's bailiff no witness to prove attempt to arrest, unless sheriff release him; and in action for false return, on *mesne* process, the jury may give the whole debt in damages. *Powell* v. *Hord.* 1 *Str.* 650.

41 On indictment for a cheat in procuring a note from *H.*, *H.* cannot be a witness. *The King* v. *Whiting.* 1 *Salk.* 283. 1 *L. Raymond,* 396.

42 If a party to a cause would be entitled to maintain an action against a particular person in case of determination against him; he cannot call such person as a witness. In a declaration for sinking a barge laden with goods, the plaintiff can recover nothing in respect of the goods, unless he shews specifically what they were. *Martin* v. *Henrickson.* 2 *L. Raym.* 1007. 1 *Salk.* 287.

43 Borrower of money held to be a competent witness to prove both usurious contract and payment of the money. *Abrahams qui tam* v. *Bunn.* 4 *Burr.* 2251.

44 Apprentice witness for the master in an action *per quod servitium amisit.* *Lewis* v. *Fogg.* 2 *Str.* 944.

45 A creditor, having sold his chance of recovering his debt, is a good witness to support a commission of bankrupt. *Granger* v. *Furlong.* 2 *Black.* 1273.

46 One obligor witness to prove the delivery by the other, good. *Lochart* v. *Graham.* 1 *Str.* 35.

47 He that apprehends himself interested, though *stricto jure* he is not, is no witness. *Fotheringham* v. *Greenwood.* 1 *Str.* 129.

48 A release by an interested party makes him a competent witness, though the releasee refuse to accept it. *Goodtitle* v. *Welford.* 1 *Doug.* 139.

49 One convicted of perjury, though pardoned, cannot be a witness. *Anon.* 3 *Salk.* 155.

50 A surrender executed by a witness removes the objection of interest, although the surrenderee refuse to accept it. *Goodtitle* v. *Welford.* 1 *Doug.* 139 to 141.

51 A bare trustee is a competent witness to prove the execution of the deed to himself. *Goodtitle* v. *Welford.* 1 *Doug.* 141, *n.*

52 If a person interested execute a surrender or release, he is an admissible witness, although the surrenderee, &c. should refuse to accept the surrender or release. *Goodtitle* v. *Welford.* 1 *Doug.* 139 to 141.

It is no objection to an executor's testimony, that he may be liable to actions as executor *de son tort.* 1 *Doug.* 141.

53 An executor who takes no beneficial interest, is a competent witness to prove the testator's sanity. *Goodtitle* v. *Welford.* 1 *Doug.* 139, to 141.

Or any other matter concerning the will. *Ibid.* 141, *n.*

So is a bare trustee to prove the execution of the deed to himself. *Ib.* 141.

54 In action against the master for his carman, negligently driving his cart, the servant allowed to be examined by the master on producing a release. *Jarvis* v. *Hayes.* 2 *Str.* 1083.

55 A person who gives a bribe to another to vote at an election for a member of parliament, is a competent witness to prove the bribery in an action for the penalty under the statute 2 G. 2, c. 24. *Mead* v. *Robinson.* *Willes,* 422.

On a prosecution for penalties under the statute 9 Ann. c. 14, s. 5, the loser of the money at cards is a good witness to prove the loss. *Ib. n. c.* 423.

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So, on a prosecution for a penalty under the statute 23 G. 2, c. 13, s. 1, for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, though entitled to half the penalty. *Ibid. n. c.*

56 It was held, that in action brought by a father for deflowering his daughter, *per quod* he lost her service; the daughter might be examined as a witness for the plaintiff. *Cock* v. *Wortham.* 2 *Str.* 1054.

57 One convicted of petit larceny and whipped cannot be a witness, for it is the crime, and not the punishment, which makes a man infamous. *Pendock, of the devise of Mackender,* v. *Mackender.* 2 *Wils.* 18.

58 In general a person is a competent witness, unless he be directly interested *in the event of the suit. Bent* v. *Baker, in error.* 3 *Term Rep.* 27. And see 7 *Term Rep.* 62.

59 And unless the verdict can be given in evidence by him in another suit. *Bell* v. *Harwood.* 3 *Term Rep.* 308. And see 7 *Term Rep.* 62.

60 Therefore one underwriter may be a witness for another in an action on a policy subscribed by both. 3 *Term Rep.* 27.

61 And if he is engaged to contribute to the defendant's costs, and has an action depending against himself on the same policy, and has joined as a plaintiff in a bill in equity for a discovery, he may be made a competent witness by the defendant's releasing him from any contribution to the costs in law or equity, and by an offer by himself and the defendant to pay the costs in equity, and dismiss the bill as to them. *Ibid.*

62 *A.* having given a bond to *B.* for the payment of money, which, it is understood between them, is to be applied towards indemnifying *B.* from the expences of an election in which *B.* is a candidate; in an action brought by *C.* against *D.* for money advanced and services performed, in supporting the interest of *B.* at the request of *D.*; *A. is not a competent witness on behalf of D. Trelawney* v. *Thomas.* 1 *H. Black.* 303.

63 In covenant for rent upon a lease by *A.* to *B.*, the point in issue was whether *C.* (whose title both admitted) demised first to *A.* or to another person; *C.* is a competent witness to prove the point in issue; for the verdict cannot be given in evidence in any action which may afterwards be brought either by or against him. *Bell* v. *Harwood.* 3 *Term Rep.* 308.

But if two persons are contending for the possession, who are to pay rent in different rights, there the landlord could not be admitted a witness to prove the demise in the ejectment. *Per Buller,* J. 3 *Term Rep.* 309.

64 Where *A.* rented a tenement of *C.*, who covenanted to reimburse him all the poor-rates; and *A.* afterwards underlet to *B.*: *A.* was held to be a competent witness to prove such letting to *B.*, upon an appeal. *Rex* v. *Woodlands, Inhab.* 1 *Term Rep.* 262.

65 If *A.* have received money from *B.* to pay to *C.*, and the question be, whether *A.* were the agent of *C.*: for that purpose *A.* may be called as a witness to prove the agency. *Ilderton* v. *Atkinson.* 7 *Term Rep.* 480.

66 So a captain of a ship who had borrowed money for the use of the ship of the plaintiffs, was held a competent witness to prove that fact in an action against the owners, whose defence was that he had borrowed it for his own use. *Evans* v. *Williams,* sittings at *Guildhall,* after *T.* 28 *G.* 3, *Cor.* lord *Kenyon.* 7 *Term Rep.* 481, *n.*

67 In order to render a witness incom-

petent, it is necessary to shew that he must derive a *certain* benefit from the determination of the cause one way or the other. 1 *Term Rep.* 164.

68 The bare possibility of a witness being liable to an action in a certain event is no objection to his *competency*. 1 *Term Rep.* 163.

69 But bail cannot be a witness for the principal. 1 *Term Rep.* 168.

70 A co-obligor in a bond to the ordinary under statute 22 and 23 Car. 2, c. 10, is a competent witness to prove a tender by the administratrix. *Carter* v. *Pearce*. 1 *Term Rep.* 163.

71 So a creditor of the administratrix is a good witness for the same purpose. *Ibid*, 164.

72 Where two persons joined in an assignment of a ship, one of them was permitted to prove that at the time of the assignment he had no interest in the vessel. 1 *Term Reports*, 301.

73 In an action against a master for the negligence of his servant, the latter is not a competent witness to disprove the negligence without a release. *Green* v. *The New River Company*. 4 *Term Rep.* 589.

74 It was held that a person is not a competent witness to impeach a security which he has given, although he is not interested in the event of the suit. *Walton* v. *Shelly*. 1 *Term Rep.* 296.

75 And on this ground where a bond was given in consideration of delivering up a promissory note, an indorser was not permitted to prove that the consideration of the note was usurious. 1 *Term Rep.* 296.

76 But afterwards, on mature deliberation, the court solemnly determined against the rule laid down in *Walton* v. *Shelly*; and held that in an action by an indorsee of a bill of exchange against the acceptor, the latter might call the payee and indorser as a witness to prove that the bill was void in its creation. *Jordaine* v. *Lashbrooke*. 7 *Term Rep.* 601. (And see 5 *Term Rep.* 579, 80.)

77 In an action by the indorsee of a bill of exchange against the acceptor, the latter cannot call the drawer indorser as a witness (because interested) to prove that the plaintiff had no right to recover upon the bill, having merely received it from the witness in trust to obtain payment of it from the acceptor on account of the witness. *Buckland* v. *Tankard*. 5 *Term Rep.* 578.

78 An indorser on a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorsee, to prove that he had satisfied the note; being either liable to the plaintiff on the note if the action were defeated, or to the defendant for money had and received if the action succeeded. And his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such non-payment makes no difference. *Birt* v. *Kershaw*. 2 *East*, 458.

79 A certificated bankrupt is not a competent witness to prove the debt of the petitioning creditor, or any other fact necessary to support the commission. *Chapman* v. *Gardner*. 2 *H. Black*. 279.—S. P. *Cross* v. *Fox*, *in note*, *Ibid*.—S. P. *Flower* v. *Herbert*, *in note*, *Ibid*.

80 In a *qui tam* action on the statute of usury against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or repaid the money; notwithstanding he is ready to release to his assignees all benefit which may arise from the discharge of this debt in particular, and all claim to allowance and surplus in general; and notwithstanding the assignee has proved his de-

mand for the money lent under the commission. *Masters qui tam* v. *Drayton.* 2 *Term Rep.* 496.

81 In an action for usury, the borrower of the money, who has paid the same is a competent witness to prove the whole case. *Smith qui tam* v. *Prager.* 7 *Term Rep.* 60.

82 Whether it be an objection to the competency of a witness for the plaintiff in an action of bribery at an election for members to serve in parliament, that a similar action was pending against the witness himself for bribery at the same election, and an acknowledgment by him that if the defendant were convicted he should avail himself, if necessary, of his having been the first discoverer to the present plaintiff? *Qu. Edwards* v. *Evans.* 3 *East*, 451.

83 It is now decided to be no objection. *Heward* v. *Shipley.* 4 *East*, 180.

84 But where the evidence given by such a witness of the defendant's bribery was by means of the defendant's *confession* of it to the witness; held, that the truth of the fact so confessed, as well as of the confession of such fact, was material for the consideration of the jury. *Ibid.*

35 Whether a person who is interested in the *question* put to him, though not in the event of the suit, be a competent witness? *Qu.* 1 *Term Rep.* 296.

85 In some cases even an interested person is a competent witness from necessity, as where the interest arises after the plaintiff or defendant has an interest in his testimony. 3 *Term Rep.* 27.

86 A person who is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a stated sum, is to be considered as a broker, and is a competent witness to prove the contract between the seller and the buyer. *Benjamin* v. *Porters.* 2 *H. Black.* 590.

87 *A.* having brought an action against *B.*, the latter filed a bill in equity against him for a discovery and injunction, and for an account; to which *A.* having put in his answer, denying the allegations of *B.*, which involved the merits of the suit at law, the injunction was dissolved; on which answer *B.* indicted *A.* for perjury; and the indictment and action coming on to be tried at the same assizes, the indictment standing first; held, that *B.* was a competent witness to prove the perjury, as he could not avail himself of the conviction of *A.* in any civil proceeding between them either in law or equity. *Rex* v. *Boston.* 4 *East*, 572.

88 Equity refused leave to file a supplemental bill in nature of a bill of review, in consequence of a conviction of a witness in the original proceeding for perjury, which conviction was obtained on the evidence of the plaintiff in the suit as well as of others. *Bartlett* v. *Pickersgill, in chancery*, cited. *Ibid.*

89 The person whose instrument is alleged to be forged is not a competent witness to prove the forgery unless the instrument is produced at the trial. 1 *Mass.* 7.

90 The indorser of a promissory note is not a competent witness to prove the hand writing of the promissor without a release from the indorser. 1 *Mass.* 73.

91 To exclude a witness on the ground of interest he must be interested in the event of the suit. 1 *Mass.* 93.

92 But a grantor is not a competent witness to explain his own deed, even in the case of a latent ambiguity and in a suit in which he is not interested. *Qu.* 1 *Mass.* 93.

93 Heir not a competent witness for the executor or administrator in an action against a debtor of the deceased. 1 *Mass.* 239.

94 Heir of a warrantor competent to prove the boundaries of land conveyed by his ancestor if he has a release from the feoffee. *Qu.* 1 *Mass.* 242.

95 In an action upon a bond given for the liberty of the prison-yard, the sheriff or gaol-keeper is a competent witness to prove that the creditor consented to the prisoner's liberation. *2 Mass.* 520.

96 A party to a negotiable security shall not be a witness to prove that at the time he gave it currency it was void, but he may be permitted to testify to any facts happening afterwards, if he is not interested. *Warren* v. *Merry.* 3 *Mass.* 27.

97 A consignee of goods on his own account, refusing to receive them, and afterwards selling them as agent to the consignors, is a competent witness for the consignors, in an action by them against the purchaser for the price of the goods, although he had indorsed the bill of lading in blank. *Brown & al.* v. *Babcock & al.* 3 *Mass.* 29.

98 Upon the trial of an indictment for passing a forged instrument, when the instrument alleged to have been has been forged secreted to protect the offender, the person, whose name is charged to have been forged, and who had seen and espied the instrument, is a competent witness to prove the instrument forged; and the production of the instrument will be dispensed with. *Commonwealth* v. *Snell.* 3 *Mass.* 82.

99 The grantee of land is a competent witness to prove the grant made without consideration, and so fraudulent as against creditors. *Hill* v. *Payson et al.* 3 *Mass.* 559.

100 The payee of a promissory note cannot be a witness to prove the note usurious in an action by the indorsee against the maker. *Parker* v. *Lovejoy.* 3 *Mass.* 565.

101 Indorsers of a negotiable security are incompetent witnesses to prove it usurious. *Churchill* v. *Suter.* 4 *Mass.* 156.

102 In an action between other parties, the petitioning creditor is a competent witness to prove his own debt, upon which a commission of bankruptcy was awarded. *Farrington* v. *Farrington.* 4 *Mass.* 237.

103 The grantor of land who covenanted in his deed that he had good right, &c. to sell the same, and that he would warrant the premises against all perons claiming them under him, is a competent witness for the grantee in an action brought by him for the land against one who does not laim under the same grantor. *Trambly* v. *Henley.* 4 *Mass.* 441.

104 One cannobe sworn as a witness, who would estify under the impression tha he is interested in the event of thesuit, although he has, in fact no legal interest in such suit. *Plumb* v. *Whiting.* 4 *Mass.* 518.

105 *A.* heingn the service of *B.* and having engaged to pay his own board, aplied to *C.* to board him, and proposed to him to take his pay in goods ut of *B.*'s store; to which *B.* consented and promised that he should be so paid; in an action by *C.* against *B.* for the board of *A.* this later was offered as a witness for the plaintiff, and these facts coming out on examining him upon the *voir dire*, he was rejected as interested in the event of the suit. *Emerton* v. *Andrews.* 4 *Mass.* 653.

106 Upon an indictment for usury the borrower is a competent witness. *Commonwealth* v. *Frost.* 5 *Mass.* 53.

107 The confesion of a witness in a criminal prosecution as to his incompetency cannot be admitted to disqualify him. *Commonwealth* v. *Waite.* 5 *Mass.* 261.

108 A party to an usurious negotiable security cannot be a witness to defeat the security on the ground of usury. *Widgery* v. *Monro & al.* 6 *Mass.* 449.

109 Where a corporation, created for pious and charitable uses, were made the residuary legatees in a will, its members were received as witnesses, on the question of the sanity of the testator. which was at issue between the executors and

the heir at law. *Mason* v. *Thatcher et al. Exr.* 7 *Mass.* 398.

110 The payee of a promissory note, who had indorsed it with a saving of his liability, was received to prove an alteration of the note after its execution. *Parker* v. *Hanson.* 7 *Mass.* 470.

111 The owner of a vessel, who had over-paid money, shipped in the vessel, to the shipper, and had been re-imbursed the amount by the master, was held a competent witness, in an action brough by the master against the shipper for the same money, though in the first instance the owner is liable for the fault of the master. *Cortes* v *Billings.* 1 *Johns. Cases,* 270.

112 In an action of *ejeament*, a person cannot be a witness to shew that he was the tenant, and not the tenant in possession. *Bradt ex dem. Van Cortlandt* v. *Dykman.* 1 *Johns. Cases,* 275.

113 A money broker, who had advanced money on a note, and deducted a premium of two *per cent. per month*, is a competent witness, in an action brought by a subsequent holder against an endorser, to prove that the note was passed for no more than the legal rate of interest. *Jones* v. *Lake.* 2 *Johns. Cas.* 60.

114 In an action of trespass *quare clausum fregit*, the defendant justified under a right of free-hold; and it was held that a person, who had conveyed the premises in question to the plaintiff, with covenants of warranty was a competent witness to prove the trespass. *Van Nuys* v. *Terhune.* 3 *Johns. Cases,* 82.

115 The general rule is, that if a witness cannot gain or lose by the event of the suit, or if the verdict cannot be given in evidence, for or against him, in another suit, the objection goes to his *credit*, and not to his competency. *Van Nuys* v. *Terhune.* 3 *Johns. Cases,* 82.

An interest in the question only, does not disqualify a witness, but the objection goes to his *credit* only. *Ibid.*

116 A person is not a competent witness to impeach the validity of a *negotiable note* or instrument, which he has made or endorsed, though he is not interested in the event of the suit. *Winton* v. *Saidler.* 3 *Johns. Cases,* 185.

The payee and endorsor of a promissory note, who had been discharged under the bankrupt law of the *United States*, and had released all his interest, was held to be an *incompetent* witness to prove that the note was given for a *usurious* consideration. *Ibid.*

117 A person who was a *tenant* under a *devisee* of part of the estate devised, was held to be a competent witness, in an action of ejectment brought by the heir against a tenant who held a part of the premises under the testator or devisee, and part under the witness, in order to impeach the validity of the will. *Woodhull* v. *Rumsey.* 3 *Johns. Cases,* 234.

118 *A.* having been convicted for forgery, was sentenced to the State Prison for life. He was afterwards pardoned by the governor. The pardon contained a proviso, that it was not to be construed so as to relieve *A.* from the legal disabilities arising from his conviction and sentence &c. but only from the imprisonment. He was afterwards offered as a witness for the people, on a trial for an indictment, and admitted to testify, although objected to as incompetent. It was held that the proviso in the pardon being incongruous, and repugnant to the pardon itself, ought to be rejected, and that the witness was competent. *The People* v. *Pease.* 3 *Johns. Cas.* 333.

119 In an action brought by the father for the seduction of his daughter, the daughter cannot be a witness to prove a previous promise of marriage, in aggravation of the damag-

es; for she has her own right of action for the breach of that promise. *Foster* v. *Scoffield.* 1 *Johns. Rep.* 297.

120 The judge before whom the proof of a deed is taken, is a competent witness to prove that it was done out of the State; but he is not bound to answer questions that may impeach his conduct as a public officer. *Jackson ex dem. Wyckoff* v. *Humphrey.* 1 *Johns. Rep.* 498.

121 A slave after he has obtained his freedom is a competent witness to prove a fact which happened while he was a slave. *Gurnee* v. *Dessies.* 1 *Johns. Rep.* 508.

122 A tenant, in an action of ejectment, may be a witness when called to prove a fact against his interest. *Young* v. *Vredenburgh.* 1 *Johns. Rep.* 159.

123 *D.* and *M.* being indebted to *C.* he attached money in the hands of *B.* at *New-Orleans*, belonging to *M.* In an action brought by *C.* against *B.* for the money so attached and held by him to answer to *C.* it was held that *D.* was a competent witness for the plaintiff; for though the recovery of the plaintiff would go so far in discharge of the debt due by the witness; yet he would be liable over for the same amount to *M.* so that his interest was balanced between the parties. *McLeod* v. *Johnston.* 4 *Johns. Rep.* 126.

Whether *M.* is a competent witness for the plaintiff in such case? *Qu. Ibid.*

124 *A.* lessor of the plaintiff in ejectment cannot be a witness in the cause; if his name is used without his consent, it may be struck out of the declaration, on application to the court. *Jackson ex dem. Goodrich et al.* v. *Ogden.* 4 *Johns. Rep.* 140.

125 A feme covert who has executed a deed with her husband, was held a competent witness to prove that the deed had been antedated. *Jackson ex dem. Griswold* v. *Ld.* 4 *Johns. Rep.* 230.

126 Where a witness is interested in any part of the demand of the plaintiff, he cannot be admitted a witness to another part. *Gary* v. *Stewart.* 4 *Johns. Rep.* 293.

127 A check in the name of *B.* on a bank was passed by *C.* to *D.* who received the money and remitted it to *C.* as his agent. The check was afterwards discovered to be a forgery, and the bank got possession of the money remitted by *D.* before it reached the hands of *C.* On an indictment of *C.* for forgery, *B.* whose name was forged, was held to be a competent witness to prove the forgery, having received a release from the bank. *The People* v. *Howell.* 4 *Johnsons Rep.* 296.

Whether in every criminal case, a witness, who is not interested in the event of the cause, is not a competent witness? *Qu. Ibid.*

128 A widow of a person deceased is a competent witness, in an action of ejectment, brought to recover possession of lands, claimed under her husband, though she would be entitled to dower in the lands. *Jackson ex dem. Van Duzen* v. *Van Duzen.* 5 *Johns. Rep.* 144.

129 In an action against a sheriff for the escape of a prisoner in execution, who had given a bond for the liberties of the gaol, it was held, that the deputy-sheriff, who had taken the bond for the prisoner, was a competent witness. *Stewart* v. *Kip.* 5 *Johns. Rep.* 256.

130 *A.* who had been discharged under the bankrupt law, and whose estate would not, probably, pay more than 25 *per cent.* was held a competent witness, in a suit brought by the assignees of *B.* a bankrupt, against whom *A.* had proved a debt under the commission. *Phoenix* v. *Assignees of Ingraham.* 5 *Johns. Rep.* 412.

131 Where a defendant producing a witness had declared that it belong-

ed such witness as well as him- to pay the demand sued, the ness could not be sworn. *Peirce Chase.* 8 *Mass.* 487.

131 A witness, who had sold personal property is not a competent witness for the vendee of such property, in a suit brought against the vendee for taking it away. *Hermance* v. *Vernoy.* 6 *Johns. Rep.* 5.

132 A grantor in a deed which is impeached as fraudulent, on being released, by the grantee, from all claims and demands whatsoever on account of covenants &c. is a competent witness to disprove, as well as prove the fraud. The objection goes to his credit not to his competency. *Jackson ex dem. Moses* v. *Frost and Haff.* 6 *Johns. Rep.* 135.

133 Where a witness, in any stage of a cause, in law, or equity, discovers himself to be interested, his testimony may be rejected. *Swift* v. *Dean in error.* 6 *Johns. Rep.* 523.

135 In an action of trespass for taking a heifer, the father of the defendant, and by whose order the trespass was committed, was held to be a competent witness for the defendant. *Alderman* v. *Tirrell.* 8 *Johns. Rep.* 418.

136 In an action of trespass, for taking and impounding the *hogs* of the plaintiff, the defendant proved that he acted as the agent and servant of *G.* on whose land the hogs were found, and offered *G.* as a witness, after executing a release to him, to prove that the hogs were taken *damage feasant;* and it was held that *G.* was a competent witness. *Hasbrouck* v. *Lown.* 8 *Johns. Rep.* 377.

137 Where a witness declares on his *voire dire* that he is interested in favour of the party calling him, and that his interest is so circumstanced that he cannot be released, the witness ought not to be sworn, though in strictness, he is not interested; but if his supposed interest is against the party calling him, he ought to be admitted. *The Trustees of Lansingburgh* v. *Willard.* 8 *Johns. Rep.* 428.

138 In an action under the act (sess. 21, c. 138,) concerning slaves, for a penalty, for harbouring the slave of the plaintiff, brought against a member of a religious society or sect, called *shakers*, a member of that society is a competent witness, although the members hold all things in common, and have a partnership interest in all their concerns, as a religious society. *Wells* v. *Lane.* 8 *Johns. Rep.* 462.

139 Where a person who is security for the defendant, in an action before a justice, is a material witness for the defendant, he ought to be discharged, and new security taken, so that the defendant may have the benefit of his testimony. *Irwin* v. *Caryell.* 8 *Johns. Rep.* 407.

140 The defendant is not a competent witness to prove the person prosecuting; it must be done by indifferent witnesses. 1 *Dallas,* 6.

141 In an action on a policy of insurance, the captain of a ship, having goods on board, and insured by other under writers, who refused to pay till the determination of this suit was examined on his *voire dire,* swearing himself disinterested, he was sworn in chief. 1 *Dallas*

142 An informer, on the seizure of contraband goods, cannot be a witness, although he releases his right to the moiety. 1 *Dallas,* 63.

143 On an indictment for forgery, the party whose name is forged, is a good witness. 1 *Dallas,* 110. 2 *Dallas,* 289, 240.

144 In an action brought by the indorsee of a bill of exchange against the first indorser, the plaintiff's immediate preceding indorser cannot be made a witness by striking his name off the *first* and *third* bills of the set, although it is suggested that the *second* bill was lost. 1 *Dallas,* 272.

145 Under what circumstances a witness once interested, may cease to be so. 1 *Dallas*, 272, 276.

146 A creditor is excluded from giving testimony, as such; but if he acknowledges an expectation, that he shall gain or lose by the fate of the cause he ought not to be admitted as a witness. 2 *Dallas*, 50.

147 Under what circumstances a residuary legatee will be admitted a witness. 2 *Dallas*, 95.

148 The plaintiff is a good witness to prove the death of the subscribing witness to a deed, in order to let in evidence of the hand writing. 2 *Dallas*, 116, 7, 8.

149 Whether a nominal plaintiff, or mere trustee, can be a witness in the cause. 2 *Dallas*, 172, in *n.*

150 The indorsor, the original payee, who had become a bankrupt, is not a witness to prove the want of consideration, in an action by the indorsee against the drawer. 2 *Dallas*, 194.

151 Modifications of the rule, that a witness shall not be admitted to contradict, or explain his own deed, or instrument. 2 *Dallas*, 196, 7.

152 A guardian who had given a receipt, was admitted as a witness, upon being released. 2 *Dallas*, 196.

153 The indorsor of a note, who is liable to the holder, is not a competent witness, on an indictment for forging the name of the drawer; *secus*, if he has paid the note. 2 *Dallas*, 241, 2.

154 A creditor is a competent witness to prove fraud in the petioner on an application to be discharged under the insolvent laws. 2 *Dallas*, 268.

155 Where the mortgagor is a competent witness to shew the use intended by the mortgage at the time of executing it. 3 *Dallas*, 508.

156 A certificated bankrupt is a witness to prove the parol evidence of a bill of exchange, in an action brought by him against the acceptor, before his bankruptcy. 4 *Dallas*, 137.

157 President of an insurance company is a competent witness, on a trial for destroying a vessel at sea, with design to injure the company. 4 *Dallas*, 115.

158 *Quere*, Whether the drawer is a competent witness for indorsor in an action against the latter. *Wilson* v. *Lenox*. 1 *Cranch*, 195.

159 The assignee of a pre-emption warrant is a competent witness if his testimony does not tend to support the title of the party producing him. *Wilson* v. *Speed*. 3 *Cranch*, 283.

160 A witness interested in certain admitted items of the plaintiff's account, is still a competent witness to prove other items. *Smith* v. *Carrington*. 4 *Cranch*, 62.

II. *Attorney, Counsel, Agents, &c.; of their being Witnesses.*

1 An attorney is not restrained by any rule of law from giving evidence of a conversation between him and his client touching the justice of his suit, after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to have been made by way of instruction for conducting his cause. *Cobden* v. *Kendrick*. 4 *Term Rep.* 431.

2 But if any matter be disclosed to an attorney in the cause, pending the cause, he is not permitted to give it in evidence either in that or in any other action. *Wilson* v. *Rastal*. 4 *Term Rep.* 753.

3 It is the privilege of the client and not of the attorney. *Ibid.*

4 But such privilege is confined to counsel, solicitors, and attornies, when acting in their respective characters. *Ibid.*

5 If several be charged with the same offence, and no evidence be given on the part of the prosecution against one of them, he is entitled to an acquittal before the others

are called upon for their defence, in order to enable them to avail themselves of his testimony as a witness. *Ship Bounty, Case of,* cited. 1 *East*, 313.

6 An attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client; the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the witness in character of his attorney. *Spenceley qui tam* v. *Schulenburgh.* 7 *East*, 357.

7 An agent of the insured, who applies to the broker to have the insurance effected, is, like all other agents, a competent witness, *ex necessitate.* *Mackay* v. *Rhinelander.* 1 *Johns. Cases*, 408.

8 An agent is a competent witness, *ex necessitate.* *Cortes* v. *Billings.* 1 *Johns. Cas.* 270.

9 An agent or broker, authorized to purchase goods on certain terms, is a competent witness, in a suit, between the vendor and vendee, though he has exceeded his authority. *Bailey and Rogers* v. *Ogden.* 3 *Johns. Rep.* 399.

10 A written order for insurance was laid before the insurers by the broker, who, at the same time, verbally communicated to them the facts said to be contained in the order; the broker was allowed to give evidence of his verbal communications without producing the order itself. *Livingston* v. *Delafield.* 1 *Johns. Rep.* 522.

11 In a suit brought on a mistake alleged to be made by arbitrators, in the calculation of the sum awarded, the evidence of the arbitrators is inadmissible to prove the mistake. *Newland* v. *Douglass.* 2 *Johnson's Rep.* 62.

12 There must be some satisfactory proof of a defendant's being actually an agent, before the court will allow him to be sworn, under the act of assembly, to identify the money in dispute. 1 *Dallas*, 224, in n.

13 A confidential agent cannot excuse himself on that account from being a witness against his constituent. 1 *Dallas*, 439.

14 *Quere*, Whether a confidential clerk or agent comes within the rule respecting counsel and attornies not permitted to disclose the secrets of their clients. 1 *Dallas*, 66, 439.

15 An agent to sell lands, is not a competent witness to prove the contents of his own written authority, which is lost. 2 *Dallas*, 246.

16 A broker is a good witness to prove his authority and instructions for making a stock contract. 2 *Dallas*, 300.

III. *Husband and Wife.*

1 Wife's owning receipt of money, no evidence against the husband. *Hall* v. *Hill and Wife, Administrator, at Guildhall.* 2 *Str.* 1094.

2 The wife of one defendant against whom material evidence has been given, cannot be a witness for the other on an indictment against two. *The King* v. *Frederick and Tracy.* 2 *Str.* 1095.

3 The chief justice allowed the wife's declaration, that she agreed to pay 4s. *per* week for nursing a child, was good evidence to charge the husband; this being a matter usually transacted by the women. *Anon.* 1 *Str.* 527.

4 Wife witness against husband on an indictment against him for an assault. *Rex* v. *Azire.* 1 *Str.* 633.

5 In an action on the case for inticing away the plaintiff's wife, the declaration of the wife's age not admissible in evidence. *Winsmore* v. *Greenbank.* *Willes*, 577.

6 Where a man may in an action to be brought by him give in evidence, the verdict to be given in a particular cause, and the proofs upon which that verdict was founded, his wife shall not be a witness in the

cause. *Tiley* v. *Cowling*. 1 *L. Raymond*, 744.

7 Wife admitted to prove husband's death before judgment in error. *Dale* v. *Johnson*. 1 *Str.* 568.

8 Wife a good witness to prove goods delivered on husband's credit. *Williams* v. *Johnson*. 1 *Str.* 504.

9 Husband and wife shall not be called in any case to give evidence, even *tending to criminate* each other. *Rex* v. *Cliviger*, *Inhab.* 2 *Term Rep.* 263.

10 Nor can they in any case be witnesses either for against each other. *Davis* v. *Dimwoody*. 4 *Term Rep.* 678.

11 In a case of settlement where a marriage in fact had been proved between two paupers, the first wife of the husband is not a competent witness to prove a former marriage with him, because such evidence shews him to have been guilty of bigamy. 2 *Term Rep.* 263.

12 Husband and wife may prove their own marriage on a question of settlement. 2 *Term Rep.* 263.

13 The wife of one indicted and on trial jointly with others is not a competent witness for any of the defendants. 1 *Mass.* 15.

14 If either husband or wife be a witness to a will containing a devise or legacy to either, such devise is void by the statute, and the devisee or legatee thereby becomes a competent witness. *Jackson ex dem. Conder* v. *Woods*. 1 *Johns. Cases*, 183. Also *Jackson ex dem. Beach et al.* v. *Burland*. 2 *Johns. Cas.* 314.

15 A *feme covert*, who had executed a deed with her husband, was held a competent witness to prove that the deed had been antedated. *Jackson ex demise Griswold* v. *Bard*. 4 *Johns. Rep.* 230.

16 Wife of the prosecutor in an indictment of *forcible entry* may be a witness to prove the *force*; but only the force. 1 *Dallas*, 68.

IV. *Parishioners, &c.*

1 On an appeal against a poor-rate because certain persons were omitted to be rated, a parishioner, who is liable to be rated, but not in fact rated, is a competent witness to prove the rateablity of the appellants. *Rex* v. *T. Prosser*. 4 *Term Rep.* 17.

2 A parishioner having rateable property in the parish, but omitted to be rated for the purpose of making him a witness upon a question of settlement between two parishes, is a competent witness for the parish in which he is so liable to be rated. *Rex* v. *Kirdford*, *Inhab.* 2 *East*, 559.

3 So such an one is a good witness to extend the boundaries of his parish on a question of boundary between two adjoining parishes. *Deacon* v. *Cook*, *Taunton*, Sp. Ass. 1789, cited. *Ibid*, 562.

4 *Aliter*, If he were actually rated at the time. *Ibid.*

5 So a person having rateable property in a parish, but not rated in fact, is a competent witness in a case respecting the settlement of a pauper in that parish. *Rex* v. *South Lynn*, *Inhab.* 5 *Term Rep.* 667; 6 *Term Rep.* 157.

6 And on an appeal between the parishes of *A.* and *B.*, the former may call an inhabitant of the latter who is not rated to the poor, and *compel* him to be examined as a witness. *Rex* v. *Little Lumley*, *Inhab.* 6 *Term Rep.* 157.

7 Persons appointed by statute to be governors and directors of the poor of a certain parish, and made liable upon appeal against a rate made by them to the payment of costs in case the sessions should award any to the appellant, cannot be witnesses on such appeal; though in truth only trustees, and entitled to be reimbursed such costs out of the pa-

rochial fund; for they are parties to the cause, and liable to the costs in the first instance. *Rex* v. *The Governor and Directors of the Poor of St. Mary Magdalen, Bermondsey, in the County of Surry.* 3 *East*, 7.

8 Yet a tenant who was rated to the poor-rate, being indemnified by his landlord, was holden a competent witness on behalf of the parish in which he was a payer, on a question of settlement. *Rex* v. *Woodland.* 3 *East*, 11, *n.*

9 By statute 27 G. 3, c. 29, parishioners are made competent witnesses in prosecutions where the penalty is given to the parish, unless it exceed 20*l*. *Rex* v. *Davis.* 6 *Term Rep.* 177.

10 A corporation being lord of a manor, and having approved part of a common and leased it, a freeman is not a competent witness to prove that a sufficiency of common was left for the commoners. *Burton* v. *Hinde.* 5 *Term Rep.* 174.

11 Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated though not in his own but in his son's name for the purpose of making such parishioner a witness, is nevertheless incompetent to prove the settlement in the other parish. *Rex* v. *The Inhabitants of Killerby.* 10 *East*, 292.

12 A rated inhabitant of a parish is to be considered as a party to an appeal between his parish and another touching the settlement of a pauper; although the nominal parties be the churchwardens and overseers of the poor of the respective parishes; and being as such parties directly interested in the event of that proceeding, he cannot be compelled to give evidence by the adverse parish even since the statute 46 G. 3, c. 37, not being within the words or meaning of that law. *Rex* v. *The Inhabitants of Woburn.* 10 *East*, 395.

13 That a person is liable to be rated for the support of the poor of a town, does not render him an incompetent witness in a cause in which the town are interested as to the maintenance of a pauper. *Falls and Smith* v. *Belknap.* 1 *Johns. Rep.* 486.

V. *Subscribing Witness.*

1 If the witness to a deed becomes infamous, he is to be considered as dead. *Jones* v. *Mason.* 2 *Str.* 833.

2 One subscribing to the attestation of a will had an interest under it, and held not to be a credible witness within the statute. *Holdfast, on the demise of Anstey*, v. *Dowsing.* 2 *Str.* 1253.

3 The minister and subscribing witnesses to the register are not the only competent witnesses to prove the identity of the persons married. *Birt* v. *Barlow.* 1 *Doug.* 171 to 175.

4 One of the bail obliged to give evidence where a subscribing witness to a note. *Hawkins* v. *Perkins.* 1 *Str.* 406.

5 *Qu.* If the attestation of a will of lands be valid, when the witnesses only see the last sheet of the will? *Bond* v. *Seawell.* 1 *Black.* 407, 422, 454. 3 *Burr.* 1773.

6 Giver of a note no witness on indictment for perjury, in denying an agreement not to put it in suit. *The King* v. *Nuez.* 2 *Str.* 1043.

7 Party whose name is to a deed, no witness to prove it a forgery. *The King* v. *Rhodes. Old Bailey.* 2 *Str.* 728.

8 The testator made his will in writing, subscribed by two witnesses, and devised all his lands to *W. R.*; afterwards he made a codicil, in which his will was recited; and this was also attested by two witnesses, one of which witnesses was a witness to the will, but the other was a new witness; the question

was, whether this new witness should make a third to the will, the statute requiring that there should be three, and adjudged that he should not. *Lea* v. *Libb.* 3 *Salk.* 395.

9 If defendant's attorney is a subscribing witness to an agreement, on which plaintiff brings his ejectment, he is compellable to give evidence of it. *Doe, ex dem. Jupp* v. *Andrews.* *Cowp.* 845.

Court will grant an attachment for refusal on service of a subpœna. *Ibid.*

10 Where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that and where the testator lay were open, so that he might see them subscribe their names if he would; and though there was no positive proof that he did see them subscribe, yet that was a sufficient subscribing within the meaning of the statute, because it was possible that the testator might see them subscribe. *Davy and Nicholas* v. *Smith.* 3 *Salk.* 395.

11 If the subscribing witness to a bond be interested therein as well at the time of the attestation as at the trial, he cannot be examined as a witness to prove the execution; nor is proof of his hand-writing sufficient for that purpose. *Swire* v. *Bell.* 5 *Term Rep.* 371.

12 But the hand-writing of the obligor having been proved, the court refused to set aside a verdict given for the plaintiff. 5 *Term Reports*, 371.

13 Where a subscribing witness is appointed executor to the obligee, proof of the hand-writing of the former may be given in an action on the bond. 5 *Term Rep.* 372.

14 A bond having been executed by *A.* and attested by one witness, was carried into an adjoining room and shewn to *B.*, who was desired to attest it also, which he accordingly did in the presence of *A.*; held, that *B.* was a good witness to prove the execution. *Parke* v. *Mears.* 2 *Bos. & Pull.* 217.

15 Where an instrument is produced at the trial by one of the parties in consequence of notice from the other; which when produced appeared to have been executed by the party producing it, and third persons, and to be attested by a subscribing witness; the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it. *Gordon* v. *Secretan.* 8 *East*, 548.

16 Under the provincial act of 9 W. 3, c. 7, for registering deeds and conveyances, in case of the absence or death of the grantor without acknowledgment of the deed, its execution must have been proved by two of the subscribing witnesses previous to the registry. *Pidge* v. *Tyler, et al.* 4 *Mass.* 541.

17 Where the subscribing witness to a bond is dead, proof of his hand-writing is sufficient, *prima facie.* *Mott* v. *Doughty.* 1 *Johns. Cas.* 230.

18 The subscribing witnesses to a promissory note must be produced, or some account given of them at the trial. 1 *Dallas*, 209.

19 If one of two witnesses to a deed becomes interested, the other must be called, or proof given that he cannot be found; otherwise the deed may not be read in evidence. 1 *Dallas*, 128.

20 A subscribing witness to a deed, attests nothing but the sealing, and delivery; he does not attest the date; and therefore, he is competent to prove that the deed was not executed at the time it bears date. 2 *Dallas*, 214.

21 Due dilligence must be used to obtain the testimony of the subscribing witness. If inquiry be made at the place, where he was last heard of,

and he cannot be found, evidence of his hand-writing may be admitted. *Cope* v. *Woodrow.* 5 *Cranch*, 13.

VI. *Examination of.*

1 Rule made upon a witness to a submission to arbitration, to make affidavit of the execution. *Clark* v. *Elwick.* 1 *Str.* 1.

2 Where a man submits to be examined as to matters which will be penal upon him, equity will not interpose. *The East India Company*, v. *Atkins, in chancery.* 1 *Str.* 168.

3 A witness is not bound to answer whether he is a papist. *The King* v. *Ld. George Gordon.* 2 *Doug.* 593.

4 Officer examined as to condition, but not in substance of records. *Leighton* v. *Leighton.* 1 *Str.* 210.

5 Deposition of a witness examined before a judge because going beyond sea, cannot be read if he be in *England.* *Anon.* 2 *Salk.* 691.

6 All persons who believe a future state are competent witnesses in this country. *Omichund* v. *Barker, chancery.* *Willes*, 549.

7 A person convicted of petit larceny not then a competent witness, nor a credible witness to attest a will, under the statute of frauds. *Pendock* v. *Mackinder.* *Willes*, 665.

But now by statute 31, G. 3, c. 35, he is a competent witness. *Ibid. n.* 668.

8 A Mahometan sworn upon the Koran. *Fachina* v. *Sabine, at the council.* 2 *Str.* 1104.

9 The party who excepts to a witness may call him afterwards. *Atwood* v. *Dent.* 1 *Str.* 480.

10 All the three witnesses to a will must be examined, if living. *Townsend* v *Ives, in chancery.* 1 *Wils.* 216.

11 Witnesses ought not to be admitted to deny their own attestation. *Goodtitle, on the demise of Alexander and others*, v. *Clayton and others.* 4 *Burr.* 2224.

12 Upon the principles of the common law, no particular form of oath is essential to be taken by a witness. *Atcheson* v. *Everitt.* 1 *Coup.* 382.

Therefore, though the christian oath was settled in very early times, yet Jews, before their expulsion on the 18th of *Edward* the first, were permitted at common law, to be sworn upon the Old Testament, and to give evidence in all cases, criminal or civil. *Ibid.*

The testimony of a sectary who refused to kiss the book, but whose form of swearing was by opening the book, and lifting up his right hand, has been admitted in a civil action. *Ibid.*

Qu. If persons of such sect might not be admitted as witnesses, in a prosecution for high treason. *Ibid.*

13 The farther recompence given by 5 Eliz. c. 9, s. 12, against a witness for non-attendance, must be assessed by the court out of which the process issues, not by the jury, nor the judge at *Nisi Prius.* *Pearson* v. *Iles.* 2 *Doug.* 556 to 561.

Debt will lie on such assessment. *Ibid.*

A witness who wilfully absents himself may be attached for the contempt. *Ibid.*

Or an action on the case will lie against him. *Ibid.*

14 Formerly the rule was to object to the competency of a witness before he was sworn in chief; but still the objection must be made at the trial. 1 *Term Rep.* 717.

15 A witness may be asked whether he has not been in the pillory for perjury. *R.* v. *Edwards.* 4 *Term Rep.* 440.

16 A witness may refresh his memory by *any* book or paper, if he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any farther than as finding it entered in a book or paper, the e-

riginal book or paper must be produced. *Doe d. Church* v. *Perkins.* 3 *Term Rep.* 749.

17 *A.*, captain of an *India* country trader, contracts in *India* with *B.* for a crew, according to the custom of the country; *A.* arrives in *England* with the crew, and then makes a voyage with them to the *West-Indies* and back again. In an action by part of the crew for wages due on the *West-India* voyage; it was held, on a motion for a mandamus to examine witnesses in *India*, that the cause of action did not arise *in India*, within 13 G. 3, c. 63, s. 44. *Francisco* v. *Gillmore.* 1 *Bos. & Pull.* 177.

18 A witness cannot be cross-examined as to any collateral independent fact irrelevant to the matter in issue, for the purpose of contradicting him if his answer be one way by another witness, in order to discredit the whole of his testimony. *Spenceley qui tam* v. *De Willott.* 7 *East*, 108.

19 The party interested in a witness's testimony, who was objected to, on account of his having been convicted of felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself. *The King* v. *The Inhabitants of Castell Careinnion.* 8 *East*, 77.

20 Where a witness is to be examined under a *dedimus protestatem*, who does not understand the language of the commissioners, and whose language the commissioners do not understand, they are to swear an interpreter. *Amory* v. *Fellows.* 5 *Mass.* 219.

21 After an attempt to prove the interest of a person offered as a witness, he cannot be examined on the *voire dire.* 1 *Mass.* 219.

22 Where a witness is produced by a party to an action, against whom he is interested, the other party may cross-examine him, as to all matters pertinent to the issue on trial, although the witness could not have been sworn at his instance. *Webster* v. *Lee.* 5 *Mass.* 334.

23 Where a witness is ignorant of the English language an interpreter is sworn to explain the oath to the witness, and to interpret his testimony. *The Case of Charles Norbery.* 4 *Mass.* 81.

24 When a witness declares, on his *voire dire*, that he is interested in favor of the party calling him, and that interest is so circumstanced that he cannot be released, the witness ought to be sworn, though, in strictness, he is not interested; but if his supposed interest is against the party calling him, he ought to be admitted. *The Trustees of Lansingburgh* v. *Willard.* 8 *Johns. Rep.* 420.

25 There are two ways of proving a witness to be interested; 1st, by examining him on the *voire dire*; and 2d, by evidence; but both cannot be pursued at the same time. 1 *Dallas*, 275.

A cross-examination under a rule for taking depositions will not amount to an examination of the witness on the *voire dire*; nor preclude any exception to his competency at the trial. *Ibid.*

VII. *Other Points relative to.*

1 No action lies against a witness, who swears falsely in a cause, whereby judgment is given against a party, at the suit of the plaintiff, for the damages he has sustained by reason of such judgment. *Smith* v. *Lewis.* 3 *Johns. Rep.* 157.

2 The plaintiff's brother was offered to prove his age, from the hearsay of his father and mother; but the court would not allow him to be sworn. 1 *Dallas*, 9.

3 Where a party calls a witness, who is contradicted by another witness of his own, he cannot call the first to disprove what the second has said. 1 *Dallas*, 63.

4 In what cases it is, or is not ne-

cessary to take out a subpœna for a witness. 1 *Dallas*, 276.

5 The addition of witnesses to be specified in the lists furnished on trials for high treason, and time allowed to the prisoner to canvass their characters. 2 *Dallas*, 342, 344.

6 A jew refusing to be sworn as a witness on his sabbath (*Saturday*) was fined. 2 *Dallas*, 213.

WORDS.

1 The words, "legal representatives," applied to lands, must be the heir, and not the administrator. 2 *Dallas*, 205.

2 The word, *purchase*, implies a purchase in fee. 1 *Dallas*, 20.

3 The word, *persuading*, used in the act with respect to treason, means to *succeed*. 1 *Dallas*, 39.

4 Though in actions of slander words were formerly construed in the mildest sense they would admit, they are now to be taken according to their ordinary import and meaning. 1 *Dallas*, 114.

WRECK.

Wreck may be claimed by prescription. *Wiggon* v. *Branthwaite*. 1 *L. Raym.* 478.

WRIT.

1 *Ac etiam* to answer the plaintiff in a plea of trover, &c. is well enough. *Callaghan, an attorney, executor, &c.* v. *Harris and wife*. 2 *Wils.* 392.

2 The date of the writ is no part of it, if the test be right it is well enough. *Coleby* v. *Norris*. 1 *Wils.* 91.

3 Quashing writs is not *debito justitiæ*. *Andrews* v. *Dingley*. 2 *Str.* 877.

4 *Fi. fa.* and *ca. sa.* not allowed by the court, at the same time. *Anon.* *Lofft*, 218.

5 A *capias* returnable on a common return day, instead of a day certain is only voidable, not void. *Karver* v. *James*. *Willes*, 258.

6 A *latitat* is a writ peculiar to the king's bench. Where it ought to appear out of what court a particular writ issued, the courts will, in case of a *latitat*, presume it to have issued out of K. B. In an action for an escape, it ought to appear out of what court the process upon which the prisoner was in custody issued. *Odes* v. *Clerk*. 1 *L. Raym.* 397.

WRIT OF DECEIT.

Proceedings on a writ of deceit to set aside a fine and recovery of lands in the ancient demesne. *Rex* v. *Serjeant Mead and another*. 2 *Wils.* 17.

WRIT OF RIGHT.

1 Almost any collateral bar may be given in evidence on the general issue in a writ of right. *Tyson* v. *Clarke*. 3 *Wils.* 419, 541. *Lofft*, 496.

2 No new trial in a writ of right, except the verdict be flagrantly wrong. *Ibid.*

3 The statute for judgment, as in case of nonsuit, does not extend to a writ of right so as to give costs thereon. *Newman* v. *Goodman*. 2 *Black.* 1093.

And after such judgment obtained, however regular, the defendant has made his election, and shall not have costs for not proceeding to trial, supposing him otherwise entitled to it. *Ibid.*

4 Supposing that in a writ of right the mere right is triable at *nisi prius*, (*Quod Qu.*) the summons to elect a grand assize should be in the alternative, to return the four knights into bank, or at the assizes, if the judges come thither before the day

of bank. *Luke* v. *Harris*. 2 *Black*. 1261, 1293.

If a writ of summons is sued out *ad eligendum* before the justices of assize at a day certain, the court will not, upon motion to quash the writ, determine whether the assize may be so tried, or only at the bar of the court. *Ibid.*

5 On the issue on a *writ of wright*, the only question is, which of the parties has the better right; and the evidence to establish the right is subject to the same rules as in other cases. *Nase* v. *Peck*. 3 *Johns. Cases*, 128.

6 Where the ancester of the demandant was in possession of the premises in question, 51 years ago, and died in possession 41 years ago, leaving the demandant his only son, this was held sufficient evidence to rebut the presumption of right in the tenant, arising from a possession of 38 years only, commenced by wrong. And a patent dated in 1697, produced in evidence by the tenant, not for the purpose of dededucing a title to himself, but to shew a title out of the demandant, was held not sufficient to repel the conclusion in favor of the demandant, as the jury might presume a title in the ancestor of the demandant, derived from the patent. *Ib.*

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ADDENDA

OF

CASES OMITTED.

ATTORNEY.

IF an attorney suffers a deed he has prepared to be executed before he is paid for it, he cannot afterwards detain it for his fees. *Anon.* 1 *L. Raym.* 738.

BANKRUPT.

1 A ship-carpenter may, as such, be a bankrupt. The assignee of a bankrupt may bring trover against a man who bought goods of a vendee of the bankrupt before the assignment. *Kirney* v. *Smith.* 1 *L. Raym.* 741.

2 In an action by the assignees of a bankrupt the plaintiff need not prove the petitioning creditor's debt, or that the bankrupt was indebted at all in the sum or sums necessary to warrant a commission. *Smith, Assignee,* v. *Blackham.* 1 *L. Raym.* 724.

3 The seizure of goods in execution cannot be effected by any subsequent act of bankruptcy by the party to whom they belonged.

A seizure after an act of bankruptcy, if a commission is taken out thereon, will.

The clandestine removal of goods to preserve them from an execution, is not an act of bankruptcy. *Cole* v. *Davies.* 1 *L. Raym.* 724.

BILLS OF EXCHANGE.

1 In an action upon a bill of exchange brought by an indorser who has been sued upon it against the acceptor, the plaintiff must prove that he paid the party who sued him. *Mendez* v. *Carreroon.* 1 *L. Raym.* 742.

2 A bill of exchange cannot be protested before it is payable, for nonpayment; but it may because the drawee has absconded. *Anon.* 1 *L. Raym.* 743.

COMMON.

1 A claim of common for cattle *levant* and *couchant* on a messuage, is good; for cattle *levant* and *couchant* on a farm, not, unless such farm be an ancient one. *Hockley* v. *Lamb.* 1 *L. Raym.* 726.

2 Common appurtenant for a certain number of cattle may be used by cattle not *levant* and *couchant*. *Richards* v. *Squibb.* 1 *L. Raym.* 6.

CONSTITUTIONS.

OF MASSACHUSETTS, CITED AND COMMENTED ON.

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1 As to teachers of religion, part 1, art. 3. 1 *Mass.* 35.

2 As to trial by jury, part 1, art. 15. 1 *Mass.* 418.

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As to the credit to be given to the records, &c. of the several states, art. 4, sec. 1. 1 *Mass.* 401.

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CONVICTION.

Instance of a conviction under the mutiny act, for not quartering officers, held to be void for not stating the evidence. *Rex* v. *Read.* 2 *Doug.* 486.

CUSTOM.

Custom of merchants, part of the general law of nations. *Vallejo and Echalai* v. *Wheeler.* *Loffi*, 631.

PARTNERS.

A demand of copartners in trade belongs to the survivor to collect, notwithstanding an adjustment of all the concerns of the copartnership between him and the administrator of the deceased copartner, in which it was agreed that the proceeds of such demand should be equally divided between them. *Peters, adm.* v. *Davis.* 7 *Mass.* 257.

PAUPER.

On indictments the defendants may be admitted *in forma pauperis.* *The King* v. *Wright & Ux.* 2 *Str.* 1041.

POOR RATE.

Parish rate made in a division where neither churchwardens or overseers residing, though the parish had such officers, bad. *The King* v. *Inhabitants of Saint Leonard, Shoreditch.* 1 *Str.* 630.

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