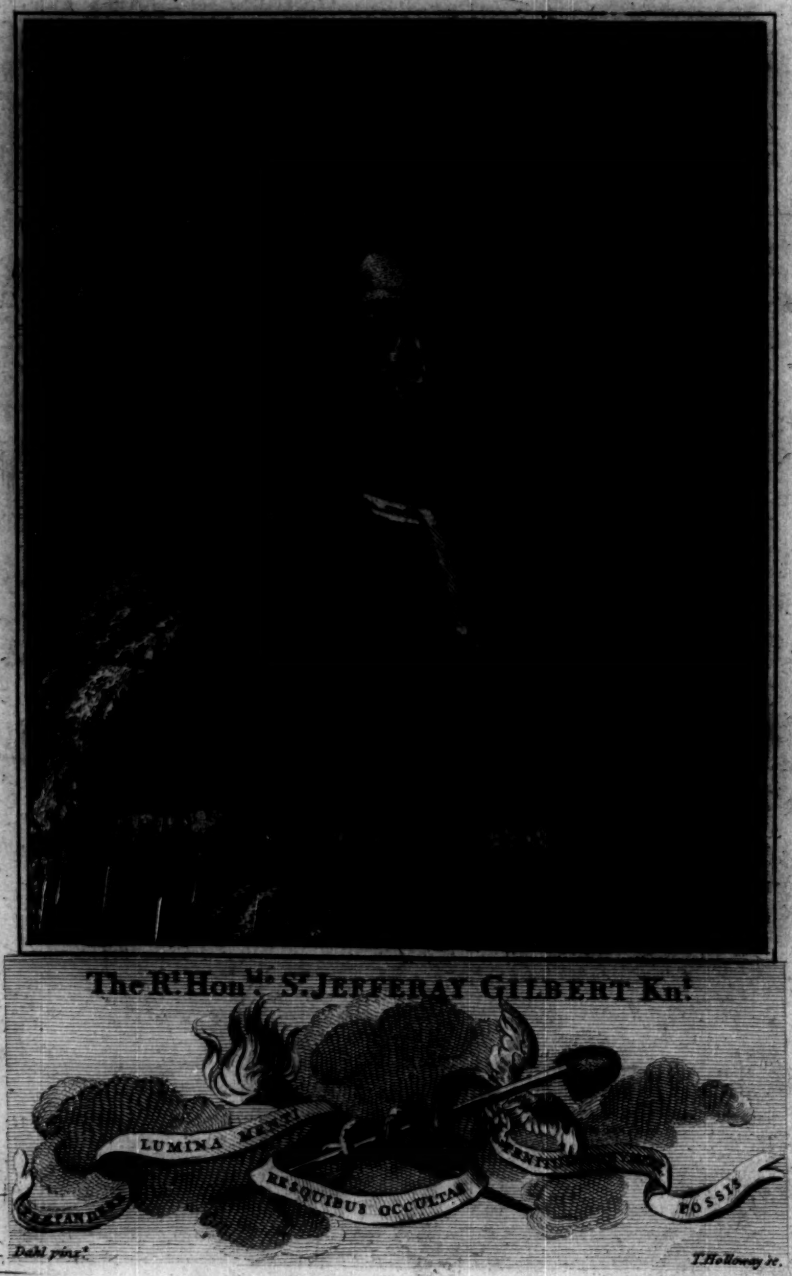

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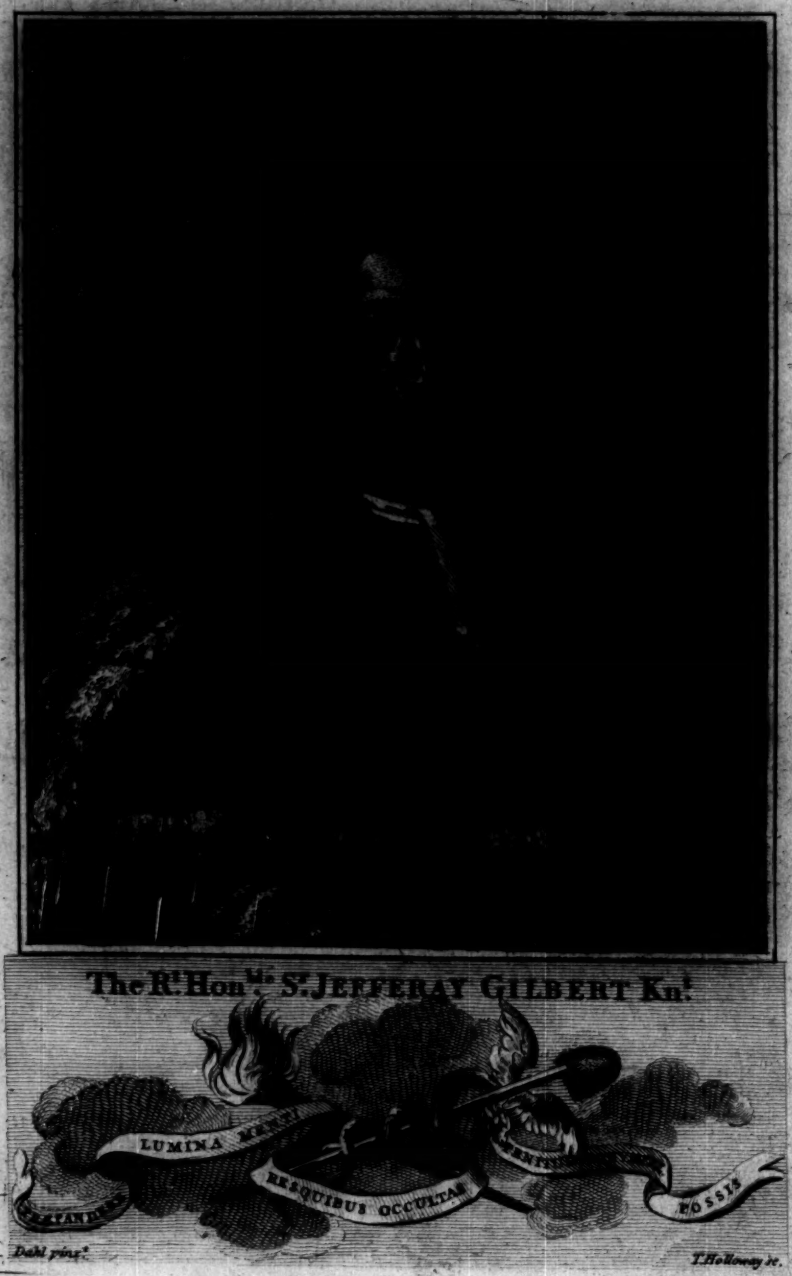

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THE LAW OF EVIDENCE,

BY

LORD CHIEF BARON GILBERT.

CONSIDERABLY ENLARGED

By CAPEL LOFFT,

BARRISTER AT LAW.

TO WHICH IS PREFIXED,

Some ACCOUNT of the AUTHOR; his Abſtract of LOCKE's Eſſay; and his ARGUMENT in a Caſe of HOMICIDE in IRELAND.

VOL. I.

LONDON:

PRINTED BY A. STRAHAN AND W. WOODFALL,

LAW-PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY,

FOR J. F. & C. RIVINGTON, T. LONGMAN, C. DILLY,

W. CLARKE & SON, & W. OTRIDGE.

1791.



ADVERTISEMENT.

THE work, of which a part is now offered to the Public, has long poſſeſſed, in the original ſtate of it, the ſanction of a deſervedly great name. It is much to be regretted that it's learned Author did not live to complete his own plan: and even if he had, the lapſe of ſo many years, and the variety of important queſtions relative to EVIDENCE which have been diſcuſſed ſince his death would have rendered ſome conſiderable additions very material. To give this extenſive title of *Juriſprudence* as fully and ſyſtematically as poſſible, has been the endeavour of the preſent editor. Profeſſional men will diſcern clearly, that no little time and reſearch muſt have been neceſſary for executing ſuch a deſign in any degree ſuitably. Much time has accordingly been employed, and interruptions have occurred which have ſuſpended the progreſs of the work. A more particular explanation of theſe will not be deſired; if the Profeſſion ſhall ſee reaſon to believe, that not much of voluntary inattention can be imputable. The editor would certainly have wiſhed to have publiſhed the whole, (agreeably to the expectations which he entertained), at a period earlier from the commencement of the undertaking than has already paſſed; but not having found it poſſible, he

has been induced by the requeſt of the Proprietors, of whoſe candour and patience during ſo long a delay he is very ſenſible, to publiſh two Volumes: which comprize the principal diviſions of the ſubject. The remainder he hopes to finiſh ſo that it may be ready for publication by the end of the winter. To the completion of the work, a full *Index* of the *Principal Matters* and a Synoptical Table of *Caſes* is reſerved.

London, 16*th July*, 1791.

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PREFACE

PREFACE:

CONTAINING

AN EXPLANATION OF THE PLAN

OF THE

PRESENT WORK;

WITH

SOME ACCOUNT

OF THE

LORD CHIEF BARON *GILBERT*.

IT is the Fate of the Law, that although, when it is ſtudied in the juſt extent, it is capable of exciting the beſt faculties of the human mind, whatever their native force or cultivation, to a moſt vigorous, uſeful, and honourable exertion, ſtill the Celebrity acquired by it is confined within the ſame Limits which bound the municipal Inſtitutions eſtabliſhed in the Country of its reſpective Profeſſors. And even in theſe, while the Labours of the Lawyer are eſtimated in proportion to their national Utility, the Judgement of their Value reſting in the Profeſſion itſelf,

the public Admiration and Curioſity hardly ſurvive a few Years: and the Memory of any circumſtances not directly included in the profeſſional Hiſtory of the perſon ſoon fades and vaniſhes; however eminent the ſtation, and however great and conſpicuous the Abilities: while in other Profeſſions and Employments, equal, or even inferior Talents may render the Poſſeſſor of them illuſtrious in every civilized Nation; and give an Intereſt and Permanency to the minuteſt Particulars reſpecting his Perſon, his Family, and his private Life. How much oftener has *Martial* been remembered than *Ulpian* or *Papinian!* With what frequency will the Name of *Gay* occur to our Poſterity, if compared with that of *Coke!* How does the exactneſs of our Intelligence with regard to *Swift* ſtrike us when contraſted with our ſcanty Information reſpecting Sir *Matthew Hale!* In the military Profeſſion, whether by Sea or Land, the Trophy beams with diffuſive ſplendor. In the elegant and captivating Arts of Painting, Sculpture, and Muſic, the public Ear catches with eagerneſs every ſlight Memorial of a favoured Artiſt. In the grave and retired Studies of Theology and Medicine the biographical information of perſons eminent in either will be found leſs defective than of perſons proportionably remarkable for their application and knowledge in the Law.

Of this Difference, in prejudice of the Law, when compared with any other liberal purſuit, a Difference mortifying indeed, if Fame were the beſt Reward of human Actions, THE AUTHOR OF THE LAW OF EVI-

EVIDENCE is a complete Example. At the diſtance of only ſixty-two years from his Death, though he filled a diſtinguiſhed ſtation, both in *Ireland* and *England*, with Abilities adequate to the greateſt, my private Reſearches, public Enquiries, and the obliging aid of others, leave me ſtill uninformed of the immediate Progenitors of the Lord Chief Baron *Gilbert*: though, from the Arms upon his Tomb-ſtone at *Bath*, a Conſanguinity may be conjectured between our Author and *John Gilbert*, of *Woodford*, in *Eſſex*; to whom, in 1609, part of the ſame Arms was confirmed.

Neither the *General Biography* nor the *Britiſh* contain his Name: however evidently moſt worthy to have graced both. And by the inadvertence of his Contemporaries we are left ignorant of the Place of his Birth, his Education, and of every thing, a ſingle Eſſay excepted, which does not fall within the Line of his Profeſſion. It does not appear that he was a *Graduate* in either *Univerſity*: yet his Education we may juſtly infer to have been liberal. His Improvement in general Knowledge in the great branches of *liberal* and *uſeful* Learning is ſtrongly indicated in ſuch of his *Remains* as have been already publiſhed.

The Date of his Birth muſt be referred to 1674, as appears by a compariſon of his Age and the Year of his Death in the *Epitaph* ſubjoined to this Account, and is confirmed by Lord RAYMOND. The Year of the Birth is always expedient to be inſerted in monumental Inſcriptions, as well as the Age and date of the

BIRTH of GILBERT, 1674.

2 Raym. 1420.

Death; ſince thus, if a numeral Error (the moſt frequent of all miſtakes, and of which there is a ſignal Example in the Epitaph of that admirable Poet, *Spenſer*) happens to be committed in any one, the other two will aſcertain how it is to be rectified: and for want of this, had not his eminent Contemporary eſtabliſhed the Age of GILBERT, in concurrence with the Inſcription at *Bath* and other cotemporary Evidence, the Proof derived from the *Latin Epitaph* might have been regarded as doubtful in ſome degree; though the Care manifeſted by his Executors would have much reduced the probability of ſuch error. He was conſequently about fourteen at the time of the glorious Revolution; of an Age,

Ut ſapere et quæ ſit poſſet cognoſcere Virtus—

And it ſeems to have made a ſuitable Impreſſion: what his ſentiments were of the Reign which rendered that Event neceſſary will be ſeen, in ſome meaſure, in the Work now publiſhed; what his Principles of legal Certainty and conſtitutional Freedom, may be collected from the Tenor of his Works.

Epitaph.

In 1715, if his *Epitaph* be correct, but in the year preceding, if a late curious and uſeful Publication * be exact in this particular, † he became one of the Judges of the KING'S BENCH in IRELAND; ‖ and before the end of

* Beatſon's Pol. Index, II. p 218. Id.

† *For want of* Dates *to the Caſes in the* COURT *of* EXCHEQUER *of* IRELAND, *preſerved in the* Folio Edition *of* 1742, *I am not enabled to aſcertain this point from thence as I expected to have done.*

‖ *It ſhould ſeem that during this Time a Caſe was ſolemnly argued before* that *Court on a* ſpecial Verdict *on a Queſtion of* Homicide: *we have unfortunately no more than the* introductory *Part of the Argument of* GILBERT: *the*

DWYER'S *Caſe.*

of that year, in which both agree, he was promoted to the Rank of CHIEF BARON of the EXCHEQUER, which he held till the early part of the year 1722, when he was called to ENGLAND, and ſucceeded by *Barnard Hale*, Eſq. He was conſequently nearly thirty-nine or forty when he was made a JUDGE, and continued ſuch in different Courts about ſeven years in *Ireland*, and nearly five in *England*. In which Station, during the Engagements of public Duty, and the trying Conflict he ſuſtained part of the time, moſt of his Works, numerous and of deep Inveſtigation as they are, ſeem to have been compoſed. B. P. I. 220.

We are now brought to a Period when, during the Ferment of the Conteſt, one Party would have thought no Apology ſufficient; the other, perhaps, no Encomium adequate. We ſhall offer neither; but ſtate the Facts.

When our *Author* was about the Age of forty-four, and had ſpent about four years in *Ireland*, the ſituation of that Country and of the Government and Policy of *England* engaged him in a very arduous Conteſt. This was in the *fifth* of *G.* I. and the occaſion, a Conteſt of *Privilege* between the ultimate *judicial* Tribunal of each. From the time of Mr. MOLYNEUX's juſtly celebrated Tract, the juſt Terms of Connection 5 G. I.

the Date of the Fact *on which the Verdict was founded is* Jan. 1724, *in the Folio Reports. But this ſeems manifeſtly a Miſtake for* 1714. *The* Argument *being curious, it will be ſubjoined by way of* Appendix.

between the two Countries could not well fail of being inveſtigated with increaſing Attention. It could hardly then be expected that the Claim of the BRITISH HOUSE of LORDS to decide in the laſt Reſort on Queſtions of real property in IRELAND, excluſively of the IRISH HOUSE of LORDS, on *Appeal* from the ſubordinate Juriſdictions in IRELAND, could prevail without a ſtruggle. This accordingly happened, and a Deduction of the ſeveral Facts in the Order of Time may perhaps give the cleareſt Idea of the Caſe.

H. S. T. VI. 187—95. Proceedings of the Houſe of Lords in Ireland againſt *Jeffray Gilbert*, Eſq. Lord Chief Baron, &c. N. *a*. p. 191.

In the year 1703, *Feb.* 11, the *Iriſh Houſe of Lords* had reſolved, *Nemine contradicente*, in the following Terms on the Petition of *Edward*, Earl of *Meath*, and *Cecilia*, Counteſs of *Meath*, his Wife:

That by the ancient known Laws and Statutes of this Kingdom her Majeſty hath an undoubted Juriſdiction and Prerogative of judging in this her HIGH COURT OF PARLIAMENT *in all Appeals and Cauſes within her Majeſty's* REALM *of* IRELAND:

That the Determinations and Judgements of this High Court of Parliament *are final and concluſive, and cannot be reverſed or ſet aſide by* any other Court *whatſoever:*

That if any Subject or Reſiant within this Kingdom ſhall hereafter preſume to remove any Cauſe determined in this High Court of Parliament *to any other Court, ſuch Perſon or Perſons ſhall be deemed* Betrayers *of her Majeſty's Prerogative and Juriſdiction, and the undoubted ancient Right and Privileges of this* Honourable Houſe, *and*

and of the Rights and Liberties of the Subjects of this Kingdom:

That if any Subject or Reſiant within this Kingdom ſhall preſume to put in execution any Order from any other Court *contrary to the final Judgement and Determination of this High Court of Parliament, ſuch Perſon or Perſons ſhall be deemed* Betrayers *of her Majeſty's Prerogative and Juriſdiction, and the undoubted ancient Rights and Liberties of this Houſe, and of the Rights and Liberties of the Subjects of this Kingdom.*

En Sterne, Cler' Parliamentor'.

About twelve years after theſe Reſolutions GILBERT became one of the Barons of the Exchequer in *Ireland*, and before the Cloſe of the year Chief Baron of that Court.

In conſequence of an *Appeal* received from the *Chancery Side* of the *Iriſh Court of Exchequer*, in the Caſe of *Anneſley* and *Sherlock*, early in the year 1717, the *Britiſh Houſe of Lords* interpoſed their Order in theſe Words:

6 Feb. 1717. Order of the Houſe of Lords of G. Britain.

Die Jovis, 6to Februarii, 1717.—*Upon Report from the Committee of the whole Houſe, to whom it was referred to conſider by what Methods the Order of this Houſe, for the reſtoring Poſſeſſion to* Maurice Anneſley, *Eſq. of the Eſtate in* Ireland, *whereof he was diſpoſſeſſed pending his Appeal* in this Houſe *may be moſt properly enforced and executed*; it is ordered by the Lords Spiri-

tual and Temporal in Parliament aſſembled, *that the* Barons of the Court of Exchequer in *Ireland do cauſe the ſaid* Maurice Anneſley, *Eſq. to be forthwith* reſtored to the Poſſeſſion of the Lands of which he was diſpoſſeſſed pending his Appeal, *which was received by this Houſe the 8th Day of* June *laſt.*

Die Jovis 6to Februarii, 1717.—Ordered by the Lords Spiritual and Temporal in Parliament aſſembled, *That the* Lord Chancellor *do tranſmit the Order of this Houſe* to the Barons of the Exchequer in *Ireland, which requires them to cauſe* Poſſeſſion to be forthwith delivered to *Maurice Anneſley*, Eſq. *of the Lands of which* he was diſpoſſeſſed pending his Appeal in this Houſe; *commanding* the Barons of the Exchequer *at the ſame time to return to this Houſe, as ſoon as they can, an Account of what ſhall be done therein.*

William Cowper, Cler' Parliamentor'.

By an official Letter from the *Lord Chancellor* COWPER the Order of the *Houſe of Lords of Great Britain* was accordingly tranſmitted to the *Barons* of the *Exchequer* in *Ireland.*

Proceedings on the laſt mentioned Order in the Court of Exchequer in Ireland, 19 Feb. 1717.

And on the 19th of *February*, 1717, the CHIEF BARON of the Court of EXCHEQUER in IRELAND produced in Court the ſaid Letter of the LORD CHANCELLOR of GREAT BRITAIN, with the Reſolution and Order before ſtated of the *Britiſh Houſe of Lords*, and thereupon the *Lord Chief Baron* and the *other Barons* ordered an *Injunction* for the reſtoring the ſaid *Maurice*

Maurice Anneſley to Poſſeſſion of the Lands of which he was diſpoſſeſſed pending his ſaid *Appeal* in the *Houſe of Lords of Great Britain:* the Order iſſued in the Name of the *Chancellor, Treaſurer, and Barons of the Exchequer*, commanding the Sheriff to reſtore Poſſeſſion accordingly.

And *Mark Anneſley*, his Attorney, Agent, Solicitor, or Counſel, was ordered by the Court to attend the Chief Remembrancer or his Deputy with the Names of the Lands of which he had been ſo diſpoſſeſſed, and the County or Counties in which they lay. P. 190.

On the 15th of *March* the *Injunction* was ſerved: the regularity of which, and to the Fact of there remaining any Right of Poſſeſſion in *Anneſley* of the Lands on which it was to operate, independent of the great Queſtion of *Privilege*, ſome Objections are ſtated by the *Committee* of the *Iriſh Houſe of Lords:* but *Alexander Burrowes*, the then *High Sheriff* of the County of *Kildare*, in which the Lands lay, refuſed to execute it. Ibid. *Report of the Lords Committees for Courts of Juſtice, in* Ireland, 15 Mar. 1717.

On the 13th of *October*, 1717, an *Order* was made by the Houſe of Lords of *Ireland* in *hæc verba:* P. 191. N. a. Order of the Houſe of Lords of Ireland thereon, 13 Oct. 1717.

Die Jovis tertio Die Octobris, 1717.—*Whereas by the* Report made from the Lords Committees *appointed to conſider the propereſt Method for the relieving of* Heſter Sherlock, *Widow*, &c. *purſuant to what was ordered and adjudged* by this Houſe on the 19th *Day of* June, 1716, *in a Cauſe wherein the ſaid* Heſter Sherlock, *Widow*,

Widow, was Appellant, and Maurice *and* John Anneſley, *Eſqrs. were Reſpondents, as alſo upon the Reſolutions agreed to this Day by this* Houſe, *it appears that the Sum of One Thouſand Five Hundred and Seven Pounds Fourteen Shillings and Eight Pence Farthing was due to* Heſter Sherlock, *the Appellant, upon* the 19th Day of February, 1716, *on account of the Principal and Intereſt of the Portion of* Edward Sherlock, *decreed unto the ſaid Appellant, as Adminiſtratrix to the ſaid* Edward, *by this Houſe, on the 19th Day of* June, 1716; *and that the Lands of* Little Rath, Boddingſtown, Darr, *and* Mullenafooky *in the* Barony *of* Naas, *and County of* Kildare, *are chargeable with and liable to the Payment of the ſaid Sum, it is thereupon* ordered by the Lords Spiritual and Temporal in Parliament aſſembled, *that the* High Sheriff of the County of Kildare *do forthwith* PUT *the ſaid* Heſter Sherlock INTO THE POSSESSION *of the ſaid Lands of* Little Rath, Boddingſtown, Darr, *and* Mullenafooky, *ſubject to the ſaid Sum of One Thouſand Five Hundred and Seven Pounds Fourteen Shillings and Eight Pence Farthing: to be held by her the ſaid* Heſter *until ſuch Time as ſhe ſhall receive the ſaid Sum chargeable upon the ſaid Lands as aforeſaid: and this ſhall be a ſufficient Warrant in that behalf.*

To *Charles Nuttal*, Eſq. *High Sheriff* of the County of *Kildare.*

Orders of the Houſe of Lords of Great Britain, 23 Jan. 1718, reinforcing their former Order.

On the 23d of *January*, 1718, it was ordered by the *Peers of Great Britain in Parliament aſſembled* in hæc verba:

Anneſley

Anneſley v. Sherlock, Die Veneris, 23 Januarii, 1718.—*Upon* REPORT *from the Lords Committees appointed to inquire into the Reaſon of the Delay in not obeying the Orders of this Houſe relating to the Appeal of* Maurice Anneſley, *Eſq. and how the ſame may more properly be inforced*; it is ordered by the Lords Spiritual and Temporal in Parliament aſſembled, that the *Barons of the Court of Exchequer in* Ireland *be and are hereby directed to proceed by the moſt ſpeedy and effectual Methods to* cauſe Poſſeſſion of the Eſtate *of the ſaid* Maurice Anneſley, *as required by the Order of this Houſe* of the 6th of February laſt, *to be* reſtored *to him.*

William Cowper, Cler' Parliamentor'.

Anneſley v. Sherlock, Die Veneris, 23 Januarii, 1718.—ORDERED, by the Lords Spiritual and Temporal in Parliament aſſembled, *that the* Barons of the Court of Exchequer in *Ireland do cauſe the Reſpondent* Heſter Sherlock *to account before them upon Oath for the Rents and Profits of the Eſtate in Queſtion, which ſhe has made or received ſince her gaining Poſſeſſion thereof* by the Orders of the Houſe of Lords in *Ireland, and to anſwer and pay the ſame to the Appellant* Maurice Anneſley, *Eſq. without Prejudice to the Right, in caſe of an Appeal to be brought by either Party from the Decree of the* Court of Exchequer in IRELAND.

William Cowper, Cler' Parliamentor'.

Anneſley

Anneſley v. Sherlock, Die Veneris, 23 Januarii, 1718.—ORDERED, by the Lords Spiritual and Temporal in Parliament aſſembled, *that the* LORD HIGH CHANCELLOR *of* GREAT BRITAIN *do tranſmit the two Orders made this Day on the behalf of* Maurice Anneſley, *Eſq. to the* BARONS *of the* COURT *of* EXCHEQUER *in* IRELAND, *commanding them at the ſame time to return, as ſoon as they can, an Account of what ſhall be done therein.*

William Cowper, Cler' Parliamentor'.

Letter of the Lord Chancellor of G. B. ſignifying the ſame to the Barons of the Exchequer in Ireland. 27 Jan. 1718.

By an official Letter, dated 27 Jan. *incloſing Copies of the ſaid Orders, the* Lord Chancellor PARKER *tranſmitted to the* Barons of the Exchequer *this renewed Signification of the Reſolution of the* Britiſh Houſe of Lords *on the Subject of this memorable Conteſt:* and concluded—*Your Lordſhip will immediately communicate this to the reſt of the Barons; and return, as ſoon as you can, an Account of what ſhall be done by yourſelf and the reſt of the Barons in purſuance of your* * *Lordſhips ſaid Orders.*

Qu. *their?*

Order of the Iriſh Exchequer.

On the 13th of *May*, 1718, on the Complaint of *Maurice Anneſley*, an *Order* was made, *fining the Sheriff* forty ſhillings, unleſs he ſhould return the Injunction in four days, and the Fine was increaſed by ſubſequent Motions to 77 *l.*

Farther Proceedings of the Barons of the Exchequer in Ireland thereon, 7 July, 1718.

On the 7th of *July*, 1718, the then High Sheriff *for the County of* Kildare, *after ſeveral intermediate Motions, made a* ſpecial Return *to the Injunction, ſetting forth the Reſolves and* Order *of the* IRISH HOUSE OF LORDS *above cited*, of the 11th of February, 1703, and

and 19th of June, 1716; and concluding, *that by virtue of the ſaid Order he had put* Heſter Sherlock *into* full, quiet, and peaceable Poſſeſſion *of all the Towns and Lands aforeſaid; and that the ſaid* Heſter *from thenceforth continued in the ſame* Poſſeſſion *of the Premiſes aforeſaid, according to the Tenor and Effect of the aforeſaid Order: by Reaſon of which* Reſolves *and* Order *he dared not in prejudice and Leſion of the* PRIVILEGES *of* PARLIAMENT by the Laws and Statutes of the Realm of IRELAND provided, *to* reſtore *the ſaid* Maurice Anneſley, *Eſq. to the Poſſeſſion of the ſeveral* Towns *and Lands of* Little Rath, Darr, *and* Mullenafooky.

On the 7th of July the Fines were reduced by the BARONS *Pocklington* and *St. Leger* in conſequence of the Return of the *Injunction:* but on the ſame day the *Officer* of the *Exchequer*, the *Attorney* for Mrs. *Sherlock*, and the former *Deputy Chief Remembrancer* were directed to attend at the Houſe of the LORD CHIEF BARON: when, in the preſence of the *Chief* and of the other *Barons*, the *Injunction* and *Return* was read: and the *Barons* declared that it was *no Return:* the *Attorney* for Mrs. *Sherlock* prayed that the Fine might be *reſpited* to the next Term, or opportunity given to the *Sheriff* to *juſtify* his Return, which was refuſed. The Attorney was ordered to *take back* the Money which he had *paid* to the Box for taking off the *Fines*, and the Fines were *eſtreated*.

Farther Proceedings againſt the Sheriff, 7 Nov. 1718.

On the 7th of *November* an ATTACHMENT iſſued againſt the Sheriff, returnable before the *Chancellor*, *Trea-*

Treaſurer, and *Barons*, on the *Octave* of *Hilary*, and was renewed the 30th of *January* following. But the *Sheriff*, by reaſon of the ſaid *Attachments*, abſconding, was not preſent when he ought to have come on his Accounts: and was upon that Account *fined* by the *Barons* 1200 *l.* and upward.

On the REPORT of the *Lords Committees*, comprising theſe and other particulars, the PEERS of IRELAND reſolved, *inter alia*,

That Alexander Burrowes, *Eſq. late* High Sheriff *of the County of* Kildare, *in not obeying the* Injunction *iſſued forth out of her Majeſty's* Court *of* Exchequer, *dated the* 22d *of* February, 1717, *in the Cauſe between* Anneſley *and* Sherlock, has behaved himſelf with Integrity and Courage, *and with* due Reſpect *to the* ORDERS and Reſolutions of THIS HOUSE.

VOTES of CENSURE and COMMITMENT by the IRISH HOUSE of LORDS *againſt* the C. B. GILBERT *and the other Barons.*

That the Fines *impoſed* (*on the ſaid late* Hign Sheriff) *for not returning the Writ of* Injunction *be taken off without Fees.*

That the Fines *impoſed* (*on the ſaid late* High Sheriff) *for not entering on his Accounts, amounting to* 1200 l. *and upwards, be taken off when he ſhall have made a juſt Account, without other Fees than ſuch as are uſual on paſſing Sheriff's Accounts.*

That the LORD CHIEF BARON *and the other* Barons *had due Notice of the* ORDER *of this* HOUSE *of the* 3d *of* October, 1717, *in the Cauſe of* Sherlock *and* Anneſley.

Reſolved,

Reſolved, that JEFFRAY GILBERT, *Eſq.* LORD CHIEF BARON *of his Majeſty's* COURT *of* EXCHEQUER, *in the Proceedings in the Cauſe between* Sherlock *and* Anneſley, *as alſo againſt* Alexander Burrowes, *Eſq. late* High Sheriff *of the County of* Kildare, *has acted* in direct Violation *of the* ORDERS *and Reſolutions of this Houſe.*

Reſolved, *that* JEFFRAY GILBERT, *Eſq.* LORD CHIEF BARON *of his Majeſty's* COURT *of* EXCHEQUER, *in the Proceedings in the Cauſe between* Sherlock *and* Anneſley, *as alſo againſt* Alexander Burrowes, *Eſq. late* High Sheriff *of the County of* Kildare, *has acted* in manifeſt Derogation to and Diminution of the King's Prerogative of finally judging in his High Court of Parliament in IRELAND, *as alſo of the Rights and Privileges of this* Kingdom, *and of the* PARLIAMENT thereof.

The ſame Reſolves with theſe two laſt paſſed againſt the two *other* BARONS.

Reſolved on the Queſtion, Nem. con. *that it is the* Duty *of the* BARONS *of the* EXCHEQUER, *where* there is any Wrong or Prejudice done to the King, in Matters lying before them, *to inform the* KING *or the Chief Governor or Governors of the Kingdom, or the Council.*

Reſolved, *that the Caſe of* Sherlock *and* Anneſley, *as it lately lay before the* BARONS *of the* EXCHEQUER, *being Matter not only of* Law *but of* State, *ought to*

have been laid before the King, *the Chief Governor or Governors of this Kingdom, or the Council of the ſame: it ſo nearly concerning his Majeſty's Prerogative and the Intereſt of the* WHOLE KINGDOM. *

Diſſentient.
Donerayle.

Jo. Meath, *Middleton,* CANC.
Welbore, Kildare, *William, Derry.*
Henry, Killala and *Achonry,*
Timo. Kilmore and *Ardagh.*

Reſolved, *that* JEFFRAY GILBERT, *Eſq.* LORD CHIEF BARON *of the* COURT *of* EXCHEQUER, John Pocklington, *Eſq. and Sir* John St. Leger, Knt. *Barons* of the ſame, *in their Proceedings in the Cauſe between* Sherlock *and* Anneſley, *and againſt* Alexander Burrowes, *Eſq. late* Sheriff *of the County of* Kildare, *have acted* contrary to Law and to the eſtabliſhed Practice of the King's Courts.

Diſſentient.
Donerayle,

John Meath *Middleton* CANC.
Welbore Kildare *William Derry.*
Henry Killala and *Achonry*
Timo. Kilmore and *Ardagh,*

* This ſeems to have Alluſion to the latter part of the oath of a Baron of the Exchequer:— "Whereas ye may know any Wrong or Prejudice to be done to the King, ye ſhall put and do all your Power and Diligence that to redreſs: and if ye may not do it, ye ſhall tell it to the King, or to them of his Council which may make relation to the King; if ye may not come to him, to the King's Majeſty's Lieutenant, or other Chief Governor or Governors of this Realm for the time being."

Reſolved,

Reſolved, *that* JEFFRAY GILBERT, *Eſq.* LORD CHIEF BARON *of the* COURT *of* EXCHEQUER, *having taken upon him to put in Execution a pretended* Order *from* another Court, *contrary to the final Judgement of this* HIGH COURT *of* PARLIAMENT, *in the Cauſe between* Sherlock *and* Anneſley, *is a* Betrayer *of his Majeſty's Prerogative, and the ancient undoubted Rights and Privileges of* THIS HOUSE, *and of the Rights and Liberties of the Subjects of this Kingdom.*

Diſſentient.

Donerayle.

John Meath, *Middleton* CANC.
Welbore Kildare, *William Derry.*
Henry Killala and *Achonry,*
Timo. Kildare and *Ardagh.*

The ſame Reſolve againſt each of the two *other* BARONS.

Finally, the Houſe reſolved and ordered, *in hæc verba:*

ORDERED, by the LORDS Spiritual and Temporal in PARLIAMENT aſſembled, that the *Right Honourable* JEFFRAY GILBERT, *Eſq.* LORD CHIEF BARON *of the* COURT *of* EXCHEQUER, *ſhall, for the ſaid Offences,* be taken into the Cuſtody *of the Gentleman Uſher of the Black Rod attending this* HOUSE.

Diſſentient.

Fitzwilliams.

Jo. Meath, *Middleton* CANC.
Welbore Kildare, *Donerayle,*
Henry Killala and *Achonry,* *William Derry.*
Timo. Kilmore and *Ardagh.*

And the ſame ORDER paſſed, with the ſame PEERS *diſſentient*, againſt the two *other* BARONS. The BRITISH HOUSE of LORDS, on the contrary, *approved* the Proceedings of the BARONS of the IRISH EXCHEQUER; *recommended* them to the royal favour as having been unjuſtly cenſured and illegally impriſoned for having done their Duty; and that a BILL be brought into PARLIAMENT for *ſecuring the Dependence of* IRELAND *on the* CROWN *of* GREAT BRITAIN. *

* Ayres, C. V. of E. & J. St. Introd. lxxiv. et ſeq.

1719. Afterwards, in the next year, the PARLIAMENT of GREAT BRITAIN declared their ſenſe of this Claim of Juriſdiction by the HOUSE of LORDS in IRELAND by a *Statute*† often quoted in the Commencement of the unhappy Conteſt, in which the Government of this Country engaged againſt the AMERICAN COLONIES. It is of a tremendous Conciſeneſs: the whole Act conſiſting of theſe two ſentences:

† *It received the Royal Aſſent on the 7th Apr.* 1720 AYRES's C. V. lxxv.

An ACT *for the better ſecuring the* Dependency *of* IRELAND *upon the* CROWN *of* GREAT BRITAIN.

WHEREAS *the* HOUSE *of* LORDS *of* IRELAND have of late, againſt Law, aſſumed to themſelves a Power and Juriſdiction to examine, correct, and amend *the Decrees of the Courts of Juſtice* in the KINGDOM of IRELAND: therefore, *for the better ſecuring of the Dependency of* IRELAND *upon the* CROWN *of* GREAT BRITAIN, may it pleaſe your Moſt Excellent Majeſty, *that it may be declared, and be it* declared *by the King's Moſt Excellent Majeſty, by and with the Advice and Conſent of the Lords Spiritual and Temporal and Commons in this preſent* PARLIAMENT *aſſembled, and* by the Authority

thority of the ſame, *that the ſaid Kingdom of* IRELAND *hath been, is, and of Right ought to be ſubordinate unto and dependent upon the Imperial* CROWN of GREAT BRITAIN, *as being* inſeparably *united and annexed thereunto: and that the King's Majeſty, by and with the Advice and Conſent of the Lords Spiritual and Temporal and Commons of* GREAT BRITAIN *in* PARLIAMENT *aſſembled*, had, hath, and of Right ought to have full Power and Authority *to make* LAWS *and* STATUTES *of ſufficient Force and Validity to* BIND *the* KINGDOM *and* PEOPLE *of* IRELAND.

And be it further declared *and enacted by the Authority aforeſaid, that the* HOUSE *of* LORDS *of* IRELAND *have not, nor of Right ought to have any Juriſdiction to judge of, affirm, or reverſe any* JUDGEMENT, Sentence, or Decree, given or made in any Court within the ſaid Kingdom: *and that all Proceedings before the ſaid* HOUSE *of* LORDS *upon any ſuch Judgement, Sentence, or Decree, are, and are hereby* declared *to be utterly* NULL *and* VOID *to all Intents and Purpoſes whatſoever.*

Mr. *Ayres* has a ſpirited Remark on this Statute: C. V. lxxiii.
we are left in the dark to judge on what grounds that auguſt aſſembly were induced to believe a power exerted without controul (he ſpeaks of the power of Judicature in the IRISH HOUSE of PEERS) *did not give a* RIGHT. *A foreigner, unacquainted with the cauſes which actuated that parliament, would imagine this a very extraordinary doctrine.*

The PARLIAMENT of GREAT BRITAIN at length thought ſo: and *repealed* the ACT which had negatived the independent *legiſlative*, and the *judicial* Claims of the IRISH PARLIAMENT: and Doubts being entertained whether the *Repeal* of an Act, which expreſſed itſelf in the *declaratory* ſtyle, would not leave room for the Claim of an *excluſive* Juriſdiction as of *Common Law*, independent of ſuch Statute ſo repealed, another ACT paſſed, which with a wiſe ſimplicity removes all ſhadow of future Controverſy on this Queſtion. It is in theſe Words:

Anno 1782. 22 G. III. c. 53.

23 G. III. c. 28.

WHEREAS *by an* ACT *of the laſt Seſſion of this preſent* PARLIAMENT, intitled, *An* ACT *to repeal an Act made in the Sixth Year of the Reign of his late Majeſty King* George *the* Firſt, intitled, *An Act for the better ſecuring the Dependency of the Kingdom of* IRELAND *upon the* CROWN *of* GREAT BRITAIN, *it was enacted, that the ſaid laſt-mentioned Act, and all Matters and Things therein contained, ſhould be repealed: And whereas Doubts have ariſen whether the Proviſions of the ſaid Act are ſufficient to ſecure to the* PEOPLE *of* IRELAND the Rights claimed by them to be bound only by Laws enacted by his Majeſty and the Parliament of that KINGDOM in all Caſes whatever; and to have all ACTIONS and SUITS at LAW or in EQUITY, which may be inſtituted in that KINGDOM, decided in his Majeſty's COURTS therein FINALLY, AND WITHOUT APPEAL from thence: THEREFORE, *for removing all Doubts reſpecting the ſame*, May it pleaſe your Majeſty,

jeſty, that it may be DECLARED and enacted, *and be it* declared *and enacted by the* KING's *Moſt Excellent Majeſty, by and with the Advice and Conſent of the* LORDS *Spiritual and Temporal and* COMMONS *in this preſent* PARLIAMENT aſſembled, *and by the Authority of the ſame,* that *the ſaid* Right claimed by the PEOPLE of IRELAND to be bound only by Laws enacted by his Majeſty and the Parliament of that KINGDOM in all Caſes whatever, and to have all ACTIONS and SUITS at LAW or in EQUITY, which may be inſtituted in that KINGDOM, decided in his Majeſty's COURTS *therein* FINALLY, AND WITHOUT APPEAL from thence, *ſhall be, and it is hereby* declared *to be eſtabliſhed and aſcertained for ever; and ſhall at no Time hereafter be queſtioned or queſtionable.*

And be it further enacted, by the Authority aforeſaid, that no Writ of ERROR *or* APPEAL *ſhall be received or adjudged, or any other Proceeding be had by or in any of his Majeſty's Courts in this* KINGDOM, *in any Action or Suit at Law or in Equity, inſtituted in any of his Majeſty's Courts in the Kingdom of* IRELAND: *and that all ſuch Writs, Appeals, or Proceedings, ſhall be, and they are hereby declared* NULL *and* VOID *to all Intents and Purpoſes: and that all Records, Tranſcripts of Records, or Proceedings, which have been tranſmitted from* IRELAND *to* GREAT BRITAIN *by Virtue of any Writ of Error or Appeal, and upon which no Judgement has been given or Decree pronounced before the* First *Day of* June, *One Thouſand Seven Hundred and Eighty-two, ſhall, upon Application made, by or in behalf of the Party in whoſe*

Favour Judgement was given or Decree pronounced in IRELAND, *be delivered to ſuch Party or any Perſon by him authoriſed to apply for and receive the ſame.*

The Conduct of our AUTHOR while this great Queſtion was depending, could not be more fairly ſtated than by vouching the authentic public Documents of the time; nor could the Opinions of the LEGISLATURE on this ſubject at different periods be more ſatisfactorily expreſſed than by *Tranſcripts* of the Statutes reſpecting this long agitated Point of JURISDICTION. For what time the LORD CHIEF BARON and his *Brethren* of that BENCH continued under *Impriſonment*, and the Proceedings of one of the *great* COURTS of COMMON LAW conſequently ſuſpended, appears not as yet. While the Conteſt was recent, it was perhaps deemed inexpedient, by entering more particularly into the circumſtances, to ſtir the ſparks of a lately ſtifled Flame; and this may account for the total ſilence of the Epitaph. But now, when all Cauſes of Diſſenſion between the Siſter Kingdoms on this ſubject (and, we may reaſonably believe, on any other) are happily eradicated, ſome Obſervations may be calmly interpoſed on the Deportment of GILBERT, and of the *other* BARONS in this important Tranſaction.

The *Juriſdiction* exerciſed in ENGLAND was not a *Novelty:* as APPEALS from the KING'S BENCH in IRELAND to the KING'S BENCH in ENGLAND were received, APPEALS from the *Equity Side* of the EXCHEQUER to the BRITISH HOUSE of LORDS ſtood upon

upon the ſame Ground of *Analogy*, and had a leſs revolting Appearance. The very able Advocate of the Rights of the IRISH NATION, whom we have already quoted, ſeems to acknowledge that the ultimate *judicial* Authority was a Queſtion on which a Difference of Opinion might admit of a much fairer Account than the far more important Queſtion of the independent *legiſlative* Authority.

With regard to the ſubordinate and collateral circumſtances, ſuch as its being objected that the Chief Baron had granted the Injunction, the COPIES of the ORDER of the HOUSE of PEERS of GREAT BRITAIN, authenticated by the CHANCELLOR, being produced and read in COURT, without *Affidavit* of their being *ſigned* or *examined*, there appears nothing in this repugnant to the known *Principles* and Rules of *Evidence* in like Caſes, as will be ſeen in the Work itſelf to which this Account is prefixed. V Rep. of the Lords Committ. p. 192.

The Eſtreat of the Fines, and the Order to take back the Money, which had been paid on the ſuppoſed compounding of them, contains ſome circumſtances of which an explanation were much to be deſired. It is difficult to imagine, under the ſentiments entertained by the CHIEF BARON and his *Brethren*, how the Fines came to be reduced; unleſs there was ſome ſurprize upon the Court by ſome evaſive Manœuvre. On any other ſuppoſition an Incongruity in the Proceedings of the ſame Judges on the ſame day, and on a plain point, muſt be admitted, which is utterly unintelligible; not to ſay, incredible.

Thus much, from the Intelligence hitherto found attainable, concerning the CHIEF BARON during his Reſidence in a public Character in IRELAND. More is greatly to be deſired: and more, in this Age of liberal communication on literary ſubjects, may perhaps hereafter be obtained. It appears, I think, by the ſtyle of the laſt ORDER of the IRISH HOUSE of LORDS, that he was a *Privy Councillor* of that Kingdom: and it is noticed in his EPITAPH, that a Tender was made to him of the GREAT SEAL; which he declining, returned to his Country; and was firſt called to the Degree of an *Engliſh Serjeant at Law*, † preparatory, according to ancient Uſage, to his taking his ſeat as one of the *Barons* of the *Exchequer*; ‖ in which he ſucceeded Sir *James Montague*: and having remained in that ſtation for *three* years, * on the 7th of *January*, 1724, he was appointed one of the COMMISSIONERS of the GREAT SEAL in the room of Lord MACCLESFIELD: and never was that Commiſſion more reſpectably filled; his Colleagues being Sir *Joſeph Jekyll* and Sir *Robert Raymond*: the GREAT SEAL continued in Commiſſion till the 1ſt of *June* in the year ſucceeding, when Sir *Peter King* was conſtituted LORD

† 31 May, 1722. B. P. J. p. 440.

Appointed 24 May, 1722. B. P. J. I. p. 422.

‖ He took his ſeat June 9, 1722. Bunb. 113.

* B. P. J. 412.

† *A Paper of the Time, dated* Tueſday, June 12, 1722, *communicated by Mr.* NICHOLS, *ſays that he was called on* Thurſday *the 8th, with* ALEXANDER DENTON, *Eſq. to the Bar of the* COURT *of* COMMON PLEAS, *with only ſuch Ceremonies as are uſed at a* private *Call. The Gentleman called with him afterwards, with exemplary Candour, preſided as Judge at the Trial of Mr.* ELWALL, *at the* STAFFORD ASSIZES, *for a ſuppoſed blaſphemous Libel, conſiſting in the Aſſertion of the divine* UNITY. *I do not pretend to aſcertain the particular ſentiments of either of theſe reſpectable Judges on this Point. Good Men are wont to be friendly to the Rights of Conſcience, whatever their particular Creed. The* WILL *of* GILBERT *is not introduced with the* Formula *uſual at that time, and frequent ſince.*

KEEPER,

KEEPER, and on the ſame day Sir JEFFRAY GILBERT became, on the Appointment of Sir *Robert Eyre* to the *Chief Juſticeſhip* of the *Common Pleas*, LORD CHIEF BARON; which Office he filled for *one* Year and leſs than *five* Months, when he deceaſed at *Bath*; at an Age which may be called early, if compared with the Multitude and the laborious Extent of his known and remaining Works. Five* Months before his Deceaſe he became a FELLOW of the ROYAL SOCIETY. Thinking it probable that his Talents and Learning might have acquired him this Diſtinction, which has always been eſteemed an Ornament to the moſt exalted ſtation, I requeſted a Friend, who is a Member of that Society, to aſcertain whether my Conjecture were verified by Fact. That it is ſo, I conſider as a Diſcovery alike honourable to that illuſtrious Body and to the party *elected*.

1 June, 1725. Ibid. 419. Bunb. 199.

14 Oct. 1726.

12 May, 1726.

Unexpectedly (conſidering the doubtful Preſervation of *fugitive* Papers after more than ſixty years have expired) a *contemporary Teſtimony** to this great Character has been obtained.

* Communicated alſo by Mr. NICHOLS.

As the moſt full and ſatisfactory which perhaps we can now hope, it is here tranſcribed.

"*London, Oct.* 22. We have an Account from *Bath*, that yeſterday ſe'nnight,* after a long Indiſpoſition,* died there, in the fifty-ſecond Year of his

The Weekly Journal, or the Britiſh Gazetteer. Saturday, Oct. 22, 1726.

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* *We find him in* Eaſter *Term, in the year in which he d ed, continuing to ſit as Chief Baron. It is uncertain whether his illneſs permitted him to be in Court in the* Trinity *Term. His* Reports *are continued no lower than the* Eaſter *Term.*

Quilter v. Muſſendine, T. P. 12 G. I. Gilb. 228---30.

Age,

Age, Sir *Jeffray Gilbert*, Knight, Lord Chief Baron of his Majeſty's Court of *Exchequer* at *Weſtminſter*."

It then proceeds to ſtate his ſeveral Appointments: commencing with that of a Judge in the King's Bench in *Ireland*, which it dates in 1715, and concluding with his promotion to the Office of Chief Baron of the Exchequer in *England*, before the Commiſſion of the Great Seal (in which he was one of the Lords Commiſſioners) was determined. ‖

It then proceeds with his Character.

" He filled up every Station of Life with the greateſt Integrity and moſt untainted Honour: and diſcharged the Duties of his Profeſſion to the general ſatisfaction of all that had any opportunity of obſerving his Conduct. Nor did his ſpeedy Advancement from one Poſt to another procure him the Envy even of the Gentlemen of the Long Robe, who conſtantly paid him the Regard that is due to the greateſt Merit when he was alive, and by whom the Loſs of him is now as generally regretted. The Skill and Experience he had in the Laws of his Country, and the uncommon Penetration he diſcovered in the Deciſion of ſuch Cauſes of Equity as came before him, were not more known in *Weſtminſter Hall* than his unwearied Purſuit of mathematical Studies (when his Affairs would permit) as well as his fine Taſte of the more polite Parts of Learning were to Men of the moſt exalted Genius

‖ *This ſeems a Miſtake of the Editor of the Journal: for the Commiſſion determined at the time when he became Chief Baron.* V. *p.* xxiv.

in

in either. We are ſatisfied our Readers will not be diſpleaſed at the imperfect Account we have endeavoured to give of this great Man; being perſuaded his Character is ſo well eſtabliſhed, that it will not be reckoned amongſt thoſe extravagant Encomiums which are beſtowed with a liberal hand on every common occaſion."

It then notices ſome of the Legatees in his Will, and mentions the Attendance on his Funeral, thus:

"We hear that he left his valuable Manuſcripts to *Charles Clarke*, Eſq. of *Lincoln's Inn*, and Mr. *Levroe*,* his Clerk, 400*l.*; Mr. *Townſend*, Examiner, 200*l.*; the ſaid Gentleman's Son, to whom his Lordſhip was Godfather, 100*l.*; Mr. *Moncrief*, Train-bearer, 100*l.*; Mr. *Palmer*, his Marſhal, 50*l.*; but left the Bulk of his Eſtate to Sir *John Norris*, and Sir *John Farmer*, of *Sennock*, † Bart. ‖

"On *Monday* Night the Corpſe was interred in a Vault built for that Purpoſe within the Abbey Church at *Bath*. The Pall being ſupported by the Lord *William Pawlett*, Lord *Cornwallis*, Sir *Henry Aſhburſt*, Bart. Sir *John Auſtin*, Bart. *John Cockborn*, Eſq. and *Daniel Pulteney*, Eſq. and Sir *Henry Farmer*, Bart. attended as Chief Mourner. We hear a very handſome Monument is deſigned to be erected to his Memory."

† Seemingly a Corruption of Sevenoak; ſo called, as they ſay, from *Seven Oaks* of an exceeding height. CAMD. BRIT. I. 223.

‖ They omit the Name of the firſt Executor.

* *This appeared to me, when I examined the Will in the Commons, to be* Deveraux: *and accordingly it ſtands in the official Copy: but the Form of the firſt Letter is doubtful. As with a ſimplicity worthy of the occaſion and of his Character,* GILBERT *has not mentioned himſelf in his Will by any Deſignation of Title or Office, he has been ſilent with regard to the employments which any of his Legatees held under him. But it ſeems pleaſing to obſerve, that after his Death the circumſtances of their relation to his ſervice, in his public Character, are mentioned.*

This

This, as we have ſeen, there was; and laudable is the attention of his Executors. But a nobler and more durable Monument, now impoſſible to be erected, would have been a complete Account of his Life and Writings.

Of his WORKS, which have been *printed* with his Name, a Liſt is ſubjoined. Chronological Order, with regard to their Publication, is perhaps now impracticable. The *Liſt* is extracted from WORRAL'S BIBLIOTHECA LEGUM.

1. GILBERT'S (Lord C. B.) CASES ‖ *in Law and Equity:* with two Treatiſes: one on the Action of Debt; the other, on the Conſtitution of *England.*

8vo. 1730. 6 s.

2. ——— REPORTS of Caſes in Equity and Exchequer, from the 4th of Q. *Anne* to the 12th of *G.* I.* To which are added ſome SELECT CASES *in Equity in the Court of Exchequer in* IRELAND, with many additional Notes and References.

Fo. 1734. 7 s. 1742. 10 s.

3. LAW *of Uſes and Truſts:* collected and digeſted in proper Order from the Books of Reports: together with a Treatiſe of Dower.

1734, 1741, the ſame, 6 s.

‖ *Theſe are* Caſes in 12 & 13 A. *Anno* 1713. In 1715 *we find our Author one of the* Judges *of B. R. in* IRELAND; *if therefore really taken by him, it muſt have been ſhortly before he left* ENGLAND. *There are one or two important Caſes; and ſo well reported as not to be unworthy of him: but in general, they are looſe Notes very badly edited.*

* *The Lord Chief Baron died in the Vacation of* Trin. 12 *G.* I. *which was the laſt year of that Reign.*

4. TREA-

4. TREATISE *of Tenures:* containing, 1. The Original, Nature, Uſe, and Effect of Feudal or Common Law Tenures: 2. Cuſtomary or Copyhold Tenures, Cuſtoms, Duty to their Lords, &c. 3d Ed. 8vo. 1757. 5 *s.*

5. LAW *of Deviſes, laſt Wills, and Revocations.* To which is added Choice Precedents of laſt Wills. Third Edition, reviſed, corrected, and improved. 1730. 2 *s.* 1756. 3 *s.* 8vo. 1773. 5 *s.*

6. TREATISE *of* EJECTMENTS. 1734 or 1741, the ſame, 5 *s.*

Ditto: To which are added Select Precedents, &c. Second Edition, with Additions, by *Charles Runnington*, Eſq. 8vo. 1781. 6 *s.*

7. LAW *and Practice of Diſtreſſes and Replevins delineated:* wherein the whole Law under thoſe Heads is conſidered, with many References to the beſt Authorities: to which is added an Appendix of *Engliſh* Precedents in Replevin. 2d Ed. 8vo. 1780. 5 *s.*

8. LAW *of Executions:* to which are added, the Hiſtory and Practice of the Court of King's Bench, and ſome Caſes touching Wills of Lands and Goods. 8vo. 1763. 6 *s.*

9. TREATISE *of* RENTS. 1758. 3 *s.* 6 *d.*

10. ——— *of the* COURT *of* EXCHEQUER: in which the Revenue of the Crown and the Manner of receiving and accounting for the ſeveral Branches of them are clearly explained. 8vo. 1753. 5 *s.*

Before printed (in part only) under the

the Title of *An hiſtorical View of the Practice of the Exchequer.*

8vo. 1738. 2s.

11. HISTORY *and* PRACTICE *of* CIVIL ACTIONS *in the Court of Common Pleas:* being an hiſtorical Account of the Parts and Order of judicial Proceedings, with an Introduction on the Conſtitution of *England.*

1737. 2s.
1761. 3s.

Third Edition, corrected, with Notes and References.

8vo. 1779. 5s.
1758. 6s.

12. HISTORY of the High Court of Chancery; printed from a correct manuſcript Copy.

2d Ed. 1756, 1760.

13. LAW of EVIDENCE.

Ditto; with Additions, and a complete Table.

8vo. 1777. 5s.

14. ABSTRACT *of Mr.* LOCKE's *Eſſay on human Underſtanding.*

Dublin. Reprinted *London*, 1752. 8vo. 1s.

In MANUSCRIPT.

15. HISTORY *of the Feud.* In the Collection of FRANCIS HARGRAVE, Eſq.

Others aſcribed to him on Probability; but without direct Proof.

16. TREATISE *of* REMAINDERS. MS. §

17. The Title LEASES, in BACON'S ABRIDGEMENT, is believed to be from GILBERT.

Thus the moſt extenſive and intricate Subjects received, from the diligence and ſagacity of this great

§ *Of this I know thus much that it is held in high Eſtimation by two Gentlemen acknowledged to be among the moſt competent to judge of the Merits of a Work developing the moſt intricate of all the branches of the Profeſſion.*

Man

Man ample Diſcuſſion and approved Illuſtration. If Teſtimonies are now ſubjoined, it is not for the purpoſe of adding Authority, but as pleaſing examples how willingly eminent Deſert is commended by the deſerving: or, in the Words of the *Roman Orator*, who might well aſſert what his own Character and Writings exemplified, *Neminem qui ſuis virtutibus confidat alienæ invidere.*

TESTIMONIES.

In a Caſe, which was eſteemed a nice Queſtion, and as ſuch ordered to be ſolemnly argued, the Court ſaid, that many Caſes had been cited on both ſides; but that they founded their Determination upon *Lord Chief Baron* GILBERT's *Law of Diſtreſſes and Replevins*, fo. 231, 2; that it would be abſurd to grant a *retorn' habend'* where there was no *Avowry*.

Cutfield v. Coney. Hil. 31 G. II. Wilſ. 83.

In a very important Cauſe Mr. *Peckham* adduced the Authority of GILBERT in theſe Terms:

I ſhall only cite a few paſſages from *Lord Chief Baron* GILBERT's *Hiſtory of the Common Pleas*, which are deciſive upon this part of the Argument. In p. 40, ſpeaking of the ORDER of pleading, he ſays, "*The Defendant firſt pleads to the* JURISDICTION *of the Court*; ſecondly, *to the* PERSON *of the Plaintiff*; *and*, thirdly, *to the* COUNT *or Declaration. By this order of* pleading, *each ſubſequent Plea admits the former. As when he pleads to the perſon of the Plaintiff, he admits the Juriſdiction of the Court; for it would be nugatory to plead any thing in that Court which has no Juriſdiction in the*

Fabrigas and Moſtyn. H. St. T. X. 192.

the Caſe. When he pleads to the Count or Declaration, he allows that the party is able to come into that Court to implead him, and he may be there properly impleaded. He lays it down in a ſubſequent part of this Treatiſe (p. 148) as a poſitive Rule of Law, that if a Defendant pleads to the Juriſdiction of the Court, he muſt do it *inſtanter* on his appearance; for if he imparls, he owns the Juriſdiction of the Court by craving leave of the Court for time to plead in, and the Court ſhall never be ouſted of its Juriſdiction after Imparlancē. When I find this Doctrine in our old Law Books, when I ſee it ratified in modern times, and ſtamped with the Authority of COKE, HALE, HOLT, and GILBERT, I am warranted in ſaying that Governor *Moſtyn* cannot now agitate the Queſtion of Juriſdiction.

The AUTHOR of the COMMENTARIES has quoted three of GILBERT's Works with diſtinguiſhed Notice.

III. Comm. c. 10. p. 179. N. i.

Of his TENURES, *as well explaining the Principles of the particular Caſes mentioned by* Littleton, B. III. 6.

Of his HISTORY of the COMMON PLEAS thus:

Ibid. c. 18. p. 272. N.

BOOKS *of* Practice, *as they are called, are all pretty much on a level in point of compoſition and ſolid inſtruction, ſo that that which bears the lateſt Edition is uſually the beſt. But* GILBERT'S HISTORY *and* PRACTICE *of the* COURT *of* COMMON PLEAS *is a book of a very different ſtamp: and though* (like the reſt of his poſthumous Works) *it has ſuffered moſt groſsly by ignorant or careleſs tranſcribers, yet it has traced out the reaſon of many*

many parts of our modern practice from the feodal institutions, and the primitive construction of our Courts, in a most clear and ingenious manner.

Of his LAW *of* EVIDENCE thus:—*The Nature of my present Design will not permit me to enter into the numberless niceties and distinctions of what is or is not* LEGAL EVIDENCE *to a* JURY: *this is admirably well performed in* LORD CHIEF BARON GILBERT'*s excellent Treatise of* EVIDENCE: *a work which it is impossible to abstract or abridge without losing some beauty and destroying the chain of the whole.* Ibid. c. 23. p. 367.

EPITAPHS.

The EPITAPHS of GILBERT have been promised. To the kind communication of Mr. NICHOLS,* than whom no man is more conversant in *biographical Anecdotes*, or more ready to assist the Researches of others, I owe the *Latin* one, which prompted my Enquiry after the other; of this, at my request, Dr. FALCONER favoured me with a Copy: and I hope will pardon the introducing, on this occasion, a Name respected by the philosophical and literary World.

* The Editor of the Gentleman's Magazine.

From him I learn that the Place of GILBERT'S *Interment* is on the *north* side of the *centre Aisle* of the Parish Church of *St. Peter and St. Paul*, commonly called the *Abbey Church*, BATH; and near the *Door* of the *Choir*. It simply expresses the *Day* and *Year* of his *Death*; his *Age* and the *Station* in which he died: and refers to his MONUMENT in the TEMPLE CHURCH.

The ſtone is a blue ſlate even with the floor. There is no *ſide Monument*. Over the Inſcription are the ARMS; *three Roſes on a Chevron* (no Colours expreſſed);—CREST, *a Squirrel in profile*, ſitting on a twiſted Cord, his head turned to the dexter ſide. Beneath the Creſt, a *Knight's Helmet*. The Arms are on a Shield encompaſſed with Palm Branches, as uſual in the old Monuments.

The EPITAPH is in *Roman Characters*, arranged in the order printed underneath:

SR JEFFRAY GILBERT KT
LORD CHIEF BARON
OF HIS MAJESTY's COURT
OF EXCHEQUER
OB. 14 OCT. A. D. 1726. ÆT. 52.
A MONUMENT
ERECTED TO HIS MEMORY
IN THE TEMPLE CHURCH
IN LONDON.

In the *Latin Epitaph* the Words are guarded from Corruption by the Copieſt, every Letter contained in each Line being *numbered*, and the total expreſſed in the Margin of the MS. with which I was favoured by Mr. NICHOL, and which appears to have been the fair original Draft.

Phillips

Phillips Gybbon, Eſq. one of the Executors of the Lord Chief Baron was born 11 *Oct.* 1678, conſequently about four years later than the LORD CHIEF BARON whom he long ſurvived: being elected Member of Parliament for *Rye* in 1707, and in every ſucceſſive Parliament till 1741. To the Father of this Gentleman Sir *Matthew Hale* preſented a Copy of the MS. Notes on *Coke upon Littleton*. By him probably the EPITAPH was compoſed. Gent. Mag. Aug. 1788. p. 699. B. L. 149.

I have examined the WILL in the COMMONS: which is remarkably conciſe, ſimple, and characteriſtic. The Reader may not be diſpleaſed to contraſt this Will of a great Lawyer and learned Judge, preſiding with ſuch Honour in one of the ſupreme Courts of Common Law, with the embarraſſed Prolixity and Parade of Limitations which the *Vanity* of *Teſtators* or the *operoſe Ignorance* of perſons employed by them, has rendered ſo frequent in modern Inſtruments of the like Nature.

It remains to ſay ſomething of the TREATISE *now republiſhed*, and of the *Plan* of the Publication. Of the *firſt Edition* I have not been able to obtain a ſight: though it would have much gratified me to diſcover what *Alterations* may have been afterwards made. Some there have been certainly by the *Memorandum* at the end of the *fourth Edition*; † and it mentions *many Additions*; what thoſe were, except *marginal Notes* and *References*, is at preſent uncertain. In this Publication

† On account of Alterations in this Edition moſt of the Pages are thrown back three Numbers.

they are carefully diſtinguiſhed. The Work, therefore, of the *original Author* will not be injured by unacknowledged Inſertions of mine: the chief Liberty I have taken is by *Tranſpoſition*: which will be ſpecified by a TABLE of the correſpondent Pages in this Edition compared with the laſt which has preceded it. And here it may be proper to explain my motive for theſe variations in the Arrangement. After the Death of an Author, his Works left unfiniſhed muſt uſually ſuffer much: and there ſeems reaſon to regret that, by ſome derangement probably of the *original Papers*, that full and perſpicuous order which the very eminent Author of this juſtly celebrated Tract ſeems clearly to have deſigned, ſhould have been much broken: the great Diviſion of EVIDENCE into *written* and *unwritten*, and of its *Subject Matter*, according to the Diſtribution of the *Roman Juriſts*, into CAUSES of CONTRACT, of TORT, and of DELICT, appear manifeſtly marked. It is alſo apparent that *Sections* were intended: though ſuch and ſimilar Diviſions have not been hitherto marked in the printed Copies, in ſo far as I am yet informed. It has therefore been my endeavour to *reſtore* the Diſpoſition of the Subject, and to fill the Outline. And at the ſame time, for convenience, and the only ornament a ſubject of ſtrict Reaſoning, blended with Authorities of municipal Law, can admit, the Indication of ſome regular Order, the Treatiſe in its preſent enlarged State is divided into BOOKS, SECTIONS, CHAPTERS, TITLES, and *Paragraphs*: and it was thought the prefixing of a *General* ANALYSIS might be ſerviceable to many, and even pleaſing to ſome. It has been in this attempted to

exhibit a SYSTEMATIC IDEA. And upon this Part of the Undertaking I cannot avoid expreſſing my obligations to the COMMENTARIES on the LAWS of ENGLAND, and to a Tract of Sir WILLIAM JONES (particularly mentioned in the *Notes* to this Edition), beautifully arranging a very extenſive Species of Contract, to which *Evidence* applies with much Delicacy of Diſtinction. I have not neglected to avail myſelf largely, in the latter Part, of the full and correct REPORTS of Sir MICHAEL FOSTER, and of his *admirable* DISCOURSES on the principal ſubjects of the CROWN LAW. I may poſſibly be thought to have been too circumſtantial, for a general and elementary Work, in the Statement of *Caſes*: but it will be recollected that they are generally Caſes of Nicety and Importance: that the Attention of the Student is apt to be divided to a fatiguing or diſcouraging degree by turning from one Book to another, in order to attain that complete information which is neceſſary *where every particular weighs ſomething in the ſcale of* EVIDENCE: and that perhaps in Books of *Law*, as much as in any other, the Opinion of HUME will be juſtified,—that every Work ſhould, as far as may be, include within itſelf whatever is eſſential to its illuſtration, and not refer any part of its Contents to be explained by the Writings of others where it can properly be avoided. I may add, that GILBERT has ſet the Example: the Caſe in the *fourth* Edition relative to the manner of laying an *Aſſumpſit* occupying near *twenty* Pages; which is a larger proportion of the whole than any ſingle Caſe will be found to occupy in this.

At the ſame time that I have amply conſulted the great Authority of Sir *M. Foſter*, I have cautiouſly gleaned from the STATE TRIALS what ſeemed moſt material to the ſubject.

There will be found *References* to ſuch modern Caſes as appeared to illuſtrate the *Theory* and *Practice* of the LAW of EVIDENCE.

With regard to the *general Deſign* of the *Original*, in reſpect to the Choice of the Subject and its Extent, it may be ſufficient to obſerve that the LAW of EVIDENCE in its fulleſt Acceptation pervades the SYSTEM of JURISPRUDENCE: that perhaps no circumſtance in the frame of our *legal Polity* does more honour to the Wiſdom and Equity of our own municipal Inſtitutions than the *Principles* and *Rules* concerning *Evidence*: none is more connected with the ſublime Principles of moral and political Science, and the Knowledge of human Nature; none more intereſting to the Gentleman and the Scholar, from its Analogy to the Rules of the moſt civilized and greateſt of the Nations of Antiquity; more awakening to the inquiſitive mind, wiſhing to underſtand the ſources of our legal Eſtaſtabliſhment; (a wiſh much to be cultivated in our ingenuous Youth) or more important to every one who partakes of our CONSTITUTION, as a Government of LAWS adminiſtered on *fixed Principles*.

The Rev. Dr. DISNEY will give me leave to acknowledge the firſt intimations I received relative to the

the *ſucceſſive public Appointments* held by GILBERT: and to Mr. HARGRAVE (to whom every one engaged in reſearches on the *Law* and *legal Antiquities* of ENGLAND muſt feel his ſhare of obligation) I am indebted for the peruſal of an earlier *Law* of *Evidence*, with manuſcript Notes, interleaved: and a Manuſcript in *four Volumes* of GILBERT'S LAW of EVIDENCE (purchaſed by that Gentleman, at a conſiderable expence, with other manuſcript Tracts ſaid to have been written by our Author). This Manuſcript appears to have been copied by an *Amanuenſis*: and has literal Errors, ſome of which have been transferred into the printed Edition which I uſed, ‖ and have been corrected in this. The Manuſcript came into my hands when I had made a progreſs of about 590 Pages in this Edition. What uſe has been made of it, and of the *other Law* of *Evidence*, ¶ will appear by the References to each in the Margin.

‖ The Fourth.

In the mention of Books, which have been conſulted with a View to the Work now offered to the public, I had nearly overpaſſed THE THEORY OF EVIDENCE,* printed in 1761, of which the Author confeſſes himſelf greatly indebted to two *Manuſcript* Treatiſes, written by different hands upon the ſame ſubject: yet, however, flatters himſelf that he has ſome Merit in not having ſlaviſhly copied after either; but endeavoured, with Freedom, to correct their Errors and ſupply their Defects.

¶ Aſcribed to NELSON. See the BIBLIOTHECA LEGUM. Of this there is an Edition in 1717, and a ſecond in 1735.

* *It conſiſts of* 123 *Octavo Pages*; *excluſive of the Index.*

This Work came too late into my hands to be of uſe: except the *Analytical Index* at the End of it, which is drawn upon an ingenious Plan, and which (enlarged and improved) will be ſubjoined.

However, nothing of any conſequence, I believe, has been loſt. The chief part of it being a *Compendium* (and not an ill one) of GILBERT'S LAW OF EVIDENCE, which had been in *Print*,—one *Engliſh* Edition at leaſt, if not two,—before the Publication of this *Theory*. And almoſt every thing it contains having been adopted into the preſent Work; either from the LAW of NISI PRIUS, or from my own Reſearches.

The liberal Spirit of Communication, which does honour to the preſent Age, has induced Gentlemen to whom I was unknown to oblige me by hints reſpecting the Life of GILBERT. The RECORDER of DURHAM † will allow me to intimate how much I am obliged by his polite Attention to my general Letter of Enquiry publiſhed in the *Gentleman's Magazine*. I have ſimilar Thanks to return to another Gentleman, the preſent Proprietor of the Chief Baron's Eſtate in KENT: his Information will be inſerted in the *additional Notices*.

V. infra xlii.

In this Edition the very numerous References of the laſt preceding are reprinted, with ſome few Omiſſions; which the Reader may be inclined to believe

† WILLIAM AMBLER, *Eſq*,

have

have been made generally for ſome ſufficient reaſons: ſome erroneous or miſprinted ones in that and other Books are corrected: and much pains has been taken that thoſe References which are in this might be accurate.

I ſhall eſteem myſelf much obliged by the correction of any Errors, of whatever kind, which may have been incurred in a Work, of which the Labour is much better known to me than the ſucceſs in the Execution can be eſtimated. To the Profeſſion,—whoſe Cenſure, being founded in Knowledge, will be juſt and candid,—I commit it: aſſured only of this, that it has been my earneſt endeavour to render it not unſerviceable to them, nor altogether unworthy of the *original* AUTHOR.

C. L.

Troſton-hall, near BURY, SUFFOLK.
10th Nov. 1788.

SOME

SOME ADDITIONAL NOTICES

RESPECTING THE

CHIEF BARON's RESIDENCE, &c.

I was much perplexed to find out *Burs*, * the place mentioned in the *Epitaph*; which I now learn to have been the Manſion-houſe of the Chief Baron: through intelligence with which I have been favoured by the Gentleman who purchaſed the Eſtate, and reſides near it.

Burs is within two Miles of *Goudhurſt*. A year or two before the Death of the Baron he made a Purchaſe of about thirty Acres, the Eſtate before conſiſting of about eighty or ninety, and immediately let it to a Mr. *John Biſhop*, at a Rent of 50 *l. per Annum* for twenty-one years.

In the Partition of his Property under the Will this came to the ſhare of Sir JOHN NORRIS, whoſe Seat and Eſtate were within five Miles.

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* Near LAMBERHURST, in the HUNDRED of MARDEN, to the S. W. ſide of the County, bordering on SUSSEX: *Rolvinden*, mentioned in the WILL, is not far off.

It appears too that he was born at BURS by a Communication from a Gentleman, *who mentions farther, that* Sir Henry Fermor *charged by his Will* a Load of Wheat *annually upon one of his farms to the* Poor *of the Pariſh of* Goudhurſt, *in memory of his Friend the Lord Chief Baron born in that Pariſh. And ſince the writing of this the preſent Proprietor of the Eſtate has, in a ſecond Letter, obligingly communicated to me the baptiſmal Entry in the Regiſter of* Goudhurſt, *which runs thus:*— 1674, Oct. 10. Jeffrey, ſon of William Gilbert and Elizabeth his Wife. *The* Burial *of Mr.* William Gilbert *appearrs the 1ſt of* November *following. And there is an uncertain Tradition communicated by a Tenant of the Gentleman who has favoured me with this Information, that Mrs.* GILBERT *died in Childbed: and that this Infant of her's, as being* ſtill-born, *was for ſome time ſuppoſed incapable of being brought to Life; or, at leaſt, as hopeleſs of being continued in it. The probability of this Tradition muſt be left with the Reader: when he is acquainted, on the one ſide, that it is the Account given by a Tenant, who has occupied* BURS *for between* forty *and* fifty *years; and on the other, that there is no Entry of Mrs.* GILBERT's *Burial diſcovered in the Regiſter of the Pariſh; which, the Gentleman who communicated theſe circumſtances very juſtly obſerves, weakens the Tradition.*

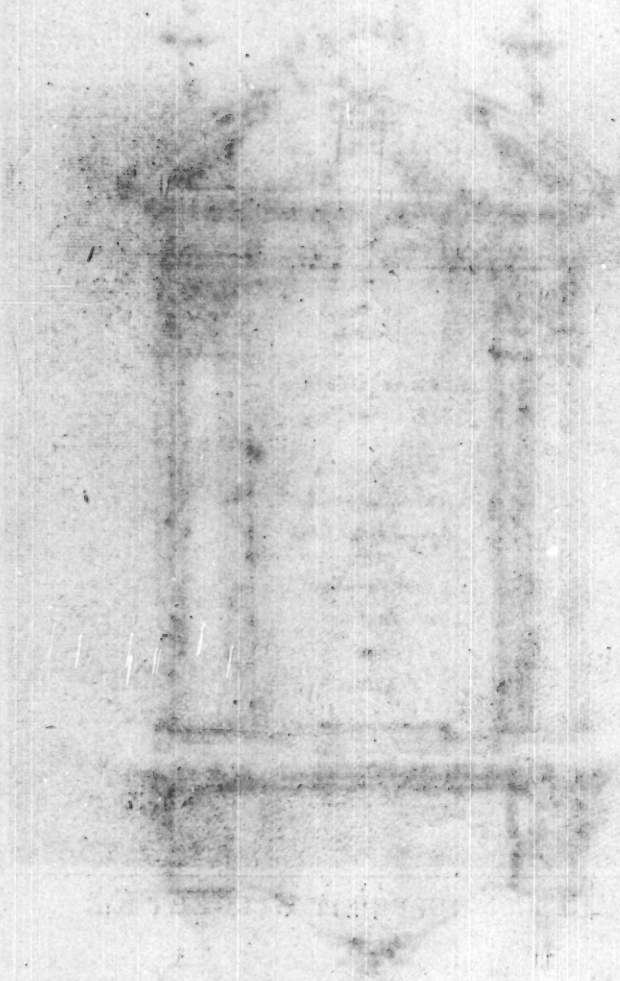
COPY

M. S.

Honorabilis JEFFRAY GILBERT, *Eq. Aur.*
De Burs in Comitatu Cantii,
Et Regiæ Curiæ Scaccarii Capitalis Baronis,
Teſtamenti Curatores
(Phillips Gybbon Arm. Hon. Johis Norris Mil. et Henri Fermor Bart)
Hoc in loco Monumentum poſuerunt,
Quoniam Societati interioris Templi
Per multos annos vixit et floruit Ornamentum.
Anno MDCCXV *Banci Regii in Hibernia*
Conſtitutus eſt Juſtitiariorum unus;
Eoque nondum elapſo, ad Dignitatem Capitalis Baronis Scaccarii
In Regno illo provectus:
Cujus deinceps Regni Cancellarius deſignatus,
In Patriam reverti maluit,
Annoque MDCCXXII
Baro Scaccarii apud Weſtmonaſterium adſcitus eſt.
Anno MDCCXXIV *unius Triumvirorum*
Quibus commiſſa eſt Magni Sigilli Cuſtodia
Munere perfungens,
Capitalis Baro Scaccarii conſtitutus eſt;
Et hoc Officium ſuſtinens
Bathoniæ obiit XIV *Die Octobris* MDCCXXVI *Anno Æt.* LII.

Per totum utiliſſimæ Vitæ decurſum
Et in omni Munere obeundo,
Summâ ſpectatus eſt Prudentiâ et Fide.
In Legibus explicandis,
Æquiſſimus idem et ſolertiſſimus Interpres.
Ideoque omnibus qui eum propius habuerint perſpectum
Probatus juxta et charus.
Nec Studiis ſeverioribus ita ſe totum dedidit,
Ut non Humanioribus etiam Literis vacaret,
Et quicquid in Scientiis amœnius eſſet et liberalius
Id quoque excoleret,
Vir eruditus, elegans et perpolitus.


JEFFRAY GILBE
In Fontibus Juris
ac
Probationum
commonstrandis
Æquissimus idem
et
solertissimus
vari Indagator
atque
Interpres.



COPY

OF

THE WILL

OF THE

Lord Chief Baron GILBERT.

IN the Name of GOD, Amen. I Jeffray Gilbert *do make and ordain this my laſt* Will *and* Teſtament. Imprimis, *I recommend my Soul to* Almighty God. As to my worldly Subſtance, *I diſpoſe of the ſame as follows.* Imprimis, *I give to* Richard Gilbert *and his Sons, to each* One Hundred Pounds. *To* William Gilbert *and his Children, to him and each of his Children* One Hundred Pounds. *To* Thomas Gilbert, *of* Rolvinden, *and to each of his Children*, One Hundred Pounds. Item, *I give to my Servant*, Thomas Deveraux,* Four Hundred Pounds. *To* William Townſend, Two Hundred Pounds: *and to my Godſon*, Gilbert Townſend, One Hundred Pounds. Item, *I give*

* Probably his Amanuenſis; and to whoſe Affection and Gratitude the Inſcription over the Tombſtone at *Bath* may probably be referred. There is a traditional *Anecdote* that the LORD CHIEF BARON being greatly afflicted with the GOUT (the Attendant very frequently on eminent Genius and intenſe Study) was rarely able to uſe his own hand in writing; and ſpent moſt of his time in Chambers when not on the BENCH.

to John Moncrief *the Sum of* One Hundred Pounds. Item, *I give to Mr.* John Palmer *the Sum of* Fifty Pounds. Item, *I give to my Godſon,* Thomas Barnard, *the Sum of* Fifty Pounds. Item, *I give to Dr.* Wadſworth Three Hundred Pounds. Item, *I give to Dr.* Leake, *of* Rye, Two Hundred Pounds. Item, *I give to* Phillips Gibbon, *Eſq. and his Heirs, my* Farm *at* Rolvinden, *now in the Occupation of* the Widow. *Item,* I give all my Law Manuſcripts to *Charles Clarke,* Eſq. under ſpecial Truſt that none ſhould be printed. *Item, I make* Phillips Gibbon, *Eſq. Sir* John Norris, *and Sir* Henry Farmer, *Executors of this my laſt Will: to whom I give all the reſt of my real and perſonal Eſtate whatever and whereſoever, to have and to hold to them, their Heirs and Executors for ever.* Item, *I forgive Mr.* Leveraw * *the Sum he owes me.*

* Quære whether this be not the ſame with the *Deveraux* before mentioned, and v. p. xxvii. *ſupra.*

In Witneſs whereof I have ſet my Hand and Seal this preſent thirteenth Day of *September,* 1726.

Jeffray Gilbert (L.S.)

Signed, ſealed, and publiſhed in the preſence of us, we alſo ſubſcribing as Witneſſes in the preſence of the Teſtator:

Alured Clarke, *William Fulman.*
Edward Morrell,

Probatum fuit hujuſmodi Teſtamentum apud London coram venerabili Viro Humfredo Henchman

man Legum Doctore, surrogato, decimo nono Die Mensis Novembris 1726. Juramentis Domini Johannis Norris, Domini Henrici Fermer et Phillips Gibbon Arm. Executorum in dicto Testamento nominat' Quibus commissa fuit Administratio &c.

Nov. 6, 1788.

Extracted by me,

232 Plymouth. *George Faulckner*, Proctor.

Henry Stevens,
Geo. Gorthiy,
James Townly,
} Deputy Registers.

ARGUMENT

ON

THE DISTINCTION

BETWEEN

MANSLAUGHTER AND MURTHER,

DEDUCED BY

An INVESTIGATION of our ANCIENT LAW:

Being the INTRODUCTORY PART

Of an OPINION delivered by *JEFFRAY GILBERT*, Esq. then one of the JUDGES of the COURT of KING's BENCH in *IRELAND*,

In *DWYER*'s CASE;

ON

A SPECIAL VERDICT.

PREFACE

TO THE

FOURTH EDITION.

AS the former Editions of this Work met with great Succeſs from the Public, the Editor is encouraged to publiſh a Fourth, which has been carefully corrected throughout, with the Addition of many References to the beſt Authorities. The Reader is deſired to take notice that *Siderfin* is referred to as it was publiſhed, not according to the Time the Caſes reported therein were taken, and of the following Abbreviations made uſe of in the Citations, *viz.* 2 Kel. *Mr. Juſtice Kelynge's in King's Bench, &c.* 1764. St. Tri. *State Trials.* 2 Jones, *Sir Thomas Jones's Reports.* R. S. L. *Readings on the Statute Law.* H. H. P. C. *Hales's Hiſtoria Placitorum Coronæ.*

This Fourth Edition is improved with Extracts from the Reports of Sir *James Burrow*, Serjeants *Wilson* and *Sayer*, and other eminent Law Writers, who have favoured the Public with their judicious Collections, since the Publication of the Third Edition of this best Piece of all the learned Author's many valuable forensic Performances.

ARGU-

ARGUMENT, &c.

Rex *v.* Dwyer.

DWYER was indicted for MURTHER, and on the Statute of *ſtabbing*. And on each Indictment a SPECIAL VERDICT was found, *viz.* GILBERT'S REPORTS. 2d Ed. 1742. fo.

That on the 17th of *January*, 1714, * DWYER met THOMAS Ross, deceaſed, on *Eſſex Bridge*, with his *Wife* and two *Children:* that *Dwyer* joſtled one of the *Children* with his Horſe he rode upon; that *Roſs* coming up to *Dwyer*, and having hold of his Bridle, ſeized him; that *Dwyer* immediately drew his ſword, and *wounded* Ross, and lighted down; that *Margaret*, Ross's Wife, interpoſed to prevent farther Miſchief, ſaying, ſhe had rather he would abuſe her than her Huſband; that *Dwyer* then returned to his Horſe; and the ſword wanting the ſcabbard, one of the Crowd reached it towards him, and the ſaid *Margaret* ſnatched the ſcabbard, and broke it, and *threw* it at *Dwyer*; DWYER then mounted his Horſe, and ſheathed his ſword; and other *angry Words* then paſſing between *Roſs* and *Dwyer*, DWYER, in a Paſſion, diſmounted again; and returns to *Roſs* with his *drawn ſword* in his

* So it ſhould clearly be, tho' printed 1724. Vi. the Account of GILBERT prefixed.

hand; and that *Roſs* endeavoured to ſeize ſomebody's ſtick, as well to defend himſelf as to offend *Dwyer*, but that he *could not*; that DWYER, with his *ſword* LIFTED UP, *attacked* Ross, aſſaulted and BEAT him with it: that *Roſs* and *Dwyer* cloſed, and mutually gave and received ſeveral Blows; in which ſcuffle *Dwyer* ſtabbed *Roſs* with his *ſword* on the left Pap, an Inch wide, and three Inches deep; of which he *died.*

In introducing of his OPINION on this ſpecial Verdict, the enſuing ARGUMENT was delivered by GILBERT:

To conſider this Caſe we muſt ſettle the *Difference* between MURTHER and *Manſlaughter*; and whether, as this Caſe is circumſtanced, it belongs to the *one* or the *other* Species of Crimes. "And in order to this, "it will be of uſe to enquire in what manner, and by "what degrees, the Diſtinction between *Murther* and "*Manſlaughter* was introduced and eſtabliſhed."

CAPITAL CRIMES under the ancient Saxon Law commutable.

By the ancient *Saxon Laws* all Crimes were capable of *Commutation* by pecuniary Payments; for they thought that under the *Chriſtian Inſtitution* no Perſon ought to die for any offence "to which Death was not "expreſsly annexed by the Law of *Moſes*; nor even "for thoſe in the *firſt* inſtance, unleſs with *one* or *two* "exceptions of ſignal Crimes:" and therefore the Laws of King *Ina*,† which are the firſt we have in *Lambard*'s Code of *Saxon* Laws, appoint proper *Penalties:*

† Obiit 727. P C. *Prieſtley's Chart.*

nalties: but no Compenſation was for a *malicious* MURTHER.*

The Laws of King ALFRED* began with a *Preface* reciting the ſeveral *Moſaic* Inſtitutions: and expreſsly, after mentioning that the *Chriſtian* Law was more mild, the Words are, *ubi vero propagato Dei Evangelio plurimæ Nationes atque adeo Angli verbo Dei fidem adjunxerant, nonnulli per orbem terrarum cœtus atque etiam in* Anglia *Epiſcoporum, aliorumque clariſſimorum ſapientum conventus agebantur, atque hi, divinâ edocti miſeratione, cuique jam* PRIMUM PECCANTI *pœnam imperabant pecuniariam; ejuſque (abſque omni divinæ offenſionis concitatione) exigendæ munus magiſtratui (datâ prius veniâ) deferebant:* PRODITORI *tantummodo, ac* DOMINI DESERTORI *hanc mitiorem pœnam haud infligendam exiſtimarunt: quippe qui ejuſmodi viro minime parcendum cenſuerunt: tum quod Deus contemptores ſui omni miſeratione indignos voluit; tum quod* Chriſtus *illorum qui ei mortem obtulerunt non eſt* omnino *miſertus: Dominum vero præ cæteris colendum ſtatuit.*

* Obiit 900.

APXAION, 21, 2.

Exception of TREASON.

Potius, *qui eum in mortem pretio addixerunt.* ðehine to deaþ realde. po. *omnium*; Judam ſcilicet excipiunt.

With this may be compared Stedman's *Caſe, which ſeems to reſemble this, though leſs favourably circumſtanced for the Priſoner, and which after ſolemn Argument was ruled* Manſlaughter, *and on the other hand* Mawgridge's *Caſe, which was ruled* Murther, *there being ſtrong Evidence in that Caſe of a deſtructive intention from the firſt.*

Foſt. 292. Kel. Rep.

* *The Term* MURTHER *was anciently equivalent to* HOMICIDE, *in whatever circumſtances of which the* Juſtification *was not* evident *and* full, *and therefore did not,* ex vi termini, *imply* Malice prepenſe, *as in our preſent Acceptation of it; there was then therefore no* Tautology *in that Addition, though there may now ſeem to be.*

The Domini deſertori, *in the ſentiment and language of thoſe Times, I apprehend to mean an* Apoſtate; *they imagining themſelves intitled and obliged to undertake the Defence of Religion by the ſecular Arm.*

Vi. Comm. IV. p. 194.

By this it appears that the *Law* which mentions *De Proditione Dominorum*, in which there is appointed an Eſtimate for the *King's* head, and the heads of other *Lords*, and the Penalty of *Death* in caſe it were not paid, was in thoſe Times thought a new Puniſhment, which they did not think fit to inflict for heinous offences, as HIGH TREASON againſt their PRINCE and *Petty Treaſon* againſt their *Lords*, without making a *Preface* to reconcile ſuch Proceedings to the Law of GOD.

LL. *Aluredi* 4. p. 23, 4.

But to puniſh *Theft* or other Crimes with *Death* was eſteemed directly oppoſite to the religious Opinions of thoſe Times: as appears by what the *Canoniſts* have obſerved on the Laws of *Frederic* the Emperor, who eſtabliſhed that a Thief that ſtole *five ſhillings* ſhould be hanged; *Proles* Frederici *Imperatoris qui ſtatuit in illâ Lege quod fur quinque ſolidorum ſuſpenderetur, et ſic quod homo ad Dei imaginem creatus propter bona occideretur, et alii Reges ſucceſſores qui ſecuti ſunt hanc Legem, eorumque Miniſtri, non regnaverunt ſuper Terram, et male vitam finierunt, nec generatio eorum ad tertium gradum pervenit.*

Julius Clauſ. Sententiæ. Lib. 529.

But in *Alfred*'s Law, in the Text DE HOMICIDIO, it appears that only a *pecuniary* Puniſhment was appointed for that offence; and in thoſe Days was levied only by Impriſonment: unleſs in the Caſe before mentioned of *High Treaſon* and *Petty Treaſon*, where the Non-payment was puniſhed with *Death*. It is not very hard to conceive how the Kingdom was maintained by *pecuniary Mulcts* only: for in thoſe days every

LL. *Aluredi* 26.

every Man was put in the *Decenna*; and if found wandering three days out of the *Decennary*, he was taken up and impriſoned; and he was preſently to abjure the Kingdom, or elſe he lay at the Mercy of every one that would lay hands on him. And if any Offence was committed in any of the *Decennaries*, if the Party was brought to anſwer, he was obliged to pay his Fine for the offence, or he was *impriſoned* for ever: if he fled, the *Tything* was anſwerable for his *Mulct* or *Fine* to the King. So that by this Diſcipline Men were put under a Neceſſity of being innocent, or paying a grievous Fine, or being totally deprived of the Converſation of Mankind. And the laying "of" the Fine on the *Tything*, in caſe the Offender fled, made it the Intereſt of every Man to bring the Offender to Light, and made it exceeding difficult to conceal a *Theft* or a *Murther*. And theſe Fines ſet by Law were the *Vitæ Majores:* for the Party was taken and impriſoned, and not to be ſet at Liberty without paying theſe Fines for his Redemption; which were therefore called a Ranſom. But the pecuniary Puniſhment, *e re*

SHARP's *Congr.* COURTS, 17—20.

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* *Beſides the* Fine *to the injured Party, as a private Satisfaction or Compoſition, there was a* Mulct *to the State. See the* LECTURES *on* HISTORY *and* POLITICS *by a Maſter-hand. But here, on a ſubject of ſuch importance and extent, it may be expected that ſome Points may require to be conſidered: of ſuch, it ſeems to me, there are inſtances in the recommendation of certain Modes of Puniſhment for atrocious Crimes not compatible with the calm Dignity of the Laws, nor with that certainty of Puniſhment which has the moſt ſteady operation in preventing Crimes: for, agreeably to the clear and ſound Maxim expreſſed in another Page of that eminently uſeful Work,* Great Severity ought to be avoided in the Sanction of Laws. The Severity hinders the Execution.

L. XLVIII p. 359, 60. P. 349, 357. 351.

Or Witæ, Witæ, *Sax.* Fine, or Mulct.

natâ, on offences were called *Vitæ minores*, or *Amerciaments*, or *Miſericordiæ*: becauſe they were referred to the Mercy of the Court, and not impoſed by preciſe Laws; but theſe becoming afterwards exorbitant were affeered *per Judicium Parium*. And though the Fines are now impoſed arbitrarily, yet being impoſed by the Court, they are ſuppoſed to be according to the Law and Precedents in the like Caſe.

‖ Obiit 1036.

Thus ſtood the Law till the Time of *Canutus*, ‖ who, as *Lambard* gives an Account, conſtituted a particular Species of Crimes, *viz.* he who inſidiouſly killed a *Dane*, by lying in wait, ſhould not pay any Price; but was certainly to die, unleſs he defended himſelf by his *Ordeal*, &c. MURDRA *quidem inventa fuerant et conſtituta in diebus* Canuti, Dani *Regis, qui poſt acquiſitam* Angliam *et pacificatam*, rogatu Baronum Anglorum *remiſit in* Daniam *exercitum ſuum. Ipſi vero* Barones *extiterunt* Fidejuſſores *quatenus quotquot in Terrâ ſecum retineret firmam* Pacem per omnia haberent, *Veruntamen ſi quis* Anglorum *aliquem* eorum *interfecerit* † *ſi ſe ſuper hoc defendere non poſſet* Judicio Dei, *ſcilicet* Aquâ *vel* Ferro, *fieret de eo* Juſtitia. *Si autem aufugeret*, ſolveretur, *ut ſupra dictum eſt*. The Fine, by the foregoing Law, was forty-ſix Marks: of which the King had forty, and the Relations of the deceaſed the Reſidue, if the Murtherer could not be brought to Juſtice.

Death for Dane-murder by Canute. Kel. 121.

† po. *interfi-ceret*.

BRACTON gives the ſame Account of the Original of this Species of Crime. And it appears that *William*

liam the *Conqueror* revived this Law for the Security of his *Frenchmen*: as appears by the *Laws* of *William* the *Conqueror*, and by the Law of *H.* I. And it ſeems, from the Time of *Canutus*, the Law began to inflict *capital Puniſhments*. SANE quidem *tectorum exciſiones et incendia, apertæ Compilationes, Cædes manifeſtæ, Dominorumque Proditiones* ſunt *Jure humano* inexpiabilia.* So that now they began to admit the Diſtinction between Crimes expiable *Jure divino*, which all Crimes, how heinous ſoever, are, and Crimes expiable *Jure humano*. The not attending to this Diſtinction was the original of their impoſing *pecuniary Mulcts* in their former Laws; and henceforth they began to think it no offence againſt Chriſtianity to inflict *capital Puniſhments* for ſome offences. Howbeit, in the Caſe of Theft, there was great Latitude left in the Puniſhment, even to BRACTON's Time. *Pro* parvo *enim* Latrocinio *vel pro parvâ re* nullus Chriſtianus Morti tradendus: *ſed alio modo ſic caſtigatur, ne facilitatis venia* † *aliis præbeat materiam delinquendi; et ne maleficia maneant impunita: et ideo ſecundum rei qualitatem furatæ et valorem, ſi Fur convictus fuerit vel* Morti *tradatur aut Regnum abjuret, vel Patriam, Comitat', Burgum, vel villam; aut caſtigetur, et ſic caſtigatus dimittatur.*

L. 53. fo. 170.

L. 75. p. 205.

* The Privilege of *Commutation* taken away from other *atrocious* Crimes.

THEFT, to an Amount reputed great in thoſe Days, CAPITAL in the Time of BRACTON.

† ſ. Ne Venia Facilitas.

In the intermediate Times "between this and" *William* I. it appears that the offence of *Theft* was

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* *Compare this with the Crimes marked with* Text *Letter in the* Abſtract of Penal Statutes *annexed to the poſthumous Work of my revered Friend on the* Conſtruction and Polity of Priſons. *I find my Idea of the proper Limits of* capital *Puniſhment nearly correſpondent with this* Enumeration. *See alſo the* Analyſis. C. L.

puniſhed

Lamb. 160.

puniſhed with a *pecuniary* Mulct only; and indeed it ſeems, that as long as the *Decennary* Law continued in its full force, there ſeemed no neceſſity of puniſhing Theft with *Death*, becauſe there was no means of concealing the things that were *ſtolen*. But when, by the Inundation of People, the *Decennaries* were diſſolved, it was neceſſary, in caſe of *Theft*, to proceed to greater ſeverities.

Riſe of the Diſtinction between *Murther* and *Manſlaughter*, and of *Benefit of Clergy*.

And as the Law of *Murther* began in *Canutus*, ſo alſo now the *Diſtinction* began between *Murther* and *Manſlaughter*. The Law runs thus: *Si quis alium* præmeditatus trucidarit palam, *perempti cognatorum in poteſtatem dator: ſin cædis* inſimuletur *tantummodo, atque in excuſatione afferendâ ceciderit*, Epiſcopum *penes eſto ejus rei Judicium.*

Hence it came to paſs that the Laws relating to *Homicide* were reduced into Form by the *Clergy*, and conſtituted on the Plan of the *Moſaic Law*; for the Clergy ſtill taught that the Life of a Man could not be taken away but as warranted by the Laws of God; and therefore the Law of *Deuteronomy** became the *Pattern* of our Laws in the Caſe of *Manſlaughter*.

* XIX.

Hence it is, that in this Law of *Canutus*, in caſe of *apparent Homicide*, the Murtherer was put in the power

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Though neceſſary to proceed to greater ſeverities than Fine, *the humane and learned Author does not ſay it was neceſſary to make* Larceny *and* other *offences puniſhable with* Death, *in the kind and circumſtances of offence ſo puniſhable in* his *Time, and to which there has been great Addition* ſince.

of

power of the Relations of the deceased: and from hence the Appeal still continues to the next of kin, who was the Avenger of Blood according to the *Jewish* Law.

In the *Manour*, that is, ἐπαυτο φωρῳ in the *Fact*.

And the *Appeal* of the *next* of *blood*.

From hence also came the Resolution, that the Avenger of Blood must make *fresh Pursuit* after the offender: and it was a good Plea in *Abatement* to the *Appeal*, that the Heir had not made fresh Pursuit: which was plainly according to the *Mosaic* Pattern, which permits the *Avenger* of *Blood* to pursue the offender, and to slay him, if he overtook him before he got to the *City* of *Refuge*. But with us the Avenger of Blood was not permitted to carve out his *own* Revenge, as with them: because that part of the institution which permits the Avenger of Blood to slay the offender, *Lege Talionis*, was thought to be merely *political*, and permitted to the *Jews* merely for the *Hardness* of their Hearts: and was therefore thought to be abrogated by the *Christian Institution*, which seems to have *abolished* the *Lex Talionis*.

Matth. v. v. 28.

And by the Statute of *Gloucester* * it is provided they should not plead in Abatement the want of fresh Suit, if it was commenced within the *Year* and the *Day*. From hence, *Murtherers* being negligently prosecuted by the Relations, the Statute ‖ was made that they proceed at the King's suit within the Year and the

* 6 E. I. *Anno* 1278.

‖ 3 H. VII. c. 1. *Anno* 1486.

For the King could pardon where the suit is in the Name of the Crown: but not on Appeal.

Day;

Day; but then the *Auterfois acquit* or *condemned* ſhould be no Bar to the *Appeal*.

Eccleſiaſtical Interpretation of the *Moſaic* Law.

From the *Moſaic* Law came likewiſe the Diſtinction between *Murther* and *Manſlaughter*: though the *Eccleſiaſtical* Interpretation carried the Diſtinction much farther than the *Moſaic* Law: for by that, *whoſo killeth his Neighbour, that he hated not of time paſt; as when a Man goeth into a Wood, and the Helm of his Axe ſlippeth off and killeth his Neighbour there, he ſhall fly to the City of Refuge, that the Avenger of Blood may not ſlay him, inaſmuch as he hated him not in time paſt: but if any Man hate his Neighbour, and lie in wait for him, and riſe up againſt him, and ſmite him that he die, and "fleeth into one of the Cities of Refuge;"* ‖ he was not to be received.

Deut. xix.

Indeed the *Jews* interpreted the Diſtinction that was made in theſe ſeveral Laws to be "between" *voluntary* and "*caſual*" Homicide: but by the *Interpretation* that was put upon this Law by the *Clergy* of *England* they diſtinguiſhed it into *Murther* and *Manſlaughter*: and they deemed him to be a *Murtherer*, that in times paſt had conceived Hatred againſt his Neighbour, and laid in wait for him; and him to be guilty only of *Manſlaughter*, who, on a *ſudden Provocation*, had committed *Homicide*. The *intermediate* ſpecies of offence is not taken notice of in *Deuteronomy*: ¶ for there the

‖ *This is nearly, though not abſolutely a literal Quotation.*

¶ *It inſtances, however, in ſuch a manner as to leave an implied Medium between deliberate purpoſe from previous* Hatred *and mere Accident.*

Exam-

Examples are taken of the *higheſt* and *loweſt* offence: the firſt from *lying in wait* and *preconceived Malice*; and the other from killing a Man with the Helm of his Axe *againſt his Will.* But this killing on a *ſudden Provocation* being not taken notice of there, the *Chriſtian Clergy* placed it with the mildeſt.

The *Moſaic* Law inſtances only in *caſual* and *voluntary* Homicide.

It appears likewiſe by the Laws of *Canutus*, that the *Biſhop* was to judge of the Truth of the Fact, who, in ancient Times, ſat with the *Sheriff* or *Earl* of the County in the *Torn*, or *Criminal Court:* and if they judged it to be *Homicide*, he took him into the *Protection* of the *Church.*

Of the Juriſdiction of the Biſhop.

But in the *Norman* Times, this Juriſdiction in the *Temporal* Courts was taken away from the Biſhops, both by the *Law* of the *Conqueror* and the *Canon* of *Toledo*, which ordains, that *his qui in ſacris ordinibus conſtituti ſunt in* Judiciis Sanguinis *adjutare non licet.* And from henceforward the *Biſhop* did not preſide over the *Proofs* in *criminal* Caſes in the *Courts* of *Juſtice:* * and then the Criminals began to fly to the Church as to a *Sanctuary:* and there the *Biſhops* having inquired into the Crime, if they thought it *Homicide*, they would not deliver him up: if it was MURTHER, they *ſometimes* delivered him up to the *ſecular* Power: and this they vindicated upon the Pattern of the *Jewiſh* Law. And to prevent this it was one of the Conſti-

How the *biſhop* came to be excluded in *capital* cauſes from ſitting in judgement.

Conſt. Clarend. c. 11. 11 H. II. IV Comm. 264, 5.

* *They retire (with a Proteſt, ſaving their Right) before the* Queſtion *is put of* guilty, *or not* guilty, *in the* HOUSE *of* PEERS *in* Parliament, *in* capital *Caſes.*

tutions

tutions of *Clarendon*, that if any one "fled to" the Church, or any privileged Place, he must either come *ad standum recto vel quod cognoscat maleficium propter quod se teneat in Ecclesia:* and if he did so, he had liberty to *abjure* the Realm, and go into *Banishment*. BRACTON spends a whole Chapter to consider how this Law could be executed; and whether, in case they would not deliver up the Malefactor, they could enter the Church, and violate the sanctuary. And he determines they could not: because this would be *horribile, nefandum:* but he says, that the *spiritual* and *temporal* Powers ought to aid each other: and adds farther, that whoever carried *sustenance* to the offender should be put out of the King's Protection. And thus the Laicks were brought under the King's Protection and the civil Power; which punished all *voluntary* Murther with Death, and excepted the *invo-*

Abjuration of the Realm admitted in favour of those who had taken *Sanctuary*.

THUCYD. Duckeri, 1731. L. I. p. 86.

A similar Expedient was used against PAUSANIAS, *when, dreading an Impeachment, he fled to the Temple of* Minerva Chalciœcos. *They would not force him from thence: but shut up the* Entrance *by placing a ponderous stone against it.* Λεγεται δε αυτον μελλοντα ξυλληφθησεσθαι . . . . . προς το Ιερον της Χαλκιοικου χωρησαι δρομῳ και προκαταφυγειν. Ηνδε εγγυς το τεμενος. Και εις οικημα ου μεγα ὁ ην του Ιερου εισελθων, ἱνα μη ὑπαιθριος ταλαιπωροιη, ἡσυχαζεν. Το παραυτικα μεν ὑστερησαν τη διωξει, μετα δε τουτο τουτε οικηματος τον οροφον αφειλον, και τας θυρας, ἐνδον οντα τηρησαντες αυτον, και απολαβοντες εισω απωκοδομησαν προσκαθεζομενοιτε εξεπολιορκησαν ΛΙΜΩ. Και μελλοντος αυτου αποψυχειν, ὡσπερ ειχεν εν τω οικηματι εξαγουσὶν εκ του Ιερου ετι εμπνουν οντα. Και εξαχθεις απεθανε παραχρημα.

NEPOS. L. B. 1675. p. 84.

It is remarkable that in this Narrative there is nothing of the Abruptness or Obscurity, and little, if any thing, of the Harshness of Style and Composition observed in the general Manner of this great Historian. Allowing for the Difference of Dialect, the Passage more resembles Herodotus. Diodorus Siculus, Plutarch, *and* Nepos, *relate this Event with some difference. The first makes the* Mother *of* Pausanias *to have stopped the Entrance of the Temple, and with this* Nepos *agrees.* Plutarch *ascribes it to the Father. Adventitious Embellishments, when the Event became remote, and the original simplicity ceased to satisfy.*

luntary,

luntary, according to the true ſenſe of the *Moſaic* Law.

After which the Clergy challenged the Privilege not to be tried themſelves by any *temporal* Juriſdiction: and therefore the Puniſhments of *Murther* and *Theft* by Death (as to *Eccleſiaſtics*) were brought in by the King's Laws. LL. Canuti, *ubi ſupra.*

The *Eccleſiaſtics* alſo challenged an Exemption from *all ſecular* Power, even in Caſes of *High Treaſon*. Thus the *Quære* of the *Canoniſt*—*Nunquid* Clericus *committens Crimen* LÆSÆ MAJESTATIS *poſſit puniri per Principem aut Judicem ſecularem cum ſit temporaliter ſubditus?* Reſp. *de Jure loquendo*, QUOD NON: Clericus *enim non dicitur* proprie *committens Crimen læſæ Majeſtatis*, cum ſit, NON VERE SUBDITUS; *tamen* DE FACTO *Principes ſeculares plures ſervant contrarium*: but he reſolves the Clergy were to be *degraded*, before they were puniſhed (though it were *High Treaſon*) by the *ſecular* Arm. Struggle between the *Clergy* and the *Laity*.

But they came to this *Temper* in *England*, that for TREASON the *Benefit* of *Clergy* ſhould not be allowed, on the *Canoniſt*'s Notion, that they were not ſubject to the King: and therefore, in the Caſe of the Biſhop of *Carliſle*, arraigned for *Treaſon*, this pretended Liberty of the Church was over-ruled by the Judges: but in the Caſe of a *Murder*, though it was to be puniſhed by Death by the Laws of GOD, and the Flight of a *Levite* to the City of Refuge was not permitted BENEFIT of CLERGY gradually excluded in TREASON.

mitted (for the *Moſaic* Law had conſtituted the Cities of Refuge to be the Towns of the *Levites*); it was never to be abuſed for the Protection of a Murtherer; yet the *Clergy* claimed, even in *this* Caſe, an *Exemption* from the *ſecular* Laws.

"Thus then of TREASON."

But in all other Caſes of HOMICIDE and *Theft*, the *eccleſiaſtical* Juriſdiction was readily allowed; and if they challenged any *eccleſiaſtical* perſon, accuſed before the *ſecular* Judge of any of theſe offences, he was delivered to the *Ordinary*, who was to judge *de Corrigibilitate*; and if he adjudged him *corrigibile*, he appointed him a proper *Penance*, and after the performance of ſuch *Penance* he was *abſoiled*; but if the offender was judged *incorrigibile*, he was degraded.

When this was ſettled, the Diſpute aroſe, *who ſhould be Judge?* And the *Canoniſts* ſay, *Quod* Probatio *et* Cognitio num aliquis ſit Clericus *debet*' eccleſiaſticæ Juriſdictioni—*debet fieri coram* Judice eccleſiaſtico; *et non coram* Judice ſeculari. Though in *Lindw.* (which gives us many of our Inſtitutions) it is ſaid, Clericus *contra quem procedet* Judex ſecularis *pro aliquo delicto exhibet coram ipſo Judice* ſeculari *Jura ſua et inſtrumenta: et iis viſis Judex eum* remittet *ad ſuum Judicem* eccleſiaſticum, *ubi ſcil.*' &c.

This Privilege extended by the Clergy to all any way employed in the offices of the Church.

The *Clergy* extended this Privilege to all that had *primam Tonſuram*: as the *Clerk* that ſet the *Pſalm*, the *Door-keeper*, the *Exorciſt*, the *Subdeacon*, the *Reader*: and

and they being Judges who were *Eccleſiaſtics*, it was thought proper to reſtrain them within Bounds; and therefore the *Temporal* and *Eccleſiaſtical* Power joined in making the *Reading* before the *Secular* and the *Spiritual* Judge as the *Teſt* of their being *Eccleſiaſtics*, ſince no man could be preſumed to be an *Eccleſiaſtic* that could not read; and therefore the *Reading* was before the *ſecular* Judge, but the *Atteſtation* that he could read was by the *Ordinary*.

Hence derived the TEST, *num legat ut Clericus.*

But before he was tried whether he was an Eccleſiaſtic, he was tried for the *Fact*: for if he was found guilty of MURTHER by *Inqueſt*, the *Ordinary* could not claim him; becauſe, as has been ſaid, all *Eccleſiaſtics* in that Caſe ſuffered *Death*.

Trial for the *Fact* to precede Trial of *eccleſiaſtics*.

Anciently when any Eccleſiaſtic was indicted or appealed of any Crime ſhort of *Treaſon* againſt the King, the *Ordinary* might challenge him; but if the *Ordinary* did not challenge him, he was to be tried as any other *temporal* Perſon.

But the *Statute* of *Weſt.* 1. provides, that ſuch Perſons delivered to the *Ordinary* ſhould not be diſcharged without *Purgation*: and this was made by Articles exhibited againſt the offender, and his Anſwer to them in the *Eccleſiaſtical* Court. If he was found guilty of MURTHER in that Court, they *degraded* him; but if he was guilty of *Homicide*, he made his *Purgation* by *Penance* or *Commutations* for Money, as the *Ordinary* thought expedient.

C. 2. 3 E. I. *Anno* 1275. *Purgation* introduced in caſe of *Eccleſiaſtics*.

But becauſe by the Delivery to the *Ordinary* the *King* loſt the *Forfeiture* of his *Goods* and *Chattels*, and *Profits* of his *Land*, an *Inqueſt* was taken, to know *qualis ordinario deliberari debeat?* This created a great Miſchief to the Priſoner: for if he ſubmitted to *plead*, he could not be claimed by the *Ordinary*, having ſubjected himſelf, as a Layman, to the *ſecular* Juriſdiction: if he did not ſubmit to plead, he loſt his *Challenges* to the *Jury*; and the Inqueſt of the *Jury*, though he had no Liberty to plead, paſſed upon him, whereby his Goods and Chattels were forfeited.

C. 4.

Prisott, *Chief Juſtice* of the *Common Pleas* in *Henry* the VI.th's Time, ſet this on a better Foot: founding himſelf on the 25 *E.* III. which ſays, that all *Clerks*, as well *ſecular* as *religious*, from henceforth convicted before the *ſecular* Juſtices for other *Treaſons* or *Felonies* than againſt the King ſhall from henceforth freely have and enjoy the Privileges of Holy Church, and ſhall, without delay, be delivered up to the Ordinary demanding them.

So that he allowed them to *plead* to the Felony, and after *Conviction* the *Ordinary* might demand them.

How the *Demand* of *Clergy* became reſtricted to *Manſlaughter* and other inferior Crimes.

This introduced the Liberty for the Priſoner to demand his Clergy: and if, on the Inqueſt, he was found guilty of *Murther*, the Court did not admit ſuch Demand from the *Priſoner*, becauſe he was to *die* by the Law of God: and therefore in ſuch Caſes the Court

Court did not deliver him, unleſs the *Ordinary* did demand him; which, in ſo heinous a Crime, was *ſeldom* done for Laymen, nor even for *Clerks:* but Caſes of *Homicide* and *Theft* were looked upon as properly *corrigible* by the *Ordinary*; becauſe they were not guilty of *Death* by the Law of GOD: and therefore they allowed any Perſon of Education that could *read*, the *Benefit* of *Clergy*; and the *Ordinary* received ſuch Perſons to *Corrections* and *Purgation* by Money, becauſe they were not offences which by the *Moſaic* Conſtitution were puniſhable with Death.

But the meaner Perſons, not educated in Learning, and *who had no Money to make Commutation*, were generally given up to the *Temporal* Law.

There were ſeveral intermediate Statutes, by which they endeavoured to abridge this *Privilege* of the Clergy: the firſt was *de Bigamis*;† which was, that the *Biſhop* of *Rome* having made a Conſtitution that all Perſons *twice married* ſhould be excluded from *Clerks Privilege*;—that ſuch Perſons when convicted ſhould not be delivered as *Clerks*, whether they were *Bigamiſts* before or after that Conſtitution: after this Statute, when *Felons* arraigned challenged their Clergy, the Proſecutors, upon ſhewing that they were *Bigamiſts*, ouſted them of this *Privilege*. To defeat the Effect of this Statute, they procured another, that *Bigamy* ſhould be tried by the *Biſhop*, and not by the *Temporal* Law. The Statutes of *Clarendon*,‖ that forbid the taking ſanctuary whereby to avoid the *ſecular* Juſtice,

† 4 E. I. *Anno* 1276.

‖ *Temp.* H. II. A. D. 1164. Vi. 1Y Comm. 422.

were alſo enervated by *Articuli Cleri*: † for if a Clerk fly to the *Sanctuary*, he ſhould not be compelled to *abjure* the Realm: ſo that the Churches and privileged Places continued a ſanctuary for the Clerks themſelves.

C. 15. † 9 E. II. *Anno* 1315. II Inſt. p. 599. Ed. 4.

It has been likewiſe reſolved, that if a Clerk had *confeſſed* the Felony, and became an *Approver*, he ſhould not be delivered to the Ordinary; becauſe by ſuch Confeſſion he had ſubmitted to the *ſecular* Juriſdiction.

But the *Eccleſiaſtics* pretended that ſuch Confeſſions were *coram non Judice*; though it had been otherwiſe reſolved in the *Temporal* Courts, as Lord *Coke* obſerves; but the Statute of *Articuli Cleri* enacts, that he ſhall enjoy his Privilege, *notwithſtanding his* CONFESSION.

C. 16.

Recapitulation. And now the Law, amongſt *Eccleſiaſtics*, ſtood on this threefold Diviſion:

Firſt, *if a Clerk was convicted of* TREASON, *he was never delivered to the Ordinary*; for that would have given up the Prerogative of the King.

Secondly, *in the Caſe of* MURTHER, *he was delivered to the Ordinary, if demanded*; but then it was in order to be *degraded*, and for no other Purpoſe: for in a Crime puniſhed by the Law of GOD with *Death*, he

was

was not permitted to make any *Purgation*; but ſuch *Degradation* was taken in the Nature of the *Death* and *Deſtruction of the Clerk:* and therefore he was not put to *Death*; they did not intend he ſhould be *twice* puniſhed for the ſame offence: and BRACTON ſays, *Clericus, ſi de Crimine convictus degradatur, non ſequitur alia Pœna pro* UNO *peccato,—delicto,—vel pluribus ante degradationem perpetratis.*

Thirdly, *if the Clerk were convicted of any Felony except* MURTHER, *he might then demand the Benefit of Clergy:* and ſo they permitted any Perſon to do that could *read*; and ſuch Perſon was permitted to make *Purgation* before his Ordinary; and, if he *purged* himſelf, he was *acquitted.*

But if the Clerk *confeſſed* the Fact, he was delivered to the Ordinary, *abſque Purgatione:* for he, having *confeſſed* the Fact, could not deny it afterwards before the *Ordinary.*

To underſtand the Reaſons of theſe Diſtinctions, we muſt conſider what is formerly laid down: that in Caſe of *Blood* by the *Common Law*, the *Eccleſiaſtical Court* had *no Juriſdiction:* and therefore, when the Clerk was *convicted*, he could not be delivered to the Eccleſiaſtical Court to make *Purgation*, becauſe they had no Cognizance of the Cauſe; but he was delivered to them *abſque Purgatione*, in order to be *degraded* by them. And the *Sentence* of the *Common Law* was, *de-*

liberetur Ordinario, abſque Purgatione.—Fleta. *Si criminaliter agatur verſus Clericum, quamvis Clericus reſpondere noluerit in Foro ſeculari, Judex tamen Eccleſiaſticus cognitionem habere non potuerit nec regiam auferre Juriſdictionem, licet habere debeat Judicii Executionem: in Causâ enim ſanguinis non poterit Eccleſiaſticus Judex cognoſcere neque judicare, niſi irregularitatem committat; et quamvis neminem valeat Morti condemnare, degradare tamen potuerit crimine convict' et perpetuâ Carceris incluſione cuſtodire.* Upon ſuch Delivery the *Ordinary* not only *degraded* him, but put him in *priſon* till he obtained the *King's Pardon.*

l. n. poterit.

But if the *Ordinary* demanded him for a Clerk that was not ſo, he loſt his *Temporality:* becauſe it was *impeaching the Temporal Juriſdiction.*

But in all Caſes, except *Treaſon* and *Murther*, the *clerk* might himſelf demand his *Privilege:* and then he was delivered to the *Ordinary* without any Reſtriction: and by this Law of the Church he was to purge himſelf of that Crime by his own *Oath* confirmed with *twelve* Compurgators, *ſix* of which were *lay* and the other *ſix* CLERKS; and if he failed in his Purgation, he was puniſhed as if he had been convicted, or had confeſſed the Crime.

When he failed in his Purgation, the *Ordinary* judged if he "were" *corrigible* or *incorrigible:* if the former, they impoſed *Penance*, and on his Performance or *Commutation*, he was *aſſoiled*; if the latter, he was *deprived* and *impriſoned.*

By

By the *Canon Law*, if the Criminal was *notorious*, they proceeded to ſentence *abſque Purgatione.*—*ſuper* notorio *nulli erit induenda Purgatio:* ſc. *tantum Condemnationis promulganda ſententia: cum patrati ſceleris Evidentia neque Accuſationis clamore indigeat.*

Lay perſons offending a *ſecond* Time *excluded Clergy*, on what Principles.

The *Temporal Court* taking notice of the *Canon Law*, and likewiſe that the *Ordinary* could not take notice of the Judgement of their Court, when a Perſon became infamous by a *ſecond* offence, they were wont to deliver him *abſque Purgatione*; and therefore an *infamous* Thief was ſo delivered.

And by the 4th of *H.* IV. it is enacted, that a *Clerk* that is a *Traitor* or *infamous* ſhould be delivered to them *abſque Purgatione.*

Anno 1402.

But as the *Clergy* had *notoriouſly abuſed* their Privilege, it is enacted that none but Perſons in Orders ſhall have the Benefit of their Clergy above *once:* and the "*Manſlaughterer*" ſhall be marked with an M, and the *Felon* with an F. and that Perſons in Orders demanding their Clergy, ſhall ſhew their Orders at a day given by the Court.

By the 28th of *H.* VIII. ‖ and 32 *H.* VIII. Perſons in Orders ſhall receive the Benefit of Clergy but once.

C. 1. § 3. *Anno* 1536.

V. 23 H. VIII. c. 1.

That is, one who became ſo by the Proof of his perſiſting to offend, after having once had advantage of the Privilege on a former Conviction.

" But this is held to have been virtually repealed " by a ſubſequent Statute."

8. 7. *Anno* 1576. Delivery to the *Ordinary* taken away.

By 18 *Eliz.* the Perſons admitted to the *Benefit of Clergy* ſhall not be delivered to the *Ordinary*, but enlarged out of Priſon by the Juſtices.

IV Comm. c. 28. Iriſh St. 11, 12, & 13 J. I. c. 3. § 2. 21 J. I. c. 6. Anno 1623.

* " No Proviſion had been made for the extenſion of " a ſimilar legal indulgence to that part of Society " which is peculiarly intitled to Lenity till early in the " *laſt* Century: when it was enacted, that *Women*, " convicted of *ſimple Larceny* under the value of *ten* " *Shillings*, ſhould, for the *firſt* offence, be *burnt* in " the hand, and farther puniſhed by *whipping*, putting " in the ſtocks, impriſonment not exceeding one year.

3 Car. I. c. 4. 16 Car. I. c. 4. 3 & 4 W. & M. c. 9.

" This Act in *England*, *temporary* in its *commencement*, " was continued, with others paſſed in the ſame ſeſſion, " by the two Statutes of the ſubſequent Reign. This " was afterwards extended to *Women* guilty of any

---

* *It is greatly to be regretted if the Remainder of this Argument be irrecoverable: till it be retrieved, if that be yet poſſible, I have ventured to add a Supplement of what may be ſuppoſed the probable import of the Argument. It is needleſs to add that this ſupplemental part pretends to no Authority; and being carefully diſtinguiſhed, it can miſlead none. It muſt be acknowledged that the Boundary which divides* Manſlaughter, *on the Facts found in this Caſe, from* Murther, *is ſuch (if it be any) as demands to be viewed with much ſteadineſs and attention to render it diſcernible: nor will I take on me to affirm that the opinion here hazarded was that of the* Chief Baron. *Yet a Conjecture may be founded on that part of the Argument which remains; for if he had thought it either within the Statute or* Murther *at Common Law, it is difficult to imagine that he would have entered ſo copiouſly into the Hiſtory of the* Privilege *of* Clergy, *a* Privilege, *on theſe ſuppoſitions,* inapplicable *to the Caſe.*

" cler-

" clergyable Felony, with liability to impriſonment " not exceeding the Period aſſigned by the former " Statute.

" At length this Privilege was ſet more completely " yet, on its true Ground, as a Benefit to be claimed by " the ignorant and illiterate, to whoſe circumſtances it " was chiefly applicable, and who certainly have the " faireſt pretenſions to it. The *Teſt* by *reading* was " accordingly *aboliſhed:* but when the exemption from " capital Puniſhment became thus extenſive, it was " neceſſary to qualify this indulgence, ſo that it might " not degenerate into a contrary extreme: and there- " fore, by the ſame Statute, a diſcretionary *Commit-* " *ment* for any time, not leſs than ſix Months nor ex- " ceeding two Years, is provided.

4 & 5 W. & M. c. 24.

1 St. 9 A. c. 6. § 1. 8 St. 5 A. c. 6. *Anno* 1707.

" But the Benefit, in its preſent Amplitude, does " not extend to a perſon within the Statute of *ſtab-* " *bing* who actually gave the ſtab: and therefore it is " neceſſary to diſtinguiſh whether the offence in this " Caſe be MURTHER;—or *Homicide* by *ſtabbing* within " the purview of the Statute, (both which are excluded " from Clergy) or whether it be Manſlaughter, as at " Common Law, not affected by the Statute, in which " Caſe the Benefit of Clergy intervenes for the of- " fender, if he has not already pleaded and received " that Privilege for ſome other clergyable offence.

Vi. infra, B. III. Ch. VII. T. 7. et 13.

" Whatever may be conjectured, no preceding Ma- " lice between theſe Parties is found by the ſpecial " Verdict.

" After

"After *Dwyer* had joſtled againſt *Roſs*'s Child on "the Bridge, and *Roſs* ſeized his Bridle, *Dwyer* was "then guilty by drawing and wounding *Roſs*, of ſuch "violence, as, independent of the Statute, would "have been capital, had *Roſs* then been ſlain, or had "the Jury found that he died in conſequence of *that* "Wound. But the Verdict negatives ſuch Concluſion "by referring the Death of *Roſs* to the Wound after-"wards given.

"It appears on this Record, that after an *Expoſtu-*"*lation* from the *Wife* of the *deceaſed*, DWYER re-"turned to his Horſe, without any intention, ſo far as "is expreſſed by the Verdict, of committing any far-"ther violence: and the ſword wanting the *ſcabbard*, "this was reached to him by one of the *Croud*, when "unhappily *Margaret*, the Wife of the deceaſed, "ſeizes and breaks the ſcabbard, and then throws it at "*Dwyer*. He, however, remounts his Horſe, and "*ſheathes* his ſword in the *broken* ſcabbard, which ſeems "to imply a Diſpoſition, at that Moment, to com-"mand his riſing Paſſion, and to reſtrain himſelf from "again proceeding to Extremities. But Wrath being "thus rekindled, angry Words take place between "him and *Roſs*; and from this moment every circum-"ſtance is material to the forming of a Judgement on "the legal Quality of the Caſe. The Jury find that "he diſmounted in a Paſſion, and returned to *Roſs* "with his *drawn ſword* in his hand; that *Roſs* endea-"voured to defend himſelf by ſeizing the Stick of "one of the By-ſtanders, but could not. *Dwyer* then "aſſaulted and BEAT him with the ſword; uſing it

"con-

" conſequently *not* as a ſword, to thruſt and ſtab, but as " a Stick or Cudgel. The Jury farther find, that (in " conſequence of this Aſſault, and the Reſiſtance of " *Roſs* in his own Defence) they cloſed: *blows* were " *mutually* received and given; and in the ſtruggle " *Dwyer* (then for the *firſt* time in *this* Conflict, and " the former being ended ſeems not to affect the Caſe,) " gave the *fatal Stab*, of which Roſs died.

" From the ſuddenneſs of the Conflict, the Paſſion " on each ſide, the Blows reciprocally given, and the " other circumſtances, it does not ſeem that at *Common* " *Law* this killing would be other than *Manſlaughter*; " though *Manſlaughter* ſo circumſtanced as to deſerve a " ſtrict *Animadverſion*. The Point for conſideration, if " this be admitted, is, whether it is ſuch a *ſtabbing* as " falls under the Statute.

" The ſolution of this muſt turn upon that Clauſe " of the Statute which relates to the ſtabbing of any " perſon not having then firſt ſtricken: and as this " Statute does not create a new Felony, but renders " Evidence concluſive againſt the Priſoner, where the " ſtabbing is circumſtanced as the Act expreſſes, it has " always in the *Engliſh* Courts, where it exiſted much " earlier, been liberally conſtrued in favour of Life, " ſo as not to hazard carrying a Preſumption of this " kind farther than the manifeſt and neceſſary intent " of the Legiſlature.

" This

"This is the known Rule of Conſtruction in all "Statutes which vary the Rules of the Common "Law; particularly in criminal, and moſt of all in "capital Caſes: it is exemplified in the Interpretation "which has been given to the former part of the "Clauſe now under conſideration, "not having then a "weapon drawn." *Inſtruments* of *Offence* have been "conſtrued to be weapons drawn, that are not within "the ſtrict grammatical import, or within the com-"mon intendment of thoſe Words, becauſe they are "within the general Reaſon of the Exceptions to the "Rule of Evidence introduced by the Statute.

Jones (W.) 340. *Byart's Caſe.

"In the *Engliſh* Courts there has been a Deciſion on "the Clauſe upon which the preſent Queſtion turns: "the Judges there thought, one only excepted, that "not having firſt ſtricken required that the party "ſtabbed ſhould have ſtruck firſt, ſhould have given "the firſt blow in the Affray: though it is obvious "that if ſuch were the meaning of the Legiſlature, "it might have been naturally and unambiguouſly ex-"preſſed without an inverſion of the order of the "words. The Judge who differed thought therefore "that it meant, not having *ſtruck* before the mortal "wound given. And this ſeems to be the ſenſe moſt "agreeable to the Principles of Interpretation applied "to Statutes which affect Life, and at the ſame time "moſt conſonant to the order and apparent import of "the expreſſions uſed in the Act.

Richardſon. Vi. *Holt*, ſimiliter *Skinn.* 668.

"It is

"It is obvious that if the firſt-mentioned of theſe "Conſtructions be adopted (independent of the firſt "Conflict) the Priſoner is not within the Benefit; for "it is found that he gave the *firſt* Aſſault: but if the "ſecond (which ſeems to be the true Conſtruction) be "admitted, he is; for the *deceaſed* has ſtricken *before* "the mortal Wound given.

"If this Reaſoning be juſt, it follows that the Pri- "ſoner, on the Verdict before the Court, is guilty "only of MANSLAUGHTER: but any finding of a "*thruſt* made by *Dwyer* in the commencement of *this* "*Conflict*, or of a Quarrel *ſought* by him, would have "clearly ſet this Caſe within the legal Definition of "MURTHER."

2 Ld. Raym. 1488, 9. Foſt. D. II. C. V. § 3. Kel. 61.

The Caſe in Skinner *has much reſemblance to this: and there* HOLT *inclined ſtrongly to the Conſtruction of* Richardſon, *which* FOSTER *alſo favours; but he thought, though not within the Statute, it was Murther at* COMMON LAW. *But there being Doubts whether the* Verdict *were not* incomplete, *and a* venire de novo *neceſſary, no Judgement was given: poſſibly, on farther Conſideration, it might have been thought doubtful whether the killing were* Murther *at Common Law, if the firſt* ſtriking *with the* ſword *was a* Blow, *as the Word ſeems to imply, and not a Thruſt: a Blow not likely to kill, nor with that intent given; but rather to intimidate. However that Caſe was ſtronger againſt the Defendant, upon the ſpecial finding, than the preſent.*

Keate's Caſe. Skinn. 666--8. M. 8 W. III.

ABSTRACT

OF

MR. *LOCKE*'S ESSAY

ON

HUMAN UNDERSTANDING.

——— "Ne te quæſiveris extra;
Eque ſuis latebris demerſum protrahe VERUM."

ADVERTISEMENT

TO

THE DUBLIN EDITION.

IT would be ſuperfluous to add any thing to recommend the following ABSTRACT of Mr. LOCKE's *celebrated* Eſſay on Human Underſtanding, *after I have aſſured my Readers that it was drawn up by no leſs a Man than the late Lord Chief Baron GILBERT.*

"To this Advertiſement the preſent Editor only "adds, that as the Tract was communicated to him "by a reſpected Friend, and is now, he believes, little "known, he agreed in ſentiment with that Friend (to "whom he is obliged alſo for the Diſcovery of the "*Portrait* of GILBERT, and for the Knowledge of "his having been a Fellow of the ROYAL SOCIETY) "that it might with obvious Propriety accompany "the LAW OF EVIDENCE. That in itſelf it "merited to be reprinted, he believes few, if any, "of the Readers will deny."

ABSTRACT

OF

MR. *LOCKE*'S ESSAY

ON

HUMAN UNDERSTANDING.

MEN come into the World without any IDEA or Principle, either ſpeculative or practical: but all our Ideas ariſe either from SENSATION or REFLECTION. H. U. I. 2. II. 1. § 2, 3, 4, 5.

An *Idea* is whatſoever is perceived or thought on: and is either, Ibid. 8. § 8.

"*A.*" I. SIMPLE, II. 2.

"*B.*" II. COMPLEX. — 12.

"*A.*" *I.* A SIMPLE IDEA is one uniform Appearance, Repreſentation, or Perception of the Mind: without Alteration or Variety.

Here three Things are to be conſidered:

Firſt, the Manner of their *Conveyance* or being in the Mind;

Secondly, the *Objects* from without that affect the Mind;

Thirdly, the *Mind* itſelf.

FIRST—*The Manner of their Conveyance into the Mind:*—

Some *ſimple Ideas* come in by *Senſation* only; ſome by *Reflection* only; ſome both by *Senſation* and *Reflection*. II. 7.

II. 3.

1. *By* SENSATION *only:* and theſe either, *by the Senſation of one Senſe*; as Light and Colour by the Eye, * Sound by the Ear, ¶ Taſte ‖ by the Palate, Odours by the Noſe; † and the Ideas of Solidity and other tangible Qualities, as Heat, Cold, &c. by the Touch;—

* T. H. M. C. II. § 4.
¶ § 5.
‖ T. H. M. C. II. § 2.
† 3.
° C. II. § 1. prop. 14.

II. 5.
‖ II. 13. § Ibid. § 5, 6.
V. inf. Prim. Qual. — 6.

Or, *of ſeveral Senſes:* as the Ideas of Motion and Reſt; Space, ‖ Extenſion, and Figure. §

2. *By* REFLECTION *only*, as *Perception* ‡ or Thinking; *Volition* † or Willing; and their ſeveral Modes.

‡ II. 21. § 5.
† Ibid.

3. *Simple* IDEAS, *both by* SENSATION *and* REFLECTION: and theſe are, Pain, * Pleaſure, Exiſtence, ° Unity.

* II. 20.
° Ibid. 7. § 7.
Ibid.

SECONDLY, OBJECTS *from without that affect the Mind:* and they are,

II. 8.

1. *Primary Qualities of Bodies:*—ſuch as Motion, Reſt, Figure, and Texture; which are in the Bodies themſelves, whether perceived or not:

Secondary Qualities.
IV. 3. § 11.
II. 8. § 13---25.

2. *The ſeveral Diſpoſitions in Bodies to produce ſeveral Senſations in us*; whence Colours, Sounds, Taſtes, &c.; which are indeed only *Senſations* produced in the Animal by the Operation or Action of ſuch *primary* Qualities.

THIRDLY, *the* MIND *itſelf:* and therein are three Faculties.

1*ſt*, *of*

1*ſt*, *of* PERCEPTION; 1. 9.

2*dly*, *of* RETENTION; *which is twofold:* —10.

1ſt, Either the keeping "of" the ſame Ideas actually in View, which we call *Contemplation*; or, —§ 1.

2. Reviving them when they are gone; which we call *Memory*. —§ 2---10.

3*dly*, *of* DISCERNMENT: which contains a threefold Power: 11.

1. of *comparing* the ſeveral Ideas, and on ſuch Compariſon obſerving their Reſemblances, which is called, *Wit*; or obſerving their manifeſt Differences, which is called, *Judgement:* —

2. The Power of *compounding* our Ideas: which is, ---§ 6.

1. By carrying ſeveral ſimple Ideas into the ſame Repreſentation; or,

2. By the *Repetition* of the ſame Idea; which is called enlarging:

3. The Power of *abſtracting:* which is the ſeparating of any Idea from the Circumſtances of real Exiſtence; as from Time, Place, and other concomitant Ideas. §9.

"*B.*" II.

So exquiſite is the ſtructure of our minds, that a whole group of ideas ſhall ſo perfectly coaleſce into one as to appear but a ſimple Idea; and ſingle Words may be ſo connected with ſuch groups as to excite them with the ſame certainty and diſtinctneſs as if they had been originally ſimple ſenſations.

How complex, for inſtance, are the ideas expreſſed by the terms which denote the ſeveral employments, offices, *and* profeſſions. *The ideas annexed to theſe terms*

II. 12. "*B.*" II. COMPLEX IDEAS *conſiſt of ſeveral ſimple Ideas united in the ſame Repreſentation, Appearance, or Perception:* and they either come into the Mind thus united, *from the Operation of Things without us*; as the Idea "of" Solidity and Figure is cauſed by the ſame Ball; therefore in the *complex* Idea of the Ball we "conſider" ſuch Ideas as co-exiſtent and concomitant; or elſe,

Conceive.

2. When ſuch *ſimple* Ideas *are united by the Mind*; as in the Idea of Law, Obligation, "Evidence," &c.

Complex Ideas are of three Sorts:

Ibid. —— §. 3. 1*ſt*, *of* MODES;
2*dly*, SUBSTANCES;
3*dly*, RELATIONS.

—— § 4. FIRST, *of Modes:* which are again twofold:
1*ſt*, *ſimple*;
2*dly*, *mixt*.

—— § 5. Iſt, *ſimple Modes* are the ſeveral different Manners under which any *ſimple* Idea may appear to the Mind: and theſe either come in,

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muſt be an epitome of the definitions *of them; and if they be acquired without definitions, by means of a ſeries of* obſervations, *the ideas will be ſtill more complex.*

Let a child be introduced to the theatre, and ſee a company of perſons from time to time in a great variety of characters, and let him be told that he muſt call them players. *That word will excite an epitome, as it were, of all that he has ſeen them perform: and if he attend to that complex idea, even the features and moſt ſtriking geſtures of the principal performers will be conſpicuous in it: and by degrees, as all theſe particulars get intermixed and completely aſſociated, whatever belonged to the ſeparate perſons will be dropped, and ſomething will remain annexed to the term, when it is explained with due preciſion, that had been obſerved in them all.*

1. *By Senſation only:* as the ſeveral Modes of *Space*, II. 13.
a Yard, a Furlong, a Mile; or, ſet out by viſible Marks and Boundaries, as the ſeveral Places of Bodies, or "as" the ſeveral Modes of Numbers, a Score, a Groſs, a Dozen.

2. *By Reflection only:* as the ſeveral Modes of *thinking*, which are either, II. 19.

1. *Without Pain or Pleaſure*; Ibid. 20.

2. *Or with it.*

1. WITHOUT *Pain or Pleaſure:* and whoever obſerves his Mind, will find a perpetual Revolution of Ideas while he is awake. The ſtopping "of" any of them, and conſidering it on all ſides, we call

Attention; ‖ ‖ II. 10. § 3.

The letting "of" the Mind run adrift in the conſtant Rotation of Ideas and Objects before us is called

Remiſſion; † — 19. § 3, 4.

And there are in the Mind conſtant Degrees of *Attention* and *Remiſſion*, according to the different Degrees of Conſideration the Mind employs concerning the Objects before it.

2. *The Modes of thinking* WITH *Pleaſure and Pain:* and theſe are called the *Paſſions*. The Pleaſure we II. 20. § 3.

This is the Proceſs that is called, Abſtraction: *and it is by means of this proceſs chiefly, that we acquire thoſe ideas which have been referred to* Reflection; *their deduction from ſenſible ideas being too remote and obſcure to be apparent, or ſo much as ſuſpected, at firſt ſight.* PRIESTLEY's 3d Introd. Eſs. to the THEORY of the H. MIND, xxxiv, v.

find in any Idea, preſent " or" abſent, we call,

Ibid. § 4. LOVE;

V. HOBBES on H. N. C. VII. and IX. The Pleaſure we find in the Thought of any future Enjoyment that we think probable to affect us, we call,

— § 9. *Hope*;

The Pleaſure we find upon the near Approach of any Pleaſure, of whoſe Poſſeſſion we think ourſelves aſſured, we call,

— § 7. *Joy*;

Whatſoever does or is like to affect us with *Pleaſure*, we call,

GOOD;

The Thought of Pain, which any Thing preſent or abſent is apt to produce in us, we call,

— § HATRED or *Averſion*;

The Uneaſineſs we find upon the Abſence of any Thing that might affect us with Pleaſure, we call,

— § 6. *Deſire*;

The Uneaſineſs of Mind upon a Good loſt, which we might have longer enjoyed, we call,

— § 8. *Sorrow*;

The Uneaſineſs of Mind upon Thought of future Pain, we call,

— § 10. *Fear*;

The

The Uneaſineſs of Mind on the Thought of a Good we deſire, obtained by another, we call,

Envy; — § 13.

If ſuch Good relates to the Enjoyment of Men and Women, it is called,

Jealouſy;

A ſudden Uneaſineſs of Mind, on a ſudden Pain produced in us by another, together with a certain Purpoſe to produce Pain in return, is called,

Anger; — § 12.

If conſtant, and the Purpoſe of returning Pain be continuing, it is called,

Malice;

The Uneaſineſs that arrives from the Thought of any unattainable Good, " or" which is ſuppoſed to be ſuch, " or" from the Dread of any Evil really inevitable, or ſuppoſed ſo to be, is called,

" *Deſpondency, or Deſpair*; — § 11.

WHATSOEVER *cauſes Pain, or is likely to produce it in us, is called,* BAD, *or* EVIL. II. 21. § 42.

3. *Simple Modes coming in by Senſation and Reflection:* hence we have the Ideas II. 21.

1. *of Power,* II. 14 & 17.

2. *of Time,* § 5. —— Ibid. § 28.

3. *of Eternity,*

II. 17. 3, 4. 4. *of Infinity.*

1. *The Idea of* POWER: ‖ which is formed from the Ability that we find in ourſelves of *ſtopping any Idea* in the Revolution of Ideas within us; or the "Ability," by a Thought, of *moving our Bodies:* which is called,

The WILL.

The *Power* of acting or *not acting* according to ſuch *Determination* of a Man's *own* Thought, is called,

II. 21. § 22. *Liberty.*

So that *Liberty is the Abſence of all Impediments that hinder acting or not acting, according to the Preference of his own Will.* ¶

II. c. 21. § 31——40. That which moves the Will is

Uneaſineſs;

But ſuch Motions may be controuled by the Power we have within us of omitting any Action till we have conſidered its *Conſequences,* and find them either

Good or *Evil.*

‖ *In fact the Idea of* Power *is the ſame complex Idea with that of* Cauſation *or* Efficiency, *derived from Experience and Obſervation in the innumerable inſtances which ſurround and perpetually ſtrike us.*

T. H. M. 3d Introd. Eſſ. p. xxxvi, vii. Hobbes, in Prieſtley's Diſquiſitions, II. 2.

¶ *Liberty is the Abſence of all Impediments to Action that are not contained in the Nature and Quality of the Agent.*

The

The acting or not acting according as the *Judgement*, upon a due and impartial Conſideration, doth find ſuch Act or Omiſſion to be *good* or *evil*, is that wherein conſiſts,

INNOCENCE;

And the not ſuſpending "of" ſuch Action till we have conſidered it as we might do, is called,

GUILT.

2. *The Idea of* Power *from* Senſation *is, when there is any Alteration in our ſimple Ideas by the Action of Bodies one upon another:* that Body which *makes the Alteration* we conceive to have the *Power* of making it, and the other a Power of receiving it. II. 21. § 4. Vi. N.

Of TIME.

2. *of* TIME: *which is a certain Revolution of Ideas in our own Mind, meaſured by the Motion of Things without; and chiefly by the Motion of the heavenly Bodies, as being more conſtant and equal.* II. 14. § 17--- 21, &c.

Of ETERNITY.

3. ETERNITY *is the Repetition of ſuch ſeveral Revolutions, together with a Reflection on our Power to add on without coming to an End.* II. 14. § 28.

Of

Of Infinity.

I. 17. 4. Infinity *is the ſame Repetition of our Ideas of* Space *or* Number;—"*i. e.*" with a Reflection on our own Power to add on without coming to an End

And ſuch Repetition of our Idea of *Space* is, by a peculiar Name, called,

——Ibid. § 3, 4. Immensity.

II. *Of* mixed Modes:

II. 22. § 2. Which are, *ſeveral diſtinct ſimple Ideas united into the ſame Combination by the Mind:* and are therefore called *Notions:* as a Lie, Obligation, Law, "Proof," *&c.* And theſe the Mind unites for the greater Diſpatch in the Buſineſs of Civil Life: and therefore only conſiders the *poſſible Union* of ſuch *ſimple* Ideas; whether it has ever ſeen them actually ſo united or not.

II. 12. § 6. Secondly, *the Ideas of* Substances: and theſe are either,

1*ſt*, *ſeparate*; or,
2*dly*, *collective.*

1*ſt*, *ſeparate Subſtances:* and that is, *the Union or Co-exiſtence of ſeveral ſimple Ideas in one and the ſame Place:* which is all the Notion we have of *Subſtance.*

Thus

Thus the Union of the Idea of Extenſion, Solidity, Figure, and a Diſpoſition to produce the Idea of Colour in us, is what we call,

Body; II. 23. § 3.

The Union or Co-exiſtence of the Ideas of Perception, reflecting, chuſing, and Self-motion, is what we call,

Spirit; Ibid.

But what are the *Subſtrata* of theſe Properties and Powers "is" to us equally unintelligible.

2*dly*, *collective*:

Which is, when ſeveral Subſtances are collected into the ſame Repreſentation: as an Army, Triumph, Proceſſion, *&c.*

THIRDLY, *of* RELATIONS: which is, *the comparing of ſeveral Ideas, whether ſimple or of Modes, "or" Subſtances one with the other, and conſidering the Denominations which may ariſe from ſuch Compariſon.* II. 25.

For ſince the Order of Nature is ſuch that there is a Dependence of Things one upon another, ſo do they convey to the Mind an Idea of ſuch Dependence: and whatever Notion we have of ſuch Dependence of

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The Term Thing *or* Subſtance *ſignifies nothing more than that to which* Properties *are aſcribed; and is itſelf abſolutely unknown, and incapable of ſuggeſting any Idea whatever. For when we exclude all* Properties, *we at the ſame time exclude from our Mind all Ideas of* Subſtance, *and have nothing left.* III. Diſq. 17.

Things

Things one on the other, or of the Connection or Repugnance of Ideas one to the other, gives us the Idea of *Relation.*

All Words that refer to a certain Standard, either of Duration or Size, are relative Terms: as old, young, ſtrong, weak, &c.; which relate to the uſual Duration or Conſtitution of each living Creature, as the Standard to which we compare the Thing mentioned.

II. 26. *But* the moſt noted *Relations* are theſe:

— 27. 1*ſt*, *of Cauſe and Effect*;

— 28. 2*dly*, *Identity and Diverſity*;

3*dly*, *Moral Relations*;

4*thly*, *the Relations of our Ideas themſelves.*

1*ſt*, *of* Cause *and* Effect.

V. ſupra, p. 10. and L. P. U. XIII. *That which produces any ſimple* "*or complex*" *Idea* "*whether of Subſtance, of Mode, or of Relation,*" *we call* Cause; *and that which is produced we call the* Effect.

2*dly*, *of* Identity *and* Diversity.

Identity cannot well be defined, but by Induction of Particulars, which differ according to the Subject Matter to which the Term is applied.

And here the *Identity* of *Bodies* ariſes from the Sameneſs of Parts, which produce the ſame ſimple Ideas in the Beholder;

The

The *Identity* of *Vegetables* ariſes from the ſame *Organization* of the Parts, whether exactly conſiſting of the ſame Matter or not;

Identity of *Animals* conſiſts *in the ſame Organization of Parts and the ſame conſtant and continued "individual" Life.*

And the *Identity* of *Perſon, Mind,* or *Spirit, conſiſts,* as far as we can apprehend it, *in having the ſame Conſciouſneſs of Ideas, Powers, and Actions,* "whether that Conſciouſneſs be univerſal or partial, continued or renewed."

3*dly, of* MORAL RELATIONS;

The Notion of which ariſes *from comparing our Actions to a Rule:* and that is threefold:

1*ſt, the Laws of the Country*;

2*d, the Laws of Opinion or Reputation*;

3*d, the Law of GOD:* which is twofold:

1. *Natural,*
2. *Revealed.*

1. *The Law of Nature*; which is, *the Rule which Reaſon "immediately" diſcovers to us touching the Fitneſs or Conveniency of any Action.*

2. *The Law revealed*; which is *a more full and explicit Diſcovery of our Duty, on more extenſive Motives, and authoritative Sanctions.*

FOURTHLY,

II. 29,——33. 4thly, the RELATIONS *of our* IDEAS *themſelves:* and they relate either,

1. *To the Perception of our own Minds;*

2. *To the Things they are ſuppoſed to repreſent;*

3. *The caſual "or aſſociated" Relations of ſuch Ideas one to another "obtaining" in the Mind.*

I. 1. *Of* IDEAS *relating to the* PERCEPTION *of our own Mind:*

And they are ſaid to be either,

II. 29. (1) *Clear*, or
(2) *Confuſed.*

1. *A clear Idea is that wherein the Mind perceives a Difference from all others.*

2. *A confuſed Idea is ſuch as is not ſufficiently diſtinguiſhable from other Ideas different from it.*

§ 4——16.

II. 2. *Of* IDEAS *relating to* THINGS *they are ſuppoſed to repreſent:* and they are,

30. (1) 1. *Real*, or
§ 5. 2. Fantaſtical.

31. 2. 1. *Adequate*,
2. Inadequate.

3. 1. *True*,
2. Falſe.

1. *of*

1. *Of* REAL *or* fantaſtical IDEAS.

1. *All our ſimple Ideas are real:* becauſe produced by the Operation of Things in us. II. 30. § 2.

2. *Mixed Modes are all real, being a Combination made by the Mind*; if the Co-exiſtence of ſuch Ideas be only *poſſible*. —— § 4.

3. *The Ideas of Subſtances are real, if we have ever found the ſimple Ideas "of which they conſiſt" come into our Mind "neceſſarily" ſo united "from actual Experience and certain Obſervation of any Subſtance;" otherwiſe they are* fantaſtical. II. 30. § 5.

2. *Of* ADEQUATE *and* inadequate IDEAS.

a *Adequate Ideas are ſuch as perfectly repreſent thoſe Archetypes or Patterns to which the Mind refers.* II. 31. § 1.

b. Inadequate *Ideas are a partial or incomplete Repreſentation of ſuch Patterns.* Ibid.

1. "*Adequate univerſally.*" { 1. *All ſimple Ideas:* § 2.
2. "*Adequate abſolutely.*" { 2. *All mixed Modes:* becauſe they refer to no Archetypes or Patterns; but only to a certain Combination made in the Mind: § 3.

3. "Inadequate *relatively.*" But ſo far they may be inadequate as they refer to a ſuppoſed Combination made in the Minds of other Perſons ſignified under the ſame Name. § 4.

4. In-

§ 6,——13. 4. Inadequate *univerſally* to us. *All Ideas of Subſtances:* becauſe they have reference to Patterns whoſe real Eſſence we know not.

3. *Of* TRUE *and* falſe IDEAS.

II. 32 § 4, 5. a. *Ideas are ſaid to be* TRUE *that are conformable to real Exiſtence*;

b. falſe, *that have no Conformity to ſuch Exiſtence any where found.*

§ 9——12. And, *relatively to others*, our Ideas are ſaid to be true, when they are conformable to the Ideas ſignified under the ſame Name by others: "*but this is obviouſly* "*an hypothetical and precarious Truth: or, in other Words, an Acquieſcence of Opinion.*"

II. 33.* T. H. M. C. I, II. § 23. § 1. prop. 13. § 2. prop. 15, 16. § 3. pr. 18. § 4. pr. 20, 1,2. § 5. pr. 24,5,6. § 6. pr. 28. *et paſſim in toto*, and Introd. Eſſ. II.

III. *Of* CASUAL* *or* ASSOCIATED RELATIONS *of ſuch Ideas one to another* "*obtaining*" *in the Mind.*

And this is by *Cuſtom* "*or Habit.*"

1. The putting together of Ideas according to their apparent or probable Agreement or Diſagreement is,

Reaſoning;

2. The connecting of independent Ideas by Cuſtom, which have no viſible "or perceived juſt" Connection in themſelves is an Infirmity of the Mind that wants a Name, *unleſs it be called*, FALSE ASSOCIATION *or habitual* PREJUDICE; as where a Man has an Imagination of an infallible Man, by Education and Cuſtom.

The connecting "of" *repugnant* Ideas is MADNESS "*or Deliratio*; unleſs where it is done implicitly in compliance with received Authority, and then this Weakneſs, Error, or Pravity of the Mind, which ever it may be, *alſo wants a Name.*"

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* *There is nothing* caſual, *in the ſenſe of ſomething that happens without* Cauſe *or* Connection: *though in popular Idea we call that* caſual *of which we do not trace the Deſign and Concatenation of Cauſes.*

"The

" The Want of Power to abſtract or compound Ideas is

IDIOCY;"

" The compounding of them (though not repugnantly upon Principles once aſſumed, yet) chimerically without juſt Ground for the Aſſumption of ſuch Principles, is, *Diſorder of Imagination*, and in its extreme

LUNACY *or* FRENZY;"

" The abſtracting and compounding of them weakly, defectively, and inconſequently is

FOLLY;"

" *Acting* without ſufficient Reaſon is

practical FOLLY;"

" Aſſuming right Principles without duly regarding the Reaſons why they ought to be entertained as ſuch is,

PREPOSSESSION;"

" A Conduct contrary to the Perſuaſion of a Man's Mind, or to his Apprehenſion of what he *ought* to do or to avoid, is

VICE;"

" *Prepoſſeſſion*, *Error*, *Prejudice*, and *Vice*, *practical Folly*, and even *Madneſs in its various afflictive Kinds (when not the Conſequence of bodily Diſorders)* reſult from" *falſe* ASSOCIATIONS *of* IDEAS, " which" *by Habit and Cuſtom* make " gradually" a perpetual " *however unnatural*" Connection in the Mind: ſo II. 33. § 13.

 that

that they perpetually appear together in the ſame *Gang*, and as much affect our Reaſonings, Opinions, and Judgements, as if they were naturally united: "*while by their Origination from our Paſſions, and their* "*reflex Agency upon them (to which is owing in great mea-* "*ſure both the Riſe, and the Strength, of the Aſſociation)* "*they often more ſtrongly influence our* PRACTICE."

Of THE MEANS *of* COMMUNICATING IDEAS.

"*Thus far of the* ORIGIN *and the two great* Sources "*of* IDEAS: *next of the Means peculiar to* MAN,—*of the* "*known Species on this Earth,—by which Ideas are commu-* "*nicated and retained; and which are eſſentially conducive* "*to the Exerciſe, in a requiſite Extent, of the Faculties of* "*abſtracting, compounding, and comparing thoſe Ideas;*"

"And this is"

T. H. M. C. III. § 1.

LANGUAGE:

"A 1. *Articulate*, unwritten, *or* phonic;
B 2. *Written*, ſemiotic, *or* graphic."

III. 2.

A 1. Men were not created to live ſolitary and independently on each other, as ſeveral Kinds of Brutes do, "nor to be confined to their *Senſations* and the *ſimple* "Ideas accompanying them or directly reſulting from "them," but for mutual Intercourſe and Society, "and "for the full Improvement of the human Faculties, "tending to the higheſt ultimate Happineſs both of the "*Individual* and of the *Species*:" and therefore it was not enough

enough for Nature to furniſh the Mind with Objects from without, which are inviſible in the Mind; but it was alſo neceſſary that we ſhould be furniſhed with a ready Method of *communicating* ſuch Ideas.

" To this is neceſſary,

" 1. *The Power of articulate Utterance, or* SPEECH,
" *with a Conſciouſneſs of the* IDEAS *annexed to the*
" *particular Sounds ſo uttered*;"

2. *The Senſe of hearing:*

3. *For complete and accurate Communication, the Faculty of writing:*

Whereby we are capable of receiving ſeveral Sounds and connecting them with the Ideas in the Mind; and farther are, by the Tongue, capable of making ſuch Sounds SIGNS *of ſuch* IDEAS; " *and, by* writing *and* " *the* improvements *founded on it, of giving them* per-" manence *and progreſſive* diffuſion, *with* authenticity;" ſo that *Language is* nothing elſe but *the Connection of ſuch Sounds to Ideas, in order,*

" 1. primarily," *to make the Ideas of one Man underſtood by another*;

" And, 2. ſecondarily, or incidentally,

" *To enable him to preſerve, multiply, and exalt to ge-*" *neral Principles of* SCIENCE, *ſpeculative or practical, the* " *Ideas which he cultivates within his own Breaſt.*"

" *Of abſtract Terms.*"

Becauſe ſeveral Objects excite in us the ſame Idea, III. 8.
therefore *Names* are made *general* " or *abſtract*," to excite in the Hearer ſuch an Idea as is framed in the Mind of the Speaker, " and meant to be conveyed" from whatſoever particular Object ſuch Idea was formed

in the Mind of the Speaker: for in connecting the Sound "with" the Idea, the Mind hath no farther Conſideration than of the Idea itſelf as it ſtands in the Mind of the Speaker, by whatſoever Thing from without it was formed in him: and were it otherwiſe, it were impoſſible to regiſter the Particularity of Things, and to accommodate Names to them; ſince "hardly" any Man hath the ſame Idea from the ſame particular Object which another has.

Beſides, that if Names were as particular as Things, ſuch Signs would become altogether uſeleſs: ſince the Particularity of Things "is" infinite, and therefore would incumber the Mind with infinite Things which could not be remembered, nor would be of uſe for Intercourſe or Communication.

B 2. *The Uſe of the* Hand *and the Faculty of* writing *is requiſite to the Communication of Ideas by giving* Permanency *to the Signs of them: which advantage is wonderfully facilitated and enhanced by* Printing.

In LANGUAGE *four* Things are conſiderable:

FIRST, *the Expreſſion of independent Ideas*;

SECONDLY, *the Expreſſion of the Connection and Repugnancy of Ideas*;

THIRDLY, *the Imperfections of Language*;

FOURTHLY, *the Abuſe of it.*

I. *Of the Expreſſion of independent Ideas:* and that is threefold, "agreeably to the Diviſion of the Claſſes of Ideas themſelves."

HARRIS's Hermes. B. III. C. 3.

LANGUAGE *is a Syſtem of articulate Sounds ſignificant by* COMPACT.

"*Expreſſion*"

"*Expreſſion*" *of*, 1. *Simple Ideas*, III. 4.
III. 4, 5.
2. *Mixed Modes*, III. 6.
3. *Subſtances*.

1. "*The Names*" *of ſimple Ideas*: which cannot be defined or explained *per notiora*; ſince *Definition is reſolving the Thing to be defined into its moſt ſimple Ideas*. III. 4. § 4.

But *complex* Ideas may be defined: becauſe they may be reſolved into their *ſimple* Ideas. Ibid. § 12, 3.

And *ſimple Modes* may be defined: being the Manner in which theſe *ſimple* Ideas are combined; and therefore the Mind may "limit and aſcertain" ſuch preciſe Combination.

2. *The Names of mixed Modes*.

And they being arbitrarily made in the Mind for the Ends of Civil Life, and Names added to them for the Diſpatch of Converſation, we may define the particular Combination of which they conſiſt; and being made without any Relation to Archetypes without, it is the *Name* that holds together the Combination. III. 5. § 3.

3. *The Names of Subſtances*.

And here the Name ſtands for the preciſe Collection of *ſimple* Ideas in the Mind of the Speaker: which is the *nominal* Eſſence, though it has Relation to ſomething without, capable of raiſing that preciſe Collection of Ideas in the Mind, which are the Patterns or Archetypes of ſuch *nominal* Eſſence.

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But the *real* Eſſence, which is the internal "primary" Conſtitution of Parts on which ſuch Properties depend, is perfectly unknown, and therefore not expreſſed in the Name.

II. *The Expreſſion of the Connection and Repugnancy of Ideas:* and this is three ways:

1*ſt. By inventing Words of Affirmation and Negation*, to be ſigns of the Expreſſion of ſuch Connection and Repugnancy.

III. 8. § 2. 2*dly. By the Invention of abſtract and concrete Terms.*

The *abſtract* Term or *Subſtantive* is the Sign of an Idea independent of any other.

The *concrete* Term or *Adjective* is the Expreſſion of the Idea with the Relation of its Co-exiſtence with others: "as EVIDENCE is the *Abſtract:*—inadmiſſible, weak, competent, and concluſive, is the *concrete*, with reference to particular *Evidence* adduced.

3*dly. By the Invention of Particles:** which are ſigns that connect the Train of Ideas one to another; that

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V. Hermes, B. II. C. 2. and the Note p. 259, 60. V. the Letter to Mr. DUNNING and the ΕΠΕΑ ΠΤΕΡΟΕΝΤΑ.

* *To theſe the* Greek Language *is much indebted for its elegant Preciſion and Harmony of Compoſition. Not that Harmony which engages the Ear (though in this ſuperior to all other Languages); but that which is perceived by the Underſtanding, from a juſt Continuity and beautifully conſtructed Dependence; the* Συναφια *of Diſcourſe. Their Uſe has been excellently ſhewn by* CLARKE *and* HARRIS: *to dewellope their etymological Origin was reſerved for one of the moſt acute of the philoſophical Critics of our preſent Day.*

they

they may be received into the Mind of the Hearer in the ſame Order " and with the ſame Limitations" in which they ſtand in the Mind of the Speaker.

III. *Of the Imperfection of Language.* III. 9.

And here:

1*ſt. Of ſimple Ideas:*

" In theſe" the *Connection* is made between the *Name* and the *Idea*, by ſhewing the *Object* which exhibits it: and therefore here we are not very liable to miſtake; ſince theſe Ideas are regularly produced from Things without; and the ſame Ideas are formed in all Men having the ſame Organs: and there is no Difference between the Archetypes and the Idea; the Object without regularly creating that Idea in the " Mind" to which the Name is annexed.

2*dly. The Names of mixed Modes.*

Theſe are often ſubject to Perplexity and Confuſion: Ibid. § 6, 7.

1. " Becauſe" there is " often" great Variety in the Combination; ſo that the *ſimple* Ideas of which the Name conſiſts cannot be remembered;

2. Becauſe we cannot go to the Archetypes to correct Miſtakes about them.

3*dly. The Names of Subſtances.*

" And theſe" are liable to great Imperfections: Ibid. § 13, 4.
becauſe we know not the real Conſtitution of Things: and therefore cannot underſtand what preciſe Combination of *ſimple* Ideas is co-exiſtent; which have all the ſame Right to be made a Part of the *nominal* Eſſence.

III. 10. IV. *The Abuſe of Words.*

Ibid. § 2, 3, 4. *1ſt. By uſing Words without Ideas:*

—ibid. § 5. *2dly. By varying the Combinations of Ideas, and keeping the ſame Name.*

3dly. "*By uſing different Names for the ſame Combination.*"

4thly. By referring Words to an "*aſſumed*" *Reality of Things, and not to our own Ideas*; which is, putting together ſuch Ideas in our Minds as united in Things without us as have not come in "with any Evidence of their being actually" co-exiſtent.

Ibid. § 6. *5thly. Affected Obſcurity.*

III. 11. "REMEDY."

The Remedy of theſe Abuſes, is—

Ibid. § 12. 1. *By defining the preciſe Combination of Ideas to which the Name is annexed:*

Ibid. § 15. 2. *By uſing the Words invariably for the ſame Combination of Ideas:*

"3. *By uſing no more than one Word (in ſtrict Reaſoning "on philoſophical Subjects, or any in which complete Preciſion is required) for one Combination of Ideas.*"

Ibid. § 8. "4. *By neither inventing nor continuing Names which "repreſent the Figments of Imagination as real Exiſtences.*"

"5. *The* fifth *is in the Power of whatever Writer has* "Truths *of ſufficient Importance to convey to exempt him "from the Temptation of magnifying Appearances; for the "Want of Realities, which will bear to be repreſented as "they are in Nature: he will then uſe Words in their known*

III. 11. § 11. "*and common Meaning, where that is ſufficiently exact.*"

"*Of*

"*Of the* COMPARISON *of* IDEAS." IV. 1.——20.

Having thus conſidered our Ideas, which are the Materials of our Knowledge, and our Language, which is the Manner of conveying them, the laſt Thing is to conſider,

How our Ideas are put together and compared one with another:

And herein,

I. *Of* KNOWLEDGE, *and* Opinion; IV. 1.——14.
II. *Of* REASON, *and* Error; Ibid. 15——7. 20.
III. *Of* FAITH, *and* Enthuſiaſm. Ibid. 18.

I. *Of* KNOWLEDGE.

Knowledge is the comparing of two or more Ideas, and viewing their Connection or Agreement, *Repugnancy* or Diſagreement:—and it is twofold:

1. *Intuitive,* IV. 2. § 1.
2. *Demonſtrative.* Ibid. § 2.

1. *Intuitive Knowledge is where the Agreement or Repugnancy of ſeveral Ideas appears upon View.*

2. *Demonſtrative Knowledge is where the Agreement or Repugnancy of Ideas doth not appear upon View; but by Compariſon with ſome intermediate Idea:* thus, we demonſtrate that all the Angles of a Triangle are equal to two right, by ſetting the Triangle between Parallels, and

and comparing the Angles at the upper Point of Interſection with the Angles of the Triangle and two Right Angles.

"CLASSES *of Agreement or Diſagreement in* IDEAS."

The *Agreement* or *Diſagreement* of our Ideas is of four Sorts:

IV. 14. § 3.

1*ſt*, *of Identity*, *or* Diverſity;
2*dly*, *Relation*;
3*dly*, *Co-exiſtence*;
4*thly*, *Real Exiſtence*.

Ibid. 4.

1ſt, *Identity or Diverſity* is known by *Intuition:* as we know by *View* that one Colour or Magnitude is not another.

IV. 1. § 5.

2*dly*, *the Ideas of Relation* are known from "*Review*" or *Demonſtration:* as in the inſtance before mentioned.

Ibid. § 6.

3*dly*, *Co-exiſtence or Non-exiſtence* is ſeldom known from the general *Compariſon* of our Ideas: for ſince we do not know the general Subſtances of Things, we do not know what Ideas "of them" are compatible with each other: and therefore here we have no Knowledge from the general Conſideration of our Ideas; but from Trial, Obſervation, and *Experience* only.

4*thly*,

4thly, Real Exiſtence: Ibid. § 7.

And here we have Knowledge,

1. *of ourſelves*;—*by Intuition*, "or immediate Perception.

2. *of the Being of a* GOD;—*by Demonſtration:* IV. 10.

As thus:

The Abſence of Being cannot produce Being;* *ergo*, ſomething eternal. Ibid. § 3, 4.

Abſence of Thought cannot produce Thought: we think; *ergo* there is Thought without Beginning: eternal Thought we call, GOD. Ibid. § 5.

We begin to think: *ergo*, not from Matter, where there is no Thought; *ergo*, the Mind created by eternal Thought. V. HARTLEY, and *Remarks*, JEBB, II. 172, —4.

And whatever could produce a Being to ſee and feel muſt be preſumed, as a leſs Effect of his Power, to produce the Things felt and viſible. Ibid. § 6.

3dly, of the Being of all other Things;—*by Senſation.*

Having thus conſidered the *Objects* of our *Knowledge*, the next Things to be conſidered are,

Firſt, the Extent; IV. 3.

Secondly, the Reality; and, Ibid. 4.

Thirdly, the Univerſality of our Knowledge.

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* *From this firſt Propoſition Dr.* Prieſtley *deduces the Proof of a* FIRST CAUSE, *the ſupreme deſigning Intelligence which muſt have given riſe to the Univerſe.* Letters to a PHIL. UNBEL. II. p. 35——43.

Firſt: *the* EXTENT *of our* KNOWLEDGE: and that is,

IV. 3. § 1. 1*ſt*, *No farther than we have Ideas:*

2*dly*, *No farther than we can find their Agreement or*

Ibid. § 2. *Diſagreement, by comparing them with intermediate Ideas.*

Secondly: *The* REALITY *of our* KNOWLEDGE.

"1. *Of ſimple Modes.*"

Ibid. § 4. And though our Knowledge be only of *Ideas*, yet thoſe Ideas having Relation to Objects without us, it is in ſome Meaſure real: for all *ſimple Modes* being the Product of the Operation of Things themſelves upon our own Minds, all our Knowledge about them muſt be *real Knowledge.*

"2. *Of mixed Modes.*"

— § 5. 2. *Mixed Modes* are intended to have Relation to Ideas in our own Mind: and therefore our Knowledge concerning them has no other Reality but upon the Suppoſition of the Exiſtence of ſuch Modes "or a real and natural Ground for ſuch Combinations" conformable to our Ideas.

"3. *Of Subſtances.*"

— 11, 2. 3. *Of Subſtances* our Knowledge "is" ſo far *real* as we put together Ideas co-exiſtent in the ſame Place, and that have come into our Minds thus united; but as far as we refer them to *the real internal Conſtitution of Things*, ſo far our Ideas of Subſtances are *not real*, becauſe their Conſtitutions are unknown to us.

"DEFI-

"DEFINITIONS *of* TRUTH, abſolute and relative."

1. *In the Mind.*

TRUTH *therefore in the Mind is the inward Perception of the Agreement or Diſagreement of our Ideas; together with a like Perception of the paſt, preſent, or future Exiſtence of Things themſelves, ſo conjoined or ſeparated in Nature.* IV. 5.

In this Definition of Truth is comprehended a *two-fold Certainty.* Ibid. § 8. 11.

"*a*" *A Certainty of Knowledge:* which is the Perception of the Agreement or Diſagreement of our own Ideas:

"*b*" *A Certainty of Exiſtence:* which is the Perception of the Things themſelves exiſting, conjoined or ſeparate, as we have put them together.

2. *In Words.*

Truth in Words is the conjoining the Signs of the Ideas together as the Ideas themſelves lie in the Mind of the Speaker.

3. *In Ideas.*

3. "*Truth of Ideas is* the Conformity they bear to *real Exiſtence.*"

Thirdly, Of the UNIVERSALITY *of our* KNOWLEDGE.

1. *In ſimple Ideas, where the real and nominal Eſſence is the ſame, there all our Knowledge is general and univerſal; becauſe there is no Difference in theſe Ideas from whatſoever Objects they are formed.*

2. *In*

2. *In* mixed Modes *our Knowledge is general and univerſal: for theſe being Combinations made by the Mind, not with Relation to an actual, but only a poſſible Exiſtence, all our Knowledge concerning them is univerſal; ſince the ſame Agreement or Diſagreement muſt happen wherever they are found.*

IV. 6. § 5, 12.— 3. *Of* Subſtances *our Knowledge, as far as relates to their Eſſence, is all particular; ſince it goes no farther than our Trial and Obſervation "concerning" the Bodies before us: "for" not knowing the real and internal Conſtitution of Things, we cannot rank them, "otherwiſe than hypothetically," into any general Sorts or Claſſes, and therefore we are not capable of any univerſal Knowledge "with reſpect to" them.*

For to make univerſal Propoſitions it is neceſſary we ſhould know the abſolute Bounds of each particular Thing which we comprehend under that general Name: and that we cannot know *without looking into the internal Conſtitution of Things*; which in this State and Condition we cannot do.

But "concerning" the *nominal Eſſence of Subſtances* we may make univerſal Propoſitions: but theſe are only identical and trifling, and ſignify no more than the ſeveral Ideas we comprehend under that Name:

As when we ſay Gold is yellow, fuſible, fixed, &c. that the whole is equal to all its parts taken together; that whatſoever is, is; and that it is impoſſible for the ſame Thing to be and not to be.

Theſe

Theſe three laſt, however they have got the Reputation of Maxims, are nothing but identical Propoſitions including what we comprehend under the Name of Whole or Being, as the other comprehends what we include under the Name or Term of Gold: by conſequence ſuch Maxims are of little Uſe for the Invention of Knowledge; but may ſerve "to ſilence" ſuch as wrangle or "wantonly" oppoſe "known and manifeſt Truths."

"Thoſe Propoſitions, however, of this Kind which "relate to *Subſtances*, have a nearer Affinity to real "Knowledge: as they repreſent, when rightly framed, "the Reſult of Experience, in ſo far as the actual "Trial hath extended, and enable us from ſome one "known Property to infer others; though as we ad-"vance in experimental Knowledge the Univerſality of "certain ſuppoſed Properties gradually diminiſhes, and "our Definition becomes more limited."

"Thus, from a Multitude of Trials with various "*Menſtruums*, Indiſſolubility might have been a ſup-"poſed univerſal Property of *Gold*, till on farther "Trial an Exception appeared of *Aqua Regia*: and "after, ſome other Exceptions."

"A certain *ſpecific Gravity* ſeems to have a yet nearer "Approximation to the unknown Eſſence of *Gold*: "yet in this *Platina* ſurpriſingly approximates to it: "while by its Want, or extreme Difficulty, of *Fuſi-"bility*, it is found *diſtinctively* differenced from that "*Metal*."

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1. b *Of* OPINION, *as oppoſed to* KNOWLEDGE.

IV. 15. § 3. *Opinion is the Perception of the* probable *Agreement or Diſagreement of our Ideas.*

Of Probability.

Ibid. § 14. *Probability is where the Connection or Agreement, or Repugnancy or Diſagreement, is not found from the Intuition or View of the Ideas themſelves, or from the Intuition of any Idea with which they are compared, which, by ſuch intermediate View, ſhews ſuch Connection or Repugnancy; but ſuch Agreement or Diſagreement is found by* Obſervation *and* Experience *only; which could not be found from any View or Juxta-poſition of the Ideas themſelves in our own Minds:* "*and is therefore ſtrong or weak according to the Number and Conſonancy of Inſtances.*"

Thus we know that our Meat nouriſhes: not from any general Ideas *of the internal Conſtitution of Meat and of the Animal*; but becauſe we have found it true from *Experience.*

But here we muſt conſider,—

Ibid. § 4. 1. *The ſeveral* Criteria *or Marks of Probability ariſing* "*immediately*" *from our own Experience;*

2. *From the Experience of others.*

1. *The ſeveral* CRITERIA *or Marks of Probability ariſing from our own Experience.*

1. *When*

1. *When ſuch Experience is general* " *or*" *univerſal, we no more doubt of ſuch Truths than of thoſe that appear from the Intuition of the Ideas themſelves:* becauſe ſuch Experience furniſhes the Mind with a conſtant Perception of the Agreement or Diſagreement of ſuch Ideas as if it had riſen from the Intuition of ſuch Ideas themſelves. Ibid. § 6.

2. If ſuch Experience hath failed in *ſingle* Inſtances, then the Agreement or Diſagreement of ſuch Ideas is judged from the *Number* of the Inſtances, *one Way* " *and*" *the other*, that have fallen under our Experience: for then we eſteem ſuch Ideas to agree or diſagree one with the other as we have generally found to do ſo; but *every Inſtance* to the *contrary* is the Cauſe of ſome *Doubt* in the Mind.

Hence it is, that what may ſeem *probable* to one Man, or in ſome Places, appears *improbable* in others; according to the Difference of their *Obſervation* and *Experience:* as that Water ſhould be hard enough in Winter to bear Carts and Horſes may ſeem *probable in England* and *Holland*, but would not ſeem *probable under the Line* where they were never uſed to ſuch Obſervations. Ibid. § 5.

All our Knowledge touching *Subſtances* goes no farther than *Probability:* becauſe we have no Ideas of the *internal Conſtitution* of ſuch Subſtances " ſo as to enable us" to compare " them" with each other:

And therefore our *Reaſoning* " concerning" the *Co-exiſtence* or *Non-co-exiſtence* of ſuch Ideas is founded,

1. *Upon the Trial and Experience of ſuch their Co-exiſtence;*

2. *Upon Analogy: whereby upon the Obſervation of the Co-exiſtence of* like *Ideas we judge, that where ſuch like Ideas are found there will follow the ſame* "*conſequences*" *which at other times we have* "*experienced.*"

IV. 16. § 6,—11.

II. *The ſeveral* CRITERIA *or Marks of Probability ariſing from the Experience of others.*

A. *Of Veriſimilitude as applied to common Life.*

Vi. infra, B. I. Introd. Ch. 1, 2. B. II. P. I. Ch. I. p. 210—30 Ch. 2. 3, 4. p. 281——302.

As we judge by our own "immediate" Experience, ſo alſo we judge by the Sight, Obſervation, and Experience of others: and this is called TESTIMONY.

And in this *eight* Things are conſiderable:

1. *The Number*
2. *The Integrity*
3. *The Skill*
4. "*The*" *true Deſign and Intent*
5. "*The*" *Conſiſtency*
6. *Contrary Teſtimonies*
7. "*Veriſimilitude or Congruity*"
8. *Information*

} *of Witneſſes.*

"The *three firſt* explain themſelves; the *fourth* re-"lates to the true Interpretation of the *meaning* of the "*Evidence* given: the *fifth* is twofold:"

1. *The* "*Conſiſtency*" *of Witneſſes with themſelves*" *in the parts and circumſtances of their Relation*;

"2. *The Conſiſtency of Witneſſes on the ſame ſide, each with the other.*"

The ſixth *explains itſelf:*

The *ſeventh* is twofold:

"1. *Fidu-*

The Foundation of our Faith in Teſtimony, *philoſophically conſidered, ariſes from our* experience *that it may be depended upon: it having been found that there is generally a correſpondence between what*

"1. *Fiducial, or relative*, from the Character of the *Witneſſes*."

"2. *Material, or abſolute*, from the *Thing* itſelf *teſtified*, as conſonant to our Experience.

The *eighth* hath reſpect to the *means* of *Information* poſſeſſed by the *Witneſſes*:

And this alſo is twofold: either,

1. *Simple*; or,
2. *Circumſtantiated*: either of which may be { 1. Direct, 2. Traditional.

Of ſimple direct Evidence.

Simple direct Evidence to points which are the object of *Senſe* depends merely on the Integrity of the Witneſſes.

Of circumſtantiated.

Circumſtantiated Evidence is of various force: in its higheſt degree it may amount to full Proof independent of the Integrity of the Witneſſes; becauſe it depends on facts not within their power to falſify: but in its inferior degrees it may be very weak, ſuſpicious, or poſitively unworthy of Credit.

Of traditional Evidence.

"With reſpect to *traditional Evidence*, unleſs in "thoſe inſtances where it is ſupported by the *clear* "*Dependence of ſubſequent Events*, it is the weakeſt "and moſt liable to Alloy of all Proof: ſuch is the "effect of" the Diſtance of Relators from the ſight and view IV. 26. § 3

what is aſſerted by men, and the things or events which their aſſertions reſpect. Thus if one perſon tells me that another ſaid or did ſo or ſo, and I find by any other evidence *(for inſtance, that of my own ſenſes) that he actually did ſay or do what I was informed of, I am ſatisfied that the aſſertion I heard was true. If I find by repeated* experience *that the ſame perſon never does deceive me, I conclude that there muſt be a ſufficient* cauſe *for this* conſtant appearance, *and that in the ſame circumſtances the ſame effect may be depended upon. In common language I ſay, that my informer is a* man of veracity, *and that he will not deceive me. In the ſame*

view of the Thing which they atteſt: "that the Proof" is "proportionably" weakened as they themſelves take it from others, and the Thing related doth not fall under their own View or Experience.

B. *Of Veriſimilitude as applied to Revelation.*

These are the *Criteria of Probability* touching Facts depending on mere human Agents. For *Veriſimilitude* or *Congruity with Experience* muſt be underſtood with relation to the ſuppoſed *Agent* and *End.*

IV. 16. § 13. And therefore in Things depending "*upon the Power of* GOD *the ſeventh Criterion of Probability in its* ſecond *Ground of* Conſonancy *to* common *Experience*" *is not to be taken into* "*the Account in*" *our weighing and conſidering ſuch Facts:* becauſe our *Obſervation*

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manner, if, notwithſtanding a number of impoſitions, I find that among Mankind at large a regard to Truth greatly prevails over falſehood, I conclude that there is, in general, ſufficient ground for Faith in Teſtimony. *Examining this intereſting appearance more cloſely, I find in what Caſes* Teſtimony *is moſt apt to be* fallacious; *as thoſe in which men have not had ſufficient opportunity of being well informed themſelves, or thoſe in which they have an intereſt in deceiving others: and ſeparating theſe from other Caſes of human* Teſtimony, *I find a ſtill ſtronger ground of* Aſſent *in the remaining Caſes.** *We may add to theſe ſources of* Credit *in* Teſtimony *that the* CONSTITUTION *and Circumſtances of* HUMAN NATURE *are, on the whole, ſuch as, without particular overpowering bias, ſtrongly incline to* TRUTH: *on that ſide are the Aſſociations of Courage, Wiſdom, Magnanimity, Honour, Security; on the other, of* Cowardice, Craft, Meanneſs, Shame, Danger. *He therefore who gives falſe* Teſtimony *muſt (even independent of municipal ſanctions) act contrary to many ſtrong and general* Motives *of Conduct. And the Conſideration of this certainly much enhances the* Credibility *of* Atteſtation.

‖ E. H. U. IV. 16. § 10. V. infra *Law of Evidence* 9, 10, 11.

* L. P. U. L. II. L. 1. p. 4, 5.

‖ *It may not be amiſs to take notice of a Rule obſerved in the LAW of* ENGLAND: *which is, that though the* atteſted Copy *of a* Record *be a good Proof, yet the* Copy of a Copy *never ſo well atteſted, and by never ſo many Witneſſes, will not be admitted as a Proof in Judicature. This is ſo generally approved as reaſonable, and ſuited to the wiſdom and caution to be uſed in our enquiry after material truths, that I never yet heard of any one that blamed it. This Practice, if it be allowable in the deciſion of right and wrong, carries this obſervation along with it:* that any Teſtimony, the farther off it is from the original Truth, the leſs force and proof it has. *The being and exiſtence of the Thing*

tion and *Experience* extends no farther than the ordinary Courſe of Nature: and not to "ſuch Things as" *Almighty GOD* can do in an extraordinary Manner for the Confirmation of Doctrines of great Importance, and which he hath thought fit to reveal: but in its *firſt* Ground it *is*, on the *Credibility* of the Witneſſes: and in that part of the *ſecond* which relates to the *Nature of the Thing*, the *firſt*, *ſecond*, *third*, and *eighth* Criteria are at the ſame time to be regarded, and the *Abſence* of the *ſixth*: together with the Diſtinction of *traditional* Evidence verified by a State of Things not otherwiſe explicable but as reſulting from the reality of the Facts atteſted.

II a *Of* Reason.

"*Reaſon*" *is that Faculty of the Mind whereby we diſcover the Connection or Repugnancy of our Ideas in themſelves, or their probable Connection or Repugnance one to the other*: "*by finding, arranging, and comparing the intermediate Ideas; and thence drawing the juſt Inference.*" IV. 17. Ibid. § 2, 3. L. to P. U. P. II. L. I. 4, 5.

II b *Of* Error.

"*Error*" ariſes from the *caſual Aſſociation of Ideas by* "*Paſſion*," *Habit, or Cuſtom*, "*whether contracted in the ſubſequent Periods of Life or imbibed*" *by Education in our Minority*: "whence we are led to conjoin or ſeparate Ideas" otherwiſe than ſuch Ideas are conjoined IV. 20.

Thing itſelf is what I call the original Truth. A credible Man vouching his knowledge of it is a good proof: but if another equally credible do witneſs it from his Report, it is weaker; † *and a third that atteſts the* hearſay of an hearſay *is yet leſs conſiderable: ſo that in traditional Truths each remove weakens the force of the proof; and the more hands the Tradition has ſucceſſively paſſed through, the leſs Strength and Evidence does it receive from them.* "*No probability can riſe higher than its firſt origin.*" *What has no other Evidence than the ſingle Teſtimony of one only Witneſs muſt ſtand or fall by his only Teſtimony, whether good, bad, or indifferent; and* V. infra 279.——31 889.——31 Ibid.

Ibid. § 17.

joined or ſeparated by Nature, " or, are induced to" depend blindly on the Authority of others, without " even imagining that we" perceive the Connection of ſuch Ideas " as are neceſſary to a Knowledge of the Subject," or " ſo much as" the probable Connection of them: and yet conjoin or ſeparate them according to ſuch Authority, where there is no Connection or Repugnance in the Ideas themſelves; forming Propoſitions in Things of which we have no Ideas by cômpariſon of them with the Ideas we have; concluding without intermediate Proofs, or without ſufficient Conſideration of them.

PRICE's DISSERTATIONS. IV. § 2. P. 392, 9.

III a *Of* FAITH.

IV. 18.

Faith is the Belief of any Truth coming from GOD, the Author of "revealed" Truth.

And this is either,

1. *By original*
2. *Traditional*

} *Revelation.*

1. *Of original Revelation.*

Original Revelation is the immediate Delivery of Truth from Almighty GOD into the Minds of Men:

Which is done in a manner to us inconceivable: for how GOD Almighty may deliver himſelf in ways different from the common Conveyance of Knowledge is not by us to be underſtood.

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though cited afterwards by hundreds of others, one after another, it ſo far from receiving any ſtrength thereby, that it is only the weaker.

Of this, and of the Advantage of *concurrent* Teſtimony, and of Evidence to a number of *independent* particulars, conſtituting together the Proof of one *Event*, ſee a curious and valuable Paper in the *PHILOSOPHICAL TRANSACTIONS.* *

* Lowthorp, P. T. Abr. III. p. 662—4.

2. *Of traditional Revelation.*

Traditional Revelation is the Belief of a Truth coming from GOD, without immediate Revelation to ourſelves, upon the Teſtimony *of Facts which muſt of neceſſity proceed from the Power of GOD.*

1. *Such Things revealed cannot be contrary to Reaſon:* becauſe it were abſurd to ſuppoſe that *Almighty GOD* ſhould dictate one Thing in the ordinary Courſe of Nature, and another by ſuch extraordinary Revelation.

Nor could ſuch a Revelation be believed: ſince the Truth of its "proceeding" from GOD could not be more evident than the Connection or Repugnance of the Ideas themſelves in their own Nature.

But, 2. *ſuch Revelation is of Things above Reaſon:* that is, of ſuch Things of which Reaſon is altogether ſilent, "or does not make ſuch Diſcovery as may be "clear, certain, and univerſal, according to the ordi-"nary Talents and Opportunities of Mankind."

For ſuch Revelation were to no purpoſe, if it taught nothing farther than what might be "generally" found by the "common" uſe of our natural Faculties: though it may enforce, "confirm, or aſcertain" ſuch Things as are "recognized" to be Truths by our natural Faculties, from Conſiderations which could never be "traced" by them; and as far as it doth ſo, it is above and beyond what Reaſon teaches. IV. 18. § 4.

III b *Of Enthuſiaſm.*

Enthuſiaſm is an opinion that our Fancies and Imaginations are Revelations from GOD. IV. 19.

1. If ſuch perſons cannot, by extraordinary Effects coming from GOD, give credit to ſuch pretended Revelations, all Men are left at liberty whether they will believe them or not.

2. If ſuch Revelation be contrary to Reaſon, or contrary to former Revelations, atteſted by Facts

coming from GOD, ſuch Revelation cannot be from GOD: becauſe GOD cannot be the Author of Contradictions.

3. If ſuch pretended Revelation contain nothing more than what Reaſon teaches, or what has been already taught by a former Revelation atteſted by the divine Power, then ſuch Revelation cannot be from GOD: unleſs it be atteſted by Facts flowing from the ſame Power, "if the influence of a former Revela-" tion require to be extended and revived, or unleſs " it add clearneſs, certainty, and facility of univerſal " Reception, to former inferences of Reaſon:" ſince we cannot ſuppoſe that to be done by GOD in a worſe and leſs evident manner, "or ſuperfluouſly," which has been done in a better and more apparent manner, "or as effectually," already.

In re-editing this ABSTRACT, Additions and Alterations are diſtinguiſhed, as in the LAW OF EVIDENCE itſelf, by inverted Commas. Notes are ſubjoined, and References inſerted. The References are not to Volumes and Pages, but to Books, Chapters, and Sections: as being more ſuitably to the ſubject, and ſerving, at the ſame time, for every good Edition of the ESSAY. *The Edition uſed on this occaſion was the very elegant one of* EDINBURGH, 1765, *in Three Volumes,* 12mo. *To LAW the Uſe of LOGIC, as the Art of reaſoning, and of communicating our Ideas, is of more importance than perhaps to any other practical Study. And particularly in the weighing of* EVIDENCE *and the Inveſtigation of the Principles of Proof. The admirable* ESSAY ON THE HUMAN UNDERSTANDING *is only a more pure, philoſophic, and tranſcendent* LOGIC. *C. L.*

Abbreviated REFERENCES.

E. H. U. LOCKE's *Eſſay on Human Underſtanding.*
T. H. M. HARTLEY's *Theory of the Human Mind:* edited by PRIESTLEY.
L. P. U. LETTERS *to a Philoſophical Unbeliever.*

ERRATA and ADDENDA

To VOL. I.

Dwyer's Case.

PAGE 9. l. 21 for ; a ,

Law of Evidence.

Page 167. l. 5. after "Cases", after "Transaction",
—— 168. l. 11. after "Writs":
—— 178. l. 15. after "Nature":
—— 202. l. 23. after *C. dele* : and place ,
—— 208. l. 17. after "dead" dele ; and place ,
—— 216 l. 19. *dele* , and place ;
—— 224. l. 5 *dele* , and place :
—— —— l. 14. *dele* , and place ;
—— 245. l. 4. after "Witness" *dele* , and insert ;
—— 264. l. 5. *dele* , insert ;
—— 270. l. 27. after "arose" ;

Abstract of Locke's Essay, p. 11.
Marg Ref. II. 21. § 4. p. 10.
Page 42. N. l. 10. *suitable.*
—— 5. Marg. Ref. to l. 3. *Sudbury* Case Dougl. Contr. El. II. 161—2. 174.
—— 16. Marg. Ref. l. 6. 21 H. VIII. c. 13. § 8.
—— 24. SECT. VII.
—— 31. l. 14. *dele* "levied."
—— 37. l. ult. *dele* "was and read "*nor held the*"
—— 54. N. l. ult. read Henzeys
—— 122. Par 5.
—— 30 l 5 "limited to"
—— 137 N. intercidisse.
—— 169. l. 2. "Convenient"
—— 170. l. 3. *dele* "since."
—— 201. l. 14. for on read *in.*
—— 206. Marg Ref. ad calc. C. I.
—— 206. l. 3. "Comparison of Hands" *does not seem* "sufficient Evidence of Notes" *or Bills of Exchange* "without Witness" *who has seen* the Party write and believes it his hand-writing. Vide Morgan's Ess. I. p. 211.
—— 217. l. 5. for "Printer" r. *Prisoner*
—— 225. SECT. III.
—— 227. l 15. after "Contract" insert TITLE II.
—— 231. l. 14. after "Ejectment" *
—— 233 l. 27. after Contract *dele*. and place ; and add - and there was no other witness to prove the payment.
—— 246. l. 8. Marg. Ref. E. I. Comp.
—— 262. l. 6. intercommon
—— 290. l. 28 add Marg. Ref. R. v. Henrietta Radbourne; Leach's Cr. L. 339. Ca. 170. O. B. Jul. 1787.
—— 293. l. 10. *dele* "that"
—— 294. l. 5. add CH. IV.
—— l. 19 every
—— 300. l. 1 for "or" read *of*
—— l. 14. insert *Par.* 2.
—— 301. l. 1. insert *Par.* 2.
—— 304. l. 4. insert TITLE II.
—— l. 18. *dele* "own"
—— 328. l. 9. after "yet")
—— 336. l. 13 justified a Verd:
—— 426. N. l. ult. after 100000 *dele* l.

VOL. I.

OF

EVIDENCE

IN GENERAL:

WRITTEN AND UNWRITTEN:

AND PARTICULARLY

In CIVIL ACTIONS real and mixed;

AND

In PERSONAL FOUNDED ON CONTRACT.

ANALYSIS
OF
THE LAW OF EVIDENCE.

A

EVIDENCE, in its DEGREES, *is* { 1. CERTAIN. 2. PROBABLE.

B

In its CONSTRUCTION. { 1. STRICT. 2. AMPLE.

C

In its FORM. { 1. WRITTEN. 2. UNWRITTEN.

D

In its MODE *of reception and inquiry.* { 1. ORDINARY. 2. EXTRAORDINARY.

E

In its OBJECTS. { 1. CIVIL. 2. CRIMINAL. 1. CONTRACTS. 2. TORTS. { 1. Public. 2. Private.

F

In its DESIGN *and limitation of purpose.* { 1. PREVIOUS. 2. DECISIVE.

G

In its general DIRECTION. { 1. *The* COURT. 2. *The* JURY.

H

In its PLACE *before* COURTS *of* JURISDICTION. { 1. GENERAL. 2. LIMITED. 3. SINGULAR. 4. CONCURRENT. ORIGINAL. SECONDARY.

A

DEGREES of EVIDENCE.

CERTAINTY, intuitive, or absolute; is simple, and cannot be defined.

I. *DEMONSTRATION Moral—*LEGAL CERTAINTY.

II. *PROBABILITY.*
- 1. *Extraordinary.* — Violent presumption of facts.
- 2. *Ordinary.* — Or certainty to a common intent.
- 3. Weak. { Inconclusive. *Evanescent.*

I. *LEGAL CERTAINTY is*
- 1. MATTER *of* RECORD.
- 2. Voluntary, deliberate CONFESSION in open COURT.
- 3. CONCLUSION *of* LAW by necessary inference.
- 4. CONCLUSION *of* FACT by full Proof.

II. *PRESUMPTION is*
- 1. *Of* FACT. { 1. Violent. 2. Probable. { *Repellable.*
- 2. *Of* LAW; necessary. { *Not repellable.*

PROOFS.

Order. { 1. Original. 2. Mesne. 3. Final.

Strength.
- 1. Direct.
- 2. Circumstantial, independent, accumulative; *which are required to convict, or discharge from a contract certain.*
- 2. Probable, ordinary; *sufficient to acquit or discharge from an uncertain contract.*

B

CONSTRUCTION of EVIDENCE.

I. *WRITTEN.*
- 1. *Words are to be understood according to their subject matter.*
- 2. *A legal intent, sufficiently expressed, is in all cases to prevail.*
- 3. *The intent to be collected from the whole instrument taken together; or the whole system where complex.*
- 4. *Antiquity of an instrument, well ascertained, is a presumption of validity.*
- 5. *General certainty is to be preferred to particular convenience.*
- 6. *General certainty is best secured by adhering to settled rules of interpretation.*
- 7. *Matters of* record *are more strictly to be construed than matters* en païs.
- 8. *Unfavourable contracts are to be strictly limited; favourable, to be liberally expounded.*
- 9. *Penal statutes admit of no extension.*
- 10. *Remedial acts are to be taken largely in advancement of the relief.*
- 11. *Acts of ademption or inhibition of general right are to be rigorously confined within their necessary sense.*
- 12. *Summary and extraordinary jurisdictions must be kept within the letter of their authority.*
- 13. *Revocations of legal acts are not to be presumed.*
- 14. *The* COMMON LAW *is never to be superseded, unless in direct terms, or by inevitable implication.*

II. *UNWRITTEN.*
- 1. *Positive* (cæteris paribus) *is of greater strength than negative testimony.*
- 2. *Circumstantial error may confirm general truth.*
- 3. *The single evidence of an* accomplice *is insufficient in* capital *cases.*
- 4. *The single evidence of* any *person must be very clear and certain, to have any force in criminal cases.*
- 5. *Great crimes are proportionably improbable, and require the strongest proof.*
- 6. *The probability or general presumption that a witness speaks truth, with no apparent cause to the contrary, is of less strength, generally, in* criminal *than in* civil *cases.*

GENERAL RULE; applicable to written and unwritten.
The best evidence in kind is always required, which the circumstances before the court presume.

C

FORM of EVIDENCE.

I. *WRITTEN.* { 1. *Public.* 2. *Private.*

PUBLIC. { 1. RECORD. 2. *Inferior.*

1. RECORD.
- 1. PUBLIC ACT of PARLIAMENT; *evidence of itself.*
- 2. JUDICIAL PROCEEDINGS *in* COURTS *having authority to fine and imprison.*
- *Ev. of itself in the court to which it belongs.* { 1. *Writs* judicial. 2. *Pleas.* 3. *Judgments.* } 1. Sworn, 2. Office; } *Copy in another court.*
- 3. PATENTS, *&c.*
- 4. Particular ACTS of PARLIAMENT. *Copy examined; or under Gr. S.*

Inferior.
- 1. CHANCERY PROCEEDINGS; *Ev. agt parties* { 1. *Bills.* 2. *Answers.* 3. *Depositions.*
- 2. ACTS of inferior COURTS of common law, not being of record.
- 3. ECCLESIASTICAL PROCEEDINGS.
- 4. ACTS of certain other COURTS within the REALM, not being of common law, so far as not of record.
- 5. DEEDS enrolled. *Inspeximus.*
- 6. REGISTERS, &c. *Copy.*
- 7. ACTS of foreign countries; duly *certified.*

PRIVATE.
Primary; or Evidence in the first instance.
- 8. DEEDS not enrolled: *To be proved by witnesses. Rasure, interlineation,* &c.
  - 1. *Real.* { Feoffment. Grant, &c.
  - 2. *Personal, or Mixed.* { 1. Annuity. 2. Bond. { 1. Single. 2. With condition.
- 9. WILLS; { 1 *Real; of land.* } Com. L. { 1. *Original.* 1. *Revocation.* 2. *Republication.* / 2. *Personal, or testamentary Disposition.* } Eccles. Court. { *Probate.* } 1 *Formal* 2. *Nuncupative.*
- 10. Agreements, not under seal.
- 11. Notes.

Secondary; or Evidence in defect of better.
- 12. Voluntary affidavits.
- 13. Letters, &c.
- 13. Tradesmen's books; *corroborative, or supplemental.*

II. *UNWRITTEN.*
- 1. *Witnesses.*
- 2. *Without witnesses.* { 1. Knowledge of jurors. 2. Fait *singulier.*

I. *WITNESSES.* { 1. *Quality.* 2. *Number.*

1. *QUALITY.*
- 1. *Of credit.*
- 2. *Of competency.*
- 3. *Neither* of credit nor of competency.

I. *Of CREDIT.*
- 1. Persons of known and exemplary character.
- 2. Persons swearing against their manifest interest.
- 3. Not impeached in reputation, or contradicted by circumstances.
- 4. Of preponderating character and verisimilitude.

II. *Of COMPETENCY,* or admissible.
- 1. Persons without direct interest, yet probable bias.
- 2. Of doubtful character.
- 3. Convict, but not attaint on record.

III. Neither of CREDIT, nor ADMISSIBLE.
- 1. Children, not having years of discernment of right or wrong. } *Propter ætatem.*
- 2. Idiots, and infane. { *Propter defectum aut pravitatem rationis.*
- 3. Persons directly interested. { *Rei suæ; v. propter lucrum damnumve.*
- 4. Persons legally infamous. { *Propter infamiam.*
- 5. Persons excommunicated.
- 6. Persons not on oath. { In *civil* cases, *Quakers* excepted; in *criminal*, no exception.
- 7. Under *professional* confidence. { *Propter fidem publicam.*

NUMBER.

CIVIL. { *To a Deed* of less than *thirty* years, ONE at least. *To a Will of Lands,* THREE.

CRIMINAL. { 1. *High Treason,* proper. 2. *Petit Treason.* } Two at least.

EVIDENCE perpetuated post mortem, &c.
- 1. In Equity. *Depositions,* &c.
- 2. At Common Law. { 1. *Verdict.* 2. *Examination,* &c.

D

MODE of RECEPTION.

1. Ordinary; by JURY.
2. Extraordinary.

1. *Disused*;
- 1. Ordeal.
- 2. Battel.
- 3. Wager of law.

2. *In use*;

Summary;
- 1. Before a magistrate:—The exceptions from the course of common law now more numerous than the rule.
- 2. Before courts of conscience (so termed) much too numerous.

E

OBJECTS or SUBJECT MATTER of EVIDENCE; ISSUES or MODES of SUIT.

Founded, I. *IN CONTRACTU.* { 1. *Express.* 2. *Implied.*

II. *IN MALEFICIO.*
- 1. *Ex injuria privata.* { Private wrong. *Action.*
- 2. *Ex Delicto.* { 1. Public wrong. 1. *Indictment.* 2. *Information.* 3. *Impeachment.*

1. *MALA IN SE.*
2. *Mala prohibita.*

CAUSES.
- I. CIVIL. } *General.*
- II. CRIMINAL. } *General.*
- III. Ex JUSSU PUBLICO, *operating on particular* CLASSES.

I. *CIVIL.* { 1. Of right. { 1. Real. 2. Personal. 3. Mixed. 2. Of possession.

Founded in CONTRACT. { 1. Express. 1. *Debt by specialty,* &c. 2. Implied. 2. *Sale, exchange,* &c.

ASSUMPSIT.

1. *Special.*
- 1. *Debt.*
- 2. *Bailment, special.*
- 3. *Hiring, sp.*

2. GENERAL.
- 1. PUBLIC.
- 1. *Undertaking of public* TRUST.
- 2. Penalty, *under statute.*
- 2. PRIVATE. *Contract uncertain.*
- 1. Service. *Quantum meruit.*
- 2. Value. *Quantum valebat.*
- 3. Money expended. *Pecuniæ impensæ.*
- 4. Money had and received. *Redhibitio indebiti.*
- 5. BAILMENT.
  - 1. Mandate or commission *gratuitous.* { *Mandatum.*
  - 2. Loan of hire. *Locatum.*
    - 1. Of things. *Rei.*
    - 2. Of work and labour. *Operis faciundi.*
    - 3. Of conveyance. { *Mercium vehendarum.* { 1. *Public.* 2. *Private.*
  - 3. Loan of use. *Commodatum.*
  - 4. Pledge. *Pignus.*
  - 5. Depositi. *Depositum.*

Founded on TORT.
- 1. TRESPASS on the CASE. P.
- 2. DISSEISIN. R.
- 3. Ejectment. M.
- 4. Waste. M.
- 5. Trespass of *Cl. fregit.* M.
- 6. Trover. P.
- 7. Detinue. P.
- 8. Trespass *vi et armis.* { 1. Direct. 2. *Consequential. Inclusive.*

ANCIPITES; having common remedy by *public* or *private* suit.
- 1. *Assault,* &c.
- 2. *Slander.* { *Gen.* *Spec.*
- 3. *Deceit.* { 1. Fraudulent conveyance. 2. Other fraudulent dealings.

II. *CRIMINAL.*
- 1. CAPITAL on the first offence, or *without clergy.*
- 2. *Capital* on the second offence; either identical, or of the same class, *clergyable.*

1. CAPITAL.

TREASON. { *Proper.* { Direct. *Constructive.* / Improper. { 1. Coinage. 2. *Petit Treason,* murder of master, or mistress, or ecclesiastical superior.

Other FELONY.

1. *Capital, ex* JURE NATURALI *primario aut hypothetico.*
- 1. MURDER.
- 2. STUPRUM, vi patratum.
- 3. CRIMEN innominandum.
- 4. *Burning of houses inhabited.*
- 5. *Wilful sinking of ships,* manned, *&c.*
- 6. *Robbery, with danger offered to life.*
- 7. *House-breaking (when inhabited) in the night, with like danger.*

2. *Capital by* STATUTE.
- *In the first instance:*
- About ONE HUNDRED and SEVENTY other GENERA, and nearly *Three Hundred* and *Thirty species* of OFFENCES reduced to enumeration.
- In the *second* instance,
- Above EIGHTY GENERA—species undetermined.

3. *Positively not Capital;* MISDEMEANOUR.
- 1. HIGH. { 1. Misprision of Treason. 2. —— of felony. 3. Signal breach of the peace; malicious mischief, *&c.* 4. Corruption, extortion, perjury, *&c.*
- 2. Common. Other offences.

III. *Ex JUSSU PUBLICO.*
- 1. BANKRUPTCY.
- 2. PAR. SETTLEMENTS.
- 3. MILITARY SERVICE.
- 4. CLAN. MARRIAGE.
- 5. RECUSANCY.
- 6. NONCONFORMITY.
- 7. GAME LAWS.

F

EVIDENCE in its DESIGN or LIMITATION.

1. PREVIOUS. { 1. Before *a magistrate.* 2. *Before the* GRAND JURY. } Ex parte.

2. *DECISIVE.* { 1. *Summary.* { 1. *With,* 2. *Without appeal.* 2. *Solemn. Before the* JURY.

No appeal in prejudice of the prisoner in capital cases.

G

EVIDENCE in its GENERAL DIRECTION.

1. En païs.
- 1. Things *real,* lying in *livery.*
- 2. *Criminal.*
- 3. *Personal; not of specialty.*

To be given in evidence to the JURY on the GEN. ISSUE.
- 1. *All facts general, & not per se manifesta.*
- 2. *Or to be certified.*
- 3. *Or of the jurisdiction.*

2. *Hors du païs.*
- 1. *Real;* lying in *grant.*
- 2. *Personal;* of specialty.

To the Court.
- 1. En fait *singulier.* { 1. *Inspection.* 2. *Certificate.*
- 2. ERLOI. { 1. Pleadable *facts.* 2. *Record.*

PLEAS:

1. GENERAL.
- 1. *In public* criminal *suits.*
- 2. *In* personal, *not founded on specialty of form, or specialty of exemption.*
- 3. *In* civil, *where the deed is collateral to the title.*

2. SPECIAL.
- 1. *In* civil *actions founded on specialty.*
- 2. *In* personal *actions founded on special claim, or defensible under particular justification.*

1. *Dilatory.*
- 1. To jurisdiction.
- 2. To ability. { Death, infancy, coverture, outlawry, *&c.*
- 3. Abatement. { 1. To writ. 2. To court. } Defect, or Error.

2. *In bar to the action.*
- 1. Release.
- 2. Justification.
- 3. Exemption. { 1. By common law. 2. By statute.
- 4. Estoppel.

H

EVIDENCE as applied to JURISDICTION.

1. GENERAL.
- *At* COMMON LAW. { 1. KING'S BENCH. 2. COMMON PLEAS. 3. EXCHEQUER. 4. CHANCERY, law side
- *In* EQUITY. { 1. CHANCERY. 2. EXCHEQUER, *Eq. S.*

2. *Limited.*
- *County court.*
- *Borough courts.*
- *Manerial,* &c.

3. *Singular.*
- 1. CHANCERY, *in cases of mere equity.*
- 2. COMMON PLEAS, *in real actions.*
- 3. KING'S BENCH, *on the high writs of prerogative,* &c.
- 4. PARLIAMENT, *on impeachment.*
- 5. *Commons, on elections.*
- 6. *Lords, on questions of right of peerage.*
- 7. *Admiralty,* on maritime causes.

4. *Concurrent.* { 1. Ecclesiastical. 2. Admiralty, *&c,*

5. *Original.* { Each of the GREAT COMMON LAW COURTS in their several jurisdiction.

6. *Secondary.*
- 1. *In the same court.* { 1. *New trial.* 2. *Attaint.* 3. *Appeal of murder,* &c.
- 2. *To different courts.* { *Writ of error or appeal:* 1. From Common Pleas; *to King's Bench.* The same from inferior Courts of Record. 2. From Exchequer side of Chancery and Exchequer; *Appeal to House of Lords:* 3. From common law side of Chancery; *to King's Bench.* 4. Of Exchequer; *to the House of Lords.* 5. From *B. R.* by *bill* to Exchequer. 6. On *original*; *to the House of Lords.*

Parum claris lucem dare conor. C. L. 28 Jul. 1787.

THE LAW OF EVIDENCE.

INTRODUCTION.

THE SUBJECT to be conſidered is LEGAL EVIDENCE, "in the full comprehenſion of the Term; as it relates, either to the COURT, or (*a*) to the JURY:" and by what RULES of PROBABILITY it ought to be weighed.

In the firſt place, it has been obſerved by a * very learned Man, that there are ſeveral DEGREES from perfect CERTAINTY and DEMONSTRATION, quite down to *Improbability* and unlikelineſs; even to the CONFINES of impoſſibility: and there are ſeveral acts of the Mind proportioned to theſe DEGREES of EVIDENCE; which may be called the DEGREES of ASSENT; from full ASSURANCE and Confidence quite down to *Conjecture*, *Doubt*, *Diſtruſt*, and *Diſbelief*. * Locke.

Now, what is to be done in all TRIALS, is to range all Matters in the Scale of "PROOF," or "Veriſimili-"tude where direct Proof cannot be had according to "the meaſure of PROBABILITY, which the ſubject to be "decided requires or admits by the RULES of LAW:" and then, "as to the EVIDENCE of the FACT, to allow "each particular its abſolute and relative Force:" ſo "that the" weight "ſhall fall" where the cauſe ought to preponderate: and thereby to make the moſt exact DISCERNMENT of RIGHT.

Now to "underſtand LEGAL CERTAINTY, and even" to come to the true Knowledge of the Nature of *Probability* itſelf, it is neceſſary to look a little higher and ſee, "in general," what CERTAINTY is, and whence it ariſes.

(*a*) LOCKE, *B.* IV. *Ch.* 15. § 2. *See the* PHILOSOPHICAL PRINCIPLES *of* EVIDENCE *beautifully unfolded, with admirable deductions both ſpeculative and practical, in the* IVth DISSERTATION *of* DR. PRICE. *See alſo*, WATT'S LOGIC. *P.* 2. *c.* 2. § 8. *See alſo* HARTLEY'S THEORY *of the* HUMAN MIND, *edited by* DR. PRIESTLEY, *Ch.* 3. § 2. *Prop.* 38, 9, 40. *and* WILKINS NAT. REL. *Ch.* 1. 3.

†++ *The Words between inverted commas in this Page are added to form a full and diſtinct Diviſion of the Subject: and it is generally to be underſtood where they occur, that they denote Additions or Alterations.*

Of CERTAINTY.

1. *Intuitive.*
2. *Demonſtrative.*

ALL CERTAINTY IS A CLEAR AND DISTINCT PERCEPTION: and ALL CLEAR AND DISTINCT PERCEPTIONS DEPEND UPON A MAN'S OWN PROPER SENSES: Thus, this in the firſt place is certain, and that which we cannot doubt of if we would, that one Perception or Idea is not another; that what belongs to one man does not belong to another: and when Perceptions are thus diſtinguiſhed upon the firſt View, it is called SELF EVIDENCE, or INTUITIVE KNOWLEDGE. (*b*)

Of demonſtrative, or deductive Certainty.

There are ſome other Things whoſe Agreement or Difference is not known on the View: and then we compare them by the MEANS of ſome THIRD Matter; by which we come to meaſure their Agreement, Diſagreement, or Relation.

As if the Queſtion be, whether certain Land be the Land of *I. S.* or of *I. N.* and a RECORD be produced whereby the Land appears to be transferred from *I. S.* to *I. N.*; now, when we ſhew any ſuch third Perception that doth neceſſarily infer the Relation in Queſtion, this is called KNOWLEDGE by DEMONSTRATION (*c*). The Way of Knowledge by NECESSARY INFERENCE is certainly the higheſt and cleareſt that Man is capable of in his Way of Reaſoning: and therefore always to be ſought when it may be had.

The Difference between DEMONSTRATION *and* PROBABILITY.

DEMONSTRATION is always converſant about permanent Things; which being conſtantly obvious to our Senſes do afford to them a very clear and diſtinct Compariſon:

(*b*) *Eſſ. on H. U. B. IV. C. 2.*

(*c*) *This can only be figuratively applied to Queſtions of* JURISPRUDENCE: *which admit of no higher proofs than thoſe of the* THIRD *order, or* VERY HIGH *and convincing* PROBABILITY, *at the moſt: yet there are points which being not* LEGALLY CONTROVERTIBLE *are* FORENSICALLY DEMONSTRABLE **. Thus* NO AVERMENT *being receivable*

* *Vid. Doderidge, E. L.* 196-7.

againſt

pariſon: but tranſient Things, that cannot always occur to our Senſes, are more obſcure; becauſe they have no conſtant being, but muſt be retrieved by Memory and Recollection.

Now moſt of the Buſineſs of CIVIL LIFE ſubſiſts on Actions of Men that are tranſient Things, and therefore often times are not capable of ſtrict Demonſtration; which, as I ſaid, is founded on the View of our Senſes: and therefore the Rights of Men muſt be determined by PROBABILITY.

Now, as all DEMONSTRATION is founded on the View of a Man's own proper Senſes by a Gradation of clear and diſtinct Perceptions, ſo all PROBABILITY is founded upon Views "partially, or in ſome degree," obſcure and indiſtinct, or upon Report from the Sight of others.

Now, this, in the firſt place, is very plain:—that when we cannot ſee or hear any thing ourſelves, and yet are obliged to make a judgement of it, we muſt ſee and hear by Report from others: which is one ſtep farther from Demonſtration, which is founded upon the View of our own Senſes: And yet there is that Faith and Credit to be given to the Honeſty and Integrity of credible and diſintereſted Witneſſes atteſting any Fact, under the ſolemnities and obligations of Religion, and the Dangers and Perils of Perjury, that the Mind equally acquieſces therein as on a Knowledge by Demonſtration; for it cannot have any more reaſon to be doubted than if we ourſelves had heard and ſeen it (*d*): and this is the "Baſis of the reliance to be placed in "Deciſions upon ſolemn Trial, and of the ſatisfactory "reſult of legal Evidence."

Per Holt 6Mod.225,248. Ld. Raym. 154, 746, 1292, 1371. 2 Vern, 471, 591, 603. Ch. Pr. 59, 64, 116. 10 Mod. 8. Str. 526, 1122. ſee alſo Carth. 79, 80, 142, 181, 220, 225, 265, 346. Skin. 15, 24, 82, 174, 205, 431, 579 584, 623, 4.

CHAP. I.

The beſt Evidence to be had which the nature of the Fact ſuppoſes.

The FIRST, therefore, and moſt SIGNAL RULE in Relation to EVIDENCE is this—that A MAN muſt PRODUCE

againſt a RECORD, *Evidence by* RECORD *is the* HIGHEST *Evidence: and therefore analogically* DEMONSTRATIVE.

(*d*) *The Principles of our confidence in teſtimony are ſuch as may well ſupport the high perſuaſion it is capable of conveying: for truth itſelf is ſo congenial to the Mind that it may always be taken for certain, even a bad man will not violate the natural attachment to it from an abſtract preference to falſehood; 2, in legal caſes, it*

639, 40, 672. 3. Salk. 285, 6, 7. 2 Salk. 690. 7 Mod. 129. Ld. Raym. 730, 734, 5. 1292. Str. 162. Barnard. K. B. 243. Vez. 505.

DUCE THE UTMOST EVIDENCE THAT THE NATURE OF THE FACT is capable of (*e*). For the Deſign of the Law is to come to *legal* Demonſtration in Matters of Right; and there can be no Demonſtration of a Fact without the beſt Evidence that the Nature of the Thing is capable of: leſs Evidence doth create but opinion and ſurmiſe; and does not leave a Man the entire ſatisfaction that ariſes from Demonſtration: for IF IT BE PLAINLY SEEN, IN THE NATURE OF THE TRANSACTION, THAT THERE IS SOME MORE EVIDENCE THAT DOTH NOT APPEAR, THE VERY NOT PRODUCING IT IS A PRESUMPTION THAT IT WOULD HAVE DETECTED SOMETHING MORE THAN APPEARS ALREADY.

EXPLANATION: *limiting the Senſe of this Rule to its juſt Conſtruction.*

When we ſay the Law requires the higheſt Evidence that the Nature of the Thing is capable of, it is not to be underſtood that in every Matter there muſt be all that Force and Atteſtation that, by ANY POSSIBILITY, might have been gathered to prove it; and that nothing under the higheſt Aſſurance poſſible ſhould have been given in Evidence to prove any Matter in Queſtion. To ſtrain the Rule to that Height, would be to create an endleſs Charge and Perplexity: for there are almoſt infinite degrees of *poſſible Evidence*, one under the other; and if nothing but Matters of the higheſt Aſſurance might be given in Evidence, the way of Illuſtration of Right "*would rarely attain the End.*" As, for inſtance, no verbal Contract could be proved; becauſe a written Contract carries with it a greater Credibility; and conſequently the unwritten Contract would not be the greateſt Aſſurance that the Nature of the Thing is capable of: ſo a Contract atteſted by two Witneſſes gains more Credit than a Contract atteſted but by one; and therefore,

is not only ſpeculative but practical truth muſt be infringed; and 3, *it is not only the injury to a fellow man, but generally the hazard of detection which is indefinitely great, and the conſequent immediate diſgrace and temporal evils ſuperadded to the influence of religion, and all the awful anticipations of futurity.*

(*e*) *So in the caſe of* Ludlam *on Demiſe of* Hunt, *Queſtion aroſe,*

therefore, by the ſame Argument one Witneſs would be no good Proof of a Contract.

But the true meaning of the Rule of Law that requires the greateſt Evidence that the Nature of the Thing is capable of, is this: THAT NO SUCH EVIDENCE ſhall be brought as, *ex Naturâ rei* ſuppoſes ſtill greater Evidence behind in the party's own poſſeſſion and power: for ſuch Evidence is altogether inſufficient, and proves nothing: it, *even as before intimated*, carries a preſumption contrary to the intent for which it was produced: for, if the other greater Evidence did not make againſt the party, why did he not produce it to the Court? As if a Man offers a Copy of a Deed or Will, where he ought to produce the original: and therefore the Proof of a Copy in this Caſe is not Evidence, and cannot poſſibly weigh any thing in a Court of Juſtice.

CHAP. II.

THE DIVISION *of* EVIDENCE *into* WRITTEN *and* UNWRITTEN.

Now, to underſtand the true THEORY of Evidence we muſt conſider two Things:

FIRST, of the ſeveral "KINDS" of TESTIMONY.

SECONDLY, the FORCE of TESTIMONY to prove the Matter which is alledged.

FIRST, of the ſeveral "KINDS" of TESTIMONY: and that is again TWOFOLD,

1. WRITTEN.
2. UNWRITTEN.

In the firſt place we are to conſider, which of theſe two is to be preferred in the SCALE of PROBABILITY, when they ſtand in oppoſition to each other.

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aroſe, whether a Copy of a Will on which the title turned could be produced from the Regiſter of the Eccleſiaſtical Court. Lord Mansfield *ſaid—the caſe is clear--a man by loſing the Evidence of his Title, ſhall not loſe his eſtate: the Rule in all caſes holds to take the beſt Evidence which the caſe,* rebus ſic ſtantibus, *according to its real circumſtances will admit. If you cannot prove a Deed by producing it, you may produce the counterpart; if you cannot produce the counterpart you may produce a copy, even if you cannot prove it to be a true Copy; but you muſt prove it, cy près, as the Caſe will admit; if a copy cannot be produced you may go into parol Evidence of the Deed: Mic.* 13 *G. III. B. R.—C. L.*

Evidentia eſt pleniſſima, quam res recipiat, Probatio.

CICERO, in his declaiming for *Archias* the Poet, gives a handſome Turn in favour of the UNWRITTEN EVIDENCE: pleading there for the Freedom of the Poet when the Tables of the Enfranchiſement were loſt: and it is to this ſenſe: (*f*) "But here you "demand the Production of the Archives of HERAC-"LEA: which it is known to us all, periſhed in the ITA-"LIAN War. Ridiculous! to have no Reply to the "Evidence in our Poſſeſſion; and to demand that "which it is impoſſible we ſhould have! to diſregard "the recent information of men; and to inſiſt on the "authority of Regiſters! and when you have the illuſ-"trious ſanction of a Man of the firſt eminence and "honour, the uncorruptible teſtimony of a free City, "to require proof from Tables which yourſelf acknow-"ledge to be often corrupted."

But the Balance of Probability is certainly on the other ſide: for the Teſtimony of an honeſt Man, however fortified with the ſolemnities of an Oath, is yet liable to the imperfections of Memory: and as the Remembrances of Things fail and go off, Men are apt to entertain opinions in their ſtead: and therefore the Argument turns the other way in moſt Caſes; for Contracts reduced to writing, are the moſt certain and deliberate Acts of the Mind, and are more advantageouſly ſecured from all corruption by the forms and ſolemnities of the Law, than they poſſibly could have been if retained in Memory only: from

(*f*) *I have taken the Paſſage rather higher than as before quoted: and have varied the tranſlation. The original is thus*; "*Hic tu tabulas deſideras* Heraclienſium *publicas*; *quas* Italico *Bello, incenſo tabulario, interiiſſe ſcimus omnes. Eſt ridiculum, ad ea quæ habemus nihil dicere; quærere quæ habere non poſſumus: et de hominum memoriâ tacere, literarum memoriam flagitare: et cum habeas ampliſſimi Viri religionem, integerrimi municipii juſjurandum; ea quæ depravari nullo modo poſſunt repudiare; tabulas, quas idem dicis ſolere corrumpi, deſiderare.*" § *III.*

hence therefore we ſhall begin with the WRITTEN EVIDENCE; that has the FIRST place in the Diſcourſes of PROOF *and* Probability.

SECTION II.

Of WRITTEN EVIDENCE.

WRITTEN EVIDENCE *is again twofold:*

1. PUBLIC.
2. Private, *between Party and Party.*

FIRST, PUBLIC, and that is alſo twofold:

1. RECORDS.
2. MATTERS *of inferior Nature.*

And firſt of RECORDS:—Theſe are the Memorials of the LEGISLATURE and of the KING'S COURTS of JUSTICE; and are authentic beyond all manner of Contradiction: They are (if a Man may be permitted a ſimile from another ſcience) the proper DIAGRAMS for the Demonſtration of Right: and they do conſtantly preſerve the Memory of the Matter, that it is ever permanent and obvious to the View, and to be ſeen at any time in all the certainty of Demonſtration (*g*): inaſmuch as the RECORD, as is obſerved elſewhere, can never be

(*g*) *We have already intimated that* proper demonſtration *is only of abſtract Truths which are perceived by the underſtanding to be the certain reſult of ſimple, determinate, neceſſary ideas.* Hypothetical, *or* forenſic *Demonſtration hath alſo been conſidered: there is yet another, applicable to our ſubject, which is the* popular, *or* civil: *this is capable of infinitely approximating to rigorous certainty: ſo as that the difference between them ſhall become evaneſcent. It is then ſynonimous to* Moral Demonſtration; *which is the Baſis of* ethical *and political ſcience: though political indeed be properly a Branch of* ETHIC, *as true* Juriſprudence, *of* POLITIC.

proved PER NOTIORA; for a Demonſtration is only appealing to a Man's own *clear* Conceptions; which can never be done with more Conviction than when you draw the conſequence from what is already *conceſſum*: and, conſequently there can be no greater Demonſtration to a COURT of JUSTICE, than an Appeal to its own Tranſactions †.

RECORDS *not being removeable, a* COPY *ſhall be received in Evidence.*

But RECORDS, being the Precedents of the Demonſtrations of Juſtice, to which every man has a common Right to have recourſe, cannot be transferred from place to place, to ſerve a private purpoſe: and therefore they have a common Repoſitory, from whence they ought not to be removed but by the authority of ſome other Court; and this is in the Treaſury of WESTMINSTER. And this piece of Law is plainly agreeable to all Maxims of Reaſon and Juſtice: for if one Man might demand a Record to ſerve his own occaſions, by the ſame Reaſon any other perſon might demand it; but both could not poſſibly poſſeſs it at the ſame time in different places; and therefore it muſt be kept in one certain place, in common for them both. Beſides, theſe Records, by being daily removed, would be in great danger of being loſt: and, conſequently, it is on all hands convenient that theſe monuments of Juſtice ſhould be fixed in a certain place; and that they ſhould not be transferred from thence but by Public Authority from ſuperior Juſtice.

† *Monumenta publica potiora ſunt teſtibus. D.* 22. 3. 10.

The Copies of Records (*b*) muſt be allowed in Evidence; for ſince you cannot have the Original, the beſt Evidence you can have of them is a true copy; and the rule of Evidence commands no farther than to produce the beſt that the Nature of the Thing is capable of: for to tie men up to the Original that is fixed to a Place, and cannot be had, is totally to diſcard their Evidence; but it were very hard and injurious to remove from Evidence the beſt and moſt authentic Teſtimony, becauſe it is ſo guarded and confined by the Law that it cannot be had or produced itſelf. For then the Rules of Law and Right would be the Authors of Injury;

10 Co. 92, 3. Ch. R. 15. Co. Litt. 225. a b. 226. a. 227. b. Cro. Car. 209. 441, 2. Cro. Jac. 70, 103, 109, 292, 317, 360. Bulſt. 154, 5. Pl. Comm. 80. a. 85. a. 148. b. 222. a. Dy. 29. pl 199. 200. a. 5 Co. 75. a. Palm. 857. R. Rep. 332. 2 R. Rep. 172, 191.

(*b*) *Of* Trial by Record *the underwritten paſſage is taken from the* Commentaries.

" *This is only uſed in one particular inſtance: and that is where a Matter of* Record *is* pleaded *in any Action: as a* Fine, *a* Judgment, *or the like; and the oppoſite party pleads* Nul tiel Record *that there is no ſuch matter of Record exiſting: upon this iſſue is tendered and joined in the following form* " and this he prays may be enquired of by the Record," *and the other* " doth the like" *and hereupon the party pleading the Record has a day given him to* " bring it in"; *and Proclamation is made in Court for him to* " bring forth the Record by him in pleading alledged, or elſe he ſhall be condemned;" *and on his failure his antagoniſt ſhall have judgment to recover. The Trial therefore of this iſſue is* merely by the Record: *for, as* Sir Edward Coke *obſerves, a Record or Enrollment is a Matter of ſo high a Nature and importeth in itſelf ſuch abſolute verity, that if it be pleaded there is no ſuch Record it ſhall not receive any Trial by Witneſs, Jury or otherwiſe, but only* by itſelf. *Thus Titles of Nobility, as whether earl or no earl, baron or no baron, ſhall be tried by the King's Writ or Patent only; which is matter of Record. Alſo in caſe of an alien, whether alien friend or enemy, ſhall be tried by the league or treaty between his ſovereign and ours; for every league or treaty is of Record. And alſo, whether a Manor be held in antient demeſne or not, ſhall be tried by the Record of Domeſday in the King's Exchequer.* Comm. *B. III. Ch. 22. § I. But this goes to the caſe where the Record is triable* per Curiam *under the* pleadings: *and in this inſtance, on the Iſſue of* nul tiel Record, *the* Record itself *muſt be produced, if it be a Record of the ſame Court; and if it be a Record of* another Court, *then an Exemplification muſt be brought in* ſub pede ſigilli. *This will be hereafter noticed* (*p.*) *but it ſeemed proper to be anticipated here.*

But

Mod. Rep. 268. Doct. Pl. 215. Saund. 9, 10. Mod. 1, 42, 3. 74, 103, 9. 126. 292, 507, &c. 515, &c. 518. 12 Mod. 3, 24. 394, 414, 494, 500, 579. 8 Mod. 75, 322. 9 Mod. 66. 2 Vern. 471, 591, 603. Ch. Pr. 166. Eq. Abr. 228. Ld. Raym. 153, 4. 746. 2d Ld. Raym. 763, 967, 1126, 1536. Str. 401, 526. 2 Str. 1122, 1186, 1198, 1241. St. Tr. 44. Langhorn's Tr. 3 Lev. 387, 8. 8 G. c. 25. § 2.

Injury; which is the higheſt Abſurdity: For in many Caſes Juſtice muſt fail without proof from the Records, when themſelves cannot be had at the Trial.

A COPY *of a* COPY; *not* EVIDENCE.

1 Bac. Abr. 308. Skin. 174, 584. By ſt. 20 G. II. c. 24. § 14. Copies of letters of attorney, &c. relating to prize-money made evidence.

But a Copy of a Copy is no Evidence: for the Rule demands the beſt Evidence that the Nature of the Thing admits; and a Copy of a Copy cannot be the beſt Evidence: for the farther off a thing lies from the firſt original Truth, ſo much the weaker muſt the Evidence be: and therefore they muſt give a true Copy in Evidence; which is to reduce it to its firſt and beſt Certainty. Beſides, when you give a Copy of a Copy in Evidence, there muſt be a Chaſm in your Evidence: for, if you have the firſt Copy, and, by oath or otherwiſe, prove that a true Copy, then the ſecond Copy is altogether idle and inſignificant; if you have only the ſecond Copy, then it cannot appear that the firſt was a true Copy, becauſe it is not there to be ſworn to, and by conſequence it is not proved in Court: and then it is no Evidence: and, conſequently, the tranſcript of that which is in itſelf not Evidence cannot be Evidence.

Kent, Tr. Aff. 3709. per Tracy, Wilſon and Wycherley.

Hence it is, that in an Ejectment upon an *Elegit* you muſt prove, not only the Judgment, and by the Judgement Roll that the Elegit iſſued and was returned; but you muſt prove the writ of Elegit by a true Copy thereof; and the inquiſition thereon: becauſe the Notice

But the Caſe where a COPY *of a Record ſhall be given in Evidence, as above intimated in the text, is where the Record is a* collateral *Matter; the* Inducement *and* NOT *the* GIST *of the Action: for then it is not traverſable, but muſt be given in Evidence to the Jury on the Proof of the Declaration. For nothing can be of itſelf traverſable that does not make a full end of the Matter; and this it cannot do if Fact be joined with it: in ſuch caſe therefore, the Iſſue muſt be upon the Fact, and tried by a Jury; and the*

Notice of the Judgement Roll is no more than that the party did elect ſuch Execution to iſſue; and it is the Elegit and Inquiſition upon it, that carves out the Term and gives the Title of Entry: ſo that the Judgement Roll is no more than a Memorandum that it was iſſued and returned; and the Copy thereof is no Evidence, being but a Copy of that which is but a Copy or Memorandum of the Thing itſelf. *Sed quære*, becauſe *Holt* was of a different opinion; and was for allowing the Entry of the Roll to be good Evidence, that an Elegit had iſſued: for a Notice on the Roll of the Being and Return of the *Elegit*, is as good Evidence that ſuch *Elegit* was, as a Copy thereof.

SECTION III.

OF THE HIGHEST LEGAL RECORDS.

ACTS OF PARLIAMENT.

1. PUBLIC, or GENERAL.
2. PRIVATE, or PARTICULAR.

The firſt ſort of Records are, ACTS of PARLIAMENT: (*i*) theſe are the Memorials of the LEGISLATURE: and therefore they are the higheſt and moſt abſolute Proof. And they either relate to the KINGDOM in GENERAL, and then they are called GENERAL ACTS of PARLIAMENT; or only to the concerns of private perſons, and are thence called *particular*, or PRIVATE Acts.

Of

the Record may be given in Evidence to ſupport the Fact: and whenever a Record is offered to a Jury, the Copy is Evidence. L, N, P. 230.

(*i*) *I have taken the Liberty to omit the Diſtinctions and inſtances of the Lord Chief Baron: as they are not ſtated with his uſual perſpicuity, being apparently* Memoranda *for a farther illuſtration; and in their place, I have ſubſtituted the explanation given in the Commentaries: which will be found free from obſcurity in the principles, and from Error in the inſtances. It is thus;*

"STATUTES *are either* GENERAL *or* ſpecial; PUBLIC *or* private. *A General or Public Act is an univerſal Rule that regards the* WHOLE COMMUNITY; *ſpecial or private Acts are rather Exceptions than Rules, being thoſe which only operate upon particular perſons and private concerns.*

Thus

Of General Acts.

Printed Statute Book.

Salk. 566. 10 Mod. 216. 126, 781. Keb. 2. Jenk. Cent. 280. pl. 5. Hale's Hiſt. C. L. 15, 6. Style 462. Str. 446. 3 R. S. L. 90.

Of General Acts of Parliament the printed Statute Book is Evidence: "or rather is allowed to be "uſed for the recollection and better vouching of that "which reſts on its own ſtrength and legal Notoriety:" for it is not that the printed Statutes are the perfect and authentic Copy of the Records themſelves, "ſince" there is no abſolute Aſſurance of their Exactneſs: but every perſon is ſuppoſed to apprehend and know the Law which he is bound to obſerve, "and which the Con-"stitution regards as the Act of his Conſent, either "by general and approved Uſage, or under full and "fair Repreſentation," and therefore the printed Statutes are allowed to be Evidence; becauſe they are the Hints of that which is ſuppoſed to be lodged in every Man's mind already.

See a remark on this, Bl. 117. the Public Acts of this Reign compoſe *ſeven* of the *fourteen* volumes in *Ruffhead*'s Edition of the Acts of *five* centuries, verging to a *ſixth* complete.

Private Acts.

Printed Statute Book not to be read.

In private Acts the printed Statute Book is not Evidence, though reduced into the ſame Volume with the general Statutes; but the party ought to have a Copy compared with the Parliament Roll: for private Statutes do not concern the Kingdom in general; and therefore no Man is underſtood to be poſſeſſed of them, as they are of thoſe General Laws which are ſet up as the Regulation of their own actions: and conſequently the private

Thus, to ſhew the Diſtinction, the ſt. 13 *Eliz. c.* 10. *to prevent ſpiritual Perſons from making Leaſes for longer terms than twenty-one years or three Lives is a Public Act; it being a Rule preſcribed to the whole body of ſpiritual Perſons in the Nation: but an Act to enable the Biſhop of Cheſter, to make a Leaſe to A. B. for ſixty years is an exception to this Rule; it concerns only the parties, and the Biſhop's ſucceſſors; and is therefore a private Act.*" Introd. § 3.

For the farther illuſtration of this it may be remarked, that the Act of Toleration, though in Larwood's *Caſe it was ſuppoſed to be a private Act, was by a great Authority, afterwards conſidered as a* public *one: and on this ground, that the diſtinction between a particular and a general ſtatute reſts upon the point of notoriety and univerſality. Now the Diſſenters*

private Statutes are no intimation to what is already known; but they are the Rules and Decrees that relate to the private Fortune of this or that particular Man, which no one elſe is obliged to underſtand or take notice of, as Matter of Evidence: and they ought therefore to be proved with the ſame punctuality as the Copies of all other Records: for they are not conſidered as already lodged in the Minds of the People.

But my *Lord Chief Juſtice* PARKER allowed the printed Statute Book to be Evidence in the Caſe of the COLLEGE of PHYSICIANS and *Dr. Weſt:* of the Truth of a private Act of Parliament, touching the Inſtitutions of the College. "And this probably from the "Notoriety of the Eſtabliſhment: according to which "it has been held, that a private Act of Parliament in "print for a purpoſe which though ſpecial, affects an "extenſive diſtrict, may be given in Evidence; as the "Act for *Bedford Levels*, for rebuilding *Tiverton*, "&c. not only becauſe they gain ſome authority by be-"ing printed by the King's Printer; but beſides, (and "chiefly it may be preſumed) becauſe from the Noto-"riety of the ſubject they cannot be ſuppoſed to be "unknown in the Vicinage. On like principles, "printed Copies of other things have been admitted in "Evidence, when of a public Nature; without being "compared with the Original: as the printed Procla-"mation for Peace was admitted to be read, without "being examined by the Record in Chancery *.

10 Mod. 353. But this matter of Evidence does not appear there. Ld. Raym. 472.

* L. N. P. P. VI. Ch. 1. 225-6.

SECTION IV.

Of PLEADING, *or giving in* EVIDENCE, ACTS *of* PARLIAMENT.

A GENERAL ACT of PARLIAMENT is taken Notice of

Hob. 227. 4 Co. 76. a. Noy 124. Doct. pl. 336.

Diſſenters were a body of people well known in the Kingdom and even mentioned in ſeveral Acts of Parliament: and had public ſtatutes enacted againſt them before the Toleration Act, which were repealed by that Act; and therefore it ſhould in all reaſon be conſidered as

Plowd. 65. a. 84. a. Cro. J. 112. 5 Co. 2.

of by the Judges or Jury without being pleaded, for the Reaſon already given.

"But, converſely, on the ſame Account," a particular Act of Parliament is not taken notice of by the Court, without being pleaded: for the Court cannot judge of particular Laws which do not concern the whole Kingdom, unleſs that Law be exhibited to the Court; for they are obliged by their oath to judge *ſecundum Leges & Conſuetudines Angliæ*, and therefore they cannot be obliged, *ex officio*, to take Notice of a particular Law; becauſe it is not *Lex Angliæ*, a Law relating to the whole Kingdom: therefore, like all other private Matters, it muſt be brought before them to judge thereon.

But a private Act of Parliament, or any other private Record, may be brought before the Jury, if it relate to the Iſſue in Queſtion, though it be not pleaded: for the Jury are to find the Truth of the Fact in Queſtion, according to the Evidence brought before them; and therefore if the private Act brought before them doth evince the Truth of the Matter in Queſtion, it is as proper Evidence to the purpoſe as any Record or Evidence whatſoever.

Nay, ſince ſuch Records are moſt authentic, it is the moſt proper ſort of Evidence: the Error in this Matter

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as a Public Act. Eſpecially as it virtually affects all perſons in the kingdom; ſetting them at liberty and giving them a legal right to become Non-conformiſts if they are ſo diſpoſed. And the preamble of the Act mentions another conſideration which is of the moſt public Nature. "Forasmuch as ſome eaſe to ſcrupulous Conſciences in the exerciſe of Religion may be an effectual means to unite their Majeſties Proteſtant ſubjects in intereſt and affection."—Now is it poſſible to conceive that . . . this can be a private Act. APPENDIX *to Dr.* FURNEAUX's *Letters.*

Matter was founded upon the old Notion, that the Jury could not find an Act of Parliament, or other Matter of Record: which is falſe; for the *Allegata* to the Jury, ſays *Hobart*, are every thing that is "alleged and "proveable, which makes to the Iſſue."

If an Action or Information be brought on a penal Statute, and there is another ſtatute which diſcharges and exempts the Defendant from the Penalty, this ought to be PLEADED, and cannot be given in Evidence on the General Iſſue: for the General Iſſue is but a denial of the Plaintiff's Declaration; and the Plaintiff hath proved him guilty when he hath proved him within the Law upon which he hath founded his Declaration; ſo that the Plaintiff hath performed what he hath undertaken: but if the defendant would exempt himſelf from the Charge of the Plaintiff, he ſhould not have denied the Declaration; but have ſhewn the Law which diſcharges him. 2 R. Abr. 683. W. Jones 320.

Another Difference is taken where there is a ſaving Proviſo: "and this is to be diſtinguiſhed: for where "the ſaving in the Proviſo is MATTER of FACT" it may be given in Evidence on the GENERAL ISSUE: becauſe if the Party be within the Proviſo, he is not guilty on

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May it not farther be concluded that the ACTS *for the* REVERSAL *of the* ATTAINDER *of Ld.* RUSSEL *and of* SYDNEY *are notwithſtanding their form and their apparent termination in the individual Caſes, properly* PUBLIC ACTS; *being* DECLARATORY *of the Common* RIGHT *of every Man in like Caſes, and of* PRINCIPLES *of the moſt general importance in the* CONSTITUTION *of our* CRIMINAL *Law. As much therefore Public as the Act for the Reverſal of the Judgment againſt* HAMPDEN *in the Caſe of Ship Money; which is rightly printed among the Public Acts: and to this Vindication of the Memories of theſe heroic Men and of our Laws, by the Voice of Parliament, ought equally to have been.*

on the body of the Act on which the Action is founded, and if an Action of Debt be brought againſt a ſpiritual perſon for taking a Farm, the Defendant pleads "that he was not poſſeſſed of or held the Farm contrary to the Form of the Statute." Upon this Iſſue joined, the Defendant may give in Evidence that it was for the Maintenance of his Houſe according to the Proviſo of the Statute.

But where it is a POINT of LAW it muſt be pleaded "as a ſpecial exemption." Thus upon an Information of the 5 and 6 E. VI * againſt Ingroſſing, the Defendant cannot give in Evidence a Licence of three Juſtices of the Peace according to the Proviſo in the Statute "in ſupport of the General Iſſue:" becauſe whether there be a ſufficient Authority is a Point of Law, and cannot be given in Evidence without pleading it.

* c. 14.

And *generally*, Public *no leſs than* private Statutes ought to be pleaded when they make void legal ſolemnities, "or take away the compulſion to the per-"formance of a Contract." For in this caſe the Conſtruction of the Law is not that ſolemn Contracts ſhall be deemed perfect Nullities, but that they are voidable "on Principles of Public ſecurity and Peace" by the parties prejudiced by thoſe Contracts, when "they ſhall "duely challenge that privilege of Exemption which "the Law ſuffers them to claim; duely challenge it, "in reſpect, at leaſt, of legal Forms and ſolemnities; "ſo that under the General Iſſue the Plaintiff may not "be ſurprized by Evidence, which from the courſe of "the Proceedings he is not prepared to encounter "on equal Terms." And farther, another Reaſon of this Conſtruction ariſeth from the Rule, that "Any "one

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been. And thus is well expreſſed what characterizes a public Act in theſe words of GILBERT "*If the Point of Law be never ſo ſpecial, yet if it relates equally to all it is a* GENERAL LAW."

"one may renounce a Right introduced for his "own Benefit." *Quilibet renuntiare poteſt Juri pro ſe introducto.* Where any perſon has benefit by a Law, he may renounce that Benefit if he will, and refuſe to take Advantage of it. "Now a Man who by pleading "generally, denies the Fact of the exiſtence of a Con- "tract virtually, by ſo doing relinquiſhes a Right of "claiming privilege to avoid the Contract. Thus, on "Action of Aſſumpſit for a ſimple Contract Debt, a "Man pleads *not Guilty*, which is denying the exiſt- "ence of ſuch Debt or undertaking; he ſhall not give "in Evidence that he did not undertake *within Six* "*Years*; for this ſpecial circumſtance ſupports not "his Plea; ſince that was a Denial, generally, of the "undertaking; this a ſubſequent Matter foreign to the "Undertaking which confeſſes and avoids it: within "this exemption therefore he muſt bring himſelf by "*pleading* it, and thus enabling the Plaintiff to go to "Iſſue on the real point on which the Defence is "grounded."

"And farther," as what Solemnities ſhall conſtitute a legal Contract is Matter of Law, "ſo and much "more is it" how the effect of thoſe Solemnities ſhall be defeated and deſtroyed by "legal Exceptions:" and therefore when any Action is founded upon a ſolemn Contract "or when any Contract apparently in force "is to be ſuperſeded by legal Limitations, as in the firſt "inſtance the Specialty of the Contract is" offered to the Court that it may appear whether legally made, "ſo for it's Avoidance the ſpecial Claim of Exemption "by Matter of Law ſhould be offered to the Court "that it may appear if it be legally" defeated. Both certainly muſt "be referred" to the ſame Judicature.

Therefore you cannot give the Act touching uſurious Contracts in Evidence on the General Iſſue; nor will notice be taken of it without pleading; but, though a General Law, it ought to be pleaded. So of a

Fine made void by the ſtatute of *Weſtminſter* 2. *c.* 1. "for" it is conſtrued voidable only "on pleading."

So of a Recovery by a Wife with a ſecond Huſband: made void by ~~11 H. VIII.~~ but conſtrued voidable only "in like manner."

So the 23 H. VI. *c.* 10. of Sheriffs Bonds cannot be given in Evidence on the General Iſſue; but ought to be pleaded.

SECTION V.

COPIES *of* MINUTES *of* JOURNALS *of* THE HOUSE *of* LORDS.

"It is here proper to mention thoſe Records which "appertain to the higheſt Judicature eſtabliſhed by the "CONSTITUTION. In a Caſe where a Copy of the "Minute Book of the HOUSE of LORDS was offered in "Evidence, and objection made to the receiving of it as "ſuch; Lord *Mansfield* expreſſed himſelf to this effect, "" The MINUTES of the Judgement are the ſolemn "Judgement itſelf:" Not a Word is added upon the "JOURNALS. And a COPY of them may certainly be "read in Evidence: for the inconvenience would be "endleſs if the Journals of the Houſe of Lords were "to be carried all over the Kingdom. Formerly a "doubt was entertained whether the MINUTES of the "HOUSE of COMMONS were *admiſſible*; becauſe it is "*not* a Court of Record, but "thoſe" of the HOUSE "of LORDS have always been admitted even in criminal "Caſes *."

* Cowp. 17. Jones v. Randall, Hil. 14 Geo. 3.

"We

SECTION VI.

"We are now to ſpeak of the" COPIES of all other RECORDS: and they are twofold.

1. UNDER SEAL.
2. *Not under Seal.* 10 Mod. 125, 6.

FIRST, *under* SEAL: And theſe are called by a particular Name, EXEMPLIFICATIONS, and are of better Credit than any ſworn Copy. For the COURTS of JUSTICE that put their Seals to the Copy, are ſuppoſed more capable to examine and more exact and critical in their examinations, than any other perſon is or can be: and there is more Credit to be given to their Seal than to the Teſtimony of any private perſon.

EXEMPLIFICATIONS are twofold.

1. *Under the* BROAD SEAL.
2. *Under the* SEAL of the COURT.

Under the Broad Seal, EXEMPLIFICATIONS are of themſelves RECORDS of the greateſt Validity: and to which the Jury ought to give Credit under Penalty of an Attaint: for there is more Faith due to the moſt ſolemn Atteſtations of Public Authority than to any other Tranſactions whatſoever: and therefore a Falſification in this Caſe is High Treaſon. Sid. 145, 6. Hardr. 118. Pl. Com. 411. a. 3 Inſt. 15, 6. 25 E. 3. St. 5. c. 2. v. Mirroir, c. 1. § 6. p. 28.

When a Record is exemplified under the GREAT SEAL it muſt be, either a Record of the COURT of CHANCERY, 3 Inſt. 173.

or

or be ſent for into the Chancery;—which is the Centre of all the Courts; by a CERTIORARI;—and from thence the ſubjects receive a Copy under the Atteſtation of the Great Seal. For in the firſt Diſtribution of the Courts, the CHANCERY held the SEAL from whence Authority iſſued to all Proceedings: and thoſe Proceedings can not be copied under the Great Seal unleſs they come into the Court where that Seal is lodged.

3 Inſt. 173. When any Record is exemplified, the whole muſt be exemplified; for the Conſtruction muſt be, from the view of the whole Matter taken together.

Under SEAL of the COURT.

The ſecond ſort of Copies under Seal are the EXEMPLIFICATIONS under the SEAL of the Court: and theſe are of higher Credit than a ſworn Copy, for the reaſons formerly given. (*k*)

"EXEMPLIFICATIONS *and inſtruments* quæ ſibi ipſa "faciant Fidem *to be delivered to the Jury to take* "*out with them.*"

Sid. 140. Hardr. 118. Pl. Com. 411. a. Theſe EXEMPLIFICATIONS, and all other under Seal, ſhall be delivered to the Jury to be carried with them, but ſworn Copies ſhall not; for we have ſhewn in "THE COURT OF CHANCERY," that the invention of Sealing was firſt advanced inſtead of Coins them-

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L. N. P. 227. (*k*) *Yet an Exemplification of a private Deed ſhall not be admitted in Evidence where in the Cuſtody of the party though under the Broad Seal: for being in private Cuſtody and not in that of the Law they are ſubject to raſures and interlineations, and ought to be produced themſelves as the beſt Evidence of the Contract. It is to the Exemplifications of a Record that this high Credit is given.*

ſelves;

ſelves; and that from thence it began to be made uſe of by way of Atteſtation; and from the Example of the King it began to be uſed in all the Courts of Juſtice for the Atteſtation of their Tranſactions; and from the ſame Example it began to be uſed by private Lords of Manors for the Authenticating of their Grants, and for Tickets inſtead of Pieces of Money; and from hence Impreſſions were deviſed with diſtinctions of Arms and of Families, and theſe were perfectly known in the Neighbourhood, and therefore are always delivered to the view of the Jury, and the Jury are allowed to carry them away with them as the Acts of the moſt remarkable Solemnity, that the moſt ſolemn Acts may make the laſt Impreſſion.

But the Chirograph of a Fine, a ſworn Copy, or any other Writing, though it may be given in Evidence, yet it ſhall not be delivered to the Jury: for theſe have no intrinſic Credit in themſelves, and the Jury of themſelves are not ſuppoſed to take notice of them: —they have no Credit but what they derive from ſomething elſe—*viz.* from the Oath of the perſon who atteſts them, or from ſome preſumption in their favour: ſo that they receive their Credit from ſome Acts in Court; but do not carry it along with them; and therefore cannot be removed out of Court with the Jury. But things *under Seal* are ſuppoſed to have an intrinſic Credit from the Impreſſion of the Signature: and are ſuppoſed to be known to the Jury in ſome meaſure, and therefore are very conveniently lodged in their poſſeſſion to diſcern of them: But of writings Sid. 145.

that are not under Seal; the Jury can make no Diſcernment of their own: their Credit muſt totally ariſe from ſome Act in Court, and therefore they can not be put in the Power of the Jury.

Of SEALS PUBLIC *and Private.*

Sid. 146. Hardr. 118, 9. Pl. Com. 411. a. Bur. R. 147. Say. R. 298. A Commiſſion under the Exchequer Seal, (though of Inſtruction not of entitling), is Evidence though not concluſive, yet, however, admiſſible.

But here the Diſtinction is to be made between SEALS of PUBLIC and Seals of Private CREDIT: for Seals of Public Credit are full Evidence of themſelves without any oath made: but Seals of Private Credit are no Evidence, but by an Oath concurring to their Credibility.

Seals of Public Credit are the Seals of the King and of the Public COURTS of JUSTICE time out of Mind: Now theſe Courts make a part of the Law and Conſtitution of the Kingdom, and have their ſanction in that immemorial Uſage that is the Foundation of the Common Law; "And" the Seals of theſe Courts are part of the Conſtitution of the Courts themſelves: and, by conſequence, the Courts and the Seals of the Courts are ſuppoſed to be known to every body: ſince they are equally entitled to that ſuppoſal as any other Cuſtom or Law whatſoever.

Sid. 146.

So the Seal of a Court created by Act of Parliament is of full Credit, without farther Atteſtation: for the Act of Parliament is of the ſame Notoriety, "preſumptively," as the Common Law: and therefore the

the Court and the Seals, thereby created are ſuppoſed "to be" univerſally known.

But the Seals of private Courts or of private Perſons are not full Evidence by themſelves without an Oath ſupporting their Credibility: for it is not poſſible to ſuppoſe theſe Seals to be univerſally known: and conſequently, they ought to be atteſted by ſomething elſe;—by the Oath of ſome one who has Knowledge of them; for what is not of itſelf known muſt be made known *aliunde*. And when the Seals are thus atteſted they ought to be delivered in to the Jury: becauſe though part of their Credit ariſes from the Oath that gives an Account of their Sealing, yet another part of their Credit ariſes from a Diſtinction of their own Impreſſion; for, as I ſaid, antiently every Family had it's own proper Seal as it is now in Corporations; and by this they diſtinguiſh their manner of contracting one from the other; and by falſe Impreſſions of their Seals they diſcovered a Counterfeit Contract; and therefore it was not the Oath but the Impreſſion of the Seal accompanying it, that made up the complete Credit of the Inſtrument. (*l*)

But ſince in all private Contracts the Diſtinction of Sealing is worn out of uſe, and men uſually Seal with any Impreſſion that comes to hand, to be ſure there

(*l*) 8 Ed. I. Henry *de* Perpoint *came into the Chancery of* Lincoln, *and publickly declared he had loſt his Seal, proteſting that if any Inſtrument were found ſealed therewith after that time, the ſame ſhould be of no value or effect, which Proteſtation was regiſtered accordingly.* FULLER's Worth, Nottinghamſhire.

muſt be Evidence of putting the Seal; becauſe at this day, little can be diſcovered from the bare Impreſſion: "and" ſince the Witneſſes Names are inſerted in the Contract, unleſs they appear to prove the Contract, there is not the utmoſt Evidence that the Nature of the Thing "ſuppoſes:" for their not appearing is a Preſumption that they never were privy to any ſuch Tranſaction. But of this hereafter.

SECTION VI.

COPIES *not under Seal.*

The SECOND Sort of COPIES are thoſe that are *not under Seal:* and theſe are of two Sorts:

1. *Sworn Copies.*

2. *Office Copies.*

FIRST, SWORN COPIES: theſe muſt be of the Records brought into Court on Parchment: and not of a Judgement on Paper ſigned by the Maſter; though upon ſuch Judgement you may take out Execution: for it does not become a permanent Matter till it be delivered into Court, and there fixed, as *Memoranda* or Rolls of that Court; and until it be a Roll of that Court it is transferable any where, and ſo doth not come under the Reaſon (*m*) of Law that permits us to give a Copy in Evidence.

3 Inſt 173. When a Man gives in Evidence the *Sworn* Copy of a Record he muſt give the whole Copy of the Record in Evidence: for the precedent and ſubſequent Words and ſentence may vary the whole Senſe and import of the thing produced, and give it quite another Face:

(*m*) *It is with reference chiefly to this and ſimilar Caſes where a General Rule reſults from Principles that it is ſaid* "Ceſſante Ratione Legis, ipſa Lex ceſſat:" *for to poſitive Inſtitutions this Maxim does not apply.*

and

and therefore ſo much at leaſt ought to be produced as concerns the Matter in Queſtion.

2. Office Copies.

Here the Difference is to be taken between a Copy authenticated by a Perſon truſted to that purpoſe, for there that Copy is Evidence; and a Copy given out by the Officer of the Court that is not truſted to that purpoſe, for that is not Evidence without proving it actually examined.

The Reaſon of the Difference is,—that where the Law hath appointed any perſon for any purpoſe, the Law muſt truſt him, ſo far as he acts under the Authority that the Law hath lodged in him; otherwiſe it would be to give Credit to him and to another Officer at the ſame time.

Therefore the *Chirograph* of a *Fine* is Evidence to all perſons of ſuch Fine; for the *Chirographer* is appointed to give out Copies between the parties, of thoſe Agreements that are lodged of Record: and therefore his Copy muſt be admitted as Evidence without Diſpute. Pl. Com. 119. b.

So where a Deed is *enrolled*, the Endorſement of that *Enrollment* is Evidence, without farther proof of the Deed; becauſe the Officer is entruſted to authenticate ſuch Deeds by Enrollment: and when ſuch Officer endorſeth that he hath done it purſuant to the Law, then the Law, which entruſted him with the Authority of doing it, ought to give Credit to what he has done. 10 A. c. 18. 8 G. 2. c. 6. § 21.

But

But if an Officer of the Court, who is not entruſted for that purpoſe makes out a Copy, they ought to prove it examined: the Reaſon is, becauſe being no part of his Office he is but a private Man: and a private Man's mere writing or word ought not to be credited without his Oath. *

Therefore it is not enough to give in Evidence a Copy of a Judgement, though it be endorſed to have been examined by the Clerk of the Treaſury; becauſe it is not part of the neceſſary Office of ſuch Clerk; for he is only entruſted to keep the Records for the Benefit of all Mens Peruſal, and not to make out Copies of them.

So if the Deed enrolled be loſt, and the Clerk of the Aſſize makes out a Copy of the Enrollment only; this is no Evidence, without proving it examined: becauſe the Clerk is intruſted to authenticate the Deed itſelf by Enrollment, and not to give out Copies of the Enrollment of that Deed.

Chutel and Pound, H. Aff. 1700.

Where a *Fine* with *Proclamations* is to be a Barr to a Stranger, there the Proclamations muſt be examined from the Roll: for the *Chirographer* is authorized by the Common Law to make out Copies to the parties of the Fine itſelf: yet is not appointed by the Statute to

* *In teſtimonio non creditur niſi jurato.*

Copy

Copy the Proclamations; and therefore his Endorſement on the Back of the Fine is not binding.

SECTION VIII.

Of Lost Records.

Where a Record is *loſt*, a Copy of it may be given in Evidence without ſwearing a true Copy; for the Record is in the Cuſtody of the Law and not of the Party; and therefore if loſt, there ought to be no Injury ariſing to the Party's private Right: and conſequently if it be loſt, the Copy muſt be admitted without ſwearing any examination concerning it; ſince there is nothing with which the Copy can be compared, and therefore it muſt be preſumed true without examination. Ventr. 257. Styl. Pr. Reg. 25. Mod. 117. Salk. 285.

But in ſuch Caſes as theſe, the Inſtruments muſt be according to the Rules required by the Civil Law; They muſt be *vetuſtate Temporis, Judiciaria Cognitione, roborata.* Mod. 117. Gravin. Dig. 292.

So the Copy of the Decree of Tythes (*n*) in *London* has been often given in Evidence without proving it a true Copy; becauſe the Original is loſt. Vent. 257.

So a Recovery of Lands in Antient Demeſne was given in Evidence where the Original was loſt, and Poſſeſſion had gone a long time according to the Recovery. Ibid.

SECTION IX.

Of the Manner *in which* A Record is Evidence.

Having thus ſhewn how the Record is to be given

(*n*) *In the Reign of* H. VIII. *it was about a Century old when it was of this ſettled Authority.*

in

in Evidence by proving a Copy, we muſt next ſee in WHAT MANNER and in WHAT CASES they ought to be EVIDENCE.

And here, in the firſt place, it regularly appears that where the Record is PLEADED and appears in the Allegations it muſt be tried on the Iſſue NUL TIEL RECORD; but where the Iſſue is upon Fact, the Record may be given in Evidence to ſupport that Fact.

Sid. 145, 6. But out of this Rule there is "an apparent" Exception which "indeed is rather a part of the Rule "itſelf fully ſtated" that where the Record is *Inducement* and not the GIST of the Action, there it is not of itſelf traverſable; and therefore "though it be upon the "Pleadings, yet ſtanding as an Allegation not concluſive, "it is SUBSTANTIALLY NOT PLEADED" and therefore muſt be given in Evidence on the Proof of the Action.

Style 22, Sid. 145. When the Iſſue is NUL TIEL RECORD, the Record if of another Court, muſt be exemplified by bringing it in SUB PEDE SIGILLI of that Court; but where offered to a Jury, any of the beforementioned Copies are Evidence.

"Where a Record is collateral to the Iſſue, you muſt "firſt prove all the circumſtances neceſſary to give "operation to the Record as between the parties." Thus, to a RECOVERY, it is eſſential that there be a TENANT to the PRÆCIPE "the perſon thus ſued muſt "be

" be ſeized of the Freehold; and in a modern Reco-
" very this ſeizin muſt be proved."

" But" where a Recovery is antient, * you need not prove any Seizin in the Tenant to the *Præcipe*; for in an antient Recovery the Preſumption is for the Recoveror; " who" ſhall be ſuppoſed ſeized at the time of the Recovery, ſince he hath been ſeized ever ſince.

" And now by the ſtatute 14 G. II. c. 20. § 4. " conformably to the ſpirit of the common Law, if " the Recovery itſelf do not appear to be entered, or " be not regularly entered on the Record, yet the Deed " to make a Tenant to the Præcipe, and to declare the " Uſes of a Recovery ſhall, after a Poſſeſſion of " TWENTY Years, be *ſufficient Evidence* in behalf of " a Purchaſor for valuable Conſideration.

" And notwithſtanding the *legal* Freehold be veſted " in Leſſees, thoſe entitled to the next freehold in re-" mainder or reverſion may make a *good Tenant to the* " *Præcipe*; and the Deed or fine creating ſuch Te-" nant, though ſubſequent to the Judgment of Reco-" very, yet, if of the ſame Term, ſhall be valid."

And before the Act, Tenant for Life, the Remainder in fee, and he in the Remainder in fee ſuffers a Common Recovery with *ſingle* Voucher, and the Re- Vent. 257. 2. Str. 1129. 1185. 1267.

* *Ex Diuturnitate Temporis omnia præſumuntur ſolenniter acta.*

covery

covery is antient; "and it was objected that Part of "the Lands were leaſed off for Life, and that for "thoſe Lands there could be no Tenant to the Præ-"cipe" but in Regard the Poſſeſſion had followed for ſo long a time, the Court ſaid, they would preſume a ſurrender.

Moor 256. pl. 402. 2. R. Abr. 395. Pig. of Rec. 36.

"Tenant for Life merely, cannot ſuffer a Recove-"ry to affect the Entail. And further," if Tenant for Life, and the Remainder-man in Tail, join in a common Recovery with SINGLE VOUCHER, this will not bar the Entail: for in this Caſe the PRÆCIPE is brought againſt them both as JOINT-TENANTS: now he in Remainder hath no immediate Eſtate of Free-hold in him, and "therefore" is not Tenant to the PRÆCIPE: and "conſequently" is not bound by the Recovery had againſt the Tenant for Life, unleſs he come in upon the AID PRAYER; though the Remain-der is turned to a Right by ſuch Recovery.

2. R. Abr. 396.

But if there be Tenant for Life, the Remainder in Tail "and the Præcipe be brought againſt the Tenant "for Life (or a Tenant of the Freehold otherwiſe "made for the occaſion, by the ſaid Tenant for Life,) "and he vouches the Tenant in Tail, who vouches "over the Common Vouchee, then on this DOUBLE "VOUCHER" he in Remainder is barred, becauſe he is as properly called in as Vouchee as if he had been called in on PRAYER of AID of Tenant for Life; and then when he takes up the Defence and makes De-fault, then he muſt be barred by the Judgment for want of Title appearing; for when any perſon is pro-perly in Court and doth not defend his Title, he is as

properly barred as he which hath no Title at all; and when Tenant in Tail is barred for want of Title, the Iſſue can never after recover in his *Formedon*. (*o*)

" So in a FINE, if it be pleaded, and the Defendant " in his Replication allege, that *partes finis nil habuerunt*, " that it was levied by thoſe who had no intereſt in " the Eſtate, this will be good to bar the operation of " the Fine, if it be by Common Law; but not ſo if it " be a Fine with Proclamations under the ſtatute, " for that ſhall bind the Parties and all who claim " under them, and ſhall alſo, if no Claim be made " within five years, bind STRANGERS. With theſe " exceptions, that if they had not a preſent Right at " the time levied, or were under impediment of ſuing " ſuch Right when the Fine was levied by reaſon of " coverture, abſence beyond Sea, inſanity, or impriſon- " ment, the Non Claim ſhall be computed only from " the accruer of the Right or Removal of the Impedi- " ment." Comm. 2. c. 21.

S. IX. *Title* 2.

OF VERDICTS.

IF A VERDICT BE HAD ON THE SAME POINT, AND BETWEEN THE SAME PARTIES, IT MAY BE GIVEN IN EVIDENCE, though the Trial was not had for the ſame Lands.

The Verdict ought to be between the ſame Parties, becauſe otherwiſe a Man would be bound by a Deciſion when he had not Liberty to croſs examine: and nothing can be more contrary to natural Juſtice than that any ſhould be injured by any determination he was not at Liberty to controvert, for that is to Lewis and Clerges, Term. Paſch. 1700.

(*o*) Smyth *v.* Clifford, E. 27 G. III. T. R. 738. A. *Tenant for Life*; *Remainder to* B. *for Life*; *Remainder to firſt*, &c. *Sons of* B. *in tail*; *Remainder to* B. *in tail*: A. *and* B. *by leaſe and releaſe make a Tenant to the* præcipe, *and ſuffer a* recovery *to bar* B's *Remainder in tail, ſubſequent to the entail on his Sons. This is no forfeiture of the Eſtate of* A. *or* B.; *the prior Entail is not deveſted by it*; *and it is a good Recovery to bar the Entail of* B.

ſet

ſet up a Deciſion unexamined, ſo far "as reſpects the Parties," in Prejudice of a Cauſe that is under Examination. Beſides, one that is not party to the Trial has no Redreſs for the Injury if the Verdict were falſe; for he can not have an ATTAINT; and therefore ought not to be injured by the Verdict.

Ibid. Str. 308. 2. Str. 1151. Carth. 79, 181. 5 Mod. 386. 2. Jones 221. 2 Mod. 142.

But it is not neceſſary that the Verdict ſhould relate to the *ſame Land:* for the verdict is only ſet up to prove the point in Queſtion, and if the verdict be upon the ſame Queſtion, then it is no doubt a good Evidence.

CASES *illuſtrative of the preceding Principle.*

3 Sid. 325.

In an Action of Treſpaſs the INDICTMENT for the ſame Treſpaſs and Verdict "thereupon" ſhall not be given in Evidence, if the Indictment "were not otherwiſe proved than" by the Party's own oath: for if the Party's oath be no Evidence in his own Cauſe (as we ſhall hereafter ſhew that it is not) then can not the verdict be any Evidence that is founded only on the Party's own Oath; for what cannot be Evidence directly, can't be made Evidence, by any ſuch Circuity.

Ex. Rel. Mr. Phipps 1700.

But where the Verdict on the Indictment is founded on other Evidence, beſides the Party's own oath, there, that Verdict may be given in Evidence: for there, this Verdict ſeems to be under the ſame General Rule with all others; and there the Judgment of twelve Men on the Fact "hath" ſway in the determination of the ſame Fact, whether the verdict be on Indictment or Action: But yet it may be objected, that the Fact might find Credit from the Party's own Oath which ought not to ſupport the Action: and ſince the Evidence is ſo intermixed that it doth not

appear

appear on what it was founded, the Verdict can not be produced in corroboration of the Evidence on the Action.

It is true, this doth in part take off the force of ſuch Evidence: for, as where a Verdict is produced in Evidence, it may be anſwered, that it did not ariſe from the Merits of the Cauſe, but from ſome formal Defect in the Proof, and that makes it no Evidence towards gaining the point in Queſtion; ſo a Verdict may be diminiſhed in point of Authority, by ſhewing that it was in part founded on the Oath of the party intereſted in the Action; and the Jury are to reſpect it no farther than as they preſume it given and ſupported by the Credit of other Teſtimony not concerned in the Cauſe.

Yet others have ſaid, the Verdict given on the Indictment can not be given in Evidence: becauſe, on that Proſecution, there is no liberty left to the Party to attaint (*k*) the Jury, as he hath power to do when injured in a Civil Action: therefore *quære*.

(*k*) *The modern Remedy for a Verdict againſt Evidence being more comprehenſive, more eaſy beyond compariſon in the mode, and not accompanied with thoſe dreadful conſequences of hazarding the perjury of a ſecond or the utter ignominy and deſtruction of the former Jury, on a Point which can rarely be ſuppoſed ſuſceptible of ſatisfactory Proof, the old Law of* ATTAINTS *is fallen into total Diſuſe. It will however be noticed in it's place as to the Evidence to be received on it. The Jury on whom this aweful Inveſtigation was devolved, conſiſted of* twenty four. *It ſeems to have been thought, that an Attaint would lie in criminal Caſes at the ſuit of the Crown: but the later, and as one ſhould think, evidently the more conſtitutional opinion is, that as it cannot be proſecuted at the ſuit of the Sufferer by the Verdict, ſo neither is the Prerogative armed with this tremendous Inſtrument: but that it is confined wholly to* CIVIL *Caſes. But againſt the malice or corruption which may affect a Verdict, there is another courſe of proceeding Criminally to be mentioned in its place: though happily, in our times, occaſions have not ariſen on which it has been called into exertion. This relates to the Crime of* TWO *or more of the Jurors, without their fellows being privy to the Offence: and is by Indictment of* CONSPIRACY.

v. Rights of Juries vindicated in the Caſe of the Dean of St. *Aſaph*, p. 11, 12.

Where there is an ACQUITTAL, A VERDICT in a Criminal Caſe, where the Matter was capital, is not to be given in Evidence in a Civil Caſe: as where the Father was acquitted on an Indictment for having two Wives; this could not be given in Evidence in a Civil Caſe, where the Validity of the ſecond Marriage was controverted; the Reaſon ſeems to be, becauſe much leſs Evidence is neceſſary to maintain the Action than to attaint the Criminal, and therefore, the Acquittal was no Argument that the Fact was not true. "The
L. N. P. 245. "Acquittal aſcertains no Fact; and therefore can-
"not tend to negative the firſt Marriage, or eſtabliſh
"the ſecond."

Tr. Aſſ. 1701. If a Verdict be given againſt the Defendant on the ſame Point, though another party were Plaintiff, yet in ſome Caſes it may be given in Evidence: as if there be Trial of Title between *A*, Leſſee of *E*. and *B*. and afterwards there be a Trial of the ſame Title between *C*. Leſſee of *E*. and *B*.; *C*. may give the Verdict found againſt *B*. in Evidence on the Trial between him and *B*. for this was the Senſe of a former Jury on the Fact. (*l*)

(*l*) *It will be remarked that the Evidence of a former Verdict is generally* (except where it is directly concluſive) *cautiouſly to be received by a Jury who are to decide on their own Conſcience and not upon that of other Men. If there was clear and full Proof to guide the Opinion of the former Jury, another Jury will be ſatisfied by like Proof; if the Evidence before was doubtful in it's Nature, no Verdict will render it otherwiſe, while the Facts remain the ſame. Perhaps there is among men in general too great proneneſs to be prejudicated in Matters of Fact, and even in points of Conſcience by the Notions or Determinations of others, who may have been antecedently ſo prejudicated theirſelves, inſtead of attending to their moſt ſolemn Duty when called by the Nature of the Subject to uſe their own. On the whole, though the Verdict of one Jury may be Evidence to another, and that Evidence may vary in its real force, yet generally it ſeems to be Evidence merely admiſſible: it is wiſely limited by Law within very narrow bounds. In proof of an antient Cuſtom it is very ſtrong. See* DOUGLAS Introd. Conteſt. ELECT. 21.

If

If there be (*m*) "ſeveral" Ejectments brought againſt ſeveral perſons, "though for Lands under the ſame "Title," if there be a Verdict againſt one, that Verdict can not be given in Evidence againſt the reſt: for it is the party againſt whom the Verdict is given that can have relief by Attaint; in as much as the Reſidue are not prejudiced; and theſe parties ſhall not be injured by a Verdict, they had not the power to controvert. "This muſt be underſtood of Ejectments in "the ſtricteſt Senſe, againſt parties that have or might "have preſumeably an actual Intereſt to defend in the "Term created.

3 Mod. 141. Lord Raym. 1292. Vern. 413. Ch. Pr. 212. 12 Mod. 319. 339. 10 Mod. 292. Gilb. R. 2. Str. 1151. Carth. 79. 181. 5 Mod. 386. 2 Jones 221. 2 Mod. 1, 2.

"For now in Ejectment, when uſed as it is general-"ly, as an expeditious Form for Trial of the Right, "the Court will take Notice who the real party is: and "not let the Rule of Evidence, reſpecting a Verdict "between the Parties on the ſame Queſtion, be de-"feated by ſuch a change as merely the Subſtitution of "a fictitious Name, when the real Parties are the ſame, "and the Queſtion remains unaltered. For a Fiction "operates only for the purpoſe for which the Law "adopts it.

"This Principle of Evidence may be otherwiſe de-"duced and illuſtrated, thus:" if *A*, *Termor* for Years recover againſt *B*. the Reverſioner might give ſuch Verdict in Evidence: for it is fit the Reverſioner ſhould make uſe of the Verdict, and have benefit by it, ſince he had been diſpoſſeſſed by the Verdict if it had gone againſt the Termor, and his Reverſion would have been turned to a naked Right: and *B*. has no prejudice; becauſe he had Liberty to croſs-examine the Witneſſes or to attaint the Jury, "or to have obtained "a New Trial."

Ld. Howard and Lady Inchiquin, 1700.

But if there be a Recovery againſt *Tenant* for Life

(*m*) *It has been neceſſary to correct the firſt Paragraph in this page, by inſerting the Limitations which appear to be contained in the Caſe of* Locke *v.* Norborne. Mic. 3 J. II. 1687. 3 Mod. 141.

by *Verdict*; this is no Evidence againſt the Reverſioner: for the Tenant for Life is ſeized in his own Right, "*ut de libero tenemento*," and the Poſſeſſion is properly his own: and he is at Liberty to pray in aid of the Reverſioner, or not; and the Reverſioner cannot poſſibly controvert the Matter where no Aid was prayed, for he had no permiſſion to intereſt himſelf in the Controverſy. "But if he had come in on Aid Pray-
L. N. P. 232. Yelv. 22. "er, then the Verdict had been Evidence againſt him. "Since Perſons under a derivative Title, conſequently "come within the Spirit of the Rule. And accord-
3 R. Abr. 680. "ingly," if a Verdict were given againſt *I. S.* and *I. S.* alien to *I. N.*; the Verdict againſt *I. S.* may be given in Evidence againſt *I. N.*: for the Alienation of *I. S.* can not put *I. N.* in a better Condition than *I. S.* was: for the Subſtitute of *I. S.* can but ſucceed in his place, and at the time of the Alienation, the Verdict might have been given in Evidence againſt *I. S.*

Ruſhworth v. Counteſs of Pembroke and Currier. Hardr. 472. But if *A.* prefer a Bill againſt *B.* and *B.* exhibit his Bill in the ſame Matter againſt *A.* and *C.*; and a Trial at Law is directed, *C.* cannot give in Evidence the Depoſitions in a Cauſe between *A.* and *B.*; but it muſt be tried entirely *ut Res nova*, "for the Reaſon "already given."

"We have ſeen that an ACQUITTAL on a criminal "Proſecution, can not be Evidence on a civil Suit "where the Fact charged becomes material to be "proved: but a CONVICTION may, where the Point "to be ſupported by it comes in ſuch a kind as to be "cognizable at the Common Law." Thus, if a man have two Wives, and be thereof convicted, and die:

"this in an Ejectment would be CONCLUSIVE Evi-"dence, when the Title turned on the Validity of "the Marriage:" but if a Man be convict of Bigamy, and die, and the ſecond Wife claim Dower, and the Heir plead *ne unques accouple en loyal Matrimonie*, the Verdict and Conviction can not now be given in Evidence; but in this Caſe the Writ muſt go to the Biſhop: for "now the point" is of eccleſiaſtical Juriſdiction, and is not to be decided at common Law.

But the Verdict may be made an Exhibit before the Biſhop as Proof "of the Bigamy, and the eccle-"ſiaſtical Court would give Credit to it as deciſive; "being the Judgement of a competent Juriſdiction "as the Court of Common Law would to the Spiritual "Court upon a Deciſion of theirs on a Matter within "their Cognizance. But of this, more hereafter.

"The Record of a Conviction in a Civil Cauſe, "cannot be given in Evidence on a criminal Proſecu-"tion." Caſ. Temp. Hardw. 312.

TIT. III.

WHERE EVIDENCE *of a* VERDICT *is good, though not between Parties, on account of the General Nature of the Queſtion.*

On an antient Verdict, where the CUSTOM of Tithing is ſet out, whether it might be given in Evidence againſt another Pariſhioner that was not party to the Verdict, "was doubted:" but Lands in Queſtion

Per Opin. I. Dod. in the Caſe of the Vicar of Rolvend. Carth. 181.

"was doubted: but by the better Opinion," it might be given in Evidence: becauſe it appeared to be antient, and becauſe there can be no other Proofs but of this ſort of what was then thought to be the Cuſtom.

L. N. P. 233. v. infra. *Unwritten Evidence.* Tit. *Hearſay.*

And ſo *as it ſeems* a ſpecial Verdict between other Parties ſtating a Pedigree is Evidence to prove a Deſcent.

L. N. P. 243. Per Holt. 14. W. 3. at Guildhall. The 14th was the *laſt* of W. The Public Acts go no lower than the 13th.

"And a Verdict, with the Evidence given, in an "Action brought by the Carrier for Goods delivered to "him to be carried, ſhall be Evidence on an Action by "the Owner againſt the Carrier for the ſame Goods: "for it is ſtrong Proof againſt him that he had the "Plaintiff's Goods.

Montgomerie v. Clarke, 1745, before the Delegates L. N. P. 234.

"But a VERDICT will not be admitted in Evidence "without likewiſe producing a Copy of the Judge-"ment founded upon it: becauſe, otherwiſe the "Judgement may have been arreſted or a New Trial "granted: but on an Iſſue directed out of Chancery, it "being not uſual to enter a Judgement in ſuch Caſe, "the DECREE is equally Proof that the Verdict is "ſatisfactory and ſtands in force."

"It has been held," that in an Information by the Attorney General for the King, when the Jury are ready to give their Verdict, the Attorney General may withdraw a Juror: for "that" it is part of the PREROGATIVE, and in the room of the *Non-ſuit* of the ſubject, for the King cannot be *Non-ſuit* being always in Court: and, "farther," this "Diſtinction prevails" on the general Reaſon of the King's Employment for the

the Public Safety: and therefore, if he hath failed in any point of Proof, ſo that Diſadvantage may be expected from the Verdict, it ſhall be at his Election, whether he will receive the Verdict or not: and in a ſecond Information, none of the firſt Jury ſhall be admitted to give in Evidence that they were agreed in their Verdict: for thereby, "if it were permitted," the King might be "indirectly" diſpoſſeſſed of the Benefit of his Prerogative.

But if the King alien the Eſtate on which the Trial was had, ſo that it comes into private hands; there, on a ſecond Trial between private perſons, the Agreement of the Jury may be given in Evidence: for the *Prerogative* is annexed to the *Crown*, and cannot extend to any private perſons; and therefore, they take the Eſtate with the Diſadvantage of a Verdict againſt them.

"But a Verdict cannot be thus avoided in criminal Caſes; for there the Party muſt conſent "to the withdrawing of a Juror: ſince he is in "Character and Eſtimation ſo highly intereſted: and "hath a Right, if he ſo prefer, to entitle himſelf to a "ſolemn Acquittal by his Peers *. (*n*)

"As a Verdict can not be given in Evidence without the Record, ſo neither can an Agreement of the "Jury to have found for the Defendant be given in

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* *Quod fieri vetatur per directum, vetatur etiam per obliquum.*

* Lex Communis ita Regis Prærogativam circumſcripſit ut ne cujus hæreditatem famamve lædat.

(*n*) *And in favor of the Defendant in* HIGH TREASON, *where a Jury was ſworn and charged with the Iſſue, and the Indictment opened, before Evidence given, a Juror was withdrawn by Conſent of the Attorney General, in order that the Defendants might plead to the Juriſdiction.* Caſe of Alex. Kinloch and Ch. Kinloch, Foſt. 16.

" Evidence, in the Caſe juſt ſtated, againſt the King's " Alienee, without a Record of the Proceedings on " the firſt Information."

SECTION X.

Of WRITS.

See farther *Cauſes ſecondary*, Tit. *Appeal.*

" We have now treated of legiſlative Records; of " judicial Records, either as the Acts of the Parties " ſolemnized by the Court, or as the Sentence of Law, " on Trial: the next ſpecies of Record requiring Con- " ſideration, are WRITS, *Prerogative*, or Judicial. The " Prerogative are either, of RIGHT, as 1. the WRIT " of ELECTION to PARLIAMENT in behalf of the COM- " MON WEAL; 2. the writ of MANDAMUS; or, 3. EX " GRATIA, of which ſomething is to be ſaid hereafter."

WRITS *judicial, are either*
1. *Original.*
2. *Of meſne Proceſs.*
3. *Of Execution.*

" WRITS *original* iſſue out of CHANCERY, and are " the Foundation of the ſuit."

When a Writ out of Court is only *Inducement* to the Action, the taking out of the Writ may be proved without any Copy of it; becauſe poſſibly it might be not returned, and then it is no Record, and therefore the Copy of it is not required; but where a Writ itſelf is the GIST of the Action, you muſt have a Copy from the Record; in as much as you are to have the uttermoſt Evidence the thing is capable of.

" A WRIT of MESNE PROCESS is that which iſſues " to ſupport the ſuit from it's Commencement to it's " ultimate Concluſion.

" Of this Nature the Principal is the *Capias ad reſ-* " *pondendum*, to bring a party into Court by Arreſt to " anſwer to the ſuit.

" The

" The Bailiff on meſne Proceſs cannot juſtify break- Cowp. 1—9. Lee and Ganſel. Hil. 14 G. III. 1774.
" ing open the OUTER Door of an Houſe to execute
" the Writ; but he may the INNER, if obſtructed.

" Where an Houſe is divided into ſeveral Tene-
" ments, and the entrance to each is by a ſeparate
" outer Door, each partakes ſeparately of this privilege.

" Chambers in the Inns of Court, and in Colleges,
" are within the Rule.

" Or if a perſon be lawfully arreſted, out of an Com. III. p. 288.
" Houſe, and eſcape, the Officer may juſtify breaking
" open an Houſe to retake him.

" A ſworn officer may arreſt within his Precinct Burn, Title Arreſt. 109.
" without ſhewing his warrant; (o) but he ought to
" apprize the party of his Authority in general Terms,
" that he may know it is not unlawful violence.

" An Arreſt (unleſs by ſubmiſſion of the party) is
" not by words only without corporal ſeizure; but
" for this, the ſlighteſt touching ſuffices: and this Blatch v. Archer. Cowp. 65.
" ſeizure need not be by the hand of the Bailiff, if it
" be by his authority, and he at hand, though not in
" ſight.

" Perſons attending on Proceſs on a Court of Re- Com. III. 289.
" cord are privileged from Arreſt in going, attending, Bl. Rep. 1115.
" and returning; and this being in furtherance of
" Juſtice is liberally conſtrued, ſo that a ſlight delay or
" a ſmall deviation from the road defeat not the pri-
" vilege.

(o) *Otherwiſe of a Diſtreſs Warrant by a Juſtice of the Peace by the* &c. 27 G. II. *c.* 20: *for that muſt be ſhewn, if required, and a Copy permitted to be taken.*

" And

"And in this Caſe the Court will generally extend "its relief in the fulleſt manner, by releaſing the party "ſo arreſted out of Cuſtody, and not merely puniſh- "ing the Officer for the Treſpaſs or the Contempt.

Coup. 9. "But in other Caſes generally it is in the Diſcretion "of the Court, on the circumſtances, to pronounce the "Proceſs void by the undue execution of it, or ſimply "to leave the party to his remedy for the Treſpaſs.

Com. III. 289. "All perſons are exempt from Arreſt on Sundays; "except for Treaſon, Felony, or breach of the Peace.

"The Members of either Houſe of Parliament are "exempt; except in the inſtances above ſpecified.

V. Bl. Rep. 483, 9. "And EMBASSADORS and their *menial* ſervants by the "LAW of NATIONS: ſo that againſt theſe the Arreſt is "utterly void, in like manner as againſt Members of "Parliament; the perſon of the Repreſentative of an "independent Community being entitled, while he "comporteth himſelf as ſuch, to inviolable Security.

"And of Privileges annexed to public Functions the "Court taketh Notice,* without their being ſpecially "pleaded."

Fenwick v. Fenwick. Bl. 788. Yet, as to the Mode of Proof, a Member of the HOUSE of COMMONS, moving to be diſcharged on PRIVILEGE, was obliged to give in *Evidence* the *Return* of the Writ of Election.

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* *And formerly their ſervants; but Parliament made a wiſe and liberal ſurrender of this and many other Privileges to public Convenience, by* 10 G. III. c. 50. 4 G. III. c. 33.

* *In Lord* Banbury's *Caſe, it not appearing he had ever ſat in* Parliament *as a* Peer *by Virtue of a Writ of* Summons, *the Court refuſed to take Notice of the Privilege on Motion.* Salk. 512. IV. Comm. 400; *where ſee the Diſtinction between a Call by* Writ *and by* Patent *of* Peerage.

In

In an Action of Treſpaſs againſt a Bailiff for taking Goods in Execution, "if it be brought by the Party "againſt whom the Writ iſſued, it is ſufficient for the "Officer to give in Evidence the Writ of *fieri facias*, "without ſhewing a Copy of the Judgment: but if "the Plaintiff be not the party againſt whom the Writ "iſſued, but claim the Goods by a prior Execution (or "Sale), that was fraudulent, there the Officer muſt "not only prove the Writ, but a Copy of the Judg-"ment. For, in the firſt Caſe, by proving that he "took the Goods in obedience to a Writ iſſued againſt "the Plaintiff, he has proved himſelf guilty of no "Treſpaſs: but in the other Caſe, they are not the "Goods of the Party againſt whom the Writ iſſued; "and therefore the Officer is not juſtified by the Writ "in taking them, unleſs he can bring the Caſe within "13 Eliz.; for which purpoſe it is neceſſary to ſhew a "Judgment." L. N. P. 234. 1 Raym. 733.

In Debt againſt the Executor, the Defendant pleads that the Teſtator was taken in *Execution* by a *Capias ad ſatisfaciendum*; and found, that he was taken in Execution on an *Alias Capias*: this is well enough: for an *Alias* is but renewing the ſame *Capias*; and doth not differ from it in ſubſtance, but in circumſtance only; as being the ſecond Proceſs of the *ſame Nature*: but if they had found that he had been taken in Execution by a *Capias pro Fine*, or a *Capias utlagatum*, this had

not maintained the Plea: becauſe they are not the ſame ſort of Execution with the *Ca. ſa.* (p) but in their Nature diſtinct; and when the Jury finds that the party was taken in Execution upon the *Alias Capias*, it ſhall be intended upon the *ſame* judgement, without any Averment; becauſe the Doubt exhibited to the Court ſhall not be intended to be quite foreign to the Matter, but ariſing out of it: and therefore it muſt be intended an *Alias Capias* on the ſame Judgement, for it is out of Controverſy that a *Capias* upon another Judgment could not poſſibly maintain the Plea.

Per Holt. "Upon *plene adminiſtravit*, upon Return of a *deva-* "*ſtavit by the Sheriff*," the Execution executed cannot be given in Evidence without the Judgement; becauſe there appears no Authority for ſuch Execution without the Judgement; for where the Execution is of Record, and the Authority for ſuch Execution is alſo of Record, they muſt both appear to the Jury; otherwiſe they have not the uttermoſt Evidence of the Fact in Queſtion.

(p) *It is ſtriking to conſider, notwithſtanding the Prolixity of the Law is in ſome caſes ſo much cenſured, what a formidable Brevity there is in other: thus a* Fi. fa. *ſhall deprive a Man of all his perſonal property, a* Ca. ſa. *conſign him to a priſon, frequently for life; (and theſe awful exertions of Authority are as compendiouſly pronounced as they are written); and a* Suſp. per Coll. *againſt a Name in the Convicts Calendar ſhall be a Warrant on a capital Felony to deprive him ignominiouſly of life itſelf. Tremendous, but not exemplary Conciſeneſs! It is now indeed in Engliſh, and at length, let him be hanged by the neck; but ſtill how juſtly is it with a mark of melancholy ſurprize,* "that the execution of a "man, the moſt important and "terrible taſk of any, ſhall de-"pend upon a marginal note." *In London indeed it is more ſolemnly by a diſtinct warrant.*

Com. B. IV. Ch. 32.

L. N. P. 142. Ca. K. B. 411. Salk. 310.

For explanation of this it may be proper to remark, that if "Execu-"tor ſuffer Judgement by De-"fault, it amounts in law to a "Confeſſion of aſſets ſufficient to "pay the Debt: and therefore "if the Sheriff on a *Fi. fa.* do "not find Goods of the Teſta-"tor, he returns a *devaſtavit*."

"*Where*

" *Where the* TIME *of ſuing out the* ORIGINAL *muſt be ſhewn.*

" If the Plaintiff, on *Non aſſumpſit infra ſex annos*, " does not bring the Commencement of the Action " on the Pleadings, ſo that it be admitted by the " Defendant, he muſt *prove* the taking out of the " Original. L. N. P. 149.

" As a LATITAT ſued out in the Vacation is by " fiction of Law referred to the firſt Day of the pre- " ceding Term, the Defendant may avoid being con- " cluded by the fictitious Relation, by pleading in his " *Rejoinder* the *real** Day on which the Writ iſſued. See alſo Burr. Manſf.—1243.

" If the Plaintiff would take Advantage of ſuch " Proceſs, he muſt ſhew that he has continued the " Writ to the time of the Action brought, and muſt " ſet forth that the firſt Writ was returned: for if the " Defendant plead *Non aſſumpſit within ſix years before* " *the exhibiting of the Bill*, and iſſue be taken thereupon, " he cannot give the Latitat in Evidence, *for the La-* " *titat may be only Proceſs to bring the Defendant into* " *Court*, and may as ſuch be ſued out before the " Cauſe of Action accrues. L. N. P. 151.

" On an Action againſt the Hundred to recover " Damages for a Robbery, the Plaintiff muſt, under " the 27 Eliz. produce a *Copy* of the *Original*, to ſhew " that he has commenced his Action *within* the *year*; " and alſo that the Oath of the *Robbery* was within " twenty Days before the *Teſte*." L. N. P. 187.

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* *Fictio ſemper infrà Æquitatis limites ſubſiſtit propter quam induƈta eſt.* *Fictio contrà Juris Veritatem nihil operatur.*

" *Who*

L. N. P. 23.

"Where an Officer and another join in the ſame "Juſtification, if it be not ſufficient for the Officer, "neither is it ſufficient for the other: and whenever an "Officer juſtifies an impriſonment under a Writ which "he ſhould return, (and all *meſne* Proceſs ought to be "returned) he muſt ſhew that the Writ was returned: "but it is otherwiſe in the Caſe of a *ſubordinate* Officer, "ſuch as a Bailiff, for he is only to execute the Sheriff's "warrant."

Silby v. Hinchly, Tr. Aſſ. 1701. per Gould.

In an Action brought by an Attorney for his Fees, it is ſufficient to prove the Return of the Writ by a Warrant made by the Coroners: for the Writ may not be returned of Record; and then the Warrant is ſufficient to prove a Title to his Fees.

"We have obſerved already that there is alſo an-"other Species of Records, which are thoſe of PRI-"VILEGE, or EX GRATIA; and theſe are PATENTS, "1. of *Honour*; 2. of *Improvement*; 3. of *Pardon*. "They iſſue under the *Great Seal*."

CHAP. III.

WRITTEN EVIDENCE NOT *of* RECORD.

"Before we enter on the Conſideration of other "Evidence under this head, it appears proper to "mention ſeparately the Journals of the HOUSE of "COMMONS.

"Theſe, though not of Record, yet from the Dig-"nity of the great Aſſembly to which they belong,

"and

" and the univerſal Notoriety which the Law pre-
" ſumes of their Tranſactions, appear to be equiva-
" lent to Records in the Principles and Mode of Proof
" by which Evidence of them may be received. This
" hath been intimated already in reference to the Pro-
" ceedings of the other Houſe: but it merited to be
" ſeparately noticed; and for that reaſon it is here
" mentioned."

SECTION II.

WRITTEN EVIDENCE *inferior to* RECORD.

1. PUBLIC.

The Things that do ſtand ſecond in point of PROBABILITY are all PUBLIC Matters that are *not of Record.*

The public Matters that are not of Record, and ſtand next in Authority to Records, do all come under this general Definition: they muſt be ſuch Matters as have an Evidence in themſelves, and that do not expect an Illuſtration from any other Thing: ſuch are the Copies of Court Rolls and TRANSACTIONS in CHANCERY, and the like: and the Copies of ſuch Matters may be given in Evidence, in as much as there is a plain and coherent proof: for the Matters *themſelves* are ſuppoſed to be ſelf-evident; and, by conſequence, when your Copy of them is produced upon

upon Oath, you have a full proof: becauſe you have proved upon Oath a Matter which, when proved, would carry its own light with it.

But here it will be objected that this is not the utmoſt Evidence that the Nature of the Thing is capable of; for theſe Teſtimonies themſelves muſt needs be better than Copies of them.

To this the Anſwer is, that the Copy upon oath is, "in ſuch inſtances," reckoned as an equivalent to the Thing itſelf: "ſince" the teſtimony itſelf muſt not be rigorouſly required; becauſe theſe Matters, lying for public ſatisfaction, every Man has a Right of their Evidence: and in ſeveral places they cannot be at the ſame time; and therefore the Things themſelves cannot be demanded, but only Copies of them.

THE FIRST ſort of "theſe" TESTIMONIES that are not of Record, are, the PROCEEDINGS of the COURT of CHANCERY on the *Engliſh* ſide.

The Reaſon why the Proceedings in Chancery, and the Rolls of the Court, are not Records, is this, becauſe they are not the Precedents of Juſtice: for the Pro-

Proceedings in Chancery are founded only on the Circumſtances of each private Caſe, and they cannot be rules to any other; and the judgement there, is *ſecundum æquum et bonum*, and not *ſecundum leges et conſuetudines:* and the Reaſon why any Record is of Authority is, becauſe it is declarative of the ſenſe of the Law, and is a Memorial of what is the Law of the Nation. Now Chancery Proceedings are no Memorial of the Law of *England*; becauſe the Chancellor is not bound to proceed according to Law. (*q*)

SECTION III.

Of BILLS *in* CHANCERY.

The *Bill* in *Chancery* is Evidence againſt the Complainant: for the Allegations of every Man's Bill ſhall be ſuppoſed to be true; nor ſhall it be ſuppoſed to be preferred by the Counſel or Solicitor without Privity of the Party, and therefore is Evidence as to the Confeſſion and Admittance of the Truth of any Fact by the Party himſelf: and if the Counſel hath mingled in it what is not true, the party may have his Action: but where a Bill is exhibited, and there are no Proceedings upon it, then it cannot be given in Evidence; unleſs they prove a Privity in the party: for a Man may file a Bill in another's Name to rob him of his Evidence by a ſham Confeſſion: and therefore a Bill filed without any Proceedings, hath not the Force of an Evidence: for no man can ſuppoſe the party did himſelf file the Bill

Ch. Ca. 64, 5. Eq. Abr. 227. pl. 1. Nelſ. Ch. R. 102.

(*q*) *The Reaſon here given for Chancery Proceedings on the Equity ſide not being Records, might lead into great Error as to the Nature of the Juriſdiction of that Court, in its preſent improved ſtate, to which it has been gradually matured by the progreſſive Extent of its Practice, with the legal Knowledge and other eminent Qualifications of thoſe who have ſucceſſively preſided in it. Chancery differs from the Courts of Common Law rather in the Forms of Proceſs, the Modes of Inveſtigation, and the ſubjects of its Interference than in the Certainty of Principles and Adherence to ſettled Rules.* Stare deciſis, *ſo far as juſtly may be done, is, for the public Security and Freedom, a governing Maxim on each ſide of the Hall.*

See the TANCRED FELLOWSHIP Caſe Bl. Rep. 91. and the great Queſtion of BURGESS and WHEATE, p. 152. both full and admirable to this point. See alſo Comm. III. Ch. 27.

without any proceedings, to bring his Adverſary to anſwer ſuch Bill; "this" is of no uſe to the party, and therefore muſt be ſuppoſed rather to be filed by a Stranger to do him an Injury. (*r*)

2 Sid. 221. Keb. 780.

This "has been" accounted to ſtand, in point of Credibility, in the ſame circumſtances as a Confeſſion by Letter under the party's hand, where no one ſaw the party write it: "but this, though urged by the "Counſel, does not appear to have been ſo taken by "the Court: and" it ſeems the Allegation in a Court of Juſtice, that amounts to a Confeſſion of any Fact, ought to have more Weight and Authority with it than any private owning.

"But a mere general ſuggeſtion of Facts, in order "to a Diſcovery, ſhall not be read in Evidence: for this "is no more than ſurmiſe of the Counſel, in order to "come at Facts: otherwiſe of a Fact ſtated in the "Bill, on which the Plaintiff founds his prayer for "Relief."

L. N. P. 235, 6.

SECTION IV.

ANSWER.

Godb. 326.

And if the *Bill* be Evidence againſt the Complainant, much more is the *Anſwer* Evidence againſt the Defendant, and carries higher Weight of Probability along with it; becauſe this is delivered in upon oath; and therefore over and above the ſingle Confeſſion, it has an Authority from the ſanction of an oath.

Keb. R. 780. 2 Sid. 221.

(*r*) *The Caſe was this: a Parſon was ſued by his Patron on a ſimoniacal Bond: he preferred a Bill in Chancery to be relieved from the Bond; and it appearing there had been proceedings on the Bill, it was reſolved it might be given in Evidence on an Ejectment brought to make void the Parſon's Living.*

But when you read an Anſwer, the Confeſſion muſt be all taken together; and you ſhall not take only what makes againſt him, and leave out what makes for him: for the Anſwer is read as the ſenſe of the Party himſelf; and if it is to be taken in this manner, you muſt take it entire and unbroken.

Brockman's Caſe. Tr. Aſſ. 1701. 2 Vern. 194, 288. 5 Mod. 10. Ch. Ca. 154.

TIT. II. INFANTS, &c.

An Infant's Anſwer by his Guardian ſhall never be admitted in Evidence againſt him on a Trial at Law: for the Law has that tenderneſs for the Affairs of Infants, that it will not ſuffer them to be prejudiced by the Guardian's oath; for the Authority the Law gives to the Guardian is for the Infant's Benefit, and not his Prejudice. (*s*)

2 Vent. 72. 3 Mod. 259. Carth. 70. 3 P. W. 237. Anſw. of Femme Coverte. 3 P. W. 238. Vern. 60, 109, 10.

"So the Anſwer of a Truſtee can in no Caſe be "admitted as Evidence againſt *Ceſtuy que* Truſt."

L. N. P. 237.

A Bill was brought by Creditors againſt an Executor to have an Account of the perſonal Eſtate; the Executor ſets forth by *Anſwer*, that there was 1100*l.* left by the Teſtator in his hands; and that coming afterwards to make up his Accounts with the Teſtator, he gave Bond for 1000 *l.* and the other 100 *l.* was given

Anon. Hil. Vacat. 1707. per Cowper.

(*s*) Εις ΟΙΚΟΔΟΜΗΝ, ουκ εις ΚΑΘΑΙΡΕΣΙΝ.
Neque interdicto, neque cæteris in cauſis, pupillo nocere debet res per *Tutorem* acta. v. D. 50. 17. l. 198.

him as a Gift for his Trouble and Pains taken in the Teſtator's buſineſs: and there was no other Evidence in the Caſe that the 1100 *l.* was depoſited but merely the Executor's own oath: and it was argued that the Anſwer, though it was put in Iſſue, ſhould be allowed: ſince there is the ſame Rule of Evidence in Equity as in Law: and that if a Man was ſo honeſt as to charge himſelf when he might have denied it, and no teſtimony could have appeared, he ought to find Credit where he ſwears in his own Diſcharge.

But it was anſwered, and reſolved by the Court, that when an Anſwer was put in Iſſue, what was confeſſed and admitted need not be proved; but it behoved the Defendant to make out by Proofs what was inſiſted upon by way of Avoidance: and this Diſtinction was held: where the Defendant admits a Fact, and inſiſts on a *diſtinct* Fact by way of Avoidance, there he ought to prove the Matter of his Defence; becauſe it may be probable that he admitted it out of Apprehenſion that it might be proved; and therefore ſuch Admittance ought not to profit him ſo far as to paſs for Truth whatever he ſays in Avoidance: but if it had been *one* Fact, as if the Defendant had ſaid the Teſtator had given him 100 *l.* it ought to have been allowed, unleſs diſproved; becauſe nothing of the

Fact

Fact charged is admitted, and the Plaintiff may diſprove the whole Fact as ſworn, if he can do it. It was "further" urged, that here the Preſumption was on the Defendant's ſide; becauſe a Bond was not taken for this ſum as for the reſidue: the Chancellor ſaid, there was ſome Preſumption in that; but not enough to carry ſo large a ſum without better Atteſtation.

Par. 2.

ANSWER *Evidence on an* INFORMATION *for* PERJURY.

In an *Information* for *Perjury*, an *Anſwer* may be given in Evidence without any Perſon to prove that the Defendant ſwore it; for the Identity may be proved by many Things out of the Anſwer itſelf: beſides, the party is obliged to *ſign* his *Anſwer:* and the Perjury may be further illuſtrated by a *Compariſon* of *Hands*; which, poſſibly, may be Evidence in Concurrence with other Proofs that out of the Anſwer itſelf evince the Identity of the Perſon.

Par. 3.

Concerning the Proof by Compariſon of Hands ſolely *in* Criminal *Caſes*; *that it is* not *admiſſible*; *otherwiſe, in* Civil.

But that the *Compariſon* of *Hands* ONLY (*t*) ſhould be Proof in a CRIMINAL Proſecution was never Law, but only in the time of King *James*; and the Diſtinction has ever been taken, that the *Compariſon* of *Hands* is Evidence in *Civil*, but not in Criminal Caſes: the

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(*t*) *Preamble to the Act* 1 *W. & M. for* REVERSING *the* ATTAINDER *of* ALGERNON SYDNEY; *reciting, among other Enormities of that moſt illegal and ſanguinary Proceſs, that the* "Paper found in his Cloſet was "not proved by any one Witneſs to have been written by "him." *In order to give ſome poſſibility of this important Act being better known than at preſent, it will be added in the* APPENDIX. *At the ſame time I muſt here repeat my Hope that it will one day be found in the Editions of the* PUBLIC STATUTES, *its proper* PLACE. *It has been publiſhed lately, with that for reverſing the Attainder of Lord* RUSSEL, *by the* SOCIETY *for* CONSTITUTIONAL INFORMATION.

Reaſon why the Compariſon of Hands is Evidence in *Civil* Matters is, becauſe Men are diſtinguiſhed by their *Hand-writing* as well as by their faces: for it is very ſeldom that the ſhape of their letters agrees any more than the ſhape of their Bodies: therefore the Compariſon of Hands ſerves for a Diſtinction in *Civil Commerce*; for the likeneſs does induce a Preſumption that they are the ſame, and the Preſumption is Evidence till the contrary appears: for every Preſumption that remains unconteſted hath the force of an Evidence; for light Proof on the one ſide will outweigh the Defect of the Proof on the other: but in Criminal Proſecutions the Preſumption is in Favour of the Defendant (for thus far is to be hoped of all Mankind, that they are not guilty in any ſuch inſtances); and the Penalty enhances the Preſumption. Now the *Compariſon* of *Hands* is no more than a Preſumption *founded only on the Likeneſs which may eaſily fail*; becauſe they are very ſubject to be counterfeited: therefore when the Compariſon of the Hands is *the only Evidence* in a Criminal Proſecution, there is no more than one Preſumption againſt another, which weighs nothing.

Hargrave's St. Tr. VI. 279.

1, 2 Burr. Manſf. 644.

In Layer's *Caſe* * *Evidence was admitted of a Perſon* "who "had often ſeen him write;" *and in* Henley's *Caſe the like Evidence admitted. Both went to* introductory *Matter, and* not *to the* overt acts *laid in the ſeveral Indictments.*

SECOND

Second Answer *explanatory, to be read in Evidence.*

In an *Information* for *Perjury*, the Perjury aſſigned was the Defendant's *Anſwer*, "that he received no "Money;" and on Exceptions for Inſufficiency, the Defendant ſays, in a *ſecond* Anſwer, "that he received "no Money until ſuch a day;" (*u*) and on the Trial of the Information it was held that nothing ſhould be aſſigned for Perjury that was explained in the ſecond Anſwer: for the firſt Anſwer *ſhall* be charitably *expounded, according to what appears to be the party's ſenſe in the ſecond Anſwer*; for the Court would rather intend there was ſome overſight in the Draft, and that it was afterwards amended in the ſecond Anſwer, than ſuppoſe the party to be guilty of manifeſt and corrupt Perjury. 2 Sid. 418, 9. 2 Keble, 516.

When a Man is ſworn in Chancery to anſwer directly to his *Knowledge*, Perjury cannot be aſſigned on any thing which is not within his Knowledge, as upon his Belief, &c. for what he ſwears on his Belief is not within the Compaſs of his oath. 2 Sid. 419.

Dif-

(*u*) *It muſt be taken of courſe that the* Day *was material to the Cauſe; ſo that* non receipt *till after ſuch a day would come within the ſenſe, as to the Matter before the Court, of* non receiver *generally. Much more is it reaſonable that ſuch explanation ſhould be admitted on* vivâ voce *Evidence: and when in croſs-examining, Counſel have impeached the Credit of a Witneſs on apparently contradictory teſtimony, Lord* Mansfield *has often ſaid, "would "you have the Witneſs perjured "becauſe he will not be perjured, "but corrects himſelf, like an ho- "neſt Man."* There was a late ſingular inſtance where this explanation ſupported itſelf by all the circumſtances imaginable, the abſolute indifference of the fact to the witneſs, the ſubſtantial Agreement between what he ſaid, and what he immediately explained himſelf to have meant to ſay; the certainty of the party *examined*, that the fact was *known* to the party *examining*, and to the *Court*, ſo as to preclude all idea of a Deſign to falſify. The Caſe was this: Captain *Shipley*, of the *Alexander and Margaret*, applied to the *Court of Admiralty* of the Borough of *Great Yarmouth* to recover Anchors and Cables which his Ship, by ſtreſs of weather, was obliged to leave in *Yarmouth* Road, on paying the charge of ſalvage. Mr. *Hurry*, as Agent to Captain *Shipley*, paid the Bill; but having an Objection to the charge of Cartage, ſummoned Mr. *Watſon* before the Court of Requeſts, to anſwer for an Overcharge.

DIFFERENCE *between* ANSWER *in Chancery and* VOLUNTARY AFFIDAVIT.

Brockman's Caſe, 1701. Str. 35. P. W. 675.

Analogous to this is a Man's own voluntary Affidavit; which may alſo be given in Evidence againſt him: but then the *Proceedings* muſt be given in Evidence on which this Affidavit did ariſe: and the Reaſon why the Proceedings muſt alſo be given in Evidence is, to prove the *Identity* of the Perſon; for to prove an Affidavit ſworn, is not ſufficient: for it may be ſworn by Fraud and Contrivance, the perſon being perſonated by ſomebody elſe: and therefore, to bring home the Proof to the perſon, you muſt prove the *occaſion* of the ſwearing; for it is not to be thought that a Man, without ſome occaſion or other, would make Affidavit; "and if the Cauſe and Circumſtances "be ſuppreſſed, it infers Fraud in the party ſuggeſt- "ing the Affidavit in prejudice of the party charged "to have made it."

"But

Mr. *Watſon*, an Attorney, was JUDGE of the COURT of ADMIRALTY, and Mr. *Reynolds*, his partner, preſided in the COURT of REQUESTS.

The Clerk of the Court adminiſtered the Oath to Mr. *Hurry*, according to the Practice, in order to his proving the Demand, and then aſked him, *Is Mr.* John Watſon *indebted to you*, Mr. Hurry, *in the ſum of eleven ſhillings?* the ſum demanded: he anſwered, *he is.* On the Queſtion being repeated, and the Witneſs deſired to recollect himſelf, he ſubjoined, "*as Agent to Mr.* Shipley." On this he was indicted for PERJURY before Sir *George Nares*, at the *Thetford* Aſſizes, *March* 18, 1786; the Indictment charging him with having "falſely, "corruptly, wilfully, and ma- "liciouſly depoſed, that the "ſaid *John Watſon* was in- "debted to him, the ſaid *Wil- "liam Hurry*, in the ſum of "eleven ſhillings; whereas in "truth, and in fact, the ſaid "*John Watſon* was not indebted "to him, the ſaid *William Hur- "ry*, in the aforeſaid ſum, nor "in any other ſum of Money "whatever." The Caſe, as ſtated, appearing on the Trial, from the Evidence on the ſide of Proſecution, the *Judge* roſe, and ſaid, "*It would be hard indeed if a man were not ſuffered to explain his*

"But, notwithſtanding ſome General Analogy," there is a very great Difference between the Evidence of an Anſwer, and that of a voluntary Affidavit.

An ANSWER cannot be given in Evidence Generally, without producing the Bill: becauſe, without the Bill, there does not appear to be a Cauſe depending: but if there be Proof by the proper Officer, that the Bill has been ſearched for diligently in the Office, and cannot be found, the Anſwer "may, on circumſtances other-"wiſe inducing a Belief that a Bill once really exiſted, "and that proceedings were had upon it," be read without a ſight of the Bill: and this Lord Chancellor *Broderick* allowed, though the Loſs of the Bill was not proved by the proper Officer, but by the Clerk only who wrote in the Office, and ſwore he ſearched carefully with the Officer, and could not find the Bill.

Mic. T. 1714, in Canc. inter Roch and Rix, Admin. of Howard et al.

"And

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his own meaning; here is evidently an Indictment found on part of an Oath, when that which is moſt eſſential to it's meaning is left out." The Counſel on the other ſide, would have had the Cauſe go on but the Judge added, that it *could not:—and that he hoped future proſecutors would take care from ſuch an example to prefer indictments on juſter Grounds.* And then immediately turning to the Jury, repeated, that *this was Perjury, aſſigned on* part *only of an Oath, the moſt material part being* purpoſely *kept back. That of courſe they muſt find the Defendant* Not Guilty. This they did, by a Verdict warmly expreſſive of their Feeling.

Afterwards, on an Action for a *malicious Proſecution*, ſtrengthened by Aggravated circumſtances in the *ſubſequent* Conduct of the Proſecutor, who had cauſed it to be advertized, *that the Perjury Cauſe went off in Conſequence* of a DEFECT *in the Indictment; but that a freſh Bill would be preferred*, Mr. *Erſkine* manifeſted the

"And in this Connection with the Original Proceed-
"ings, there is Analogy between an Anſwer and a
"Voluntary Affidavit."

Hill. Aſſ. 1700.

"But," an *Anſwer* is *proved* by ſhewing the Allegations in Court, *viz.* by ſhewing the Bill, which is the Charge, and the Anſwer which is, as it were, the Defence to the Bill; and this, in *civil* Caſes, ſhall be *intended* to be ſworn, becauſe the Proceedings upon ſuch Defence *are* upon Oath. Now, ſince the Proceedings of any "ſuperior" Court of Judicature, within the Kingdom are good Evidence in other Courts, "who "will take notice of the Practice and general Courſe "of ſuch Court," and the Proceedings in this Court are upon Oath; it follows of courſe, that in all *civil* Caſes the *Anſwer* is to be taken as an *Oath* without any farther Proof, but from the Proceedings in the Cauſe.

Vern. 53. 413. Lord Raym. 311. 734.

But a *Voluntary Affidavit* is not part of any Cauſe in a Court of Juſtice; and therefore it muſt be *proved* to be *ſworn*: for if you only prove it ſigned by the Party,

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Proceedings in the Trial of *Hurry*; and on the *Action*, againſt *Watſon*. NORWICH 1787.

the powers of his Eloquence and Senſibility, and the JURY, which was a *Special* one, gave Damages of 3000*l*.

On this Trial they proved the Advertiſement, by the Evidence of a Copy delivered to the Printer by an Agent (for that Purpoſe) of the Proſecutor, *Watſon*: who ſwore that he copied it from one received from *Watſon*. The Counſel for the Defendant, objected to this Evidence, but the Judge ſaid, in common Caſes you are certainly right: but in this, Mr. *Watſon* gave Mr. *Locke* one Paper which was meant to be *multiplied*. He employed Mr. *Locke* as his AGENT. He entruſted him with *Agency*, and *therefore* becomes anſwerable for his Acts. The paragraph is admiſſible Evidence.

the

the Proof goes no farther than to ſuppoſe it as a Note or Letter: (and as ſuch, you may give it in Evidence without more proof:) for a Note or Letter is a bare Acknowledgement (*v*) under the hand of the Party; and this is no more unleſs you prove it to be ſworn alſo, for it cannot be *preſumed* to be ſworn, being not filed as an Oath in a Court of Juſtice.

2 Vern. 471. 547. 555. 592. 603. Ch. Pre. 59. 116. 212. 3 Mod. 36. 9 Mod. 66. 11 Mod. 210. 262. 12 Mod. 136. 237. 305. 310. 319. 339. 342. 375. 394. 414. 494. 500. 521. 555. 565. 579. 607.

Such are the Affidavits made before a Maſter in Chancery by the Vendor of the Eſtate in ſatisfaction of the Purchaſer, that the Eſtate is free from all charges and incumbrances.

The *ſecond* Difference between them is, that the *Copy* of an *Anſwer* may be given in Evidence; but the Copy of a Voluntary Affidavit cannot: "for the "Reaſon already given," that an Anſwer is an Allegation in a *Court of Judicature*, and being Matter of *Public Credit*, the *Copies* of it may be given in Evidence: but a *Voluntary Affidavit* hath no Relation to any Court of Juſtice, and therefore is not entitled to public Credit, and being a private Matter, the Affidavit itſelf muſt be produced as the beſt Evidence. 3. Mod. 116.

"And ſince weaker Evidence can not be introduced, "where ſtronger, under the ſame circumſtances, would "be not admitted" the Voluntary Affidavit of a ſtranger, *can by no means be given in Evidence*; becauſe the oppoſite party had not the Liberty to croſs-examine. But of this in the next Section.

"CASES

(*v*) An Action of Covenant brought againſt two, the Affidavit of one of them was given in Evidence as the *Acknowledgement* of them both: becauſe the Acknowledgement of one of them, where they had a *joint* Intereſt, was to be looked upon as a Truth relating to them both; and the Conſideration of the Matter is to be left to the Jury, how far it is Evidence againſt the other. Vicary's Caſe in the Exchequer.

And *an Anſwer of the Mother concerning the illegitimacy of her Son, was ruled to be good Evidence*

Sacheverill *and* Sacheverill, 5 Mar. 1710, *before the* Delegates.

L. N. P. 241.

May and May, K. B. at Bar. v. Note to the p. preceding.

" CASES indeed may exiſt where a voluntary Affida-
" vit ſhall be Evidence between Strangers: but they
" are ſuch, where the Confeſſion of the party making
" the Affidavit would be Evidence. Thus, where a
" Widow came for Adminiſtration, the Marriage be-
" ing conteſted, an Affidavit of the Man himſelf was
" read. So on an Iſſue directed out of Chancery, to
" try the Legitimacy of the Plaintiff, the Father's Oath
" before the Judges on a private Bill, was allowed to
" be Evidence."

SECTION V.

DEPOSITIONS.

The *next* Thing is the *depoſitions:* and here we muſt, in the firſt place, conſider in what rank they ſtand in point of Credibility. And to enlighten this Matter, we muſt give an Account of their original uſe: " now" they plainly come over to us from the *Civil* Law. It is very plain, " that under that Law," the parties exhibited their Interrogatories upon their ſeveral Allegations: but that the Witneſſes were privately examined upon theſe Interrogatories by *the ſame Judge* who tried the Cauſe: ſo that the Courſe, antiently among the *Romans*, is very different from the modern pleadings of the *Chancery*, where the ſenſe of the Witneſs is ſtated by the Examiner; on which the Chancellor is to Judge.

That this which I have mentioned, was the antient Courſe of the *Civil* Law, is " evident" from the Epiſtle of *Adrian* to *Varus*, the Legate of *Cilicia*. " You beſt " may judge what Credit is to be allowed to Witneſſes;

Goodright on Demiſe of Stephens *againſt* Moſs, E. 17 G. III. Cowp. 591. 4.

dence admiſſible to prove the Legitimacy after the Death of the Mother; and that it ought not to have been rejected.

It is favorable to public Manners and to legal Certainty, that ſo little Credit is allowed to Voluntary Affidavits: where a Cauſe is depending, there is proportionable weight in that Teſtimony which the Law requires of the Parties: but in voluntary Affidavits, Raſhneſs, Paſſion, latent Intereſts, Fraud, have a dangerous ſcope. Villainy has much leſs to apprehend from human Cenſure, and even perſons not abſolutely profligate, may be preſumed leſs careful of exact Truth, than if under the Solemnities of a judicial Examination. And,

Qui facile, et ultro, et ex proclivi jurant iis non temere credendum.

" who,

D. 22.
T. 5. § 3.

"who, and of what worth, of what Eſtimation they "are: who of them appear to ſpeak with Simplicity: "whether they bring before you one premeditated "Account; or, being interrogated on the ſudden, "give probable Anſwers, with that general conſiſtency, "that unpreparedneſs for literal and minute exactneſs, "which bears the native Character of Integrity and "Truth." (*w*)

Now theſe Examinations were firſt made privately: that the Judge might, in the firſt place, be poſſeſſed of the "mere" Fact; and the ſenſe of theſe Witneſſes was after taken in Writing; and then Publication paſſed; that the Judge might have all due Aſſiſtance from the Obſervation of the Advocate, if he had not ſufficiently compared and weighed the Examination.— As the Trials of the *Civil* Law thus ſtood, when the Judges viewed the Behaviour of the Witneſſes, there is very little difference between this Trial and that of the *Jury:* ſave only that the *Trial by Jury* is much more ſpeedy, and the Evidence more entire; while in the other way, the Judges take up the Evidence at one time, and the Gloſs at another, and ſuch breaking of the Evidence may be dangerous to a weak and leſs conſidering Judge: beſides, the Judge not being of the *Neighbourhood,* cannot ſo eaſily diſtinguiſh the Credit of the Witneſſes: and upon this Account alſo, the *Trial by Jury* is preferable to the Examination of the *Civil* Law, when under the beſt Regulations.

And

(*w*) *I have rendered this fine paſſage freely and rather paraphraſtically, according to the import in which it ſtrikes my mind. The original is reſerved for it's proper Place, as a Note with ſimilar Extracts on* unwritten *Evidence.*

Theſe and other conſiderations, eſtabliſh a ſtriking preference for this admirable Mode of Trial, even in Civil *Caſes; in* criminal, *it's Title to our Confidence and unceaſing care for it's preſervation in it's full extent, without farther reduction of it's Objects, and in it's purity and vigour, without any impairing of it's conſtitutional Spirit, is yet more conſpicuous, when Jurors are conſidered under their peculiar diſcriminations, as indifferently choſen, liable to be rejected, on exceptions duly made, by the Crown: and by the Priſoner, with a wiſe and humane Delicacy,*

on

And no doubt, in *our Chancery Proceedings*, the Witneſſes were formerly examined by the *Maſters*; who ſat in Court to inform the Chancery of their Credibility; until Cauſes ſo multiplied, that the Maſters were employed in other Affairs, and ſo the Examination of Witneſſes was left to Examiners *out of Court*.

Par. 2.

Comparative Value of Depoſitions to immediate Vivâ Voce *Teſtimony.*

Now ſince this Practice has been uſed, no Doubt the Credit of DEPOSITIONS, *cæteris paribus*, falls much below the Credibility of a preſent examination *Vivâ Voce:* for the Examiners and Commiſſioners in ſuch Caſes, do often dreſs up ſecret Examinations, and ſet a quite Different Air upon them from what they would ſeem, if the ſame Teſtimony had been plainly delivered under the ſtrict and open Examination of the Judge at the Aſſizes.

Par. 3.

Comparative Value of Depoſitions to hearſay Evidence.

But though the *Depoſitions* do fall ſhort of Examinations *Vivâ Voce*, yet they ſeem ſuperior to what a Witneſs ſaid at a former Trial: for what is reduced to Writing, by an Officer ſworn to that purpoſe, from the very Mouth of the Witneſs, is of more Credit than what a ſtander-by retains in Memory, of the ſame Oath: for the Images of things decay in the Memory by the perpetual Change of Appearances: ſo that we cannot be certain on a verbal Atteſtation, but that ſome circumſtances of the Fact may be loſt in the Recollection: but what is reduced to Writing continues conſtantly the ſame.

v. Forteſcue *de* Land. L. A. 625. 30. p. 77. 112 Gregor's Ed. 1775. Monteſquieu, B. XI. 65. Beccar. § 14. De Lolme, 182—4. 4th Ed. 1784.

on exception without Aſſignment of Cauſe, to as great a Number as any fair purpoſe can be ſuppoſed to require : to conſiſt on Trial of a Foreigner of a moiety of Foreigners: and which is the Glory of the Inſtitution, the Judgement on the whole Matter of Law and Fact, not entruſted to one or more of the Bench; but the ſentence of Law, the ſword of Juſtice, ſuſpended over the accuſed by an adamantine Chain, until the concurrent Voice of this ſeparate and ſo conſtituted body of his* EQUALS *pronounce him,* Guilty; *no concluſion of Law being poſſible to attach againſt him, without their previous Conſent and unanimous Deciſion on the Trial.*

* 35 in Treaſon; and ſince, 22 H. VIII. c. 14 in Felonies of inferior Nature, 20.

* *This the* Greek Juriſts *too, call* ΑΠΟ ΣΤΟΜΑΤΟΣ.

DEPOSITIONS before an Anſwer put in, are not admitted to be read, unleſs the Defendant appears to be in Contempt: for if a Cauſe doth not appear to be depending, then are the Depoſitions conſidered as *voluntary* Affidavits: for unleſs a ſuit is ſhewn to be commenced, it doth not appear that the adverſe party had Liberty to croſs examine: but if the adverſe party had been in Contempt, then the Depoſitions of the Witneſſes ſhould have been admitted; for then it is the fault of the Objector, that he did not croſs examine the Witneſſes, ſince he would not join in the Examination of the Witneſſes. T. Raym. 335.

When the Bill is diſmiſſed, the Rule as to the reading of Depoſitions is this; where the Bill is diſmiſſed, becauſe the Matter is not proper for *Equity* to decree, yet the Depoſitions on the Fact in the Cauſe, may be read afterwards in a new Cauſe between the *ſame* parties: for though the Matter is not proper for Equity to decree, yet there was a Cauſe properly before the Court; for it is proper for the Juriſdiction of Equity to conſider how far the Law ought to be relaxed and moderated: and where there is a Cauſe properly before the Court, howſoever that Cauſe be decided, yet the Depoſitions in that Cauſe muſt be Evidence, as well as in all others.

But

Ch. Ca. 175.

But if a Cauſe in Equity be diſmiſſed for the irregularity of the Complainant, the *Depoſitions* in that Cauſe can never be read: as where a Deviſee, in a ſuit pending by his Deviſor, brings a Bill of *Revivor*, and ſeveral Depoſitions are taken, and then the Cauſe on a hearing is diſmiſſed, becauſe a *Deviſee*, claiming as a *Purchaſor* and not by *Repreſentation*, cannot bring a Bill of *Revivor*. (*x*) In this Caſe, on a new original Bill exhibited, the Deviſee cannot uſe the former Depoſitions: for, in the firſt Cauſe, miſtaking the Bill that he ought to bring, there was no Complaint before the Court;—ſince the Court does not allow any *Deviſee* to complain in that manner, by Right of *Repreſentation*;—and there being no Cauſe regularly before the Court, there could be no Depoſitions in it.

In *Croſs Cauſes* in Equity, an Agreement was proved in one of the Cauſes; and in that Cauſe it was not ſet forth in the Allegations of the Bill; nor in the Anſwer: in the other Cauſe, the Agreement was ſet forth in the Bill, and not proved in the Cauſe: and an order was obtained before Publication, that the ſame Depoſitions ſhould be read in both Cauſes: and by the better opinion this might be: but ſince the order was before Publication, in the ſecond Cauſe, the Defendant had

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Pleadings in the Court of Chanc. p. 26.

(*x*) Wherever a ſuit abates by Death, and the Intereſt of the perſon whoſe death has cauſed the abatement, is tranſmitted to that repreſentative, the Law gives or aſcertains as an heir at law, executor or adminiſtrator, ſo that the title can not be diſputed, at leaſt in the Court of Chancery; but the perſon is alone to be aſcertained, the ſuit may be continued by Bill of REVIVOR merely.

Liberty

Liberty to croſs examine Witneſſes, on which particular he pleaſed, and the ſight of the Depoſitions was to his Advantage.

" For on the ſame principles of Natural Juſtice, on " which the Rule at the COMMON LAW, reſpecting " VERDICTS in Evidence is founded:" a DEPOSITION cannot be given in Evidence againſt any perſon that was not Party to the ſuit: and the Reaſon is, that he had not Liberty to croſs examine the Witneſſes, and it is againſt natural Juſtice that a Man ſhould be concluded in a Cauſe to which he never was a Party.

Hardr. ut ſupra, Atk. Rep. 445. 3 Atk. 415. 501, 2.—524. 2 Bac. Abr. 314.

" And conſequently, on the other Side," a Man ſhall *never take Advantage* of a Depoſition that was *not party* to the ſuit: for if he cannot be prejudiced by the Depoſition, he ſhall never receive any Advantage from it: for this would create the greateſt Miſchief that could be: for then a Man that never was party to the Chancery Proceedings, might uſe againſt his Adverſary all the Depoſitions that made againſt him, and he, in his own Advantage, could not uſe the Depoſitions that made for him; becauſe the other party not being concerned in the ſuit, had not the Liberty to croſs examine, and therefore cannot be encountered with any Depoſitions out of the Cauſe.

" And" if a Witneſs be examined *de bene eſſe*, and before the coming in of the Anſwer, the Defendant

Hardr. 315. 2 Jones 164. P. W. Rep. 454. 2 P. W. R. 563. Atk. R. 450.

not being in Contempt, the Witneſs dies, yet his Depoſition ſhall not be read: becauſe the oppoſite party had not the power to croſs examine him: and the Rule of the *Common Law* is ſtrict to this, that no Evidence ſhall be admitted but what is, or might be, under the Examination of both the Parties.

"And to this muſt be referred the Rule, before "noticed, that" a voluntary Affidavit can not poſſibly be admitted as Evidence; unleſs between the Parties.

Of Depoſitions as Evidence poſt Mortem, v. *infra*.

SECTION VI.

SPIRITUAL COURT.

"The SPIRITUAL COURT is ſo called, becauſe it "judges of *ſecular* Matters on Account of their ſup-"poſed reference to things *Spiritual*. Of *Marriage*, "as being formerly accounted a *Sacrament*: of *Wills*, "pro *Salute Animæ*, as it was called: becauſe the Con-"ſcience and *Soul* of the deceaſed was preſumed to "be concerned in the diſpoſal of his effects, agreeably "to the Precepts of *Holy Church*: and finally, they "were drawing *all temporal* Cauſes within their Juriſ-"diction: becauſe, to *diſobey a Law*, was a *Sin*; "and a *Sin* was of *eccleſiaſtical* Cognizance; becauſe, "to perform a *Contract*, was a *moral* Duty recognized "and confirmed by *Religion*: and wherever *Religion* was "concerned, in the cleareſt points of Obligation, or

2 Jones 164.

But in ſuch Caſes as theſe, the Way is to move the Court of Chancery that ſuch a Witneſs's Depoſitions ſhould be read, and if the Court ſee cauſe, they will order it, and ſuch Order will bind the parties to aſſent to the reading of ſuch Depoſitions:—though it doth not bind the Court of *Niſi Prius*:—and this is thought juſt, becauſe the Witneſſes are examined by Officers of the Court who are ſuppoſed to favor neither party.

"imagined

" imagined to be concerned in Caſes moſt diametrically " the reverſe, the *Church* never neglected to avail her- " ſelf of that powerful aid to enforce her Domination. " At length the Monſtrouſneſs and intolerable Exceſs of " the Evil became it's Cure. The *Crown* found " even it's juſt Authority on the point of being anni- " hilated, by thoſe whom it had protected and ad- " vanced as the inſtruments of abſolute Sovereignty; " the *Barons*, with manly Spirit, vindicated the COM- " MON LAW of the LAND; and the riſing Strength " of the Commonalty matured itſelf for that exertion " of it's Might, which was to break the Yoke of Civil " and of religious Deſpotiſm. *Sed in longum tamen* " *ævum manſerunt, hodieque manent Veſtigia.* The " Practice of theſe Courts is analogous to that of the "*Civil* Law."

Of PROCEEDINGS *in* THE SPIRITUAL COURT:

TIT. II.

" The Chief Matters now of uſual Cognizance in " the Spiritual or Eccleſiaſtical Court, are" CAUSES MATRIMONIAL, and CAUSES TESTAMENTARY. How theſe Courts gained the Juriſdiction in Cauſes *Teſtamentary*, which were originally of *temporal* Conuzance, has been already tranſiently ſuggeſted, and beyond this general intimation is not here to be conſidered; farther than is neceſſary to determine the Weight of Credibility to be given to their ſentences.

2 Mod. 231
2 Str. 960, 1.
Eq. Abr. 227.
Ch. Pre. 59. 64. 116. 212.
10 Mod. 42, 3, 4. 74. 108, 9.
126 Vern. 53. 413. 2 Vern. 471. 591. 547. 555. 603.
Fitzgib. 197.
Lord Raym. 734. 893. 936.

(*y*) *The* Probate *of Wills did originally belong to the temporal Courts: and every* Legatee *had a proper Remedy to recover their Legacies in thoſe Courts. And* Glanville *tells us,* there is a writ which lies at Common Law to demand a Legacy.* Linwood, *who was Dean of the Arches, and wrote about the Beginning of the Reign of* H VI. *confeſſes, that the Probate of Wills did not belong to the ordinary* de jure, *but only by Cuſtom. And Archbiſhop* Parker, *publiſhed a Book* 1573, *wherein he writes* Teſtamenti probandi authoritatem Epiſcopi non habebant; nec Adminiſtrationis poteſtatem cuique delegare potuerunt.

Swinburne, B. VI. § 11.
*L. VII. c. 6, 7.

68. P. W. R: 414, 5. 8 Mod. 75 181. 322. 9 Mod. 66. 11 Mod. 210. 12 Gilb. Eq. R. 2. 203. 12 Mod. 24. 85. 136. 215. 231. 305. 310. 319. 339. 342. 343. 375. 394. 414. 494. 500. 521. 555. 565. 579. 607. Str. 95. 162. 308. Barnard. K. B. 243. 2 Str. 960. 1151. 1242. 2 R. Abr. 679. Wilſ R. K. B. 124, 5. Caſ. Temp. Hard. 12.

The way of authenticating *Teſtaments* by the *Civil* Law, was this: The *Teſtator* and his Witneſſes ſubſcribed the Will, bound it up, and ſealed it with their Seals: which, after the Deceaſe of the Teſtator was opened in the preſence of the *Prætor*; and he delivered Copies of the Will, and kept the Original in "the" Public Treaſury: and hence it is, that the *Spiritual* Court keeps the *Original* will, and gives the PROBATE which is but a Copy of the Will under their Seals.

"But this accounts for the Form only: for the "Cauſe or Pretence of entertaining Juriſdiction, it was "thus:" Originally, among the *Germans*, the Goods, as well as the *Feud* itſelf, belonged to the Lord: afterwards it was thought fit that the Feudary ſhould diſpoſe of them; and then the Will was proved in the *County* Courts, before the *Alderman* (ealdepmon, *Senior*) and *Biſhop*; and if any Man died inteſtate, they were diſtributed among his Children: but after the Conqueſt, the Probate of the Will, and the Commiſſion of Adminiſtration was indulged to the *Biſhop*, who never had it in the times of the Empire, under Pretence, that Proviſion would be better made for the Souls of the deceaſed: but if they exceeded their Commiſſion, they had plainly no Authority: and therefore they muſt confine themſelves to the Bequeſt of the *perſonal* Eſtate:

Granville Sharpe's Congregational Courts 60, &c. 2 Ed. 1786.

Co. Litt. 18 b.

Conqueſt is taken by our Juriſts *in a peculiar Senſe: not as for a ſubjugation by Arms, but,* "*quod quis* conquiſivit *aliter quam jure* hæreditario *ſibi obventum:*" *as we ſay* Purchaſe, *not ſimply for buying; but for any legal Mode of Acquiſition, otherwiſe than by Deſcent or Repreſentation. And as obſerved by Mr.* Hargrave, *in his excellent Notes on* Coke's Littleton, *the Diviſion would be more accurate into Eſtates by Act of Law and Eſtates by Act of the Party.*

for

for the *Feud* was not *deviſable* until the 32 H. VIII. for reaſons mentioned in another Place.

TIT. III.

On Will of LANDS, *Probate not Evidence.*

Therefore if a Man deviſe Lands by Force of the Statute of Wills, or by Cuſtom, the *Probate* of the Will in the Spiritual Court can not be given in Evidence: for all their Proceedings, ſo far as they relate to Lands, are plainly *coram non Judice*, for they have no power to authenticate any ſuch Deviſe; and therefore, a Copy produced under their Seals, is no Evidence of a true Copy. Roll's Abr. 673.

But the *Probate* of the Will is good Evidence as to the *perſonal* Eſtate: (and *indeed, ordinarily the only Evidence*) and they are the Records of that Court; and therefore a Copy of them, under the *Seal* of that Court, muſt be good Evidence: and this is ſtill the more reaſonable, becauſe it is the Uſe of that Court to preſerve the *original* Will, and only to give back to the party the *Copy*, under the Seal of the Court. *v. infra, of concurrent Juriſdictions.* R. Abr. 678.

"But it was held, that" where a Perſon in Ejectment would prove the *Relation* of Father and Son, by his Father's Will, he muſt have the *Original* Will, and not the *Probate* only: for where the Original is in being, the Copy is no Evidence; and the Probate is no more than a true Copy, under the Seal of the Court, Polhill and Polhill, Hil. 1701.

Polhill and Polhill, Hil. 1701.

of a private Inſtrument; and the Law, which ſeeks the beſt Evidence, will not allow of a Copy only: beſides, this is not proved to be a *true* Copy: for the Seal doth not prove the *Truth* of the Copy, unleſs the Suit related to the *perſonal* Eſtate only.

L. N. P. 246.

"Yet though the Probate be not Evidence in the "inſtance above cited for the Reaſon given, it ſeemeth "that" the *Leiger Book is* Evidence in ſuch a Caſe. Becauſe *theſe* are not conſidered merely as *Copies*: they are the *Rolls* of the Court: and though the Law doth not allow theſe Rolls to prove a *Deviſe* of *Lands*, yet when the Will is only to prove a *Relation*, the Rolls of the Spiritual Court, that hath Authority to enroll *all* Wills, are ſufficient Proof: for if there be ſuch a Teſtament, as appears by the Rolls of that Court, the Relation is proved: "now" that there is ſuch a Teſtament doth not appear by a Copy "of the Court, but "by the very Roll of the Court, which is an Original." However, the Copy of the Leiger was not allowed to be read in this Caſe; becauſe the Common Practice had prevailed otherwiſe: "yet the Opinion of my Lord "*Holt*, who would have admitted it, appears to be the "better Opinion;" and the Common Practice ſeems to be founded in a miſtake that the *Leiger Book* is a Copy, whereas the *Leiger Book* is a *Roll* of the *Prerogative* Court; and ſince the Original would be read

as

as a Roll of the Court without farther Atteſtation, it ſeems fit the Copy ſhould be read. L. N. P. 246.

"And where the Probate is Evidence and concluſive "Evidence, as of perſonal Eſtate it is, where it ap- "pears the Act of the proper Court having Juriſdic- "tion" the adverſe party may give in Evidence that the Probate was *forged*, becauſe ſuch Evidence ſheweth that the Spiritual Court hath given no Judgement: "that their ſuppoſed Act is indeed not their Act:" and ſo there is no Reaſon for the Temporal Court to be concluded; for a forged Probate is none at all. T. Raym. 404. 6. Lev. 235. 2 Keb. 337. 343. 64. Comyns 150. Lord Raym. 262. Str. 481. P. W. R. 388.

"But that the Will was forged on which the Probate "was granted, you cannot give in Evidence: for upon "that, the proper Juriſdiction has already decided. Noel v. Wells, 2 Sid. 359. 1 Str. 481. R. v. Vincent Lev. 235. 2 Keb. 337. 343. 641. Comyns 150. Ld. Raym. 262. P. W. R. 388.

TIT. IV.

REGISTER.

THE REGISTER of "Marriages, Chriſtenings and "Burials," is good Evidence; or a Copy of it. The Regiſter began in the 30th of H. VIII. by the Inſtigation of Lord *Cromwell*; who at that time was veſted Hil. Aſſ 1700. Sid. 71. Godolph. 145. Noy 146. Brownl. 207.

2 R. Abr. 115. pl. 11. Cro. Eliz. 411. Moor 451. Salk. 281. 12 Mod. 86.

with all the Authority that the Pope's Legates formerly had, under the Title of Vicar General to the King: and all Wills that were above the Value of two hundred Pounds were to be proved in that Court. And therefore, it ſerved his purpoſe to ſet on foot a Regiſtry of all perſons that were chriſtened and buried:—and when a Book was appointed by Public Authority, it muſt be a Public Evidence: this was afterwards confirmed by the Injunction of Edw. VI. and the particular manner of Regiſtering appointed: as that the Regiſtering ſhould be in the Preſence of the Parſon and Churchwardens on Sunday: and that the Book ſhould be kept locked in the Church; to which the Vicar and Churchwardens are to have Keys.

Godolph. 164.

2 Str. 1703.

L. N. P. 247.

"Though it appear in Evidence that the Regiſter "was made from a Day-Book, kept by the Miniſter "for that purpoſe, yet the Day-Book will not be ad- "mitted to contradict the Evidence in the Regiſter: "e. g.—to prove a Child baſe born, where no Notice "is taken of it in the Regiſter, which would therefore "be Evidence to prove him legitimate."

Sid. 71, 2.

An Indictment for entring a falſe Marriage in the Regiſter Book:* and the Defendant fined 200 Marks: for ſince the Regiſter is Public Evidence, it muſt be guarded by the Law, that it be not counterfeited.

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* *This is now a Felony without Clergy by the ſtatute* 26 *Geo.* II. *c.* 33. § 16.

The

SECTION VII.

ROLLS *of* COURT BARON.

The *Court Rolls* are Evidence, or Copies thereof; for they are the public Rolls by which the Inheritance of every Tenant is preſerved: and they are the Rolls of the Manor Court, which was anciently a Court of Juſtice relating to all Property within the Diſtrict. Hil. Aſſ. 1701,

"But" if *Copyhold Rolls* make mention of a ſurrender to the uſe of the Tenant's laſt Will, and then admit *A.* as Deviſee to the Will; this was ruled to be no Evidence of the ſeiſin or Title of *A.* without the Will itſelf: becauſe the Land doth not paſs by the ſurrender without the Will; and therefore the Will muſt be ſhewn as the beſt Evidence of *A.*'s Poſſeſſion and Title. Jenk. & Barker, per Tracey, 1705.

TIT. II.

PUBLIC BOOKS, SURVEYS, *&c.*

If the Queſtion be whether a certain Manor be *ancient Demeſne* or not, the Trial ſhall be by *Domeſday Book*, which ſhall be *inſpected* by the *Court*. Ancient Demeſnes are the Socage Tenures that were in the hands of *Edward* the *Confeſſor*, and which *William* the Conqueror, in Honour of him, endowed with ſeveral Privileges. *Domeſday Book* was a *Terrier*, or *Survey* of

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(z) *The Court of* B. R. *refuſed a Rule moved by the Attorney General againſt the Vice-chancellor of* Oxford, *to produce the Statutes of the Univerſity, in order to prove a Miſdemeanour againſt the Vice-chancellor.*

The Evidence of a *neighbouring* Manor ſhall not in general be admitted to ſhew the Cuſtoms of another Manor; becauſe each is governed by its own. But this is not ſo univerſal as not to be varied in ſome inſtances: for in the *Mine Countries* the Courts of Law have admitted Evidence with regard to Profits of Mines, &c. out of *other* Manors, where they are ſimilar, to explain the Cuſtom of the Manor in Queſtion. Per *Hardw. Ch. v. N. of the 4th Ed. of this Work.* Blackſt. Rep. 37, 46. E. 22. G. II. 2 Tr. Atk. 198, p. 78.

the

the King's Lands, which was made in the time of the Conqueror, and which aſcertains the particular Manors which had this Privilege.

To know whether any thing be done in or out of the *Ports*, there lies in the *Exchequer* a particular ſurvey of the King's *Ports*, which aſcertains their extent.

TIT. III.

ANCIENT MEMORIALS *and Acts of particular* JURISDICTIONS.

An old *Terrier*, or *ſurvey* of a Manor, whether *Eccleſiaſtical* or *Temporal*, may be given in Evidence; for "ſometimes" there can be no other way of aſcertaining old Tenures or *Boundaries*.

L. N. P. 248. "But a Terrier of Glebe is not Evidence for the "Parſon, unleſs ſigned by the Churchwardens as well "as by the Parſon: nor then, *or at leaſt barely admiſ-"ſible*, if they be of his nomination; and though it "be ſigned by them, yet it ſeems to deſerve very little "Credit, unleſs it be likewiſe ſigned by the ſubſtantial "Inhabitants: but, in all Caſes, it is ſtrong Evidence "againſt the Parſon.

"ROLLS or *ancient* Books in the *Heralds'* Office "are Evidence to prove a *Pedigree*, and ſo *Epitaphs*, "&c.: but an *Extract* of a Pedigree, proved to be "taken out of *Records*, ſhall not: becauſe ſuch Ex-"tract is not the beſt Evidence in the Nature of the L. N. P. 248. "Thing, as a Copy of ſuch Records might be had."

An

Ancient Memorials, *and Acts of particular* Jurisdictions.

An old *Map* of Lands allowed Evidence.

Yates & Harris, Hil. Aff. 1702.

" *Camden's Britannia* would not be Evidence to " prove a *particular* Cuſtom: but a general Hiſtory " may be given in Evidence to prove a Matter relat- " ing to the Kingdom in general. As in the Caſe of " *Neal* and *Jay*, Chronicles were admitted to prove " that King *Philip* did not take the *Style* in the *Deed* " at that time; *Charles* V. of *Spain*, not having then " ſurrendered."

L. N. P. ut ſuà pra.

An *Inventory*, taken by a Sheriff on an Execution, is Evidence between ſtrangers to prove the Quantity and Value of the Goods; for the Law, entruſting him with the Execution, muſt truſt him throughout.

The Regiſter of the *Navy Office*, with proof of the Method there uſed, to return all perſons dead with the Mark *Dd*, is ſufficient Evidence of a Death.

Ibid. 249.

The Pope's *Licence*, without the King's, has been held good Evidence of an Impropriation: becauſe an-

Palm. 427.

anciently the Pope was held to have a Diſpoſition of all ſpiritual Benefices with the Concurrence of the Patron, without any Leave from the Prince of the Country; and theſe ancient Matters muſt be admitted according to the Error of the times in which they were tranſacted.

Palm. 38. "Yet" a Pope's Bull is no Evidence on a general Preſcription to be diſcharged of Tythes: becauſe that ſhews the Commencement of ſuch a Cuſtom; and a general Preſcription ſhews that there was no Time or Memory of Things to the contrary; ſo that the Bull itſelf doth contradict ſuch Preſcription.

L. N. P. 248. But the Pope's Bull was Evidence on a ſpiritual Preſcription, when you only ſay the lands belonged to ſuch a Monaſtery as was diſcharged of Tythe at the time of the Diſſolution; for then they continue diſcharged by Act of Parliament.

31 H. VIII. c. 13. § 21.

Of

PART II.

Of WRITTEN EVIDENCE, *private.*

CHAPTER I.

1. DEEDS.

We now come, in the ſecond Place, to that which is only *private* Evidence between Party and Party: and that is alſo twofold.

1. DEEDS.
2. *Matters of inferior Nature.*

SECTION II.

Of DEEDS.

And here the general Rule is, that when any perſon *claims* by a *Deed* in the *Pleadings*, there he ought to make a *Profert* of it to the *Court*; and when he would prove any *Fact* in *Iſſue* by a Deed, "there, he ought to "give it in Evidence to the *Jury*:" in both Caſes the Deeds themſelves muſt be ſhewn.

A DEED conſiſts of three parts:

1. *Of* SEALING *by the Parties*;
2. *Of Delivery to the Party to whom the Deed is made*;
3. *Of a Right transferred, or Obligation created.*

TIT. II.

1. *Of* SEALING.

The SEAL was very ancient in the *Roman* and *Grecian* Governments: and from them it came to the *Northern* Nations;

Nations, who anciently paſſed all Manner of Right by the actual Tradition of the Thing itſelf: the *Seal* followed, from the Invention of Coins, and is a Derivation from the ſame Convenience: for as Coins were invented as Tickets to facilitate the Exchange of all manner of Commodities, ſo when Coin was wanting, or not ready for payment, Tickets were given by Impreſſion in Wax, and theſe paſſed inſtead of the Coin itſelf: and theſe Impreſſions were made with great Diſtinction; for they contained the Arms or ſome notorious Symbol of the Perſon contracting: now when ſuch Diſtinctions were taken up, and found of uſe, they were at laſt required in authenticating of all manner of written Contracts; and from hence the Law grew, that there could be no ſolemn Contract without the Diſtinction of the Seal.

2. *Of* DELIVERY.

2. *The Delivery* was always a ſolemn Sign uſed by the *Northern* Nations in transferring of Right: and as they anciently delivered the Thing itſelf, and by that Delivery made the Alienation; ſo when *Contracts*

Sheppard's Touchſtone. Hilliard's Ed. 55.

L. N. P. 268.

(a) *But now* any *impreſſion, on the Paper amounts to ſealing, if made with that intent. And a Deed by a* Corporation *ſhall be good, though not with their common ſeal: unleſs where certain Acts (excluſively) are limited to the ſanction of a certain ſeal; as the* GREAT SEAL, *&c. And where the* ſeal *is torn off, &c. Evidence may be given to a* Jury HOW *it happened, &c. in Relief of Accidents. Unleſs perhaps where the* ISSUE *is directly upon the Deed: as on* NON EST FACTUM: SIGNING *now ſeems neceſſary as well as ſealing (in moſt caſes) ſince* 29 Car. II. *which is the more reaſonable as the ſeals now annexed to Deeds are no longer ſymbols of the Parties.* V. Comm. B. II. Ch. 20.

took

took the place of Things themſelves that were to be delivered, they annexed the ſolemnity to the Contract, and the Contract was completed by Delivery: and from thence it became neceſſary that a Delivery ſhould be made in all Contracts.

3. *Right transferred, or Obligation created.*

Thirdly, in every Contract there muſt be ſome Right transferred, or Obligation created: and therefore there muſt be apt words to ſhew what Right was transferred, and to whom; to ſhew what Obligation was created, and to whom; and the ſenſe and ſignification of the words muſt be expounded by the Law, ſince it is the province of the Law to determine the forms and ſolemnities and operation of all manner of Contracts: for the operation and effect of a Contract cannot be determined but by the Rules of Law that are appointed as the meaſures of transferring Right, and of creating Obligations; and without ſuch ſtated Rules in every ſociety, no man could be certain of any Property; for then the ſenſe of the Contract muſt be at the Mercy of the Judge or Jury, who might conſtrue or refine upon it at pleaſure.

TIT. III.

PROFERT *of* DEEDS.

There muſt therefore be a PROFERT made of all ſolemn Contracts in any Action *founded* on ſuch Contracts.

Firſt,

Rules *concerning* Profert *of* Deeds.

First, for the ſecurity of the ſubject, that what Right is transferred, or Obligation created, might be judged according to the Rules of Law.

Secondly, becauſe all Allegations in a Court of Juſtice muſt ſet forth the Thing demanded: now the Thing demanded cannot be ſet forth without the Inſtrument ſhewn upon which the Demand ariſes; for ſince the Demand is by the Inſtrument, there can be no Demand at all, without ſhewing that from which it ariſes.

Rules *concerning* Profert *of* Deeds.

Co, Litt. 226. Therefore *Parties* to a Deed cannot found any Claim without *ſhewing* it to the *Court*.

267. Nor can *Privies in Eſtate* take any Advantage of a

10 Rep. 92. Deed without ſhewing it.

Ibid. 93. As if there be Tenant for Life, Remainder in Fee, and there be a Releaſe to him in Remainder, Tenant for Life cannot take Advantage of it without ſhewing the Deed: for ſince the Right paſſed merely *by* the Deed, to ſay that any Perſon releaſed without * Deed will not be a good Plea.

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* *De non apparentibus et non exiſtentibus eadem eſt Ratio.*

"But, on the other hand," when a Man ſhews a Title in himſelf, every Thing collateral to that Title ſhall be intended, whether it be ſhewn or not: for though the Law requires an Exactneſs in the Derivation of the Title, yet when that Title is ſhewn, the Law will preſume all collateral circumſtances in favour of Right: for when lawful Conveyances, which are made with Care and on Conſideration, do appear, it would create too great Nicety to require an Exactneſs in the ſhewing of every collateral Matter, and would tend to the intangling of Right with too many Difficulties: and therefore by the Benignity of Juſtice they ſhall be *intended:** beſides a Matter collateral to a Title is what doth not enter into the Eſſence of a Title, but ariſes *aliunde*; ſo that there muſt be a good Derivation of your Right without it.

As when a Man declares of a Grant or Feoffment of a Manor, the *Attornment* ſhall be *intended:* for when a Title is ſhewn to a Manor, Attornment of the Tenant, which is *collateral* to the Title, ſhall be "preſumed" till the contrary is ſhewn on the other ſide. Co. Litt. 310. Cro. El. 401.

So in *Treſpaſs*, the Defendant conveys the Houſe in which, &c. by Feoffment from *T. S.* and juſtifies *Da-*

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* *Lex non vult ſupervacua neque nimis ſubtilia. Infinitum in Lege reprobatur.*
Ubi Jus aliquod probatur, omnia ex eo legitime conſequentia præſumuntur.
Stabitur Præſumptioni donec probetur in contrarium.

mage

mage feaſant: the Plaintiff replies, that *T. S.* before the Feoffment, made a Leaſe to *T. N.* who aſſigned to him; the Defendant rejoins, that the Leaſe was made on Condition that if *T. N.* aſſigned over without Licence by Deed from *T. S.* that then *T. S.* ſhould re-enter; the Plaintiff ſur-rejoins that *T. S. did* give Licence by Deed, without any *Profert* of the Deed; and yet this ſur-rejoinder was good: becauſe the Plaintiff's Title was by Aſſignment of the Leaſe from *T. N.*; and conſequently the Licence from *T. S.* is but a Matter *collateral* to the Aſſignment; and by conſequence the Deed muſt be intended to be well and legally made, though it be not ſhewn to the *Court.*

6 Co. 38. Cro. Ja. 102.

6 Co. 38.

But when Matter "is ſaid to be" collateral to the Title, then there is another Difference to be conſidered: and that is, where the Deed is neceſſary *ex proviſione hominis*, and where it is neceſſary *ex Inſtitutione Legis:* for where the Deed is neceſſary *ex Inſtitutione Legis*, there you muſt ſhew it: for it is repugnant that the Law ſhould require a Deed, and not put you to ſhew that Deed when it is made: as if you are obliged to ſhew the *Attornment* of a *Corporation*, there you muſt ſhew a *Deed*; in as much as (*b*) corporate Bodies, by the Rule of the Law, cannot act but by corporate Inſtruments; for the Body conſiſts in

(*b*) *It is ſuppoſed that the change, or rather reſtitution of* corporate *for* corporeal, *as it before ſtood, cannot be doubted.*

See St. 4 A. c. 16. whereby all *Attornments* of Tenants are taken away, *N.* 4 *Ed. They appear now to be no longer of uſe except only to ſave a* manerial *Fine.*

Agreement and Union, by Creation of Law, by Patents and Inſtruments under Seal: and there is no Act of the aggregate Body but in the ſame manner; ſo that there can be no Attornment without a Deed, and the Law cannot allow the Attornment of ſuch a Body without it, therefore no Attornment is ſhewn, unleſs a Deed is ſhewn alſo: "and in this and ſimilar inſtances, "what would otherwiſe have been collateral, becomes "indeed a part of the Title."

But when a Deed is neceſſary *ex proviſione hominis*, there, when it is collateral, as in the Caſe of the Licence beforementioned, it needs not "to" be ſhewn: * for the private Act of the parties ſhall not controll the Judgment of the Law, that *intends* all ſuch Matters without ſhewing.

"And here it is proper to notice one leading and "general Difference; that of *Matter en païs*, and *Matter* "*hors du païs*; of which the former is to the *Jury*, the "latter to the *Court*.

Par. 3.

Of MATTER.

1. *En Païs.*
2. *Hors du Païs.*

"Now *Matter en Païs*, and its *contradiſtinctive*, are "each of them ancient and comprehenſive Terms in "the Law: the former ſignifying Acts to which no

* *Res inter privatos acta publico Juri non intercedit.*

" *particular legal ſolemnity* is required; and the latter, " Acts of which *the Conſtitution and the Allegation* is " ſpecial: the one being conſidered as Facts ſimply " tranſacted without profeſſional Aſſiſtance, and cogni- " zable by the Country from their Simplicity and pub- " lic Notoriety; the other as ſolemn Compacts to be " regularly framed by due Advice in the Profeſſion, to " be pleaded formally according to their Nature, and " to be decided by the Judgement of the ſages of the " Law.

" And hither is to be referred a grand Diviſion im- " mediately applicable to that branch of the Law of " Evidence which is now before us; that is, of *Things* " that lie *in Livery*, and" Things that lie in *Grant:* for Things in Livery may be pleaded without Deed; but for a Thing that lies in Grant, regularly a Deed muſt be ſhewn.

Par. 4.

Of THINGS.

1. *In Livery.*
2. *In Grant.*

Bef. Right. Bef. reſided.

1ſt. *Of Things in Livery* it is to be known, that Livery was the ancient Conveyance, which was a ſolemn Delivery of Land in *Sight* of the Inhabitants; and becauſe this was done *coram Paribus Curiæ*, and the Tenant ever after *reſted* in the Poſſeſſion, it was reckoned the moſt notorious way of Conveyance: and

and ſince this was the ancient *Gothic* way, and becauſe they reckoned it of itſelf moſt manifeſt, the ſolemnities of a Deed were not neceſſary.

And therefore a Man may plead that *T. S. enfeoffed* him, without ſaying *per Indenturam*; and yet give the Indenture in Evidence: becauſe the Indenture is not the *Feoffment*, but the Feoffment is made by the *Livery*; and by that only the party is inveſted with the *Feud*, and the Indenture is only *Evidence* of ſuch Feoffment. 2 R. Abr. 682.

But if a Man plead that *T. S.* hath enfeoffed him *per Fait*, (*c*) whether a Man may give a *parol* Feoffment in Evidence hath been reaſonably doubted: becauſe he hath bound himſelf up to a Feoffment by *Deed*; and if the Jury have only Evidence of a *parol* Feoffment, and yet find the Iſſue, the Deed may be uſed by way of *Eſtoppel* ever after, where in Truth there was no ſuch Deed. Ibid.

So a *Demiſe* may be made without Deed as well as a Feoffment: for here the Party reſides in the Poſſeſſion; and therefore the old way of contracting governs this Caſe: and "therefore" a man may plead a Demiſe without Deed, and give the Indenture 2 R. Abr. 682.

(*c*) *So a Leaſe not ſtamped to be given in Evidence to prove a Demiſe by* parol *for ſo many years as the Stat.* Car. *allows: for though void to all intents and purpoſes as a* Deed, *it is good to manifeſt the* general *Right of the Claimant, as holding under a Demiſe that would have been valid without Writing.* v. alſo Weakly ex Dim. Yea v. Bucknell, Cowp. 473.

in Evidence: for the Indenture may be uſed as Evidence of a Contract that would be good whether there were any Indenture or not: but if the Demiſe were laid, *by Indenture*, it ſeemeth that they could not give a *parol* Demiſe in Evidence.

Co. Litt. 352. LIVERY alſo is an *Eſtoppel*; (*d*) and is by *Coke* an *Eſtoppel en Païs:* becauſe it is a Fact a Man cannot impeach or deny: and this, from the Notoriety of the Ceremony: for when Solemnities are ſettled for transferring a legal Poſſeſſion, they ought to be held as ſacred by the Law: and therefore a man is concluded from deſtroying that of which he himſelf is the Author, or from impeaching that which is held as ſacred in transferring all poſſeſſions.

Ibid. 225. Lit. § 365. Therefore if the Defendant pleads the *Livery* and *Seizin* "from" the Plaintiff, the Plaintiff cannot reply, that the Livery was conditional, without ſhewing the Deed: in as much as the Plaintiff is *eſtopped* to defeat his own Livery, by a naked Averment and parol Evidence only.

But

Co. Litt. § 667. (*d*) ESTOPPEL, *or Concluſion, is where a Man's own Act or Acceptance ſtoppeth or cloſeth up his Mouth, to allege or plead the Truth: and it is either by Matter* EN PAIS, *or* HORS DU PAIS. *Thus a Man,* Tenant for Years, *having levied a* Fine, *is* eſtopped *from ſaying, in order to recover ſuch Lands, that he had* no freehold: *a Man who has expended Money on an* immoral *Conſideration ſues to recover it by* indebitatus aſſumpſit; *he is* eſtopped *from ſaying the conſideration was* immoral: *for he has knowingly parted with it on ſuch conſideration upon which he ought to* loſe *it: thus again, where a Man has accepted Rent, he is eſtopped from ſaying that the Payer was not his Tenant. But Acceptance of Rent, after*

Comm. III. 308.

Salk. 22. 11 W. & M. Co. Litt. ſupra.

But the Jury are not *eſtopped* on the general Iſſue from finding ſuch a conditional Feoffment: for the Jury are Men of the Neighbourhood that are ſuppoſed to be preſent at the ſolemnity: and they are ſworn *ad Veritatem dicendam*; and therefore they cannot be eſtopped from finding the Truth of the Matter; and, by conſequence, may exhibit the Condition of the Feoffment.

But ſince the uſe of the ſolemnities before the Men of the Country hath ceaſed, by allowing ſecret Liveries only in the Preſence of two Witneſſes, therefore the *Statute of Frauds and Perjuries* hath enacted, that no Leaſes, Eſtates, or Intereſt of Freehold, or for a Term of Years or uncertain Intereſt (not being Copyhold) ſhall be aſſigned, granted, or ſurrendered, unleſs it be by Deed or Note in Writing under the hand of the Party, or his Agent, thereunto lawfully authorized in Writing, or by Act and Operation of Law. 29 Car. II. c. 3. § 1. 1 R. Abr. 24. 2 Lev. 227.

"Excepting Leaſes not exceeding the Term of three "years on a Rent reſerved of not leſs than two-thirds "of the full value of the demiſed premiſſes." § 2.

So that by this Statute the Ceremony of Livery only is not ſufficient to paſs Eſtates of Freehold, or Terms for Years "greater than as above ſpecified:" but it is not neceſſary to ſet forth ſuch Contract on the Pleadings: for they are as before, *feoffavit et demiſit*.

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after Notice to quit, due for occupation, *ſubſequent to the time of the Notice, does not operate as an Eſtoppel or* waivure *of* Notice, *though it may of the* penalty *of double Rent given by the* 4 G. II. Cowp. 243. Doe ex Dim. Cheney v. Batten.

A Man may plead a Condition to determine an Eſtate for Years without Deed: for this begins without any Livery; and therefore the Party is not eſtopped by any notorious circumſtance from averring the Condition.

Co. Litt. 225. Litt. § 365.

But where a Man ſets out a Feoffment, the other Party may reply, that it was by Deed, and ſhew the Condition, for then there is an Eſtoppel: and ſo the Matter is in equal Balance, and therefore muſt be determined according to Truth.

Par. 5.

Of Things lying in GRANT.

Comm. B. II. Ch. 20. p. 317.

Secondly, of Things lying in GRANT: and theſe are all Rights, as Fairs, Markets, Advowſons, "Titles" to Lands, where the owner is out of poſſeſſion: and theſe being Rights, they cannot poſſibly paſs by Inveſtiture of the Poſſeſſion, becauſe they cannot poſſibly be delivered over nor "viſibly" poſſeſſed: and therefore they muſt paſs by the ſecond Sort of "Conveyance," that holds the ſecond place in ſolemnity: and that is, by *Grant* under the Hand and Seal of the Party.

Par. 6.

Of Grant *preſumed, or* PRESCRIPTION.

Now a perſon that claims any thing by *Grant* muſt ſhew his Deed from the Party that had the original Grant; or otherwiſe he muſt preſcribe in the Thing he pretends to, and the *Preſcription* being ſuppoſed immemorial, ſupplies the place of a *Grant.*

10 Co. 93.

He alſo that has a *particular* Eſtate, by the Agreement of the Parties, muſt ſhew, not only his own Conveyance, but the Deeds paramount: for there can be

no Title to a Thing in Agreement but by ſhewing ſuch Agreement; and the particular Tenant ought to have the power of the Deeds, in as much as he has no Title unleſs he can derive the Eſtate that ariſes in Agreement up to the firſt original Grant.

Par. 7.

Of particular Eſtates by Act of Law. 10 Co. 93, 4.

But where any perſon claims any "ſuch particular" Eſtate by an Act of Law, there they may make their Claims without ſhewing the Deeds: as *Tenant* in *Dower* or by *Elegit*: (*e*) or the Guardian in *Chivalry* may claim an Eſtate in a Thing lying in Dower, without the Deed: for when the Law creates an Eſtate, and yet doth not give the particular Tenant the property of the Deeds, it muſt be allowed that the Eſtate be defended without them: otherwiſe the Creation of the Eſtate were altogether vain.

So they may plead a Condition without ſhewing the Deeds: becauſe they claim an Eſtate by the Act of the Law, and therefore are not eſtopped by the Livery: ſo that they may claim an Eſtate, "defeaſible "on Condition," without a Deed: alſo they are not ſuppoſed to have the Deeds and Muniments of the

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(*e*) The Eſtate by *Elegit* entitles a Creditor, after Judgement, to one half of the profits of the Lands, and all the Goods (*Oxen, and Beaſts of the Plough excepted*) until the Debt be ſatisfied, on his ſuing *out the Writ of* Elegit *within a year of the Judgement.* Wood, B. II. C. 1. Comm. II. Ch. 10.

Eſtate:

Eſtate; and therefore, for the reaſon formerly given, may do it without Deed.

Co. Litt. 226. a. 10 Co. 93, 4. Dr. Leyfield's Caſe.

But *Tenant* by the *Curteſy* cannot claim an Eſtate lying in Grant without Deed "ſhewn; therefore, if "there be a Releaſe made to his Wife, or Condition "by the Wife, and re-entry on Condition broken, he "ought to produce it; for he hath the power over "ſuch Deeds during his Life;" he hath the property and cuſtody of them "in Right of his Eſtate; and "this" cannot be diveſted out of him during the continuance of his Eſtate; "and therefore the Law pre-"ſumeth his poſſeſſion of ſuch Deeds and Evidences, "and calleth on him to ſhew them in manifeſtation "of his Title."

"And as" he cannot defeat an Eſtate of Freehold without ſhewing the Deed, ſo neither can the Lord by *Eſcheat*; for the Act of Livery is an Eſtoppel that runs with the Land, and bars all perſons to claim it by virtue of any Condition, without the Condition "be apparent" in a Deed; for the Solemnity and Notoriety of the Act is that which makes it obligatory to all perſons; ſo that they cannot impeach it without ſhewing a precedent Title equally notorious: and ſince in both theſe Caſes the Cuſtody of the Deeds reſides with them, they muſt ſhew the Condition.

So

TIT. IV.

GENERAL RULE: *Parties or Privies ſhall ſhew a Deed; but not* STRANGERS.

So that the GENERAL RULE is, that where any perſon *ought* to have the *Cuſtody* of the Deeds, there when ſuch perſon is compelled to ſhew his Title, he ought to make *Profert* of thoſe Deeds to the Court: for every man ought to keep his Deeds, and can not take Advantage of his own Negligence in loſing them.

Therefore, in the Caſe formerly put of Tenant for Life the Remainder in Fee, and a Releaſe to him in Remainder; Tenant for Life ought to make *Profert* of the Deed: for they both have parts of the ſame Feud; and therefore, Tenant for Life is ſuppoſed to be equally entitled to the Deeds as he in Remainder.

But where a perſon is an utter *Stranger* to any Deed, there in Pleading he is not compelled to ſhew it: for where he is not ſuppoſed in Law to have Cuſtody of the Deeds, there he cannot be compelled in Pleading to ſhew ſuch Deed to the Court: for that were to compel the Party to *impoſſibilities*, which were a very unequitable and unjuſt Law. Co. Litt. 226. Styl. Reg. 205.

As

As if a Man mortgageth his Land, and the Mortgagee leaſeth the Land for Years, reſerving a Rent; and then the Condition is performed, the Mortgagor reenters: the Leſſee, in Bar of an Action of Debt, ſhall plead the Condition and Re-entry without ſhewing the Deed; for the Leſſee was never, nor could be, entitled to the Cuſtody of the Deed, and therefore it would be altogether unjuſt to compel him to produce it.

So if a Man bring a *præcipe* againſt *A.* he ſhall plead that he was only a Mortgagee, and that the Mortgage was performed, ſo that he hath no longer ſeiſin of the Eſtate: and this without ſhewing the Deed: for, upon performance of the Condition, the property of the Deed was no longer in the Mortgagee, but it ought to be rebailed to the Mortgagor; and having no longer any Title to the Deed, he may plead the Condition without ſhewing it.

10 Co. 94. So in an Action of Waſte, or in diſcharge of the Arrears of Rent, the Tenant pleads a Grant of the Lord with Attornment, he cannot ſhew the Grant, *Cauſâ quâ ſupra.*

In an Action of Debt upon a Bond, it is Matter of Subſtance to make PROFERT of the Deed: becauſe this is the Contract on which the Court ought to found their

their Judgement, and therefore it ought to be exhibited to the Court. Cro. Ja. 32.

"But where Plaintiff declared as Adminiſtrator "without concluding, *et hic profert Curiæ Litt. Ad-* "*miniſtr.* it was held a defect of Form againſt which "advantage ſhould not be taken on a *general* Demurrer. 2 Saund. 402. 3 Keb. 61.

And where a third Perſon claims under an Executor or Adminiſtrator, there (on the general Principle before ſtated) PROFERT is not required. 2 Str. 1260, 13

A Deed enrolled muſt be offered to the Court in pleading, though the Deed be enrolled in the ſame Court in which the Plea is depending: for this is no Record; but a *Deed* recorded: for a Record muſt be the Act of the Court: or of "public Authority:" and therefore, the Deciſions of Juſtice by the Court that lie as Precedents for future Obſervation, and LETTERS PATENT, which are the King's Acts "in his executive "Capacity, and STATUTES which are the Acts of the "entire Legiſlature in behalf of the whole Community," are "RECORDS and of" the higheſt legal Authority: but a Deed enrolled is only the *private* Act of the Party *authenticated* in Court: and from thence this Difference is drawn; that *Letters Patent*, enrolled in the ſame Court, need not be *proffered* to the Court; but

but a Deed enrolled muſt: for all Records that are public Acts, and that lie for the Direction of the Court in Matters of Judicature, muſt be taken Notice of; and therefore, they need not refer to them with a *prout patet per Recordum*; for the Court will take Notice of the Courſe and Orders of the Court upon reference to them: but Deeds enrolled are no more than the private Act of the Parties authenticated by the Court: and they do not lie for the Direction of the Court, but take hold of the Authority of it to give them Credit: and therefore, the Court doth not take notice of them, unleſs they be *pleaded:* "but of" the Letters Patent of *another* Court, the Court doth not take notice, unleſs they be *offered*; for ſince they are none of the Records which are directory to this Court of Juſtice, it is not the office of the Court to take notice of them: and therefore it is the Duty of "the Parties who would "take Advantage of them," to offer them as they do all other Allegations.

5 Co. 74, 5. Since the TERM, to avoid the entering up of the ſeveral Continuances of Buſineſs, is reckoned as *one continued Law-Day*, therefore, Deeds pleaded, ſhall be in the Cuſtody of the Law during the whole Term, being the Day wherein they are pleaded; and being then before the Court, any Body may take Advantage of them: but ſince they belong to the Cuſtody of the Party, if the Deed be not denied, it ſhall go back to the Party after the Term is over; and then no Body can take advantage of it, without a new PROFERT; for then it is not before the Court.

And

And therefore, the Plaintiff, in the *King's Bench*, may, in his Replication, take Advantage of the Condition of a Deed, becauſe it was "et prædictus A dicit"—as of the *ſame* Term: but he cannot, in his Replication in the *Common Pleas*, take advantage of a Deed; becauſe there they enter an (*f*) Imparlance to *another* Term.

But where the Deed comes in, and is denied, it remains in Court for ever: becauſe that is the only point in Debate on which the Deciſion of the Court is founded; and therefore, like all other Deciſions, it muſt remain among the Records of the Court: and becauſe it is tied up to this Court, and is impoſſible to be removed, it ſhall be pleaded in another Court without ſhewing. 5 Co. 74. 81

Par. 2.

Of Deeds taken away by the contrary Party.

As no party ſhall take Advantage of his own Negligence in not keeping his Deeds, which in all Caſes ought *fairly* to be produced to the Court, ſo his Adverſary ſhall not take any Advantage "by" violently detaining of them: for the one by a violent taking away Co. Litt. 226.

(*f*) *An* IMPARLANCE *is a Licence to take time where the ſuit commences without* ſpecial Original, *ſo that the Defendant, by his delay of pleading, may not incur a* Diſcontinuance. *And the Law preſumeth that he employs this time to* interparle *or converſe amicably with the Plaintiff for accommodation of the Difference. In this Senſe ſome have underſtood the Fragment in the twelve Tables,* endo viam uti paicunt orato, *and it is thought alluſion is made to it in the Goſpel.* Comm. III. 20. TAB. I. 7. Luc. XII. 58.

of

of the Deeds, gives a juſt excuſe to the other for not having them at Command; and no man can ever make advantage of his own Injury: and therefore, it is a good Plea for the party to ſay, that the other entered, and took away the Cheſt where the Deeds were.

TIT. V.

Of giving DEEDS *in* EVIDENCE *to the Jury.*

SECONDLY, of giving *Deeds* in Evidence to the Jury: and here the General Rule is, that where any Thing is to be *proved*, the *Deed itſelf* muſt be given in Evidence, and *not* the *Copy* of it: and the Deed muſt be regularly proved by *one* Witneſs at leaſt: "which "later requiſite belongs to our ſubſequent Diviſion; "and will be more fully treated under the Head of "UNWRITTEN TESTIMONY."

Firſt, the *Deed* ought to be given in Evidence, and *not* the *Copy*: for though in *Records* the Copy is admitted in Evidence, yet the Law will not regularly allow it in *private* Deeds: for they are not within the ſame Reaſon as *Records*: for a Record, "as before "noticed," is fixed in a certain place; and therefore the Original cannot be had; and by conſequence the Copy is the beſt Evidence.

But

But *Deeds* are only *private* Evidence, and not fixed or confined to a certain place: lodged in the Cuſtody of the Party, not of the Law: and therefore, muſt be produced in Evidence: the Law requiring the beſt Evidence of which the Nature of the Thing is capable: and the Deed is much better Evidence than the Copy of it; for the Razure and Interlineation that might vacate the Deed, might appear in the Deed itſelf: and the very offering a Copy, carries a Preſumption as if the Original were defective; and therefore, the Copy is not to be admitted. Beſides, ſince the Deeds are in the Cuſtody of the Party, the Deeds themſelves muſt be produced: "for it concerns him to make apparent "thoſe ſecurities of which he would take advantage: "and a general looſe Allegation of his having" loſt or "miſlaid them," which is his own fault, he can not make any part of his Excuſe.

TIT. VI.

But out of this General Rule, "for the Production "of Deeds," there are ſome Exceptions.

1. *Deſtruction by Accident.*

1ſt. And that is, where they *prove* the Deeds themſelves to be burned with Fire: for the Proof of this Matter will excuſe the Deed from being produced to the Jury: "but where the Deed is the Ground of the "Action, and it is therefore neceſſary to be pleaded, "it

10 Co. 92. b. 93. Mod. 4. 9. 117. S. P. by Hardw. Ch. 3 Atk. Rep. 214.

2 Str. 1186. 1198. 1 Mod. 266.

" it may ſeem an actual Profert is neceſſary and indiſ-
" penſible :" for there is that Convenience in keeping to known Rules, that they cannot be broken, though they tend, " accidentally," to the Miſchief of particular perſons: and there can not be a more convenient Rule than that the *Cauſe* of every Complaint ought to be ſhewed to the *Court*, but the *Jury* muſt go according to the Evidence of the Fact.

" And therefore, where Evidence is to be given of a " Deed to a Jury" to prove the Import of the Deed, that it was in ſuch an Houſe, and that the Houſe was burned, is the beſt Evidence that can be had of ſuch Deed, and gives reaſonable Grounds to the Jury to find it.

2. *Suppreſſion by the Party.*

2d. A *Copy* of a Deed is good Evidence where the Deed is in the Defendant's hands, and he will not produce it: " and if you cannot ſhew a Copy in ſuch " Caſe, you may give inferior Evidence, the beſt in your " power, to prove the Contents." For when the Original is in the Defendant's hands, the Copy is the beſt Evidence: for the Preſumption that oppoſes the Copy is, becauſe the Original Deed is, or ought to be, in the party's hands that would produce the Copy; now the Preſumption is deſtroyed, where the Plaintiff

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Lex potius vult pati privatum inconvenieus quam publicum Malum. — *Ubi Res ipſa per ſe conſtat, præſumptioni non eſt Locus.*

proves the Deed itſelf to have been in the hands of the Defendant; for then it can not be preſumed that there was any better evidence, or that there was any Interlineation that obliged the Plaintiff to cover it; for if the Copy were not perfect and exact, it would be overthrown by the Defendant's producing the Original: "the ſame obſervation will "apply to any the inferior Evidence intimated above, "when you can not even produce a Copy; for no Evi- "dence is ſlight againſt him who ſuppreſſes what "otherwiſe would have been given.

"But where you rely on a Paper as the Copy of a "Deed, that" Copy muſt be proved by a Witneſs who compared it with the Original: for there is no proof of the Truth of the Copy, or that it hath any Relation to the Deed, unleſs there be ſome body to prove it's compariſon with the Original.

Where the *Effect* or *Contents* (g) of a Deed are proved, and the Deed is afterwards given in Evidence, and they diſagree, there the Deed itſelf ſhall control the other Evidence. So it is where the Jury on the ſpecial Verdict do collect the Contents, and yet afterwards do find the Deed, *in hæc Verba:* the Court there, is not

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(g) *In* Civil *Caſes, the Court will force parties to produce Evidence which may prove againſt themſelves; or leave the Refuſal to do it (after proper Notice) as a ſtrong Preſumption to the Jury. The Court will do it, in many Caſes, under particular circumſtances by Rule before the Trial; eſpecially, if the Party from whom the Production is wanted, applies for a Favour. But in a* criminal *or* penal *Cauſe, the Defendant is never forced to produce any Evidence; though he ſhould hold it in his hands, in Court.* Note of the form. Ed. enlar. Burr. Mansf. M. 10 Geo. III. 2489.

to regard the Collection they have made of the Substance of the Deed, but the Deed itself; for that Collection derives it's Authority from the Deed, and therefore must of itself fail and come to nothing, when it is opposite to the Deed of which it is a Collection.

3. *Copy of Antient Deed where Original lost.*

Where the Possession hath gone along with the Deed many Years, there a very old Copy of the Deed may be given in Evidence; with Proof also that the Original is lost: and that is according to the Rule of the *Civil* Law, "if they be corroborated by Length of Time "and judiciary Cognizance," *si vetustate Temporis et judiciariâ Cognitione sint roboratæ:* for Possession could not be supposed to have gone along in the same manner, unless there had been originally such a Deed, and so executed as the Copy mentions: and the Copy can not be supposed to be only offered in Evidence to avoid sight of the Original; since it is so antient, that the Antiquity alone prevents all suspicion of it's being counterfeit; and the Antiquity is known from the Antientness of the Possession.

Former Ed.

"And of very antient Deeds, the Original may be "taken to be lost on small Evidence beyond the natural "Probability of the Thing:—otherwise of a modern "Deed."

4. *In-*

4. *Inſpeximus.*

4. The Inſpection of a Deed enrolled ſhall be given in Evidence: "for," where the Deed needs Enrollment, there the Enrollment is the ſign of the lawful Execution of ſuch Deed: and the Officer appointed to authenticate ſuch Deeds by Enrollment, is alſo empowered to take care of the fairneſs "or legibility" of ſuch Deeds: and therefore, a Copy of ſuch Enrollment muſt be ſufficient: for when the Law hath appointed them to be made Public Acts, the Copy of them, "as of" all other Public Acts, ſhall be a ſufficient Atteſtation.

5 Co. 54. Sty. 445. Keb. 117. Salk. 280.

Former Ed. *legality.*

The *Recital* of one Deed in another, is no Evidence of the Deed *recited*; though the Deed containing the Recital be well proved: becauſe there ſtill wants an Atteſtation of the firſt Deed: but if the perſon, objecting to the Evidence of the recited Deed, claims under the perſon who executed the Deed, "containing the recital," this is Evidence againſt him of the Reality of the recited Deed: becauſe, he that claims under me, ſtands in my place; and therefore, what is Evidence againſt me muſt be Evidence againſt him.

Thus, in the Caſe of *Fitzgerald* and *Euſtace*: *Euſtace* the Plaintiff, claimed in Equity a Debt on the Defendant's Eſtate, by virtue of a power, reſerved in the Grandfather's Settlement, on the Defendant's Father to charge

the Eſtate for payment of Debts and Younger Children's portions. There, Defendant objected that there were not proper parties; becauſe the Grandfather had made a Mortgage purſuant to that power to one *Cox* who was not party to the Bill, and did not produce the Original Mortgage, but only an Aſſignment thereof to *Wybrants*, to which the Grandfather was party: yet the Court allowed it to be Evidence of the original Mortgage; becauſe the party claimed under the Grandfather, who was party to the Aſſignment.

But where a Deed needs no Enrollment, there, though it be enrolled, the *Inſpeximus* of ſuch Enrollment is no Evidence: becauſe, ſince the Officer hath no Authority to enroll them, ſuch Enrollment cannot make them Public Acts; and conſequently, can not entitle the Copy of them to be given in Evidence: "for" ſuch practices "might" be improved to very ill purpoſes, "ſince" then, if the Deed were doubtful, it were but to enroll it, and bring the Copy or Inſpection of it in Evidence, and thereby avoid giving in Evidence a Deed that was in any way ſuſpicious.

Inſpeximus of antient Deed.

But the *Inſpeximus* on an antient Deed, may be given in Evidence, though the Deeds need no Enrollment: for an antient Deed may be eaſily ſuppoſed to be worn out, or loſt, and the offering "of" the *inſpeximus* in Evidence, induces no ſuſpicion that the Deed is doubtful: for it hath a Sanction from Antiquity, and if it had been ill executed, it muſt be ſuppoſed to be detected when it was newly made.

As

TIT. VII.

As to the *ſecond* part of the Rule, *the Deed muſt be proved to the Jury by one Witneſs at leaſt:* for though the Deed be produced under Hand and Seal, and the hand of the party that executes the Deed be proved, yet this is no full proof of the Deed: for the *Delivery* is neceſſary to the Eſſence of the Deed, and the Deed takes effect from the Delivery, ſo that unleſs the Delivery be proved, there is no perfect Proof of the Deed; and there is no proof of the Delivery but by a Witneſs who ſaw the Delivery.

Exceptions.

But to this Rule there are ſeveral Exceptions.

Deed a certain Number of Years old.

FIRST, if a Deed be *forty* Years old, that Deed may be given in Evidence without any Proof of the Execution of it: for the Witneſſes cannot be ſuppoſed to live above forty Years: and forty years is proof ſufficient of a Preſcription: for the Age of Man is no more than Sixty Years; and a Man is ſuppoſed to be (*b*) *twenty* Years before he is of Age ſufficient to underſtand the General Forms of contracting: ſo that after forty years, the Witneſs muſt be ſuppoſed to be dead: and therefore, ſince no perſon living can be ſuppoſed to be co-eval with ſuch Deeds, they may be offered in Evidence without Proof.

But

(*b*) Thirty *is the Rule now eſtabliſhed: and more agreeable to the expectation of the continuance of living teſtimony.*

At twelve, *a perſon ſhall be ſworn in the County Court: at* fourteen, *a male, and at* twelve, *a female is held capable of contracting Marriage: and at the ſame Age either may appoint Executors: at* eighteen, *a man ſhall be liable to ſerve in the Militia: at* twenty-one, *perſons ſhall have the diſpoſal of their real property: at the ſame age, by Statute, they ſhall be permitted to marry without conſent of Parents, Guardians, &c.: at the ſame Age a man may* Comm. I. c. 15. II. c. 32. p. 497.

Failure of Poſſeſſion.

Aſſ. 1702. per Haſſel.

But although the Deed be "of the Age mentioned," yet if Poſſeſſion hath not gone along with the Deed, they ought to give ſome account of the Deed: becauſe the Preſumption fails where there is no Poſſeſſion; for it is no more than old Parchment, if they give no Account of it's Execution.

2. *Raſure, or Interlineation.*

"And" if there be any blemiſh in the Deed by Raſure or Interlineation, then it ought to be proved, though it be "of the Age which otherwiſe would "prove itſelf:" if the Witneſſes be living, then they ought to prove it by the Witneſſes; if dead, they ought to prove the hands of the Witneſſes "and of "the party:" for "though" there muſt be (as is ſaid) a Preſumption in favour of the Deed when "it is beyond "the Period of probable Duration of living Teſtimony," yet that is encountered by another Preſumption from the Blemiſhes of the Deed itſelf; and therefore, the Credit of the Deed ought to be reſtored by Proof of the Execution of it.

3. *Fraud apparent.*

Chattel and Pound, Hil. Aſſ. 1701. in Kent.

So if the Deed imports Fraud; as where a Man conveys a Reverſion to one, and after conveys it to another, and the ſecond Purchaſer proves his Title; there the firſt Deed muſt be proved, "though of the "Age

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12 G. III. c. 11. 1772.

ſit in Parliament: but by a very brief Act of the Legiſlature, none of the Deſcendants of George the Second, *except the Iſſue of Princeſſes married into foreign Families, ſhall be permitted to contract Marriage, without conſent of the King, declared in Council, entered in the Council Books, and ſignified under the Great Seal: with an Exception (of a very ſingular Fabric) reſpecting ſuch Deſcendants above the Age of* twenty-five. *And for the ſolemnizing, or aſſiſting at, ſuch Marriage or matrimonial Contract, the Pains and Penalties of a Premunire are provided: and ſuch Marriage is pronounced* null and void to all intents and purpoſes: *ſo that inſtead of the* Cæſaribus virtus advenit ante diem; *the Deſcendants of this Friend to Liberty and to ſocial Happineſs, are to be four years later*

"Age of preſumed authenticity:" for the Preſumption of the Antiquity of the Deed is deſtroyed by an oppoſite Preſumption: for no man ſhall be ſuppoſed to be guilty of ſo manifeſt a Fraud: and therefore here alſo the Credit of the firſt Deed muſt be reſtored by proving Execution of it.

TIT. VIII.

Where LIVERY *to be proved.*

If a Deed of Feoffment be proved, and Poſſeſſion has gone along with the Deed, there Livery ſhall be preſumed, though it be not proved: for when there has been Poſſeſſion in the manner that the Deed ſets forth, it founds a very ſtrong Preſumption that Poſſeſſion was "ſo delivered;" for that there ſhould be a Contract to transfer Poſſeſſion, and that Poſſeſſion ſhould go according to that Contract, are ſuch concurring circumſtances as cannot be accounted for, unleſs the Poſſeſſion was transferred according to the Contract: and conſequently, the Livery and ſeiſin muſt be ſuppoſed by the Jury. Roll. Rep. 192, 227. Cro. Ja.

But if Poſſeſſion hath not gone along with the Deed, then the Livery upon the Feoffment muſt be proved: for ſince the Livery is to give Poſſeſſion on the Deed, where Pl. Comm. 6, 7.

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later than all the other inhabitants of the Iſland before they are in parliamentary Judgement *capable of forming this firſt and moſt important of natural Contracts, by their own uninterdicted Choice: and even then, this poſſibility is ſo checked and counterchecked, and finally liable to be negatived by an Addreſs of the two Houſes, as to be hardly a difference in their favour:* perpetual Celibacy, *in obedience to a ſingle Mandate, would have been more conſiſtently enjoined in Terms than a nominal indulgence given of ſo extraordinary a kind, on conditions the moſt repugnant to manly Dignity, to feminine Delicacy, and to the Voice of Nature. I know this Note is of a different kind from ſuch as uſually have place in works of this ſort: but if it be poſſible that an Attempt ſhould be made to put this Act in Execution (and its objects,* ſhould they be only the male *Deſcendants,* might *amount, within a Century, to* hundreds *or even* thouſands) *a new ſpecies of* Evidence *reſpecting*

where no Poſſeſſion is, the Preſumption is that there was no Livery: and conſequently the Livery muſt be proved to encounter that Preſumption.

Roll. Rep. 132. But if the Jury find the Deed of Feoffment, and that Poſſeſſion hath gone along with the Deed, yet the Judges, upon ſuch Finding, cannot adjudge it a good conveyance: for the Jury are Judges of the Fact, and what is probable, and what improbable; the Court is only Judge of what is Law, and have nothing to do with any Probabilities of Fact: therefore it is the Jury only that are to make the Concluſions and Deductions as to the Truth of the Fact; the Court cannot, if they are not drawn by neceſſary conſequence out of the Words of the Verdict: for to the Court the Rule is, *De non apparentibus et non exiſtentibus eadem eſt Ratio:* therefore they cannot conclude that there was a lawful conveyance, unleſs the Jury find the Delivery of the Deed.

A Deed of Feoffment may be given in Evidence as a Releaſe: for where the party is in poſſeſſion already, the Deed only will be a ſufficient Contract to transfer a Right.

Secondly, a Deed may be given in Evidence, on a Rule of Court, without proving ſuch Deed.

A Deed

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ing the Validity of Marriage, would emerge; eaſy perhaps in its conſtruction, but far otherwiſe in its Reſult: and in conteſting the Validity of the Contract a difficulty might ariſe to which it can never be expedient that a legiſlative Aſſembly ſhould give cauſe. That LAW* *is a* JUST SANCTION, *preſcribing* RIGHT *and forbidding* WRONG, *conveys to the Mind of the* COMMUNITY *an auguſt Idea: but if any ordinance be paſſed to which a contrary Deſcription ſhall apply, the ſolemnity of Forms may be found inadequate to its ſupport.*

If the Age of Man be computed by the number of years in which a Moiety remains of perſons born within a given Period, it might probably be eſtimated at between thirty-one *and* thirty-two, *according to a Table deduced by Dr.* PRICE *from Obſervations on the Bills of Mortality in* NORTHAMPTON; *by which it appears that* leſs *than half of a large given number ſurvive at* thirty-two: *but at any Age between*

* Lex eſt ſanctio juſta, jubens honeſta et prohibens contraria.

A Deed may be given in Evidence, "or taken as if "given in Evidence," on a Rule of Court, without proving ſuch Deed: "as where the Rule is in Eject-"ment to confeſs Leaſe, Entry, and Ouſter:" for the Conſent of Parties concerned muſt be ſufficient and concluding Evidence of the Truth of ſuch Fact. 2 Sid. 269.

TIT. IX.

Of the Effect of Raſure, Interlineation, Breaking of Seals, &c.

We come now to give an Account where the Raſure and Interlineation, and where the breaking of the ſeal avoids the Deed.

As to Raſure, Interlineation, and Addition—

Formerly, if there were any Raſure or Interlineation the Judges determined, upon the *Profert* of the Deed and View of it, whether the Deed was good or not: for the very Contrivance of ſolemn Contracts, ſuch as Deeds are, was founded on this, that the intent of the Parties is there manifeſtly ſettled in expreſs words, and notoriouſly authenticated: and there ſuch Contracts are totally referred to the Court, if the Truth of the ſolemnities, *viz.* of the Seal and of the Delivery, be admitted; and therefore muſt be diſſolved by 10 Co. 92.

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tween twenty-ſix *and* forty, *though the probability of any one Witneſs being alive at the end of* thirty *years from the Atteſtation be againſt the event, the probability of one out of two living is for it.* MONTAIGNE *ſays, with his uſual ſtrength and vivacity:* C'eſt un vice des loix meſmes, d'avoir cette fauce imagination: elles ne veulent pas qu'un homme ſoit capable du maniement de ſes biens qu'il n'ait *vingt & cinque* ans, & à peine conſervera il juſque lors le maniement de ſa vie. Eſſai I. Ch. 57.

a Con-

a Contract of equal ſolemnity: becauſe how they are to be deſtroyed and avoided muſt appear to the ſame Judges who are by law to determine of them. "And "thus" it came to paſs that if a Deed was raſed or interlined, they adjudged it a void Deed, becauſe it did not certainly appear to the Court that were the Judges of theſe ſolemn contracts, whether the mind of the party was contained in ſuch a mangled Contract or not.

Ibid. But as the Manner of conveyancing ſwelled from ſhort little Deeds to large and voluminous ones, ſo vaſt room was left to the Miſpriſions of the Clerks, that muſt be altered and amended, or with greater Labour and Expence of Time written over again: from thence the Court thought it neceſſary not to diſcharge the Deeds raſed or interlined, as void, upon the (*i*) Demurrer; but they referred to the Jury, upon the Iſſue of *Non eſt Factum*, whether the Deed, thus raſed and interlined, was the original Contract delivered by the Parties.

11 Co. 27. 2 Str. 1160. If a Deed ("as Bond, for inſtance,") be altered by a ſtranger without the Conſent of the Obligee, in a point not material, this does not avoid the Deed; otherwiſe it is, if it be altered by a ſtranger in a point material; for the Witneſſes cannot prove it to be the

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V. Comm. II. c. 21. (*i*) *To demur is to join iſſue in Law, by admitting the Facts as pleaded, and inſiſting that the charge is inſufficient, or the juſtification invalid, and thereon praying the Judgement of the Court.* There may *too in civil caſes, though it very rarely happens, be, after Iſſue of Fact joined and Evidence given, a* Demurrer to the Evidence; *and the party who hazards this, admits the whole Evidence of Fact againſt him as offered to the Jury, but denies the legal conſequences: if this happen, it withdraws the Matter from the cognizance of the Jury, and refers it to the Court, whence the Record iſſued, upon which the Cauſe went down to Trial.*

Comm. III. c. 23. p. 372.

Act of the Party that ſealed and delivered it, when there is any material difference from the ſenſe of the Contract: but if the Contract doth contain the ſenſe of the Parties, the Witneſſes may well ſwear it to be their Act, for an immaterial Alteration doth not change the Deed, and conſequently the Witneſſes may atteſt that very Deed, without danger of Perjury.

But if the Deed be altered by the Party himſelf, 11 Co. 27.
though in a point not material, yet it will avoid the Deed: for when the Party himſelf makes any Alteration in his own Deed, it diſchargeth the Contract: (*k*) for the Contract hath its whole Form from the Words of the Obligor; now when the Obligor undertakes to ſupply it with new words, and to alter thoſe the Party hath fixed upon, this is, according to the Rules of Law, which takes every man's Act moſt ſtrongly againſt himſelf, a new Making and a new Framing of the Contract "by one Party without concurrence of "the other:" and for a Man to contract with himſelf is utterly void and ineffectual.

Another Reaſon of this Interpretation of Law might be, "or at leaſt a beneficial effect naturally reſulting "from it," to add a ſanction to Deeds: that Perſons

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(*k*) So where *Aumerle* had hid in his Boſom the engagement of conſpiracy againſt *Henry*, our Poet, who ranged civil Life for topics and characters, as well as viſible Nature and the World of Paſſions for Deſcription and Intereſt, replies to a ſuggeſtion of the Mother of the Youth, that it might be a Bond for ſupplying his expences againſt the approaching Pageant:

——*bound to himſelf?*
What doth he with a Bond that he is bound to?

Capell's Shakeſpeare, 5. R. II. A. v. S. 1.

who

who had them in their Cuſtody might not alter them, for fear of deſtroying their ſecurities.

11 Co. 286. If there be ſeveral Covenants in the Deed, and one of them be altered, this deſtroys the whole Deed: for the Deed is but a Complication of all the Covenants; ſo that the Deed, which is the whole, cannot be the ſame, unleſs every Covenant of which it conſiſts be the ſame alſo.

2 R. Abr. 29. All Intereſts that paſs without Deed would paſs though the Deed were afterwards interlined or altered: (*l*) "for" the Intereſt once veſted did not thereby return back again, ſince the Deed is not abſolutely neceſſary to the paſſing of the Intereſt, but is only *Evidence* that it was paſſed: but by the Statute it is in many of thoſe Caſes neceſſary to ſhew a Writing under the hand of the Parties. "And where a Demiſe under ſuch Wri-"ting is neceſſary to ſupport the Claim, there the "party claiming by the Deed muſt make good his "Claim by the very unaltered and perfect Deed on "which the Contract was founded; otherwiſe where "ſuch Writing is uſed, not as a formal Inſtrument "under which Title is made, but as mere general "proof of an Agreement."

Roll's Rep. 39, 40. 2 R. Abr. 29. If there be Blanks left in an Obligation in places material, and filled up afterward by the Aſſent of the

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(*l*) *As to the Queſtion of Alteration, many which were Miſdemeanours at Common Law are now capital* FELONIES *under the Statute Law reſpecting Forgery, of which this intimation may ſuffice at preſent.*

Parties,

Parties, yet the Obligation is void: but if there is a Blank left in the Obligation, and filled up afterward with ſomething immaterial, this doth not avoid the Contract: for where there is a material part of the Contract added after the ſealing and Delivery, it is not the ſame Contract that was ſealed and delivered; as if a Bond was made to *C.* with a Blank left for Chriſtian Names and Additions, which is afterward filled up by Aſſent of the Parties, yet this is a void Bond; but if any immaterial part of the Contract be added after ſealing and Delivery, as if *A.* with a Blank left after his Name, be bound to *B.* and after *C.* is added as a joint Obligor, this does not avoid the Bond, becauſe this does not alter the Contract of *A.* for he was bound to pay the whole Money without ſuch Addition.

Ventr. 185.

2 Lev. 35. 2 Keb. 872, 881. Moor, 547, 619, Cro. Eliz. 627.

SEAL *broken off, &c.*

Where a Thing lies in *Livery*, a Deed formerly ſealed may be given in Evidence, though the *Seal* be afterward torn off: for the Intereſt paſſed by the Act of the Livery that inveſts the Party with the Poſſeſſion, and the Deed is only an Evidence of transferring Poſſeſſion: for by the Act of Livery the Poſſeſſion paſſes; and the Deed without the ſeal, the Livery being indorſed,

Palm. 403. Mod. 11. Ventr. 14. 2 Keb. 556. 2 Lev. 220. 2 Show. 28.

dorſed, is an Evidence of ſuch Poſſeſſion: ſo if the Conveyance was made by Leaſe and Releaſe, the *Uſes* were once executed by the ſtatute, and they do not return back again by cancelling the Deed.

3 Bulſ. 79. R. R. 188.

But if a Man ſhews a Title to a Thing lying in *Grant*, there he fails, if the Seal be torn off from his Deed: for a Man cannot ſhew a Title to a Thing lying in ſolemn Agreement but by ſolemn Agreement; and there can be no ſolemn Agreement "of this kind" without a ſeal: ſo that "here" Poſſeſſion alone is no good Title; ſince the Thing itſelf doth not lie in Poſſeſſion but in Agreement: therefore a Man cannot claim a Title to a Water-courſe but by Deed and under Seal.

2 Bulſtr. 246. 2 R. Abr. 28—30.

"For generally," where a Contract creates an Obligation, it cannot be pleaded if the Seal be taken off: for the ſeal is "an" eſſential part of the Deed: and without a ſeal it is no longer a Deed, nor to be pleaded and given in Evidence as a Deed; unleſs in the Caſe above mentioned, where the Intereſt veſts though the Deed

Deed hath no Continuance: but where the Deed is neceſſary to be ſhewn, in order to acquire the Intereſt, there it muſt have the Eſſentials of a Deed.

If an Obligation were ſealed when pleaded, and after Iſſue joined, the ſeal was torn off, yet ſhall the Plaintiff recover: becauſe the Deed proferred to the Court was in the Cuſtody of the Law; and therefore the Law ought to defend it: beſides, the Truth of the Plea which is to be proved muſt have relation to the time when Iſſue was taken; and at the time of the Iſſue it had the Eſſentials of a good Deed: and therefore that is ſufficient to maintain the Iſſue.

Ow. 8.
Cro. Eliz. 120.
5 Co. 119, b.
2 Bulſ. 247.
Dy. 59, pl. 12, 3.
Co. Litt. 283. a.
Doct. Pl. 262.
R. R. 29, 40.
2 R. Abr. 29.

Alſo if the ſeal of a Deed be broken off in Court, it ſhall be there enrolled for the benefit of the Parties: becauſe where any thing is impaired under the Cuſtody of the Law, * it ſhall be reſtored by the Benignity of the Law, as far as poſſible.

2 Inſt. 676.

If there be a joint Contract or Obligation, and one of the Obligor's ſeals be broken off, it deſtroys the Obligation: becauſe they are both bound as one perſon; and if one be diſcharged, the other cannot ſtand obliged, becauſe they both make up but one Obligor.

Noy 112.
2 R. R. 30, 40.
5 Co. 23 a.
Cro. Eliz. 546, 576.
11 Co. 28. b.

But if two Perſons be bound ſeverally, there, if the ſeal of one of the Obligors be broken off, yet the Obligation continues in the other: becauſe there are

5 Co. 23 a.
Cro. Eliz. 546.
R. Rep. 40, 129.
Cro. Eliz. 408, 546, 576.

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* *Lex vult ut neminem ſibi crediti pœniteat.*

11 Co. 28. b. Doct. plac. 260, 262. 3.

ſeveral Contractors and ſeveral Contracts; and therefore by deſtroying the Obligation of one of them, the Obligation of the other is not taken away.

Mar. 125. 2 Show. 29.

But if two Men are bound jointly and ſeverally, and the ſeal of one of them is torn off by the Obligee, this is a diſcharge of the other: for the manner of the Obligation is diſcharged by the Act of the Obligee: and therefore that is (according to the Rule of the Law, that conſtrues every man's own Act moſt ſtrongly againſt himſelf) a Diſcharge of the Obligation itſelf: beſides, ſince both are jointly bound as one perſon, diſcharging one of them is a diſcharge of the whole, and a ſatisfaction is ſuppoſed to be given for the whole Debt: and when one man is diſcharged, that concurs to make an Obligor, and the whole Debt is ſatisfied, no Obligation can reſt upon the other.

Of WILLS.

SECTION III.

"The *laſt* Conveyance to which the Law annexes "particular ſolemnities is now to be inveſtigated, with "reſpect to the Evidence that applies to it, and this "is a WILL: which is firſt to be conſidered in itſelf; "and after in its incidents of REVOCATION and of "REPUBLICATION.

TIT. II.

WILL *defined.*

" A WILL *is the laſt legal Declaration of that which* " *a Man willeth to be done reſpecting his Property after* " *his Deceaſe.* (*m*)

" WILLS were by Common Law before the Con- " queſt: afterwards they were reſtricted to particular " places; and about the time of the Reformation again " revived by Statute.

Wright's Tenures, 172, 3. Wyndham & Chetwynd. 4 Burr. 429, 20. 32 H. VIII. c. 1. 34 H. VIII. c. 5.

" A Will may be either *real*, ſimply of Lands " alone; or *perſonal*, of ſuch property alone as is in- " cluded in the Perſonalty; or *mixed*, which conveys " both ſpecies of Intereſt: and, according to the De- " nomination of the higher Genus of Eſtate, is liable to " the Rules of a Will ſimply *real*. A *perſonal* is " either,

1. *Formal*,
2. *Nuncupative*.

" Firſt, and chiefly, we are to treat of a *Will of* " *Lands*.

TIT. III.

Of a WILL *of* LANDS.

" In a Will are to be regarded,

1. *The Act and Perſon of the Teſtator*,
2. *The Number and Competency of the Witneſſes*,
3. *The Intereſt to be conveyed*.

1. *The* ACT *and* PERSON *of the* TESTATOR.

" All perſons may make a Will of Lands who are " not incapacitated by ſuch impediments as apply alſo " to conveyances *inter vivos*: 1. Want of diſpoſing " *Mind*, as Infants, Ideots, inſane perſons; 2. Want " of diſpoſing *Power*:

1. *By Crime*; *as Outlaws, attaint perſons, &c.*
2. *By Birth*; *as Aliens.*
3. *By Condition*; *as Femme Couverte.*

1. ACT

(*m*) Teſtamentum eſt Voluntatis noſtræ juſta Sententia: de eo quod quis poſt mortem ſuam fieri vult.

The celebrated Statute of Weſtminſter, 3. Quia Emptores Terrarum, *ſoon enabled the Clergy to ſuggeſt the expedient of deviſing an* Use;

D. 28.

18 Ed. I. 1290. Swinb. I. p. 48.

Par. 2.

1. ACT *of the* TESTATOR.

"The ACT of the TESTATOR is now to be obſerved:

"1. And firſt, it is neceſſary that there be a SIGN-"ING; but if the Will be in the *Hand-writing* of "the Teſtator, with his Name at the beginning of it, "this is Evidence of a ſufficient ſigning. And far-"ther, on account of corporal infirmity, the ſigning 29 Car. II. c. 3. § 5. "may be by the hand of another, in the preſence of the "Teſtator, and by his expreſs Directions:

"2. Next, either the *ſigning* muſt be in the *Preſence* "of the *Witneſſes*, or the Teſtator muſt *acknowledge* "the Inſtrument in their preſence.

Par. 3.

2. *Of the* WITNESSES.

"The next Point of Evidence is the WITNESSES.

1. *Number.*

Lea v. Libb. Carth. 35. "The NUMBER of the Witneſſes, ſince the Statute, "neceſſary to a Will, is THREE.

2. *Preſence.*

"They muſt abſolutely ſubſcribe the Will in the pre-"ſence of the Teſtator: and this preſence hath never 3 Mod. 259. "been carried farther in Conſtruction than the Inter-"poſition of a *Window*, through which the Witneſs "and the Teſtator might be intended to ſee each other.

"But it is not neceſſary, though prudent, that the 3 Burr. Manſf. 1775. "Witneſſes ſhould all ſubſcribe in the preſence of *each* "*other:* nor that they know the Contents:

"Nor that they atteſt every Page, Folio, or Sheet: Comm. II. c. 18. Ma. Charta, c. 36. 9 H. III. 1225. 7 E. I. 13 E. I. before the Statute *Quia Emptores*, went againſt *purchaſe leaſe* and recovery. 15 R. II. againſt Uſes a full Century after the ſtat. 23 H. VIII. againſt Grants to lay hands and charges or heirs to ſu- "but it ſeems to be neceſſary that the whole Will, "if conſiſting of ſeveral ſheets, ſhould be in the room "at the time of Atteſtation.

3. *Of*

USE: *under a precedent Feoffment. Succeſſive Statutes were applied to obviate theſe Uſes ſo far as they effected Alterations in Mortmain, of Land, or Profits, to the benefit of the Church. But the Invention enabled individuals in ſome degree to extend their poſthumous favour to their relations or friends. The Uſe was a matter of conſcience, of which the Eccleſiaſtics preſiding in Chancery enforced the performance. But when the great Statute for transferring the poſſeſſion executed the Uſe to the Land, it became, in contemplation of Law,* the Land itſelf; *and conſequently, about five years after, it was found neceſſary to enable Deviſes of Land by Will.*

In

Par. 4.

3. *Of the Credibility of Witneſſes.*

" There is nothing more diſtinguiſhed in Law and " Reaſon than the abſtract *Competency* of Witneſſes, " which entitles them to be heard, and their *Credit*, " on which the ſatisfactory fullneſs of the Proof de- " pends. This Diſtinction will be hereafter noticed " more at large: however a negligence of expreſſion " in the Statute ſeems to have introduced, till within " theſe few years it was diſpelled, ſome degree of ob- " ſcurity, not to ſay of confuſion, reſpecting this very " plain and natural diſtinction.

Bond v. Sewell. 3 Burr. Manſf. 1773. Mic. 1765.

The Statute directs " that all Deviſes of Lands ſhall " be atteſted and ſubſcribed, in the preſence of the " Deviſor, by three or four credible Witneſſes: or " elſe they ſhall be utterly void and of none effect."

§ 5.

" And this requiſite of three Witneſſes to the Will " is indiſpenſible, nor will three to the Codicil ſatisfy " it: nor three partitively.

Attorney Gen. & Barnes. 2 Vern. 597. Lea & Libb. 3 Mod. 262.

" As to Credibility, it may neither be unintereſting " nor uſeleſs to conſider, in the order of time, ſome of " the moſt remarkable Caſes which have ariſen upon " the Conſtruction of this Clauſe.

" The firſt Caſe I ſhall mention occurred in little " more than twenty years after the Statute. Lands " were deviſed to one of the Witneſſes of the Will: " and there the Court could have no difficulty in de- " ciding as they did, that *quoad* ‖ *this Deviſe the Will* " *was a void Will*; being atteſted but by two Wit- " neſſes, ſince the Plaintiff, the Legatee, could not be " Witneſs to eſtabliſh an Eſtate deviſed to himſelf.

Carth. 514. Hillyard v. Jennings. Hil. 11 W. III. B. R.

‖ That it might be good, in like circumſtances, As to other Deviſes, ſee Baugh and Holloway, in Canc. 1 P. W. 557.

The

In proving a Will according to the Statute of Frauds and Perjuries, if one Witneſs prove his own Atteſtation, and that the other Witneſſes were there preſent, and did atteſt it, *this is proof ſufficient of ſuch Will, without having all the Witneſſes there to prove it: for then it is proved by a Witneſs that the Will was executed according to the Method required by the Statute, unleſs they ſhew ſuch characters of Fraud as would make it neceſſary to pro-*

perſtitious Uſes. And 9 Geo. II. limits the time and circumſtances of Gifts to *charitable* Uſes. *Anno* 1736.

Str. 1253. E. 19 G. II. Bl. 8.—17. Hil. 20 G. II.

"The Caſe of *Anſley* and *Dowſing* aroſe ſeventy "years after the Statute: in that Caſe the Teſtator "deviſed an Eſtate in Tail to the Defendant, and "charged his real and perſonal Eſtate with the pay- "ment of annuities and legacies: of theſe was an an- "nuity of 20 *l.* for Life to *Elizabeth*, the Wife of "*John Hailes*, to her ſeparate uſe, and 10 *l.* each to "the ſaid *John* and his Wife, for Mourning. *John* "*Hailes*, the before-mentioned Legatee, was one of "the three ſubſcribing Witneſſes to the Will; and on "an Ejectment brought by the Heir at Law to re- "cover the deviſed premiſes, LEE, *Chief Juſtice*, and "the whole Court were of opinion that this was not a "good Atteſtation under the Statute, by reaſon of the "intereſt in the ſaid Witneſs *John Hailes:* and that "conſequently the Title of the Defendant under the "Will could not be maintained.

"As to the Hiſtory of this Cauſe, there is a rather "unuſual difference in the Account of the Reporters. "Sir *John Strange*, who was of Counſel afterwards for "the Defendant in Error, (the Plaintiff of Courſe in "the original Cauſe) has given the Judgement of *B. R.* "pretty much at large; but no Account of the Argu- "ments at the Bar. Sir *William Blackſtone* is copious "in relating the Arguments in Error in the *Exchequer* "*Chamber*; but gives no Account of the Judgement; "nor could give any, for the Parties came to a Com- "promiſe.

"In

Such is the progreſs of legiſlative precaution in a courſe of more than 500 years.

‖ D. 28. 1. l. 22. p. 1.

† C. l. 6. 23. 1.

duce the reſt.—GILB. It ſeems, however, that without ſuggeſting Fraud, the party by whom the Will is conteſted is entitled to demand that the three Witneſſes be ſeverally examined in Court upon the Trial; for each is the beſt Evidence as to the Fact of his own Atteſtation; and probably the remark reſpecting the proof of the ſubſcribing by the Evidence of one Witneſs only, which is inſerted where it breaks the continuity of the Work, is not from *Gilbert*.

‖ Conditionem teſtium tunc inſpicere debemus cum ſignarent; non mortis tempore: ſi igitur tunc cum ſignarent tales fuerint ut adhiberi poſſint, nihil nocet ſi quid poſtea eis contigerit.

† Teſtes, ſervi an liberi fuerint non in hac cauſa tractari oportet: cum eo tempore quo teſtamentum ſignabatur, omnium conſenſu liberorum loco habiti ſint, nec quiſquam eis uſque adhuc ſtatus controverſiam moverit.

The Statute 29 Car. II. was not meant to check the teſta-

mentary

" In this Caſe, LEE, *Chief Juſtice*, relied much on " the Rule of the *Roman* Law, which ſays, that" the Condition of Witneſſes is to be regarded, ſuch as it was at the time of ſealing; " and that of the Code, " concerning the reputed Condition of Witneſſes at " the time of" ſealing. " Of theſe, the firſt applies to " a very plain point in favour of teſtimony, that no " ſubſequent change in the condition of the Witneſſes " ſhall defeat their Atteſtation; and the other ſeems to " go ſo far as that the reputed freedom of the Wit- " neſſes, in general Eſtimation, at the time of their " atteſting, ſhall ſupply the defect of an abſolute legal " freedom; a poſition which it may be difficult to ſup- " port in principle; unleſs on the ground, that there " had been no direct Adjudication againſt their free- " dom; but it ſhews a kind of anxiety to ſupport the " competency of Witneſſes, ſo far as poſſible. An- " other reaſon diſtinguiſhes it from our Rule of Wit- " neſſes to a Will; and this is to be obſerved in at- " tending to the next Caſe; by which this whole Doc- " trine has been admirably cleared, illuſtrated, and " ſettled.

" For in *Wyndham* againſt *Chetwynd* the Caſe was " this. On an Iſſue out of Chancery, *deviſavit, vel* " *non*, on the Will of Mr. *Chetwynd*, the Jury found " a *ſpecial Verdict* that the Teſtator died 17th of *May*, " 1750, leaving the Will atteſted by three Witneſſes, " to all of whom he was indebted at the time of At- " teſtation; but who had been paid (except a ſmall " miſtake in caſting up as to two of them, who were " Attornies and Partners) before the Trial of the Iſſue: " that the real Eſtate was charged with payment of " Debts and Legacies; but that the perſonal was " much more than ſufficient for the diſcharge of all the " ſpecialty and ſimple Contract Debts. And whether " theſe were *credible* Witneſſes within the Statute was " the point ſubmitted to the Court.

Bl. 25—103. Mic. 31 G. II. S. C. Burr. Manſf. 414—30.

" Lord

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mentary power over property, but only to guard againſt Fraud. In Theory it ſeemed a ſtrong guard, in Practice it may be ſome guard. But I believe more fair Wills have been deſtroyed for want of obſerving its reſtrictions than fraudulent Wills obſtructed by its Caution. In all my experience at the Court of Delegates,

Wyndham and Chetwynd, Bl. 190.

" Lord MANSFIELD, *Chief Juſtice*, in delivering " the opinion of the Court, went fully into the Prin- " ciples and Caſes. He ſhewed that Experience had " not confirmed the expectation of preventing frauds " concerning Wills by the multiplying of Witneſſes " and other Forms: that the Competency to Atteſta- " tion was to be maintained as much as a juſt Theory " founded upon the Nature and Analogy of Evidence, " and conſiſtent with Adjudications, would allow, for " the ſake of giving effect to the laſt Diſpoſal of Pro- " perty. He remarked on the vague and general im- " port of the word *credible* in the Statute, and evinced " that ſuch Witneſſes as were competent at Common " Law remained competent: that by Common Law " Intereſt went againſt the Competency of a Witneſs " on the preſumed Bias, but that an Intereſt of ſuch a " Nature as to be probably unknown to the Witneſs " at the time of ſigning, an Intereſt ſatisfied or re- " nounced before the Trial, was not within the Pre- " ſumption.

" That with reſpect to Deciſions, a *Releaſe* was al- " lowed to take away the objection to Intereſt: that in " the Caſe of *Hillyard* and *Jennings*, the Plaintiff was " the ſubſtantial Deviſee, and came to eſtabliſh that " Intereſt to himſelf which he had atteſted. That in " the Caſe of *Anſtey* and *Dowſing*, the Wife's Annuity " could not be releaſed: and it was the Intereſt of the " Huſband to eſtabliſh it as a Proviſion for his Wife, " for whom he was legally compellable to provide, and " being to her ſeparate uſe, the Defendant, the Deviſee " held in Truſt for her; and her Annuity could only " be obtained by eſtabliſhing the Deviſe to him. That " in the general reaſoning on the Caſe, LEE, *Chief* " *Juſtice*, had indeed adverted to a Doctrine of the " *Roman* Law, as to the Period which was to fix the " Competency: but that the Witneſſes under that Law " had a" poſitive capacity " preſcribed; that they be" " free, Adults, " and poſſeſſed of other *Qualifications*: " that

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legates, I never knew a fraudulent Will, but what was legally atteſted; and I have heard the ſame from many learned Civilians. Courts of Juſtice ought therefore to lean rather againſt than in ſupport of any too rigid Formalities. Lord *Mansfield*, *I muſt*

" that *this* was the *Condition* of the Witnesses to which " the Law, in the *Digests* and the *Code*, referred: but " that there is no such positive Condition in that Law " or in the Law of *England*, excluding a Legatee or " Creditor from being a Witness: that such when in- " competent are so on the general Principles of Interest " in a Witness, and therefore, no farther than those " Principles extend.

" That had the resort of the Witnesses been to the " real Estate, it did not seem, in a Case like this, their " Competency even then should have been impeached: " however, that they had no occasion to resort to the " real Estate, and had been already paid. And that " therefore, the Court was unanimously of Opinion, " that the Will was duely attested by three Witnesses.

A COPYHOLD is not within the Statute: for it passes by the Surrender. 2 P. W. 258.

" By the Statute 25 *G.* II. *Ch.* 6. said to have been " occasioned by the Case of *Anstey* and *Dowsing*, entitled, " *An Act for putting an End to certain Doubts and* " *Questions, relating to the Attestation of Wills and* " *Codicils, concerning Real Estates in that part of* Great " Britain *called* England, *and in his Majesty's* Colonies " *and* Plantations *in* America," where Devisee or Le- " gatee attests, the Devise, &c. is void as to him; and " he shall be admitted a Witness to prove the Will.

" Creditor shall be admitted a Witness; notwith- " standing the Land is charged with Debts.

" And

I must here be permitted to notice a seeming inadvertence, Animi ad majora properantis, *where his Lordship reasons generally on the Admissibility of Witnesses under the* Roman Law, *even where directly interested, and adduces a Passage in the* Miloniana, *where* Cicero *and* Clodius *were the* hæredes facti, *under the Will of* Cyrus *the Architect, and the Argument infers they were also Witnesses to the Will;—from these words:* Uná fui: testamentum simul obsignavi cum Clodio; testamentum autem palam fecerat, et illum hæredem et me scripserat. *But* Obsignare *is not the Act of the Witnesses, as* [illegible] Signare; *it is the Act of the*

Lowe and Joliffe, Bl. 365. 2 G. III.

" And a Will may be eſtabliſhed by proof of Sanity, " by other Witneſſes, though the ſubſcribing Witneſſes " concur in endeavouring to impeach it; for they are " concluſive only to the mere exiſtence of the Inſtru- " ment.

" The Act of the Teſtator, and of the Witneſſes, " being made known, it remains to ſpeak of the Intereſt " conveyed by a Will of Lands.

Par. 4.

3. *Intereſt conveyed.*

" Now this Intereſt is moſt general, in as much as " by Will ſhall paſs all ſuch Eſtate as a Man" hath, " in poſſeſſion, remainder, or reverſion*, at the time of " making his Will: but after-purchaſed Lands require " a" Republication; " otherwiſe they will not paſs by " general Words of Deviſe; ſuch as" all my Lands or all my Eſtate: " for theſe general expreſſions will " be referred to the time of making the Will. For " Wills are conſidered as conveyances or diſpoſitions, " leſs fettered in point of Form, than Acts taking effect " *inter vivos* to paſs the real Eſtate, and where the " Terms are general, it would be a foreign intendment " to ſuppoſe any other Eſtate in contemplation of the " Teſtator to paſs, than ſuch as he then had, either in " poſſeſſion or in right: and hence it is, and not upon " the force of the word " having," that ſubſequent " purchaſes are not included: for the word " having," " is only a deſcription of a general Caſe; not a *Limita-* " *tion* of the *power* to deviſe; and it is of experience, " that

Comm. II. 23. p. 378. Brett. and Rigden, Pl. Coram. 343, 4. Bunter v. Coke, Mic. 6 Anne, B. R. Salk. 237. 4 Burr. 1496.

* By what general words a Reverſion may paſs, and *contra*, v. Bl. 200.—4.

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the Heir, or of the Teſtator, or of ſome Confidential Friend under his direction, ſealing up a cloſed Will to prevent it's being altered. And ſo Paulus, *of the* Subſtitutio pupillaris—in extrema pagina fieri debuit: ut pars illa quamdiu Pupillus annos pubertatis egrediatur obſignata maneat, et pars prior reſeretur.

V. N, *in* Sueton. 1691. p. 100. *the Will ſeems to have been ſealed, as the Book is repreſented in the* Apocalyptic Viſion, *where the opening of each Seal is conſidered as ſucceſſively revealing the Events, ſealed or latent in that Book of Fate; the* תעלומות, abſcondita *or* obſignata *of the prophetic Series. And this* obſignatio

" that if a man ſufficiently declare his purpoſe to paſs" after-purchaſed " Eſtates, ſuch Eſtates ſhall paſs.

Tit. IV.

How a Will *ſhall be revoked.*

29 Car. II. c. 3. § 6.

" No Revocation ſhall be good of a Will of Lands, nor " any Clauſe thereof ſhall be revocable, otherwiſe than by " ſome other *Will* or Codicil in Writing, or other Writ- " ing, declaring the ſame ſigned in the preſence of three " or four Witneſſes; or by Burning, Cancelling, Tear- " ing, or Obliterating by the Teſtator, or in his preſence, " and by his direction and conſent.

" But this does not extend to Revocations by *Act of* " *Law*, as by Sale of the Lands deviſed, or *Forfeiture*; " or by Marriage of a *Femme*, who was ſole when ſhe " made the Will: for this is revoked by the Act of " marrying, which deprives her of the Diſpoſal of her " property: and ſuch Will does not revive, in Caſe ſhe " outlive her Huſband; but remains revoked, unleſs " renewed by republication.

Brown and Thompſon, 1701. v. 1 P. W. 304. 2 Eq. Abr. 413. 4 Bur. Manſ. 2171.

" And by intendment of Law, a Marriage with Iſſue " hath been held a complete conſtructive Revocation " of a Will made before.

" But no deſtruction by another ſhall defeat the Will " and fruſtrate the meaning of the Teſtator, if the Con- " tents can be proved. ‖

‖ Haines v. Haines, 2 Vern. 441. Anno 1702.

" And *no Acts* of the *Party* ſhall revoke a Will, if " ſuch Act be *deficient* in any of the requiſites of the " Statute.

" Neither ſhall any formal Act amount to a *Revoca-* " *tion*, if the *intent* to revoke the Inſtrument (the *Animus* " *revocandi*) accompany it not.

" And

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natio *was entirely different, as I apprehend, from the atteſting Signature of the Teſtament, both in the Mode and intent; and perhaps generally in the perſons by whom it was performed, the one being of* Atteſtation *ſimply, the other of* Cuſtody. *And, though, by the old Law, the Real Heir or Deviſee general, might be a Witneſs, yet he was exhorted not to abuſe this privilege: of which, indeed, the Uſe could hardly ever have been conſidered as very decorous.* Cicero, *we may juſtly preſume, would not have uſed it: and from an Anecdote, reſpecting* Hortenſius *and* Craſſus *preſerved in the* Offices, *we have reaſon to ſuppoſe, that perſons largely benefited, and particularly general Deviſees, were not uſually called to witneſs a Will. The Anecdote gives one pain, particularly for* Hortenſius, *ſo diſtinguiſhed by his*

I. Li. II. to. § 10.

" And, leaſt of all, ſhall a *Change of Eſtate* operate as " a Revocation, where the diſpoſing Power over the " Property remains, and the formal Change appears to " have been made only to effectuate the ſubſtantial " intent.—We will examine,

1. *Formal erroneous Acts.*
2. *Incomplete diſpoſals to different purpoſes.*
3. *Change of Eſtate.*

" Firſt, therefore, to conſider an erroneous deſtruc- " tion of a Will; or a ſubſequent contrary Will that " can not take effect:

Par. 2.

1. *Erroneous cancelling, &c.*

1. P. W. 345. and Burtenſhaw and Gilbert, E. 14 G. III. B. R. Goodright on Dem. of Glazier v. Glazier, Hil. 10 G. III. 4 Burr. 2512. 15.

" A Will remains good, though formally cancelled " if it be in Evidence, that it was not the intent of the " Teſtator to cancel that Will. As, if a Man, ſick and " infirm, having two Wills near him, ſhould order a " perſon to cancel his firſt Will, who, by miſtake, can- " cels his laſt. Now here the laſt Will is in force, and " the firſt can not revive: though if the ſecond had " been intentionally cancelled by the Teſtator, this, " *ipſo facto*, would have revived the firſt, as a repealed " Act of Parliament revives of Courſe by the Abroga- " tion of the repealing Act.

" So if the Teſtator had accidentally thrown Ink " upon the Will inſtead of Sand, and defaced thereby " the Signatures of the Witneſſes.

Par. 3.

2. *Of a Subſequent ineffective Will, or incomplete Diſpoſal.*

Eccleſtone v. Speke, 3 Mod. 258.

" On this, where it was ſtated on a ſpecial Verdict, " that Lady *Anne Speke*, being ſeized in Fee, did, on " the 12th day of *March*, 1682, make her Will, and " deviſed the Lands to *John Pettit* for Life; and after- " wards

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De Officiis, III. 18. L. VII. 7. § 2, et 8. § 8, 9.

Roſini Antiq. VI. 3.

his Talents and by his Merit: but what was indeed very unbecoming, circumſtanced as the Caſe was, had been flagitious, had they been Witneſſes, or their Names annexed as ſuch in that inſtance. See too, Valerius Maximus, *in the places to which the Margin refers. Had* Cicero *been a Witneſs, the words had been,* ſubſcripſi; *or* ſubſcripſi et ſignavi: *but not* obſignavi; *of this it ſeems one may be very nearly certain. The Tranſlation of this paſſage, in the Select Orations, publiſhed in* 1741, *is right.*

It is curious, and not foreign to our Subject, to obſerve the ſucceſſive Changes in the Solemnities of a Roman *Teſtament: firſt, in Peace*

it

" wards to *George* his Son, and his Heirs for ever: on " condition of his taking the Name of *Speke.*

That, on the 25th of *December*, 1685, ſhe cauſed " another Writing to be made, purporting to be her " Will; which was Signed, Sealed, and Publiſhed by " her, in the preſence of three Witneſſes in the Cham- " ber where ſhe was, and where ſhe continued while " the Witneſſes ſubſcribed their Names in the Hall, " and that ſhe could not ſee them ſo Subſcribing.

" That the Leſſors of the Plaintiff are Heirs at Law, " &c.

" And upon the firſt Argument, Judgement was given " for the Defendant: for that the ſecond Will muſt be " a good Will in all circumſtances, otherwiſe it would " not revoke a former Will.

" And this Doctrine needs little illuſtration: for if " you cannot produce the inſtrument as a Will, you " cannot ſhew that the inſtrument which preceded it, " valid in itſelf, was not the laſt Will. And to prove I. 2. 17. 10. *ex eo autem ſolo.* " that it is an ineffective Will, is to prove that it can- " not ſtand in the way of the former.

" And, purſuant to this Principle, where a Man hav- Onions v. Tyrer, 2 Vern. 741. " ing made his Will, after made a ſecond, with change Ch. Pre. 459. " of Truſtees, but not effective under the Statute of " Frauds, and then cancels the Duplicate of the firſt; " this

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it was in the Comitia calata: *which were when the* Præco, *twice in the Year, ſummoned the Citizens of* Rome *to hold an Aſſembly for the purpoſe of giving Sanction, by their preſence, to ſuch Wills as ſhould be made before them*; *or*, in procinctu, *which was an informal military Teſtament, indulged in time of War, to thoſe who were hazarding their Lives for the Republic: and the firſt of theſe reſembles our Feoffments anciently, in the preſence of the* Pares Curiæ. *Afterward, a fictitious Bargain and Sale*; *and it operated as a Surrender to Uſes at the time declared, to veſt in poſſeſſion after the Death of the Teſtator. It was thus:* five *Witneſſes, Citizens of* Rome, *attended*; *the* Libripens, *or balance holder, who either was, or repreſented the Teſtator, and the* Emptor Familiæ Ros. Antiq. VIII. 6.

or

" this is no Revocation, for he meant his firſt to be " void only on ſuppoſition of his ſecond being good: " and this illuſtrates both the preceding Propoſitions.

Par. 4.

Jenkinſon v. Watts, Tr. 14. G. III.

3. *Of Change in Eſtate.*

" And here the Rule already recited, may ſerve as a " general Direction. This Queſtion of *conſtructive* " Revocations by *Change of Eſtate*, was largely diſcuſ- " ſed before the late Lord CHANCELLOR on a *Rehearing* " from the *Rolls*.

" In this Caſe, Mr. WATTS made his Will, and de- " viſed a capital *Manſion-Houſe* and Eſtate in ſtrict Set- " tlement. Afterwards he contracts for the Manor of " *Hanſworth*, in *Bucks*, to be purchaſed of the *Duke of* " *Kingſton* for 40,000*l.* and then by Codicil, he diſ- " poſes of the Eſtate under Contract to the ſame Uſes " as thoſe in the Will: the Vendor having covenanted " to convey to Truſtees, ſubject to ſuch Uſes as the " Purchaſer ſhould appoint.

" Afterwards, by completing the purchaſe, he takes " the *legal* Eſtate abſolutely to himſelf; who had the " *equitable* before, by virtue of the Contract, and the " Truſt to ſuch Uſes as by himſelf ſhould be appointed. " The CHANCELLOR was of Opinion, that this taking " of the *legal* Eſtate was no ſuch change as ſhould be " conſtrued a Revocation: it being ſubſtantially the " *ſame* Eſtate, and taken in completion of the *ſame pur-* " *poſes* which he had before declared by his Codicil. " And the Prayer of the Petition was diſmiſſed.

" And

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or Purchaſer: theſe were the Actores Fabulæ Solemnis. *The* Emptor Familiæ, *who was in the Nature of an Executor, ſaid, I claim the Family (including in that Term, all the rights, real and perſonal of the Teſtator, which can fall into Repreſentation); I claim the Family of this Perſon, which I have purchaſed according to the antient Law of* Rome, *with this Coin and balance. He then ſtruck the Balance with a piece of Copper Coin: and this* emancipatio, *or Surrinder to Uſes, being performed in Virtue of the ſuppoſed purchaſe, then followed the* Nuncupatio Teſtamenti, *or Declaration of Uſes according to the Will: and then the Will was produced*

" And where it was held, that a Deviſe by a Joint Tenant of his part and intereſt in the Eſtate which he jointly held, was not good, a partition having been made, after the Will, and prior to the Death of the Teſtator, this, though cited as an inſtance of a conſtructive Revocation, was not ſo, but was decided on very different Grounds, that the Eſtate of a Joint Tenant was before partition not deviſable: and that the ſubſequent event could not make it ſo: the Right of Survivorſhip, at the time of making the Will, being paramount to the power of deviſing.

Swift and Neale, 3 Burr. Manſ. 1488. Tr. 4 G. III. 1764.

" And in a Caſe, in 1711, where the Teſtator articled for the Purchaſe of Lands, and afterward made his Will, and after took the legal Eſtate to himſelf, by payment of the purchaſe Money and Entry, this was held a good Deviſe of the Lands ſo under Contract, and that the ſubſequent Change of the Eſtate, by Completion of the Purchaſe, was no Revocation.

Greenhill v. Greenhill, 2 Vern. 679, 80.

" So on the Marriage of a Daughter, to whom there was a conditional Deviſe of Lands, part of which Lands were ſettled by the Teſtator after making his ſaid Will, on the Huſband of his ſaid Daughter:—

Clarke and Ux. v. Berkeley et al. 2 Vern. 720.

" So a *Mortgage* ſhall be only a Revocation *pro tanto*.

Salk. 158.

" But

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produced in the preſence of the five Witneſſes. And hence it was, that the number of ſeven became requiſite to authenticate a Will when the Tabulæ Teſtamenti *thus ſtated, came in the place of this fictitious and circuitous conveyance; which however was ſingular and ingenious, and perhaps gave the hint to our common Recovery, and the earlier invention of Fines: as well as the more modern* Bargain *and* Sale, *which, for want of notoriety, is by Statute required to be enrolled; and* Leaſe *and* Releaſe, *by which firſt a Chattel Intereſt paſſes from the Tenant of the freehold to the Bargainor, and then the Statute immediately annexes and veſts the Poſſeſſion to the Uſe; and he thus becoming Tenant in poſſeſſion to Uſes, the Releaſe completes*

Comm. II. 20. P. 338, 9.

" But where a perſon takes a different Eſtate, for " purpoſes contrary to thoſe of his Will, though ſuch " purpoſes never take effect, and the diſpoſing power " was only conditionally deveſted, yet this change of " Eſtate, for the purpoſe of an intended new appoint- " ment, has been held a Revocation.

Earl of Lincoln and Rolls, et al. Eq. Ca. Abr. 412.

" So, where the Earl of *Lincoln* deviſed a mortgaged " Eſtate, in default of Iſſue to his next Heir in the " Honour, Sir *Francis Clinton:* and afterwards, in " contemplation of a ſuppoſed future Marriage, by " Leaſe and Releaſe, took an Eſtate in Truſt to himſelf " and his Heirs, till the Marriage ſhould take effect, " and afterwards, in part to the uſe of the Marriage, " and died without marrying, this was held a Revoca- " tion, and the Decree was accordingly affirmed in the " Houſe of Lords.

Pollen and Huband, Mic. 1712.

" For this, a ſatisfactory explanation may perhaps " be given: for there was once a purpoſe incompati- " ble with the Will, and a change made in the Eſtate " in order to the execution of ſuch purpoſe. But in a " ſubſequent Caſe, after a general Deviſe in Tail, on " condition of taking the Name of the Teſtator, with " diverſe remainders over, the Teſtator conveyed a part " of his Eſtate in Truſt, to convey to ſuch Uſes as he, " by Deed or Will, ſhould appoint; he died without " making any appointment, and without altering his " Will, and yet, even this was held a Revocation of the " Will.

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completes the power by conveying an Intereſt of freehold to the poſſeſſion, adequate to the purpoſes for which the Truſt is created: and this without enrollment: for Chattel Intereſts were not held of ſufficient conſideration to be ſo protected by the Statute, or to be within the danger againſt which the notoriety of Enrollment was provided: now this laſt conveyance, originating in ſo low a Chattel Intereſt as a Leaſe for a Year, converts itſelf by the ſubſequent Releaſe, into an inſtrument of equal efficacy with the bargain and ſale: an Eſtate of equal Extent thus accompanying the legal poſſeſſion: and at the ſame time, the original imbecillity of the Eſtate was allowed to exempt it from the purview of the Statute.

But

" But extreme Caſes of this kind, will, at moſt, be " underſtood as being applicable to future Queſtions, " only when they ſhall be abſolutely in point. Lord " MANSFIELD has obſerved, that *conſtructive Revoca-* Burr. Manſ. 1491.
" *tions contrary to the Intention of the Teſtator, ought not* " *to be indulged: and that ſome overſtrained Reſolutions of* " *that ſort, had brought a Scandal upon the Law.*

" In a celebrated Caſe before Lord HARDWICKE *, Parſons and Freeman, 9 Nov. 1751.
" there was a Change of the Eſtate by ſuffering a Recovery. " The Chancellor after obſerving, that Caſes of Re- " vocation, by Act of Law, had gone farther, and ex- " tended to inſtances of an alteration in the Eſtate, far " ſhort of that before the Court, and after diſcounte- " nancing the idea, that a revocation in Law would not " be a revocation in Equity, for that it would be miſ- " chievous, if revocations in Equity ſhould not turn on " the ſame principles as of legal Eſtates at Common " Law, proceeds to diſtinguiſh, that where the change " of Eſtate is for a particular purpoſe only, there a " Revocation ſhall not be intended farther than that " purpoſe requires, while the Eſtate ſubſtantially re- " mains as before: as when a Teſtator mortgages, " this is but a Security, and a revocation only *pro* " *tanto*; and as it would have been ſubject to Redemp- " tion, in favor of the Heir, ſo it ſhall in favor of the " Deviſee.

" And had there been no more in this Caſe, but exe- " cuting the equitable Eſtate, by taking in the legal " one, it had been no revocation; but the purpoſe of " this recovery was to vary and alter the power of ap- " pointing; and how can this be called a particular " purpoſe, which might operate over the whole inſtru- " ment, and ride over the whole Eſtate.

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* *The Subſtance of this I copy from a Manuſcript Collection of my Father. If from him, in purſuit of the ſame profeſſion, I may have learnt one part of that beſt paternal wiſh,* Virtutem verumque laborem; *of the reſt I ſhall not be over ſolicitous.*

" His Lordſhip concluded;—and therefore, I am " of Opinion, he took a new fee, under different qualifi- " cations, and ſubject to be conveyed in different ways, " and under very different circumſtances: and that this " can not be called a change, ſo limited a particular " purpoſe, as that the Court can reſtrain the revocation " to it.

Inferentes.

" From the whole, reſult three Rules reſpecting this " ſpecies of conſtructive Revocation; 1. That nothing " is ſuch, (while the diſpoſing power remains,) which is " done with the deſign of carrying into *execution* the " intent of the Teſtator, and would have been neceſſary " or expedient on the part of the Deviſee, to complete " and perfect the Eſtate given by the Deviſe.*—And " this Rule hath been intimated already.

" 2. That a partial change of Eſtate, for a particular " purpoſe, ſhall be (generally,) but a partial and pro- " portionable change in the intereſt deviſed, and not a " total Revocation.

" 3. That a change of the Eſtate, which varies ſub- " ſtantially the diſpoſing power, or which is made for " a purpoſe of indefinite Extent, ſo that it can not be " aſcertained that any part of the originally deviſed In- " tereſt was without the ſcope of it, ſhall operate as an " abſolute Revocation.

TIT. V.

REPUBLICATION.

" REPUBLICATION, being the perfecting or renewal " of a legal intent, once competently declared, is favor- " able in Law, as Revocation is unfavorable: and " therefore is readily admitted.

Weld and Acton, et al. Mic. 9 G. II. in Canc. M. S. Ch. L.

|| Doe on Dem. of Pate v. Davy, Cowp. 158.

* *So alſo a Deviſe for payment of Debts: Truſt Term created for that purpoſe: another Term with new Truſtees and preference of Debts by Specialty. No Revocation of the former.*

|| *And, in another Caſe, where the Surrender was to ſuch Uſes as Teſtator* ſhould *appoint, a Codicil, confirming the Will, excepting Alterations, was ſufficient.*

" And

" And therefore, if a Man have Land in *D.* and de- Rolls Abr. 618. 8.
" vise by his Will all his Land in *D.* this will carry
" such land as he then had when he published his Will,
" and not *other* Land in *D.* but if after making and
" publishing his Will, he purchase other Lands in *D.*
" and on Treaty for those Lands, he declares that he
" will not sell the new purchased Lands, for that he
" means they shall go to the Devisee of the rest (his
" Executor) under the Will, and after adds a Codicil,
" disposing of personal property, and dieth, this is a
" sufficient Republication to pass the newly purchased
" Lands in *D.*

" And so, Testator makes his Will, and devises his Heylin v. Heylin, T. 14 G. III, Cowp. 130.
" Lands freehold and copyhold: he after purchases
" other Copyhold, and surrenders it to the Use of his
" Will, declared or to be declared. This is an effectual
" Republication.

" No precise Form of Words is necessary to a Re- Potter and Potter, 7 May, 1750. Str. Master of the Rolls, Ch. L. M. S.
" publication. And a Codicil, not annexed to the Will,
" but on a different Paper, may, though the Will was
" not even before the Testator at the time, nor is re-
" published by it in Terms, amount to a Republica-
" tion, if it evidently adverts to the Will.

" A Will once revoked, according to the Statute
" of Frauds, a Republication to revive it must have all
" the Solemnities required by that Statute. *

" We

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* *By this is meant, that it cannot be republished by an instrument signed by two Witnesses, or otherwise defective. But it may be republished, as already has been observed, if the Testator destroy the Revocation. But if the first Will be destroyed, then it shall not revive by the simple destruction of the Revocation. Thus a man* Burtenshaw v. Gilbert, E. 14 G. III. Cowp. 49.

TIT. VI.

" We are now to ſpeak briefly of the Will of " PERSONALTY: and as the Authentication of this " Species of Will, is retained in a Court which bor- " rows much of it's Terms, Rules, and Modes of " proceeding from the Civil Law, it is characterized " by a Name which that Law gave to the whole Genus, " *Teſtament*, or teſtamentary Diſpoſition.

Par. 2.

Will of Perſonalty, relatively conſidered.

" Theſe are to be noticed chiefly in reſpect of their " leading Analogies or Differences from a Will of " Lands.

1. *Good without Witneſſes, if written by Teſtator.*

Harris's Juſtin. L. II. 11. 5. n.

" And firſt, if a Will of perſonalty be written by the " Teſtator, it will be valid without any ſubſcribing " Witneſs.

2. *Valid without Executor.*

Swinburne, I. 6. p. 2.

" Secondly, though the appointment of an Executor " be neceſſary to the full Idea of a Teſtament, Bequeſts " lawfully made, ſhall be ſupported, though there be " no Executor: for it is yet a laſt Will, though leſs " ſolemn and leſs providently guarded.

3. *Revoked by Marriage with Iſſue.*

Lugg and Lugg, Salk. 592. Mic. 8 W. III.

" Marriage with Birth of a Child, is a Revocation " of a Will, which makes a general Diſpoſition of per- " ſonalty.

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makes a Will and Duplicate: he after makes a ſecond Will, and thereby revokes all former Wills, and, at the ſame time, cancels the former Will in his Cuſtody. He then ſends for an Attorney to make a third Will, but dies before it could be completed. After his Death, the ſecond Will is found cancelled: the firſt is alſo found in the ſame Paper, cancelled: but the Duplicate *of the* firſt *is found, uncancelled, among the Teſtator's Deeds and Papers. The cancelling the ſecond, doth not, under theſe circumſtances, revive the firſt.*

" To

Par. 3.

Of Ademption.

" To the head of conſtructive Revocations of Be-
" queſts, are to be referred, *Ademption* and *Satisfaction*,
" which are Revocations *pro tanto*, on the implied
" intent.

" Firſt, if the ſame Sum be twice given in the ſame
" inſtrument to the ſame perſon, without any diſtinc-
" tion of cauſe, or difference of expreſſion, the *preſump-*
" *tion* is, that it is only once given. Swinb. VII. 20. p. 526. 21. p. 530.

" When a Will reſerves a power of adding a Codicil,
" and a Codicil is after added, and annexed to the Will,
" they are both as one inſtrument, and ſubject to the
" ſame conſtruction, as if the double Legacy had been
" in the Will only.

" When a Codicil is made without ſuch reference to
" the Will, they are different inſtruments, and on the
" ſame Sum given to the ſame perſon by each, the pre-
" ſumption is for the Deviſee.

" If an hundred Pounds be given to *A.* by Will, and
" afterwards fifty to *A.* by the ſame Will, the preſump-
" tion is, that *A.* ſhall take both. Swinb. p. 530. D. 34. 4. 9.

" And where a ſmaller Sum (500*l.*) was given by
" the Will, and after the Teſtatrix adds a Codicil to
" her Will, and gives an Annuity, expreſsly, over
" and above, of 12*l.* for Life to the ſame perſon;
" and afterwards a greater ſum by another codicil
" (1000*l.*) to the ſame perſon, and ſays, in the
" laſt Bequeſt, " *I add* this Codicil to my Will,"

" and there was a Year and two Months between " the Will and the laſt Codicil, the *Maſter* of the *Rolls* " was of Opinion, that 1500*l.* was due, over and " above the Annuity. And the *Chancellor*, by his " Decree, on a *rehearing*, confirmed the Judgment of " the Maſter. Mr. Juſtice *Aſton*, and the Chief Baron " *Smyth* aſſiſting.

Hatton and Hooley, Hil. 13 G. III. See alſo Maſters and Maſters, P. W. 421—4.

" So if there are Aſſets to ſatisfy Debts and Legacies, " without preſuming a Legacy to go in Satisfaction of " a Debt, it ſhall be preſumed a pure Benefit, where no " intent appears to the contrary, and the Executors ſhall " pay both.

Cuthbert and Peacock, Salk. 155. Mic. 6 Anne, per *Cowper*, Canc. Cranmer's Caſe in Canc. Salk. 508. per *Harcourt*, Canc. 2 Eq. C. Abr. 296, 297. Eq. C. 295. Br. Deviſe 27 Mic. 3 Ja. B. R. Dyer 59. Office of Ex. 240, 1. Ed. 1720. Swinb. 535. VII. 23.

" A Legacy given to *A.* who dies before the Teſtator, " is a *lapſed* Legacy: for the Bequeſt ſpeaks at the " time of the Teſtator's Death. But where he takes as " a Truſtee, it ſhall not lapſe in prejudice of the Truſt.

" A Legacy given to one, IF he live to the Age of " Twenty-one, is a lapſed Legacy if he die before; " but a Legacy, *payable* WHEN he ſhall attain the Age " of Twenty-one, veſts immediately if he ſurvive the " Teſtator, and ſhall go over by Repreſentation to ſuch " perſons as ſhall repreſentatively be entitled at the " time when it becomes payable. It is *debitum in præ-* " *ſenti, ſolvendum in futuro.* And the Diſtinction is, " that when the time is annexed to the Legacy, it ſhall " not be paid if the Legatee die before the time; for " the time is the *condition*, on failure of which it never " becomes due; but if the time is annexed to the *pay-* " *ment*, then the Legacy is abſolute, and *due* immedi- " ately if the Legatee ſurvive the Teſtator; though " *payable* at a future Day. And this ſenſible Diſtinc- " tion was adopted into our principles of legal Con- " ſtruction, in clear and preciſe terms, more than an " hundred and eighty Years back.

" It

" It is remarkable, that *Wentworth*, where above " cited, appears to treat this as a nice and doubtful " Diſtinction: and ſo late as the Year 1700, though " admitted binding as a Precedent, it was treated with " yet more ſeverity. And yet there is on its ſide *Analogy* " to thoſe Laws, which govern, by voluntary Adoption, " the other parts of teſtamentary Law in *England*; it has " *reaſon*, as a perſonal Bequeſt carries no certain pre- " ſumption of a ſubſtitutional benefit to an unknown re- " preſentative, if the Legatee, in immediate contempla- " tion, die before the Teſtator, and a remote contem- " plation ought not to be intended; and it has *certainty*, " being a clear and preciſe diviſion between ſuch Le- " gacies as ſhall be deemed extinct, and ſuch as ſhall " ſurvive. (*n*)

" A charge by two ſeveral Securities of 14 *l. per Ann.* " to a Wife, in conſideration of her giving up part of " her Jointure; bequeſt of 14 *l. per Ann.* for Life, " without noticing the charges, held a ſatisfaction. 2 Vern. 498. Brown v. Dawſon, 1705.

Par. 4.

INTESTACY *as to part.*

" Nothing ſhall paſs as bequeathed in general Terms, " which belongs to a different Claſs, or does not ap- " pear to have been within the ſcope of the intention " of the Teſtator. And therefore, where a Seaman " made his Will abroad, and bequeathed to his Mother " his

(*n*) *It ſeems not true that the diſtinction in the* civil *Law does not go the whole length of coincidence with ours: for although by that Law, it appears at firſt as if a Legacy given at a very diſtant period, might veſt abſolutely in the Legatee; by the circumſtances taken together it ſeems ſufficiently diſtinct, that it is only meant of a Legacy payable at ſuch remote Period that if the Legatee ſurvive the Teſtator, the intereſt ſhall go over by repreſentation; this will beſt appear by quoting the ſeveral clauſes:* Si Dies appo- D. 36. 2. 27, 2 3.

Cook v. Oakley, & al. P. W. 302. Hil. 1715. per *Trevor.*

" his Gold Rings, Buttons, and Cheſt of Cloaths, and to " his Friend (who was on board with him) his red Box, " Arrack, and all Things not before bequeathed, this " was held reſtricted to Things *ejuſdem Generis*, and " not to extend to Leaſehold Intereſt, which had been " bequeathed him during his Abſence.

Moore v. Magrath, Hil. 14 G. III. Cowp. 9.

" For this is analogous to a *ſweeping* Clauſe, cuſtom- " marily and ſometimes incautiouſly inſerted in a Deed, " which is taken with reference to preceding Clauſes; " and not ſo as to paſs a conſiderable property unnoticed " in any other part of the Deed, not apparently under " particular, or at leaſt, general, contemplation to " be ſo conveyed: only that the preſumption of a total " Diſpoſition of property is agreeable to the Nature " of a Will, and not of a Deed.

E. of Darlington v. Pulteney. E. 15 Geo. III. Cowp. 260.

" A Power to be executed by DEED is not executed " if by WILL: at leaſt unleſs in benefit of a Wife, " Children, or Creditors.

Par. 5.

NUNCUPATIVE WILL.

Weſt's Caſe, Moor 177. Swinb. 49.

" Formerly, Wills were allowed with very little regard " to the Mode and Solemnities of the *Deviſe*, and of " courſe, with leſs nicety ſtill, as to a mere *bequeſt*: " a *Letter* has been held a good Will of Lands: and " *nuncupative* Wills, which are verbal Declarations of " intent,

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ſita legato non eſt, præſens debetur; aut confeſtim ad eum pertinet cui datum eſt: adjecta, quamvis longa ſit, ſi certa eſt, dies (veluti, *Kalendis Januarii centeſimis*) dies quidem legati ſtatim cedit; ſed ante diem peti non poteſt.

At ſi incerta (quaſi, *cum tules erit, cum in familiam nupſerit*; *cum magiſtratum inierit*; *cum aliquid* quod ſcribendo comprehendere ſit commodum, *fecerit*) niſi tempus conditione obtigit, neque res pertinere, neque dies legati cedere poteſt.

Si Titio " *cum is annorum quatuordecim erit factus*" legatum fuerit, et is ante quartum decimum annum deceſſerit, verum eſt ad hæredem ejus, legatum *non* tran-

" intent, were good even as to realty, and much more as to perſonalty, almoſt as unreſtrictedly as the *teſtamentum in procinctu* among the *Romans*: but it is now with us limited by the Statute, as it was inſtituted by them, in favour of military perſons, by whom alone ſuch nuncupative Wills can, to any conſiderable amount be made, as before, were allowed in general: for in reſpect of others, it is required, 1. That *no written Will of perſonalty ſhall be revoked by a ſubſequent nuncupative one, except the ſame be in the life-time of the Teſtator reduced to writing, and read over to him and approved; and unleſs the ſame be proved to have been ſo done by the oath of three Witneſſes at the leaſt.*

Swinb. I. 22. p. 51. 48.

29 Car. II. c. 3 § 22.

" 2. *That no nuncupative Will ſhall in any wiſe be good where the Eſtate bequeathed exceeds* 30 *l. unleſs proved by three Witneſſes preſent at the making thereof; and unleſs they or ſome of them were ſpecially required to bear witneſs thereto by the Teſtator himſelf; and unleſs it was made in his laſt ſickneſs, in his own habitation or dwelling-houſe, or where he had been previouſly reſident ten days at the leaſt, except he be ſurprized with ſickneſs on a journey, or from home, and dies without return to his dwelling.*

§ 19.

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tranſire: quoniam non ſolum diem ſed et conditionem hoc legatum in ſe continet; ſi effectus eſſet annorum quatuordecem; qui autem in rerum natura non eſſet, annorum quatuordecem non eſſe intelligeretur. Nec intereſt utrum ſcribatur SI *annorum quatuordecem factus erit*, an ita, Titio " CUM, &c." cum priore ſcriptura per conditionem tempus demonſtratur, ſequenti per tempus conditio: utrobique tamen eadem conditio.

Suppleo vocem cum, &c. quod intercediſſe videtur.

V. etiam Huberi Prælect. 1368, 9, 70.

Huberus quæſtionem non contemnendam citat de *Archiguberno Claſſis Britannicæ*; antiquiſſimo enimvero.

§ 20. "3. *That no nuncupative Will ſhall be proved by the* "*Witneſſes after ſix Months from the making, unleſs it* "*were put in writing within ſix Days.*

§ 21. "Nor ſhall a nuncupative Will be proved till four-"teen days after the death of the Teſtator: nor till "proceſs hath firſt iſſued to the Widow or next of kin "to conteſt it, if they think proper.

"Thus nuncupative Wills in general are advanced "to the rank of written Evidence; ſo as to be proper "to be mentioned in this place.

SECTION IV.

"We are now led to attend to the leſs ſolemn written "Evidence. And firſt of AGREEMENTS *not under* "*Seal:* including in this term ſuch ſeveral inſtru-"ments as the Law allows to take effect in this man-"ner *inter vivos*; promiſſory *Notes* and *Bills* of *Ex-*"*change* excepted, which are after to be treated under "a diſtinct head.

TIT. II.

"Theſe may be divided into

AGREEMENTS:

1. *Executory of* 1. *Real,*
   2. *Chattel Intereſt,*
   3. *Perſonal.*
2. *Executed.*

1. *Of*

Par. 2:

1. *Of* AGREEMENTS REAL.

" 1. AGREEMENTS *real, not under ſeal*, nor exe- Bac. Abr. 67. Tit. Agr.
" cuted by *Livery*, are ſuch Contracts uſually as are
" preparatory to a more ſolemn Mode of Tranſaction
" by Deed, as Articles in Conſideration of an in-
" tended Marriage, or of a Purchaſe.

" For theſe, unleſs the Remedy which is ſought
" lies ſimply in *Damages*, which the Courts of Com-
" mon Law may wholly and at once redreſs upon
" *Action on the Caſe*, in which the Jury will give da-
" mages according to the Proof; the general Redreſs
" is in the *Chancery*.

" Thus if the Anceſtor ſeized in Fee hath agreed 2 Vern. 215. Anno 1690.
" for the ſale of Lands, and hath received part of the
" Purchaſe Money, Equity will compel his Heir to
" convey, and the Purchaſe Money will go to the Exe-
" cutor.

" So a defective Conveyance to a younger Son will Bac. 68.
" be decreed to be completed by the Heir, 1. Where
" there is a Covenant for farther Aſſurance;

" 2. Where there is Proviſion made by the Father
" in his life-time for the Heir, or ſuch proviſion de-
" volves on him by deſcent from the Father.

" But

"But if Tenant in Tail agree to convey, and die "before Fine or Recovery be levied, *Equity* will not "oblige the Iſſue to ſupply this Defect; unleſs ſome "Act be done by the Iſſue which amounts to a con- "ſtructive Ratification of the Agreement: for Equity "cannot ſuperſede the ſtatute *de Donis*; its province "being to give liberal relief, but not againſt Law.

Cavendiſh v. Worſley. Hob. 267. 1 Chanc. Ca. 271.

Voluntary.

"*Voluntary* Agreements reduced to Writing are good "againſt thoſe who have no higher than a voluntary "Claim: and *Equity* will not relieve againſt them in "favour of ſuch, nor ſuffer them to be diſturbed as "between the parties; though it will as againſt *Cre-* "*ditors*, *Purchaſers* for valuable conſideration, (*o*) or "younger Children.

Par. 3.

2. *Of Agreements relating to Chattels real.*

"A Leaſe for Years, to commence at a future Day, "may be good without Seal: and an Agreement ſigned "by the Parties for that purpoſe ſhall entitle to "Damages at *Law* for non-performance, or to a ſpe- "cific performance in *Equity*.

Comm. II. Ch. 20, p. 296, 7.

(*o*) *Conſideration* in Law is either good, *bona*, as of propinquity or natural affection, or valuable, *æſtimabilis*, the worth of which is eſtimated by a certain Rule of Juſtice; as for ſo much Money; or on Account of Marriage; a ſimply *good* Conſideration is not available againſt *Creditors*, &c.

All *voluntary* Conveyances are void, as againſt Creditors or Purchaſers for conſideration, by the two ſtatutes of *Elizabeth*;* or, perhaps, more accurately, at *Common Law* affirmed, explained, and enforced by the Legiſlature.

* 13 Eliz. c. 5. 27 Eliz. c. 4.

Par. 4.

Par. 4.

3. *Of* AGREEMENTS *perſonal.*

Promiſe of Marriage not within the Statute of Frauds.

" It is proper, on all Accounts, to mention, firſt, " *Agreements in conſideration of Marriage*; and the ra- " ther, ſince by the Statute ſo frequently already cited, " no Contract *in Conſideration of Marriage* is ſuable, " unleſs it be in Writing, and ſigned by the party " charged, or by his Authority.

29 Car. II. c. 3. § 4. 3 Lev. 65, 6. 1 Sa. 34.

" A Contract to marry, upon which an Action for " breach of promiſe is founded, is generally proved " by ſome Evidence in writing: and when ſuch a " Contract has been duly in Evidence before the " Court, Damages have been frequently recovered, " either in a ſpecific ſum aſcertained by the Con- " tract, or more generally, where no ſum has been " ſtipulated, the Jury have awarded liberally according " to the circumſtances of the party and the other con- " ſiderations of the Caſe. But it hath been long ſet- " tled that a Promiſe to marry is not a Contract *in* " *conſideration* of Marriage ſo as to ſubject the Proof " of it to the Limitations of the Statute.

" It is remarkable that *Levinz*, only *five* years after " the Statute, ſeems to have had no Doubt that a Pro- " miſe of Marriage *was* an Agreement in Conſideration " of Marriage within the ſtatute: but the Caſe in " *Levinz* has no report of the Judgement annexed: " and the Caſe in *Strange*, already cited in the Margin, " is directly contrary: though it makes a miſreference " to the Book, the Note is probably correct, ſhort as it " is, as to the reſolution of the Court of *Common Pleas*; " which it ſtates to have been, that ſubſequent determi-

" nations

Contract or Agreement in conſideration *of Marriage, within the Statute.*

" nations were againſt the Caſe in *Levinz:* and
" a modern Book of conſiderable reputation affirms
L. N. P. 280. " the Authority of the Caſe in *Strange.*

Par. 5.

Rawdes v. Amhurſt. Ch. Pre. 402. Eq. C. Abr. 21. " On a Treaty of Marriage the Lady's Father pro-
" poſed to give 4,500 *l.* Portion, and the Huſband was
" to ſettle 4 or 500 *l.* per *Annum* Jointure. The Fa-
" ther and intended Huſband went to the Chambers of
" a Conveyancer, who heard the Propoſals on both
" ſides, took minutes, and ordered a ſettlement to be
" drawn according to the Terms of the Agreement:
" the next day the Father fell ſick, and died in two
" hours after; and the next Morning the Marriage
" was conſummated.

" On a Bill brought to have a ſpecific performance
" of the Agreement, the Lord *Chancellor* decreed it to
" be within the Statute: and ſaid, he knew no Caſe
" where an Agreement, though" written " by the
" Party himſelf, ſhould bind, if not ſigned, or" in part executed " by him: and that thoſe preparatory
" heads might have received ſeveral Alterations or
" Additions, or the Agreement might have entirely
" broke off.

" But

Par. 6.

Notes or Bonds in reſtraint of Marriage are void.

" But a Bond by which *A.* engages that he will not " marry any other Perſon but *B.* on Penalty of 1000 *l.* " though ſigned and ſealed by the party, is held not a " good Agreement; for it is not in conſideration of " Marriage, but rather in reſtraint of Marriage, ſince " *B.* is not bound to accept *A.* for her Huſband; and " if the Bond were ſupported, a party might be bound " under ſuch penalty as would amount to an abſolute " prohibition of Marriage, which would be againſt " all Policy, Reaſon, and natural Right.

" Accordingly an Obligation under Seal to this pur- " port having been ſued, Lord *Manſfield* left it to the " Jury, on an Action of Covenant, to find 1000 *l.* " Damages, if they thought the Deed a good Deed.

Catharine Lowe v. Newſham. Peers E. 8 G. III. 4 Burr. Manſf. 2225.

" On this two Motions were made; one for a *new* " *Trial*, on the ſuggeſtion that the Damages ought to " have been left at large to the Jury: but on this the " Rule was diſcharged; for the Damages were aſ- " certained by the parties, and muſt be either none or " entire, as liquidated by the Contract: but the Mo- " tion in Arreſt of Judgement went on the Ground " that there was no Obligation on which an Action

" could

" could be maintained: what was pleaded as ſuch being " void; as amounting in ſubſtance not to an engage- " ment to marry the Plaintiff, but to be reſtrained, if " ſhe ſhould ſo pleaſe, from marrying any other Per- " ſon. And of this opinion was the whole Court; " Judgement was accordingly arreſted; and the Ex- " chequer Chamber confirmed the Deciſion.

" Upon this occaſion, to ſhew how far the prin- " ciples of legal Policy had prevailed againſt reſtraints " on Marriage, the Chief Juſtice quoted a Caſe, than " which it is indeed difficult to conceive a ſtronger; " and well may one be permitted to acknowledge, even " independent of the intimations from that great " Authority, that, juſt and beneficial as the general " Principle is, the determination in that particular " inſtance, went farther than Equity or public Con- " venience can eaſily be imagined to require. A " Lady, who was near thirty, and not unapprized of " the extent of her Engagement, for ſhe was a " Widow, freely and deliberately gave a Bond, which " *ſi non pertæſum thalami tædæque fuiſſet*, it may be " thought ſhe would have declined: however, the " generous Lady forfeited the Obligation (if it had

2 Vern. 215. Baker & Ux. v. White & al.

" been

" been forfeitable) by marrying, and joined in an Ap-
" plication with her Huſband, that the Bond, which
" was for 100*l.* might be delivered up to be cancelled:
" there was a Counterbond in an equal ſum, payable
" to her Executors, in caſe ſhe ſhould not marry a
" ſecond time, and it was contended her Daughter by
" the firſt Huſband might have had the Benefit of this:
" that there was no ſurprize or inequality in the
" Contract; that ſhe had expreſſed her ſubſequent
" as well as previous Approbation to it. However,
" the Bond was ordered to be delivered up. And in
" referring to this Caſe, Lord *Mansfield* remarks, that
" reſtraint, on a firſt marriage, is contrary to the general
" Intereſts of Society and the ſettled Policy of the
" Law; but that the frequent Cuſtoms of Copyholds
" ſeemed to intimate the Reſtraint on a ſecond, was 4 Burr. Manſf. 2233.
" not equally ſo held, yet that the Bond was decreed to
" be delivered up.

" Theſe were indeed both Obligations by ſpecialty,
" and ſo do not apply to this head, otherwiſe than *à*
" *fortiori*, and as they illuſtrate the general principle
" by which written Agreements of this nature are
" decided.

" Where, after Propoſal by *Letter*, made and re-
" jected, the Lady's Father *offered* a certain ſum to be
" paid down which had been demanded on the other
" ſide, and the Marriage took place; this was held a Skinn. 142, 3.
" good promiſe.

Par. 7.

"*Agreements* by an *Executor* to anſwer out of his "*own* Eſtate; and generally, Agreements by ſpecial "Promiſe to anſwer for the debt, default, or miſcarriage "of another, muſt be proved in the ſame manner as
29 Car. II. c. 3. ut ſupra. § 4. "promiſes in conſideration of Marriage, and cannot "be ſupported by *parol* Evidence only.

§ 2. § 3. § 4. ut ſupra. "So of a Demiſe of a Term of Years exceeding "three: the ſame of Aſſignment of Intereſts, free-"hold or cuſtomary.

"The ſame is to be underſtood of any Contract or "Sale of Lands, Tenements, or Hereditaments, or "any *Intereſt* in or concerning them.

2 Ventr. 361, 2. "The Aſſignment of a *Term* is clearly within this "Clauſe, and was ſo reſolved in the Court of King's "Bench very ſoon after the Statute.

§ 7, 8, 9. "All Declarations and Aſſignments of Truſt by "Act of the Party fall under the proviſion of the "Statute.

"Any Agreement, which is not to be performed "within a Year, muſt alſo be in writing, and ſigned "by the party charged.

Salk. 280. L. N. P. 280 "But where the Agreement depends for the time of "its performance on a *contingency*, and may probably, "in the Nature of the Thing, and the preſumable "expectation of the parties, be performed within the "year, it is not within the Statute.*

* Vide alſo, for this, and ſeveral other curious Points, the Caſe of Simon and Metivier or Motivor, Tr. 6 G. III. B. R. 3 Burr. 1921; and more at large, 1 Bl. 259.

SECTION V.

Bills *of* Exchange.

"The Progreſs of theſe Conſiderations on the Evi-"dence applicable to written Agreements, not of ſpe-"cialty, has now brought us to *Bills of Exchange*; an "Article of moſt extenſive importance, particularly

" in the commercial World, and of which the Limits " and Nature of this Work will not permit a com- " plete Detail."

TIT. II.

To underſtand this Matter aright, we muſt conſider the Nature of Bills of Exchange a little more extendedly from their original.

All Exchange is made either in Goods, or Money, or " on Credit; and may accordingly be termed

1. *Actual, or ſimple,*
2. *Eſtimative,*
3. *Pignorative.*

" The *firſt* is of the earlieſt Antiquity, and is ſtill " preſerved among thoſe Nations which are, or have " been reputed, *ſavage.* It conſiſts in bartering Goods " for Goods, and in any Country would ſupply the " mere neceſſaries of natural Life: in a Country tole- " rably fruitful, and of due Extent, compared with its " Population, it will anſwer a great part of the real and " general conveniences; but when Arts and Luxury " prevail, it is wholly inadequate to the artificial exi- " gencies of Society. Some Medium, (*p*) therefore, " which has a *conventional* value, muſt be adopted; and " this ought to be ſomething eaſily diſtinguiſhed, du- " rable, capable of receiving a viſible ſanction from " the impreſſed Authority of the State, and likely to " be received in payment in other civilized ſocieties, " though not at an equal Eſtimation as at home; and " *portable,*

(*p*) *Here it may be allowed to quote a paſſage from that great Mirror of Antiquity and Manners, the imperiſhable Poems of* HOMER,* *if any thing not immediately divine may be allowed that Epithet. It has frequently indeed been quoted by various writers, yet it will bear, and merits to be ſtill as often repeated.* I. 3. 24. 2. Urſini Virgil. illuſtr.—38.

Νῆεςδ' εκ Λήμνοιο παρεςασαν ΟΙΝΟΝ ἄγουσαι
Πολλὰρ τὰς προέηκεν Ἰησονίδης Εὔηνος.
Ἔνθεν αρ' οἰνιζοντο καρηκομόωντες Αχαιοὶ
Ἄλλοι μὲν χαλχῷ, ἄλλοι δ' ἄιθωνι σιδήρῳ,
Ἄλλοι δὲ ῥινοῖς, αλλοι δ' αὐτοῖσι βόεσσιν,
Ἄλλοι δ' ανδραπόδεσσι.

IA. H. 467, 9. 472, 5.

* Think of a Poet of *twenty-ſeven Centuries,* who has deſcended to us, probably without the loſs of a line.

" *portable*, ſo that a ſufficient quantity for general " preſent occaſions may eaſily accompany the perſon. " All theſe requiſites ſo far unite in a Metal, com- " monly accounted of the moſt ordinary kind (*iron* " excepted, from its want of *malleability*, and *lead*, from " its extreme ſoftneſs,) that Copper* has been the " Money of moſt Countries during their firſt Period of " civil ſociety; and *gold* Coin has been unknown, not " only to the *Infancy*, but to the full *Manhood* of the " greateſt ſtates.

* What we call *Braſs*, in tranſlating the Ancients, particularly the *Poets*, is *Copper*, the native Metal, not *Braſs*, the factitious one. See, reſpecting theſe Metals, WATSON'S CHEM. ESS. Vol. III. IV.

" But when Commerce becomes extenſive, Nations (as late Experience hath too largely inſtructed moſt of " the chief Communities of modern times) will, firſt, " from the neceſſity or obvious convenience of the " thing, indulge to individuals a farther and ſecondary " ſubſtitution; and at length will tax the aggregate of " the induſtry, power, and real or preſumed reſources " of the ſtate, in ſupport of a FUND of CREDIT. " Hence BILLS of EXCHANGE, *Banks* incorporated " for *local* purpoſes, and that amazing political Eſta- " bliſhment a NATIONAL BANK, which bears ſuch " complicated Relations to the Manners, the Conſti- " tution, the domeſtic and external operations of a " Community.

Comm. II. c. 30. p. 466.

" Bills of Exchange are ſaid to have been firſt in- " troduced in this Country by the *Jews* and *Lombards*, " when baniſhed from *Guienne*, and afterwards from " *England*, and other Countries, about five Centuries " from the preſent period. Yet it is aſſerted they are " conſiderably an earlier invention, and that they had " been introduced into the *Mogul* Empire in 1236. " Be this as it may, it is comparatively but of late,

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One is grieved to quote in the ſame paſſage an inſtance of eaſe and plenty, from a more extended intercourſe than the firſt ſtate of Nations admits of, and of oppreſſive cruelty in the deteſtable SLAVE TRADE.

" ſince

" ſince they became an important branch of our Juriſ-
" prudence. Our Reports are nearly ſilent concerning
" them till about the æra of the *Revolution:* they were
" complimented by the *Legiſlature* with an exemption
" from ſtamps in 1694, apparently from being thought 5 W. & M. c. 21. § 5.
" ſo convenient that no obſtacles ſhould be thrown in
" their way: (Parliament has ſince appeared to be of
" opinion that their convenience was an argument for
" ſubjecting them to ſucceſſive ſtamps) and in 1698 a
" direct legiſlative ſupport was given to them. Their
" Currency was enforced and extended by an Act 9 & 10 W. III. c. 17.
" paſſed ſix years after in the ſubſequent Reign, and 3 & 4 A. c. 9. 1704.
" *promiſſory Notes* payable to the party, or *Order*, which
" before were not aſſignable, were made equivalent to
" inland Bills of Exchange. This Act (temporary
" in its firſt appointment, and that for a very brief
" period indeed) was ſoon made perpetual: and from
" that time this medium of commercial intercourſe
" acquired ſtability and univerſality, and our Books
" abounded in Caſes by which this grand Article of
" mercantile Law has been progreſſively formed into a 7 A. c. 25. § 3.
" SYSTEM.

TIT. III.

What is a Bill of Exchange.

" *A Bill of Exchange is an open Letter of Requeſt*
" *from one perſon to another, deſiring him to pay a ſum*
" *named therein to a third perſon, on his Account.*

" In

ARGENTUM *ſignatum eſt Anno Urbis* DLXXXV Q. Fabio *Conſule quinque annis ante primum bellum* Punicum: AUREUS NUMMUS *poſt annum* LXII *percuſſus eſt quam argenteus.*

Suppoſing this Computation had been correct, and no Error of the Preſs or MSS. *it is probable that* CORRADUS, *in his whimſical but elegant* QUÆSTURA, *where he compares the Life of* CICERO *to a* Plin. N. H. 33. c. 3. T. 3. p. 240. Ed. 1601.

TIT. IV.

" In this are to be regarded,

1. *The Bill,*
2. *Its collateral incidents.*

1. *Acceptance,*
2. *Indorſement,*
3. *Proteſt.*

Par. 2.

" It is eſſential to the *Bill* that it be *a Promiſe to* " *pay,* and therefore, if limited to a *ſpecial, future,* " *contingent Fund,* it will not maintain a Declaration in " *Aſſumpſit,* as on a Bill of Exchange.

Dawkes and Wife againſt Earl Deloraine. Bl. 782. Tr. 11 Geo. III. C. P.

" *Sir,*

" *Seven Weeks after Date, pay Miſs* R. 32 l. *out of* " W. S.'*s Money, as ſoon as you ſhall receive it.*

" Plaintiffs counted, 1. on a *Bill of Exchange,* ac- " cording to the Cuſtom of Merchants.

Per Curiam—" As this Count in the Declaration is " founded on the Cuſtom of Merchants, if the Bill in " Queſtion be not a Bill of Exchange, according to " that Cuſtom, no Action will lie on this Count: we " deliver no opinion on the omiſſion of the Words, "*Value* " *received*" and " *Order,*" but confine ourſelves to the " latter objection, that the Bill is drawn payable out of " a *particular* Fund, and upon an Event which is future " and contingent, the Drawee's having received *W. S.*'s " Money.

ſeries of Medals, would have marked this coincidence; for it brings it to the æra of the Birth of that illuſtrious Roman: *according to* Middleton, *the very year; though* Corradus *places it a year later, in* 648 *of the City, but the truth is, there is an Error of no leſs than a Century; which the* Synchroniſm *of a Period ſo well marked as that of the firſt* Punic *War corrects: we ſhould therefore read the firſt æra* CCCCLXXXV, *and the ſecond, conſequently* DXLVII.

I do not know that ſince the Conqueſt *we have any earlier gold Coin than that ſtruck by* Edward III. *in* 1364, *on occaſion of his victory by Sea againſt the* Spaniſh *Cruiſers.*

" A Bill

"A Bill of Exchange always implies a perſonal "general Credit, not applicable to particular circum- "ſtances and events, which cannot be known to the "Holder of the Bill in a general Courſe of Nego- "tiation.

Par. 3.

Form of a BILL *of* EXCHANGE.

"The uſual Form of a Bill of Exchange is well "known.

"*At ſight*, [*or* *Days after ſight*, *or* *Days* "*after Date*,] *pleaſe to pay to* *of* "*Merchant*, *the ſum of* *and place* "*the ſame to the Account of*

"But a Note, payable to or Bearer, is nego- "tiable; and ſo where it was, *Pay to* SHIP FORTUNE, "or BEARER.

There were TWO COUNTS.

1. *On an Inland Bill of Exchange*,
2. *On* indebitatus aſſumpſit.

Grant v. Vaughan. T. 4 Geo. III. 3 Burr. Manſf. 1516. S. C. 1. Bl. R. 485.

"The Note was loſt, and payment ſtopped: this "Action was brought by the Bearer, who purchaſed "it, without Notice, for a valuable conſideration.

"The Opinion of the Court was that the Bill was "NEGOTIABLE.

"That the Plaintiff was certainly entitled to re- "cover on the *ſecond* Count; and the Court ſeems "ſtrongly to have intimated that even if it had ſtood "on the *firſt* Count alone, the Action might ſtill have "been maintained.

" But the Bearer, to entitle himſelf, muſt have come " by it honeſtly; and when he has ſo come by it, " whatever may be the Merits between the *Drawer* and " a *third* perſon, he ſhall never be ſubjected to loſe " what he hath purchaſed in the Courſe of Trade for " Conſideration, and without Notice.

1 Salk. 126. Mic. 10 W. III.

" So a Bank Bill, payable to *A.* or Bearer, was " given to *A.* and loſt; a ſtranger found and trans- " ferred it to *C.* for valuable conſideration. *Per* " HOLT, *Chief Juſtice*, *A.* may have *Trover* againſt " the ſtranger who found the Bill, for he had no " Title, though payment to him would have indemni- " fied the Bank. But *A.* cannot maintain Trover " againſt *C.* by reaſon of the Courſe of Trade, which " creates a property in the Aſſignee or Bearer.

Miller v. Race. Hil. 31 G. II. 1 Burr. Manſf. 452.

" And thus a *Bank Note*, of which the Mail had " been robbed, having been purchaſed, without know- " ledge of the Robbery, for a valuable conſideration, " it was held *Trover* would not lie againſt the *Pur-* " *chaſer*; but that it was *Caſh* in his hands, who was " entitled to it accordingly againſt all the World; " this being neceſſary to the Freedom and Security of " Commerce, and a juſt reſult from the very Nature " of the ſubject in diſpute.

" And

" And in this reſpect, there is no difference between " *Bank Bills*, and other *Bills* of *Exchange*. 3 Burr. Manſf. 1524.

" In the *principal* Caſe juſt cited, Notice is taken of " ſome early Opinions before this Point of Juriſpru- " dence had been much agitated, evidently founded in " miſtake. As that which ſuppoſes ſuch a Bill, " might be paid to the Nominee of it, after it came " into the hand of a perſon entitling himſelf as *Bearer*, " without notice from the Bearer. A thing plainly re- " pugnant to the very Nature of theſe Tranſactions. 3 Lev. 299. Horton v. Cogge. Mic. 3 W. & M. C. B.

" And a later Caſe, which ſuggeſts that the Action " ought not to be brought in the Name of the *Bearer*, " but in that of the *Payee*, particularly ſpecified in the " Bill, in order to prevent a perſon claiming who " came into poſſeſſion of a Bill without conſideration, " was obſerved to go on a *Petitio Principii*, that ſuch " holder would be entitled: whereas the holder, who " claims as Bearer, will be put to prove the conſidera- " tion and the fairneſs of his poſſeſſion. Nicholſon v. Sedgewick. 1 Lord Raym. 180. 3 Burr. Manſf. 1521.

" A Bill may be drawn (though *Engliſh* Bills of Ex- " change in *England*, ſeem not generally ſo to be) pay- " able at *ſingle*, double, or treble *Uſance* (or Credit), " which is commonly at ſo many Months after Date: " but if a Plaintiff declare on a foreign Bill bearing ſuch " Uſance, he muſt aver in his Declaration what that " Uſance is. L. N. P. 269. Buckley v. Campbell. Hil. 7 A. Salk. 131.

" A Bill is good, if drawn, " *pay to me or order*," for " the third perſon is as effectually included in it, as if " it had been expreſſed in the uſual Terms. 6 Mod. 30.

Of

TIT. V.

"An *Acceptance* is an *undertaking* to pay on the "*Credit* of the *Drawer*. (*q*)

"There are no preciſe words requiſite to an Ac-"ceptance: any thing will make one that gives a de-"terminate Credit to the Bill,

Par. 2.

L. N. P. 271. 3 Bac. Abr. 610 Moll. B. II. c. 10. § 20.

An Acceptance may be *abſolute* or *conditional.*

1. *abſolute.*

"Thus," *leave the Bill with me, and I will accept it to morrow*, this is an Acceptance; for it is giving Credit to the Bill, and hindering the Proteſt in the mean time.

2. *conditional.*

Moll. B. 2. c. 10. § 20. 3 Bac. Abr. 610. Str. 648. Lord Raym. 444.

But if the Merchant ſay, leave the Bill with me, and I will look over my Books and Accounts between the Drawer and me; call to morrow, and accordingly the Bill ſhall be accepted: this is no complete Acceptance, becauſe it depends upon the Balance of the Account, and on the Merchant having effects in his hands to anſwer it: ſo that the Merchant gives no abſolute Credit to the Bill, but the Deliverer was willing to commit it to him, and to delay the Proteſt till his Anſwer.

2 Str. 817. Barnard, K. B. 87. 2 Lord Raym. 1542. 2 Str. 955. Hard. 136. 2 Barn. 120. 2 Str. 1000.

"And

(*q*) *The Caſe in* 6 Mod. *furniſhes an opportunity of aſcertaining, with reaſonable probability, when inland Bills of Exchange began to be conſidered in our Law, and what Idea was entertained of them at their firſt introduction to our Courts.* HOLT. Ch. Juſt. *ſays, I remember when Actions on inland Bills of Exchange did firſt*

" And this Acceptance is no otherwiſe neceſſary to " be in Writing, than to charge the *Drawer* with " *Damages* and *Coſts:* but an Action will lie againſt the " Acceptor on a *parol* Acceptance. L. N. P. 272. Lumley v. Palmer. Str. 1000.

" And, of Courſe, an Acceptance when in Writing " is not neceſſary to be on the Bill itſelf, but may be " by Letter or otherwiſe detached from the Bill.

" So a Draft on a third perſon by the *Drawee*, to pay, " and place to Account of *Drawer*, is an Acceptance. Moor v. Withy. Tr. 10 Geo. III. B. R.

" An Acceptance is good after the time of payment " elapſed, and amounts to a promiſe to pay, generally. " So an Acceptance to pay at a longer Date than the " Bill has to run. Jackſon v. Pigot. 10 W. III. Salk. 127. V. alſo S. P. Salk. 129. 2 Str. 1153.

" It was before ſhewn, that an Acceptance might be " conditional on a fact aſcertainable at the time: and " ſo it may on a future *contingency:* and will be bind- " ing when the contingency takes place: as to pay, " *when effects come to hand*, or the like. But where " the Plaintiffs were entreated to accept and draw on *G.* " they drew on *G.* who *does not accept:* this was held " no implied Acceptance of the Plaintiffs. Smith v. Abbot. Str. 1152. Smith v. Niſſen. T. Rep. Tr. 26 G. III.

Par. 3.

Of partial Acceptance.

" An *Acceptance* may be alſo *partial*, and ſhall be " good *pro tanto:* for ſo much of the Value as the " Acceptor conſents to charge himſelf with reſponſibility. L. N. P. 270.

" So it may be otherwiſe qualified: as part in *goods* " and part in money: but he to whom the Bill is due, " may refuſe ſuch Acceptance, and proteſt the Bill, ſo " as to charge the Drawer. V. Sprat v. Matthews. E. 26 G. III. T. Rep.

Whoſe

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firſt begin, it was about thirty Years ago (this brings it to about 1670*). And there they laid a particular Cuſtom between* London *and* Briſtol, *and it was an Action againſt the Acceptor. The Defendant's Counſel would put them to prove the Cuſtom: at which,* Hale, *who tried it, laughed, and ſaid, they had a hopeful Caſe on it. And, in my Lord* North's *Caſe, it was ſaid, this*

Par. 4.

Whoſe Acceptance ſhall bind another.

If a Bill be drawn on two, or either of them, either may accept the Bill: and if one accept, it can not be proteſted for non-acceptance: but the party accepting only, is liable to the Action; becauſe he only has given Credit to the Bill.

Molloy, B. II. c. 12. § 18.

But if a Bill be drawn on two "jointly, who are not "Partners," it ſeems that both muſt accept it, otherwiſe it may be proteſted: "for their Credit is tendered "by the Drawer to the Payee jointly.

If ten Merchants employ one Factor, and he draws a Bill upon them all, and one accepts it, it ſhall only bind him, and not the reſt; becauſe they are ſeparate in Intereſt, one from the other.

Pinkey v. Hall. Lord Raym. 175 Mic. 8 & 9 W. III. S. C. Salk. 126. very ſhort but clear.

But in Caſe of two JOINT TRADERS, the *Acceptance* of the one will bind the other; becauſe they trade for a common Benefit: and therefore, where one of them gives Credit, it is the Act of both.

But

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the Cuſtom, in that Caſe, was part of the Common Law of England: *and the Actions ſince became frequent as the Trade of the Nation did increaſe.—And the Notes in queſtion, are only an invention of the* Goldſmith's *Company, who had a mind to make a Law to bind all thoſe that did deal with them: and ſurely, to allow ſuch Note to carry any* Lien *with it, were to turn a piece of paper, which is, in Law, but* Evidence *of a parol Contract, into a* Specialty.

Mic. 20 Car. II. in Scacc. Hard. 485.

This Caſe ſeems to have manifeſted, that the Court were very anxious to keep up the diſtinction between promiſſory Notes, though ex reſsly drawn negotiable, and Bills of Exchange; *and that the Bills of Exchange, at that time, were ſuppoſed not much to concern* inland *commerce: for a chief part of the ſtreſs ſeems to be laid on their hindering exportation of Money* out of the Kingdom.

The firſt Caſe that has hitherto occurred to me, was in 1668, *and it is ſo well reported, and illuſtrates ſo much the Idea entertained at that time, that I ſhall quote it at large.*

In an Action for 100l. (*on* DEBT), *the Plaintiff declared, that by the* Cuſtom of England, *if*

But if a Factor of " a Public" Company, draw a Bill on ſuch Company, and any Member accept it, it ſhall not bind the Company or any other Member of it: becauſe it is only a private Act of ſuch perſon; and not of the Company " directly, or by their Officer " duely authorized for ſuch purpoſes."

A Servant, or " even" a Wife cannot accept a Bill without an Authority from the Maſter or from the Huſband: unleſs they uſually made ſuch Acceptances. Moll. B. II. c. 10. § 27. Sty. 307.

Par. 5.

Collateral Acceptance.

A. draws a Bill upon *B.*, and *B.* being in the Country, *C.*, his Friend, accepts it: the Bill muſt be proteſted for the Non-acceptance of *B.*; and then *C.*'s Acceptance ſhall bind him to anſwer the Money. 12 Mod. 410. Salk. 129. 3 Bac. Abr. 608. Com. Rep. 76. Lutw. 891, 2. 896, 9. Carth. 129.

So if a Bill be not accepted, and a third Perſon accepts the Bill for the Honour of the Drawer; this ſhall bind him to anſwer the Money: becauſe he hath given Credit to the Bill: and by conſequence, he muſt anſwer the Money for which he hath given Credit. Moll. B. II. c. 10. § 33.

A Bill,

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if a Merchant ſend a Bill of Exchange to another Merchant, to pay Money to another Perſon, and the Bill be accepted, that he who accepts the Bill, does thereby become chargeable with the Sum therein contained; and that a certain Merchant drew a Bill of Exchange upon the Defendant, *payable to the* Plaintiff; *which Bill the* Defendant *accepted:* per quod Actio accrevit. *And upon* nil debet *pleaded, a Verdict paſſed for the* Plaintiff. *And now it was moved in* Arreſt *of Judgement by* Offley.

1. That the Declaration is naught.
2. That the Action of Debt lies not.

For the firſt, *he ſaid the* Declaration *was* naught; *becauſe the Plaintff declared,* per Conſuetudinem Angliæ: *becauſe the* Cuſtom *of* England *is the* Law *of* England,* *which the Judges*

* Conſuetudo Angliæ eſt Lex Angliæ.

are

Moll. II. c. 10. § 28. Styl. 370.

A Bill, once accepted, cannot be revoked "by the "Party who hath accepted it," although the Acceptor has advice that the Drawer is broke: becauſe, by Acceptance, he hath given Credit to the Bill; and after Credit given, the Acceptor has made the Bill his own, and, by Cuſtom, the Payment is to be made where the Credit was given: and the Cuſtom muſt be particularly alleged, being the Foundation of the Action.

TIT. VI.

2. INDORSEMENT.

"An Indorſement is a ſigning by one who paſſes a "Bill, whereby he, implicitly, acknowledges himſelf to "undertake, that the ſame ſhall be paid as Caſh."

It

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are bound to take notice of: and that therefore, the Conſuetudo Angliæ, *ought to have been omitted; and that it would have been naught, on a general Demurrer.* †

Secondly, an Action of Debt lies not in this Caſe, becauſe there is no Privity, nor any Contract, Y. B. 4. fo. 18. *in Deed or in Law, between the Plaintiff and Defendant: and where theſe fail, Debt lieth not.*

Stevens pro Quer. *As to the firſt Exception, it has been made a doubt before; but it is now ſettled to be good.—And for the Second, it is a Rule in Law, that where the Common Law, or any particular Cuſtom creates a* Duty, DEBT *lies for it.*

Chief Baron. This is a Caſe of Weight and Concern for the future, and deſerves Conſideration. Declarations upon Bills of Ex-

† The Caſe of 2 *H.* 4. was quoted in ſupport of this Doctrine: but it does not ſupport it, for there the Plaintiff counted on the General Cuſtom of the Realm; and Defendant would have had him ſhew the Cuſtom; and this the Court very ſenſibly overruled: for the common Cuſtom is the Common Law.

‖ A DUTY here is *a legal Liability in a ſum certain:* ſee this Principle accurately ſtated in the *Law* of *Niſi Prius*;‖ it will be neceſſary to ſpeak of it more at large hereafter in treating of the Action of Debt, &c.

‖ P. 2 H. IV. 6. ‖ P. 11. C. IV. 167.

change

It is uſual when Bills of Exchange are drawn, eſpecially when they are payable at two or three Uſances, for the Deliverer to endorſe them over to others in the Traffic of Goods and Commodities: and the Receiver of ſuch Bills, has not only the Original Credit of the Drawer at ſtake, and of the Acceptor, if the Bill be accepted, but alſo of the Indorſees of ſuch Bills: becauſe, ſuch Indorſees have paſſed ſuch Credit in their payments inſtead of Money, and the Perſons receiving ſuch Bills, have Actions in their own Names againſt either: for all their ſeveral Credits are at ſtake when they have paſſed their Subſcriptions inſtead of Money.

A Note,

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change have often varied: ſometimes Declarations have been on the Cuſtom among Merchants only, without laying an expreſs Promiſe: Afterwards they came to declare upon an Aſſumpſit. And after all, if an Action of Debt will lie, it will be a ſhort Cut, and pare off a long Recital. For if Debt *lies, a Man may declare upon a Bill of Exchange accepted in* Debt, *or in an* indebitatus aſſumpſit *for ſo much Money. But for the Plaintiff's inſerting the* Cuſtom of the Realm *into his Declaration here, I hold that to be mere ſuperfluity and redundancy, which does not vitiate the Declaration. And without doubt, if the* Common Law, *or the Cuſtom of the Place, create a* Duty, DEBT *lies for it: as in the Caſe of a* Toll *due by* Cuſtom, 20 H. 7. 1. *But the great Queſtion here is, whether or no, a Debt or* Duty *be hereby raiſed. For if it be no more than a* collateral Engagement, *order, or Promiſe,* DEBT *lies not: as in the Caſe that has been cited of Goods delivered by* A. *to* B. *at the requeſt of* C. *which* C. *promiſes to pay for, if* B. *do not: for in that Caſe, a Debt or Duty doth not ariſe between* A. *and* C., *but a* collateral Obligation *only. In our Caſe, the* Acceptance *of a* Bill *amounts clearly to a* Promiſe *to pay the Money; but it may be a Queſtion, whether it amount to a* Debt *or not; for if ſo, then it is aſſign-*

1 Show. 317. L. N. P. 278.

Str. 516. A NOTE, payable to a *Femme Sole*, who marries before Transfer of it, muſt be endorſed by her Huſband.

L. N. P. 273. In like manner, an Executor or Adminiſtrator, "may indorſe a Bill of their Teſtator.

King and others, Executors of Stevenſon, againſt Thom. T. R. Mic. 27. G. III. 487. "And where Bill is endorſed to *A.* and *B.* as *Executors*, "they may declare, as ſuch, againſt the Acceptor.

"If

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aſſignable to the King, *or by* Commiſſioners *of* Bankrupt. *And it were worth while to enquire what the Courſe hath been among* Merchants; *or to direct an Iſſue for trial of the Cuſtom among Merchants in this Caſe; for although we muſt take notice,* in general, *of the* Law *of* Merchants; *yet* all *their Cuſtoms we cannot know but by Information.*

Precedents were ordered to be ſearched: and afterwards in Hil. *Term, it was moved again: and ſhewn, that by the Opinion of* Chief Juſtice, Debt *lay not, and all the Clerks in* Guildhall *certified, that they had no Precedent in* London, *of* Debt, *in ſuch a Caſe. Afterwards* (*in the ſame manner*) *the Court declared their opinions, that an* Action *of* Debt *would not lie upon a* Bill *of Exchange* accepted *againſt the Acceptor: but that a* ſpecial Action on the Caſe *muſt be brought againſt him. For that the Acceptance does not create a Duty:—And this courſe of* accepting Bills, *being a* general Cuſtom *amongſt all Traders, both within and without the Realm, and having every where that effect, as to make the* Acceptor *ſubject to pay the Contents, the Court muſt take notice of that Cuſtom; but the Cuſtom does not extend ſo far as to create a Debt; only make the Acceptor* Onerabilis *for the Money.*

Here follows a remark (*and a very reaſonable one it ſeems*), *probably made by the Reporter;* "*tho' Cuſtom may give an action of debt, as in* 20 H. 7. 1. *of Toll: and ſo in caſe of a Fine for a Copyhold.*"

And it then concludes,

Wherefore, and becauſe no Precedents could be produced, that an Action of Debt *had been brought upon an* accepted *Bill of Exchange:* Judgement *was arreſted.*

The Doctrine of General Cuſtoms, *may illuſtrate what has been before intimated, concerning the Diſtinction between* General *and* Special Acts *of* Parliament.

With

Par. 2.

Order of Liability.

" If the *Bill* be an *indorſed* Bill, and the *Indorſee* " cannot get the Drawee to diſcharge it, he may call " upon the Drawer or the Indorſer, or, if the Bill has " gone through many hands, any one of the *Indorſers:* " for each *Indorſer* is a *Warranter* for the payment of " the Bill, which is frequently taken in payment as " much (or more) upon the Credit of the *Indorſer* as of " the *Drawer*. And if ſuch *Indorſer*, ſo called upon, " has the Names of one or more *Indorſers* prior to his " own, to each of whom he is properly an *Indorſee*, he " is alſo at Liberty to call upon any of them to make " him ſatisfaction, and ſo upwards. But the *firſt* " Indorſer has nobody to reſort to but the *Drawer* " only.

" In

With regard to the Term Exchange, *there is another ſenſe of it properly relative to* foreign *Bills. And in this ſenſe* Exchange *is a Reduction of Coins or Denominations of Money from the Species of one Country to thoſe of another; or in a Senſe more materially* commercial EXCHANGE is the RELATIVE Value of SPECIE *in the* CONVERSION *of* BILLS, *&c. into* CASH *payable in* ANOTHER COUNTRY. *And this greatly depends upon the* abſolute *Value. This* relative *Value is fixed by the current Courſe of Commerce, and the general Opinion and Conſent of Merchants: but is not fixable by a permanent Law of any State; being in its Nature ſubject to inceſſant Variations from innumerable circumſtances. In general where there is much Specie the Exchange is* low: *where there is* leſs, *the Exchange, or relative Value between the two Countries, muſt be higher in that Country, which has the comparative* deficiency *of* Specie.

When Money in France, *for inſtance, yields money of the ſame ſtandard and weight in* England, *the Exchange between theſe two Countries is ſaid to be at* PAR: *when it yields more than Par it is* high; *when* below, *it is* low.

When an Exchange is below PAR *from one Country to another, the former loſes as* Debtor *and* Buyer, *and gains as* Creditor *and* Seller.

What is to be proved againſt the Indorſer.

2 Salk. 127. L. N. P. 273.

" In an Action againſt the *Indorſer*, the Plaintiff is " not obliged to prove the hand of the *Drawer*; for if " the Note be *forged*, the *Indorſer* is liable.

L. N. P. *ibid.*

" On a *Bill* payable to *A.* or *Bearer*, it is not neceſ- " ſary to prove a Demand on the *Drawer*, for there " the *Indorſer* is in the Nature of an original Drawer.

Mic. 32 G. II. Heylyn v. Adamſon. 2 Bur. Manſf. 674. 2 Str. 1087.

" But on a Bill payable to *A.* or *Order*, Demand on " the Drawer is to be proved, in general; if Bill not " accepted; but if accepted, then on the *Drawee*, " who is the Acceptor.

" Yet if the *Indorſer* have paid part of the Money, " this Proof is no longer neceſſary.

" As

Thus, let the Par *be repreſented by* 100, *if the* Exchange *between* England *and* France *is at* 90, *then* England, *in purchaſing of* France, *ſuffers a depreciation to that amount; but if ſhe ſell to* France, *ſhe will be to receive the difference as a balance in her favour.*

Or ſuppoſe, as between France *and* Holland *in* 1744, *that the* Par *was* 54 gros, *for a* French crown *of* three livres, *and that the Exchange to* Holland *is* below Par, *namely at* 50. *let there be a Bill for* 5400 gros, *payable from* Holland *to* France, 108 French *Crowns will pay this: and at* 54 *it would have been paid by* 100; *the ſuppoſed abſolute Value: and at* 60 *it would have been diſcharged by payment of* 90 *Crowns.*

Now reverſe this: let France *have to pay to* Holland 108 Crowns: *at* 50, *ſhe muſt pay* 5,400 Gros: *at* 54, *ſhe muſt pay* 5832: *and at* 60, *ſhe muſt pay* 6480. *This is not meant to ſtate the Mode of payment in Exchange, or of Computation between different Countries, but to intimate the Nature of it.*

Vide Cyclop. laſt Ed. Tit. Exchange.

Exchange *has a* third *mercantile ſenſe, as it ſtands for the* Commiſſion *which a Merchant receives for Money advanced payable by Bill abroad; and this varies from* 3 *to* 15 *or more per Cent. in different places and at different Periods.*

Of

" As to *foreign Bills* of *Exchange*, the point of *De-*
" *mand* was ſolemnly determined in the Caſe of *Brom-*
" *ley* v. *Frazier*. There on *Action*, on the *Caſe* by the
" *Indorſee* againſt the *Indorſer*, the Objection upon
" general Demurrer was, that they had not ſhewn a
" Demand on the Drawer, in whoſe default only it is,
" that the Indorſer warrants. And becauſe this was a
" point unſettled, and becauſe there are contradictory
" opinions in *Salkeld* 133 and 134, the Court took
" time to conſider of it. And on the ſecond Argu-
" ment they delivered their Opinion that the Declara-
" tion was good enough: on the ground of inconve-
" nience and circuity, contrary to the Nature of this
" Mode of Negotiation, if it ſhould be otherwiſe. For
" that

Of Policies of Insurance.

Though Policies *of* Inſurance *are properly, at leaſt in general, Matters of* Specialty, *yet they have ſuch a Connection, eſpecially thoſe upon* Ships, *with mercantile Tranſactions, that they are proper to be here mentioned.*

The Court *of* Policies *of* Aſſurance, *erected in the Year* 1601,* *is a Juriſdiction which the Great Seal is empowered annually to create by granting a Commiſſion to the Judge of the Admiralty, the Recorder of* London, *two Doctors of the Civil, two of the Common Law, and eight Merchants: any three of which, one being a Civilian or a Barriſter, are thereby, and by the Statute of the third ſubſequent King, empowered ſummarily to determine all cauſes concerning Policies of Aſſurance in* London, *with an Appeal to Chancery by way of Bill.*

But this power being held (perhaps by too reſtricted a Conſtruction derived from the Preamble *ſolely, for the* enacting Clauſe *ſeems ſufficiently general) to be confined to Cauſes inſtituted by the* aſſured, *and not by the* Aſſurers; *and it being certainly confined to ſuch Policies of Aſſurance as ſhould be entered in the Aſſurance Office of the City of* London, *no ſuch Commiſſion has lately iſſued; but Aſſurance Cauſes have generally been determined by the Verdict of a*

Comm. III. c. 6. p. 74, 5.

* 43 Eliz. c. 12.

13 & 14 Car. II c. 23.

1 Show. 396.

" that the favour allowed to this ſpecies of Contract " was for commercial ſecurity and diſpatch, by ſuch " Bills paſſing from hand to hand, as if they were Caſh. " And that accordingly the more Indorſements the " greater Credit to a Bill; but which could not be, if " the reſort were neceſſary to the Drawer, in whatever " part of the Globe, or however to be traced. And " that as to the Notion that the Indorſer warrants " only *in default* of the Drawer, there is no Colour for " it: for that every Indorſer was in the Nature of a " *new Drawer*. And that at *Niſi prius* the Indorſee " never was put to prove the hand of the *firſt Drawer*, " where the Action was againſt the Indorſer.

" That every inconvenience in that Caſe ſuggeſted, " holds to a great degree, and every other Argument " equally, in the Caſe of INLAND BILLS of EX- " CHANGE.

" The

Jury of Merchants, and the Opinion of the Judges, in caſe of any legal Doubt, whereby the Deciſion is more ſpeedy, ſatisfactory, and final. At the ſame time the Author of the Commentaries remarks that it were to be wiſhed 13 & 14 Car. II. § 3, 4. *that ſome of the parliamentary powers inveſted in thoſe Commiſſioners (eſpecially for the examination of witneſſes, either beyond ſeas, or ſpeedily going out of the Kingdom) could be adopted in the Courts of* Weſtminſter, *without requiring the Conſent of Parties.*

Comm. II. c. 30. p. 461.

To confine theſe Inſurances to their proper object, the encouragement of Commerce, and the ſecurity of fair Trade, a ſtatute was paſſed about the middle of the late Reign, by which all inſurances, intereſt or no intereſt, *or without farther proof of the Intereſt than from the Policy itſelf, or by way of gaming or wagering, or without benefit of ſalvage to the inſurer, ſhall be totally null and void, (with an exception indeed to privateers, and ſhips in the* Spaniſh *and* Portugueſe *trade) and that no* reaſſurance *be lawful, except the former inſurer be inſolvent, a bankrupt, or dead.*

19 Geo. II. c. 37.

And

"The COURT, therefore, in the principal Caſe, "thus declared, We are all of opinion that to entitle "the Indorſee of an INLAND Bill of Exchange to "bring an Action againſt the Indorſer, upon failure of "payment by the Drawee, it is *not* neceſſary to make "any Demand of, or Enquiry after, the firſt *Drawer*. 2 Burr. Manſf. 676.

"If

And in general theſe being Contracts, the very eſſence of which conſiſteth in the pureſt faith and integrity, they are vacated by any the leaſt ſhadow of fraud or concealment: at the ſame time being much for the ſecurity and extenſion of trade, they are protected and encouraged both by Common Law, and by various Acts of Parliament.

And it was held, even before the Statute, that Inſurance without Intereſt was relievable. Indeed there was a circumſtance of manifeſt Fraud *in that Caſe, by uſing the Name of the firſt Subſcriber as a* Decoy, *which might be a part inducement; but the opinion of the Court, as reported in the Book, is founded on the Extent of the general Principle.*

The Caſe was: Thornborough *and others came to the Inſurance Office, and bought a Policy on the Life of one* Horwell, *(in whoſe Life they had no Intereſt) for one Year; and the Policy ran,* whether Intereſt or not Intereſt, *and the* Premium 5 *per Cent.*

They took this way to draw in ſubſcribers: one Marwood, *a noted Merchant on the Exchange, and a leading Man in ſuch Caſes, to ſubſcribe firſt: but in caſe* Horwell *died within the year,* Marwood *was to loſe nothing: on the contrary, he was to ſhare what ſhould be gained from the other ſubſcribers.*

On the Credit of Marwood *ſubſcribing, ſeveral others, who had enquired of him about the Life enſured, who was his neighbour, ſubſcribed likewiſe.* Horwell *lived about four Months, and then died.*

On Bill to be relieved againſt the Policy, this Matter was all confeſſed by Anſwer. The Court decreed the Policy to be delivered up, and the Premium *to be repaid, the Plaintiffs deducting thereout their Coſts.* Wittingham v. Thornborough. Ch. Pre. 20. Hil. 1690.

The Court ſaid, this way of inſuring was firſt ſet up for the Benefit of Trade, that when a Merchant happened to have a Loſs, he might not be undone by it, the Loſs this way being borne by many; but if ſuch ill Practices were uſed, it would turn to the ruin of Trade, inſtead of advancing it. Preamble to 43 Eliz. c. 12.

And again, in another Caſe, the Court ſaid, on the ſame general Reaſon, Take it, that the Law is ſettled that if a Man has no Intereſt, and inſures, the inſurance is void; 2 Vern. 269. Goddart v. Garret. Tr. 1692.

More v. Manning, 6 G. 1. Comyns 311. Acheſon v. Fountain. 1 Str. 557. Tr. 9 Geo. I. Ecie & al. v. E. J. Comp. Tr. 1 G. III. 2 Burr. 1216.

" If the *original* Bill be made payable to *A. B.* or " *Order*, it is in its Nature *negotiable* and *aſſignable*, and " is transferred by Indorſement as amply without the " words, OR ORDER, added to all or ANY of the " ſucceſſive Indorſements as with them. For the " Transfer follows the Nature of the Bill itſelf, and is " GENERAL, like that.

" Very different is a mere Authority to receive as " ſervant or Agent.

Carth. 403. Paſch. 9 W. III.

" And converſely, (ſince what is payable to a " perſon by Indorſement of ſuch a Bill is payable to " his *Order*) what is payable to his *Order*, may be de- " manded by the party's ſelf. As, pay the Contents " of this Bill unto the Order of Mr. *Fiſher*. Mr. " *Fiſher* brought an Action: the Defendant demurred; " becauſe it was not to *Fiſher* himſelf, but to his Order: " but the Court held that *Fiſher* might well bring the " Action. And he had Judgement accordingly.

" An

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void; *although it be expreſſed in the Policy*, intereſted or not intereſted.

What Naval Inſurance *is*.

V. Bac. Abr. Tit. MERCHANT. (I) 3 p. 598.

NAVAL INSURANCE is where, for a certain ſum, a Perſon takes on himſelf the Riſque a SHIP and GOODS, or both, are to run in a certain Voyage.

Skinn. 411, 2. * Tomkyns and Barnet.

If a Man pay Money on a Policy of Inſurance, ſuppoſing a Loſs where in reality there was no Loſs, either in Fact, the Ship being ſafe, or in Law, the inſurance being in fraud of the inſurer, *he ſhall recover the Value on* indebitatus aſſumpſit.

‖ 2 Vern. 176.

‖ *Where there is Inſurance againſt* Reſtraint of Princes, *this intends ſuch Reſtraint as the party by a lawful and regular Conduct might have avoided. And therefore, where the enſured ſhall navigate contrary to the Law of the Country, or where ſeizure is incurred by non-payment of Cuſtoms, he is not within the benefit of the Policy.*

M. 1 J. II. B. R. Skinn. 243.

† *An Inſurance* until the Ship ſhall have ended, and be diſcharged her Voyage, *is not ſatisfied by her Arrival in Port merely.*

§ Skinn. 327.

§ *Inſurance by* T. S. *for himſelf and ſuch as ſhould have Goods on board the Ship. Good as to ſuch who might lawfully have Goods on board.*

If a Ship is warranted to depart

" An Indorſement to pay *part* of a Bill, ſo as to " ſplit the Entirety of it into different payments, is " not good, becauſe it multiplieth Actions: and an " Uſage of ſuch a kind, contrary to the Analogy of " Caſes to the Nature of the Tranſaction and to it's own " Principles, the Law will not ſuffer to obtain the Au- " thority of a Cuſtom.

1 Salk. 65. Hawkins v. Cardee, M. 10 W. III. B. R. Carth. 466. S. C. L. N. P. 271. S. P.

" The Holder of a Bill of Exchange, may ſue a ſub- " ſequent *Indorſer*, notwithſtanding an ineffectual Ex- " ecution and Diſcharge of a precedent one.

M. 19 G. III. C. P. Hayling *againſt* Mulihall, Bl. 1235.

TIT. VII.

PROTEST.

" Having treated of the ſeveral *Parties* ſucceſſively " concerned in a Bill of Exchange, the *Drawer* and " original *Payee*; the *Acceptor*; and the *Indorſors*; " it is now fit to obſerve the ſeveral Conſequences, " dependant on *Non-Acceptance* and *Proteſt*.

" It

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part with Convoy, this muſt be underſtood not only departing the firſt port with Convoy, but alſo a continuance with ſuch Convoy, if poſſible, during the Voyage. *

But Evidence, that the Ship was ſevered from her Convoy by ſtreſs of Weather, and taken, ſhall render the Inſurers liable, if no neglect appears of endeavour to rejoin the Convoy. ‖

Regularly, a Loſs by Deviation, *either directly or conſequentially happening, is not within the benefit of the Policy; which protects only in and during the Voyage.*

But to go out of the courſe for the purpoſe of joining Convoy at the uſual place of rendezvous for Convoy, is no Deviation.

So going back to repair, *having ſprung a leak in the Voyage, or for the purpoſe of avoiding an Enemy, or for any other purpoſe, obviouſly for the benefit of the inſured, and comprehended within the fair meaning of the Policy.*

* Bac. Abr. 3. 599.

‖ Carth. 216, 7. Hil. 3 W. & M. B. R. S. C. Salk. 443. 3 Lev. and much beſt. 48 Mod. 58. though at the end there is a tranſpoſition; for it ſhould be, *if the Ship had run from the Convoy.* Bond. v. Nutt, Cowp. E. 17 G. III. 601, 9. v. alſo Str. 1264. 1 Atk. 545. Delaney v. Stoddart, T. Rep. M. 26 G. III.

"It has been remarked already, that a partial and "conditional Acceptance may be good. However, "the Holder of the Bill may *proteſt*, if the *Drawee* "offer any thing ſhort of an abſolute Acceptance for "the whole.

Str. 1153.
L. N. P. 270.

"For payment of a Bill of Exchange, after the "Day which it has to run, the Acceptor," by the Cuſtom of *London*, "which is general in this Caſe "throughout *England*," has three Days, "which are "called" Days of Grace: which ſeems to be like the *Quarto die poſt*, on return of Writs which might have ſprung from the *Saxons*, "thinking" it unbecoming a Freeman to do any Act immediately.

When the three Days of Grace are out, "in caſe "of Non-Payment," the party "who has tendered it, "ſhould note the Bill with the Date of the tender and "refuſal, and then it is to be proteſted, according to that "Date, for Non-Payment."

L. N. P. 271, 2.

The

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† Hore v. Whitmore, E. 18 G. III. Cowp. 784, 5.
§ Pawſon v. Watſon, 785. De Hahn v. Hartley, T. R. Tr. 26 G. III. 343.
* Gardiner v. Croſdale, Hil. 33 G. II. 2 Burr. Manſ. 904. 908. S. C. Bl. 198, 9.

L. N. P. 129.

Warranty.

† *A Warranty to Sail on or before ſuch a Day, makes the Sailing accordingly an indiſpenſible Condition without regard how it may have been prevented.*

§ *A Warranty muſt be* literally *performed: nothing tantamount will ſatisfy: it excludes the conſideration of an equivalent: otherwiſe of a* Repreſentation; *for in that it is ſufficient if it be* Subſtantially *performed. And a Warranty may be written in the* Margin *of a Policy: for thus it is ſtill part of the inſtrument of Inſurance.*

* *The* inſured *may recover on a* partial *though declaring on a* total *Loſs: For this is not in the Nature of an Action of Debt: it is an Action on the Caſe, a liberal and equitable Action in which the Plaintiff may recover* leſs, *though not more, than the Sum for which he ſues: The Defendant, on this general Action, comes prepared to ſhew that either no Loſs happened, or none with which he is chargeable, or that he is chargeable but for part: And if a partial Loſs could not be recovered under ſuch general Declaration, it would introduce great inconvenience, by making diſtinct Counts requiſite for every Species of Damage and every poſſible* Quantum *of Loſs.*

Evidence

The *Proteſt* for *Non-Acceptance* or *Non-Payment*, muſt be made and ſent over in due and covenient time. "And it ſeems that," if the three Days of Grace end on a *Saturday*, the holder muſt proteſt it on *Monday*, and ſend it away by the next Poſt: and if the Proteſtation, within the time be neglected, the Drawer will not be anſwerable; becauſe the Bill of Credit was given inſtead of Money: and if the Deliverer neglect to proteſt it in due time, it is "he" has given Credit to the Correſpondent, and therefore ought not to be anſwered by the Drawer of the Bill.

Moll. B. 2. c. 10. § 17. 2 Keb. 584. Ventr. 45. Mic. 21 Car. II. B. R. Show. 164.

Barnard. K. B. 305.

"And the convenient time of proteſting for Non-"Acceptance or Non-Payment, is not arbitrary and "vague,

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Evidence of Acts done with an intention to deviate, but without actual *Deviation, ſhall not defeat the Policy.* *

Where the Defendants enſured Goods to London, *and until the ſame ſhould be ſafely landed there. The Evidence was, that the Ship arrived in the port of* London, *and the Owner of the Goods ſent his Lighter and received the Goods out of the Ship: but before they reached Land, by an Accident they were damaged.* ‖

Held, that on this Evidence the Inſurance was diſcharged: but that it would have been otherwiſe, had the Goods been ſent off by the Ship's Boat.

* Str. 1249. Hil. 19 G. II. Foſter v. Wilmer.

‖ Sparrow v. Caruthers, Tr. 18 G. II. Str. 1236.

Where the Value ſaved comes ſhort of the freight, *the inſured is entitled to conſider it as a total Loſs.* †

Where a Ship goes out, and is not heard of within ſuch time as ſhe, by the general courſe of Voyages ſhould have been, this negative Evidence ſufficiently infers the preſumption ſhe was loſt at Sea; and though there be an Exception in ſuch inſurance, that it ſhall not extend to captures and ſeizures, this ſhall not avail the underwriter: becauſe the preſumption is that of ſuch Accidents, notice would have arrived. §

An Inſurance on the Ship will not cover Seamens *Wages.*

† Mic. 10. G. II. Str. 1065.

§ Str. 1199. Green v. Brown, Mic. 17 G. II.

Robertſon v. Ewer, Hil. 26 G. III. T. Rep. 127, 32.

Hill v. Lewis, Salk. 133.

" vague, for if it were, that Certainty of Contracts, " which is eſſential to Trade, would have no exiſtence " ſince.

Allen v. Dockwra, *coram* Treby, C. J. Mic. 10 W. III. Salk. 127.

" And *Notice* of ſuch Proteſt, as early as reaſonably " may be, is neceſſary to charge the Drawer: other- " wiſe the Law will imply the Bill paid; becauſe of " the *Truſt* and Confidence between the Parties, and the " extreme inconvenience to Commerce, if a Bill might " riſe up to charge the Drawer at any diſtance of time, " when, in the meanwhile, all reckonings and accounts " may have been adjuſted between the Drawee and " Drawer.

" And

Lockyer v. Offley, E. 26 G. III. T. R. 252.

The Voyage determined, which was the Object of the Inſurance, the underwriter ſhall not be liable, though the Ship be loſt in conſequence of a cauſe which took place during her Voyage: as if ſhe be ſeized on account of an Act of Smuggling committed by the Maſter, for it is, at the ſtrongeſt, only like the Caſe where a Ship was inſured for ſix Months: three days before the expiration of that Term, ſhe received, what the Sailors emphatically expreſs, her death's Wound; but by pumping, was kept afloat till three days after the time: and, in that Caſe, the inſurer was held not liable.

Meretony and Dunlope, E. 23 G. III.

Where every thing is done for the probable benefit of all parties concerned, and according to uſage, the inſured *ſhall not ſuffer the loſs: and a tranſaction in the courſe of the* Voyage, *though not literally upon it, ſhall come within the Inſurance.*

‖ Kelly v. R. Exch. Aſſur. Comp. E. 30 G. II.

And therefore, in an Action brought againſt the Royal Exchange *Inſurance Company, upon a Policy on the Body, Tackle, Ordnance, and Apparel of the Ship* Onſlow, *againſt Perils of the Seas, Men of War, Fire; and then, in general Terms, from the* Thames *to all places beyond the* Cape *of* Good Hope *and back again, until moored twenty-four hours in the River* Thames. ‖

Cuning. C. 72. p. 282, &c. S. C. 2 Burr. Manſf. 341.

When the Ship got to Canton, *the Captain laid up his Sails and Tackle on a* Bank Saul, * *according to the Cuſtom in that Navigation. A* Swediſh *Ship took Fire, which burnt the Tackle of the* Onſlow; *adjudged that the* Inſurers *were liable.*

* Or Sand Bank.

After

" And, in general, it may be taken, that Credit given L. N. P. 273, 5
" to one of the Parties, without Notice to him who
" otherwiſe was liable, diſcharges the other: for this is
" a determining of the Election.

" And it is evident, that actual payment from one of Windham v. Wither and v. Trull, Str. 515. Cunningham, § 5. art. 6.
" the parties, amounts to ſuch a Satisfaction, as may
" be given in Evidence, in bar of an Action brought by
" the ſame Plaintiff againſt another. And therefore,
" where the Plaintiff brought two ſeveral Actions
" againſt the *Drawer* and *Indorſer* of a *promiſſory Note*,
" the Court ſaid, they would have laid the Plaintiff by
" the heels if he had taken out execution on both.

" But where the Drawer has no Caſh in the hands
" of the Drawee, Notice of the Bill being diſhonoured,
" is not neceſſary to charge the Drawer.

" And where a Bill is tendered by the Holder to Bliſard v. Hirſt, 5 Burr. Manſ. Mic. 11 G. III. 2670. 2. S. P. Goodall v. Dolley, T. Rep. 712. E. 27 G. III.
" the Drawee, for Acceptance *before* it becomes due,
" and

Abandonment.

After Notice of Loſs, the Inſured may abandon: *which is making a Renunciation to the* Inſurers, *and the* Inſured *comes in for ſo much as ſhall appear his Intereſt in the Adventure beyond the Value inſured.*

This Doctrine of Abandonment, *and of the Loſs which ſhall authorize it, was largely diſcuſſed in the Caſe of an* Inſurance *on the Ship* David *and* Rebecca, *and another on the* Goods *on board the ſaid Ship.* Cunningham, Art. 69. p. 278, 9.

The Caſe was this:—The Ship was bound from Newfoundland *to her Port of* Diſcharge *in* Portugal *or* Spain, *without the* Straights, *or* England, *to commence from the time of her beginning to load at* Newfoundland *for either of the above Places: and the* Inſurance *on the firſt Policy was, on the Body, Tackle, Apparel, Ordnance, &c. &c. of the Ship.* Goſs v. Withers, 2 Burr. Manſ. 683. Mic. 32 G. II.

The

" and is not accepted, Notice muſt be given to the " *Indorſer* of the Non-acceptance; otherwiſe he ſhall " not be charged, if the Drawer, when it becomes " due, fail of payment, not even though he have pro- " miſed after it became due, to take it up: the pro- " miſe being founded on a miſtake of Liability.

SECTION VI.

OF PROMISSORY NOTES.

" A *Promiſſory Note* is a written Engagement, not " under Seal, to pay a certain Sum of Money to a " Perſon or his Order.

" It

The Adventure to commence from Newfoundland, *and to continue during her Abode there, and until ſhe ſhould have been moored at Anchor twenty-four Hours in Safety.*

The Ship and Cargo were valued at the Sum Subſcribed without farther Account.

And it was agreed, that in caſe of Loſs, it ſhould be lawful for the Inſurers *to purſue, labour, travel, &c. for the Recovery of any part; and that the Loſs ſhould be conſidered as an Average Loſs.*

The Plaintiff declared on a total *Loſs; by* Capture *by the* French.

The other Policy was upon any kind of lawful Goods or Merchandize, laden or to be laden on board the ſaid Ship. And the Declaration ſtated diverſe Quantities of Fiſh and other lawful Merchandize, to the Value of the Money inſured, were put on board to be carried from Newfoundland *to her port of Deſtination: and ſo continued (except ſuch as were thrown over board as after mentioned) till the Loſs of the Ship and Goods.*

The Declaration then farther ſtated, that one fourth of the ſaid Goods were neceſſarily thrown overboard, in a Storm, to preſerve the Ship and the reſt of the Cargo: after which, the Ship and the Remainder of the Goods were taken by the French.

On

" It differs from a *Bill of Exchange*, which is an " *Order* to pay, including an *implied* Promiſe.

" In other reſpects, there is now a general Analogy " eſtabliſhed between *promiſſory Notes*, payable to a " perſon or his order, or to a perſon generally without " Name as *unto Bearer*; and Bills of Exchange. Such " Notes being now unqueſtionably aſſignable, and *in-* " *dorſable*, with the ſame general conſequences and " rules as Bills of Exchange. 3 & 4 A. c. 9. L. N. P. 272.

" And

On the Special *Caſe it appeared, that the Ship departed from her proper port; and on the 23d of* December, 1756, *was taken by the* French. *And that the* Maſter, Mates, *and all the* Sailors, (*except an Apprentice and Landman*) *were* taken out and carried to FRANCE. *That the Ship remained* IN THE HANDS OF THE ENEMY, EIGHT DAYS, *and was then* retaken *by a* Britiſh Privateer; *and brought into* Milford Haven *on the 18th of* January, *and that immediate* Notice *was given by the* Aſſured *to the* Aſſurers, *with an* offer *to* ABANDON *the Ship to their Care.*

It was alſo proved on the Trial, that previous to the Capture by the Enemy, a violent Storm aroſe, and that then part of the Cargo was thrown over-board as in the Declaration alledged, and the reſt SPOILED, *while the Ship lay at* Milford Haven, *after the offer to abandon. But ſome of theſe points ſeem to have been introduced from a doubt what might be the Deciſion of the Court on the effect of the Capture, &c. and to have had no eſſential influence on the Determination.*

The LORD CHIEF JUSTICE, *after noticing the indiſtinctneſs and diſcordancy of the Rules concerning what ſhould be held to be a Capture ſo as to alter the* property, *as a poſſeſſion after the Battle ended; a carrying* intra præſidia; *or, by later and clearer Authorities, a* Sentence of Condemnation, *obſerved, that the difficulty which might ariſe on*

L. N. P. 277.

" And this Analogy between *promiſſory* Notes and " *Bills*, ſeems to take effect from the *Indorſement:* for " then a Note is an Order to pay the Money to the In- " dorſee; which we have ſeen, is the very Definition " of a Bill of Exchange.

TIT. II.

What Notes ſhall be good as abſolute.

Morris v. Lee, Tr. 11 G. I. 2d Ld. Raym. 1396. S. C. 1 Str. 629.

" We have already ſeen a Bill or Note muſt be ab- " ſolute at all Events: it may be proper to adduce " ſome inſtances of diſputed Notes, held to have been " good within this Rule.

" The

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on the Queſtion, whether by the Facts in Evidence, the property *were changed, was foreign to this Caſe: that being a Point which it might have been neceſſary to decide between other parties, as againſt a* Vendee, *or* Recaptor, *but not between the* Aſſured *and the* Aſſurers.

That here was *a* Loss, *on which the general Queſtion depended, whether on the circumſtances it amounted to a* TOTAL Loss, *intitling them to* abandon *the Ship and Cargo to the* Inſurers, *for them to make what advantage of the Salvage they could:—or, in other Words, whether the* Inſured *had, under all the circumſtances, upon the* 18*th of* January, 1757, *an* Election *to* abandon?

His Lordſhip continued, the Loſs and Diſability was in it's Nature total *at the* time *it happened.* During Eight Days, *the Plaintiff was certainly intitled to be paid by the Inſurer as for a* total *Loſs. And in Caſe of a* Recapture, *the Inſurer would have* ſtood in his place. *The ſubſequent Recapture is, at beſt, a ſaving only of a* ſmall part: *half the Value muſt be paid for* Salvage. *The Diſability to* purſue the Voyage *ſtill continued. The Maſter and Mariners were* Priſoners. *The Charter-party was* diſſolved. *The Freight (except in proportion to the Goods ſaved) was loſt. The Ship, neceſſarily brought into an* Engliſh Port. *What could be ſaved* might not be worth the expence *attending it.*

The ſubſequent *Title to* Reſtitution, *ariſing from the Recapture, cannot take away a Right*

VESTED

" The *Indorſee* brought an Action againſt the *Drawer*, " upon a Note which appears to have been thus:— " I promiſe to be *accountable* to *A.* or order for 100*l.* " value received. Verdict for the Plaintiff. In arreſt " of Judgement, it was argued, that this Note was " not negotiable or aſſignable under the Statute: for " that it was not to pay at all Events, and that he " might account for it as a Factor, by laying out " the

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VESTED *in the* inſured *at the time of the Capture. But becauſe he cannot recover more than he has ſuffered, he muſt* abandon *what may be ſaved.*

I cannot find a ſingle Book, antient or modern, which does not ſay, that in caſe of the Ship being taken, the Inſured may demand as for a total *Loſs and* abandon.

And what proves the Propoſition moſt ſtrongly is, that by the general *Law, he may abandon in the Caſe merely of an* Arreſt *or an* Embargo *by a Prince,* not *an Enemy. Poſitive Regulations in different Countries have fixed a preciſe time, before the inſured ſhall be at Liberty to abandon in that Caſe. The fixing a preciſe time proves the general Principle.*

Every Argument holds ſtronger in the Caſe of the other POLICY, *with regard to the* GOODS.

No Capture by the Enemy, though condemned, can be ſo total a Loſs as to leave no poſſibility *of a Recovery. If the* Owner *himſelf ſhould retake at* any *time, he will be entitled: and, by the Act of Parliament, if an* Engliſh *Ship retakes at any time before condemnation, the Owner is entitled to Reſtitution upon ſtated Salvage This Chance does not ſuſpend the demand, for a* total *Loſs, upon the Inſurer: but Juſtice is done, by putting him in the* place *of the* inſured, *in Caſe of a Recapture.*

In Queſtions upon POLICIES, *the Nature of the Contract, as an* Indemnity *and* nothing elſe, *is always* liberally *conſidered— In* ALL *Caſes the* inſured *may* chuſe NOT to abandon. v. infra.

In the ſecond Part of the Uſage and Cuſtoms of the Sea, (*a* French *Book tranſlated into* Engliſh) *a Treatiſe is inſerted, called* GUIDON. *Where, after mentioning the Right to abandon*

upon

" the Value in the purchaſe of Goods for the Uſe of *A. B.*

" But the Court held, that this was a good aſſignable " Note within the Statute: that under all the circum- " ſtances apparent on this Note, " to promiſe to be ac- " " countable," was equivalent to a promiſe to pay. " He could not be any otherwiſe accountable to *In-* " *dorſees*; and it being expreſsly to *A. B.* or order, it " muſt be taken, that it's transferibility, in the way " of payment, was in contemplation. *Powys*, Juſtice, " indeed, ſeemed to ground himſelf much upon the " Verdict: but as the Plaintiff, in this Caſe, ſeems to " have declared on the Note, as in the Nature of a " Specialty, and thus to have brought it, however, " unneceſſarily

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upon a Capture, he adds, or any other ſuch diſturbance as defeats the Voyage, or makes it not worth while, or worth the Freight, to purſue it.

I know, that of late times, the privilege of abandoning *has been* reſtrained *for fear of letting in Frauds. And the Merchant can* not *elect to turn, what at the time when it happened, was in it's Nature, but an* Average *into a* total *Loſs, by abandoning. But there is no danger of Fraud in the preſent Caſe. The Loſs was* total *at the time it happened.*

The Chief Juſtice then recapitulated the other circumſtances of the Caſe: and concluded, after remarking on them.

We are of Opinion, that the LOSS *was* TOTAL BY THE CAPTURE: *and the Right which the Owner had, after the Voyage defeated to obtain Reſtitution of the Ship and Cargo, paying great Salvage to the Recaptor,* might *be abandoned to the Inſurers after ſhe was brought into* Milford Haven.

POSTEA *to the* PLAINTIFF *in both Cauſes. See the ſame Caſe* * *in a Collection which contains Statutes reſpecting Navigation and Commerce, from* 28 E. III. 1354, *to* 13 G. III. 1773. *and adjudged Caſes, from* 1 W. & M. *to* 14 G. III.

* p. 380. 400. of Parker's Laws of Shipping and Inſurance 1775.

And

" unneceſſarily on the Record, and as the Verdict was " entire, without diſtinguiſhing the other Count, which " was general on an *inſimul computaſſet* (on theſe reaſons " as it may be preſumed), the other Judges were " clear that the Verdict could not aid the Note: but " that, if bad on the Statute, it muſt remain unremedied " by the Verdict. They thought it good, and Judge- " ment was for the Plaintiff. v. Cunningham on Pro. N. Sect. 2. art. 5.

" On Error from *C. B.* Note to pay to *A.* or order, ſix " Weeks after the Death of the Defendant's Father, for " value received, was held a good Note: for that there " was no contingency whereby it might never become " payable, but only the time of payment was uncertain; " which is the Caſe of all Bills payable at ſo many days " after Sight. In *Communi Banco*, it held three Argu- " ments, 2 Str. 1217. M. 18 Geo. II. Cooke v. Coleran.

And afterwards, another great Cauſe came before the Court, which was on a ſpecial Caſe reſerved at Guildhall *from the Sittings there, before Lord* MANSFIELD, *after* Michaelmas Term, 1760, *on an* Inſurance *of a Ship called the* Selby, *from* Virginia *or* Maryland *to* London, *and of Goods and Merchandize therein, until ſhe ſhall have moored at Anchor twenty-four Hours.*

This was a VALUED POLICY: *and on a* Special Caſe *it appeared:—*

That the Ship, after quitting her Port of Departure, was taken by a French *Privateer: that at the time of the Capture, ſhe had nine Men on board, of whom the Captain of the Enemy's Ship took out Six beſides the Captain, leaving only the Mate and one Man; and put a Prize Maſter and ſeveral Men* Hamilton v. Mendes, 2 Burr. 1198. Parker's, L. S. I. 427.

" ments, and was adjudged good, by a ſolemn Reſolu-
" tion, delivered by Lord *Chief Juſtice* WILLES.

Cunningham 504.

" So a Note payable to *A.* when he ſhall come of
" Age, which will be 12 *June* 1750: for it is pay-
" able, at all Events, on 12 *June* 1750; and the com-
" ing of Age, is not a *condition*, but a circumſtance:
" here the Reaſon is clear and ſatisfactory. It may
Str. 24 Andrews v. Franklin. Hil 3 G. I.
" not be ſo eaſy to reconcile the Caſe with the
" Principle, where, according to a very ſhort and early
" Note of an eminent Reporter, it appears to have been
" held, that a promiſſory Note to be paid within two
" Months after a certain Ship ſhould be paid off, was
" good.

" The only Cauſe there aſſigned is, that the paying
" off a Ship is a thing of a public Nature, which indeed
" eſtabliſhes the Notoriety of it, when it ſhall happen:
" but there is ſtill the want of Aſſurance that it ever will
" happen; for the Ship and Crew may periſh. I know
" not

Men on board to carry her to France.

That SEVENTEEN DAYS *after, ſhe was retaken by an* Engliſh *Man of War, who ſent her into* Plymouth, *where ſhe arrived, fourteen Days after her Recapture: the Day of her Arrival being the* Sixth *of* June.

That

" not that any ſubſequent Caſe has been decided on the " ſame Principles, except the following:

" On an Action upon a Note, in the following " Form: *I promiſe to pay Mr.* James Lewis, *Eleven* " *Pounds, at the Payment of the Ship* Devonſhire, *for* " *value received.*

Lewis v. Orde, Sittings at *Middleſex.* 8 Geo. II. Dict. T. and Comm. 26. Cunningham § 2. 8.

" In this Caſe, *Hardwicke*, Chief Juſtice, is repre- " ſented to have ſaid, as to the Contingency of the Pay- " ment, the ſubſequent Act of the payment of the " Ship makes it certain: and therefore, though not a " *Lien*

That the Plaintiff living at Hull, *informed of what had happened to his Ship the* Selby, *wrote, on the* 23*d of* June, *to his Agent in* London, *to acquaint the Defendant, that the Plaintiff did, from* thenceforth, ABANDON *to him his Intereſt in the ſaid Ship. That the Defendant, on being ſo acquainted, ſaid,* he did not think himſelf bound to take to the SHIP: *but was ready to pay the* Salvage, *and all other Loſſes and Charges that the Plaintiff ſuſtained by the Capture.*

It was admitted on the ſpecial Caſe, that the Ship and Cargo ſuſtained no damage by the Capture.

On this, the Queſtion ſubmitted to the Court was, whether the Plaintiff, ON *the ſaid* 26*th Day of* June, *had a* Right *to* ABANDON, *and hath a Right to recover for a* TOTAL *Loſs?*

Lord MANSFIELD, *in delivering the Reſolution of the Court, after ſtating the Caſe as ſettled, the general Queſtion, and the points made by Counſel, firſt admitted this a total Loſs by the Capture: but that on the Recapture it would depend on circumſtances, whether that total ſhould not be converted into an Average Loſs. That in point of Fact, the Loſs, in this Caſe, was ſo converted by the Recapture: and thus the whole was brought to the laſt Point,* whether *the Loſs having been* once *total, a Right* veſted *in the inſured to recover the whole by* abandoning, *ſo as it could never after be deveſted or taken from him by any ſubſequent Event.*

" *Lien ab initio*, yet became ſufficiently ſo, and within " the Statute, by the Fact happening after. It is not " like the Caſe of *Jocelyn* and *Laſerre*, where it was " held, that a Bill of Exchange, payable out of a par- " ticular Fund for growing Subſiſtence, was not within " the Statute. I think, therefore, the Declaration is " proper enough: but you may make your objection " in Arreſt of Judgement; for this will appear on the " Record.

" It

On this the Chief Juſtice *thus expreſſed himſelf:*

The Plaintiff's Demand is for an Indemnity. *His Action then muſt be founded upon the Nature of his* Damnification, *as it really is at the time of the Action brought. It is repugnant, upon a Contract of* Indemnity, *to recover as for a* total *Loſs, when the final Event has decided, that the Damnification, in truth, is an* Average, *or perhaps* no *loſs at all.*

Whatever undoes the Damnification, *in whole or in part, muſt operate upon the* Indemnity *in the* ſame degree. *It is a Contradiction in Terms to bring an Action for* Indemnity, *when upon the whole Event, no Damage has been ſuſtained.*

This Reaſon is ſo much founded in ſenſe and the Nature of the Thing that the Common Law *of* England *adopts it; (though inclined to ſtrictneſs). The Tenant is obliged to indemnify his Landlord from* Waſte: *but if the Tenant do or ſuffer waſte to be done in Houſes, yet* if he repair before any Action brought, *there lies no Action of waſte againſt him: But he can not plead* non fecit vaſtum, *but the Special Matter. The Special Matter ſhews, that the Injury being repaired* before *the Action brought, the Plaintiff had* no Cauſe *of Action: And whatever takes away the Cauſe takes away the Action.* *

Suppoſe a Surety ſued to Judgement: and afterwards, before an Action brought, the Principal pays the Debt and Coſts, and procures ſatisfaction to be acknowledged on Record: the Surety can have no Action for Indemnity; becauſe he is *indemnified before any Action brought. If the Demand or Cauſe of Action does not ſubſiſt at the time the Action is brought, the having exiſted at any former time will be of no Avail.*

But in the preſent Caſe, the Notion of a veſted *Right in the Plaintiff to ſue as for a total Loſs before*

* Sublatâ Cauſâ tollitur effectus.

" It does not appear, that any Motion afterwards " was made to bring this point to a more ſolemn De- " termination.

" In this Caſe, there was another Point on which " the Judge gave his Opinion. The Note being with- " out the Words " *Order,*" or " *Bearer,*" he ſaid, " he remembered a Caſe where it was held on Demur- " rer, that a Note within the Statute need not be in " terms ſo payable.

" *I pro-*

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the Recapture, is fictitious only, and not founded in Truth. For the inſured is not obliged *to abandon in* any *Caſe: He has an* Election. *No Right can veſt as for a total Loſs, till he has* made *that Election. He can not elect before* Advice *is received of the Loſs: and if the Advice ſhews the Peril to be* over, *and the Thing in ſafety, he can not elect at all; becauſe he has no right to abandon when the Thing is ſafe.*

Writers upon the Marine Law are apt to embaraſs General Principles with the poſitive Regulations of their Country: but they ſeem all to agree, that if the Thing is recovered before *the Money paid, the Inſurer can only be entitled according to the final Event.*

After citing Riccius *for the Sentiments of the foreign Juriſts, his Lordſhip thus proceeds:*

In the Caſe of Spencer *v.* Franco, *though upon a Wager-Policy, the Loſs was held* not *to be total, after the Return of the Ship,* Prince Frederic *in ſafety, though ſhe had been ſeized and long kept by the King of* Spain *in a time of actual War.* Before Lord *Hardwicke* at *Guildhall* in 1735.

In the Caſe of Pole *v.* Fitzgerald, *though upon a Wager-Policy, the Majority of the Judges and the Houſe of Lords, held there was* no total Loſs, *the Ship having been* reſtored *before the End of* Four Months. *Caſes* in *Dom. Proc. Wedn.* 13 *Feb.* 1754

The preſent Attempt is the firſt that ever was made to charge the Inſurer as for a total Loſs, upon an Intereſt Policy after the Thing was recovered: And it is ſaid, the Judgement in the Caſe of Goſs *v.* Withers, *gave riſe to it.*

It is admitted, that Caſe was no way ſimilar. Before that Action was brought, the whole Ship and Cargo were literally loſt: At the time of the offer to abandon, a fourth of the Cargo had been thrown overboard; the Voyage was entirely loſt; the Remainder of the Cargo was Fiſh periſhing; and of no Value at Milford Haven, *where the*

Mic. 2 G. II. Ld. Raym. 1545. Burchell v. Slocock, Cunningham § 2. 12.

" *I promiſe to pay to* W. 100*l. in three Months after* " *Date, value received of the Premiſſes in* Roſemary Lane, " *late in the Poſſeſſion of* T. R.

" On Demurrer, the Court clearly held this to be " a promiſſory Note within 3 & 4 *Ann. c.* 9.

Error on Judgement in *C. B.*, in Caſe, upon a promiſſory Note, entered into by *A.* to pay ſo much to *B.* " for

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the Ship was brought in; the Ship ſo ſhattered as to want great and expenſive Repairs; the Salvage one Half, and the Inſurer did not engage to be at any expence; it did not appear that it was worth while to try to ſave any thing.

But it is ſaid, though the Caſe was entirely different, ſome part of the reaſoning *warranted the Propoſition now inferred by the Plaintiff from it.*

The great Principle relied upon was, that, as between the Inſurer and the Inſured, the Contract being an Indemnity, *the* Truth *of the* Fact *ought to be regarded: and therefore, there might be a total Loſs by a Capture which could not operate a change of property. And a Recapture ſhould not relate by Fiction, (like the* Roman Jus Poſtliminii) *as if the Capture had never happened, unleſs the Loſs was in Truth recovered.*

This reaſoning proved, è converſo, that if the Thing in Truth was ſafe, no artificial reaſoning ſhall be allowed to ſet up a total *Loſs.*

The Words quoted at the Bar were certainly uſed, that there is no Book, antient or modern, which does not ſay,—that in Caſe of a Ship being taken, the Inſured may demand as for a total Loſs, and ABANDON. *But the Propoſition was* applied *to the Subject Matter: and is certainly true, provided the Capture,* OR *the total Loſs occaſioned thereby,* CONTINUE to the time of abandoning *and bringing the Action.*

The Caſe then before the Court did not make it neceſſary to ſpecify all the reſtrictions.

From the way of Reaſoning, (then uſed as reſulting from the circumſtances of that Caſe), it did by no means follow, that if the Ship and Cargo had, by the Recapture, been brought ſafe to the Port of Delivery, without having ſuſtained any damage at all, *that the Inſured might abandon.*

But without dwelling longer upon Principles or Authorities, the Conſequences of the preſent Queſtion are deciſive. It is impoſſible that any man ſhould deſire to abandon in a caſe circumſtanced like the preſent, but for one of two Reaſons; either that he has overvalued, or the Market has fallen below it's original Price. The only Reaſons which can make it the Intereſt of the party to deſire, are concluſive againſt allowing it.

It is unjuſt to turn the Fall *of the Market againſt the Inſurer, who*

" for a Debt due from *C.* to the ſaid *B.* And it was " objected, that this not being for *value received*, was " not within the Statute: and *primâ facie*, the Debt of " another is no conſideration to raiſe a promiſe. But " the Court held it to be within the Statute; being an " abſolute promiſe, and every way as negotiable as if " it had been for value received.

Str. 264. Popplewell v. Wilſon, Hil. 6 Geo. I. Cunningham, § 2. 11.

" But,

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who has no concern in it, and could never gain any thing by it's riſe. And an overvaluation *is contrary to the general Policy of the Marine Law; contrary to the Spirit of the Act of* 19 G. II. *a temptation to Fraud, and a ſource of great Aluſe: Therefore no man ſhould be allowed to avail himſelf of having* overvalued.

The Inſurer, upon the Marine Law, ought never to pay leſs *upon a Contract of Indemnity* than the Value of the Loſs: *and the* Inſured *ought never* to gain more. *Therefore, if there was occaſion to reſort to that Argument, the Conſequences of the Determination would alone be ſufficient upon the preſent occaſion.*

But upon Principles, this Action could not be maintained as for a total *Loſs if the Queſtion was to be judged by the* ſtricteſt *Rules of Common Law: much leſs can it be ſupported for a total Loſs, as the Queſtion ought to be decided by the large Principles of the* Marine *Law, according to the ſubſtantial Intent of the Contract, and the real Truth of the Fact.*

The daily Negociations and Property of Merchants, ought not to depend upon Subtilties *and* Niceties: *but upon Rules eaſily learned and eaſily retained, becauſe they are the Dictates of common Senſe, drawn from the Truth of the Caſe.*

If the Queſtion is to depend upon the Fact, *every Man can judge of the Nature of the Loſs before the Money is paid: but if it is to depend upon ſpeculative Refinements, from the Law of Nations, and the* Roman Jus Poſtliminii, *concerning the Change and veſting of Property, no wonder* Merchants *are at a loſs, when* Doctors *have differed upon the Subject from the Beginning, and are not yet agreed.*

To obviate too large an inference being drawn from this Determination, I deſire it may be underſtood, that the Point here determined is, that the Plaintiff, upon a Policy, can only recover an Indemnity according to the Nature of his Caſe at the time of the Action brought, or, at moſt, at the time of his offer to abandon.

We give no opinion how it would be in Caſe the Ship or Goods be

Cunningham, § II. 13.

" But, *I promiſe to pay to* T. S. 50*l. if* T. S. *doth not* " *pay it within ſix Weeks*, was held bad, on Motion in " Arreſt of Judgement, becauſe the Drawer was not " the original Debtor, but might be a Debtor on a " Contingency.

" But where the Note is jointly *and* ſeverally, or " even jointly *or* ſeverally, this is well on a ſeparate " Action againſt either, no leſs than on a joint Action.

" And

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reſtored in ſafety, BETWEEN *the offer to abandon, and the Action brought; or* BETWEEN *the Commencement of the Action and the Verdict. And, particularly, I deſire that no inference may be drawn, that in caſe the Ship or Goods ſhould be reſtored after the Money paid as for a total Loſs, the Inſurer could compel the Inſured to refund the Money, and take the Ship or Goods. That Caſe is totally different for the preſent; and depends throughout upon different reaſons and principles.*

Here *the Event had fixed the Loſs to be an Average* ONLY before *the Action brought,* before *the offer to abandon, and* before *the Plaintiff had notice of any Accident: conſequently, before he could make an Election.*

Therefore, under theſe circumſtances, we are of opinion, that he cannot recover for a total, but for an AVERAGE *Loſs* only, *the Quantity of which is eſtimated and aſcertained by the Jury.*

2 Burr. Manſ. 1167. E. 1 G. III.

And in the Caſe of Lewis *and another* v. Rucker, *is a perſpicuous and full elucidation of the Nature and effects of a* VALUED *Policy.*

The Caſe was on a POLICY *upon Goods aboard the* Vrow Martha, *at and from St.* Thomas's Iſland *to* Hamburgh, *from the Loading at the ſaid* Iſland, *till the Ship ſhould arrive and land the Goods at* Hamburgh.

The Goods (conſiſting of Sugars, Coffee, and Indigo) were valued, *the* clayed *Sugars at* 30*l. per Hogſhead, and the* Muſcovado *at* 20*l. They were warranted free from Average under* 5 per Cent.

In the Courſe of the Voyage, the Sea Water got in: and when the Ship arrived at Hamburgh, *it appeared that every Hogſhead of Sugar was damaged. The Damage made it neceſſary to ſell immediately; they were accordingly ſold: the difference between the Price which they brought, by reaſon of the Damage, and that which they might then have brought at* Hamburgh, *if ſound, was as* 20*l.* 8*s.* 8*d.* per *Hogſhead, to* 23*l.* 7*s.* 8*d.*

The

" And accordingly, on ERROR from the COMMON " PLEAS, on Action upon a PROMISSORY NOTE made " by *two*, who *jointly* or *ſeverally*, promiſed to pay: " And in that Form the Plaintiff had declared againſt " the Defendant: Rees v. Abbot. Cowp. 832. Tr. 18 G. III.

" Mr. *Wood* argued for the Plaintiff in Error, that " it was not ſufficiently alleged that *he* had ever pro- " miſed to pay the Note in Queſtion; and cited a " Caſe where this very Point had been made, and had " prevailed. 1 Str. 76. Hil. 4 G.

" That was the Caſe of *Butler* and *Maliſſey*, where " upon a promiſſory Note the Plaintiff ſet forth that " the Defendant and another, *conjunctim vel diviſim*, " promiſed to pay. On this there was a DEMURRER: " and,

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The Defendant paid Money into Court on the like proportion *of the ſum at which the ſugars were* valued *in the* Policy, *as the Price the damaged ſugars bore to the Sound at the Port of Delivery. The only Queſtion at the Trial was, by what meaſure or rule the Damage, under all the circumſtances of this caſe, ought to be eſtimated.*

The Plaintiff proved, that at the time of the Inſurance ſugars were worth, at London *and* Hamburgh, 35 l. *a Hogſhead. That the Price having ſunk, on the Expectation of a Peace, orders had been ſent, before the Arrival of the Goods at* Hamburgh, *and before notice of the Damage, to houſe and keep the ſugars till the Price ſhould riſe above* 30 l. *the Hogſhead. That in Fact ſugars did riſe* 25 l. per Cent.; *and it was contended that this conſequential difference in the produce, ariſing from the Neceſſity of Sale, ought to be included in the Damage.*

The Jury found agreeably to the Defendant's Eſtimate, upon the proportion *of the actual Difference between ſound ſugars and theſe damaged ſugars, when ſold, at the Port of Delivery, to the Value inſured.*

On

" and, *per Parker*, Chief Juſtice, the Plaintiff might " have brought it againſt either or both, for he had " his Election. If the Action had been againſt both, " he ſhould have declared as he now does; but that " is not right in the Action againſt one only. For he " ſhould have declared *generally*, that this Defendant " by his Note promiſed to pay, and a ſeveral Note by " two would have been good Evidence. As where " there are ſeveral Obligors, and one only is ſued, no " mention is made in the Declaration of the other " Obligors. He that ſpeaks in the disjunctive ſays " true, if either member of the *disjunctive* be verified; " whereas he that ſpeaks in the conjunctive, affirms " both parts to be true.

" The Plaintiff, in that Caſe, had leave to diſcon- " tinue, on payment of Coſts.

" He

On this the Plaintiff moved a new Trial.

To this there were two Objections taken.

Firſt, that this was altering the Meaſure *of Damages, in the Caſe of a* partial *Loſs, from what would have been the meaſure in the Caſe of a* total *Loſs. For then the prime Coſt, or Value in the Policy, muſt have been paid.*

To this the Anſwer, recognized by the Court, was, that the different Meaſure of Value in the two inſtances ariſes from the Nature of the Thing.

Where there is a total Loſs, no meaſure can be taken but the prime Coſt, to aſcertain the Damages, and he thus fulfills his Contract of Indemnity: *he pays the Value of the thing he inſures, ſuch as it was, at the Outſet. He has*

" He alſo cited the Caſe of *Ovington v. Neale*, which 2 Str. 819. M. 2 G. II.
" was much ſtronger, to the ſame purpoſe: for that was
" upon *Error* from the *Common Pleas*, after Judgement
" for the Plaintiff, who had declared upon a promiſſory
" Note, by which, as in the principal Caſe, the Defen-
" dant and *A. B. conjunctim aut ſeparatim* promiſed.

" And there, by the Court, by the preſent Decla-
" ration, he only ſays he has this *or* ſome other Cauſe
" of Action: and Judgement was *reverſed*, for want
" of the Plaintiff's ſhewing a Title to bring a ſeparate
" Action againſt one of the Makers of the Note.

" Lord

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has no concern in the ſubſequent Value; and ſo it is if part be utterly loſt; the prime Coſt is the meaſure for that part.

But if part of the Cargo, capable of a diſtinct valuation, as being an entire individual, be ſpoiled, as one *hogſhead out of* ten, *no meaſure can be taken from the prime Coſt to aſcertain* ſuch *damage. If you can fix whether it be a third, a fourth, or a fifth worſe, you aſcertain the Damage by a rule of mathematical certainty. And here the port of* Outſet *can be no Guide; but on account of the ſubſequent actual depretiation it muſt be decided by the Price at the Port of* Delivery, *where the Voyage is completed, and the whole Damage known. And whether the Price there be high or low, the Difference between that price for the damaged, compared with ſound Goods, equally fixes the proportionate deteriation; and as the injured would pay the whole prime Coſt, if the Thing be wholly loſt, ſo if it be only a third, fourth, or fifth* worſe, *he pays a third, fourth, or fifth of the* value *of the Goods ſo damaged, taken proportionably on the Value inſured; that is, if they are one ſeventh leſs ſaleable than ſound Goods, he pays on* 30 l. *for inſtance, prime Coſt inſured,* one ſeventh, *or* 3 l. 2 s. 10 d. $\frac{1}{4}$

The ſecond objection was from its

" Lord MANSFIELD. If *or* is to be underſtood as a " *disjunctive*, who is to elect whether the Note ſhall " be joint or ſeveral? Certainly the perſon to whom " it is payable. If ſo, the Plaintiff has made his " *Election*. But *or* in this Caſe is ſynonimous to *and*. " They *both* promiſe that they or one of them ſhall " pay: then *both* and *each* is liable *in ſolidum*. The " Nature of the tranſaction forces this conſtruction. " It is ſaid that Judges ſhould be *aſtute* in furtherance " of right, and the means of recovering it. And " therefore one is aſhamed to ſee either hitch or hang " upon pins or particles, contrary to the true manifeſt " meaning of the Contract.

" And

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its being a valued *Policy: and it was attempted to be argued, that a* valued *was equivalent to a* wager *Policy, and that therefore there could be no* Average *Loſs, the Value being fictitious.*

To this the Anſwer *eſtabliſhed by the Deciſion of the Court was, that a valued Policy is not a wager Policy, or like,* " Intereſt " or no Intereſt." *If it were, it would be void by the Statute.* 19 Geo. II. c. 37. v. ſupra. *But that the only effect of the Valuation is* fixing the Amount of the prime Coſt, *juſt as if the Parties admitted it at the Trial: but that in every argument, and for every other purpoſe, it muſt be taken that the value was ſo fixed as that the inſured meant only to have an* Indemnity.

If it be undervalued, *the Merchant himſelf ſtands Inſurer of the ſurplus: if* much overvalued, *it muſt be done with a fraudulent view; either to gain contrary to the Statute againſt Intereſt, or with ſome View to a fraudulent Loſs. The Court, therefore, will never ſuffer the inſured to plead, that he has* greatly *overvalued, or that his Intereſt was a Trifle only.*

That it is ſettled, that upon valued *Policies the Merchant need only prove ſome Intereſt, to take*

That had it been bad, it ſhould have been pleaded in Abatement.

" And BULLER, *Juſtice*, ſaid, if the Note had been " a joint Note only, not a joint and ſeparate Note, " the Defendant could only have pleaded in *abate-* 2 Sid. 139. " *ment*; it would not have been *error*.

" The

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take it out of the Statute; becauſe the adverſe party has admitted *the Value, and if more was required the agreed Valuation would ſignify nothing. But if it ſhould come out in proof that a Man had inſured* 2000l. *and had Intereſt on board to the Value of a Cable only, there never has been, and I believe there never will be, a Determination that by ſuch an Evaſion the Act of Parliament may be defeated.*

That there are many conveniences from allowing valued Policies: but where they are uſed merely as a Cover to a Wager, they would be conſidered accordingly.

That the effect of a Valuation is only fixing, concluſively, the prime Coſt: which in an open *Policy, muſt be proved; in a valued one, is agreed.*

That to argue there can be no Adjuſtment of an average Loſs upon a valued Policy, is in this inſtance directly againſt the Terms of the Policy itſelf: that being expreſsly ſubject to Average, *if the Loſs upon ſugars exceed* 5 per Cent.

That the Difference between the Price the damaged Goods actually produce, and the prime Coſt (or Value in the Policy) cannot be the Rule, as it was contended it ought to be: for that this would involve the Underwriter in the Riſe *or* Fall *of the Market; ſubject him in ſome caſes to pay laſtly more than the Loſs; in others, deprive the inſured of any ſatisfaction though there was a Loſs.*

On the other Ground, from the particular circumſtances of the Caſe for making up the 30l. *valued in the Policy, becauſe it appears the ſugars would have ſold for that, if the Damage from the ſea water had not made an immediate ſale neceſſary,—*

His Lordſhip delivered the opinion of the Court, that the Jury rightly diſregarded this circumſtance, and properly went on the general Nature of the Contract. A Contract that the Goods ſhall come ſafe into the Port of Delivery; or otherwiſe to indemnify the Plaintiff to the Amount of the prime Coſt or Value in the Policy. If they arrive, but leſſened in Value through Damages at ſea, the Nature of a Contract of Indemnity ſpeaks demonſtratively that the Merchant muſt be put in the ſame Condition (Relation being had to the prime Coſt or Value in the Policy) in which he would have been, if the Goods had arrived free *from Damage; that is, by being paid ſuch proportion or aliquot part of the prime coſt or value in the Policy as correſponds with the proportion or aliquot part of the Diminution in Value*

Note not good where other Things were blended with Payment of Money.

Str. 1271. Cunningh. § 2. 10.

" The Court held in *Error* from *C. B.* that a Note " to deliver up *horſes* and a *wharf*, and to pay money at " a particular day, could not be counted on as a good " Note within the Statute: and therefore reverſed the " Judgement.

" A Note

Value occaſioned by the Damage. That the Duty accrued upon the Ship's *arrival, and landing her Cargo at the Port of Delivery. The inſured had then a right to demand ſatisfaction. The Adjuſtment never could depend upon future Events or Speculations.*

That if theſe were to be regarded, it would be productive of the greateſt inconvenience and injuſtice, and that the Right and Meaſure of ſatisfaction which accrued at the landing being incapable of variation from ſubſequent Contingencies, it appeared as plain as any propoſition in Euclid *that the Rule by which the Jury had gone was the right meaſure.*

* Cunningh. C. III. § 6. art. 14.

* *A Merchant inſures his Goods from* London *to* Sallee, *and there to be landed. The Factor, on his Arrival, ſells the Cargo on board without unlading the ſhip: and the Buyer agrees for the Freight to the Port of* Venice. *Before ſhe breaks Ground, the Ship takes fire. Held that the* aſſured *and* Buyer *are abſolutely without Remedy: for the* Property *of the Goods becoming changed, and Freight being contracted* de novo, *was equivalent to a diſcharge of the Policy by landing of the Goods.*

‖ Ld Raym. 724.

‖ *In an Action brought on a Policy of Inſurance of a Ship, it appeared in Evidence that the Ship was* condemned *by Proceſs of Law, and ſeized: by this ſentence the* Property *and ownerſhip are deſtroyed, and there is no remedy on this Policy of Inſurance.*

‖ Cunning. 309.

† Cunning. 317.

† *And it ſeems, by the Caſe of* Grant *v.* Innes, *that the* Premium *may be inſured as well as the Ship and Freight, under a* general *Inſurance on Ship and Freight.*

§ Cunningh. C. III. § 6. art. 52.

§ *If an Inſurance is made on a Ship generally, and the Name of the Ship expreſſed, according to the ſaid Policy of Inſurance, upon the Keel of the Ship of ſuch a Burthen, this Aſſurance does not extend to the Goods when the Ship only is named.*

§ Malyne's Lex Mercator, 116.

‡ Vi. Cunning. ut ſupra. art. 48.

‡ *Goods inſured; and Ship diſabled: the Goods put into a Boat or Lighter, which afterwards is found to be an Enemy's Ship, and ſeized, the Inſurers ſhall anſwer: it being a Loſs incurred* bona fide *under the Neceſſity of the Moment.*

Policy of Aſſurance to warrant a Ship for twelve Months. The Ship did *periſh within the time of twelve Months reckoned by the Calendar, but* not *within twelve Months,*

" A Note alledged to have been *written* by the " Defendant needs not to be averred to have been " *ſigned* by him: for it might be—I, *A. B.* promiſe to " pay;—which would be as valid as, *I promiſe to pay:* " ſigned *A. B.* Str. 299. Paſch. 6 G. I. Taylor v. Dobbins. Cunningh. 124.

" It

Months, accounting twenty-eight Days to the Months. This Evidence held not ſufficient to maintain the Action, and that the Policy was diſcharged.

This was cited in Sir Wollaſton Dexie's *Caſe (on the computation of time under the ſtatute of Uſury) in the* 29 Eliz. *and ſo far as I have yet obſerved, it is the oldeſt reference in our Books to an Obligation in the Nature of a* Policy of Aſſurance. *And the more remarkable, as the very term is uſed; ſo that the Cuſtom of ſuch undertakings ſeems by that time to have been pretty well ſettled. And it is ſaid the Inſurers in this Country uſed to meet, before the building of the* Royal Exchange, *at an Houſe ſituate where* Lombard-ſtreet *now is, and called the* Pawnhouſe, *or* Lombard; *ſo that it is probable both* Bills *of* Exchange *and theſe Policies were derived to us from theſe Refugees from* Lombardy. *About the year* 1719, *the* Royal Exchange *Aſſurance Company, originally patronized by Lord* Onſlow, *and that of the* London Aſſurance *by Lord* Chetwynd, *were inſtituted: and an aid of* 600,000 l. *having been offered to Government, if they ſhould obtain a full and permanent ſanction, they were eſtabliſhed by Act of Parliament in the Year already mentioned: and by the laſt Clauſe the Companies are ſubjected to ſpecific Penalties, if they ſhall lend Money to the Crown otherwiſe than on Credit of Parliament; the Prerogative thus wiſely, and with a becoming ſpirit, giving its concurrence in ſupport of an eſſential principle of the Conſtitution.* 6 Geo. I. c. 18. 1 Leon. 96. Cunningh. art. 71.

In ſuch a Country as this the Inſtitution could not fail of advancing rapidly and vigorouſly to its perfection; ſo that it has not only been long ſince verified with reſpect to its extent of Indemnity with us, that they inſure againſt Streſs of Weather, Pirates, Rovers, Rocks, Lightning, almoſt every detriment that can happen; (there being hardly any misfortune for which proviſion is not made, either particularly or by the general ſcope of a Policy of Inſurance:) but with regard to their conſtruction and effect, the good ſenſe and experience of reſpectable commercial men, with the equity, clearneſs, and conſonancy of a ſeries of judicial deciſions, have concurred to found a ſyſtem clear, liberal, ſolid, and comprehenſive, by which the event of Queſtions reſpecting mercantile Intereſts might generally be foreſeen ſo as to be previouſly adjuſted on ſatisfactory Grounds, or if brought into Litigation ſuch Queſtions Vi. Cunningh. p. 147, 8. p. 149. § 29.

Salk. 25. E. 1 Anne. Meredith and Shute. S. C. 2 Ld. Raym. 759.

" It very ſoon came to be ſettled, what at this day " when Notes have acquired ſuch extenſive currency " and conſequence we can hardly bring ourſelves to " ſuppoſe ever could have been doubted, that the " Delivery of a promiſſory Note was a good Conſidera- " ration on which to found an *Aſſumpſit*, the Note " being *Evidence* of a Debt.

" And

Eq. Ca. Abr. 3. 595. where Molloy is cited.

tions are now terminated without difficulty, without delay; and an Appeal for ſome Years ſcarcely in a ſingle inſtance has been made.

Cunningh. § 6.

Before we take leave of this branch of our ſubject, it appears proper to lay before the Reader ſome Caſes which have been determined on the leading Principles intimated in the Outſet. That Fraud, either by miſrepreſentation poſitively, or negatively by ſuppreſſion of Truth in the formation of the Contract, or by ſubſequent mal-practice under it, abſolutely forfeits all advantage from the ſtipulated Indemnity.

Skinn. 327. Mic. 4 W. & M.

Cunningh. § 6. art. 8.

It is hardly requiſite to advert to the groſs ſpecies of Impoſition inſtanced by the early writers on this head; ſuch as ſending out of a decayed Veſſel, painted and diſguiſed, to appear like a new and ſound one; or inſuring with knowledge that the ſubject of the inſurance is loſt; or inſuring to a conſiderable Value on Articles of little worth, and deſtroying them to profit by the Policy.

Skinn. 404.

Cunningh. § ut ſupra. art. 9.

And therefore, though an Inſurance " loſt or not loſt" *will be good, when the party inſuring proceeds with good Faith, under a real want of information as to the Event, it will not avail him to have inſerted theſe words, if it appear in Evidence that either directly or by advice he knew, at the time, the Ship to have been actually loſt.*

And in another Caſe, Holt *Chief Juſtice obſerved, that if Goods had been inſured as the Goods of an* Hamburgher, *when in fact they were the Goods of a* Frenchman, *at that time an Enemy, this inſurance would have been void: and the ſame, it may be added, would be the Caſe if the Inſurance were on the Goods of a perſon ſtated in the Policy to be of one Country, when in Truth he was of another, though neither at enmity with this: for upon many accounts it is not the ſame riſque.*

So where a Ship was to go under Paſſes not applicable to the Name ſhe bore at the time of making the Inſurance, and the Goods on board were of the ſubjects of a Country not warranted by the Policy; it was by the Chief Juſtice admitted that on each of theſe reaſons the Condition of the Policy was not performed.

And thus the Concealment of a Fact,

" And where a Bill or Note is taken without a " precedent Debt, Caſh being given for it or the " like, this is conſidered as a ſale of the Bill or Note; " but where there is a precedent Debt, the Bill in itſelf " ſhall not be payment, unleſs the particular Contract " of the Parties, or their ſubſequent Act make it ſo.

" The

Fact material to the Contract (and indeed any fact is material which the contracting party wiſhes to learn, as ſuppoſing it may concern him with reſpect to the tranſaction depending,) the ſuppreſſion, therefore, of a Fact, which relates to the object of the Policy, either in its real or apprehended tendency, deſtroys the Inſurance.

T. S. *had a doubtful Account of of his Ship that was at ſea; namely,* that a Ship, deſcribed like his, was taken. *He inſured her without giving any information to the Inſurers, either as to the hazard or circumſtances which might induce him to believe that his ſhip was in great danger, if not actually loſt.*

The Inſurers bring a Bill for an Injunction, and to be relieved againſt the Inſurance as fraudulent.

Lord CHANCELLOR (Macclesfield) *the inſured has not dealt fairly with the Inſurers in this caſe. He ought to have diſcloſed to them what intelligence he had of the ſhip's being in danger, and which might induce him at leaſt to fear that it was loſt, though he had no certain account of it: for if this had been diſcovered, it is impoſſible to think they would have inſured at ſo ſmall a* Præmium: *but either not at all, or on a larger: ſo that the concealing of this Intelligence is a Fraud.*

He decreed, therefore, the Policy *to be delivered up with* Coſts; *but the* Præmium *to be paid back, and allowed out of the Coſts.* 2 P. W. 170. Trin. 1723.

And though in that Caſe, no Action being at Iſſue, the cautionary Protection ſought, could only be given in a Court of Equity; *had the Cauſe with theſe circumſtances come to Trial on the other ſide of the Hall, the inſured would have there been precluded by the Evidence of ſuch Facts. For where a Queſtion is equitable in its Nature, the ſame Principles of Deciſion pervade all the Courts.* Cunningh. § ut ſupra. art. 1.

The next Caſe was an Action at Law: and ſhews that a Concealment of a known or ſuppoſed hazard will be equally deſtructive of the benefit which the inſured might otherwiſe have claimed under the Policy, whether the ſubſequent Loſs be of the ſame Nature with the precedent Danger or not. Smith v. Fonnereau. Hil. 16 G. II. 2 Str. 1183. Cunningh. p. 174.

On the 25th of Auguſt, 1740, *the Defendant underwrote a Policy*

Jefferies v. Auſtin. Mic. 12 G. I. 2 Str. 674. and v. Guichard & Roberts, 1 Bl. 445. Mic. 4 G. III.

" The *Conſideration* of a Note may be enquired as " between the *Drawer* and the *Payee*; but generally " when the Note has been paſſed in a courſe of pay- " ment, neither want of conſideration, nor fraud in " the commencement, nor ſatisfaction, unleſs endorſed " on the Note itſelf, can be given in Evidence to de- " feat the Claim of the Holder, to the Value which " it

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from Carolina *to* Holland. *It appeared the Agent for the Plaintiff had, on the* 23*d of* Auguſt, *received a Letter from* Cowes, *dated* 21*ſt of* Auguſt, *wherein it was ſaid*—The 12th of this Month I was in company with the ſhip *Davy (the ſhip in Queſtion) at twelve in the Night, loſt ſight of her all at once.* The Captain ſpoke to me the day before, that he was leaky; and the next day we had a hard Gale. *The Ship, however, continued her Voyage till the* 19*th of* Auguſt, *when ſhe was taken by the* Spaniards; *there was no pretence of any knowledge of the actual Loſs at the time of the Inſurance, which was made in conſequence of a Letter received that day from the Plaintiff abroad, dated* 27*th of* June *before.*

3 Burr. Manſf. 1905.

The Chief Juſtice *declared, that as theſe are Contracts upon Chance, each party ought to know all the circumſtances. And he thought it not material that the Loſs was not ſuch an one as the Letter imported; for thoſe things are to be conſidered in the ſituation of them at the time of the Contract, and not to be judged by ſubſequent Events: he therefore thought it a ſtrong Caſe for the Defendant, and the Jury found accordingly.*

* *The Caſe of* CARTER v. BOEHM, *was an* INSURANCE *governed by the ſame Principles as the common Marine Inſurances, and therefore proper to be adduced under this head: after remarking thoſe points which were peculiar to it, and ſhewing that they did not affect the general Principles of the Deciſion.*

This was an Inſurance for one year, from the 16*th of* October, 1759, *to the* 16*th of* October, 1760, *for the Benefit of the* GOVERNOR *of* FORT MARLBOROUGH, *in the* Iſland *of* Sumatra, *in the* EAST INDIES, indemnifying *againſt the Event of the Fort being taken by a* foreign *Enemy. The* FORT was *taken by* Count d'Eſtaign *within the year.*

It was in Evidence, that the Governor *had a real Intereſt, by the Value of his Property in the Fort, greatly above the Amount inſured.*

That

"it purports to convey. And this from Principles "not only explained in the Books of the Profeſſion, "but noticed and adopted by the very able Author "of *Remarks on the Influence of Climate, &c. on "Manners, Laws, Government, &c.* It is indeed of "the Eſſence of Commerce that no latent Bar ſhould "impeach the Validity of an apparently good transfer "of negotiable Intereſts; otherwiſe they would ſoon "ceaſe to be negotiable.

LOND. 1781. B. IV. C. 6. p. 427.

"But

That he was guilty of no Fault *in the Loſs of the Fort.*

That it was not a Fort proper or deſigned to reſiſt European *Enemies; but only for Defence againſt the Natives: that the Office of the* Governor *was not* military *but mercantile: and that it was only a ſubordinate Factory to* Fort St. George.

The Caſe farther included two Letters; the firſt dated the 16th *of* September, 1759, *which was ſent to* England, *together with the Inſtructions for* inſuring, *and which repreſented that the* French *had, the preceding year, a deſign on foot to attempt taking that ſettlement by ſurprize, and the probability of that deſign reviving; the weakneſs of the Fort; its being badly ſupplied with Stores, Arms, and Ammunition, and the impracticability of maintaining it in its then ſtate againſt an* European *Enemy.*

The letter, dated the 22d *of* September, 1759, *and ſent to his Brother by the ſame conveyance, confeſſes his being then more afraid than formerly, that the* French *ſhould attack and take the ſettlement, and aſſigns farther inducements to that opinion from their inability of muſtering a Force to relieve their friends on the Coaſt, ſo that rather than remain idle, they might pay the Fort a Viſit.*

It was alſo objected the Governor had not diſcloſed the Condition of the Place. Of every thing which could differ this Caſe from that of a merchant ſhip lying in harbour, and inſured for the ſame time in a diſtant port againſt an hoſtile attack, the Queſtion was ultimately cleared; for the COURT *agreed (on ſome or all of the Reaſons ſpecified by the* Chief Juſtice, *among which were its being no military Fort, and the Governor really in a mercantile capacity; and that even the Captain of a Ship was allowed to inſure Goods he had on board, or his part, if he be a part owner; and the Captain of a Ship, under like circumſtances, to inſure his ſhare;*

" But to this there is one Exception founded on the " too zealous Anxiety of the Legiſlature to ſuppreſs " an evil excluſively injurious to Individuals, and " frequently a ſource of unſuſpected Ruin to their " deareſt and beſt deſerving connections; but which, " after all the remedy or prevention, rather depends " on the Manners, and not on Laws.

9 Anne. Ch. 14. § 1.

" The Statute, entitled, " *An Act for the better pre-* " *venting of exceſſive and deceitful Gaming*," enacts that " all NOTES, BILLS, Bonds, Judgements, Mort- " gages, or *other ſecurities and conveyances* whatſoever, " by any perſon or perſons, *where the whole, or any* " *part of the conſideration* ſhall be for Money, or other " valuable thing won by GAMING, or for repayment " of Money lent or advanced for ſuch purpoſe, *ſhall be* " *utterly void, fruſtrate, and of none effect, to* ALL IN- " TENTS AND PURPOSES *whatſoever.*

" Upon

ſhare; and that on principles of public Convenience, little was to be apprehended from the Example) that they were not warranted to ſay the POLICY *was void upon this Account.*

It went, therefore, ſolely on the Queſtion of Concealment; and in diſcuſſing that Queſtion, theſe Principles were ſtated by the Chief Juſtice *in delivering the Judgement of the Court.*

INSURANCE *is a Contract on ſpeculation: the ſpecial Facts upon which the Chance of the Contingency is to be eſtimated, lie moſt commonly in the knowledge of the* inſured *only; to whoſe Repreſentation therefore the Underwriter truſts: upon Confidence that he does not keep back any circumſtance in his knowledge, to miſlead the Underwriter into a belief that ſuch circumſtance does not exiſt, and to induce him to eſtimate the Riſque as if it did not.*

The keeping back ſuch circumſtance is a Fraud, *and therefore the Policy is void. And although the* Non-communication *ſhould happen through Miſtake, and not through any fraudulent Intention, ſtill the Policy is void, for the Riſque really run is different from the Riſque underſtood and intended to be run.*

The Policy *would be equally void*

" Upon a Caſe ſtated at *Niſi prius*, upon an Action " brought by the Plaintiff as *Indorſee* of ſeveral *pro-* " *miſſory Notes*, it appeared the Notes were given by " the Defendant to one *John Church*, for money by " him knowingly advanced to the Defendant, to game " with at dice. That *Church* indorſed them to the " Plaintiff for a full valuable conſideration; and that " the Plaintiff had not notice, or was privy to the " Notes being given for a gaming purpoſe.

Bowyer v. Bampton. Tr. 14 G. II. 2 Str. 1155.

" Upon this a Queſtion aroſe on the Clauſe of the " Statute laſt recited, whether the Plaintiff could main- " tain this Action againſt the Defendant. And after " two Arguments, the Court were of opinion he could " not: for that it is making uſe of the ſecurity to " ſome intent and purpoſe, if he can pay his debts " with it: beſides the evaſion which would take place " even where an Indorſee might be privy to the tranſ- " action; from the difficulty of proving notice. And " though

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void againſt the Underwriter if he concealed; and an Action would lie to recover the Premium: as if he inſured a ſhip on her Voyage which he privately knew to be arrived.

The governing Principle is applicable to all CONTRACTS *and dealings.*

GOOD FAITH FORBIDS EITHER PARTY, BY CONCEALING WHAT HE PRIVATELY KNOWS, TO DRAW THE OTHER INTO A BARGAIN FROM HIS IGNORANCE OF THAT FACT, AND HIS BELIEVING THE CONTRARY.

But either party may be innocently ſilent as to Grounds open to both *to exerciſe their Judgement.* Aliud eſt celare aliud tacere: neque enim id eſt celare quicquid reticeas, ſed cum id quod tu ſcias id ignorare, emolumenti tui cauſa, velis eos, quorum interſit id ſcire.

Cic. de Offic. L. III. 14.

This Definition of Concealment, reſtrained to the efficient Motives and preciſe Subject of any Contract, will generally hold to make it void in Favour of the Party miſled by his Ignorance of the Thing concealed.

There are many Matters as to which the Inſured may be innocently ſilent. He need not mention what the Underwriter knows, what

" though it will be some inconvenience to an innocent " man, yet that will not balance the considerations on " the other side. And it is but the common hazard of " taking notes of infants or *femmes couvertes*. And the " Plaintiff is not without his remedy, as he might sue " *Church* on his Indorsement.

Mic. 8 W. III. B. R.

16 Car. II. c. 7. § 2.

" And in this Case, notice is taken of the opinion " thrown out, extrajudicially, by HOLT, in *Hussey*'s " Case, which was on the statute of *Charles*; which " provides, that if any person shall play, otherwise " than with and for ready Money, and shall lose any " sum or thing exceeding the sum of one hundred " Pounds, at one time or meeting, upon Ticket or credit, " or otherwise, and shall not pay down the same, *the* " *party losing shall not be compellable to pay or make good* " *the same:* BUT the Contract and Contracts for the " same,

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way soever he came to the Knowledge. Scientia utrinque par PARES contrahentes facit.

He need not mention what the Underwriter ought *to know*; *what* he takes upon himself *the knowledge of*; *or what he* waives *being informed of.*

The Underwriter needs not be told general Topics of speculation. *He is bound to know the Causes which may occasion* natural *Perils*; *as the difficulty of the Voyage*; *Seasons*; *Probability of Lightning*; *Hurricanes, Earthquakes. He is bound to know Causes of* political *Peril from the Ruptures of States, from War, and the various operations of it.*

If an Underwriter insures private ships of War, by sea and on shore, from Ports to Ports, from Places to Places, any where; he needs not be told the secret Enterprizes on which they are destined; because he knows some expedition must be in view: and from the Nature of his Contract, he waives the Information. If he insures for three years, he needs not be told any circumstance which shews it may be over in two: or if a Voyage with Liberty to deviate, he needs not be told what tends to shew there will be no Deviation.

Men argue differently from natural Phænomena, and political Appearances: they have different Capacities, different Degrees of Knowledge, and different Intelligence. But the means of Information are open to both: each professes

" ſame, and for every part thereof, and all and ſingular " Judgements, Statutes, Recognizances, Mortgages, " Conveyances, Aſſurances, Bonds, Bills, Specialties, " Promiſes, Covenants, Agreements, and other Acts, " Deeds, and Securities whatſoever, which ſhall be ob- " tained, made, given, acknowledged, or entered into " for ſecurity or ſatisfaction of or for the ſame, or any " part thereof, ſhall be utterly void, and of none " effect.

" It was holden that by this Clauſe *Aſſumpſit* was no " longer maintainable againſt an Acceptor of a Bill " drawn for payment of a gaming Debt: but HOLT, " concurring in this, held it would have been other- " wiſe if the Bill had been aſſigned on good Conſidera- " tion, and the ſtranger ſo taking it, not being privy to " the illegal Contract, had brought the Action. Salk. 344.

" This

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feſſes to act from his own ſkill and ſagacity; and therefore neither needs to communicate to the other. *

The Reaſon *of the Rule which obliges Parties to diſcloſe, is to prevent Fraud, and to encourage good Faith. It is is adapted to ſuch Facts as vary the Nature of the Contract, which one privately knows, and of which the other is ignorant.*

The Queſtion, therefore, muſt always be, as intimated in the Outſet, whether there was, under all the circumſtances at the time the Policy was underwritten, a fair REPRESENTATION: *or a* CONCEALMENT; *fraudulent if deſigned, or, though not deſigned,* varying materially the Object of the Policy, *and* changing *the Riſque underſtood to be ran.*

The Court were of opinion, that in this Caſe there was no Conceal-ment *or* Non-communication *of any thing which ought to have been diſcloſed by the inſured: that the ſuppoſed probabilities in the Letter were Matter of mere general ſpeculation, upon which the Underwriters, from their local ſituation, had even greater opportunity to have formed their Judgement. That no Attack was in Evidence, or hoſtile Attempt againſt the Place, till long after the Inſurance propoſed and made. That by inſuring againſt a total Loſs in general Terms, the expectation of the inſured of the danger of a total*

* Ubi enim Judicium Emptoris eſt, ibi Fraus Venditoris quæ poteſt eſſe? *may be ſafely applied in the ſenſe and with the limitations here intimated.* Cic. ut ſupra.

" This *Dictum* of that great Man has been ſtrongly " queſtioned; even to the extent of ſaying, that all " the learned part of the Bar wondered at it. It may " be proper to conſider a little the intent and operation " of this Statute.

Robinſon v. Bland. 2 Burr. Manſf. 1080. 1.

" It has been obſerved, in a Caſe preſently to be " cited, for another reaſon, that the Statute of *Charles* " makes void the CONTRACT in the inſtances upon " which it attaches; the Statute of *Anne* the SECU- " RITY alone. And the Point under Conſideration " ſeems to turn upon this, whether in the Statute of " *Charles*, SECURITIES which are after mentioned are " made void, in ſo far as the inforcing of them would " execute the illegal Contract; or void *to all intents* and " purpoſes (which words are not in that Act) ſo as ne- " ceſſarily to deprive *Strangers* taking without notice, " and for valuable conſideration, of all benefit, from " a Note free from ſuſpicion on the face of it, and " which in many reſpects paſſes, and is by Law con- " ſidered as Money in aid of the public convenience " and freedom of commercial Contract.

" In

Loſs, ſhould the Place be attacked by an European *Force, was ſuggeſted in the Nature of the Propoſal: ſo that, in Fact, the Contingency inſured was, whether the Place would be attacked by an* European *Force, its incapacity for Reſiſtance being preſumed in the Terms and Circumſtances of the Contract; ſo that the Fort, under this Policy and the circumſtances of the Caſe, ſtood as a ſhip under the implied Condition of being* ſea-worthy; *anſwerable, (for all that appeared,) and adequate to the purpoſe for which it was intended, of Defence againſt the Natives; and it muſt be taken to have been inſured, under the certainty of a total Loſs, if a Ship of War, or an* European *Enemy ſhould come up the River againſt it. And that a contrary Conſtruction would render the Rule againſt Concealment, deſigned to prevent Fraud, an inſtrument of Fraud; of which and every Rule it might be ſaid, as of the Statute of Frauds, it ſhall not be turned againſt itſelf.*

V. S. C. 1 Bl. R. 593.

" In the hand of a Stranger, it is not a Security for " the performance of any Contract between the original " parties. If the Drawer, the Acceptor, or any of the " Indorſers are of Credit and known reſponſibility, it " is in the contemplation of a Stranger, portable Caſh. " It is neither his Duty nor in his power to come at " the original Conſideration: and we have ſeen already, " that where that Conſideration is fraudulent, and the " Security, as between the Parties, null at Common " Law, as being for performance of a void Contract, " this ſhall not change the Nature of a Bill of Exchange " or promiſſory Note aſſignable (which is now the ſame " thing), ſo as in other inſtances to affect a Stranger. " If it does on this, it muſt be on the clear and neceſſary " effect of the Statute. Now in this Statute the Clauſe " which ſays *Securities* ſhall be void, immediately fol- " lows, and refers to that which ſays, the party ſhall " not be compellable to pay; for it then ſubjoins, " without any intervening words, BUT all bonds, &c. " and Securities whatſoever, which ſhall be given, &c. " for payment or ſatisfaction of, or for the ſame, ſhall " be void and of no effect. If this proviſion is ſatisfi- " ed by their being void, as between parties and privies " under the Contract, it will not be extended farther " to an operation ſo unfavourable, but by abſolute " Neceſſity of Law.

" Now the Gameſter, the original Payee, when he " indorſes the Note to a Stranger, who becomes a pur- " chaſer of it for a valuable Conſideration, has received " the advantage of the Contract and Security, he has

" Caſh

"Caſh or Value for it: and Strangers, into whoſe "hands it may ſucceſſively paſs from an innocent In- "dorſee, may be thought to ſtand on a footing wholly "independant of the Contract.

4 Bac. Abr. 622. IV. Comm. 372.

"And this Sentiment appears to be adopted in "*Bacon*'s Abridgement, and to be favoured by the dif- "ferent Mode of expreſſion in the Commentaries, "when treating of the effect of the Statute of *Charles* "and that of *Anne*. And no Deciſion occurs contra- "dictory to HOLT's Idea. It is perhaps as becoming "in the Law as in Philoſophy, not to wonder without "adequate Cauſe: and poſſibly the learned part of the "Bar would have done no injuſtice to that character "by a leſs empaſſioned reception of the Sentiments on "this occaſion of that very learned and diſcerning "Judge.

2 Mod. 279. Mic. 29. Car. II. C. B.

"And HOLT himſelf, in affirmance of this Opinion, "puts a Caſe much ſtronger: being on a Bond which "is not regarded as Currency in the Place of Caſh, "but as a ſpecial Security: that Caſe had actually been "decided within little more than twelve Years of the "Statute: *A* won 100 *l.* of *B.* and being indebted in that "Sum to *C.*; he takes *B.* with him to *C.*, and there *B.* "acknowledges the Debt, but ſays nothing of the Con- "ſideration, (of which *C.* remained wholly ignorant), "and conſents to give Bond to *C.* for the Debt of 100 *l.*

"which

" which *A.* owed to *C.* *B.* is ſued by *C.* on this Bond, " who pleads the Statute of *Charles* in his Defence, " namely, that it was for payment of a Gaming Debt. " Now, a Contract, that *B.* would make Security " by Bond, Mortgage or Judgement to *A.* for ſuch " Debt, is clearly pronounced Void under the Statute: " and though *C.*, if privy to the Conſideration of giving " the Bond, could never have recovered under it, yet *C.* " innocent, and a Stranger to the Tranſaction, and ac- " cepting only a Security for payment of a legal Debt, " was held by the whole Court not to be within the " Statute. This appears to go the whole extent of " the Dictum of the *Lord Chief Juſtice* HOLT, and be- " yond it: and to be a direct ſatisfactory Deciſion in " point upon this Queſtion on the Statute.

" In the Caſe of *Robinſon* and *Bland*, which will re- " quire to be hereafter mentioned for another import- " ant Principle contained in it, the Action was on the " Caſe upon Promiſes. The Declaration conſiſted of " three Counts: The *firſt*, on a Bill of Exchange, " drawn by Sir *John Bland* (whoſe Siſter and Admini- " ſtratrix was the Defendant) at *Paris*, 31ſt of *Auguſt*, " 1755, payable in *England*, at ten days after Sight, " for the ſum of 672*l.* payable to the order of the Plain- " tiff. The ſecond Count was for Money *lent* and ad- " vanced; the third for Money *had* and *received*, by " the Defendant to the Uſe of the Plaintiff.

1 Bl. R. 237 and 256. S. C. 2 Burr. Manſ. 1077. Mic. 2 G. III.

" There was a Verdict for the Plaintiff, ſubject to " the opinion of the Court on a Caſe reſerved: which,

" ſo

" ſo far as is material to the preſent occaſion, compriſed " the following Facts :

" That the Bill was given for Money on Account " of Play at *Paris*, which was fairly loſt; 300 *l.* Money " *lent* by the Plaintiff for the above purpoſe; 372 *l.* Money *loſt* to the Plaintiff at the ſame time.

" *The Court* was of Opinion, that the SECURITY for " Money loſt or lent for the purpoſe of Gaming, was " rendered void by the Statute of *Anne:* ſo that upon " the *firſt Count*, the Plaintiff could not recover.

" But as to the CONTRACT, *the Court* was of Opinion, " that the Money WON was not recoverable: the *Con-* " *tract* and *Security* being both defeated by the Statute " of *Charles*.

" But that, as to the Money LENT, the Plaintiff was " entitled to recover ſuch LOAN, not being prohibited " by the Statute of *Charles*, and the SECURITY only " being affected by that of *Anne*; the CONTRACT at " large remaining open to be decided according to the " Merits of the Conſideration, which, in this Caſe, the " Court held ſufficient to entitle the Plaintiff; and " that he muſt accordingly recover for *ſo much* (with " Intereſt up to the time of giving the Judgement), on " his Counts of *general* ASSUMPSIT.

" Judgement was accordingly entered up on the " Verdict: but under Rule to ſtand as a Security for " 300 *l.* the Principal Money lent, and 75 *l.* Intereſt.

Gilb. R. 49. 139.

" The Plaintiff declared on a *promiſſory* Note: the " Defendant pleaded, that by the Statute of ANNE to " make void Notes or other Securities given to induce " a Creditor

" a Creditor to ſign a Bankrupts *Certificate*, (*a*) the Plain-
" tiff ought not to maintain his Action, for that on ſuch
" day, he, the Defendant *aecoctor devenit*. And that
" before that time and hereunto, he was and is indebted
" to *I. S.* in 100*l.* and above: that a Commiſſion iſſued,
" and Commiſſioners proceeded and made a *Certificate*
" of his (the Defendant's), having conformed in all
" things to the Statute, &c. and that the ſaid *I. S.* re-
" fuſed to ſubſcribe the *Certificate*, until he the De-
" fendant, ſhould give him a Security, namely, the
" Note in the Declaration mentioned, or a like Note;
" whereupon the Defendant gave the Note, in the
" Declaration ſet forth, to the Plaintiff in Truſt for *I. S.*
" to induce him to ſubſcribe the ſaid Certificate.

" The Plaintiff demurred, and on Argument, it was
" contended, that the Plea was general and bad: that
" it amounted to no more than the *general Iſſue*; which
" he might have pleaded, and given the Conſideration
" in *Evidence* under the Statute.

" The Court ſeemed to be of Opinion, that though
" he might well have pleaded the general Iſſue in this
" Caſe, yet that having introduced a ſpecial Plea, he
" ought to have ſhewn that he was ſuch a Bankrupt
" as was entitled to his Diſcharge: ſince otherwiſe, the
" Creditors for whoſe Benefit, equally and impartially,
" the Proviſion was framed, would not be prejudiced
" by the Note or Certificate, and the Miſchief would
" only fall where the Fraud was intended.

(*a*) *Neither this Act nor the Title occurs in* Ruffhead's *Edition. It is afterwards cited under the Title of* 4 & 5 Anne, *in this Caſe. A Statute of that Date* (*c.* 17.) *is expired. But there is at preſent, by the Statute* 5 G. II. *a Clauſe pronouncing void all Bonds*, Bills, Notes, *Contracts and Agreements, as a Conſideration or to the intent to perſuade a Creditor to ſign a* Certificate, *the party ſued to be at Liberty to plead the general Iſſue, and* give the Act *and the ſpecial Matter in Evidence.* c. 30. § 11.

" *Bills*

Eq. Ca. Abr. 602. Renew v. Axton, Hil. 2 & 3 T. II. Carth. 3. v. etiam 226.

" *Bills* of *Exchange* and promiſſory Notes are within " the Statute of Limitations.

SECTION VII.

Of SECONDARY EVIDENCE.

" *Voluntary Affidavits* have already been conſidered. " Little requires to be ſaid of the Evidence of " LETTERS.

Letters.

" Theſe, however, are ſometimes the very Baſis of " the Charge: as where the Contents of them conſtitute " an *overt* Act of *Treaſon*. But in this Senſe, they do " not properly relate to this head.

" They are *Secondary* Evidence, where they are ad- " duced *Collaterally* to the Charge: and thus *Letters* " may be read in Evidence, from the Wife to the De- " fendant, on an Action, of which there are too many " examples: though he cannot read them in his " favour.

" *Letters* too are not unfrequently read in proof of a " promiſe of Marriage.

TIT. II.

Tradeſmen's Books.

L. N. P. 282.

" The Statute of JAMES enacts, that a *Tradeſman*'s " SHOP-BOOK ſhall not be *Evidence* AFTER a Year. This " might infer a Surmiſe of Parliament, that of itſelf it " was Evidence, generally. Yet it is not ſo, unleſs " under circumſtances *for defect of better*.

Price v. the Earl of Torrington, Cor. Holt. C. T. Salk. 285. Tr. 2 Ann.

" Thus, where an Action was brought by the Plain- " tiff, being a Brewer, for Beer ſold and delivered; it " was proved that the uſual way of the Plaintiff's deal- " ing was, that the Drayman came every Night to the " Clerk of the Brewhouſe, and gave him an Account " of

" of the Beer they had delivered out, which he ſet " down in a Book for that purpoſe, to which the Dray- " men ſet their hands, and that the Drayman was dead. " They proved his hand-writing to the Book: and this " was held good Evidence of the Delivery; otherwiſe " of the Shop-Book ſingly, without more.

" And in an earlier Caſe, on a Taylor's Bill, a Shop- " Book was allowed Evidence, it being proved that " the Servant accuſtomed to make the Entries was " dead, and that it was his hand to the Book. Salk. 690. Hil. 11 W. III.

" But where the Plaintiff to prove Delivery, pro- " duced a Book which belonged to his Cooper who " was dead, and whoſe Name was ſet to ſeveral Articles, " as Wine delivered to the Defendant, and a Witneſs " was ready to prove his hand, it is ſaid, that Lord " Chief Juſtice *Raymond* would not allow it, for that " it differed from Lord *Torrington*'s Caſe, becauſe there " the Witneſs ſaw the Drayman ſign the Book every " Night. Clerk & Bedford, Mic. 5 G. II. L. N. P. 282.

" Upon an Iſſue out of Chancery, to try whether " eight Parcels of *Hudſon*'s *Bay* Stock, bought in the " Name of Mr. *Lake*, were in Truſt for Sir *Stephen* " *Evans*, his Aſſignees, the Plaintiffs, ſhewed firſt, " that there was no Entry in the Books of Mr. *Lake* " relating to this Tranſaction. Secondly, ſix of the " Receipts were in the hands of Sir *Stephen Evans:* " and there was a Reference to the Back of them by " *Jeremy Thomas* (Sir *Stephen's* Book-keeper), to Book " *B. B.* of Sir *Stephen Evans.* Thirdly, *Jeremy Thomas* " was proved to be dead. The Queſtion was, whether " the Book of Sir *Stephen Evans* referred to, in which " was an Entry of the payment of the Money, ſhould " be permitted to be read. And the Court of *King's* " *Bench*, on *Trial* at *Bar*, admitted it, not only as to " the Six, but likewiſe as to the other two, in the hands " of Sir *Beiby Lake*, the Son of Mr. *Lake*. L. N. P. 283. 3 May 1738.

" And

L. N. P. qua supra, cited by Ld. Hardw. in Montgomerie and Turner.

" And in *Smartle* and *Williams*, where the Queſtion " was, whether the Mortgage Money was really paid; " a Scrivener's Book of Accounts, the Scrivener being " dead, was holden to be good Evidence of payment.

TIT. III.

DEPOSITIONS, &c. *poſt Mortem*.

" We come now to the laſt Species of WRITTEN " EVIDENCE, and the moſt proper to precede *parol* " Teſtimony, for it is indeed only parol in its Origin, " and not admitted till the direct Verbal Proof ceaſes to " be attainable; I mean *Depoſitions* and Examinations " at Common Law, introduced as Evidence after the " Death of the party by whom they were made and ac- " knowledged.

Barnard. K. B. 348.

" And firſt," *Exemplifications* of *Depoſitions* in *Equity*: " theſe" ſhall be delivered to the Jury if the party be dead; and the Exemplifications are under the Great Seal: but if the Exemplification contains the Teſtimony of ſome that are living and ſome that are dead, it ſhall not be delivered to the Jury; becauſe, when the Parties are dead, their Depoſitions are the greateſt Evidence that the Nature of the thing is capable of, and equal to Evidence *Viva Voce*, and ought to be as carefully conſidered and examined; which cannot eaſily be, unleſs they are carried away by the Jury, for the bare reading of them in Court is not likely to make the ſame Impreſſion; beſides, this Evidence does not derive Credibility from any Act of the *Niſi Prius* Court, but they have it intrinſically in themſelves, from the Self-Evidence of their own Seals, and therefore, wherever they are removed they remain the ſame: but if ſome of the Witneſſes are living, it is not the higheſt Evidence.

Styl. Prac. Reg. 294.

" But

" But it ſhall not be preſumed that Witneſſes are " dead, ſo as to admit their Depoſitions in a Court of " Common Law, while it is apparently ſuppoſeable " that they continue living.

" And therefore, on Trial of an Iſſue directed from " the Equity ſide of the Exchequer, in the year 1732, " the Depoſition of a Witneſs examined fifty (*b*) years " before, namely, in 1672, was offered to be read, " without any Evidence of his being dead. The " *Chief Baron* would not admit it; diſtinguiſhing it " from a Deed, which proves itſelf after thirty years: " for that a Deed had ſome Authenticity from the " ſolemnity of hand and ſeal (probably he muſt have " added to this effect, and became original proof, to " which the atteſtation of Witneſſes was but a circum- " ſtance ſubſervient; but in the inſtance under conſi- " deration the *vivâ voce* Evidence is, in Courts of " Common Law, the primary Proof, and Depoſitions " are received in its room only from the Neceſſity of " the Caſe.) He ſaid if proper enquiry and ſearch " had been made, and no account could have been " given of him, he would have admitted it at ſuch a " diſtance of time."

Benſon v. Olive cor. Reynolds, C. B. Mic. 5 G. II.

V. ſupra, 100, 103.

Another

(*b*) *It is upon a Principle analogous to this, that the Rule is founded, that a period, which by any reaſonable intendment a perſon in being may ſurvive, ſhall not be ſuch a precedent Eſtate as ſhall conſtitute a veſted remainder in the perſon, whoſe intereſt is to take effect after the Death of him, to whom ſuch a Term is deviſed.*

Thus, where A. *deviſed Lands to* B. *his eldeſt Son, for the Term of ſixty Years, if he ſhould ſo long live; and from and after his deceaſe to his grandſon* D, *the ſon of* B, *in Tail.* B. *and* D. *ſuffered a* Recovery: *an objection was taken to that Recovery, for that the Deviſe to* B. *being* only *for* ſixty *Years, if he ſhould ſo long live, and after his deceaſe to* D. *the freehold, during the Life of* B. *was in* abeyance.

Beverley v. Beverley, et al. 2 Vern. 131.

12 Mod. 318. Barnard. K. B. 243.

Another way of perpetuating the Evidence of a party deceaſed is, by giving the Verdict in Evidence, and the *Oath* of the party deceaſed "upon that Trial."

V. ſupra, 65, et paſſim.

"Now concerning this there are theſe Rules." Where you give in Evidence any Matter ſworn at a former Trial, it muſt be between the ſame parties: becauſe otherwiſe you diſpoſſeſs your Adverſary of the Liberty to croſs-examine: beſides, otherwiſe you cannot regularly give the verdict in evidence, and where you cannot give the verdict in evidence, you cannot give the Oath on which it was founded; for if you cannot ſhew there was ſuch a cauſe, you cannot ſhew that any perſon was examined in that Cauſe; and without ſhewing that Cauſe, no man's oath can be given in Evidence.

"And

Cited, Litt. Rep. 370. as of 34 Eliz. C. B.

abeyance. *It was argued that the limitation of the Eſtate Tail, expectant on the term of* ſixty *years, was good. And Lord* Derby's *Caſe was cited as in point. That the deviſe over, from and immediately after the deceaſe of* B. *ought to be intended of his dying within the Term; which was highly preſumable,* B. *being then upwards of* forty *years of Age. But the Court held it would be hard to make ſuch conſtruction on the Words of the Will, as to ſay where a Term is limited to a man for* ſixty *years, if he ſhall ſo long live, and from and after his deceaſe, to another, that it muſt be meant, from and after his deceaſe* within the term. *For ſuppoſe he outlived the Term, ſhould the remainder-man take in the life of the firſt deviſee? That would be a conſtruction contrary to the words and intention of the Teſtator.*

Lord Derby's *Caſe was this: Covenant to ſtand ſeized to the Uſe of himſelf for Life, Remainder to another for* eighty-nine *years, if* Ferdinand *his ſon ſhould ſo long live, Remainder after the Death of* Ferdinand *to a ſecond ſon in Tail. The Queſtion was, if the ſecond Remainder in Tail were good. And it was adjudged ſo to be: for that it was for* eighty-nine *years; which is longer than by intendment of Law a man ſhould live: but that if it had been for* ten *years, if* Ferdinand *ſhould live ſo long, then it had been a void Remainder.*

In the Caſe of Napper *and* Sanders, A. *made a Feoffment to the Uſe of herſelf for Life, and after, to the Uſe of the Feoffees, for* 80 *years, if* B. *and* C. *ſhould ſo long live: and if* C. *ſurvived* B. *then to the Uſe of her for Life and after the Deceaſe of* C. *to the Uſe of* D. *in Tail; with Remainders over.*

" And for this purpoſe it hath been holden that the " *Poſtea* is ſufficient Evidence of a Verdict; that is, " ſo far as to entitle you to introduce an account of " what a Witneſs, ſince dead, ſwore at that Trial. Str. 162.

" Declarations of a *dying* perſon are frequently part " of the Evidence given in ſupport of an Indictment " (after his deceaſe) of Murther. On this ſource of " Evidence ſome points aroſe in the melancholy Caſe " of Mr. *Luttrel.* Pratt Ch. J. Hil. 5 G. I. Str. 162. Str. 499. S. C. Hargr. St. Tr. Vol. VI. p. 202—4.

" This Gentleman being mortally wounded, his ac- " count of the Facts, together with his ſentiments on " the circumſtances leading to the event, was reduced " to writing by a Clergyman, at the requeſt, and in " the preſence, of two Juſtices. The writing was not " ſigned by the deceaſed, and one of the Juſtices took " it with him into *Wales.* The Clergyman took a " Copy of it. There were alſo three ſeveral confe- " rences to the ſame general purport which the writ- " ten declaration was meant to have proved; namely, " charging the Defendants with having barbarouſly " murdered him.

" The *Copy* was offered to be given in Evidence; " but the Court would not admit it: the Counſel for " the Proſecution not having ſhewn that the Original " was loſt; but it appearing, on the contrary, that they " might have produced it if they had applied in due " time.

" There

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over. The Queſtion was, whether the Remainders ſubſequent to that for the Life of C. *were contingent or veſted.*

In this Queſtion there were two points: the firſt foreign to the preſent conſideration, whether the contingency on which the Eſtate for Life to C. *was limited to depend, ſhould extend to all the ſubſequent remainders, and it was determined that it ſhould not.*

There remained then the other point, neceſſary to the deciſion of the queſtion; namely, whether ſuch remainders were not to be deemed contingent in regard of the poſſibility of the joint lives outſtanding the term of eighty *years,*

"There then aroſe a Queſtion whether any of the "Declarations of the deceaſed, touching the Cauſe of "his Death, could be Evidence. The Court was un- "animous that the Declaration at the ſecond conference "could have no account given of it that would be "Evidence; that being the conference in which the "Declaration was reduced to writing. But the firſt "and third were held to be diſtinct Facts, of which "Evidence was receivable, and the Declaration of the "deceaſed at theſe conferences was accordingly ad- "mitted, the CHIEF JUSTICE *diſſentient*, as conſider- "ing the firſt, ſecond, and third, to be all to the ſame "effect, like ſupplemental Anſwers in Chancery, ſo "as to conſtitute but one fact, of which the beſt Evi- "dence was not produced; and therefore he was of "opinion they could not be let in to give an account "of the firſt and third conference."

In

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years, in which event, ſuppoſing A. the feoffor, to be dead, there would be evidently no preceding eſtate ſubſiſting, nor, conſequently, the remainders capable of taking effect.

Lord Derby's *Caſe was cited; and it was adjudged that the Remainders veſted immediately.*

Weale v. Lower Poller. 67.

In another Caſe it was ſaid by Hale, *Chief Juſtice, that a Feoffment for ninety-nine years, if A. ſhould ſo long live; and, after his Death, to the Uſe of B. in fee, ſhall not be contingent; but it ſhall be preſumed his life will not exceed ninety-nine years; otherwiſe if it had been limited but for* twenty-one.

Fearne on Conting. Rem. & Ex. Devizes, 11, 55. Hargrave's Notes, 20 b.

See for theſe Caſes a Work, which, for the importance (in a profeſſional and public view) and intricacy of its ſubject, and the clearneſs and ſtrength of reaſoning, merits early to be ſtudied, and never to be wholly laid aſide, by the Lawyer, who would unite the higher knowledge and principles of his profeſſion with practical experience: ſince Caſes without order, and a firm regular connection of well-eſtabliſhed inferences, which the Mind acquires an habit of deducing from an exerciſe of its powers in the attentive ſtudy of a juſt ſyſtem, impart a defective, fugitive, and fallacious intelligence. The Treatiſe, to which reference is here made, may be expected to have that direct influence in fortifying the Judgement of a Student which the Mathematics more remotely (as to the object of legal Attainments) are obſerved to exert. After the admirable COMMEN-

TARIES

In an Information of *Perjury*, on a Trial in Ejectment on *Not Guilty*, the Defendant "inſiſting" that what he ſwore was true; in proof of the Perjury one was produced to prove what a perſon deceaſed ſwore at the former Trial in Ejectment. And this was allowed to be good Evidence; becauſe it doth not go to the Proof of the charge itſelf that the Defendant ſwore, but only to the falſity of the fact that was ſworn. "And it was "held" that the Charge itſelf, which conſiſts in the Proof of "the Truth of the Fact, and the Contrariety of" what the Defendant ſwore might be directly proved by Evidence, which "might be" croſs-examined by the Defendant; but "that" the falſity of the fact to which the Defendant ſwore may be made out by any other Proof: becauſe, in this Caſe, you muſt give the Verdict in Evidence to prove the Perjury; in as much as the Cauſe in which the Perjury was T. Raym. 170. v. infra

TARIES *on the* Laws *of* England, *and the nervous Copiouſneſs of* PLOWDEN's Reports, *we might ſay of that Treatiſe, of* HALE's Hiſtory of the Common Law, BACON's Reading on the Statute of Uſes, *and* SHEPHERD's Touchſtone, *and* DODDERIDGE's Engliſh Lawyer---nocturna verſate manu, verſate diurna. *After a year or two thus ſtrenuouſly employed, if he ſhall peruſe the* Law *of* Evidence, FOSTER's Treatiſe on the Crown Law, *and with it* HALE's Pleas of the Crown, *and inform himſelf, from the few Authors who have treated on the ſubject, concerning the courſe of Proceedings and general Principles of the conſtitution of the* COURT *of* CHANCERY (*not neglecting* WOOD's Inſtitutes of the Law of Eng and, *for they are an excellent ſpecimen of diſtinct and cloſe Arrangement, and by no means, even now, ſuperſeded in their Utility*) *will not the young ſtudent be ſo grounded, that the year before his Call to the Bar he may attend the Courts to great Improvement? And having acquainted himſelf with leading Caſes in a few of our beſt modern Reporters, among whom I know not that any can with more advantage be read than* SIR JAMES BURROW, *for the* COMMON LAW, *and* PEERE WILLIAMS, (*ſtill a modern, from the Paucity of Chancery Reporters*) *for his admirable Caſes, chiefly in* EQUITY, *would he not enter on the practice with a well-ground-*

was committed muſt be ſet forth in your information; and by conſequence be proved on your Iſſue. And when you have proved that the Defendant ſwore in the Cauſe, you may ſhew the whole Matter, *viz.* how his Teſtimony ſtood oppoſed by the Evidence of the party deceaſed.

2 Hawk. P. C. 429. Ch. 46. § 6. Keb. 55. H. H. P. C. 306. Ch. 24. 2 H. H. P. C. 284, 5. Chap. 38. 2 Keb. 18, 9. 1 Lev. 180.

A Witneſs "is" examined before the Coroner, but upon the Trial is either dead, or ſo ill that he is not able to travel: if oath be made of the Truth of this Fact, the *Examination* of ſuch Witneſs, ſo dead or unable to travel, may be read; but the Coroner muſt "firſt make oath that ſuch Examinations are the ſame that were taken before him upon oath, without any Addition or Alteration; becauſe the *Examinations* are, in theſe Caſes, the utmoſt Evidence that can be procured, the Examinant himſelf being prevented in coming by the Act of God.

Kel. 55. 2 H. Pl. C. 429. 2 Keb. 19. H. P. C. Ch. 46. St. Tr. 265. 3 St. Tr. 8, 9. 2 H. H. P. C. 284, 5.

And much more ſo are ſuch Examinations Evidence, and to be read on the Trial, when it can be proved on oath that the Witneſs is detained and kept back from appearing by the means and procurement of the priſoner:

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ed hope, and a ſenſe of the real magnitude and extent of the objects which the Profeſſion comprehends. Would he not, if unſucceſsful, be ſuſtained by a not unbecoming conſciouſneſs; and if ſucceſsful, enjoy his honourable Acquiſitions with a ſentiment proportioned to the means by which he attained them? This indeed may ſuppoſe a later Call to the Bar than juvenile impatience or parental wiſhes may well admit: as otherwiſe it would interfere with academical exercciſes at the ſeaſon beſt adapted for claſſical and ſcientific ſtudies. But the dubious benefit of a few years ſeniority will not bear a competition with the advantages, both profeſſional and general, of being contented not to aſſume the Garb and Name of the Profeſſion till well grounded in its Theory, and even ſomewhat diſciplined in its Practice: of which oppor-

ſoner: for he ſhall never be admitted to ſhelter himſelf by ſuch evil Practices on the Witneſs, that being to give him Advantage of his own Wrong.

In an Information againſt *Paine* for compoſing and publiſhing a Libel againſt the late Queen *Mary*, which was called her Epitaph. The Caſe was, that *Paine* wrote the Epitaph, but it was dictated to him by another, and that afterwards *Paine* put it into his ſtudy, and by miſtake delivered it to *B.* inſtead of another Paper. It came at length through ſeveral hands to the Magiſtrates, who ſent for *B.* and examined him upon oath in the Abſence of *Paine*. *B.* died before the Trial of *Paine*, which was at Bar; and the Court would not allow the Examination of *B.* to be given in Evidence, becauſe *Paine* was not preſent to croſs-examine: and though it is Evidence in *Indictments* for Felony in ſuch Caſes, by Force "of the Statute," yet it is not ſo in *Informations* for Miſdemeanours, or *Appeals* of Murder.

1 & 2 P. & M. c. 13.
2 & 3 P. & M. c. 10.

And upon this "Statute the Confeſſion of the Pri-
"ſoner (though it is not to be exhibited to the Grand
"Jury) may on the Trial be read in Evidence againſt
"the

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portunities are not wanting ſince a very commendable and antient Inſtitution has been revived. * *Five years ſpent in this manner, the latter half perhaps in one of the Law Societies, might introduce him to the Bar not too young to be reſpected on the firſt occaſion which ſhould call him forth, nor too old for the full gratification (probably to be continued for a number of years) of every juſt and liberal view, with ſtill increaſing ſatisfaction to himſelf and the Community.*

* Alluding to voluntary Exerciſes in which Law Queſtions are debated.

" the Priſoner: ſuch" Examination and Confeſſion " being taken" before a Juſtice of Peace.

" And of this the following particulars are to be " obſerved:

Burn, J. P. I. 537. " The Examination of the *accuſed* ought not to be " upon oath: the reaſon of this reſults from the moſt " obvious Principles of Juſtice, Policy, and Hu- " manity.

It is proper that he ſet his Name " or Mark to it."

" This Information being upon the Trial duly " proved by the Juſtice, who, if it may be, ſhould be " perſonally preſent, or his Clerk," is Evidence againſt the Party himſelf who made it; but cannot be made uſe of againſt any others.

H. H. P. C. Ch. 38. p. 284. This Confeſſion " to be Evidence, muſt be volun- " tary; for, as the excellent Sir MATTHEW HALE " notices, it muſt ſatisfactorily appear that the Priſoner " confeſſed freely without menaces or any ſpecies of " undue influence impoſed upon him, and that he has " often known (he ſubjoins) the Priſoner acquitted " againſt his Confeſſion upon the Examination: for " that the reaſon of theſe Examinations being at all " Evidence is, that they are taken before Judges of " Record, authorized and required by Act of Par- " liament, and who have juriſdiction concerning the " Crimes upon which they are taken.

" If it appear, therefore, that any of the requiſite " circumſtances are wanting, this ſpecies of Proof " will be rejected; and the laſt Circuit *Sir George* " *Nares* ever went, he, though ſinking under his ill- " neſs, exerted his accuſtomed Vigilance and Bene-

" volence

" volence in a Caſe where the Admiſſibility of a Con-
" feſſion in Writing was rendered doubtful by circum-
" ſtances at the time of making it. If practicable, it
" may ſeem always beſt where the Confeſſion of the
" Printer is taken, that it be in the preſence of one or
" more indifferent perſons unconnected with the *Proſe-*
" *cutor*, the *Magiſtrate*, or the *Priſoner*, (or at leaſt
" the two former), that it may be proveable to have
" been deliberately and freely made.

" In the Caſe now to be ſtated it was diſallowed, as
" being before a Juriſdiction deemed not relevant to
" the *criminal* Iſſue.

" *Welſh* forcibly took away Mrs. *Pickering*, and mar- H. H. P. C. II. Ch. 38. p. 285.
" ried her; and thereupon a temporary Act of Par-
" liament was obtained, enabling *Commiſſioners* therein
" named to hear and determine that Marriage, and to
" diſſolve it if there were cauſe. In that Caſe Mrs.
" *Pickering* herſelf was examined touching the Manner
" of the Marriage, as a ſupplemental proof, and died
" pending the ſuit. *Welſh* was afterwards indicted
" upon the Statute 3 *H.* VII. for Felony in this Fact:
" and it was moved, that this Examination of Mrs.
" *Pickering* might be read in Evidence againſt the
" Priſoner; but it was denied: becauſe it was a
" proceeding according to the Civil Law, in a Civil
" Court; becauſe that ſuit was originally at the inſtance
" of Mrs. *Pickering*, in her own Cauſe, for her own
" Intereſt, and therefore at Common Law not allow-
" able, though the Commiſſioners on that Exami-
" nation, were Judges conſtituted by that which was Mic. 1652. B. R.
" then allowed to be an Act of Parliament.

" And this Examination of a perſon charged with
" Felony not amounting to a CONVICTION *ipſo facto*,
" but only to a part of the Evidence againſt the Pri-
" ſoner, is not to be introduced as Evidence till after
" the Plea of *Not Guilty*," becauſe the Trial ought

to

to be of Record, ſolemn, in open Court, that determines upon the Fate of Life and Death.

"The Reader may obſerve that under this head of "WRITTEN EVIDENCE is included here the OATH of "a party deceaſed, on a former Trial, which, ſeparately "conſidered, would belong to unwritten Proof: but "ſince it is neceſſarily connected with the proceedings "on Record in the former Trial, not being receivable "till at leaſt the POSTEA be given in Evidence, and "ſince it could not be referred to the general character "of unwritten verbal teſtimony, which is by living "Witneſſes ſpeaking to their own knowledge, and "not (unleſs in ſome rare inſtances of exception) to "that of other perſons, or the declarations of others; "on the whole it ſeems that the oath of a deceaſed "Witneſs, as attached in a manner to the written "Evidence by Record, has its proper place in this "concluding diviſion of written Evidence.

"It has been a controverted point with reſpect to a "Witneſs examined before the Coroner, and who "afterwards," on all endeavours uſed againſt the Trial, cannot be found.

"On Proof of this it hath been thought his Exa-"mination may be read in a Caſe of Felony at Com-"mon Law:" becauſe it is to be preſumed that the Witneſs is dead, when he cannot be found after the ſtricteſt Enquiry. "And in merely civil Caſes," where a Witneſs is loſt, and cannot be found, you may, upon oath of the Matter, uſe his Depoſition; for "then" it is the beſt Evidence that can poſſibly be had of the Matter: "and" when a Witneſs is ſought, and cannot be found, he is in the ſame circumſtances as

Godb. 336. Tr. Atk. Rep. 445.

to

to the party, "and as to the expedience of ſupplying, "for the purpoſes of information to the Court upon "the Queſtion, the want of his verbal Teſtimony," as if he were dead: "and public Juſtice will not "reject any Evidence, where better is not attainable, "unleſs in the reception of it there would be greater "inconvenience.

"And it was reſolved by the Judges, on their pre- Kel. 55. v. Rſ. form. Ed. "vious conſultations with each other, touching the 2 Hawk. P. C. 430. "Courſe of Law on points likely to ariſe on the Trial "of Lord *Morley*, before the HOUSE of PEERS, for "*Murder*.

"That in caſe oath ſhould be made concerning "any Witneſs, who had been examined by the "Coroner, and was then abſent, that they had uſed "all their endeavours to find him, and cannot find "him, that is not ſufficient to authorize the reading of "ſuch examination.

"The extreme hazard of Abuſe in this inſtance "is manifeſt.

"But there ſeemeth to be no doubt that even in Kel. 55. "capital Caſes," if it be proved that a Witneſs was ſubpœnaed, and fell ſick by the way "ſo as to be un- "able to travel," his Depoſition may be allowed to be read, "the Coroner, or other Magiſtrate before whom "it was taken, firſt making oath that ſuch Depoſi- "tion is the ſame which he took upon oath, without "any Addition or Alteration whatſoever:" for the Depoſition is the beſt Evidence that in this Caſe can poſſibly be had; and that anſwers what the Law re- quires. "And in general Terms this hath been al- "ready expreſſed."

BOOK

BOOK II.

PART I.

CHAPTER I.

Of UNWRITTEN EVIDENCE.

We now come to conſider the UNWRITTEN EVIDENCE, or PROOFS from the Mouth of WITNESSES.

SECTION II.

WITNESSES.

And where we muſt conſider,

1. Who are totally excluded from Credit; "or, in "other Words, what Exceptions go to the *Competency* "or *Admiſſibility*.

2. By what Rules we may diſtinguiſh the Truth of contradictory Evidence; "or, in other Words, what "circumſtances augment or impair the CREDIT rea- "ſonably to be given to a Witneſs."

TIT. II.

Of INCOMPETENCY.

Thoſe who are *totally excluded* from all *Teſtimony* are,

FIRST, for WANT of LEGAL INTEGRITY; "which "is twofold.

1. *Preſumptive*; *from* INTEREST.

2. *Poſitive*; *from* INFAMY.

SECOND, for WANT *of* DISCERNMENT, which is alſo twofold.

FIRST. *From* NON-ATTAINMENT *of Years of* REASON.

SECOND. *From* DEPRIVATION *or Defect of Reaſon.*

THIRD, propter JURISJURANDI defectum, *for want of a legal* OATH.

FOURTH, propter FIDEM PUBLICAM; *from* PROFESSIONAL CONFIDENCE.

TIT.

TIT. III.

1. *Witneſſes excluded by Intereſt.*

Concerning *Perſons* intereſted in the Matter in Queſtion, the general Rule is, that NO MAN CAN BE A WITNESS FOR HIMSELF.

"But this Rule, though univerſal in civil Matters, "does not exclude the party, who proſecutes in the "Name of the CROWN, in *Right* and in *Behalf* of "the PUBLIC. For this, in ordinary Caſes of per-"ſonal Wrong, there is an obvious Reaſon; ſince he "doth not come for perſonal compenſation in the "ſhape of *Damages*, which are recoverable only by a "civil Action; nor is he by intendment of Law pre-"ſumed to come for private Revenge in the Puniſh-"ment of the Offender, but in pure Maintenance of "the Laws and public Juſtice.

"However, the Principle is yet more general; for, "not to mention *Appeals* of *Murder*, which perhaps "cannot with legal propriety be claſſed under this "head, ſince the Law will not preſume an Intereſt in "the indulgence of an acrimonial and unſocial Paſſion, "ſuch as Revenge is, a Party ſhall proſecute by In-"dictment where he hath a direct Intereſt in the "Event, that is, where he hath been *robbed*, and the "Goods are out of his Poſſeſſion, remaining in the "hands of the Party charged. And here, if he *pro-"ſecute* to CONVICTION, he ſhall have by the Statute "a WRIT of RESTITUTION. Nay, he ſhall often be

"without

" without Recovery of his Goods, unleſs he proſecute;
" for, on reaſons eaſily to be apprehended, he ſhall not
" have *Trover*, or other *civil Action*, againſt the *Felon*;
" for the TRESPASS mergeth in the FELONY.

Gilb. Rep. 113. " The true and moſt general PRINCIPLE, therefore,
" which governeth this Diſtinction, is, that *it concerneth*
" *the Community that* Crimes paſs not wholly unpuniſhed.
" And if the party ſuffering might not proſecute, few
" beſide might have the certain knowledge of the Fact,
" or the Diſpoſition of bringing it to Trial, which
" muſt combine to call forth the Exertions of PUBLIC
" JUSTICE.

" Yet ſo far the Rule holds, being founded on a
" Principle not to be ſuperſeded of neceſſary Juſtice.
" That where a Perſon is to *diſcharge* himſelf by ſuch
" Evidence as would effect a Conviction, he ſhall not
" be an Evidence in ſupport of a public Proſecution.
" Thus where a Man is *indicted* for FORGERY, the
" party whoſe hand is ſaid to be forged ſhall not be
L. N. P. 288, 9. " admitted to prove the Fact charged, of Forgery;
" for his hand, apparently, againſt him is Evidence, till
" the contrary be proved, of an Obligation: and
" therefore he ſhall not be permitted in the Indictment
" to make proof (while he hath intereſt in the Queſ-
" tion, the ſuppoſed Obligation ſtanding in apparent
" Force againſt him) that it was not his hand.

" But though in *criminal Caſes*, the Exceptions are
" few indeed, in which a party intereſted in the Event

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* Intereſt Reipublicæ ut ne ſint Delicta impunita.

" may

" may not be a Witneſs; in CIVIL CASES, there is " hardly at COMMON LAW an inſtance where the Cauſe " is ſo circumſtanced as that he may: and this upon " clear reaſons operating ſuch Excluſion;" for where " a Man, who is intereſted in the Matter in Queſtion, would alſo prove it, it rather is a Ground for Diſtruſt than any juſt Cauſe of Belief: for men are generally ſo ſhort-ſighted as to look to their own private Benefit, which is near them, rather than to the Good of the World, " which, though on the ſum of Things really " beſt for the individual," is more remote; therefore, from the Nature of human Paſſions and Actions, there is more reaſon to diſtruſt ſuch a biaſſed Teſtimony than to believe it. It is alſo eaſy for perſons who are prejudiced and prepoſſeſſed to put falſe and unequal Gloſſes upon what they give in Evidence; and therefore the Law removes them from Teſtimony, to prevent their ſliding into Perjury: and it can be no Injury to Truth to remove thoſe from the Jury, whoſe Teſtimony may hurt themſelves, and can never induce any rational Belief.

" If it be objected, that Intereſt in the Matter in " diſpute might, from the Bias it creates, be an Ex- " ception to the *Credit*, but that it ought not to be abſo- " lutely ſo to the *Competency*, any more than the Friend- " ſhip or Enmity of a party whoſe Evidence is offered, " towards either of the Parties in the Cauſe, or many " other conſiderations hereafter to be intimated: the " general Anſwer may be this, that in point of Authority

" no

" no diſtinction is more abſolutely ſettled; and in
" point of *Theory*, the exiſtence of a direct Intereſt
" is capable of being preciſely proved; but its
" influence on the mind is of a Nature not to
" diſcover itſelf to the Jury, whence it hath been
" held expedient to adopt a general Exception, by
" which Witneſſes ſo circumſtanced are free from
" Temptation, and the Cauſe not expoſed to the
" hazard of the very doubtful Eſtimate, what quan-
" tity of Intereſt in the Queſtion, in proportion to
" the character of the Witneſs in any inſtance, leaves
" his Teſtimony entitled to Belief. Some indeed are
" incapable of being biaſſed even latently by the
" greateſt Intereſt, many would betray the moſt ſo-
" lemn obligation and public Confidence for an In-
" tereſt very inconſiderable. An univerſal Excluſion,
" where no line ſhort of this could have been drawn,
" preſerves Infirmity from a ſnare, and Integrity from
" ſuſpicion; and keeps the Current of Evidence, thus
" far at leaſt, clear and uninfected.

* V. 4 Burr. Manſf. 2254, 5.

" But Reſentment or Partiality, when prevalent in a
" great degree, are apt to ſhew themſelves in the
" Voice, Countenance, and Air of the Witneſs; in
" the manner of his repreſenting facts, and often by
" the intermixture of his own ſentiments and opinions;
" ſometimes by an exceſs of warmth, at other times
" by a ſolicitous reſerve, and in ſome by an affecta-
" tion of Candour.

To explain this Rule, "that *Intereſt excludes Teſtimony*," we muſt conſider what the Law looks upon as Intereſt, and it is, *where there is a certain Benefit or Diſadvantage to the Witneſs attending the Conſequence of the Cauſe one way.* 2 Atk. Rep. 229. P. W. Rep. 239.

And therefore, in the firſt place, a naked *Truſt* doth not exclude a man from being a Witneſs: for ſince there is no falſe Bias on his Conſcience, there is no reaſon to exclude him from Atteſtation.

Therefore a Guardian in Socage may be ſworn for his Ward.

An Infant bringing his Action by Guardian, the Guardian on Record not allowed to be a Witneſs: becauſe if the Action be frivolous, the Expence of ſuch Action will not be allowed him in his Diſcharge: and therefore the Guardian that would be ſworn to ſupport this Action, ſwears to the maintaining "of" his own Intereſt; and conſequently, is not a competent Witneſs. Lent Aſſ. 1714 per Parker, C. J. Str. 506. 548.

SECTION II.

Of WITNESSES *intereſted, and others not intereſted, within the meaning of the Rule.*

"It ſeemeth that" an Executor may be ſworn in a Cauſe relating to the Will, where he is not reſiduary Legatee; becauſe he is no more than a Truſtee, and has no Intereſt. Mod. 107.

Where a Man has a Truſt, coupled with an Intereſt, he can not be ſworn in the Proof of it; becauſe he is "regarded" in Law as Maſter of the Eſtate. 3 P. W. Rep. 181. contra-form. Ed.

"But when the Doctrine of Truſts was novel, much "ſeverer hath been the Rule: and accordingly it hath "been held, that" where *A.* has the Freehold in Truſt for *B.*, *A.* cannot be ſworn in Defence of it: becauſe

P. W. 290. is not contrary; for that was in *Chancery*.

he is looked upon in Law as Maſter of the Eſtate: for the *Ceſtui qui Truſt* can not derive a legal Title in the Ejectment, and the Truſteee muſt not be ſworn to derive a legal Intereſt to himſelf.

P. W. 290.

"And although now, for a conſiderable time, it is "clearly ſettled, that in Equity, at leaſt, a *Truſtee*, "MERELY as ſuch, is not precluded from being a "Witneſs concerning the Truſt Eſtate; yet in con- "formity to the antient Diſtinction (too ſtrongly it "then ſeemed eſtabliſhed by Precedent), an highly re- "ſpected Authority declared his Idea, that" a Truſtee, though merely nominal, cannot be examined at *Law*, though he clearly may in Equity. "This, if it were "ſtill held Law, would ſeem to merit the Aid of the "Legiſlature, that Evidence might not be excluded in "this ſingular inſtance contrary to the general Princi- "ples, and the other Rules of our Law concerning "Admiſſibility of Witneſſes. But recent and great "Authority appears for the admiſſibility of an Executor "in Truſt, and of a Common Truſtee without Re- "leaſe." *

By Hardw. Ch. 2. Tr. Atk. Rep. 229. Note to former Ed.

v. Lowe v. Joliffe, Bl. 365, 6. E. 2 G. III.

Hale, ſuper Litt. 6.

Tenant at *Will* has been allowed to prove Livery of ſeiſin in the Leſſor: for a Man cannot be ſaid to get or loſe where he has only a precarious Intereſt, and not ſuch certain Benefit or Charge out of the Eſtate as he may recover in an Action: Now Tenant at Will can maintain no Action for the Poſſeſſion in his own Right; and therefore, by his Oath, he doth not defend any Eſtate or Intereſt of his own, he is but in Nature of a Bailiff or Servant to the Freeholder, and the Law does not exclude Servants to be ſworn in behalf of their Maſters.

"In theſe Terms the Doctrine on this head hath "been ſtated: but now, ſince AGRICULTURE hath "become an Object of conſideration, proportioned to "it's juſt and great importance, for this Cauſe, and, in "favour alſo of the free and certain poſſeſſion of pro-

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* Holt *and* Tyrrel, 1. Barnardiſt. 12. E. 13 G. I. 1727. *cited in the above Caſe, where, on a Trial at Bar, it was held, that a Truſtee, without Releaſe, might be a good Witneſs.*

"perty,

" perty, *Tenancy* at *Will* is conſidered as *Tenancy from* " *Year to Year*; entitled to an half Year's Notice, deter- " mining with the Commencement of the Eſtate: or if it " be thought more proper to ſtate the Propoſition in " theſe Terms, where on the Tenancy there is annual " Rent reſerved, or where the Nature of the Demiſe " requires occupation for an Year certain, the Courts " of Juſtice will conſtrue ſuch Demiſe, without any " ſpecified Term, agreeably to the Nature of the Sub- " ject, and the fair intent of the Tranſaction, ſo as " that it be a Tenancy for a Year certain; renewed by " Implication, if timely Notice (of which the Limits " have been ſpecified already), be not given of the " Determination of the Contract.

v. Comm. 11 ch. 9. p. 147.

" And this Neceſſity of an half Year's Notice, deter- " mining at the Period from which the Demiſe ori- " ginally commenced, is recognized not only with re- " gard to *Lands*, but *Houſes*, in a Caſe very recently " determined: which was, a Demiſe by parol of a " public Houſe at 10*l.* per *Annum*, the Rent to com- " mence from the Midſummer of 1781.

Right on dem. of Flower v. Darby, et al. T. Rep. E. 26 G. III.

" On the 26 *March*, 1785, a Notice was ſerved " to quit on the 29th *September* following.

" A Verdict was taken for the Plaintiff at the *Saliſ-* " *bury* Aſſizes, ſubject to the Opinion of the Court on " the Special Caſe as above ſtated.

" It was much contended by Mr. *Le Meſurier*, who " argued for the Plaintiff, that the reaſons for protec- " tion and encouragement of Huſbandry, had governed " all the preceding Caſes: that the Principle of the " Rule failed with regard to Houſes; that in ſtrictneſs " ſuch a Contract as that in Queſtion, amounted to no

" more than a Tenancy at Will; and that the reaſons " of convenience would not warrant extending a con- " ſtruction as to the circumſtance requiſite to the ef- " ficacy of an half Year's Notice, to ſuch inſtances. " And that although ever ſince the time of *H.* VIII. " half a Year's Notice to quit, had been held to be ne- " ceſſary in the Caſe of a Tenant at Will, it was not " then nor by any ſubſequent Caſe required that ſuch " Notice ſhould expire with the Year, and that at leaſt " there could be no Analogy from the motives for re- " quiring this in the inſtance of *Farms*, which, ſhould " make this correſpondence of the expiration of the " Notice to any particular Period neceſſary in the Caſe " of *Houſes*.

" But all the Judges then preſent (*abſente* WILLES) " conſidered this Diſtinction as not affecting the " Caſe: which they held to be ſufficiently ſtrong on " the general Principle, that Notice given to quit be- " fore the expiration of the Year, computed from the " Term of Commencement, is contrary to the implied " Agreement of a Tenancy from Year to Year, which a " Tenancy on annual Rent is now underſtood to be at " the leaſt. And therefore, Judgment for the *De-* " *fendants*.

Comm. I. c. 9, p. 150, 1.

" It ſeemeth now therefore, that hardly any *Tenant* " can come in as a Witneſs, unleſs *Tenant* by *Sufferance*, " which is, he who holdeth over without conſent of " the Landlord, after the expiration of his legal Term: " an inconvenience, frequent when there was no better " remedy than by *Ejectment* in ſuch Caſes: but of " which little is now heard ſince the Statute, early in " the Reign of the late King, gave the Penalty of the " double Yearly Value.

Hargr. Co. Litt. ch. 8. § 68. n. 3.
4 G. II. c. 28.
11 G. II. c. 19. § 18.

" It

"It is clear," the equitable *Ceſtuy que Truſt* can not be ſworn to the Title: for Equity is a part of the Law of *England:* and therefore, the Law ought ſo far to take Notice of the equitable Intereſt, as to exclude the Owners of ſuch Intereſt, who do really enjoy the Benefit of the Eſtate, from any Atteſtation. 3 Ch. Rep. 22.

If a Man promiſe a Witneſs, that if he recover the Lands, he ſhall have a Leaſe of them for ſo many Years, this excludes the Evidence: for here the Witneſs would have a fixed and certain Advantage from the Event of the Verdict, and by conſequence, his Atteſtation is to derive an Intereſt to himſelf. Mod. 21. 2 Keb. 576.

"The Caſe indeed thus put, bears a Complexion "very like *Subornation* of *Perjury:* at leaſt it amounts "to that undue practiſing of Witneſſes which the Law "abhorreth: but ſo much is not neceſſary to the "Rule: for if the Intereſt be direct and dependant "on the Event of the Cauſe, in favour of the party, "by whom the Teſtimony is tendered, it is immaterial "in what manner or from what ſource ſuch Intereſt "ariſes."

A *ſcire facias* was brought by the King to avoid a Patent, and Exception was taken to the Witneſs, becauſe he was to be Deputy to the Perſon that would avoid it: but the Exception was diſallowed: becauſe the *ſcire facias* is in the King's Name; and therefore, "it" cannot be preſumed, that the Intereſt was in another, which would deſtroy the very being of the *ſcire facias:* for no Judge ought to preſume contrary to the Record. "It ſeems the reaſon of this was, that "there muſt have been preſumption on preſumption, "and that of Fraud." Mod. 21.

TITLE. III.

If the Obligee deviſes the Debt to the Obligor, and the Executor, in ſatisfaction of the Legacy, delivers up the Bond, and the Bond is cancelled, and after the Validity of the Will is queſtioned, *viz.* whether the Teſtator was *compos* or not, the Obligor is ſaid to be a good Witneſs to the Will: becauſe the Obligation being cancelled, he can never be charged at Law upon a cancelled Bond, for it is the Seal that "carries" the "Obligation."

"It may indeed be ſaid, that if the Will be a void "one, the Executor may be liable to the perſon who "ſhould have had the Benefit of the Bond, whoſe ſecu- "rity he hath raſhly deſtroyed: but this doth not "prevent the Competence of the Witneſs; nor even "affect his Credit ſo long as he is under no ſuſpicion "of having fraudulently promoted the making of a "falſe Will (as a forged one, or obtained by impoſition), "in order to procure a Diſcharge of the Debt he owed "to the Teſtator."

But otherwiſe it is "held" in caſe of a *Mortgage:* for though the Mortgage be cancelled, yet the Right being transferred, doth not ceaſe or go back again by the cancelling of the Deed.

Now the Mortgagee, at Law, hath an abſolute Eſtate: and Equity "doth not allow" a Redemption, but by diſcharging the Mortgage Money, "or by the Act "of the Mortgagee, equivalent to ſatisfaction by pay- "ment:" ſo, that in ſuch caſe, the ſwearing the Teſta- tor to be *compos* after cancelling the Deed of Mortgage, would ſtill be in Defence of his own Intereſt: for the Eſtate doth not come back to the Mortgagor, but by Virtue of the Deviſe.

"And

"And that the real Intereſt or equitable Lien on "the Eſtate is to be regarded, hath been confirmed "by late Caſes. The Deeds ought to accompany the "Title, and a prior Mortgagee, if he hath ſuffered "the Deeds to be in poſſeſſion of the Mortgagor, ſhall "not prevail againſt a ſecond Mortgagee without "notice, who has all the title Deeds, and has taken the "Aſſignment of the Truſt Term for a valuable Con-"ſideration. Goodtitle v. Morgan, E. 1787, B. R. T. R. 755.

"Nor, on the other hand, ſhall the poſſeſſion of a "ſatisfied Truſt Term and of the Title prejudice the "true ownerſhip: which will be conſidered, not only "in Equity, but at Common Law, in Trial of an "Ejectment. Now in Evidence, the Court will * ſee "where the ſubſtantial Intereſt is: and to this the "Objection of Incompetency muſt be allowed to ap-"ply, though the formal Intereſt may be in another." T. R. 758, 9, 60. * Wheate and Burgeſs. Bl. 123. Willoughby v. Willoughby, Canc. T. R. 763.

If a Man makes a Feoffment to one, and afterwards makes a Feoffment to another of the ſame Lands; and in the ſecond Feoffment, "reciting," that he was ſeiſed in Fee at the time of the Feoffment, makes diverſe Covenants, that the Feoffee ſhall quietly enjoy, &c. after, upon an Iſſue taken, whether there were any former Feoffments, the Feoffor ſhall not be ſworn to prove that there was not; becauſe the Feoffor, in this Caſe, would be ſworn to ſave himſelf from the Breach of Covenant in the ſecond Feoffment, and therefore, he is concerned in Intereſt in the Succeſs of the Cauſe, and ought to be excluded from all Atteſtation. 2 R. Abr. 685.

TITLE. IV.

INTEREST, *where direct and abſolute, applies as an* EXCEPTION *to* CRIMINAL *Caſes.*

"As hath before been noticed," in all public Proſecutions, the Party injured may be a Witneſs, "with "the Exceptions already intimated, and now to be "ſtated more largely."

"Thus the Party may be a Witness," where there is a Fine to the King, and no private Advantage arising to himself, "immediately or consequentially," from such a Prosecution: but if there be any Advantage of private Benefit to accrue by the Prosecution, the Party is equally excluded as in a private Action.

Hardr. 331. In an Information of Assault and Battery, the person injured may be a Witness: because here the Fine is to the King, and no private Benefit accrues to the party as the result of the Prosecution.

But such Verdict in an Information, founded only on the party's own Oath, cannot (which we have already observed) be given in Evidence in a Civil Action: for that were indirectly to suffer the party to attest in his own behalf.

But where, on any public Prosecution, there arises any private Advantage to the Prosecutor, there he can not be a Witness: because that were plainly "and directly" to attest in his own behalf; which can never be admitted.

Therefore, on an Information of *Forgery*, the party whose Right was prejudiced by the forged Deed, can not be a Witness: because (as was intimated above) there plainly results a private Benefit to the party from the Success of the Prosecution.

Hardr. ubi supr. 2 Str. 728. S. P.

v. L. N. P. 289. "But this is one of the Objections to competency "which is removed by a *Release*. Accordingly the "principal Evidence against *Dr.* DODD, the party in "whose Name the Bond was forged, was admitted to "give Evidence, this proof being first made. I cite, "for this the memory of the transaction, recent on account of it's particular circumstances in the minds of "many, and the account given in a respectable Publication. We have before observed, the point is settled in civil Cases; it is not less so in criminal ones."

Ann. Reg. 1777.

So in an Information of *Perjury*, founded on the Statute, the Perſon injured by the Perjury, can not be a Witneſs: becauſe "he" gains ten Pounds on the Statute by Conviction. "But, of courſe, on an Indictment at "Common Law, where the Penalty does not go to the "Informer, the party injured may be a Witneſs."

Hardr. ubi ſupr. 2 Sid. 237. 2 Str. 1043. 1104. L. N. P. 289.

So in an Information on the Statute of *Uſury*, the party to the uſurious Contract can not be a Witneſs, (while he hath an Intereſt in the Queſtion), becauſe that were to avoid his own Securities; but after he hath paid the Money, he is a good Witneſs; becauſe then the Party guilty is fined to the King, and there is no Advantage to the Proſecutor from the Information.

Co. Litt. Ed. 6. b. Harg. 2 R. Abr. 689. T. R. 191. 7 Mod. 118.

"I ſhall now mention a Determination, which "throws great Light on the general Theory and "Diſtinctions of this Article, and ſhall, for that "reaſon, quote it almoſt *verbatim*.

TITLE V.

Diſtinction between Intereſt and indefinite Influence.

"In the Caſe of *Abrahams* againſt *Bunn*, which was "an Action *qui tam*, on an uſurious Contract, on the "Trial at *Guildhall*, before *Lord* MANSFIELD, there "was a Verdict for the Plaintiff. On a Motion for a "*New Trial*, the Ground taken, was the ſuppoſed *In-*"*competency* of the Plaintiff's Witneſs. He was the "*Borrower* of the Money, and was called by the "Plaintiff to prove the uſurious Contract.

4 Burr. Manſ. 2251.

"That this Witneſs *was* the *Borrower* of the Money "ſufficiently appeared, being directly ſo charged in "all the Counts on the Record: which were entirely "on uſuriouſly *taking*, there being no Count which "charged any *Bond*, *Aſſurance*, or *Contract*.

"There

" There was an Exception as to the *Form* and *Time* " of taking the Objection; which belongs to another " head, and is preſently to be conſidered: but the " COURT went on the *Merits*; as if the Exception had " been duely taken in point of *time* and *form*.

" The CHIEF JUSTICE, in delivering the Opinion " of the COURT, ſaid,

" There are two Reaſons given for univerſally re- " jecting the Teſtimony of the *Borrower*.

" 1ſt, Becauſe 'tis to be preſumed really his own " Cauſe, and that the nominal Plaintiff is ſet up co- " lourably by him.

" 2dly, Becauſe it would enable him to avoid his " own Securities, and diſcharge himſelf of the Money " borrowed.

" The firſt Reaſon is *now* totally exploded: for he " is not *now* preſumed to be a party in the Cauſe.

" As to the ſecond, the Propoſition laid down is too " large; for there may be Uſury which can not af- " fect the Debt or avoid the Contract. The Clauſe " which avoids the Contract is, where the Uſury is for " more than *five per Cent*. But if a Contract be only " for *five per Cent*. and the Lender afterwards takes " more, he is liable to be proſecuted for Uſury, and " to pay the Penalty, though it does not avoid the " Contract. And where it would affect the Debt, it " may have been * paid.

* v. Long's Caſe. Sir T. Raym. 191.

" All the other Caſes are looſe Notes of *ſayings*, or " Opinions at *Niſi prius*, general Aſſertions, general " Inferences, without particulars, without Argument, " without Conſideration, without any State of Pleadings " or Facts.

" This

" This Queſtion having now come before the Court, " it is neceſſary to conſider it with Accuracy and Pre- " ciſion.

" The Objection to the *Competency* of the Witneſs " can only be ſupported by arguing, either, that the " Event of this penal Proſecution, in favour of the " Plaintiff, will *avoid* the Bond, Aſſurance, or Contract " of the Witneſs, and *diſcharge* him from the *Debt*; " or that this Cauſe turns upon the *ſame* points and " tranſactions, which, if proved in another Cauſe, would " avoid the ſame.

" The Foundation fails in both Propoſitions: and " the Conſequences would not follow in the laſt, if " the Premiſes were true.

" No *Contract* or Aſſurance appears here for Uſury, " or ſo much as to repay the Money. And if there " was, the Recovery of the Penalty, upon this Infor- " mation, would not affect the Contract. The Judge- " ment in this Action could not be given in Evidence " in an Action for the Debt, though the Validity of " the Contract depended upon the ſame Grounds as " the Information. That might indeed be a Preju- " dice, Influence, or Bias upon the Mind of the Wit- " neſs and go to his *Credit*, but not an actual Intereſt " to go to his *Competence*. v. ſupra.

" This Diſtinction has not been ſufficiently attended " to at *Niſi prius*. The Caſes are contradictory, and " it is impoſſible to reconcile them.

" The great Deference to Lord *Chief Juſtice* HOLT's " Opinion made the Caſe of *The King* v. *Whiting*, to " be followed for ſome time. Nay, *Lord* HARD- " WICKE implicitly followed it in the Caſe of *The* " *King* v. *Nunez*. Salk. 283. Mic. 10W. III. 2 Str. 1043. P. 9 G. II.

" At

"At that time there were many Cases both ways, a "string of both Sorts: and among the rest, *Watts's* "Case, in *Hardress*, that in Forgery, Perjury, or "Usury, the party grieved shall not be admitted as a "Witness, because he may receive a *consequential* Ad- "vantage from the Verdict; and *Parris's* Case, in "1 *Ventr.* 49. where such a Witness was admitted. "None of which Cases were considered or looked into.

S. C. 2 Sid. 431.

"But since the Case of *Whiting*, and the Case of "*Nunez*, there has been great Light thrown upon the "Distinction between *Interest* which affects the COM- "PETENCE of a Witness, and *Influence*, which goes "only to his *Credit*. There have been the Argu- "ments, and Judgment in the Case of *Rex* v. *Bray*, "Mayor of *Tintagel*, * where Lord *Hardwicke* shook "the Authority of *Rex* v. *Whiting*; which he there, "in effect, contradicts, (though with guarded Decency "of Expression), notwithstanding his having before "followed it in the Case of *Nunez*. †

* First Mod. 26 Oct. 1736. argued in Hil. T. 1736. and determined on Friday, 21 Febr. 1736. Burr.

† Lord Hardwicke's Words were, (as I took them in my Note), if that Case were strictly examined, I believe it would appear that the Objection went rather to the *Credit* than to the Competency of the Witness. Burr.

"Then came the Case of the *East India Company* v. "*Gosden*. There was also a Case of *Bailie* v. *Wilson*, "(about the proving of a Will) before the Delegates: "who were *equally divided*, whether the Objection "should go to the *Competence* or *Credit* of the only "Witness who proved a Codicil, subsequent to a second "Will, setting up again the first Will; and therefore, "no Sentence was given. Thereupon a Commission "of Adjuncts issued: a Majority of whom (Mr.

"Justice

" Juſtice *Denniſon* being one) held that it went only to " the *Credit*. And ſentence was given for the firſt " Will. Upon a Petition for a Commiſſion to review, " it was fully argued: and Lord *Hardwicke*, on the " 15th of *Jan.* 1744, gave a ſolemn Opinion with the " Majority of the Adjuncts, that the Witneſs having " adminiſtered under the firſt Will as Agent to the " Executor, or as Executor *de ſon Tort*, and being lia- " ble to Actions, the objection went only to the *Credit*, " not to the *Competency*.

" The ſolemn Diſcuſſion in theſe three Caſes drew " the Line between INTEREST, which goes to the " COMPETENCE, and INFLUENCE which goes to the " *Credit*, more clearly than had been before underſtood.

" It eſtabliſhed a Rule, that where the Matter was " *doubtful*, the objection ſhould go to the *Credit*.

" It eſtabliſhed, that the Queſtion in a criminal Pro- " ſecution being the ſame with a Civil Cauſe in which " the Witneſs was intereſted, went *generally* to the Cre- " dit; unleſs the Judgment in the Proſecution where " he was a Witneſs, could be given in Evidence in " the Cauſe where he was intereſted. I ſay, generally, " becauſe all Rules of Evidence admit of Exceptions.

" After theſe Caſes, in that of *Rex* v. *Broughton*, in " 1745, Lord Chief Juſtice *Lee*, over-ruled the three " Caſes of *Rex* v. *Whiting*, *Rex* v. *Nunez*, and *Rex* v. " *Ellis*; which opinion of his has been followed ſince " and approved.

" There has been a remarkable Caſe in *Trinity* Term, " 32 & 33 *G.* II. *Bartlet* v. *Pickerſgill*. The Defend- " ant bought an Eſtate for the Plaintiff. There was

" no

Caſe where Plaintiff was Witneſs in an Indictment for Perjury; the Charge relating to a Tranſaction which affected the Intereſt of the Plaintiff.

" no Writing, nor was any part of the Money paid by " the Plaintiff. The Defendant articled in his own " Name, and refuſed to convey; and by his Anſwer " denied any Truſt. Parol Evidence was rejected; " and the Bill was diſmiſſed. The Defendant was " afterwards indicted for Perjury; tried at *York*; and " convicted upon Evidence of the Plaintiff, confirmed " by circumſtances, and the Defendant's Declarations. " The Plaintiff then petitioned for a ſupplemental " Bill in the Nature of a Bill of Review, ſtating this " Conviction: But the Petition was diſmiſſed, becauſe " the Conviction was not Evidence. 22 *Nov.* 1762.

" This Reaſoning ſhews too, that if it was neceſſary, " the Witneſs was competent to be heard as to the " Debt being paid: What he ſwore could not be " Evidence in an Action for the Debt.

" There is no Danger of Perjury from hearing him. " The Defendant may produce the Security, and falſify " him. If (as here) it is the Caſe of a Pawn, the Wit- " neſs would ſwear againſt his own Intereſt to ſay un- " truely the Debt was paid and the Pledge returned. " But either way the Debt is paid. For unleſs the " Pledge be redeemed, it is a ſatisfaction.

" Suppoſe a Witneſs produces a Bond or Mortgage " cancelled—ſuppoſe he produces a Receipt,—there " can be no Danger in hearing him: For the Jury " are not bound to believe him. That depends on " Circumſtances, which may contradict or ſupport his " Teſtimony.

" But

"But if it be neceſſary to prove Payment, and the "Party is not to be heard as a Witneſs to prove ſuch "Payment, the Statute would be as effectually re- "pealed, as if the Borrower could never be a Witneſs "at all: For they never would ſuffer any Body elſe "to be privy to the Payment, delivering up, or can- "celling the Securities.

"But to go further, all Objections to the Com- "petence of the Witneſs muſt either be *proved*, or "drawn from him upon a *Voire dire*; or, to take it in "the utmoſt Latitude, upon his *Examination*.

"Here was no Proof of any Objection, or of any "Debt remaining. The Witneſs ſwore, that he ſhould "neither gain nor loſe by the Event of the Cauſe; in "every ſhape in which the Queſtion could be put: "And he ſhews it by giving an Account of the Debt "being paid. He ſwore, upon a *Voire dire*, that it "was paid.

"Had the Defendant produced a Security, or proved "the Pledge to be remaining in his Cuſtody; it would "have been a different Conſideration, whether the "Witneſs, who was the Borrower of the Money, "could be examined to contradict this. But *when the "whole Ground of the Objection comes from himſelf only, "what he ſays muſt be taken together as he ſays it:* and "then the Debt is paid.

"In every Light, we are all of Opinion, that, under "all the circumſtances of this Caſe, *Benjamin Abraham "was a* COMPETENT *Witneſs*."

TITLE. VI.

Different effect of General and particular Intereſt.

The Men of one County, City, Hundred, Town, Corporation or Pariſh, are Evidence in relation to the "Rights,

GENERAL INTEREST.

" Rights, Privileges, Immunities, and Affairs of ſuch " Town, City, &c." if they are not concerned in private Intereſt in relation thereunto, nor advantaged by ſuch Rights and Privileges as they aſſert by their Atteſtation. Men of the County are Evidence on an Indictment for not repairing a Bridge: for, ‖ whether it be in repair or not, they are perfectly indifferent: for every man for the convenience of his own Paſſage is concerned to uphold the Bridge, and can not be thought to create an uſeleſs Charge; ſo that he is perfectly indifferent, being equally concerned on both ſides of the Queſtion.

‖ There ſeems an evident tranſpoſition in the former Ed.

" And this which appears to have been before ſettled " at Common Law, is now expreſsly provided by " Statute."

1 A. St. 1. c. 18. 13.

But the Men of the County can not be ſworn in a Cauſe relating to the Bounds of the County, in a ſuit depending between that and another County, carried on at a County Charge: becauſe every man is in ſuch a Caſe concerned to prevail in point of Intereſt.

" Formerly," if the Hundred " were" ſued on the Statute of *Winton*, no Perſon of that Hundred, " it " was held, could" be a Witneſs; becauſe every perſon's Intereſt is concerned in the Tax of the Hundred, and " he" therefore ſwears in his own Diſcharge.

" But now" Inhabitants of the Hundred " are" to be admitted as Witneſſes at Trials on the Statutes of Hue and Cry.

v. Note to the former Ed. St. 8 G. II. c. 16. § 15.

The Inhabitants of a Pariſh can not be Witneſſes in relation to Common, or the *Modus Decimandi*; becauſe this

this touches the private Intereſt of thoſe Perſons, and the Loſs or Gain falls upon their private Fortunes. Hob. 91, 2. v. Caſe of Poole, *Dougl.* Controv. Elec. II. 236, 7.

"So in an Action on a Policy of Inſurance, any "who have inſured on the ſame Ship ſhall not be Wit- "neſſes." L. N. P. 283.

So neither ſhall a Sailor who hath Wages due, be a Witneſs concerning the ſafety of a Ship ſuppoſed to be loſt, "for he is intereſted in the Event of the Queſtion: "ſince, if the Ship be loſt, the Crew loſe their Wages." v. Str. 414.

So in a Corporation, the Inhabitants and Freemen are Witneſſes to any thing relating to the Public, where they are not concerned in Gain or Diſadvantage in relation to their private Fortunes; but where any Loſs or Diſadvantage is conſequent to the Witneſs upon his Trial, he muſt be excluded. v. Parker 286.

In an Action on the Caſe, brought by the Mayor and Commonalty, concerning the Water Bailage, a Freeman of *London* may be a Witneſs: becauſe the Freemen are not concerned in the Privilege by immediate or private Intereſt, nor do they get or loſe by Conſequence of the Trial. "Yet at that Period (32 *Car.* II.), this did "not paſs unanimouſly: and on the Tender of a Bill "of Exceptions, the Counſel by whom theſe Witneſſes "were offered, appear to have thought it ſafeſt to waive "the Point." 1 Ventr. 351. 2 Show. 146. 3 Keb. 295.

So in a Gift to a Corporation, any Member may be Witneſs if the Gift be public in relation to their Buildings, Schools, or the like, becauſe no man gets or loſes by the Event of the Trial. Sid. 109.

But as to the Cuſtom of Foreign-bought or Foreign-ſold in a Corporation, none of the Freemen are to be admitted as Evidence; becauſe every Man's private Intereſt is concerned in the Trial, and where a Man is concerned in the conſequence of the Trial, he can not ſupport it by his Oath.

But in an Action brought by Pariſhioners for embezzling the Stores; now by St. 3 & 4 *W.* & *M. c.* 11. § 12. the Pariſhioners may be Witneſſes (Alms-men excepted): for the Statute, in Behalf of the Poor, hath ſet aſide the Rules of the Common Law in that inſtance: and ſince the whole Riches and Improvement of the Nation ariſe out of the Labour of the poorer ſort, it is but reaſonable that the Materials of their Labour ſhould be abundantly ſecured againſt all Miſmanagement.

17 G. III. c. 29. "And now the *Inhabitants* of every *Pariſh*, Town-"ſhip, or Place, ſhall be competent to prove an of-"fence within their Limits, notwithſtanding the Pe-"nalty (provided it exceed not *twenty* pounds), &c. "given to the Poor of ſuch Pariſh, &c. or other-"wiſe, in Exoneration thereof.

L. N. P. 194. "And where part of the Penalty goes to the Corpo-"ration, the Wives of Freemen have been rejected as "Witneſſes.

2. N. P. 285. "It is no good Exception to a Witneſs that he hath "Common *per Cauſe de Vicinage* of the Lands in Queſ-"tion, for this is no Intereſt, but only an Excuſe for "Treſpaſs.

Bay. Rep 18d. N. to form. Ed. "An Inhabitant not rated to the Poor, nor receiving "Alms, is a *competent* Witneſs in an Action for a Pe-"nalty, a Moiety of which is given to the Poor of the "Pariſh.

L. N. P. 284. Balk. 283. "But the Intereſt which excludes, muſt be certain, "and not contingent. For which reaſon the Heir at "Law is a competent Witneſs: for his Eſtate is pre-"carious, at the Will of the Owner, and he therefore "hath no abſolute Intereſt; but he who hath a *veſted* "Eſtate in *Remainder*, is not competent, for he hath a "certain Intereſt. And accordingly the Heir of a Cor. Treby, Mic. 10 W. III. "Bankrupt was admitted, to ſwear a Debt due to the "Bankrupt."

"Illegal

"Illegal Intereſt is not to be preſumed. The Law "will not preſume an Intereſt contrary to the legal "or conſtitutional quality of the ſubject.

"Thus where a Party, being an inhabitant, was "offered to prove that *outfitters* had no *vote* in the "choice of *repreſentatives*, on the ground that he was "*intereſted*, ſince by this proof he would enhance the "value of his own Vote, the Anſwer was, that a Vote "for Members to ſerve in Parliament was not of the "number of thoſe Rights whoſe value is diminiſhed "by increaſing the number of thoſe who have a con-"current title; that ſuch Vote had, in the eye of the "Law, no Analogy to *ſaleable* property; and that it "had been the conſtant practice to admit a Voter un-"der an indiſputed Title to give Evidence concerning "the Rights of Election; and his *Evidence* was ac-"cordingly allowed by the *Committee*." Dougl.contr.El. 360, 1. IV. 69, 9.

TITLE VII.

PARTY *cannot be a Witneſs in his own Cauſe.*

From "this" Rule "concerning Intereſt," a Corollary may be deduced.

That the Plaintiff or Defendant cannot be a Witneſs in his own Cauſe: for theſe are the Perſons that have a moſt immediate Intereſt: and it is not to be preſumed that a Man who complains without Cauſe, or defends without Juſtice, ſhould have Honeſty enough to confeſs it. Norton and Moult. Hil. 1701.

And therefore, an Anſwer in Equity is of little Weight "in favour of the party," where there are no proofs in the Cauſe to back theſe Suggeſtions: becauſe, though it is the Conſtitution of the Court to examine the Parties upon Oath to diſcover the ſecret Practices complained of, yet there is very little Credit to be given to a Man's Oath "in his own behalf," where there is no probable circumſtance to ſupport it.

"The Defendant *B.*, had lent Money to *C.*, on a "Mortgage of *C.*'s Eſtate, and the Plaintiff *A.*, being "alſo about to lend Money to *C.*; *D.*, a Witneſs, de-"poſed, that *C.*, upon Enquiry, made from Inſtruc-"tions by the Plaintiff, had denied any prior Incum-"brance. Ibbotſon v. Rhodes, 2 Vern. 554, 5. E. 1706.

L. N. P. 285. Eq. Ca. Abr. 229.

" The Defendant, in his Anſwer, denies the Charge " of Concealment. An Iſſue directed to try the Fact; " and the Plaintiff, to admit the Anſwer of the Defend- " ant *B.*, to be read on the Trial.

L. N. P. 285. Eq. Ca. Abr. 229.

" However, an exceeding ſtrong Caſe is put, where " the Plaintiff was allowed to benefit by his own Teſti- " mony. It is this:

" The Defendants had taken out an Execution " contrary to an Injunction of the Court of Chancery. " And it was alledged, that ſome of the Bailiffs who " ſerved the Execution, had found Money hid by the " Plaintiff in a Wall of his Houſe, to the Amount of " 150*l.* which they had purloined, and otherwiſe done " great damage to the Goods of the Plaintiff. The " Lord Chancellor ordered the Defendants to make " good the Money, and ſatisfy the Plaintiff, all the " Loſs which he ſhould ſwear he had ſuſtained.

" This Caſe manifeſtly went on the Ground of the " juſt odium, entertained both in Law and Equity " againſt Spoliation, * particularly under Colour of " Law: and the Neceſſity of the Caſe, the Wrong-doers, " having from the Nature of the Tranſaction, deprived " the Plaintiff of the regular Proof by which the " Amount of the Injury ſhould have been otherwiſe " aſcertained. I think it muſt be preſumed, that there " was ſtill ſome Evidence independent of the Plaintiff's " Oath, to induce a Belief, that the Sum of Money ſo " charged, as taken from him, had been laid by for " Safety: and then in a Caſe ſo peculiarly circumſtanc- " ed, we may perceive ſatisfactory Principles in ſup- " port of the Deciſion."

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* In Odium *Spoliatoris* et in Subſidium *Spoliate* præſtandum omna præſumuntur.

" And

TITLE VIII.

EXCEPTIONS *by* COMMON *Law or by Statute.*

" And in general, there are EXCEPTIONS to the Rule " not admitting an intereſted Witneſs, partly at COM- " MON LAW, and partly by *Statute.*

" Thus, where from the Nature of the ſubject proof " cannot otherwiſe be expected, a party ſhall be admit- " ted as Witneſs whoſe Intereſt otherwiſe is ſufficient " to exclude him: for," where the Law could receive no Execution, unleſs a party intereſted were a Witneſs, there he muſt be allowed; for the " Law" muſt not be rendered ineffectual by impoſſibility of Proof. And where the " Law" can have no force, but by the Proof of the Perſon in Intereſt, there the Rules of the Common Law, " reſpecting Evidence in general," are preſumed to be laid aſide: " or rather the ſubordinate " are ſilenced by the moſt tranſcendant and univerſal " Rule, that in all Caſes, that Evidence is good than " which the Nature of the ſubject preſumes none bet- " ter to be attainable."

2 Roll's Abr. 685, 6. 3 Mod. 115. 10 Mod. 103. Forteſ. 246. Ventr. 351. 12 Mod. 340.

Therefore, " before the expreſs proviſion of the Le- " giſlature," the Party robbed might be Evidence on the Statute of *Winton*, to charge the Hundred: for otherwiſe the Benefit of the Statute would be excluded; as no other perſon can be ſuppoſed preſent in ſuch a Tranſaction to give their Evidence.

V. ſupra, and Douglas Controv. Elect. *Sudbury*, vol. II. p. 161, 2.

" So where the Queſtion was, whether the Defend- " ants had a Right to be Freemen; though it appeared " there were Commons belonging to the Freemen, yet " an Alderman was admitted to prove them no Free- " men, it appearing that none but Aldermen were " privy to theſe Tranſactions.

Rex v. Phipps and Archer, at Cambr. per Lee Ch. J. L. N. P. 289.

L. N. P. 289.

" So in Actions by Informers for ſelling Coals with-
" out meaſuring by the Buſhel, the Servants were ad-
" mitted as Witneſſes for their Maſter: notwithſtand-
" ing 3 *G.* II. inflicts a Penalty upon them for not do-
" ing it; though *Eyre, Ch. Juſ.* did, on that Account,
" in two or three inſtances refuſe to receive them.

Ibid. E. T. Comp. and Goſling, 16 G. II.

" So, where the Queſtion was, whether the Maſter
" had deſerted the Ship (*Suſſex*) without ſufficient
" Neceſſity; a Sailor who had given Bond to the
" Maſter (as a Truſtee to the Company) not to deſert
" the Ship during the Voyage, was admitted Evidence
" for the Maſter, it appearing all the Sailors entered
" into ſuch Bonds.

" So, where a Son having a general Authority to re-
" ceive Money for his Father, received a Sum, and
" gave it to the Defendant; the Son (though his Teſti-
" mony might ſeem to fall under another Exception,
" as well as that of Intereſt, which will be explained
" hereafter) was admitted as a good Witneſs in *Trover*,
" brought by the Father to recover the Money, his
" Teſtimony being corroborated by other circum-
" ſtances.

L. N. P. 289, 90.

Salk. 289. Cor. *Holt.*

L. N. P. 290. Mic. 1752. C. B.

" So, in Trover againſt a Pawn Broker, the Servant
" embezzling his Maſter's Goods, and pawning them,
" admitted to prove the Fact.

Willes and Harris, Douglas Controv. El. 11. 273, 4. and Note D.

" Thus in a Cauſe which originated in the Ex-
" chequer on a Bill brought by the Plaintiff, as Impro-
" priator of *Tythes*, in the Pariſh of St. *Keavine*, in *Corn-
" wall*, the Court directed an Iſſue, which was tried at
" the Summer Aſſizes, in 1774, before Mr. Baron EYRE.
" Several *Fiſhermen* were called by the Defendant to
" prove the Manner of Tything Fiſh: the Counſel for
" the Plaintiff objected to their *Evidence*, as they had
" an Intereſt to *negative* his Claim. But the Judge
" ſaid, the Objection proved too much, as it would de-
" prive the Plaintiff of the only means he could have

" of

" of proving the Cuſtom: and the Evidence was ad-
" mitted. But the Counſel for the Plaintiff, except-
" ing to the Admiſſion of any Witneſſes who had fol-
" lowed the Occupation of Fiſhermen within *ſix* Years,
" ſuch being under a preſent liability, in caſe the
" Plaintiff ſhould ſucceed, the Judge ruled accordingly,
" that no Witneſs ſo circumſtanced ſhould be admit-
" ted."

On the Statute concerning the hunting of Deer, which gives a forfeiture on conviction, before " a Juſ-
" tice on the Oath of one or more CREDIBLE Witneſſes," the Informer " hath been allowed as a" good Evidence, though he hath part of the Penalty. 13 Car. II. 3 Mod. 114. P. Str.

" However, by a later Authority, a Conviction for
" this very offence was quaſhed on this very Ground,
" that the Informer was the Witneſs, and was intitled
" to a part of the Penalty. Str. 316. Rex v. Tilly, Tr. 6 G. 1. Ref. to former Ed.

" And where an Information was moved againſt a
" Juſtice, for not condemning an Horſe taken out of a
" team, under the Statute which requires proof to be
" made before a Juſtice of the cauſe of forfeiture,—
" the Caſe was this: the party who ſeized, tendered
" his own Oath, the Defendant ſcrupled to take it,
" or to determine the Affair in the Abſence of the
" Owner or Driver. Rex v. T. Sergiſon, Eſq. 2 Str. 1181. Hil. 16 G. II.

" *Per Curiam*, both were reaſonable Objections.
" Why is not the perſon who ſeized, and is to have the
" benefit of the forfeiture, within the reaſon of exclud-
" ing Informers where there is a Penalty? Making
" *proof*, muſt mean *legal proof*: the other alſo is but
" natural Juſtice.

" Here the Court appears to have recognized both
" Principles, that of not condemning a perſon without
" giving him an opportunity of being heard, (which, if

10 Mod. 156. Forteſ. 246. Andr. 240, 1.

" the Juſtice had done, he would deſervedly have been " brought to condign Cenſure), and this other of not " condemning upon the Teſtimony of a Witneſs, who " is to gain by the Conviction, as alike grounded in " immutable and natural Equity. The Information " was diſcharged; and with Coſts."

16 Car. II. ch. 4. exp. 22 Car. II. ch. 1.

On the Statute of *Conventicles*, " the Informer hath " been held a good Witneſs, though he hath not only " part of the Penalty, but comes in the moſt invidious " character to criminate an Act of worſhip at which " he has been preſent: and this hath been allowed on " the Principle, that the Nature of the Caſe excludes " the Preſumption of better Evidence.

" And it muſt be obſerved, that the Preſumption of " Impoſſibility to adduce better Evidence, muſt be a " Reſult of the Nature of the Subject as conſtituted by " General Law: or if depending on particular circum- " ſtances, thoſe muſt be ſuch as entitle a Witneſs other- " wiſe incompetent, to be heard by the fault of the " contrary party: for an accidental want of ſuch " Proof as the Law allows, will amount only to a legal " Inability in the Plaintiff to recover: in rare Caſes, " and proceeding uſually from his own negligence, " this may be inconvenient to the Individual; but it " importeth no leſs than the Certainty of the Rules of " Deciſion and the conſequent Security of the Public. " And the Law regarding the Welfare of the whole, " which is that of Individuals too, as parts of the " Syſtem, muſt prefer the ſuffering of a particular in- " convenience, rather than the admitting of a public " miſchief."*

Some have extended this " Rule of admitting a " Witneſs, who hath an Intereſt in the Queſtion, in de- " fault of a diſintereſted Witneſs (when the Nature of " the Caſe ſuppoſes ſuch an one not to be adducible),

* *Lex potius vult pati privatum incommodum quam publicum malum.*

" ſo

"ſo far as" to the *Bye Laws* of a Corporation: and it is ſaid, that in an Action brought by the Corporation of Weavers, in *Norwich*, for the Penalty of a Bye Law, which ordains that no Weaver ſhould work at his Trade in Harveſt; one of the Corporation "was" allowed "as" Evidence, though the Penalty was due to the Corporation, leſt the Bye Law ſhould be eluded, which was made for a Common Benefit.

But *quære:* for no Body of Men ſeem to be authorized to make a Law and atteſt the Breach of it, where it turns to their own Benefit.

On an Information *qui tam pro Domino Rege*, on the Act of Navigation, the Informer was, on ſolemn Debate, allowed to be a Witneſs, though he was to have half the Forfeiture: and this *ex Neceſſitate Rei*, otherwiſe the Statute would be eluded. See 10 Mod. 194, and Str. 316. Contra. N. to form. Ed.

"And in general, the Rule prevails which was re-
"cognized by the Deciſion of the Court, in the Caſe
"of an Information on the Statute 5 *Anne, c.* 14. for
"the preſervation of the Game. There the *Informer* was
"the *Witneſs:* Mr. *Salkeld* forcibly argued that the
"Common Law of *England*, the Laws in general of
"civilized Nations, and of univerſal Juſtice, would no
"more permit a Man to be his own Witneſs than his
"own Judge. And upon this Exception, ſingly, the
"Conviction was quaſhed. Gilb. Rep. 111. Regina v. Cobbold. See alſo Rex v. Stone, Lord Raym. 1545. and 2 Burn. 270.

"But Statutes have infringed on this Rule, and Eva-
"ſions, eſpecially in Caſes where the Revenue is con-
"cerned, have made their way into practice, which
"reduce the Obſervance of it almoſt to an ineffective
"form. An apparently diſintereſted Witneſs is ſet
"up: who, if a conviction takes place, has a regularly
"allotted portion with the Informer.

"A Perſon" who has part of the Land, ſells *bonâ fide*, and for good Conſideration: if it be after he is ſummoned as a Witneſs, or after he has had Notice of Trial, the Court will not admit his Evidence. 2 Sid. 51. Keb. 134. T. Raym. 32. See Styl. 482.

If any perſon be arbitrarily made a Defendant to prevent his Teſtimony in the Cauſe, the "Plaintiff" ſhall not prevail by that Artifice, but the Defendant, againſt whom nothing is proved, ſhall be ſworn notwithſtanding; for here the Defendant does not ſwear in his own Juſtification, but in Juſtification of another, with whom he is "unduely" joined in the Action: and were not this allowed, it were but for the Plaintiff to turn all the ſeveral Witneſſes into Defendants, and he might be able to prove what he pleaſed without Conteſt: therefore, if there be an Action of Treſpaſs againſt two, and no Evidence againſt one of them, he may be Evidence againſt the other.

But this Rule muſt be underſtood where there is no manner of Evidence againſt the Defendant: for if there be Evidence againſt one, though, in the Judges opinion, not enough to convict him, yet ſuch perſon can be no Witneſs for the other, becauſe his Guilt or Innocence muſt wait the Event of the Verdict; for the Jury are Judges of the Fact, and not the "Bench."

Par. 2.

Nominal Defendants not excluded.

L. N. P. 285, 6. "In Treſpaſs, if one of whom the Plaintiff deſigned "to make uſe as a Witneſs, be by Miſtake made a "Defendant, the Court on Motion will give leave to "omit him, and have his Name ſtruck out of the Re-"cord, even after Iſſue joined; for the Plaintiff can in "no Caſe examine a Defendant, while he continues ſuch "on the Record, though nothing be proved againſt "him. And therefore, in an Information for a Miſ-"demeanour, the Attorney General (*Trevor*) offering "to examine a Defendant for the King, which the "Court would not permit, he entered a *Nolle proſequi*, "and then examined him.

"And

" And if a material Witneſs for the Defendant in " Ejectment, be made a Co-Defendant, the right way " for him is to let Judgment go by Default: but if, by " pleading, he admit himſelf to be Tenant in Poſſeſ- " ſion, the Court will not afterwards, on Motion, ſtrike " out his Name. But in ſuch Caſe, if he conſent to " let a Verdict be given againſt him, for ſo much as he " is in Poſſeſſion of; it ſeems he may be a Witneſs for " another Defendant.

" In Treſpaſs, the Defendant pleaded *Quod Actio* " *non:* for that *Richard Mawſon*, named in the *ſimul* " *cum*, paid the Plaintiff a Guinea in Satisfaction: and " Iſſue thereon; the Defendant produced *Mawſon:* and " *per* EYRE, Ch. J. he may be examined: for what he " has now to prove can not be given in Evidence in " another Action; and in effect, he makes himſelf liable " by ſwearing he was concerned in the Treſpaſs.

" But if the Plaintiff can prove the Perſons named " in the *ſimul cum* in Treſpaſs, were, *bonâ fide*, made " Parties to the ſuit, which muſt be by producing the " Original and Proceſs againſt them, and proving an " ineffectual endeavour to arreſt them, the Defendant " ſhall not have the Benefit of their Teſtimony."

Treſpaſs againſt *A.* and *B.* for two Horſes: Evidence againſt *A.* as to one, and the Queſtion is, if he may be a Witneſs for *B.* in relation to the other: and it ſeems, that if it were the ſame Fact, and the Treſpaſs committed at the ſame time and place, he may not be a Witneſs, becauſe he ſwears to diſcharge himſelf; but if

Hale ſuper, Litt. 6. b. Str. 633.

if they were not a ſingle Fact, but two diſtinct Treſpaſſes at different times and places, arbitrarily joined in the ſame Declaration, then they may be Witneſſes one for the other, becauſe the Oath of one of them, has no influence on the Crime laid to his Charge, but merely goes in Diſcharge of the other.

TITLE IX.

HUSBAND *and* WIFE *not* EVIDENCE *for or againſt each other.*

" There is one peculiar Species of Intereſt, and com-
" bined too with the principle of confidential obligation,
" which is ſeparately to be diſtinguiſhed. And this
" founds" the ſecond Corrollary on the General Rule; which is,

Co. Litt. 66. 4 St. Tr. 608. 2 H. P. C. 279.

That Huſband and Wife cannot be admitted to be Witneſſes for or againſt each other.

For if they ſwear for the Benefit of each other, they are not to be believed, becauſe their Intereſts are abſolutely the ſame; and therefore, they can gain no more Credit when they atteſt for each other, than when any Man atteſts for himſelf.

And it would be very hard that a Wife ſhould be allowed as Evidence againſt her own Huſband, when ſhe cannot atteſt for him: ſuch a Law would occaſion implacable Diviſions and Quarrels, and deſtroy the very legal Policy of Marriage that has ſo contrived it, that their Intereſt ſhould be but one: which it could never be if Huſbands were permitted to deſtroy the Intereſts of the Wife, nor could the Peace of Families be well maintained, if the Law admitted any Atteſtation againſt the Huſband.

Brownl. 47.

The Wife, in Caſe of High Treaſon, is not bound to diſcover her Huſband's Treaſon, although the Son is " compellable" to reveal it.

T. Raym. 1.

Yet in Caſe of High Treaſon, the Wife is admitted as Evidence againſt her Huſband, becauſe this " has
" been ſuppoſed to be," for the public ſafety, which is to be preferred before the Intereſt or Peace of private Families, and the Ties of Allegiance are more obligatory than any Relation whatever.*

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* *Cari ſunt Parentes, cari liberi, propinqui, familiares; omnes omnium caritates Patria una complexa eſt: pro quâ quis bonus dubitet mortem oppetere ſi ei ſit profuturus?*

De Offic. Ed. Davis I. 17.

In

In the Caſe of the Lord *Audley*, where the Huſband was charged to have aſſiſted to the Rape of his Wife, the Wife was allowed a Witneſs, becauſe it was a perſonal Force done to her; and of ſuch ſecret violence there could be no other Proof but by the Oath of his Wife.

Hutt. 116. St. Tr. 2659. H. H. P. C. 301. H. P. C. 431—2. Ruſh. Coll. P. 2. Vol. I. fo. 94---9. Str. 633. Comm. 1 Ch. 15. p. 443. T. Raym. 1 Ventr. 2 Keb. 403. pl. 8.

But, "on the whole," this piece of Law hath ſince been exploded, that in a perſonal Wrong done to the Wife, the Wife may be Evidence againſt the Huſband; becauſe it may be improved to dreadful purpoſes, and muſt be a Cauſe of implacable Quarrels, if the Huſband chance to be acquitted.

"And in a very recent Caſe, ſingular indeed, and I "believe without example in this Country, where a "Wife was the Proſecutrix and ſole direct Witneſs in "proof of an execrable Charge againſt her Huſband; "which came before the Grand Jury for the County at "large, at the Summer Aſſizes at *Bury*, in 1784, the "Judge recommended in his Charge, that the Bill "ſhould not be found, if unſupported by any other Evi-"dence: ſince otherwiſe a Cauſe very peculiarly un-"ſuitable to be brought without effect before the pub-"lic Ear, would come to Trial with a legal Neceſſity "of the Priſoner being diſcharged from the Indict-"ment, for Want of Evidence *competent* to go to the "Jury."

There is a great Difference between a Wife *de Facto* and a Wife *de Jure*: for a Wife *de Jure* cannot be an Evidence for or againſt her Huſband; but a Wife *de Facto* may: as if a Woman be taken away by Force and married, ſhe may be an Evidence againſt her Huſband, indicted on the Statute againſt the ſtealing of Women: for a Contract obtained by Force hath no Obligation in Law:* and therefore ſhe is a Witneſs in this Caſe as well as in any other Caſe whatſoever.

3 Hen. VII. c. 2 Anno 1486. 1 Ventr. 243-4.

A. marries with *B.* and after with *C*; and by *C.* has Iſſue *D.* *C.* is an Heireſs to certain Lands, and leaves them to deſcend to *D.* And between *D.* and a col-

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* Ex vi injuſtâ non oritur Contractus.

lateral

lateral Heir to *C.* the Queſtion of Title aroſe: and the Queſtion was, whether *B.* could give Evidence of her Marriage with *A.* It was objected that by the very Teſtimony of *B.* ſhe ſuppoſes herſelf the Wife of *A.* and conſequently can depoſe nothing againſt his Intereſt, and he by this ſecond Marriage, "ſuppoſing it "were good, which ſhe impeaches," is intitled to be Tenant by the Courteſy. But to this it was anſwered, that the Trial in this Caſe could be no Evidence in the Queſtion between *A.* and the collateral Heir; and therefore the Wife of *A.* might be a Witneſs.

By *Gould*, Juſt.

2 Lord Raym. 752.

But it was objected before HOLT on another Trial between the ſame Parties, that the other Wife was no Witneſs in this Caſe; becauſe ſhe by her Oath gains an Intereſt, "namely, the ſtrengthening of the Reputa-"tion of her Marriage with *A.*" and ſo doth not ſtand as a fair and unprejudiced Witneſs, and he refuſed to admit her to be a Witneſs.

"But perhaps the Matter was leſs debated as her "Teſtimony was not neceſſary to the Cauſe: for they "proved the Marriage of *A.* with *B.* by other Wit-"neſſes, to the ſatisfaction of the ſpecial Jury."

Par. 2.

No other Relation held incompetent to be a Witneſs.

And v. T. I. C. in the paſſage cited in the foot Note; where the Author exempts the fraternal, parental, and conjugal Relation. See to the ſame effect the *Code* of the *D.* of *Tuſcany*, Art. XXVIII.

But no other Relation is excluded: becauſe no other Relation is abſolutely the ſame in Intereſt: but by the Civil Law *Servants* and Children were excluded: becauſe the Parents and Maſters had an abſolute Power over them; and therefore under that Law they ſwore with manifeſt Intereſt to themſelves: "or if you will "rather ſay that nothing is in a legal ſenſe an Intereſt "which depends on the Fraud, or Force, or arbitrary "will of another, it may be more generally expreſſed

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* D. 22. 5.
‖ C. 4. 20, 8.

* *Idonei non videntur eſſe Teſtes quibus imperari poteſt ut Teſtes fiant.*

‖ *Servos pro Domino, quemadmodum adverſus eum, interrogari non poſſe non ambigitur.*

Quelque grand que ſoit le droit ſocial il cede, & doit toujours céder, au lieu de la Nature.

Jura ſanguinis nullo Jure civili dirimi poſſunt.

"that

" that they are excluded as not poſſeſſing that civil *free* " *Agency* which is neceſſary to the character of a Wit- " neſs, and are conſidered as politically included in the " perſon of him whoſe Dominion over them is un- " limited. We find, however, in the DIGEST, an Ex- " ception to the Incompetence of ſervile Teſtimony " when the Truth was not attainable by any other " Proof.

" Yet is not the Idea dreadful of a Child Evidence " againſt a Parent, or a Parent againſt a Child, in ca- " pital Caſes; or Children of the ſame Parents againſt " each other?

" And where the Evidence tends merely to ſettle " the Truth of the Fact as between other Parties, the " Wife's Teſtimony ſhall be admitted, though it go to " a Fact which ſhe could not be allowed to prove or " diſprove, if the Action were directly againſt her " Huſband. Thus where an Action was brought " againſt the Defendant for the Wedding Cloaths of " his Wife; the Wife's Mother was allowed an Evi- " dence to prove the Cloaths were purchaſed on the " Credit of the Father, and not of the Defendant. Str. 504. Note to former Edition.

" And the Declaration of a Wife may be admitted " though relative to a Fact which charges the Huſband, " in the ſame manner as his own Declaration, when it " is not offered as direct Evidence, but only as corrobo- " rating the Credit of what has been before offered in " proof by a *competent* Witneſs. And this ſeems to have " been the Principle of the Caſe of the Nurſe Child: Str. " but the Reaſon of the Diſtinction comes more pro- " perly to be conſidered under the Article, HEARSAY. Str. 527.

" And ſo lately, in an Action for Damages againſt " the Driver of a Stage-coach, tried at *Bury* Aſſizes " in the ſpring of this year 1787. The Carriage in which

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Servi reſponſo tunc credendum, cum alia Probatio ad eruendam veritatem non eſt. D. 22, 5.

"the Husband and Wife were was overset, and the "Wife much hurt. The Declaration of the Wife that "the Accident was owing to the inattention of the "Husband was given in Evidence, to corroborate the "Proofs of the Defendant's Witnesses."

SECTION IV.

Of Incompetency from INFAMY.

The "next" sort of Persons excluded from Testi-"mony, for want of Integrity, are *such as are stigma-"tized.*

Co. Litt. 6 b. Salk. 461. 5 Mod. 74. S.C.

Now there are several Crimes that so blemish, that the Party is ever after unfit to be a Witness: as Treason, Felony, and every *Crimen falsi*; as Perjury, Forgery, and the like.

2 Str. 1148. where Affidavits rejected for this Cause, on which the Defendant, thus infamized, would have aided himself.

And the Reason is very "clear," because every plain and honest Man, affirming the Truth of any Matter under the sanction of an Oath, is entitled to Faith and Credit, so that under such Attestation the Fact is understood to be fully proved.

2 Bulstr. 154. Br. L. IV. c. 19. § 2. Fl. L. IV. c. 8. § 2. Fitz. Ch. 41. Bro. Ch. 15. 2 Hawk. P. C. 432. § 19, 433. § 21, 2, 3.

But where a Man is convicted of Falsity and other Crimes against the common Principles of Honesty and Humanity, his Oath is of no Weight, because he hath not the Credit of a Witness, and there is greater Presumption against him than can be on his behalf.

For the Presumption is benign and humane to every Man produced as a Witness, that he will not falsify or prevaricate in Matters of such Importance as all Affairs of Justice are: but where a Man is a notorious and public Criminal, this Presumption fails him: and from thenceforth he is rather to be intended as a Man profligate and abandoned than one under the Sentiments and Conviction of those Principles that teach Probity and Veracity; and consequently the producing "of" such a Man is ineffectual, because the Credit of his Oath is overbalanced by the Stain of his Iniquity.

The

The common Puniſhment that "indicates" the *Crimen falſi* is being ſet in the Pillory: and therefore they anciently held the Law to be, that no Man legally ſet in the Pillory could be a Witneſs: for they thought it a ridiculous Thing, and boding ill to a Cauſe, when a Perſon thus ſtigmatized appeared in Court to atteſt any thing: but the Rigour of this is reduced to Reaſon: for now it is held that unleſs a Man be put in the Pillory for *Crimen falſi*, as for Perjury, Forgery, or the like, it is no Blemiſh to a Man's Atteſtation: for a Man may be pilloried for ſpeaking ſcandalous Words of the Government, which yet in doubtful and factious Times ought not to be taken as a Preſumption againſt his common Credibility. *

Co. Litt. 6. b. 5 Mod. 15. Skinn. 578, 9. Ld Raym. 39. S. C. 5 Mod. 74. Holt, 753. 12 Mod. 72. 12 Vin. Abr. 28. pl. 9. Wilſ. Rep. B. R. 18. Ventr. 349. 2 Sid. 51, 2.

"Otherwiſe if the Crime be recognized by the Law "as infamous in its Nature, though not attended with "what is termed infamous Puniſhment.

SECTION V.

Of REHABILITATION *of Teſtimony.*

"We are now led to conſider how far Teſtimony "may be reſtored which has been ſuſpended by Crime: "or how far a Witneſs infamized may be rehabilitated "by *Pardon*.

"Of Pardons there are two Species in Reference to "this Point: the one which is called a *Statute Pardon*; "the other a Pardon at COMMON LAW.

"A general Statute Pardon is ſuch as paſſes on an "Acceſſion, or other memorable occaſion."

Owen, 150. Moor, 872. Browne, 10. Hob. 617. Cuddington v. Wilkins. Roll's Abr. 87, pl. 6. Tr. 13 T. T. Raym. 370, 380. Godb. 288. Styl. 388. Keyl. 38. Ventr. 349.

One attainted of Felony or of cheating, after a general Statute Pardon, was allowed to be a good Witneſs:

"A *Pardon* by *Common Law* is either by *Prerogative*, "or by *Privilege:* that by *Privilege* was anciently by

* *Ex Delicto, non ex ſupplicio, emergit Infamia.*
C'eſt le Crime qui fait l'infame et non pas le ſupplice.

"COMPURGATION, and is now called Benefit of "Clergy: and this relates to all Felonies, whether at "Common Law or newly created, if not expreſsly "taken away by Act of Parliament. By Clergymen "it is held claimable on the repetition of a clergyable
4 H. VII. c. 13. "offence indefinitely; but to laymen only once: ſo "that if ſuch be again guilty of the ſame or any other "clergyable offence, they are liable, on conviction, to "ſuffer death: and they can no longer interpoſe this pri- "vilege either as a *declinatory* Plea, or after ſentence to "avoid Execution. And very lately a perſon ſuffered "death for a clergyable Felony reſpecting the copper "Coin, having once before been allowed the benefit of "Clergy on Conviction for the ſame offence.

"The Statute which eſtabliſhed this limitation, in "the inſtance of laymen, directs them to be alſo "branded in the hand; both as a puniſhment and as a "mark to give notice they have no farther claim to "this indulgence.

"Formerly they were required to read, as the Teſt "of their Title to this Privilege: but the Legiſlature
5 A. c. 6. "of an enlightened Reign, more beneficially for the "individuals and the Public, threw down this Barrier "which denied Acceſs to Clemency in favour of ab- "ſolutely unlettered Ignorance, by making it alike to "all whoſe offences were within the benefit, and re- "quiring them to work as the Condition of their Par- "don. The Statutes of the early part of the following
4 G. I. c. 11. "Reign ſubſtituted for *clergyable Larcenies*, Tranſpor-
6 G. I. c. 23. "tation to *America* for *ſeven years*, in lieu of branding or "whipping, if in the diſcretion of the Court ſuch pu- "niſhment ſhall be expedient, on penalty of Felony "without benefit of Clergy on their return within the "time.

"The

" The burning in the hand has been by ſome legal " writers ſaid to be in the Nature of a Statute Pardon: " being a Condition on performance of which the diſ- " charge from puniſhment, and the reſtitution to cre- " dit, took effect.

" A Pardon by Prerogative is the Reſult of the high " Truſt repoſed in the Crown, and the Power of diſ- " penſing it is indulged to the King in the conſtitu- " tional character of *Pater Patriæ*. This is not the " time for diſcuſſing the expediency of ſo reforming " the penal ſyſtem, as that rarely an occaſion ſhould be " preſumeable to call forth the exertion of this Power. " At preſent, rarely from a ſevere Verdict founded on " unſatisfactory Evidence, but often from the Inequa- " lity and Rigour of our criminal Code this power hath " interpoſed.

" In every ſuch inſtance, if the Pardon be abſolute, " then immediately when recorded; if conditional, " then in like manner after performance of the condi- " tion, the *competency* of the party to be heard as a " *Witneſs* is reſtored or legally *created*.

" It hath been ſaid that by a Statute Pardon" every " one" within that Pardon is reſtored " to Compe- " tency, and is to be conſidered as" received into ſo- ciety as a Perſon of Credit; " for that" no man can be puniſhed in his Reputation when the public Voice hath diſcharged him.

But whether the King's Pardon " has generally re- " ſtored his Competency," hath been a Queſtion: for ſome hold that the King's Pardon takes away the Puniſhment indeed, but doth not remove the Crime: and that the Turpitude of the Crime remaining is ever a Preſumption againſt his Evidence.

2 Brownl. 47. 2 Bulſtr. 154. 2 Sid. 221, 2. Danv. Abr. 163. pl. 6. Cro. Ja. 622. 2 Str Tr. 521---4. 269.

Pardon doth not reſtore Competency where perpetual Excluſion from Teſtimony is a Part of the Judgment poſitively preſcribed.

2 State Tr. 269. 3 St. Tr. 585, 610, 552, 3. and particularly 2 St. Tr. 610. T. R. 23, 369, 379.

Others hold the King's Pardon reſtores the Reputation, and the Loſs of Reputation being part of the Puniſhment, the King's Pardon, that can take off the whole Puniſhment, muſt, by neceſſary conſequence, reſtore the Reputation: and "that" the King, as conſtitutional Guardian of the Life, Liberty, and Eſtate of his ſubject, is the beſt Judge of the Conſequence of his Pardon.

2 Hawk. P. C. 433. § 22.

So that if any Perſon guilty of thoſe Crimes by which Credit is loſt, be afterwards pardoned, he muſt be ſuppoſed that he hath repented of his Fault, and hath returned to a better Mind: and therefore that his Evidence is not dangerous to the Life, Liberty, or Eſtate of the ſubject: "that is, in ſo far as to be excluded as incompetent: though the Jury doubtleſs "will exerciſe their Diſcretion as to the *Credit* due to a "Witneſs under theſe circumſtances, according to the "Nature of his Offence.

"But a Diſtinction hath been taken where the *In*"*competence* is the general conſtructive Reſult by Pre"ſumption of Law, on conviction upon an infamizing
* V. 2 Salk. 514, 689. S. P. 690.
"charge, and where it is *expreſsly included* in the legi"ſlative ſanction as a *conſequence annexed* to the parti"cular offence, and that inſeparably, until the Judg"ment be reverſed."

Therefore the Law is now held to be, that on *Perjury* at *Common Law* the Party pardoned may be a Witneſs: becauſe the King has a power to take off every part of the Penalty, "and this effectively comprizes a "power to" diſcern whether it is fit the Offender ſhould be reſtored to Credibility: but if a Man be indicted of *Perjury* on the *Statute*, the King cannot pardon "ſo as "to diſcharge this Incompetency:" for the King is excluded and diveſted of that Prerogative by the expreſs words in the Statute: "*the Oath of ſuch perſon ſo* "*offending not to be received in any Court of Record*; or, as the Statute elſewhere expreſſes it, "*the Offender* "*from thenceforth to be diſcredited and diſabled for ever to* "*be ſworn in any of the Courts of Record.*"

5 Eliz. c. 9. Anno 1562. § 6. § 7. V. 2 Salk. ut ſupra.

An

SECTION VI.

An Indictment of Perjury, and Verdict thereon, and no *Judgment* entered, cannot be admitted to weaken the Credit of any Witneſs: for if there be no Judgment entered, the *Allegata* muſt be ſuppoſed defective; and a man cannot be intended to make competent Proof upon inſufficient Allegations. 2 Raym. 32. Keb. 134. Lee and Ganſel, Hil. 14 G. III. Cowp. 3.

SECTION VII.

Perſons EXCOMMUNICATED *not* WITNESSES.

Perſons excommunicated cannot be Witneſſes: becauſe by the Laws of the Church ſuch Perſons are excluded from human converſation. Nay, her laws go ſo far as to excommunicate ſuch who converſe with them: and conſequently they cannot be admitted to receive any Queſtions from a Court of Juſtice; beſides, they thought that thoſe who were excluded out of the Church were not under the Influence of any Religion. Cæſ. Comm. B. C. VI. Ed. Elzev. 1635. p. 135.

" When one conſiders the ſeveral Cauſes of *Excom-*
" *munication* excluſively recited by the Statute, it is im-
" poſſible not to be ſurprized that they remain as un-
" repealed exceptions to the *Competence* of *Teſtimony*. 5 Eliz. c. 23. v. Morgan's Brit. Lib. p. 215, &c. Lond. 1766.

" The firſt is HERESY, which, whatever it may
" mean, implies a ſenſe of religious obligation, and of
" conſcientious Acceptance of *Chriſtianity* itſelf as di-
" vinely revealed. How then does it preſume a Man
" to have no regard to the utterlng of an injurious
" falſehood in the preſence of the Deity, and in repug-
" nance to that Religion the Truth and Authority of
" whoſe general Doctrines he admits. Another Cauſe
" is Error in Opinion in Matters of Religion and Doc-
" trine received and allowed in the Church of *England*.
" Now if the Church of *England* were really infallible,
" it would be a misfortune to differ from her in any
" point; but certainly no ground of civil incapacity;
" eſpecially ſo as to preclude a Court of Juſtice from

" being informed by a Perſon labouring under that " Misfortune. Another Cauſe is *Simony:* which as a " corrupt trafficking may indeed affect the Credit of a " Witneſs: though the offence is conſtituted ſo " ſtrangely, that eccleſiaſtical Right and Wrong upon " this ſubject enter commonly in a manner very perplex- " ing to a lay imagination, ſhould it attempt to define " the principles of morality or ſenſe by which the Boun- " daries have been ſettled. A remark not very diſſi- " milar may be applied to *Uſury*.

" *Incontinence*, under which Cenſure antenuptial " Commerce was till very lately included, * though the " Parties ſhould have made the *Amende honorable* by in- " termarrying, is another of the recited Grounds of *Ex-* " *communication*; as if being unguardedly awake to " the Impreſſions of Nature demonſtrated an Inſenſibi- " lity to the Voice of Truth.

* 27 G. III. c. 44.

" PERJURY, in an eccleſiaſtical Court, ſtands in " the Cloſe of the Catalogue. And this, under due " Conviction in the Courts of common Law, forms, " as we have ſeen, and juſtly, a deciſive Exception to " the Competency. But if Excommunication take " place on this as an eccleſiaſtical Charge, this exten- " ſive civil Conſequence is thus anticipated by the ſen- " tence of a *Forum* whoſe Rules of *Evidence* are far " different from thoſe of the common Law.

" Even in Popiſh Countries, the civil Terrors an- " nexed by this fulmination of the Church, are made " to yield to the ſteady and ſerene Ray of Juſtice.* In " *England*, if the Cognizance of teſtamentary, matri- " monial, and ſome other Cauſes be judged expe- " dient to remain under the eccleſiaſtical Juriſdiction, " it will be expedient that they have Proceſs to aſſiſt " them, like other Courts, in the Inveſtigation of ſuch " Cauſes.

* V. T. L. C. II. 112---14.

" Cauſes. But Excommunication is clearly as unſuitably " applied to the Contumacy of a Witneſs in a Cauſe " depending at Doctors' Commons, as in a Cauſe de- " pending in Chancery or the King's Bench."

SECTION VIII.

Of POPISH RECUSANTS.

The ſame Law has been ſaid to hold place in relation to *Popiſh Recuſants:* " for that by the Statute of " *James*" they are in the ſame Condition with perſons excommunicated. " But the learned and judicious " Serjeant *Hawkins* thinks the Diſqualification does not " extend to this. The Words of the Act are,—*Every* " *Popiſh Recuſant convicted* ſhall ſtand and be reputed to " all Intents and Purpoſes diſabled, as a Perſon law- " fully excommunicated.

2 Bulſtr. 155, 6. 2 St. Tr. 425. but Crawley, 216 contra, and *Hawkins*, ut infra.

" That ſuch Perſon ſhould not be *competent* as a *Wit-* " *neſs* in any Cauſe hath been the *Inference* from theſe " Terms: but the valuable Author already cited ob- " ſerves, that this Conſtruction ſeems over ſevere: for " that this, like all other penal ſtatutes, ought to be " conſtrued ſtrictly, in limitation of the Penalty; and " that the Purport of the Words may be fully ſatisfied " by the Diſability to bring any Action.

Hawk. P. C. 33, 4.

" Indeed a Diſability introduced againſt a party " ought not, by the force given to any general Terms, " to operate a failure in the Courſe of public Juſtice. " The perſon may be underſtood diſabled as to any In- " tereſt of his own: but the competence of Teſti- " mony is an Intereſt of public Juſtice."

Perſons outlawed may be Witneſſes: they are pu- " niſhed in their Properties; but the Outlawry " doth " not affect their Competence: if it have any Influence, " it, at moſt, terminates in their *Credit* as *Witneſſes.*

Co. Litt. 6 b.

" In *civil* or *criminal* Cauſes, no perſon at common " Law could be admitted to give Evidence otherwiſe " than upon Oath: excepting Witneſſes for the Pri- " ſoner who were not ſuffered to be ſworn againſt the " Crown; that is, on criminal Proſecutions, as if the " Crown had an Intereſt in the Death, Forfeitures, Im- " priſonment, or Diſhonour of the Subject: and as " if, in favour of ſuch Intereſt, the ſcale were to be ren- " dered unequal between Government and the accuſed.
1 A. S. 2. c. 9. § 2. Anno 1701. " In the Dawn of a female Reign this ignominious and " cruel partiality was effectually renounced.

SECTION IX.

Exception in favour of the Teſtimony of Quakers.

" But it being apparently juſt and expedient that " perſons who believe a ſolemn Affirmation made under " the conſciouſneſs of an omnipreſent Deity to be the " only allowed Mode of atteſting to a Truth in Contro- " verſy, ſhould be admitted as *Witneſſes*, under a ſanc- " tion ſubſtantially the ſame, and with the ſame civil
7 & 8 W. III. c. 34. " Conſequences, the Statute of *William* III. introduc- " ed an intended Remedy: which however was found " unſatisfactory, being indeed an *Oath*, although not " an imprecatory one: and therefore an Affirmation " in the ſimple and proper Senſe was ſubſtituted; but " this right of being heard on Affirmation is expreſsly " limited to *civil* Caſes.

TITLE II.

A Suit proſecuted by ACTION, *though given with a* penal *Intent, is a* civil *Caſe within the Statute in favour of the Teſtimony of Quakers.*

" On this it has been contended that an Action to " recover a Penalty given by Statute on an offence " which was a *crime* at common Law, was not a *civil* " but a criminal ſuit within the meaning of the ſtatute. " The Caſe is a recent one, and opened a very liberal " Inveſtigation not only of the import and effect " of the Statute but of the Nature of Atteſtation.

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* *In Teſtimonio injuratus recipitur Nemo.*

" This

" This was an Action of *Debt* upon the Statute " againſt *Bribery*.

Atcheſon v. Everett, Cowp. 382. Hill. 16 G. III. B. R. v. St. 2 G. II. c. 24.

" On behalf of the Defendant on a Motion for a " New Trial, it was contended, that *Evidence* not legal- " ly *admiſſible* had been received; by allowing the " teſtimony of a *Quaker*: which it was argued, ſhould " not, in this Inſtance, have been permitted; the " Cauſe being ſubſtantially, and within the meaning of " the Statute, a *criminal* one. For that the Mode of Re- " covery, and the conſiderable Sum allotted to the In- " former, went not as a perſonal ſuit for a private Be- " nefit, but as a Reſtriction on a *Crime* at *Common* " *Law*:—that the ſignal Penalties and Diſabilities, con- " ſequent on the Judgement, proved it both in princi- " ple and effect a criminal ſuit.

" For the Plaintiff, it was argued that the Evidence " was rightly received. That whatever the Object of " the Action, as countenanced by the Legiſlature in a " Public View might be, the Form was *Civil*;—the " legal Characters of the ſuit, ranked it with complete " Certainty in the Claſs of *Civil Cauſes*;—that the In- " tent of the Statute correſponded with the Terms of " it, in thus fixing the Line, and protecting this Body " of Citizens from private coercion or revenge, to which " they would remain liable, if where the ſuit was com- " menced by an *individual*, and could not therefore be " diſcontinued by the *Crown*, a *Quaker* ſhould be driven " to the alternative of violating his conſcience by taking " an Oath, or incurring a contempt, by refuſing to " comply with the *ſubpœna* of the party for that pur- " poſe.

v. 7 & 8 W. III. c. 34. § 1, 2, 3. 6 Anno 1696.

" poſe. Here the Action, the Declaration, the Plea, " the Judgment, the Operation of the Inſolvent Act, " which confeſſedly would diſcharge this like any other " *Debt*; all demonſtrate, that this is truely a Civil " Cauſe, within the Letter and the Spirit of the Act.

" That a Point of which the Analogy would govern " this, had been already decided: where an Action had " been brought againſt the Sheriff, for a *falſe* Return. 7 & 8 W. III. c. 12. " The Judgment concluded with a *ſit defendens in* " *miſericordia*, inſtead of a *capiatur*. The Plaintiff had " a Verdict and Judgment: the Defendant brought " *Error:* on which one of the Cauſes aſſigned, was the " irregularity in the concluſion of the Judgment as " already ſtated: and urged, that it was not amend- " able within the Statutes of *jeofails*, as being not on a " *civil* but a *criminal* Suit.

" The *Judges* in the *Exchequer Chamber*, though " differing in opinion as to the regularity of the Judg- " ment, were unanimous, that if wrong, it was aided by " the Statutes of *Jeofails*. For that although the ſta- " tute 4 G. II. *c.* 26. excepts criminal Caſes from thoſe " Statutes, whether the Statute, giving double damages " on a *falſe return*, be *penal* or *remedial*, as this is *not* a " *criminal proſecution*, the defect is aided by the " Statute.

" Lord MANSFIELD, in delivering the opinion of " the Court, after adverting to the Caſes in which this " Queſtion had been touched, rather than decided, and " noticing the ſituation of the *Quakers*, before the time " of paſſing the Act, expreſſed himſelf to this effect:—

" A more

" A more liberal way of thinking prevailed after the " Revolution. The principles of *Toleration* were ex- " plained and juſtified by conſequence of the Writings " of *Locke*, *Somers*, and other great men of thoſe times. " And a Statute paſſed, which, though not general, " was very extenſive in the relief it afforded to ſcrupul- " ous conſciences. That Statute was 1 *William* and " *Mary*, *c.* 18. commonly called the *Toleration* Act.

" In the *thirteenth* Sectionof that Statute, the Legiſla- " ture takes Notice, that there was a Sect called *Quakers*, " who had religious Principles in which they differed " from the eſtabliſhed Doctrine of the Church *England*: " and that one of their religious Scruples was the tak- " ing an Oath according to the Form preſcribed by the " Law of *England* to Chriſtians: and therefore, the Act " enables them to give aſſurance of their fidelity and " allegiance to the State by what I may call *another* " form of Oath: becauſe it is appealing to the Deity " for the veracity of what they ſhall ſay.

" This Statute was followed about ſix Years after by " another, which allows a *Quaker* to *affirm* in Caſes " where other perſons are required to take an Oath: " but ſtill this Affirmation retains the ſubſtantial cha- " racteriſtic of an Oath. 7 & 8 W. III. c. 34.

" But

The Form in the Toleration Act, is this:—

I do ſincerely promiſe, and ſolemnly declare before God and the World,

In the Statute of 7 & 8 *W.* III. the Affirmation is,—

I do declare, in the Preſence of Almighty God, the Witneſs of the Truth of what I ſay.

In the Statute of *G.* I. it is rendered unexceptionable; being only as quoted in the next Page. Thus a ſingle Law, founded in due Attention to the Rights of Humanity, is the ſource of ſucceſſive Improvement.

A very

8 G. I. c. 6. "But in the Year 1721, a Statute paſſed, which, "after reciting that the Forms preſcribed, in Lieu of "the common Abjuration Oath, the Declaration, and "the Atteſtation, in Courts of Juſtice, were not found "ſufficient to avoid the inconveniences which they were "meant to obviate, by reaſon of difficulties remaining "among the ſaid *Quakers* concerning them, reduces the "whole to a more ſimple, but ſolemn Affirmation, by "omitting the Appeal to the divine Preſence, the Af-"firmation being thus:—I do ſolemnly, ſincerely, and "truely declare and affirm.

"And the ſecond Section, after giving to this Affir-"mation the ſame force and effect in all Courts of "Juſtice, as if ſuch *Quaker* had made it in the Form "preſcribed by the Act of *William*, annexes all the "civil conſequences of Perjury, to the wilfully, falſely, "and corruptly ſo affirming, in the ſame manner as "that Statute had done.

"And on this liberal and ſecure footing, the Evi-"dence of *Quakers* in *Civil* Cauſes ſtands at the preſent "Day.

"It has been truely ſaid, that ſince the Caſe of *Omi-"chund* v. *Barker*, and another Caſe of great Authority "determined ſince, the Nature of an Appeal to Heaven, "which ought to be received as a full Sanction to Evi-"dence, has been more fully underſtood. I there "argued, and the Judges, in delivering their Opinions "agreed,

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A very reſpectable Perſon, not a Quaker, was greatly offended with the Multiplicity and imprecatory Clauſe of the civil oath of his Country. He remonſtrated in a grave and becoming manner: but hardly, in any inſtance, has the Dignity of a wiſe and virtuous Republic more ſuffered than by the Treatment, which, on that occaſion, he experienced.

Vogliamo

" agreed, that upon the principles of the Common " Law, there is no particular Form eſſential to an Oath " to be taken by a Witneſs. But as the purpoſe of it " is to bind his Conſcience, every Man of every Religi- " on, ſhould be bound by that Form which he himſelf " thinks will bind his own Conſcience moſt.

" Therefore, though the Chriſtian Oath was ſettled " in very early times, yet *Jews*, before the 18th of " *Edward* the *Firſt*, when they were expelled the " Kingdom, were permitted to give Evidence at *Com-* " *mon Law*; and were ſworn, not on the Evangeliſts, " but on the Old Teſtament. No diſtinction was " taken between their ſwearing in a *civil* and in a *cri-* " *minal* Caſe.

" It is objected, that the *Quakers* are the only people " in the world who ever refuſed to *ſwear*: but, in " *ſubſtance*, their affirmation is the ſame thing: the *form* " only is different; for an Affirmation is a moſt ſolemn " Appeal and Atteſtation to the God of Truth.

" There is a remarkable Caſe reported in *Siderfin*, " where Dr. *Owen*, Vice-chancellor of *Oxford*, in the " Year 1657, being called as a Witneſs, refuſed to kiſs " the Book; but deſired it might be opened before " him, and he lifted up his right hand. The Jury " prayed the Opinion of the Court, if they ought to " give the ſame credit to him as to a Witneſs ſworn in " the uſual manner; and GLYN, *Chief Juſtice*, told " them, that in his opinion, he had taken as ſtrong an " Oath as any other Witneſs: but, ſaid he, if I were " to be ſworn, I would kiſs the Book.

" There

Vogliamo che in qualunque caſo e circoſtanza in cui ſia permeſſo deferirſi il Giuramento a qualunque Perſona per qualunque cauſa, debba il Giudice, o Miniſtro proceſſante, prima de deferire il Giuramento cerziorare le perſone ſopra l'obligo che porta

" There is a Sect in *Scotland*, at this Day, who hold " it to be Idolatry to kiſs the Book. But their own " Form of ſwearing is much more Solemn. At *Carliſle*, " in the Year 1745, upon a Proſecution of ſome of " the Rebels, there was no Evidence but of this Sect; " and a Caſe was ſent up for Advice, whether they " could be received as Witneſſes. It was the opinion " of thoſe who were conſulted here, that the Evidence " might be received; but it was not an Object, and the " Proſecution went no farther.

" The Chief Juſtice then adverts to the Hiſtory of " the progreſs of the Bill for admitting the Teſtimony " of *Quakers* on Affirmation in the Reign of *William* III. " He attributes the exception with regard to *criminal* " *proſecutions*, to a ſtrong prejudice in the minds of " great men of that period. He ſhews that the Act, 13 W. III. c. 4. " a *temporary* one, being carried with difficulty, was " afterwards continued for eleven Years; and in the " Reign of Q. *Anne*, two unſucceſsful efforts were made " to render it perpetual, which was not effected until " the Year of the Acceſſion of the preſent Family to " the Throne. But that neither then, nor in the ſub- " ſequent enlarging and amending Statute, any altera- " tion was made relative to the Exception of criminal " Cauſes; which, in ſome inſtances, bears harder upon " the *Quakers*, and leaves them in a worſe condition " than when their ſect firſt aroſe. The Statute of " *Anne*, having afterwards intervened, and putting the " examination of Witneſſes for the Priſoner on the ſame " footing

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porta ſeco il Giuramento; ſpegiandogliene, l'eſſenza, e l'importanza—e ſi ſe tratterà di perſone di Religione diverſa della noſtra, a tali perſone ſi fara preſtare il Giuramento, (previa la detta cerziorazione ſecondo l'uſato, ma,) con il piu reſpettato e temuto loro rito. PENAL CODE of the GRAND DUKE of TUSCANY; Art. XII. Dated *Piſa*, 30th *Nov.* 1786. I owe the Peruſal of this Code to him, who for a Courſe of Years, with a Conſtancy of ſelf Denial, and an intrepid Perſeverance of Exertion

" footing of Teſtimony upon *oath*, with thoſe for the " *Crown*. So that if a *Quaker* be indicted of a capital " Offence, he can not now call *Quakers* as Witneſſes in " his behalf.

" That it is not poſſible to ſay, why the Exception " was made; yet ſince made, it muſt be followed.

" That however it is not of a Nature to admit any " extenſion by Equity. For that in *remedial* Caſes, the " conſtruction of Statutes is indeed extended to caſes " within the reaſon or within the rule of them. But " where it is an hard poſitive Law, and the reaſon not " very plainly to be ſeen, it ought not to be extended " by Conſtruction.

" That we come then to this Queſtion; Is the pre- " ſent a criminal Cauſe? A *Quaker* appears, and offers " himſelf as a Witneſs; can he give *Evidence* without " being ſworn? If it be a criminal Cauſe, he can not.

" Now there is no diſtinction better known than be- " tween *civil* and criminal Law; or between *criminal* " *Proſecutions* and *civil Actions*.

" Mr. Juſtice *Blackſtone*, (and all other antient and " modern Writers on the ſubject,) diſtinguiſhes them. " *Penal* Actions, in our Syſtem of Juriſprudence, were " never yet put under the head of *criminal* Law. The " conſtruction of the Statute muſt be extended by " Equity to make this a *criminal* Cauſe. It is as much " a *civil* Action, as an Action for *Money had* and " *received*. The Legiſlature, when they excepted to " the Evidence of *Quakers* in *criminal* Cauſes, muſt be " underſtood to mean Cauſes *technically* criminal;

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tion not to be deſcribed, ſcrutinizes the Globe to diminiſh the Crimes and alleviate the Miſeries of its Inhabitants; purſuing Horror and Peril in their moſt ſhunned Receſſes, under the influence and protection of divine Philanthropy.

The Caſe in *Siderfin*, was a Queſtion of extremely great importance in point of Property: and one of the lateſt in which the Uſe of a perſon's particular Seal was conſidered as requiſite to prove the Authenticity of a Deed. v. ſupra.

and

" and a different conſtruction would not only be in-
" jurious to *Quakers*, but prejudicial to the reſt of the
" King's Subjects who may want their Teſtimony.
1 Wilſ. 125. 2 Str. 1227. " The Caſe of Sir *Watkyn Williams Wynne* v. *Middleton*,
" is a very full Authority; and alone ſufficient to
" warrant the Diſtinction between civil and *criminal*
" Proceedings. In that Caſe, the Queſtion was, whe-
Ch. 22. " ther the Statute 7 & 8 *W.* III. was *penal* or *reme-*
" *dial.* The Court held it was *not* a *penal* Statute.
" But ſuppoſing it was to be conſidered as a *penal*
" Statute, yet it was alſo a *remedial Law*; and there-
" fore, the Objection taken was cured by 16 & 17
" *Car.* II. *c.* 8. Now the Exceptions in that Statute,
" and alſo in St. 32 *H.* VIII. *c.* 30. and in St. 18 *Eliz.*
v. § 1, 2. " *c.* 14. are of *penal* Actions and *criminal Proceedings.*
" But Lord *Chief Juſtice* WILLES, in delivering the
" Solemn Judgment of the Court, ſays, there is another
" Act which would decide of itſelf, if conſidered in the
" light of a new Law, or as an Interpretation of what
" was meant by *penal* Actions in the St. 16 & 17 *Car.* II.
" This is the Statute of 4 *G.* II. *c.* 26. for turning all
" Law proceedings into *Engliſh:* and it has this re-
" markable Concluſion, that every Statute of *Jeofails*
" ſhall extend to all forms and proceedings in *Engliſh*;
" (except in *criminal* Caſes) and that this Clauſe ſhall be
" conſtrued in the moſt beneficial manner. This is
" very deciſive.

" No Authority whatever has been mentioned on the
" other ſide, nor any caſe cited where it has been men-
" tioned, that a *penal* Action was a *criminal* Caſe.
" The ſingle Authority mentioned againſt receiving
" the Evidence of a *Quaker* in this Caſe is, an *Appeal*
" of *Murder.* But that is only a different Mode of
" proſecuting an Offender to Death. Inſtead of pro-
" ceeding by Indictment in the uſual way, it allows

" the relation to carry on the Proſecution for the Pur-
" poſe of attaining the ſame end which the King's
" Proſecution would have had, if the Offender had
" been convicted; namely, execution: and therefore,
" the Writers on the Law of *England* claſs an Appeal
" of Murder in the Books under the Head of *Criminal*
" Caſes. (*)

" With reſpect to a *Quaker*'s giving Evidence in
" *criminal* Caſes, his Lordſhip obſerved, that the Qua-
" ker was liable to an *Attachment* on refuſal: but inti-
" mated that by the Act of Toleration he would be ex-
" empted from any penal conſequences, his diſſent
" touching the *lawfulneſs* of an oath being no longer
" liable to be treated as a *crime*, nor he to be ſubjected
" to *puniſhment* for a refuſal founded on it.

" And to evince that where the end was *civil*, though
" the *form* was that of a *criminal* ſuit, the teſtimony
" of a Quaker was receivable by the Statute, he in-
" ſtanced *Rex v. Turner*, where on a motion to quaſh
" an appointment of *Overſeers*, though in the King's
" Name, the end being a *civil remedy*, the *Affirmation*
" of a *Quaker* was allowed to be read.

2 Str. 1219. Hil. 18 G. II. *Lee*, Ch. J.

" The Reſult is, that where the Form is *civil*, though
" the ſubject may be *penal*, or where the Form is
" *criminal*, but the object a *civil* remedy, the Evidence
" of a Quaker ſhall be admitted: being excluded in
" proper *criminal* Cauſes; where the Form and the
" Object both denominate the ſuit a Proſecution for a
" public Offence.

(*) Thus GLANVILLE, who held that great office of *Capitalis Juſticiarius Angliæ* (an office apparently ſuperior to that of either Chancellor or Chief Juſtice in the preſent day,) under HENRY the SECOND, commences his Book§ by this diviſion. *Placitorum aliud eſt* CRIMINALE, *aliud* CIVILE. *Item placitorum* criminalium *aliud pertinet ad Coronam domini Regis, aliud ad vicecomitem provinciarum.*

§ L. I. c. 1.

‖ And afterwards he ranks the *Appeal* of the *Wife* for the *death* of her *Huſband* amongſt the criminal Cauſes.

‖ L. XIV. c. 3. Co. Litt. 284, 7.

Incapacity from Want of Diſcernment:

"The CHIEF JUSTICE concluded thus: We are "not under the leaſt embarraſſment in the preſent "caſe: for there is not a ſingle Authority to prove "that upon a penal Action a *Quaker's Evidence* may not "be received upon his *Affirmation*. Therefore I am of "opinion that Mr. Juſtice *Nares* did perfectly right "in admitting this *Quaker* to be a Witneſs upon his "Affirmation; and conſequently that the Rule for a "new Trial ſhould be diſcharged.

SECTION X.

Peer to be examined on Oath.

V. Foſt, 140---53. "But although on Trial before the Lord *High* "*Steward* and *Peers*, out of Parliament, (in which Caſe "the Peers are in the Nature of a *Jury*) or before the "*King* in *Parliament*, which is by the *Houſe* of *Peers* "in its judicial Capacity when Parliament is ſitting, "(the High Steward, if any be appointed, being only "as Speaker *pro Tempore*,) the Peers give their Ver- "dict or Sentence upon their *Honour*, perhaps meaning "not merely their perſonal dignity and eſtimation, but "their *Barony*, which as *Pares maximæ Curiæ* they "hold as a ſolemn Truſt by the Tenure of the due "performance of the Duties of their Office; yet if a Comm. I. c. 12. p. 402. "*Peer* be examined as a *Witneſs*, he ſhall give his Evi- "dence on Oath: and accordingly, on the laſt Trial "on an Indictment of High Treaſon, in levying War "againſt the King, the Lord Viſcount *Stormont* was ſo "examined; he being at that time one of the *ſixteen*.

SECTION XI.

Of INCAPACITY *for Want of* DISCERNMENT.

Co. Litt. 6. b. L. N. P. 293. H. P. C. B. 1. c. 46. § 27. Brownl. 47. Moſeley, 72. "We are now to conſider Perſons under" thoſe who are excluded from Teſtimony by want of Diſcernment: "and this either,

"1. Propter Ætatem,

"2. Propter defectum Rationis.

TITLE II.

"1. *Of incapacity by reaſon of years.*

CHILDREN under the Age of *fourteen*, are not, "as of courſe," admitted as Witneſſes: and yet at twelve

twelve they are obliged to ſwear Allegiance in the Leet. There is no time fixed wherein they are to be excluded from Evidence; but the reaſon and ſenſe of their Evidence is to appear from the Queſtions propounded and their Anſwers to them. "And as Children of "very tender years are capable of being legally con- "ſidered as being capital offenders, much more are "they capable of being *Witneſſes.*

"And *Hale* thinks that even in a capital Caſe where "the Information from the party injured is peculiarly "eſſential, it may be expedient to hear an Infant, "though the Court ſhould think it unfit to ſwear "her."

The Evidence of a Child of 6 years was refuſed by the Lord CHIEF BARON himſelf on an Indictment of a Rape; and afterwards by Raymond, on an Indictment for an Aſſault with intent to commit that offence. Str. 700. E. 12 G. H. H. P. C. 634, 5

TITLE III.

2. *Of Incapacity by reaſon of Want of Underſtanding, by Idiocy or Inſanity.*

Ideots and *inſane* Perſons are obviouſly incapable of being "*Witneſſes:* but this muſt be underſtood of "ſuch as manifeſtly are within the deſcription of this "deplorable Calamity: otherwiſe a *defect* or *inconſtancy* "of underſtanding not clearly to this extent will "affect their Credit but not their Competency to be "examined; but where they appear" perfectly incapable of any ſenſe of Truth, "they are" plainly and neceſſarily excluded.

"Yet of an *inſane* Perſon it might, for Defect of "other Evidence, merit to be conſidered, whether, in "*civil* Caſes at leaſt, the Teſtimony of ſuch might "not be *admiſſible* upon points where his underſtanding "did not appear to be ſubject to diſturbance: it being "well known that in many of theſe melancholy in- "ſtances, eſpecially where the reſult of ſome violent "paſſion, the party affected is entirely cool, clear, and "recollected in his Ideas, and as free as other perſons "from the deluſions of a perverted imagination, in "every thing not connected with the Cauſe of his In- "ſanity.

" With regard to perſons who have only temporary " fits of *Madneſs* (then uſually termed *Lunacy*), and at " other times are in all reſpects of ſound reaſon; theſe " are then conſequently as capable of teſtimony as of " any other legal Act.

SECTION XI.

EXEMPTION propter FIDEM PUBLICAM *or* Incapacity *on account of* profeſſional *Confidence.*

" We are laſt, on the head of *Competency*, to conſider " the Caſe of thoſe who being *profeſſionally* engaged as of " *Counſel* for a party, or as Solicitor, Attorney, or other " Law Agent, are poſſeſſed by virtue of ſuch confiden- " tial character, of facts which are under the Inveſti- " gation of a Court of Juſtice.

* Rayner 111—22. and L. N. P. 284, 5.

" This Point hath been largely and well treated by " the Author * of *Readings* on Statutes in the Reign of " *George* the *Second:* and from him chiefly will be " cited what appears of moſt importance under this " head.

" The general Principle is derived from hence. That " formerly, in the ſimpler ſtate of Society and Laws, " Perſons appeared for themſelves, and conducted their " own Claims or Defences, without needing the Aſſiſt- " ance of men educated to the formal practice of the " Law. When the extenſion of property, the encreaſe " of Laws, the magnitude, number, and ſubtilty of " legal Queſtions rendered this no longer ſafe or prac- " ticable, the Attorney, as the Name indicates, became " the legal Repreſentative of his Client in the Cauſe. " The Anſwer of the Agent was the Anſwer of the " Principal; and whatever the party could have done " perſonally, was concluſive when tranſacted in his " place by his legal Proxy. It was therefore converſely " juſt that the Attorney ſhould neither be compelled " nor permitted to anſwer Queſtions pointed at the Diſ- " cloſure of Facts, which to divulge would be incon- " ſiſtent with the Nature of ſuch Repreſentation, being

" of that kind to which the party could not perſonally " have been obliged to anſwer. III Comm. 370. Theor. of Ev. 95. L. N. P. 284.

" But there are Limitations reſulting from the Prin- " ciple of this Rule.

" Thus, an Attorney or Solicitor may diſcloſe a Fact " communicated *prior* to his being *profeſſionally* con- " ſulted by the party who afterwards became his " Client. Cutts and Pickering, E. 24 Car. II. 1 Ventr. 197.

" So alſo of a ſubſequent Fact during his Retainer, " if in its Nature unconnected with the profeſſional " Truſt, as neither being, nor preſumably taken to be, " relative to the legal Buſineſs on which he is employed, " or as being ſuch as equally was open to his knowledge " had he not ſtood in that relation. 11 St. Tr. 253. Obſ. of Sir J. S. 2 Str. 1122.

" Farther, if the Fact to which an Attorney or So- " licitor is examined be ſuch, as that on the proved or " admitted circumſtances of the Caſe, or on the ſtate " of the Queſtion upon which either Party relies, the " Truth cannot be inveſtigated but by examining a per- " ſon under this profeſſional Confidence, he ſhall be con- " ſidered as free from the generally implied obligation " to ſecreſy; at leaſt where the point to be aſcertained " by his Evidence cannot criminate his Client. V. 12 Vin. Abr. 38. pl. 1.

" And where an Attorney is Witneſs to a Deed, the " Conſent of his Client that he ſhall atteſt the Inſtru- " ment carries with it an abſolute implied Conſent that " he ſhall be examined concerning the Execution of " the Deed. Rayn. 117, 8. Ld Say & Sele's caſe. Mich. 10 A. 10 Mod. 41. Sir O. Bridgman with the Advice of all the Judges, and v. Barnes, 58.

" Where the original Ground of Communication is " *Malum in ſe*, as if he be conſulted on an *Intention* " to commit a *Forgery*, or *Perjury*, this can never be in- " cluded within the Compaſs of profeſſional Confidence: " being equally contrary to his Duty in his Profeſſion, " his Duty as a Citizen, and as a Man: but if ſuch " offence, as Forgery, for Example, *committed* with- " out his being *privy*, comes to his knowledge in the " courſe of confidential tranſactions with his Client, in

Rex v. Dixon. E. 25 G. III. 3 Burr. Manſf. 1687, 8.

" the way of buſineſs, he ſhall not be compelled to " aſſiſt in proving it.

" But this Privilege, or rather this incapacitation, " (it being more for the protection of the Client, and " of the Faith of a Truſt eſſential to civil Society than " for the ſake of the Agent) is underſtood of *Law* " *Agents*, not of Agents in a popular and general " ſenſe; otherwiſe it might be moſt inconveniently " extended to *Stewards*, and even common ſervants.

Sir Samuel Jones v. Counteſs of Mancheſter, at ſupra.

" In Ejectment on a Trial at Bar, the Evidences, " which as the Plaintiff inſiſted, would have eſtabliſhed " his Title, and avoided the ſettlement of the De- " fendant, were locked in a Box, which had been in " the Cuſtody of a ſtranger, who before the Trial de- " livered it to the *Earl* of *Bedford*, a Truſtee for the " Defendant.

" The Earl, preſent in Court, was requeſted to de- " liver the Key, that the Box, which was brought " into Court, might be opened. He ſaid, that being " a *Truſtee*, he conceived he was not obliged to ſhew " forth any Writings that might impeach her Eſtate; " and if he ſhould, it would be a Breach of the Truſt " repoſed in him, which was ſacred and inviolable.

" The Court ſaid, that they could not compel him " to deliver the Key: but *Hales* ſaid it was adviſable " for him to do it. For he held, though it is againſt " the Duty of a *Counſellor*, or *Solicitor*, &c. to diſcover " the Evidence with which he who retains acquaints " him, yet a *Truſtee* may and ought to produce Wri- " tings; but that *there* they could not rule him to " do it.

SECTION XII.

EVIDENCE *on* HEARSAY.

" We now come to the loweſt ſpecies of *parol* Evi-
" dence. The *Light* which Evidence hitherto con-
" ſidered throws on a Cauſe was *primary* and *direct*;
" but of this *ſecondary* and reflected: for where bet-
" ter can be adduced the Rule is, that *Hearſay* is no
" Evidence.

" Yet of certain Queſtions *Hearſay* is full Evidence, III. Comm. 368.
" when from the Nature of the ſubject no other can be L. N. P. 233, 294, 5.
" expected: as in common Opinion to general Character
" which reſts upon general Eſtimation; but otherwiſe
" of particular Facts. So of a Preſcription, which ex-
" cluding direct Proof from written Evidence, and Skinner v. Ld Bellamont, Worceſter 1744.
" running beyond the reach of preſent knowledge, is
" well proved by referring to the Account given by
" diſintereſted parties long ſince deceaſed.

" So even of an ancient Preſentation to a Benefice, Biſhop of Meath v. Ld Belfield, 1747.
" under circumſtances; this being good by parol, the
" general Reputation of the Country that *B.* was in by
" the Preſentation of *A.* was allowed as Evidence,
" the Pariſh Regiſter being ſilent.

" So of a Deſcent, or Family Relationſhip, Teſti- Grimwade and Stevens, Kent, 1697.
" mony concerning the common Reputation and Belief
" in the Family is frequently given in Evidence for De-
" fect of better.

So Declaration of *deceaſed* Tenants, that a certain piece of Land is parcel of the Eſtate which they occupied, is admiſſible Evidence. Davies v. Pierce Tr. 27 G. III. T. R. II. 53.

" So where it comes in corroboration of the Teſti- 1 Mod. 283. Tr. 29 Car. II. B. R.
" mony of a Witneſs, by ſhewing him on a former oc-
" caſion to have declared agreeably to his preſent Evi-
" dence.

" So in Iſſue, on the Legitimacy of Plaintiff or De- V. ſupra,
" fendant, Evidence of what the Parents have been
" heard to ſay is admiſſible; not as a detached ſource
" of direct Evidence, but as an Inducement to the Be-
" lief of the Witneſs one way or the other.

Pendrel and Pendrel. 2 Str. 925.

"Where a party is living and producible as a Wit-
"neſs, the Declarations of that party ſhall not be
"given in Evidence on the one hand, till the party hath
"been produced and examined to the point to which
"ſuch ſuppoſed declarations refer, on the other.

"What a Witneſs hath heard from a Criminal volun-
"tarily, without force or undue influence of any kind,
"confeſſing the charge, is Evidence againſt that Cri-
"minal on the Trial, but not againſt a third Perſon.

"It has been already ſeen, that ſince the beſt Evi-
"dence, which the Caſe, circumſtanced as it ſtands,
"will allow, is always required, *parol* proof cannot be
V. ſupra, 211. "given of what a deceaſed perſon ſaid on his death-
"bed touching the Cauſe of his Death, when thoſe
"Declarations were reduced to writing, and might
"have been ſo given in Evidence; but where they were
"not reduced, this Evidence is admiſſible: though
Trial of *Bambridge*. Harg. St. Tr. IX. 161. "the *Credit* of it much depends on the Memory and
"Temper of the Witneſs by whom it is related.

"Such Declarations, well authenticated and ſup-
"ported by circumſtances, have undoubtedly their
"Weight, from the ſituation in which they are uttered.

On the caſe of a Man convicted of Murder on the Declaration of the deceaſed, ſupported by ſtrong circumſtantial Evidence, Sir *George Nares*, in converſing on the ſubject, quoted this Paſſage:

Have I not hideous death before my view,
Retaining but a quantity of life,
Which bleeds away, even as a form of wax
Reſolveth from his figure 'gainſt the fire?
What in the world ſhould make me now deceive,
Since I muſt loſe the uſe of all deceit?
Why ſhould I then be falſe, ſince it is true
That I muſt die here, and live hence by truth.

John, A. V. Sc. IV. *Capell's* Shakſpeare, 5.

"On

"On the other hand, an extremely able Writer "ſhews the various ſources of Error and Miſrepreſen- "tation ariſing from this ſpecies of Proof, by what an "aſſaſſinated Perſon may have been heard to ſay rela- "tive to the Cauſe of his Death. At preſent this is "but hinted; its proper place will occur hereafter, in "treating on the *probability* reſulting from Teſtimony. "And this Diſcuſſion it will ſoon be ſeaſonable to "commence. It remains, however, a general Rule "ſubject only to neceſſary Limitations, that no Evi- "dence ſhall be admitted upon oath of what a man "ſaid when he was not upon oath.

Dougl. II. 397, 8, and 308, 9.

CHAPTER II.

General Observations.

"There remain a few general Obſervations on this "Article of *Competency*.

Par. 2.

Effect of the Objection where doubtful.

"Firſt, wherever it is *doubtful* whether the Objection "ſhould go to the *Competency* or to the *Credit*, the Wit- "neſs ought to be heard: for no Evidence ſhould be "rejected that is not clearly and decidedly inadmiſſible.

V. ſupra, 237.

Par. 3.

Time of excepting.

"Then, as to the *time* of taking the Exception.

"Evidence muſt be opened before it is offered, "that the Court may judge of its Nature and Cir- "cumſtances, ſo as to be able to diſcern whether it "ought to be offered to the Jury.

4 St. Tr. 129. old Edition.

"And then, after a Man hath been examined *in "chief*, hath gone through his whole Evidence, and "been croſs-examined, the *Exception* to his *Competency* "comes, in ſtrictneſs of Law, too late: * and, in "this reſpect, the ſtrictneſs of Law is very wiſe: it "always ſaves time, and it precludes Abuſes which "might otherwiſe take place.

4 Burr. Manſf. 2252. v. ſupra. T. R. 718, 9. E. 27 G. III.

* *Vigilantibus, non dormientibus, ſubveniunt Jura.*

"In

Observations on the effect of Exceptions to the Competency, as liable to prejudice the Queſtion.

2 Comm. 370. Turner & al. v. Peart, T. R. ubi ſupra.

"In the ſtrict antient Method, if a Witneſs was ſuſ-
"pected to be intereſted, he was examined by the party
"liable to be prejudiced by his Teſtimony, on a *voire*
"*dire*, to diſcloſe the Truth concerning ſuch circum-
"ſtances. But as the Queſtions put with this view,
"were generally in a great degree the ſame which would
"be afterward repeated on the examination *in chief*, it
"has been permitted, for the diſpatch of Juſtice and
"the mutual convenience of the parties, to examine
"*conditionally*, (as it were in the nature of a *de bene*
"*eſſe*), ſubject to *exceptions* of *Competency* reſerved, to be
"argued, if judged material, at the Cloſe of the Evi-
"dence.

T. R. ut ſupra. 717-- 20.

"But where a Verdict is clearly ſatisfactory on the
"Merits, this Exception to the Competence of ſome of
"the Witneſſes, will be of no Weight to induce the
"granting of a new Trial; though it might have had
"ſome in a doubtful Queſtion.

TITLE II.

Inconvenience in the Effect of Exceptions to Competency.

Douglas contr. El. III. 231, 2.

"A remark has been made by a Gentleman, to
"whom the Public is obliged for valuable information
"on a great branch of *conſtitutional* Law, that there is
"a conſiderable inconvenience attendant on the Mode
"of taking Exceptions to *Evidence:* for that the Coun-
"ſel, who offers Evidence, againſt the Competency of
"which the other ſide has to except, has already the
"advantage of whatever prejudice or improper impreſ-
"ſion, ſuch Evidence may be likely to convey with it,
"by ſtating it's purport and tendency to the Jury;
"who may too probably infer, when objection is made
"to it's Admiſſibility, that it is therefore, of courſe,
"both true and fatal to the party objecting. Yet the

" Remedy intimated, that perhaps it might be an im-
" provement, when Queſtions of Admiſſibility are
" raiſed, that the Jury, as well as the Witneſſes, ſhould
" withdraw till the point be argued and decided, may
" ſeem neither effectually to meet the inconvenience at
" preſent ſubſiſting, nor to be free from diſadvantages
" of it's own, and thoſe of a kind yet more to be avoid-
" ed: poſſibly this may be one of the inſtances in which
" ſome diſadvantageous circumſtance is attached in-
" ſeparably to a great and peculiar benefit, not as a
" corruption or accidental deviation, but as admitted
" into the original frame of a ſublime Inſtitution;
" which, if more guarded in this point, muſt have been
" ſo by the ſacrifice of ſomething more eſſential."

CHAPTER III.

We come now to conſider the Scale of *Probability*, and to compare the ſeveral Degrees of Evidence. All Certainty, as we have ſhewn, ariſes from the Knowledge of a Man's own proper Senſes: " and is either direct" by Intuition, " or reflective," by comparing his Ideas and Thoughts one with another.

V. ſupra, p. 2.

SECTION II.

On DEGREES *of* PROBABILITY *in* TESTIMONY.

PROBABILITY " ariſeth from the Teſtimony of
" others, concerning a Subject proveable to their Senſes,
" when ſuch Teſtimony is in" Agreement with a Man's own Thoughts and Obſervations.

TITLE II.

Order of Proof.

And here it is firſt to be conſidered, that in all Courts of Juſtice, the Affirmative * ought to be proved: for it is ſufficient barely to deny what is affirmed, until the contrary be proved: for Words are but the Expreſſion of Facts, and therefore, when nothing is ſaid to be done, nothing can be ſaid to be proved: and this is a Rule, both in the *Common* and *Civil* Law; the Civil Law ſays,

* Actori incumbit Probatio.

" the

" the Proof lies on him who makes the Allegation; " for it is againſt the Nature of Things to prove a " Negative."

But in a Caſe where the Affirmative is *primâ facie* proved, the other Side may conteſt with oppoſite Proofs: and this is not properly the Proof of a Negative; but the Proof of a Propoſition, totally inconſiſtent with what is affirmed.

And therefore, when the General Iſſue is in the Negative, the Plaintiff muſt always begin with his Proof: becauſe the Defendant cannot prove the Negative, and the Charge beginning by the Plaintiff, he muſt take it out of his Evidence: as if the Defendant be charged with a *Treſpaſs*, he need only make a general Denial of the Fact, and if " Evidence be given, which " uncontradicted, will" prove the Fact, he can only prove a Propoſition inconſiſtent with the Charge: " as" that he was at another Place at the time when the Fact was ſuppoſed to be done, " or that the Ground was " his own where he had a Right to be;" or the like.

But where Law " implies an Affirmative," contained in the Iſſue, there the oppoſite Party " may" be put into the Proof of it by a Negative: as in the Iſſue *ne unques accouple en loyal Matrimonie*, the Law will ſuppoſe the Affirmative, that the " Marriage " was lawful; at the ſame time, the Plaintiff having " averred a general Illegality, the Defendant, from the " Neceſſity of the Caſe, is put to ſhew on what Marriage, " under what circumſtances and qualifications he re- " lies. It is therefore, in Truth," the Defendant muſt

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D. XXII. 3. 2. Ei incumbit Probatio, qui dicit, non qui negat.

begin,

begin, " by offering Evidence to ſupport the Legality " of the Marriage.

" So on a Suit againſt a *Juſtice* of Peace, for exer- " ciſing that Office, *not* being qualified according to the " Statute, it lies on the Defendant to prove his *Quali-* " *fication.*" 18 G. II. c. 20. 3 Burn. 21, 2.

In an Information againſt Lord *Halifax*, for refuſing" " to deliver up the Rolls of the Auditor of the Exche- " quer, the Court put the Plaintiff to prove that he " did not deliver them: for a perſon ſhall be preſumed " duely to execute his office till the contrary appears. " And this might be proved by poſitive Facts, ſuch as " Refuſal, their remaining in his Poſſeſſion, and the " like. L. N. P. 298. v. Co. Litt. L. III. § 534.

" The Truth is, that in legal Queſtions, the general " negative Term is convertible, (often by various diſ- " tinct Subſtitutions of litigated Fact), into a poſitive " one. In ſuch inſtances, therefore, where it ſuffices " for the Plaintiff generally, to deny the exiſtence of " any legal Qualification, under which the Defendant " might juſtify, it is incumbent on the Defendant to " prove the particular circumſtances which contradict " the Negative. And this is not proving a Negative, " which in a direct Senſe is impoſſible, but it is proving " an Affirmative repugnant to the general Negation. Crouſaz's Art of Thinking. P. 1. § 2. c. 4. par. 5.

" As in the caſe juſt intimated, the Plaintiff charges, " that the Defendant hath acted as a Juſtice of the " Peace, not having qualified purſuant to the Statute. " The Defendant proves his Property, and proves his " Compliance with the Requiſitions of the Statute. " The Nature of the Queſtion puts the Proof on " the Defendant. If he fail in that Proof, then the " general Negative of Qualification, comprized in

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Actor quod adſeverat probare ſe non poſſe profitendo, reum neceſſitate monſtrandi contrarium non adſtringit: cum per rerum naturam factum negantis probatio nulla ſit. C. IV. 19. 23.

" the

" the Plaintiff's Charge is converted into an Affirma-
" tive, that the Defendant, having an Eſtate amounting
" in the whole to leſs Value than the Qualification by
" Law required, did exerciſe the office of a Juſtice
" of the Peace; or that the Defendant having
" neglected to take and ſubſcribe the oath of Qua-
" lification, hath acted as a Juſtice; or that his
" Qualification, if any, conſiſteth in Lands which he
" hath omitted to ſpecify in the Oath preſcribed; or
" in the Notice directed in default thereof, to be given
" in Writing before the Trial. Now theſe poſitive re-
" quiſites, being Acts to be performed by the Defend-
" ant, it is for him to prove that he hath performed
" them."

In a Writ of Right, the Evidence muſt begin from the Tenant, if the Miſe is thus joined.—And the Defendant putteth himſelf upon the Great Aſſize of our Lord the King, " and prayeth that Recognition
" be made, whether he hath the better Right of hold-
" ing the Tenements with the Appurtenances to him
" and his Heirs as Tenant thereof as he holdeth, or
" whether the ſaid Plaintiff, of holding the ſaid Tene-
" ments with the Appurtenances as he above demand-
" eth:" ſo that in this Caſe, the Defendant's Iſſue is in the Affirmative, and therefore, the Proof muſt begin from him.

SECTION III.

Loweſt Proof in a general Senſe; cæteris paribus.

The firſt and loweſt Proof, is the Oath of one Witneſs only: and there is that Sanction and Reverence due to an Oath, that the Teſtimony of one Witneſs

Et Def. ſe pon. in magn. Aſſiz. Dom. Reg. et petit Recognitionem fieri utrum ipſe majus Jus habeat tenendi tenementa cu' pertinentiis ſibi et hæredibus ſuis ut tenens inde, ſicut illa tenet, an præd. querens habendi eadem Tenementa cum pertinen' ut illa ſuperius pet.

naturally

naturally obtaineth Credit; unleſs there be "ſtronger" appearance of probability to the contrary.

Now that which ſets aſide his Credit, and overthrows his Teſtimony, is the Incredibility of the Fact, and the Repugnancy of his Evidence: for if the Fact be contrary to all manner of experience and obſervation, it is too much to receive it upon the Oath of one Witneſs; or if, what he ſays, be contradictory, *that** removes him from all Credit; for Things totally oppoſite cannot receive Belief from the Atteſtation of any Man. "And "of theſe Objections, the former is *extrinſic* to the "Teſtimony, the latter is *internal*. Any ſuppoſed Fact, "not plainly impoſſible, may be proved by ſuch force "of teſtimony in the Number, Character, and Situa- "tion of the Witneſſes, as ſhall induce a manifeſt Im- "probability of their ſpeaking falſely: for difficulties "external to the teſtimony are ſubdued and com- "paratively loſt, when the Teſtimony under all "it's circumſtances, is entitled to Credit: it then com- "municates its general Credibility to whatever Queſ- "tions of Fact it is offered; it being evidently incon- "ſiſtent, that the antecedent improbability of the Event "ſhould affect the Credit of actual Proof, that it has "taken place. It has no ſuch effect on the moſt im- "probable incidents, if a Man's own Senſes and im- "mediate Obſervation, aſſure him of the certainty of "their having taken place; it has proportionably no "effect on matter of Evidence, where the general "Credibility of the Witneſſes is fully eſtabliſhed, and "no intereſt or undue motive is reaſonably imputable "to render them ſuſpected on the particular point.

Price's IV. Diss. 403--9.

"The moſt unlikely and the moſt familiar occur- "rence are, as to their exiſtence or non exiſtence, "determinable by the ſame natural means of Obſer- "vation, according to the Quality of the Fact to be "aſcertained. Either is therefore proveable, not ac- "cording to the previous Grounds for expecting it, but "to the reaſons for acquieſcing with juſt Cauſe in the "Truth and Knowledge of the Witneſſes.

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* *Allegans contraria non eſt audiendus.*

"An

" An *eſſential* Repugnance, is an intrinſic Diſcredit " to Teſtimony, which deſtroys the credence which " might otherwiſe be given to any Witneſs on any " Queſtion, as already hath been noticed.

SECTION IV.

Two Witnesses.

The *Second* * Degree of Credibility, is from the Oaths of *two* ſeveral Witneſſes: and is " conſiderably " higher" than the " general" Credibility which ariſes from the Oath of one Witneſs only. For here, if they agree in every circumſtance, there muſt be two perjured, or it muſt be true what theſe Witneſſes allege " and" depoſe; but if, upon their Examinations, they " materially" diſagree in circumſtances, then they fail in their Credit, becauſe their Contradictions cannot be true.

Title II.

There are ſome Caſes in the Law, where the full Evidence of *two* Witneſſes is abſolutely neceſſary.

Par. 2.

Where neceſſary.

First, where the Trial is by Witneſſes *only:* as in the Caſe of a Summons in a real Action: for a Man's affirming, is but equal to another Man's denying; and where there is no Jury to diſcern of the Credibility of Witneſſes, there can be no Diſtinction made as to the Credit of their Evidence: for the Court doth not determine of the Credibility of one Man in preference to another, for that muſt be left to the Determination of the Neighbourhood: † therefore, where a Summons is not proved by two Witneſſes, " in the inſtance ſtated," the Defendant may wage his Law of non Summons.

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* *Proximus huic, longo ſed fortior intervallo.*

† *Vicinus Facta Vicini præſumitur ſcire.*

The

The *ſecond* Caſe ("which before was mentioned") is in *Chancery*; and that is where there is but *one* Witneſs, contradicting the Anſwer, for there the Credibility is equal: unleſs it appears from the Nature and Face of the Fact that the Anſwer is not to be believed: and the Courſe of the Court in ſuch caſe is to direct a Trial at Law to aſcertain the Credibility of that Witneſs by a Jury, which is the common ſtandard on which the Credit of an *Engliſhman* is to ſtand and fall on all Events.

The *third* Caſe in which the Law requires *two* Witneſſes, is *High Treaſon*; and this not ſo much from the natural Equity of the Rule, that every Man's Allegiance is ſuppoſed till the contrary is proved, and the Negative of the Priſoner is equal to the Affirmative of the Witneſs, and therefore the Treaſon ought to be proved upon him by two Witneſſes; for then the ſame would be good in Caſes of Felony, where every Man's Honeſty is preſumed till the contrary is proved, and yet there it is ſufficient to prove the contrary by one Witneſs; but the Law hath appointed *two* Witneſſes in this Caſe, becauſe a Court Faction might, in many Caſes, cut off their Enemies without a ſufficient Proof: and now by the late Statute two Witneſſes are required to every *overt* Act of Treaſon.

2 Hawk. P. C. 246, 7, 8, 428. T. Raym. 407. Kel. 9.

"The Words of the Act (one of the nobleſt Exer-
"tions of humane Policy and legiſlative Wiſdom that
"our Code can boaſt,) are theſe: That no Perſon
"ſhall be INDICTED (ſo that Evidence before the
"Grand Jury is comprized within the proviſion of
"the Clauſe) tried or attainted of High Treaſon
"whereby any Corruption of Blood ſhall be made,
"or of Miſpriſion of ſuch Treaſon, but by and upon
"the Oath and Teſtimony of *two* lawful Witneſſes,
"either both of them to the ſame *overt* Act, or one

7 W. III. c. 3. Anno 1695. § 2.

Comm. IV. 357.

" of them to one, and the other to another overt Act " of the ſame Treaſon; unleſs the party indicted or " arraigned ſhall willingly, without Violence, in OPEN " COURT, confeſs the ſame, or ſhall ſtand mute, or " refuſe to plead; or in Caſes of High Treaſon, ſhall " peremptorily challenge above the Number of thirty-" five of the Jury, any Law, Statute, or Uſage to the " contrary notwithſtanding.

" And that if two or more diſtinct Treaſons of di-" verſe heads or *kinds* ſhall be alleged in one Bill of In-" dictment, one Witneſs produced to prove one, and " another to prove another of the ſaid Treaſons, ſhall " not be deemed or taken to be two Witneſſes to the " ſame Treaſon within the meaning of this Act.

Foſt. on H. T. Ch. III. p. 240, 241.

" On the Conſtruction of this Clauſe it hath been " held, that to *collateral* Points *one* Witneſs ſufficeth.

Foſt. 241, 2.

" That a *Confeſſion* before *Magiſtrates* out of Court, " freely made and duly taken, may be given in *Evi-*" *dence:* and if it goes to the *overt Act* directly, it " muſt be proved by *two* Witneſſes, and is then proper " to be left to the *Jury* as corroborative of other Evi-" dence, though not as *concluſive*, like a *Confeſſion* in " open Court; and a declaration of the party concern-" ing his ſhare in a fact *collateral* to the Charge, it " ſeemeth remains proveable by a *ſingle* Witneſs.

1 E 8. c. 12. 5 E. VI. c. 11.

" *Petit* Treaſon is alſo entitled to the Benefit of the " ſtatutes of *E.* VI. requiring two Witneſſes. And " this was lately exemplified in the Caſe of a Woman " indicted for this Crime committed againſt an aged " Lady to whom ſhe was ſervant. There being but " one Witneſs, ſhe was acquitted of the *Treaſon*, and " found guilty of Murder, though not otherwiſe laid " in the Indictment than as included in the charge of " Petit Treaſon.

V. Foſter, 107, and on P. T. Diſc. II. Ch. IX. p. 323—7, 8, 9.

" In

" In Caſe of an Indictment of PERJURY, our Law requireth it to be proved by *two* Witneſſes; as otherwiſe deeming it in equal balance, that one Witneſs ſhould falſely aſſert this Charge as that another Man ſhould have been guilty of this Crime; or, in other Words, that the Perjury of an Individual is as preſumable to have been committed by the *Accuſer*, on the depending Trial, as by the *accuſed* on a former one. Comm. IV. 358.

" As an univerſal Rule, the principle of the two admirable Writers, to whom Philoſophy and Humanity are ſo much indebted, ſeems to fall juſtly under the obſervation of the Author of the *Commentaries* on the Laws of *England*. Doubtleſs one affirming and one denying is not a judicial Equilibrium in the univerſal Nature of ſuch Caſes; the *negative* of the accuſed amounting to little more than a demand that the Guilt charged againſt him may not ſubject him to Sentence and Puniſhment till duly proved by fair Evidence. When the Accuſer has ſupported his Charge, though but by one Witneſs, the ſcale in general caſes certainly preponderates againſt the accuſed; though in STATE CRIMES, (from the peculiar hazard which would reſult if the legal Circumſpection, and even Jealouſy, as to Evidence were not very ſtrong) and on a Proſecution for PERJURY, from the Nature of the Queſtion, two Witneſſes are required. IV. Comm. 357.

" Thus

(*) Thoſe Laws which condemn to Death on the depoſition of a ſingle Witneſs are fatal to Liberty. In right reaſon there ſhould be two, becauſe a Witneſs who affirms, and the accuſed who denies, make an equal balance, and a third muſt incline the Scale.

§ *Più d'un teſtimonio e neceſſario: perche fin tanto che un aſſeriſce, e l'altro nega, niente v'è di certo, e prevale il diritto che ciaſcuno ha d'eſſere creduto innocente.*

† On this point an eminent French Author expreſſes himſelf very ſtrongly. He calls the reaſon given by *Monteſquieu* the Reaſon of *Nature*: he adds, that the Juriſconſults have aſſigned a farther one derived from the knowledge of the human heart, its paſſion, its corruption, its fallibility, and the Guard againſt theſe by requiring the Evidence of two at leaſt. He ſays, *Le Nombre des temoins ſuffiſans pour faire condamner un homme eſt fixé à deux dans tous les gouvernemens. C'eſt la ſeule preuve qui ait un caractere legale et qui porte l'empreinte de la certitude.*

* Sp. of L. XII. c. 3.

§ Becc. § 13. p. 56.

† Theorie de Loix criminelles Par. 1781. Ch. III. S. 2. par. 3. T. II. p. 120, 1.

" Thus the Caſe of *Petit Treaſon* depends on poſi-
" tive Proviſion, founded probably on the Heinouſ-
" neſs of the Offence, which was deemed to require
" more full Evidence: the Wiſdom and Benevolence of
" our ancient Law proceeding on a contrary Principle
" to that ſanguinary Maxim of the *Roman* Code, that
" the greateſt Crimes demand only a ſlighter proof.
" In *Perjury* the Requiſition of two Witneſſes is founded
" in the peculiar Nature of the Crime charged, and in *High*
" *Treaſon* it is eſtabliſhed," not ſo much on the natural Juſtice of the Rule, that every Man's Allegiance is ſuppoſed till the contrary is proved, and the Negative of the Priſoner is equal to the Affirmative of one Witneſs, and therefore the Treaſon ought to be proved upon him by two Witneſſes, for then the ſame would be good in Caſes of Felony, where every Man's Honeſty is preſumed till the contrary is proved, and yet there it is ſufficient to prove the contrary by one Witneſs; but the Law has appointed two Witneſſes in this Caſe, becauſe, " as already intimated," a Court Faction might, in many Caſes, cut off their Enemies on ſuch Articles without ſufficient Proof.

" When the eccleſiaſtical Uſurpation on the Con-
" ſciences and Lives of Individuals, and on the pro-
" tective Sovereignty of the State, aſſumed the Trial
T. Raym. 468. H. H. P. C. 410. N. b. " of *Hereſy*, this one Barrier, feeble as it was, ſtood
" againſt their Cruelty," that two Witneſſes were required; becauſe this was to be tried by the Canon, and
17 DEUT, 6. they followed the Rule of the *Moſaic* Law, that required two Witneſſes in every capital " Caſe."

" Some-

Comme les crimes demeureroient impunis ſi l'on introduiſoit dans les tribunaux ce pyrrhoniſme où jettent les erreurs de nos ſens et les vices du cœur humain il faut s'en rapporter au témoignage deſintereſſé conſtant, et uniforme de deux temoins non ſuſpects depoſant du même fait: ſur tout l'orſque le corps du delit eſt conſtate.

In atrocioribus leviores conjecturas ſufficere.

Though the Writ for burning an Heretic be aboliſhed, yet the obnoxiouſneſs to Perſecution for religious Opinions is very far from being yet entirely removed. Some of the moſt perplexed Points of Theology, and on which contrary Judgments have been formed by men of acknowledged Talents, Learning, and general Piety, and even the formulary of devotion of a particular Church, and the ſenſe of*

* By 29 Car. II. c. 9.

"Sometimes the Evidence of a ſingle Witneſs, "though *admiſſible*, ſhall not be left to the Jury as "*competent* to convict, if not ſupported by other Teſti- "mony.

"Thus there are Caſes of *Felony* in which an accom- "plice ſhall, under poſitive Law, be received as *Evi- "dence.* The *Common Law*, indeed, (except in the "Caſe, and under the particular circumſtances of thoſe "whom it termed *Approvers*), rejected ſuch Teſti- "mony: and pronounced that, in ſuch Caſes, that no "Man ſhould be heard againſt the ſafety and legal "Eſtimation of another, who, by the very Terms of "his Evidence, *infamized* his own. But the Statute "Law admits Accomplices in certain inſtances to bear "Witneſs in ſupport of the Charge: yet ſo admits "them, that in matter of Felony, the Evidence of an "Accomplice alone ſhall not go to the Jury for Deli- "beration on the Guilt or Innocence of the Priſoner: "but they will be regularly informed by the Judge, "that there is no Evidence againſt the Priſoner on "which he can legally be convicted.

v. Rex v. Bate Niſi. Pr. 22 June 1780.

v. 4 & 5 W. & M. c. 8. 6 & 7 W. III. c. 17. 10 & 11 W. III. c. 23. 5 A. c. 31. 15 G. II. c. 28.

"In proſecution for *Miſdemeanour*, it is otherwiſe "held: and it ſeems to be now received for Law, that "in Caſes ſhort of Felony, ſuch Evidence muſt be "received, and may ſingly be ſufficient to Conviction.

v. ut ſupra.

"There is indeed one Caſe, where a perſon who is "both an Accomplice, and otherwiſe a party intereſted, "is admitted from Neceſſity and for want of other "proof: and her Evidence, if conſiſtent, is not only "*admiſſible* but *concluſive.* And that is on the Statute "of *Eliz.*" where the Mother of a Baſtard Child is al- lowed Evidence to prove the reputed Father: and this is for Neceſſity; becauſe otherwiſe, ſuch ſecret Lewdneſs would go totally unpuniſhed: but then, if a Woman charges two Perſons, ſhe loſes her Credibility; but if ſhe keeps conſtantly to the charge of one only, it is a ſufficient proof, the Statute having ſet aſide the Common Law in that particular.

2 R. Rep. 82. Styl. 207. 283. Cro. Car. 341. 350. 470. 2 Bulſ. 341. 348. 350. 355.

In

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* *Allegans turpitudinem ſuam non eſt audiendus.*

v. 9 & 10 W. III. c. 32. 1 Eliz. c. 1 & 2. 13 & 14 Car. II. c. 4.

of certain Propoſitions, than which ever iſſued from the human brain, nothing of more ſingular fabric all theſe have been eſtabliſhed by

2 Hawk. P. C. 258. § 142. Sir T. Jones 233. 3 Keb. 68. H. P. C 262. Bro. Coro. 220.

In Treaſon for counterfeiting the Coin, one Witneſs only is ſufficient: becauſe this does not relate to State Criminals, and there is no danger of oppreſſion from a Court Faction.

On the WEIGHING *of* EVIDENCE.

We come now, "though generally and imperfectly," to ſet the ſeveral bounds of Credibility where there are contrary Proofs: "but this Subject is ſo unlimited, "and branches into ſuch an infinity of undeſcribable "particulars, that it ſeems to admit of little more than "a mere Outline; and even this, it will be difficult to "mark throughout with the due force and preciſion: "the reſt muſt be left to Integrity, ſound Diſcretion and "Humanity, exerted on particular Caſes as they ariſe."

In contrary Proofs, if Mens ſwearing can be "rea-"ſonably and probably" reconciled, ſuch Interpretation ſhall be put upon it as may make them agree: becauſe evey one ſhould be ſuppoſed, "ſo far as a fair "conſtruction without prejudice to others will extend," to ſwear the Truth, and no Man ſhall be intended to ſwear a manifeſt Perjury; therefore, that Conſtruction ſhall be taken that would make them agree, rather than ſuch whereby they muſt neceſſarily oppoſe each other.

One affirmative Witneſs countervails the Proof of ſeveral Negative: becauſe the Affirmative may ſwear true, and the negative alſo: for the Negatives may commonly be, that they know nothing of the matter; the Affirmative ſwears that it is, and ſo the Affirmative may be true, and the Negative alſo; for the thing that the one ſwears may be true, though the other know nothing of the Matter: "and this is the true Idea of "negative Evidence."

But

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17 Car. II. c. 2. 22 Car. II. c. 1. 1 W. & M. ſt. 1. c. 18. Comm. IV. c. 4.

paints and penalties: as if Parliaments were either the infallible Judges of myſterious Truth, or had the power by their mandate of creating Truth. The papal Church, indeed, in the height of it's Aſcendance in this Country, puniſhed Hereſy *as* Treaſon *of an infinitely higher atrocity, than any Offence againſt the freedom and being of the Community, to which that denomination could politically be annexed.* Gravius peccat qui divinam quam qui temporalem lædit Majeſtatem, *was a Principle that never ſhould have induced Men to arrogate the Defence of the Honour of the Deity, by Arms the moſt*

But where the Affirmative and Negative oppoſe each other in contradictory Propoſitions, the Evidence is to be weighed according to the Rules hereafter mentioned.

" Thus if a perſon be charged with a *Robbery* committed in *London*, to aſſert that he was at *Bath* the whole Day on which the Robbery is charged to have been committed, and to the proof of which time the whole Evidence in ſupport of the Proſecution is preciſely applied, this is not ſo properly negative Evidence, as an *affirmative* contradictory Propoſition; but if two Witneſſes, on the part of the Proſecution, ſwear to the Stature, Voice, Complexion, Colour of the Horſe, and another ſwears that he did not obſerve ſome of theſe particulars, this is negative Evidence, which may well conſiſt with the affirmative, as of ſeveral perſons preſent, one might not hear or ſee what was heard or ſeen by others.

" Yet in ſome inſtances, as the diſcharge of a Piſtol and ſeveral Caſes of no infrequent occurrence, the negative of a credible Witneſs, preſent on the ſpot, and at the very time when the fact, if real, muſt have happened, weighs much againſt the Credit of affirmative Teſtimony: ſince theſe are Facts to which every Eye and Ear within the ſame diſtance muſt be preſumed ſenſible.

" But affirmative contradictory Propoſitions, according to their reſpective force of Proof, deſtroy each other: ſo that even in the Caſe inſtanced, though no Evidence, in general, is weaker or more ſuſpicious than that of which the tendency is to prove the *alibi*, it may, from the number, the character, the confirmatory circumſtances of proof from the ſeveral Witneſſes, in points that exclude the idea of preconcerted Agreement, be ſo ſtrong as to overbalance very clear, probable, full and reſpected Teſtimony on the contrary ſide."

If

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moſt unſuitable. DEORUM INJURIÆ DIIS CURÆ *is a ſafer and a juſter Principle. It is for Omniſcience to judge, for Omnipotence to defend, and for infinite Goodneſs to promote the*

If there be "ſeveral" Witneſſes "*on each ſide*," and no preponderating as to Number, they are to be weighed as to their Credit.

If a Witneſs be produced, and another be "called "in Evidence on the contrary ſide, to impeach" his Credit, his Credit is leſſened in proportion to that of the oppoſite Witneſs.

If a Witneſs be produced, and another be "offered" in Deſtruction of his Credit, and a third be produced to ſupport his Credit, the Credit of the firſt Witneſs is to be ſupported in proportion to the Credit of the firſt and third Witneſs to the ſecond.

Bougl. Contr. El. III. 263,—5.

"The party who has called a Witneſs, ſhall not "call other Evidence merely to ſupport his Credibility, "till the other ſide have gone into Evidence to impeach "it."

The Credit of a Witneſs is to be judged from his State and Dignity in the World: for Men of eaſy circumſtances, "and educated in principles of "Honour," are ſuppoſed more hardly induced to commit a manifeſt Perjury: "but this is a Preſumption "extrinſic and limited."

Theorie des L. C. 124.

Their Credit is to be taken from their "religious "and moral" Principles: for Men atheiſtical and looſe, are not of the ſame Credit as Men of good Manners and clear Converſation; "and hence, formerly, a very "unwarrantable turn was given to a circumſtance in "the Mode of giving Teſtimony in capital Proſecu-"tions."

In

Reception of theſe Truths in which Human Society has an Intereſt of a Nature wholly diſtinct from it's civil Obligations. The Eſtabliſhments which ſprung from corrupt and ſecular Chriſtianity, when

In Caſes of Treaſon and Felony, no Witneſſes "were" ſworn againſt the King. "Of this Notice "has been taken already," and the Reaſon not "im- "probably was," becauſe Men think it an Act of Piety to ſave the Life of a Man, and therefore, may ſtretch a little beyond their knowledge, and for that Reaſon, "were" not admitted to hurt their Conſciences by ſwearing. Hard, therefore, "it was indeed," to make any uſe of this Rule of Law to depretiate the Affirmation, as if of leſs Value than an Oath: for the party affirming, declares he was willing to take his Oath, and cannot be admitted: ſo that "if" Advantage, "un- "der theſe circumſtances," were taken of the Authority of an Oath, above that of a naked Affirmation, "this" were to turn the Rules of Law into oppreſſion and Injury. Where there is only Judgment "inferior to "capital," there Witneſſes "were" admitted againſt the King: "and if the preceding Solution be allowed "of the original Ground of the Rule, the Diſtinction is "exactly ſuch as would reſult from it: it being ob- "vious that" the Reaſon of the Rule, "ſo underſtood," does not extend to ſuch Caſes.

Their Credit is to be taken from their perfect indifference to the point in Queſtion: for we rather ſuppoſe that the favour and regard to a Relation, may draw a Man into Perjury, than that it ſhould lie upon a Man wholly indifferent and unconcerned.

If Witneſſes are equal in Number and Credit "of "Integrity, the" Diſcernment, "whoſe Teſtimony ſhall "be preferred," ariſes from their "*general* means of "*Information*, their apparent *ſincerity*, or their *particular* "*ſkill*.

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when they made Hereſy *worſe than* High Treaſon, *made Aſſent to their arbitrary Impoſitions, a Duty paramount to all others, and Fidelity to the Common Rights of Society, and to the divine Obligations of Conſcience, the worſt of Crimes.*

" By *general* means of *Information* may be under-
" ſtood ſuch powers of perceiving and diſtinguiſhing,
" as to common Facts, as the Generality of Mankind,
" without the Aid of any particular Science, uſually
" poſſeſs by means of their ſenſes and ordinary under-
" ſtanding.

" And this, under equal circumſtances of local ſitua-
" tion, with reſpect to the object to be aſcertained,
" may be, for the moſt part, nearly equal in reſpect of
" the Eſtimation it may deſerve in judicial Inquiries.

" In criminal Queſtions eſpecially, what is too ob-
" ſcure for common Diſcernment does not preſs with
" ſufficient Certainty in almoſt any inſtance to autho-
" rize Conviction; and can rarely even be ſubſervient
" to the more favourable ſide, that of Acquittal.

" And in civil Matters the Facts moſt frequently to
" be proved by Witneſſes are ſimple and obvious to the
" ſenſes, as Deeds, Bills, &c. though the inference
" on the whole Matter may be very complex.

" By *apparent Sincerity* we mean, when nothing in
" the Courſe of his Evidence renders ſuſpected the
" Depoſition of the Witneſs and the Fidelity of his
" Teſtimony.

" By *particular Skill* we mean ſuch as profeſſional
" men of character and experience are preſumed to
" exerciſe when they give a ſolemn Opinion and At-
" teſtation of their Judgment on Facts properly within
" their eſpecial Study and Practice. Of this the moſt
" uſual is the Teſtimony of Phyſicians or Surgeons,
" concerning the health of a Party, the Cauſe of a
" ſuſpected Death, the Nature of a Wound or other
" Injury, and the means and manner in which it may
" be juſtly believed or deciſively concluded to have
" been effected; or, on the contrary, the *negative*, on
" Cauſes of ſuſpicion, from circumſtances apparently
" ſtrong. The ſtate of mind, as to ſanity, is ſome-
" times neceſſary to be aſcertained by men of medical

" knowledge; as where a Will is diſputed on the " Ground of ſuppoſed Want of ſuch Soundneſs of " Mind and Memory as the Law requires; or where a " Crime is charged.

" On the ſame Principles, Merchants, with regard to " their particular Cuſtoms, not contrary to the general " Law; Tradeſmen concerning the Quality of parti- " ticular Goods, Ship-builders, and other Artiſans, " concerning the State and Conſtruction of Veſſels, " and other their reſpective ſubjects of mechanical " ſkill, are entitled to Attention by Virtue of the Rule; " —any one, not under particular bias, or apparent in- " capacity, may juſtly challenge belief in the Art " which he profeſſes. *

" In reſpect of *general means of Information*, this " may be noticed, that he who has obſerved accurately " an incident of any apparent conſequence, remem- " bers ſtrongly, and for the moſt part can relate cir- " cumſtantially, the moſt particulars aſſociated in his " mind with the occurrence, and which partake in " degree of the force of the general Impreſſion: and " thus the Reality of the Knowledge of a Witneſs, as " to a particular Fact, will appear" from the Reaſons and Accounts "he" gives of " his" Knowledge. For if one gives more clear and evident ſigns of " unaffect- ed recollection" than the other, he is rather to find Credit; for the Memory of the other ſide ſeems more faded, and therefore they appear raſh in taking upon them; at leaſt they do not appear ſo diſtinguiſhing in their Obſervations as thoſe who give the Marks and Signs of their Memory.

" Yet a Detail exceſſively circumſtantiated is highly " ſuſpicious, and moſt ſo when either the Event was of " no apparent importance to the Witneſs, at the time of " its happening, ſo as to intereſt attention in a degree

V. *Vindication of Mary Q. of Scotland*, p. 134 --7. 3d Ed. Edinb. 1772.

* Cuilibet in Arte ſuâ fidem (in quantum liceat) adhiberi oportet.

" ſo

" ſo extraordinary, or the Suddenneſs or Alarm which " would naturally accompany it, precludes the pro- " bability of ſuch exact attention or remembrance. ‖

" Upon the ſame principle, eſpecially" where the Matter they atteſt was tranſacted long before " the " Trial, a Variance in ſmall immaterial circumſtances, " atteſted by different Witneſſes, will ſtrengthen in- " ſtead of impairing the ſubſtantial Credit of their Teſ- " timony;" for it may be ſuppoſed that the little circumſtances of things might be forgotten: and it ſeems more like a ſtory laid and concerted beforehand, if in every particular and minute circumſtance they had both agreed in Evidence.

Indications of Inſincerity.

V. ſupra, 224.

" It has been remarked, that a Witneſs may rea- " ſonably become diſcredited by evident indications of " ſubtlety or of rancour. It will be the ſame if the " party inſtituting a capital Proſecution for an atrocious " perſonal Injury, ſhould give Evidence with Indif- " ference or Levity, or ſhould appear to have been " late in making any complaint.

" The

‖ On this Article it ſeems right to quote at large a ſtriking and an inſtructive paſſage.

Un particulier attaqué a minuit dans un grand chemin, frappe d'un coup de fuſil declare en mourant qu'il croit que ſon aſſaſſin etoit un homme qu'il deſigna, parce qu'il avoit crû reconnoître la voix de cet homme qui lui avoit demandé qu'il etoit, pour mieux ajuſter ſon coup ur cette declaration, le particulier eſt arreté: une fille entendue comme temoin declare avoir reconnu la même voix; ſur cette depoſition on condamne l'accuſé a mort, & preliminairement a la queſtion. Il s'y preſente avec fermeté. Son juge, en le tutoyant, lui demande le nom de ſes complices. Il repond, qu'il n'en ait point, puiſqu'il eſt innocent. On le traine au ſupplice; ſur l'echaffaud il proteſte de nouveau de ſon innocence, & meurt avec tranquillité. Croiroit on bien que ce rapporteur revenant en triomphe de cette expedition ſe felicitoit d'avoir condamné ce malheureux à mort? Il intituloit preuve complete *la reunion de deux faits que n'avoient pas même*

" The Proof from the Atteſtation of Perſons on " their profeſſional Knowledge, we may properly, with " the *French* Lawyers, call PROOF *by* EXPERTS.

" In proportion as *Experience* and *Science* advances, " the uncertainty and danger from this kind of proof " diminiſhes.

" Formerly, when the Mother of an *illegitimate* " Child was indicted for the Murder of it, if the " *Lungs*, being immerſed in water, would float, it " was held a proof on which *Surgeons* might juſtify an " opinion that the Child was born alive; the inflated " lungs, in conſequence of the Air which had been " drawn into them having been rendered ſpecifically " lighter than the Water. But this preſumption is now " held inſufficient, for that the Air included in the " *Veſicles* of the Lungs from other cauſes may be ade- " quate to the production of this effect in the lungs of " a ſtill-born Child.

" In

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même la fauſſe apparencedes Indices. Car d'abord peut on regarder comme une preuve la declaration d'un mourant? Cet infortuné, au milieu des ombres de la nuit, au ſein de l'effroi qui devoit lui cauſer la queſtion terrible qu'un inconnu lui faiſoit, etoit il aſſez maître de ſes organes pour reconnoître ſurement la voix du queſtionneur? Son eſprit n'etoit pas preoccupé contre celui qu'il ſoupçonnoit? Enfin l'aſſaſſin pour ſe mettre en ſurete lui même, ne pourroit il contrefaire ſa voix? En ſuppoſant que ces preſumptions duſſent être comptées pour quelque choſe, ne devoient elles pas dans la balance être emportées par la preuve morale qui preſentoit la conduite ferme au l'accuſe? Conduite qui avoit tous les caracteres de l'innocence. Si cette preuve morale n'etoit pas ſuffiſante pour le fair declarer innocente, au moins elle l'etoit pour faire ordonner un plus amplement informe. La plus part des juges qui avoient ſouſcrit à cet etrange jugement etoient de cet avis, après lui avoir vû ſoutenir la queſtion ſans effet. Mais une fauſſe honte les empecha de revenir ſur leur pas: comme ſi l'on ſe deſhonoroit en retractant une injuſtice causée par un erreur. Ceux d'entre eux qui exiſtent encore & qui me liſont, fremiront peut-être. Mais

ſi le

" In general it may be taken that when Teſtimonies " of profeſſional Men of juſt Eſtimation are *affirma-* " *tive*, they may be ſafely credited; but when *negative*, " they do not amount to a diſproof of a charge other- " wiſe eſtabliſhed by ſtrong, various, and independent " circumſtances.

" Thus, on the view of a body after death on " ſuſpicion of *Poiſon*, a Phyſician may ſee cauſe for " not poſitively pronouncing that the party died by " *Poiſon*; yet if the party charged be intereſted in " the Death, if he appears to have made preparation " of poiſons without any probable juſt motive, and " this ſecretly; if it be in Evidence that he has in " other inſtances brought the life of the deceaſed into " hazard; if he has diſcovered an expectation of the " fatal Event; if that Event has taken place ſud- " denly, and without previous circumſtances of ill " health; if he has endeavoured to ſtifle Enquiry, " by precipitately burying the Body, and afterwards, " on inſpection, Signs agreeing with Poiſon are ob- " ſerved, though ſuch as medical men will not poſi- " tively affirm could not have been owing to any other " Cauſe, the accumulative ſtrength of circumſtantial " Evidence may be ſuch as to warrant a Conviction; " ſince more cannot be required than that the charge " ſhould be rendered highly credible from a variety of " detached points of proof, and that ſuppoſing poi- " ſon to have been employed, ſtronger demonſtration " could not reaſonably have been expected to have " been, under all the circumſtances, producible.

CHAP-

Th. L. C. T. II. 127, 8.

ſi le mot glaçant du farouche MAHOMET, il eſt donc des remords, *ne fait aucune impreſſion ſur eux, il faut l'avouer, l'aſyle de la ſureté, n'eſt plus qu'au ſein des forêts: & le fuſil bandé de l'Aſſaſſin doit moins effrayer que l'air riant d'un magiſtrat ignorant & preſomptueux.*

Con-

CHAPTER II.

On PRESUMPTIONS.

Having ſpoken of *living* and "of" *written* EVIDENCE "of *direct* Facts," we now come to PRESUMPTIONS.

"A Preſumption," as it is defined by the *Civilians*, is an "Inference reſulting from a certain ſign of a "Fact which is taken to be proved on account of its "connection with a Fact directly proved.

"For," when the Fact itſelf cannot be proved, that which comes neareſt to the proof of the Fact is, the Proof of the circumſtances that neceſſarily or uſually attend ſuch Facts; and theſe are called Preſumptions, and not Proofs, for they ſtand inſtead of the Proofs of the Facts till the contrary be proved.

Theſe Preſumptions are twofold:

1. Of LAW, "which are neceſſary, and abſolutely "concluſive:

"2. Of FACT, which are,"

1. VIOLENT;

2. "merely" *probable.*

"There is a third ſort of *weak* and inconcluſive "Preſumptions, which are only noticed in a cautionary "view

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Conjectura ex certo ſigno proveniens quæ alio adducto pro veritate habetur.

We here make the promiſed Extracts from the Roman Law concerning TESTIMONY.

In TESTIMONIIS *dignitas, fides, mores, gravitas examinanda eſt; et ideo Teſtes qui adverſus fidem ſuam teſtationis vacillant, audiendi non ſunt.* D. XXII. 5. 2.

Teſtium fides diligenter examinanda eſt: ideoque in perſona eorum exploranda erunt in primis conditio *cujuſque; et an* honeſtæ *et inculpatæ vitæ, an vero notatus* Ibid. 3.

quis

"view by reason of their frequent occurrence;" for these light and rash presumptions weigh nothing, and therefore cannot come under "judicial" Consideration.

Presumption *of* Law.

"Presumptions in Law arise either from general "Principles, or from *positive* Institution.

"Thus that the Averments of a Record are true is "an irrefragable Presumption, against which every "other species of Evidence, being inferior and subor-"dinate to this, must contend in vain: of this and of "its reasons sufficient has been said already.

"And again, if a party have acknowledged satis-"faction" under hand and seal, the Presumption is so "absolute," that the Law admits no Proof of "the "Money not having been paid; because that were "to let a Man invalidate his deed, which our "own Law doth not permit;" for here, though "the payment of the Money is not proved, yet the Acquittance is proved, "which the Law intendeth "could not be thus acknowledged with the high-"est private Act of legal solemnity, the Deed of "the

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quis et reprehensibilis: an locuples *vel egens sit*; *an* inimicus *ei adversus quem testimonium fert*; *vel amicus ei pro quo testimonium dat*; *si careat suspicione testimonium* . . . propter causam lucri.

Ideoque Divus Hadrianus, Vivio Varo legato provinciæ Ciliciæ, rescripsit . . . . *Tu magis scire potes quanta Fides habenda sit Testibus: qui et cujus dignitatis et cujus æstimationis sint: et qui simpliciter visi sint dicere: utrum unum eundemque meditatum sermonem attulerint, an ad ea quæ interrogaveras, ex tempore, veri similia responderint.*

Ejusdem quoque Principis extat Rescriptum *de excutienda fide Testium* in hæc verba; *Quæ argumenta ad quem modum probandæ cuique rei sufficiant, nullo certo modo satis definiri potest. Sicut non semper, ita sæpe, sine* publicis monumentis *cujusque rei veritas deprehenditur: alias, numerus Testium, alias dignitas et auctoritas, alias veluti* consentiens fama *confirmat rei de qua quæritur fidem. Hoc ergo solum tibi rescribere possum*

"the party" could not be without ſuch payment, "or "other juſt equivalent.

"Thus where a Franchiſe has been held and exer- "ciſed beyond time of *legal Memory*, a Charter or "Grant from the Crown ſhall be *preſumed*," and this Preſumption is a neceſſary inference from the immemorial exerciſe of the Franchiſe. Comm. I. Ch. 18. p. 472, 3.

"Thus a diſcharge of Tythes may be by immemo- "rial Uſage, which *preſumes* a ſatisfaction. Comm. II. Ch. 3. p. 29.

"And, on the other hand, on the ſame Preſumption "of a lawful Origin, the parſon of one pariſh may "*preſcribe* for Tythes in another. And innumerable "inſtances of concluſive Preſumption might be cited, "reſulting from *general* Principles of the *Common* "*Law*. Ibid. p. 28.

"Thus upon Analogy with other Limitations, and "for public Peace and Security, TWENTY YEARS of "undiſturbed Poſſeſſion of *corporate* Franchiſes has "been eſtabliſhed as a *Bar* to applications for the aid "of the *diſcretionary* power of the Court of *King's* "*Bench*, under the *Statute* empowering that Court to "grant Informations in the Nature of *Quo Warranto*. Winchelſea Cauſes. 4 Burr. Manſf. 1962. 9 An. c. 20. Cowp. 75---7.

ſum ſummatim; non utique ad unam probationis ſpeciem cognitionem ſtatim alligari debere: ſed ex ſententia animi tui æſtimare oportere quid aut credas aut parum probatum tibi opineris.

Alia eſt Auctoritas præſentium *Teſtium; aliud Teſtimoniorum quæ recitari ſolebant.*

Lege Julia de vi cavetur ne in reum teſtimonium dicere liceret ei, qui ſe ab eo, parenteve ejus liberaverit: quive impuberes *erunt: quique judicio publico* damnatus, *qui eorum in integrum reſtitutus non erit: quive in vinculis cuſtodiâve publicâ erit: quive ad beſtias ut depugnaret ſe locaverit: quæve palam quæſtum faciat faceritve: quive, ob teſtimonium dicendum vel non dicendum* pecuniam accepiſſe *judicatus, vel convictus erit. Nam quidam propter reverentiam perſonarum, quidam propter lubricum conſilii ſui, quidam vero propter notam et infamiam vitæ ſuæ* admittendi non ſunt *ad teſtimoniorum fidem.* Ibid. 3.

" *Fraud* is not presumable where the Facts do not " necessarily infer it; but *Presumptions* of this sort too " there are.

" Thus visible possession and apparent ownership, " covering a secret Transfer to another, is a Badge of " Fraud, against which *Creditors* were protected even " by the *Common* Law.

" The Statute of *Elizabeth* applies by positive Pro- " vision a Remedy of which the Law had not been " unmindful, by virtue of its general Principles. And " therefore," if a Man, enfeoffed by Covin, to avoid the " Claims" of Creditors, pleads that he was seised at the time of the Judgment by Virtue of a Feoffment, and the Creditor, that he was not seised at the time of the Judgment, nor at any time after; on this Issue the *Covin* may be given in *Evidence*; for this is indeed no seisin, by the plain Words of the Statute, to avoid the Extent of Creditors; " otherwise, it might have " been, if the Issue had been taken, not on the *Seisin*, " but on the Feoffment; for then, it seemeth, the Covin " must have been especially pleaded."

Humberton v. Howgill. Hob. 72.

If the Heir pleads *Riens per Descent*, and, to shew that there was nothing descended to him, gives in Evidence a Feoffment, the Plaintiff may, in opposition, " as in the preceding instance," give *Covin* in *Evidence*; for this is to destroy the effect of the Feoffment, which indeed hath no effect to defend and cover the Heir from the Actions of his Ancestor's Creditors by the Design of the Statute; and the Creditor in this cannot be put to plead it, because he could not foresee any such secret Feoffment, or know whether the Heir would insist on it, till it is offered in Evidence; and therefore that is the proper time to encounter it with the proof of the *Covin*.

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A voluntary Conveyance hath no Badge of Fraud, unleſs the Party were then in Debt, or in Treaty for a Sale of the Lands; for a Man may have reaſon to ſettle for the Good of his Wife and Children; and if he hath a clear Eſtate, and no intention to ſell, the ſettlement muſt be taken to be a good one, for that cannot lie under a ſuſpicion where there is no Diſcovery made of an intent to uſe that ſettlement to fraudulent purpoſes at the time of making it.

" And by *Preſumption* of Law, founded on Uſage, " even Copyholds are held *entailable*. And therefore," if Copies of *Court Rolls* be ſhewn to prove a *cuſtomary* Eſtate, the Enjoyment of ſuch Eſtate, " by general " Uſage of the Manor," muſt be proved, otherwiſe it is not good. As if the Cuſtom was to be proved of *entailing* Copyholds, you muſt not only prove from the Rolls that there were ſuch Entails, but alſo an Enjoyment under them accordingly; for the Rolls only ſhew, that ſuch an Eſtate was limited, and that the *Entailing* of *Copyholds* was endeavoured; but this does not prove an Uſage, unleſs the parties continued in poſſeſſion undiſturbed under it: for the Words of Limitation to a Man and the Heirs of his Body make a *Fee ſimple conditional* at Common Law; and therefore, from the Words of the Roll, without Proof of the Uſage, you cannot collect that there was a *Cuſtom* of *entailing*. Styl. 450.

" Thus far of *Preſumptions* of *Law*, which are un- " controllable; next of Preſumptions of Fact.

Presumptions *of* Fact.

"And, firſt, of ſuch as relate to *Civil* Caſes.

4 Burr. Manſf. 1963---5.

"Thus an undiſturbed Enjoyment of *corporate* "*Franchiſes*, though under twenty years, *may*, ac- "cording to circumſtances, weigh with the Diſcretion "of the Court not to grant an Information under "the Statute of *Anne*.

* The Mayor of Kingſton upon Hull v. Horner, Tr. 14 G. III. B. R. 1774. Cowp. 102--11. and v. 12 Co. 5. there cited.

"Thus a Poſſeſſion of Duties for 350 years, though "a ſpace ſhort of the time of *legal* Memory, was held "a *Preſumption* to be left to the Jury of a Grant of "ſuch Duties originally by Record.

Doe ex Dem. F. & T. v. Proſſer. Cowp. 217--20.

"Thus though the Poſſeſſion of one *Tenant* in "*common* is, *primâ facie*, in Law the Poſſeſſion of the "other; yet *thirty-ſix* years holding, without Evidence "of payment or demand of Rent, was held to have "been rightly left to the Jury, as Evidence on which "they were at liberty to preſume an actual ouſter; or, "in other Words, that the Tenant had diſclaimed to "hold as in common, and had held, during that Pe- "riod, by an adverſe Title; in which caſe the Perſon "claiming under the other Tenant in common would "be barred by the *Statute* of *Limitations*."

If there be an old "Feoffment," and Poſſeſſion has "long continued" with the "Feoffment," it is a vio- lent *Preſumption* of a Right, though *Livery* be not actually proved: for though the fact of livery be not proved, yet the circumſtances uſually attending ſuch "Facts are really proved;" that is, the "Feoffment" and the long conſequent Poſſeſſion.

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If a Man gives a *Receipt* for the laſt Rent, the former is preſumed to be paid; becauſe a Man is *preſumed* firſt to receive and take in the Debts of the longeſt ſtanding: eſpecially if the Receipt be in full of all Demands, then it is plain there were no Debts ſtanding our.

" And if ſuch Acquittance be under *ſeal*, then it " becomes a Matter of *ſpecialty*, from which reſulteth " the full *Preſumption* of *Law*, in the manner before " ſtated."

" But now by a Statute, neither very popular nor " apparently very productive, a Receipt (except on " ſpecialty or upon commercial or public payment) " ſhall not be given in Evidence as an Acquittance for " the ſum therein expreſſed, unleſs on *ſtamp* of 2*d.* if " the ſum be above 2*l.* and 4*d.* if above 20*l.* A " leſs unfavourable Act led the way, by impoſing a " Duty * on Legacies or diſtributive ſhares of *inteſtate* " Property (which was ſoon after doubled by another " Statute). Legacies or Shares of Wife, Children, or " Grandchildren, are excepted from the additional " Duties."

23 G. III. c. 49. 24 G. III. c. 7. Seſſ. 1.

20 G. III. c. 28.

23 G. III. c. 58.

Every Preſumption is more or leſs violent according as the circumſtances ſworn are more or leſs " ſtrongly " connected" with the Fact to be proved.

" A *violent Preſumption* is required in *capital* Caſes: " and in *civil* ones, where it goes in deſtruction of a " Right; a leſs Preſumption is ſufficient to *ſupport* a " Right *prima facie* apparent.

" In an Action of *Treſpaſs*, for breaking open the " Houſe of the Plaintiff, and deſtroying his Goods, " the Defendants juſtified as Bailiffs of the Lord of " the Manor, and that by virtue of ſuch their Autho-

Eldridge v. Knott, et al. Mic. 15 G. III. Cowp. 214---16.

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* 2*s.* 6*d.* for Legacy or ſhare under 20*l.*
5*s.* above 20*l.* and under 100*l.*
Additional 20*s.* at 100*l.*
Additional 20*s.* at 300*l.*
Additional 20*s.* at 600*l.*
Additional 20*s.* at 1000*l.*

"rity, they distrained for *Quit-Rents*. The Evidence "was of *Payment* regularly, till the year 1736; a *re-* "*fusal* in 1738; since which time there had been no "farther demand (nor had any payment been made) "till within these few years, from the year 1736 to "time of the Action.

"That in 1736 an Action was tried between the "Lord and the Owner of the Tenement in Question, "for cutting down two Timber Trees growing thereon: "a Verdict was given for the Tenant, since which "Payments had been discontinued.

32 H. VIII. c. 2. Anno 1540.

"The Statute hath limited fifty years as the Term "of Prescription for *customary* Rents and Services: "so that this being but thirty-six years from the de- "mand could not be a Bar. But it was contended that "it amounted to a *Presumption* to be left to the Jury; "the learned Judge* had accordingly so left it: but, "on a Motion for a new Trial, the Court was of opi- "nion, that there were no circumstances on which the "Presumption could be so raised as to leave it to the "Jury; for that the precise time of the refusal *com-* "*mencing* was in Evidence, and the probable cause of "it, not by *release*, but by the success of the Tenant "in the Action concerning the Timber against the "Lord whom the smallness of the payment might well "induce not to bring an Action; and for these reasons "a new Trial was granted.

Eldridge v. Knott, Cowp. 214. Anno 1774.

* Mr. Baron *Eyre*.

Criminal.

Co. Litt. 6. b. S. P. C. 179 a. Hawk. 11. P.C. Ch. 12. § 12. 45. § 7. 46. 42. 1 S.. Tr. 181. 3 St. Tr. 930.

If a Man be found suddenly dead in a Room, and another be found running out in haste with a bloody sword, this is a violent Presumption that he is the Murdererer: for the Blood, the Weapon, the hasty Flight, are all necessary concomitants to such horrid Facts; and the next Proof to the sight of the Fact itself is the Proof of those circumstances that do "thus indicate" the Fact.

CHAP-

CHAPTER VI.

Of PAROL EVIDENCE *to explain a* DEED.

"We have hitherto treated of *parol* EVIDENCE, and "*written* ſeparately. There is a Caſe, however, not "very frequent, but exceedingly important, which "concerns the *Admiſſion* of *parol* Evidence to explain a "DEED.

"Thus" where a Man has *two Manors* called *Dale*, and levies a *Fine* of the Manor of *Dale*, Circumſtances may be given in Evidence to prove *which* Manor he intended: for ſince the Fine is uncertain by the Identity of the Name, it is fit that it ſhould be reduced to a Certainty by Proof, that the Fine may not loſe the Operation which the Parties intended. 2 R. Abr. 676, 12.

"But where Action of DEBT was brought upon "a BOND payable at a certain Day, the Defendant "pleaded, that by *Agreement* between Defendant and "Teſtator of the Plaintiff, the Bond only ſtood as an "*Indemnity*. To this Plea the Plaintiff demurred, and "the Queſtion was, whether the Agreement pleaded "could be given in Evidence, contrary to the expreſs "Tenor of the Bond, purporting to be abſolute, for "payment on the Day. Meaſe, Executor, v. Meaſe. Cowp. 47. S. C. C. L. 457–60.

"The Plaintiff contended, that the Office of *parol* "Evidence extended no farther than to explain a Deed "conſiſtently with its general purport, and by no means "to vary and change the Nature of the *ſpecial Obli-* "*gation*; and that even on a Will the *uncertainty* to be "removed by Evidence muſt ariſe from ſomething ex- "trinſic to the inſtrument. V. 1 P.W. 113. and 2 P.W. 137.

"And that excellent Obſervation of LORD BACON "was cited, where he thus expreſſes the Rule:—There "be two ſorts of *Ambiguities* of Words. The one is Max. of Law. L. T. p. 99.

" *Ambiguitas patens*, and the other *latens*.* PATENS " is that which appears to be ambiguous on the Deed or " Instrument; *latens* is that which seemeth certain, " and *without Ambiguity*, for any thing that appeareth " on the Deed or Instrument; but there is some *col-* " *lateral* matter out of the Deed that breedeth the " Ambiguity.

" AMBIGUITAS PATENS is never holpen by Aver- " ment; and the reason is, because the Law will not " couple and mingle Matter of *Specialty*, which is of " higher Account, with Matter of *Averment*, which is " of inferior Account in Law: for that were to make " all Deeds hollow, and subject to Averments; and so " in effect that to pass without Deed, which the Law " hath appointed shall not pass but by Deed.

" THE COURT were agreed that the Plea was bad, " and the objection decisive against admitting collateral " Evidence to change the Nature of the Deed. That " if there had been Merits, and it had sufficiently ap- " peared this was a proceeding contrary to Agreement, " the Court would have done Justice between the " Parties in another Way."

Reg. 23 L.T. ut supra.

* *Ambiguitas Verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.*

Ambiguitas Verborum patens nullâ unquam verificatione amovetur.

BOOK III.

On the SUBJECT MATTER *of* EVIDENCE, *and the* ISSUES *or* MODES *of* SUIT.

CHAPTER I.

" WE have hitherto conſidered EVIDENCE in its " Form as *written* or *unwritten*, and in its DEGREE " as *certain* or *probable*. It is now time to regard it " with relation to its OBJECTS or SUBJECT MATTER; " and theſe will naturally conduct us to the *Iſſues* or " *Modes* of *Suit* appropriated to each."

CHAPTER II.

" And in contemplating this extenſive Subject, we " have adopted the Diviſion of the ROMAN LAW; " according to which we ſhall conſider all CAUSES to " which EVIDENCE can be applied as divided into " CLASSES, as founded either in CONTRACT or in " TORT; and theſe may again be divided into OR- " DERS, by which they will be diſtributed into Queſ- " tions of

" 1. Expreſs } CONTRACT { 1. *Private* { WRONG.
" 2. Implied } { 2. PUBLIC {

" And theſe *Orders* fall reſpectively into a farther " Subdiviſion of SPECIES;

Expreſs Contract, 1. By *Specialty*,
2. Without *Specialty*.
Implied, 1. *General*,
2. *Particular*.

" Thus we are poſſeſſed of the two well-known and " great Branches of JURISPRUDENCE.

CAUSES, 1. Civil,
2. Criminal.

" Queſtions of *Contract* and of *private Tort* belong- " ing to the *Civil*; Queſtions of PUBLIC WRONG, to " the *Criminal* JURISDICTION."

CHAPTER III.

" And as every Cauſe, according as it is referred, " either by its Nature, or the Option frequently of " the party, to one or the other of theſe Diviſions, hath

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Sunt Jura, ſunt Formulæ de omnibus rebus conſtitutæ: ne quis aut in *Genere Injuriæ* aut in *Remedii Ratione* errare poſſit. Potter I. 123.

Or, as the Attic *Juriſts*,

Δίκαι ἰδιωτικαὶ
ΚΑΤΗΓΟΡΙΑΙ ΔΗΜΟΤΙΚΑΙ.

" its

" its correſpondent ISSUE or MODE of SUIT, our next " point of Attention is to the ſeveral FORMS of *pro-* " *ceeding*, and the EVIDENCE adapted to each. And " here it is proper to premiſe what is meant by an " ISSUE, which is, *a Point material to the Queſtion in* " *diſpute, and alleged conformably to the Nature of the* " *Cauſe affirmed on one ſide, and competently denied on the* " *other.* If it be a Point of *Fact*, it is ſimply called " an *Iſſue*; if it be a Point of *Law*, the Facts are " then admitted, and it becomes an *Iſſue* of *Law*, or " *Demurrer*."

Comm. III. 313, & Ch. 21, p. 314, &c.

CHAPTER IV.

" Having already obſerved, that *Cauſes civil* are " founded either in *Contract* or in *Tort*, it remains to " conſider them arranged, firſt, under the head of " CONTRACT.

TITLE I.

" And this muſt be either *expreſs* or *implied*.

" To the firſt belong chiefly:

" 1. *Debt*,
" 2. *Sale or Exchange*,
" 3. *Bailment, ſpecial*,
" 4. *Hiring, ſpecial*.

TITLE II.

Of DEBT.

Bl. A. of L. E. 77.

" A *Debt* is any Contract whereby a certain ſum of " Money becomes due. And it may be either,

" 1. *Of* Record,
" 2. *Of* ſpecial Contract, *by Bond or* " *other Specialty*;
" 3. *By* ſimple Contract, *as Note or other* " *Writing not under Seal.*

Par. 2.

For what Debt will lie.

L. N. P. P. II. Ch. IV. p. 167.

" Firſt, it is to be conſidered for what Debt will " lie. In general it will lie where Damages can be " aſcertained by the Averment.

" Thus for *Amercement* in a Court Leet *Debt* will lie; " and in the *Evidence* requiſite to ſupport this Action, " it will be to be proved that he was an *Inhabitant*, at " the time of the Amercement, as well as at the time of " the Offence.

" So

" So if a Statute prohibit the doing of any thing " under a certain Penalty, and do not limit the Remedy " by directing to ſue in another Form, Debt will lie; " but if it preſcribe a different Method of Recovery, " that Method muſt be purſued. 168.

" If a Man enter into a ſingle obligation for pay- " ment of Money by *Inſtallments*, Debt will not lie " till the laſt Day of Payment is completed; for this " is a Remedy founded on *Entirety* of Contract; the " Contract being one, the Debt is alſo one, and not " ſeveral for the ſeveral ſums payable by Inſtallment: " but otherwiſe where there is a Bond with a penal " ſum conditioned to pay Money at ſeveral days: for " there the *Condition* is *broken*, and the Bond become " *abſolute* on failure of payment on any of the Days, " and *Debt* therefore will lie before the laſt day of pay- " ment is paſt." Cotes & Howel. Mic. 18 G. II.

TITLE III.

Of DEBT *by* RECORD.

" Of Debt by Record ſufficient has been in gene- " ral implied in the precedent Obſervations on the high " Nature and uncontrollable Validity of Records. It " may here, however, be obſerved that if Debt be " due by Leſſee under Indenture, and the Landlord " accept a Bond for the Rent, this doth not deprive " him of his Election to ſue by Action of Debt for the " Rent as due by the Indenture; for his taking a ſe- " curity of an equal Nature is no Extinguiſhment of " his precedent Right: but a JUDGMENT obtained on " ſuch Bond is an Extinguiſhment; for this is para- " mount, and his Remedy is now determined to the " Judgment." L. N. P. 182.

TITLE IV.

Of DEBT *by* SPECIAL CONTRACT.

" In *Debt* upon *Bond* the Defendant is not to plead " *nil debet*, but *non eſt factum*.

" And this leads us to what may be given in *Evidence* " on the Plea of *non eſt factum*."

TITLE V.

NON EST FACTUM.

What may be given in Evidence on this Plea.

If a Man ſeals an *Obligation*, and commands another to keep it till certain Conditions are performed, and the 2 R. Abr. 683, 8.

Sav. 71. Salk. 274.

the Bond is delivered to the Obligee before they are performed, this could never be his Bond till thoſe Conditions were performed; and therefore this ſpecial Matter may be given in *Evidence* to prove *Non eſt Factum.*

5 Co. 119. b. Cro. Eliz. 54. Dy. 163, 167. 2 Leon. 111. And. 4. Bendl. 75. Danv. Abr. 514. pl. 1.

If an Obligation is delivered to the Uſe of another, and he diſagrees to it, by this the Obligation has no force, and therefore it is no Deed; and this may be given in Evidence upon *Non eſt Factum.*

5 Co. 119. Dy. 110.

Upon Debt againſt two, and *Non eſt Factum* pleaded, it is proved the Deed of one, and not of the other: the Iſſue is maintained: for a joint Action charges each with the whole Deed; and when the Iſſue is found that it is the Deed of one, it amounts to the total Cauſe of Complaint alledged in the Declaration againſt that Perſon, and conſequently the Plaintiff ought to recover againſt him, ſince he is proved to be his Debtor.

5 Burr. Manſf. 2611---15.

"But where there is a *joint* Bond, and this appears "on the Face of the Declaration, and one only is "ſued, he may ſhew this Variance on *Non eſt Factum*; "otherwiſe it is only to be pleaded in *Abatement.*"

A Man was bound to *Randolph*, and the Plaintiff declares of an Obligation to *Ralph:* upon *Non eſt Factum* pleaded, it cannot be found the Deed to *Randolph*; for *Randolph* and *Ralph* are different Chriſtian Names, and cannot denote the ſame Perſons; ſo it is of *Edward* and *Edmond.*

"Otherwiſe if it be a mere Miſpelling, as *Jacob*, "where the Party ſpelt his Name *Jacaob*; for now it "is not a different Name, but a different Mode of "ſpelling the Name."

If a Man confeſſes the Obligation, and pleads an Acquittance, he cannot conclude *Non eſt Factum*, ("ei-"ther generally or with an *Iſſint*, of which hereafter") but muſt alledge "the ſpecial Matter, and conclude "to the Court with" Judgment, *ſi Actio*; for it is really his Deed, though it be avoided by a contrary Agreement, which muſt be exhibited to the Court to judge of; ſo that the Validity and Eſſence of a lawful "Defeazance" of the Contract may be ſeen by the Court, before the Truth of the Fact be called in queſtion before the Jury.

The

The Plaintiff brings an Action againſt *W. S.* on *Non eſt Factum*; the Jury find a ſpecial Verdict, that *W. S.* entered into an Obligation with the Plaintiff, by the Name of *T. S.* This is found for the Defendant: becauſe the Jury do not find it the Obligation of *W. S.* for the Jury cannot find any Fact contrary to the ſpecialty put in Iſſue, and by the ſpecialty it appeareth to be the Deed of *T. S.* Dy. 279. pl. 9. Cro. Ja. 558, 640. Ow. 48. Moor 897. Rolls Abr. 872.

"Yet the Reaſon given by *Perkins* is very ſtrong, "that if properly pleaded, the Plaintiff ſhall recover "on theſe Facts; for *W. S.* ſhall be concluded by his "own Act from ſaying that it is not his Deed." Perk. 15. pl. 38, 9.

A Man declares of an Obligation made to himſelf, and on *Non eſt Factum* pleaded, the Jury find an Obligation made to another of the ſame Name; this warrants the Iſſue: for the only Queſtion in this Action is, whether the Deed profered in the Declaration be the Deed of the Defendant; for if it were his Deed, ſealed and delivered to another than the Plaintiff in the Action, he ought to *confeſs* the Truth of the Deed, and *avoid* it, by pleading the ſpecial Matter. 16 H. VIII. 7. Sid. 450.

The ſame Law, if they find the Obligation to the Plaintiff and another, and that he brought the Action "ſole, which he ought not but" as ſurvivor. Here the Defendant might "have" demanded *Oyer*, and demurred to it, "by way of Plea in *Abatement*; but" ſhall not "take advantage of it on the Plea of *Non eſt* "*Factum*." Styl. 78.

But where a wrong party is ſued, that bears the Name of the Obligor, he may plead *Non eſt Factum*; for then it is not any Deed of his.

The Plaintiff declares of a Bond dated 4 *Apr.* 24 *Eliz.* upon *Non eſt Factum*, the Jury find a Bond dated 4 *Apr.* 24 *Eliz.* and delivered 30 *Feb.* 23 *Eliz.* this is a finding of the Deed declared; "for if a Deed "be without Date, or with a falſe or impoſſible Date, "ſo as without Fraud, the Deed is good." Styl. 414. 2 Co. 4. Cro. J. 136.

If

Sid. 450. 2 Keb. 333. Ventr.

If a Man pleads that the Obligation was made to another, and not to the Plaintiff, this is ill; "becauſe "while it affects the Form of a ſpecial Plea," it amounts "in ſubſtance merely" to the general Iſſue of *Non eſt Factum* "and ought therefore to have been ſo "pleaded."

Par. 2.

What Diſabilities *are pleadable upon* Non eſt Factum.

5 H. VII. 38. 2 Co. 9. Plow. 66.

Upon *Non eſt Factum*, you may give, *not lettered*, in Evidence; for when the Perſon who delivered the Deed is unlearned, and the Deed is read and expounded to him in another ſenſe than that which the Deed really contains, then did not the party agree to the written Deed, it is not the expreſſion of his Mind, nor to be accounted his Deed.

Styl. 78. 2 Co. 9.

If a Man was blind, and the Deed miſread to him, he may plead *Non eſt Factum*, and ſuch Evidence will maintain the Iſſue, for then indeed it is none of his Contract.

5 Co. 119. Plow. 66.

"But it has been held, that" a Man cannot give *Dureſſe* in Evidence upon *Non eſt Factum*; for the only Point in Iſſue, and the Controverſy on *Non eſt Factum*, is whether the Deed be the Act of the Party; ſo that when the Act is proved to be done, the whole Matter denied by the Defendant is proved to the Jury; but if there be any circumſtances to deſtroy that Act, and avoid its binding Force, that muſt be ſhewn to the Court, that the Court may judge, and not the Jury, whether they are ſufficient to avoid that Deed.

"And" upon *Non eſt Factum*, a Man ſhall not give *Infancy* in *Evidence*: but he muſt plead it, and conclude to the Court with an *Hoc paratus eſt verificare*: for the Infant is in Law reputed to have a contracting Power for his own Benefit, and to bind all the perſonal Eſtate which is his own: and therefore, has power to avoid his Agreements or not, "as they are for his Benefit or "Detriment, when he ſhall come of Age, and be of "legal Diſcretion to elect:" and therefore, this cannot be ſaid to be a void Agreement; and ſo the Iſſue is not proved by this Evidence, ſince the Iſſue denies any Agreement at all. And accordingly, "leave was given "to withdraw a Plea of *Non eſt Factum*, and plead "*Infancy*."

5 Co. 119. Plow. 668. Moor 43. 3 Keb. 228. * Ld. Raym. 315.

Olding v. Arundel, Bl. 357. Hil. 2 G.

But *Coverture* may be given in Evidence on *Non eſt Factum*: for the Wife has no will of her own, but is ſubject entirely to the power of the Huſband, and he is to make all Agreements which are to bind the perſonal Eſtate of the Huſband; and therefore, at the time of the making, it is no Deed at all.

"But where the Wife has a ſeparate Proviſion, ſhe "may, under circumſtances, charge herſelf by Deed.

Gorbett v. Poelnitz. M. 26 G. III. T. R. 5.

"And where a perſon, apparently of Age, has re-"preſented himſelf as being *really* of Age, he ſhall not "after avoid his own deliberate and reaſonable Obliga-"tion (though it be not ſtrictly for Neceſſaries), by "pleading of his own Fraud, and giving Evidence to "prove himſelf an *Infant*.

"For

TITLE VI.

5 Co. 119.

Hob. 166. accordingly recommends the ſp. iſſint N.E.F. 3 Co. 59. Al. 58.

"For the moſt part," where an Act of Parliament declares a Bond to be void, as Sheriff's Bonds againſt the Statute of 23 *H.* 6. and uſurious Bonds againſt the Statute of 13 *Eliz.*: yet this matter cannot be given in *Evidence* on *Non eſt Factum*, but muſt be ſpecially pleaded and ſhewn to the Court to judge of; for where a Statute declares a ſolemn Act to be void, it is not to be conſtrued *ipſo Facto* void, but to be voided upon Appearance to the Court, to be within the circumſtances mentioned in the Statute; for "where there is a ſpe-"cialty before the Court," it were prepoſterous, that the Statute ſhould be referred to the *Jury* who are not Judges of the Law, as affecting "ſuch Specialty.

1 H. VII. 15. Moor 43.

"Therefore," if the Deed be only *voidable* at "Com-"mon Law," the general Rule is, that you muſt conclude to the Court with Judgment *ſi Actio*, becauſe the Court may judge, whether you have offered ſuch matter as will amount to the avoiding of the Deed: "and "generally," the Law is the ſame "reſpecting theſe "Specialties," whether voidable at Common Law, or void by Act of Parliament.

Par. 2.

Iſſint non eſt Factum.

1 H. VII. 15. 5 Co. 119.

Where the Controverſy relates to the ſigning, ſealing, or Delivery, of the Deed by the Defendant, he pleads *Non eſt Factum*, generally: but antiently where the Deed was ſigned, ſealed, and delivered, yet was originally void by matter *dehors*, as by reaſon of *Coverture*,

ture, or becauſe the party had no Right in the Thing transferred by the Deed, or it became void afterwards by Raſure, Interlineation, or Addition, there the Defendant muſt have pleaded the Matter ſpecially, and concluded *iſſint non eſt Factum*; and this was, that the Plaintiff might be apprized "of" the Point of Defence: for ſince there are ſo many various Modes to make the Deed null and void, if all of them might be given in Evidence upon *Non eſt Factum* generally pleaded, they thought the Plaintiff could never come prepared to falſify the Evidence of the Defendant; and therefore that Notice muſt be given of ſuch foreign Matters as theſe, if you would have them given in *Evidence*.

Another Reaſon why this ſpecial Concluſion with an *Iſſint Non eſt Factum* was anciently referred to the Court was this, becauſe it generally contains Matter of Law, which, if it had ariſen on proof of the Fact, "would have been" to be referred back to the Court by *Demurrer* to Evidence or ſpecial Verdict; and therefore it is very reaſonable that the Doubt of Law ſhould be offered to the Court originally.

But at this day the Law is otherwiſe: "and" if a Man pleads, *delivered as an Eſcrow*, and concludes ſpecially *iſſint non eſt Factum*, the general way is to put it to the Jury, becauſe it is in effect to ſay there was no Deed at all; but they may put it to the Court by an *hoc paratus eſt verificare*, becauſe the Court will judge whether he exhibited ſuch Matter as will make the Deed of no effect at all; and therefore ſuch pleading is not apprehended to be vicious.

Noy, 112. Moor, 30. Dall. 105.

But if you plead a Breaking of the Seal, raſing, or addition after Delivery, you may conclude *Iſſint non eſt Factum*; but the better pleading has been reckoned to conclude to the Court with Judgment *ſi Actio*; becauſe the Deed is not ſo apparently void, but that it "may be expedient" to put it to the Court, whether thoſe are circumſtances that would avoid it.

"Yet" you may give it in Evidence on *Non eſt Factum*, for it diſproves the Deed. "The *Iſſint non* "*eſt Factum* upon Raſures, &c. is much diſcounte-"nanced, ſo far back as the time of HOLT, as being

6 Mod. 217, 8. "unneceſſary and inconvenient."

Cro. Eliz. 800.

If a Man pleads *Quod Factum prædictum* was made and delivered without Date, and that the Plaintiff added a Date, and *iſſint Non eſt Factum*, "this has "been held" not good; for at the beginning of the Plea he confeſſes it to be his Deed, and to be made and delivered by him, which at the latter end he denies, and ſo it is repugnant. "But he might have "pleaded *Non eſt Factum* generally, and given this "in *Evidence*."

Latch. 185.

Debt againſt *G. B.* Executor of *T. B.* on a Bond made by *T. B.* The Defendant pleads *Quod ſcriptum prædictum non eſt Factum ſuum*, whereas he ought to have ſaid, *Non eſt Factum T. B.* After a Verdict this was held to be good, becauſe (*his*) ſhall be intended his that the Plaintiff declares on, and that was the Bond of the Teſtator, ſince the Jury by their Verdict have confirmed the Relation to that Bond in the Declaration.

"The

"The Principle is obvious upon which," on *Non eſt Factum* pleaded, a Man may give the ſpecial Matter in Evidence, as Raſure, Interlineation, or Addition: being no more than this, "that" it is not neceſſary to plead any Matter or Thing ſpecially but what is exhibited to the Court to judge of, and ſuch Plea concludes with an Averment *that you are prepared to verify*; and it ſeems incongruous to make that abſolutely neceſſary to be ſhewn to the Court which is ſhewn to them in vain, and that doth not come under their Judgment: now when "you" ſhew that the Deed is void, you ſhew that it is none at all, which amounts to the *general Iſſue* of *Non eſt Factum*, and therefore you conclude, not to the Court, but to the Country; "and thus" it "appears" that it cannot be neceſſary to ſet it out to the Court, ſince it is not offered for their Judgment and Determination. 11 Co. 26, 7. V. ſupra, 104.

"And ſuch Alterations will ſupport the Iſſue of "*Non eſt Factum*, though made ſubſequent to the De-"livery of the Deed; for by them it is not NOW the "Deed of the Party, and the Iſſue is in the preſent "Tenſe." L. N. P. 171. V. Cowp. 590.

In Debt upon Obligation the Defendant pleads, that there was a *Schedule* annexed to the Obligation, the which Schedule is diſannexed, and *Iſſint non eſt Factum*: this is not good; for here he confeſſes the Deed, and avoids it, by ſaying that the *Appendices* to the Deed are altered; "but he might have made a good plea, "and" concluded to the Court with Judgment *ſi Actio*,

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( ) Of Remedy after Verdict againſt Defects and Irregularities of Pleading, &c. ſee Comm. III. *c.* 25. and the Statutes there cited—14 *E.* III. *c.* 6. Anno 1340. 9 *H.* V. *c.* 4. 4 *H.* VI. *c.* 3. 8 *H.* VI. *c.* 12. and 15. 32 *H.* VIII. *c.* 30. 18 *Eliz. c.* 14. 21 *J.* I. *c.* 13. 16 and 17 *Car.* II. *c.* 8. (ſtiled in 1 Ventr. 100. an *omnipotent* Act, perhaps the firſt inſtance of the Abuſe of that ſacred Term by applying it to Parliaments) 4 and 5 *A. c.* 16. 9 *A. c.* 20. 5 *G.* I. *c.* 13. Anno 1718. Moor, 43.

allowing the Deed, but declining the Plaintiff's Action, by ſaying that the "Plaintiff" himſelf altered the Appendices thereunto relating.

But on *Non eſt Factum*, if the Seal were broken off after Plea pleaded, it is the Deed of the Party.

9 H. VI. 60. If the Deed be *enrolled*, you ſhall not plead *Non eſt Factum*; for by the Acknowledgment of the Party it appears to be the Party's Deed: for there is that Credit given to the Tranſactions in a Court of Juſtice that the Party ſhall never ſay he did not acknowledge it; * ſo that though this Deed be no Record (that is, no Act of the Court in the Deciſion of Right and Wrong) yet it is in Court, and ſo far to be credited, that the Party ſhall never deny the *being* of ſuch a Deed, "though he may its" operation "by a Plea properly "adapted, which will hereafter be noticed."

35 H. VI. 9 b. If the Defendant pleads *Non eſt Factum*, and further *demurs* to the Obligation, the Demurrer is void; becauſe no Man is allowed a Plea, "which is thus at "once double and repugnant," to alledge the Fact to be falſe, and the Charge contrary to Law; but he muſt take one Plea that he thinks moſt advantageous: for if he ſhould be allowed ſeveral ways of Defence, it would multiply Contention infinitely, as we find by the Practice of the *Chancery*, where they judge upon innumerable Circumſtances, and never reduce the Weight of the whole Cauſe to one Iſſue.

4 A. c. 16. §4. "And though now by Statute *double* Pleading is to a "certain extent allowed, yet it ſhall not be ſuch Pleading as militates againſt all Form and Reaſon: and the "Leave of the Court (which is of courſe, if the Pleas "are regular) is made neceſſary, in order to reſtrain "this indulgence within due Limits.

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* *Probatio contra ſeipſum allegantis eſt fortiſſima.*
Contra Præſumptionem Legis non recipitur Probatio.

"On

"On this Iſſue reſpecting an Obligation by Specialty, "there are Pleas hereafter to be mentioned, which ſhall "not be joined with that of *Non eſt Factum*.

"Thus *ſolvit poſt Diem*; for it admits the Deed, and "is therefore contradictory: the ſame of *Non eſt* "*Factum* with *ſolvit ad Diem*." 2 Bl. 305, 6. Ibid. 993.

Par. 3.

Riens paſſa par le Fait.

"This is naturally the next Plea to be conſidered: "and it has been a Queſtion whether "ſuch Matter "as would ſupport the Iſſue of" *riens paſſa par le Fait* can be given in Evidence upon *Non eſt Factum:* for, on the "one" ſide, it may be ſaid, that on *Non eſt Factum* the operation of the Deed is not in Debate, but whether the party ſigned, ſealed, and delivered the Contract alledged in the Declaration: ſo that if the eſſential part of that ſort of Contract, "which "the Law preſumes, when an Inſtrument, verified by "legal ſolemnity, is brought in Queſtion as to its Ex-"iſtence," be proved;—the Execution of the Inſtrument with the required Forms;—they take it to be a proof of the Iſſue, "as otherwiſe the Defendant ſhould "not have reſted the *Iſſue* on a point which conteſts "the Exiſtence of the Deed, when his real Defence "ſuppoſes its *Exiſtence*, and impeaches its *Validity*." 5 H. VII. 8. Br. 3. 2 R. Abr. 677. pl. 25.

Others have ſaid, that where a Deed is of no effect to paſs any Right, it is utterly void, "and therefore "properly *no Deed*;" as if a Man accepts a Leaſe of his own Land by Deed Poll; and where a Contract is void, and of no effect, it is reputed no Contract.

"But its being no Contract in point of legal avail-"ment does not prove that it is no Deed: the force "and operation of the inſtrument is one Queſtion, its "mere exiſtence another; and it may ſeem ſtrange, "if a Man ſhould, on the Trial, find himſelf com-"pelled to defend his Right of conveying when the "Nature of the Iſſue calls on him to prove the Deed.

Solvit ad Diem.

"In one inſtance, however, *riens paſſa par le fait* "muſt be pleaded, and Evidence that would prove "*Non eſt Factum* between parties is proper to be given "in ſupport of it: and that is where the effect of the "Deed comes in Queſtion with regard to the intereſt "of a ſtranger; for" a ſtranger ſhall not plead a *general* or ſpecial *Non eſt Factum*, as that the ſeal is ſevered from the Deed, and *iſſint non eſt Factum*; but he ought to plead *riens paſſa par le Fait*: "ſince" a man ought to try the Validity of a Stranger's Deeds no farther than they regard his own Intereſt, and therefore he cannot deny the Being of ſuch a Deed, but only the operation of it as to himſelf.

D. Pl. 177. Fait 3.

"In general, *Non eſt Factum* is the Plea where there "is an original Defect of neceſſary requiſites to the Con- "ſtitution of the Deed; *riens paſſa par le fait*, where "there is an incapacity to convey or to receive, either "generally, extrinſic to the Deed, or particularly, in "relation to that Mode of Conveyance."

Title VII.

2. *Solvit ad Diem.*

The *ſecond Iſſue* is that of *ſolvit ad Diem*: "for *riens* "*paſſa par le Fait* generally terminates in a *Demurrer*: "but this now to be conſidered puts a Fact in Iſſue, in "like manner as the precedent *Non eſt Factum* does for "the *Jury*." And to explain this Iſſue, it is to be conſidered that when any Contract is founded on a *ſpecialty*, it cannot be diſſolved but by ſpecialty: for every Contract muſt be diſſolved by the ſame ſolemnity and notoriety with which it was made; otherwiſe there is more Evidence to ſuppoſe the Continuance of the Contract than the Diſſolution. Therefore on a ſingle Bill, you cannot *plead* a naked Payment, without a Diſcharge in Writing, becauſe there is a ſolemn Contract by which you are charged,

Payment to Agent, &c.

charged, and there cannot be any Diſcharge but by Matter of equal ſolemnity; but you may plead *Payment at the Day*, becauſe the Condition is contained in the very Contract itſelf, and upon that Matter of Fact the force of the Contract depends; and when you diſcharge yourſelf by pleading the Act required in the Condition, then is the Contract diſſolved by ſomething ariſing out of the Contract itſelf, which is the ſame Thing as if it were diſſolved by a Contract of equal ſolemnity.

Where I am bound to pay a "ſingle" ſum of Money to two, "generally," a Payment to any of them is ſufficient, becauſe a Man cannot pay the ſame "ſum" to two ſeveral Perſons. Sid. 41.

"But a ſpecial Payment may be required, which "will not be ſatisfied by paying to a ſingle Perſon."

Par. 2.

Payment to an Agent.

Condition to pay Ten Pounds to *A.* Payment to his Deputy "may be given in Evidence."*

The Payment to the *Scrivener* who has the Bond is *prima Facie* a good Payment; becauſe he appears entruſted to receive it; and therefore on ſuch Evidence it is preſumed to have come to the Party's hands: but if it be proved, on the other ſide, that the *Scrivener* broke, ſo that the Money was never paid to the Plaintiff, this is no Payment to the Plaintiff: but where a Man gets Judgment, Payment to his Attorney is well enough; for he is not only entruſted, and put in the Place of the Creditor, to get Judgment, but to take the Effect of that Judgment; and ſince the Attorney might take out Execution, he may take the Payment of the Money inſtead of Execution; therefore the Debtor ought to be indemnified by the Law. Lit. Rep. 54. Hetl. 46. 2 Keb. 249.

* *Nam qui agit per alium agit per ſe.*

Not neceſſary to aver it came to the Hands of the Principal.

Debt on Bond to a Biſhop, the Defendant pleads he paid the Money at the Day to *T. S.* Bailiff of the Plaintiff, and by his Command; and "farther ten-"ders an Averment," that this came to the uſe of the Biſhop: this Averment makes the Plea *double* ("though it might have been ſo combined with the "entire Plea as to be only Surpluſage);" for if the Bailiff receives this by Command from the Biſhop, (though it does not come to the Biſhop's Uſe, yet it is a ſufficient Diſcharge to the Defendant: "and when "he ſays farther that he is ready to aver that the Money "came to the Uſe of the Biſhop, this makes two *Iſ-*"*ſues*: for one Iſſue ariſes on the Commandment, and "the other, whether it came to his Uſe. And the "*Defendant* was ordered to *amend* his Plea: which he "did by leaving out the Averment that the Money "came to the Biſhop's Uſe.*

"If Money be paid to an Agent for the Uſe of his "Principal, the Conſequence of this, under particular "circumſtances, belongs more properly to the Title "ASSUMPSIT."

Moor, 47. Cro. Eliz. 142. Dy. 222. contra Str. 622. Caſ. Temp. Ld Hardw. 134.

The Condition was to pay Money at a certain Day and Place, and Payment was made *before* the Day, and an Acquittance given in Evidence; this was adjudged not to maintain the Iſſue; becauſe the preciſe Day is parcel of the Iſſue: but it is there ſaid, they ought to plead the Payment ſpecially, and the Acceptance of the Plaintiff. "But the Authorities on the Margin "conſider this Plea as good without the ſpecial Mat-"ter being more particularly averred, for that pay-"ment *before* the Day is payment *at* the Day."†

Debt

* *Probably the Plea on which he tendered the Averment was,* que les dens bener a les maines de meſme l'Evеſque; *though the Book has* al œps. *The former Edition has a Query (I imagine added by the Editor) whether this were worſe than ſurpluſage.*

† But now by ſtatute 4 *A. c.* 16. § 12. where an Action of Debt is brought upon any Bond which hath a Condition or Defeazance to make void the ſame upon Payment of a leſs ſum at a Day and Place certain, if the Obligor, his Heirs, Execu-tors,

Debt on an Obligation of *two hundred* Pounds: Defendant pleaded, that after the Day of the Writ purchaſed, *viz.* ſuch a Day, *apud*, &c. he paid to the Plaintiff *ſixty Pounds* Parcel thereof, which he received.—Judgement *de Brevi*, &c.

Cro. Eliz. 884. 5 H. VII. 41. Doct. & Stud. D. I. c. 12. V. ſupra, 26—7.

Upon ſpecial Demurrer, adjudged for the Plaintiff: becauſe the Defendant did not ſhew any Acquittance or Releaſe proving this Payment, which if he had done, the Writ would have abated for the whole: but ſince he did not produce any Deed of Acquittance, his Plea ſhall be no more than a naked Averment, which can never overthrow any Obligation which is of an higher Nature, and conſequently cannot abate the Writ which is founded on it.

"But this is to be underſtood with the Qualifica- "tion now ſubjoined," in Debt on a ſingle Bond, Payment without Acquittance is no Plea: for the Bond being a Contract with ſolemnity cannot be avoided by a bare Averment, which is inferior in its Nature to it: otherwiſe in Debt on an Obligation *with Condition*: for there, by the Nature of the Contract, and the *expreſs* Agreement of the Parties, Performance of the Condition is to be a full Diſcharge of the Bond; ſo that if the Performance be pleaded and proved, it is a full Bar.

Dy. 52. Moor, 12.

In

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tors, or Adminiſtrators have, before the Action brought, paid to the Obligee, his Executors or Adminiſtrators, the Principal and Intereſt due by the Defeazance or Condition of ſuch Bond, though ſuch payment was not made ſtrictly according to the Condition or Defeazance, it ſhall and may nevertheleſs be pleaded in Bar of ſuch Actions, and ſhall be as effectual a Bar thereof as if the Money had been paid at the Day and Place, according to the Condition or Defeazance, and had been ſo pleaded.

To this we may add, that where Payment is not made on the Day, whereby the Bond is become abſolute, and the Penalty incurred generally, the Penalty is regarded in Law and Equity as the Form *of the*

Note to the former Edition.

5 Co. 117. b. In Debt on an Obligation of Ten Pounds, the Defendant pleads that one *H.* was jointly bound with him, to whom the Plaintiff had made an Acquittance, bearing Date before the Bond, but delivered after it, in which he acknowledged the Payment of Twenty Shillings in full ſatisfaction of the Ten Pounds, and adjudged a good Bar; for if a Man acknowledges himſelf ſatisfied by Deed, it is good againſt him, though he have received nothing, ſince he ſhall not be allowed to contradict what appears under his Hand and Seal.

Cro. Eliz. 2 Danv. Abr. 230. pl. 14. Condition to pay Seventy Pounds, viz. Thirty-five Pounds at one Day, and Thirty-five Pounds at another Day, at the *Temple* Church. The Defendant pleads Payment of the *Seventy Pounds* at *Ludlow*, and held good, *ſecundum formam et effectum reddendo ſingula ſingulis*, as if he had pleaded Payment of the ſeveral Sums at the ſeveral Days.

22 E. IV. 25 a. Bro. Condition. pl. 181. Debt upon a Bond: the Caſe was, that the Defendant did owe to the Plaintiff a certain Sum of Money by Bond, and certain Money for Wares ſold; and *at the Day of Payment* of the Bond he tendered the Money according to the Bond, which the Plaintiff accepted, and ſaid it ſhould be for the Book Debt, and not for the Bond Debt; but the Defendant ſaid he paid it on his Bond, and no otherwiſe: the Plaintiff croſſed his Book, and brought Debt on the Bond: and adjudged againſt him, for the Defendant is to appoint the Manner of Payment.

C. L. 555, 6. *the ſecurity; yet in ſome Caſes the Penalty is* ſubſtance; *as in beneficial Loans for charitable purpoſes, where forfeitures go in aid of the Fund, as in Mr.* Wilſon's *Donation to lend Money to young Tradeſmen at one per* Cent. *for the firſt Year, and two for the ſecond, with ſpecial Conditions.*

In

In Debt on a Bond of *two hundred* Pounds, conditioned to pay one hundred and *five* Pounds, the Defendant pleads Payment of the aforeſaid ſum of *one hundred* Pounds at the Day: the Plaintiff replies, that he did not pay the ſaid one hundred and five Pounds, and this he prayeth "may be enquired by the Country;" and it was found for the Plaintiff, and Judgment given for him, which was afterwards reverſed, becauſe the Plaintiff and Defendant do not join in a Point, and therefore there is no Iſſue or Verdict upon it. Cro. Ja. 585. Danv. Abr. 353. pl. 2.

But where the Defendant pleads to Debt on Bond, Payment of fifty Pounds on the 14th of *June*, &c. and the Plaintiff replies, that he did not pay the fifty Pounds the SAID 14th of *Auguſt*, which at the Day aforeſaid he ought to have paid him, and *Verdict* found that he did not pay it the 14th of *June*, yet it is no Error; for the Defendant's Plea was according to the Condition; and the Plaintiff's Replication, that he did not pay the ſaid 14th, was good, for the Word *Auguſt* was ſuperfluous, and the ſaid 14th Day, without more, had been ſufficient: but in the former Caſe there was another ſum in the Plea of the Defendant than was in the Condition, and another ſum in the Replication than was in the Bar; ſo that there could be no Iſſue. Cro. Ja. 549. 3 Roll. R. 135. Palm. 74.

On Debt on an Obligation the Defendant pleads, that he paid at the Day, and *on this he puts himſelf* "*on the Country*:" and the Plaintiff in like manner: and in *Error* it was inſiſted, that the Defendant ought to have concluded his Bar with, *and this he is ready to verify*; and then the Plaintiff ought to have replied, that he did not pay, and this he prays may be enquired by the "Country," ſo there had been an Affirmative

Cro. Car. 316. Dany. Abr. 354. pl. 1. 2 Sid. 215. Keb. 759. 766. T. Raym. 98.

and a Negative: but rejected: for there is an Iſſue, "for "both Parties join in putting the Queſtion of Pay- "ment to the Jury;" and the Error is only the Formality of joining it; ſo that it is aided by the Statute of *Jeofails*.

TITLE VIII.

Where the Specialty, if any, is not the Ground of the Action;—

NIL DEBET.

Cro. Ja. 227, 233. Brownl. 105. Bulſtr. 1. Yelv. 167. 2 Brownl. 220.

If a Man makes a Leaſe for years, either by *Parol* or by *Indenture*, NIL DEBET is the GENERAL ISSUE: but in Debt upon an Obligation NON EST FACTUM, as is ſhewn, is the general Iſſue: and the Reaſon of the Difference is this: in caſe of a *Bond*, the Debt ariſes *on the ſpecialty*: and therefore the conſequence is, that you cannot diſown "the Debt" in the Iſſue; for then you would fall into this Abſurdity, that you would deny the Debt, and yet not deny the Deed which owns the Debt: now you cannot deny the Deed, which confeſſes the Debt under your Hand and Seal, without denying it to be your own Deed, which Iſſue is *Non eſt Factum*, and without diſowning the Deed, you cannot diſown the Debt, which ariſes on the Deed only.

But in Caſe of a Leaſe by Deed for Years, the Demand ariſes, not only on the Deed, but on the *taking of the Profits* in purſuance of that Contract, for there is no Debt until the Day of Payment; and this does not depend upon the Act of the Leſſee only, as in the former Caſe the Debt depended upon the mere Act and Acknowledgement of the Obligor, but alſo on the Act of the Leſſor in quitting the Premiſes: ſo that the denying "of" the Contract, by pleading *Non eſt*

eſt Factum, could not be the general Iſſue, becauſe not commenſurate with the Declaration; for it might be the Deed of the Leſſee, and yet no Debt might ariſe to the Leſſor, becauſe it is not the Deed alone that is required to make a Debt in this Caſe: now ſince an Act *en Païs*, as well as the Deed, goes to the creating "of" this Debt, by taking away the Act *en Païs* you deſtroy the Debt; and therefore ſhewing any Act that infers Impoſſibility of the Leſſee's taking the Profits is good Diſcharge of the Debt.

But though this Obligation is not merely founded on the Contract, but on the taking of the Profits alſo, yet, in ſome Caſes, I may charge my Leſſee, though he never take the Profits; and this is where I charge the Leſſee on his Contract, and as a "legally preſumed" Taker of the Profits of my Eſtate and Freehold: and he cannot diſcharge himſelf from ſuch a demand but by ſhewing his own Act or Laches in Excuſe, which the Rules of Law will never allow as a good Excuſe; and then in ſuch a Caſe he is Pernor of the Profits *de Jure*, though not *de Facto*; ſo the Law looks upon him as my Tenant, and as taking the Profits of my Eſtate, becauſe he cannot ſufficiently excuſe himſelf when I charge him with it.

Therefore, if I make a Leaſe, and quit the Poſſeſſion, though the Leſſee never enters, I may charge him in Debt for Rent: ſo if he enters and aſſigns the Premiſes to another. "And the modern Authorities are, "ſince the privity of Contract continues, that *Executor* "or *Adminiſtrator* ſhall anſwer for Rent, if *they* aſſign."

Rol. Abr. 605, pl. 5. 2 Sid. 240. 2 Ventr. 209. 3 Mod. 325. Co. Litt. 54. 5 Co. 77, a, b.

But

But if my Leſſee enters and aſſigns the Premiſes, I can never charge him with *Waſte* committed after Aſſignment: for though the Law Books own him as my Tenant *de Jure* on his own Contract, which by his own Act cannot be diſſolved, yet this is only to anſwer my Rent, which by his Contract he had undertaken to levy and pay me out of the Profits; but this ſuppoſition of Law ſhall not make him anſwer for the *wrongful* Acts of another, to whom he had a legal power to aſſign it, and when the Penalty of the words of the Statute is laid upon the very Tenant; for the ſuppoſition of the Law is framed to do every Body Right, but not to do any Body an Injury.

The Leſſee for Years was anciently reckoned in the Nature of a Receiver or Bailiff of the Freehold; and therefore upon any ſuch Contracts he was chargeable as a Debtor to the Freeholder, upon taking the Profits of the Eſtate, that in the eye of the Law do belong to the Perſon whom the Law makes Tenant of the Freehold. Now nobody can be ſuppoſed to continue another in the Poſſeſſion of the Eſtate, and to diſcharge him on the Receipt of the laſt Rent, if he had not received what was formerly due; no more than a Man would ſtate Accounts with his ſteward, and diſcharge him on the Accounts of the Year before he had received what was precedent: the very continuing in the ſame ſtate, and a Man's behaving ſo well as to account for the Money due this Year, is a Preſumption that he hath done the ſame Thing formerly, or elſe a Man would not now have ſuffered it: "and the Te-" nant being thus conſidered in a view analogous to " that of a Bailiff, a *prima facie* Preſumption attaches, " and" the laſt Receipt is good " and ſtrong" Evidence, " ſtronger than would reſult but for that Rela-" tion,

Co. Litt. 373. Dy. 71. b. 3 Co 55. 2 Sid. 44.

" tion; and concluſive until rebutted by contrary " Proof:" but if this Acquittance be under Hand and Seal, then, " as hath been ſhewn," it may be pleaded, and it is ſuch *Evidence* as nothing can be proved to the contrary: for this is Evidence by *Specialty*, and any Deceit or Miſtake in former Payments is but Matter *en Païs*, and therefore not of as high a Nature as the Deed; and in giving *Evidence*, every thing muſt be contradicted by a Matter of the ſame Notoriety as that whereby it is proved. Mod. 118.

Eviction, Expulſion, and any ſuſpenſion of Rent, is good *Evidence* upon *Nil Debet*; for that amounts to diſcharge and falſify the " Cauſe" of Complaint: for then, " by the Fault of the Leſſor," there was no Pernancy of the Profits whereby I could become Debtor to him in the Reverſion: and ſo the Act *en Païs* is diſcharged, which goes of Neceſſity to the creating of this Debt, " and this being a Matter *en Païs* may be given in Evidence to the Jury," though others have held it ought to be pleaded. Mod. 35, 118. Ventr. 358. 2 Sid. 151. Leo, 104.

If a ſtranger evict the *Leſſee* of part of the Land, the whole Rent muſt be apportioned: for though part be taken away, ſtill alſo ſome part remains, " and " therefore" there is Part of the Conſideration Money remaining due to the Leſſor; for otherwiſe the Act of the Law in the ſtranger's Recovery would do wrong to the Leſſor.

" But" if the Leſſor enter into part, the whole Rent is ſuſpended; for the Leſſor cannot apportion it by a wrongful Act of his own; for if the Party himſelf by his own Wrong doth hinder himſelf from the Benefit of his own entire Contract, the Jury ought not to divide it in his favour; " and" poſſibly the Leſſee would not have contracted for one part without the other.

" But

Hunt v. Cope. Hil. 15 G. III. Cowp. 242.

" But where the Nature of the Diſturbance does not " conſiſt in an abſolute and total Diſpoſſeſſion, as if " the Party plead that the Leſſor pulled down a Sum- " mer Houſe, whereby he was deprived of the Uſe of " it, this may amount to a *Treſpaſs* merely, which will " not operate a *ſuſpenſion* of *Rent*; and therefore on " ſuch Plea the party ſhall not recover on a *replevin* for " Goods diſtrained for *Rent*: for *non conſtat* by the " Plea that the Leſſor had done any thing which would " diſcharge the Rent: but the *Leſſee* might have pleaded " that by this pulling down he was expelled and evicted " from the Premiſes, and then the Facts might have " juſtified Verdict in his favour on the Iſſue of Evic- " TION.

" And upon this Reaſon the Judgment in IRELAND " for the *Leſſee* was REVERSED."

2 R. Abr. 677, pl. 21.

In *Debt* for Rent upon a Leaſe, and NIL DEBET pleaded, *ne unques ſeiſi de la Terre* may be given in Evidence: for if the *Leſſor* doth keep poſſeſſion againſt the *Leſſee* that he cannot enter, in as much as this Action riſes not on the Contract only, but on the *Pernancy* of the Profits, in purſuance of the Contract, there is no Rent due; and conſequently this is an Evidence that there is no Debt at all, and therefore proves the Iſſue.

R. Abr. 605.

But if the *Leſſor* waives the Poſſeſſion, though the Leſſee never " actually" enters, yet an Action of Debt lies for the Rent; for the *Leſſee* did not enter and take the Profits, yet ſince he might have entered and have taken them, he cannot make his own Fault and Laches any Part of the Defence.

But on the Plea of *Riens arrere*, or, *levie* " *par*" *Diſtreſſe*, *ne unques ſeiſi de la Terre* is no good Evidence; for when

when a Man inſiſts that there is nothing behind of the Rent, or that it is already levied by Diſtreſs, it ſuppoſes that he has already the Poſſeſſion of that for which he has already paid the Rent, or for which the Rent is already levied.

Hil. Aſſ. 1700.

Debt for Rent on a Leaſe: the Evidence to prove the Leaſe was that the Plaintiff leaſed the Houſe to the Defendant at a Rent, but no time mentioned; and it was agreed at the ſame time, that the Leſſee was not to leave it without half a year's warning: for when the Rent is payable half yearly, and the Leſſor permits him to continue any part of the half year, it is an Indication of his Will that he ſhould continue the whole half year; and the like Law as to a Quarter's Notice, "if" the Rent payable quarterly. "But of *preſumed* "Leaſes from Year to Year, the Principles upon which "they reſt, and the Extent in which they are appli-"cable, mention has been made already, where it ap-"pears that at this day the Notice to a Tenant who has "no certain ſpecified Leaſe muſt be half a year, termi-"nating in ſuch manner as to *complete* the annual period "from the *Commencement* of his Leaſe. There is only "to be added, as a point of Deciſion, though indeed "a neceſſary and obvious Corollary from the preceding "Doctrine, that the Tenant before a Mortgage or "Grant of a Reverſion is entitled to the ſame Notice "from the Mortgagee or Grantee."

Birch v. Wright Mic. 27 G. III. 379—81.

Upon NIL DEBET pleaded, it was doubtful whether a Defendant might give in Evidence that his Leſſor was bound by Covenant to *repair* the Houſes, and that he expended the Rent in *neceſſary* Reparations: two Judges againſt one held that this was a good Diſcharge of the Tenant, becauſe it is very convenient that the Law ſhould look upon this as a Payment, and not put the Leſſee to ſue his Covenant, for the Houſes might tumble down before the Tenant could have the effect of his ſuit: but the Judges differed in this, whether the Reparation ought to be pleaded or might be

Cro. Eliz. 222. 12 H. VIII. 6.

given in Evidence: though the latter ſeems plainly to be the beſt Opinion; becauſe, as it is a Diſcharge, it amounts to Payment; and then it is very good Evidence on *Nil debet*, for if the Rent be paid, it is no Debt; alſo, if it muſt be pleaded, it is the Plea of a collateral Agreement in ſatisfaction of the Debt, and then no ſuch Agreement can be proved: for, though there was an Agreement that the Leſſor ſhould *repair*, yet there was no Agreement that the Leſſee ſhould expend his Rent on ſuch *Reparations*.

" And thus" on *Nil debet* the *Retainer* of the ſame ſum by *verbal* Agreement " for Reparations" was given in Evidence, and allowed to be good; for this amounts to a Payment: and when the Leaſe is by Deed, it cannot be *pleaded* without Deed: " and" ſince ſuch Expence in Reparation, " if pleaded," muſt be pleaded as a Counter-Agreement in ſatisfaction of the Debt, if the Leaſe be by Deed, they muſt plead this Counter-Agreement by Deed; otherwiſe, *non ſolvitur eo Ligamine quo ligatur:* laſtly, the Plea amounts to the *general Iſſue:* " and therefore by the Rule already " expreſſed, can be neither neceſſary nor regular."

Gouldſ. 80. R. Abr. 605.

But it may be objected, that ſince two Debts of equal Value in two ſeveral Perſons are no ſatisfaction to each other, " on the general Principles of the Com- " mon Law," without Agreement, which muſt be pleaded, why ſhould there be any *Recouper* or Balance of Demands in this Caſe?

It is true that two Debts of equal Value, " uncon- " nected with the ſame Tranſaction," are no ſatisfaction to each other: and the Reaſon is, becauſe nothing can come in Proof but the Truth of the Matter alleged. " And the Common Law held," that when one Debt is alleged in the Declaration, you " ſhould" not encounter it with the Proof of another, to which no Man can come prepared: for if one Debt were to balance another in this Manner, all the Tranſactions during the

Releaſe under Hand and Seal muſt be pleaded.

Parties whole Lives "might" be run over in every ſingle Action, which would make ſuits perfectly infinite: but it is not unreaſonable to balance Demands ariſing on the ſame Contract and in the ſame Action: for the Law, to avoid Circuity of Action, conſiders the whole Matter of the ſame Demand, and doth not take it in part to break it into ſeveral Actions, for that is contrary to the Office of a Judge, which is to determine, and not to multiply Controverſies: and therefore, if a Diſſeizor diſburſes Money in Repairs to have a Rent Charge iſſuing out of the Land, it ſhall be recovered in Damage: for the Law balances the Damage in View of the whole Matter, and not on a partial Conſideration of the Damage merely belonging to the Diſſeizin: for that would create another Action: and ſo in this Caſe the Law conſiders the Money expended in Repairs as paid to the Leſſor.

Upon NIL DEBET, Payment, "as hath been before "noticed," is good Evidence to diſcharge the Debt: for the Iſſue is in the preſent Tenſe, whether there be a Debt or not at the inſtant when the Iſſue was taken, and there is no Debt where it is paid.

But on *Nil debet* a *Releaſe* cannot be given in *Evidence*: for though a Debt, when it is releaſed, is no more than when it is paid, yet when it is diſcharged by Releaſe under Hand and Seal, it muſt be pleaded and ſhewn to the Court, that it may appear to the Court to be diſcharged with thoſe apt Words and Solemnities which the Law requires to make a legal Contract; for *verbal* Contracts in ſuch Caſes are not ſufficient "in the Way of Plea," becauſe they are *nuda Pacta*, which create no Obligation.

Shetelworth v. Neville. T. R. Mic. 27 G. III. 454—7.

" And analogous to this, on *Debt* upon *Bond* againſt " the *Heir* of the *Obligor*, the *Heir* pleaded that he " expended Money in repair of the Premiſes liable, " *over* and *beyond* the Amount of the Rents and Pro- " fits; and on *Demurrer* this was ruled a *bad* Plea.

Set off.

Par. 2.

" By Statute 2 *G.* II. *c.* 22. § 13. made perpetual " by 8 *G.* II. *c.* 24. § 4. mutual Debts may be ſet off " one againſt the other, and pleaded or given in Evi- " dence, upon Notice.

V Rayn. Read: 24—36.

" And by the latter Statute (which indeed ſeems to " have been the true intent and operation of the pre- " ceding one, only that Doubts and Diverſity of Sen- " timent on this head were deemed to require the le- " giſlative Interpoſition) Debts of different Degree, as " by *ſimple Contract* and by *Specialty*, may be *ſet off* " one againſt the other.

" But not ſo Debts in *different* Rights, for theſe are " not *mutual* Debts.

V. Rayn. ut ſupra, and Collins and Collins, 32 & 33 G. II. 2 Burr. Manſf. 825, 6.

" This excellent Bill was introduced by Lord Chan- " cellor TALBOT: and by it the Circuity and Expence " of reſorting to a Court of Equity in ſuch inſtances " is ſaved; and *ſet off*, where duly pleaded within the " Statute, made equivalent to Payment.

Cowp. 56.

" But in Covenant *unliquidated* Damages cannot be " pleaded by way of *ſet off*.

Jaques v. Withy, T. R. 557. H. 27 G. III.

" And where the Plaintiff had been diſcharged out " of Execution, on Judgment at Suit of the Defen- " dant, on giving *ſecurity*, which was afterwards ſet " aſide for *Informality*; and the Defendant pleaded " the Value originally ſecured by this Judgment as a " *ſet off*: the Court held that this Plea could not be " ſupported: for the Judgment was gone by the ſe- " curity taken, though the Defendant, who accepted " that ſecurity as ſatisfaction, had neglected to make " it effectually ſo, by omitting an eſſential requiſite in " the Form."

Where

Where a Matter may be intended different Ways on the Allegation, ſo as to make or not make a Right in the Plaintiff, ſuch Allegation is not good; but if it is "open to" Evidence to ſettle the Doubt, there the Matter ſhall be intended for the Plaintiff, if found for him: as if in *Debt* for *Rent*, the Plaintiff ſets forth that *A.* was poſſeſſed of Lands for ninety-nine Years, who demiſed the premiſes to the Plaintiff for 21 years; and then *A.* granted the Reverſion to the Plaintiff, and ſo for Rent Arrear he brought his Action. Now, if upon the Allegation "the Plaintiff hath not ſet "forth ſo much as to ſhew an" efficacious Grant, yet if the Defendant pleads *Nil debet*, and it be found for the Plaintiff, there what was before doubtful on the Words of the Declaration, "is now" aſcertained: for if there was no effectual Grant proved, there could be no Debt to the Plaintiff; an effectual Grant muſt be ſuppoſed to be proved, otherwiſe there could be no Debt: and ſo the "Grant" muſt be ſuppoſed "an" effectual Grant, for the Jury muſt not be intended to give a falſe Verdict; and ſuch Conſtruction can never be made of the Allegation, as cannot be made without falſifying the Verdict.

TITLE IX.

Of DEBT *merely on* SIMPLE CONTRACT.

"Hitherto we have treated of Debt as ariſing either "from PUBLIC Matter of SPECIALTY, as by *Record*; "or expreſsly grounded on *private Specialty*, as by "*Bond*; or connected with Matter *en Païs* originating "in Specialty; as for Rent accruing from the actual or "legal *Pernancy* of *Profits*, under a Demiſe by Indenture. We are now to conſider briefly of Debt as "merely reſting in SIMPLE CONTRACT. And here "the Action is nearly diſuſed: firſt, becauſe the Plaintiff muſt recover the entire ſum laid in his Declaration, or nothing; and, *ſecondly*, becauſe when this "Action is founded on ſimple Contract, the Defendant

Comm. III. ch. 9. p. 154.

" may *wage* his Law and clear himſelf of the Demand " upon Oath; of which more remains to be ſaid in " adverting to extraordinary Modes of Trial.

" If brought againſt an *Executor* for the Debt of " the Teſtator, it ſhall be brought in the *Detinet* only.

" It can properly be brought for Money only: for " the ſuit of or Recovery of Goods and Chattels be- " longs to the kindred Action of DETINUE.

Comm. II. c. 32. p. 511. " And here it may be proper to notice, that among " Debts by *ſimple Contract* the priority in the marſhall- " ing of *Aſſets* has been allowed to *ſervants wages* by " reſpectable Authority.

SECTION II.

Of SALE *or* EXCHANGE.

" Of Sale, with reſpect to *perſonal* property, in " which view alone we are now led to conſider it, there " are theſe chief particulars to be obſerved.

Par. 2.

Definition.

Comm. II. 30. p. 446. " SALE is a tranſmutation of property from one " man to another, in conſideration of ſome price or " recompence in Value. If it be a commutation of " goods for goods, it is more properly an *exchange:* " but if it be a transferring of *goods* for *money*, it is " called a *ſale.*

Par. 3.

Obſervations.

" The Progreſs from the ſimple and natural to this " latter *artificial* Mode of Traffic has been already con- " ſidered.

" But with regard to the *Law* of *Sales* and of *Ex-* " *change*, there is no difference: they are to be treated " therefore under the ſingle denomination of *Sale.* And " it is to be obſerved what *Evidence* will in general " eſtabliſh or affect a Sale: *firſt*, where the VENDER " *hath*, and ſecondly, where he *hath not* the property " in him: reſerving farther particulars to the Action of " *Trover.*

" Where

TITLE II.

1. *Where the Vender* hath *the Property.*

" Where the Vender hath in himſelf the property " of the Goods ſold, he hath the liberty of diſpoſing " them to whomſoever he pleaſes, at any time and in " any manner; unleſs *Judgment* has been obtained " againſt him for a *Debt* or *Damages*, and the Writ of " *Execution* actually delivered to the Sheriff: for then 29 Car. II. c. 3. " by the Statute of *Frauds*, the Sale ſhall be regarded " fraudulent, and the property of the Goods ſhall be " bound to anſwer the Debt from the time of deliver- " ing the Writ.

" Indeed at *Common Law* it was bound from the 8 Rep. 171. 1 Mod. 188. " *teſte*, or iſſuing of the Writ, and any ſubſequent " Sale was fraudulent: but now in favour of *Pur-* " *chaſers*, the Law is thus far altered; though it ſtill " remains as between the *parties:* and therefore, if a " Defendant dies after the awarding, and before the " delivery of the Writ, his goods are bound in the " hands of the Executor.

" Nor is a Bill of *Sale* valid againſt Creditors, if 3 Co. 81.* Twyne's Caſe. Comb. 33. 7 Mod. 95. 12 Mod. 5. Mace v. Cadell. Cowp. 232, 3. " the oſtenſible property continue untransferred.

" It is no ſale without *payment*, unleſs the contrary is " agreed: of which *delivery*, on the part of the *ſeller*, " is *concluſive* Evidence againſt the *Buyer*; and ſo is " *Tender* of payment at the price agreed, againſt the " *Seller*.

" EARNEST accepted, if but a *Penny*, and deli- " very, if but a Part of the Goods, is payment or " delivery to *bind* the bargain.

" And by the Statute already cited, no contract for the " ſale of Goods to the Value of 10 *l.* or more, ſhall be

" valid, unleſs the buyer actually *receives* part of the " Goods ſold by way of *earneſt* on his part, or unleſs " he gives part of the Price to the Vender, by way of
V. ſupra, 146. " *Earneſt* to bind the bargain; or unleſs ſome Note " in Writing be made and ſigned by the party or his " Agent.

" And with regard to goods under the Value of 10 *l.* " no Contract or Agreement for the ſale of them ſhall " be valid, unleſs the goods are to be delivered within " one year, or unleſs the Contract be in writing.

" By ſale the property is ſo veſted, that if the
Noy, 42. " Thing ſold periſh, the Loſs is the Buyer's after Ear- " neſt paid: and he muſt make good the full price, " though it never come to his hands.

" But though the Contract is complete by payment
Hob. 41. " of *Earneſt*, the *Vendee* cannot take away the Goods " without paying the full Price, otherwiſe than by " permiſſion of the Owner.

TITLE III.

Of Property transferred where not *in the Vender.*

" In general, *Sales* in MARKET *overt* bind the Right
Comm. II. 449. " on account of the Notoriety of the Contract.

" In LONDON every Day, except *Sunday*, is a Mar-
Wood, B. II. Ch. 2. p. 211. " ket *overt*, and the ſales in *ſhops* there for valuable " conſideration are good.

" But this Rule is held not to bind the King ſo as to " diveſt property from him: and reciprocally, if goods " are ſtolen, and ſeized by the Officer of the Crown, " and by him ſold in Market *overt*, the Owner, uſing
L. T. 158. " due Diligence, ſhall recover them; for if he ſue the " Felon to conviction upon the ſame Felony, he ſhall " have a Writ of Reſtitution.

" And

Par. 2.

Pawnbrokers.

" And in a particular *Trade*, from the peculiar " Danger of *Fraud*, and the oppreſſions it would pro- " duce, the property is not immediately changed by ſale.

" By the Statute of *James*, the ſale of goods wrong- " fully taken to a *Pawnbroker* in *London*, or within " two Miles, is not to alter the Property. 1 J. I. c. 21.

" This Trade was regulated in the Reign of the " late King; and in the *preſent* two Statutes have " paſſed concerning it. 30 G. II. c. 24. § 3- -13. 24 G. III. c. 42. 27 G. III. § 8.

" Power is given, by the laſt of theſe Statutes, to " a *Juſtice* of the *Peace*, on the Oath or Affirmation of § 12. " one Witneſs, to reſtore to the *Owner* goods unlaw- " fully pledged; and pawned Goods are deemed for- " feited at the expiration of the year, which Term is " extended to three Months beyond the year, on *Notice* § 13. " from the Owner in writing.

Par. 3.

HORSES.

" Another Exception is deduced from the Nature of " the Property: for, with regard to *Horſes*, no property 2 P. & M. c. 7. 31 Eliz. c. 12. " is gained, although ſold in Market *overt*, unleſs " expoſed to ſale in an open place for ſuch ſales, be- " tween ten in the forenoon and ſunſet, and unleſs " brought by the Vender and Vendee to the toll-ga- " therer or book-keeper, the toll paid, (if any) and " the Horſe, with price, colour, marks, and name, addi-

" addition and abode of the Vender and Vendee entered " in a Book for that purpoſe; nor even then is the pro- " perty loſt, if within ſix Months, the Owner puts in his " Claim before ſome Mayor or Juſtice of the Diſtrict; " and within forty days after proves it by the oath of " two Witneſſes before ſuch Mayor or Juſtice, and " tenders the Price *bona fide* paid in ſuch Market.

Of BAILMENT *ſpecial*, ſee hereafter under the general Title, BAILMENT.

HIRING *ſpecial*, which is a ſpecies of Bailment, ſee under the ſame Head.

CHAPTER II.

" We now come to Actions founded on Contract, " expreſs or implied, with uncertain Damages: and " here every Thing of chief Importance will naturally " fall under the ample Title of *Aſſumpſit*.

ASSUMPSIT.

" The Action of ASSUMPSIT is founded on *Con-* " *tract*, either *expreſs* or implied; and it is either *ge-* " *neral* or *ſpecial*.

L. N. P. B. II. Ch. 2. p. 128, ...56.

" The general *Indebitatus aſſumpſit* bears a near Af- " finity to the Action of Debt. It differs, however, " in being detached from *ſpecial*, and limited to *ſimple* " *Contracts*, and in the eſtimability of the Value of " the Demand, which is liable to be apportioned ac- " cording to the Proof which the Plaintiff eſtabliſhes.

" It will lie for theſe general Cauſes:

" 1. Money lent,

" 2. Money laid out and expended to the Uſe " of the Defendant,

" 3. Money

" 3. Money had and received to the Plaintiff's
" Uſe,
" 4. Goods ſold and delivered,
" 5. A ſum certain on Work and Labour,
" 6. On Account ſtated,
" 7. A *Quantum meruit* for Labour,
" 8. A *Quantum valebant* for Goods.

TITLE II.

1. ASSUMPSIT *for Money lent.*

" An *indebitatus aſſumpſit* will lie for Fines on Ad- Douglas, 695. 3 Burr. 1717.
" miſſion to *Copyholds*, *Tolls*, and Profits of an Office. T. R. 619.

" Upon an *Aſſumpſit* againſt an Executor or Admi-
" niſtrator, the Plaintiff muſt prove his Debt, though
" the Defendant have pleaded *plene adminiſtravit*; for
" by that Plea, though a Debt be admitted, yet the
" *Quantum* is not, and it differs therefore from an
" Action of Debt, in which the Plea of *plene admi-*
" *niſtravit* is an Admiſſion of the Debt.

" *Aſſumpſit* will not lie on a promiſe by Defendant to
" pay Debt and Coſts on a Judgment; for this would
" be converting a *ſpecialty* into a *ſimple Contract* Debt.

" *Aſſumpſit* will lie for Money lent to play with, as
" already ſhewn at large; for this Action goes on the
" CONTRACT.

" *Aſſumpſit* will lie for *Loan* to the Wife at the Stevenſon v. Hardie. 2 Bl. 872---4. H. 13 G. III. C. B. 1 T.
" *requeſt* of the Huſband; for it is in *reality* a Loan to
" the Huſband.

" *Aſſumpſit*

1 Burr. Mansf. 376.

" *Assumpsit*, as we have seen before, will *not* lie on a " *promissory Note* or *Bill of Exchange*: but it will lie for " the *Debt*, and the Note may be given in Evidence: " but now the *Revenue* Laws have variously interposed " respecting this species of commercial transaction.

23 G. III. c. 51.

" And, first, under the Idea of preventing trouble- " some and prejudicial circulation of Bills for small " Value, no *promissory* Notes, or *Inland* Bills of Ex- " change, were to be negotiated or transferred for a " sum under *twenty* shillings.

23 G. III. c. 49. § 2. § 4. § 5. § 6.

" And Bills of Exchange and promissory Notes for " less than 50 *l.* are subjected to a Stamp Duty of " *Sixpence*; if more than 50 *l.* to a Stamp Duty of " *one* shilling: with an Exemption in favour of Bills " drawn payable on Demand, on a Banker living within " ten Miles of the Person drawing, and of Bills in " *Scotland* not exceeding *twenty-one* shillings. Bills " under 10 *l.* payable on Demand to pay only *three* " *pence*.

Moulsdale v. Birchall. 2 Bl. R. 820--1.

" In the *Exchequer Chamber*, on Error from the " *King*'s Bench, it was held that *Assumpsit* will lie for " not paying the Consideration of the Assignment of " an uncertain Debt; and the Judgment of *B. R.* was " accordingly affirmed.

1 Cowp. 437. 43---5. Martyn v. Hind.

" The Rector of a Parish gives the Plaintiff a *Title* " to the Bishop by appointing him Curate with *Salary*, " and promising to continue him till he shall be pro- " vided of some ecclesiastical preferment.

" The

" The Plaintiff brought *aſſumpſit* for the Salary on " this Title. The Defendant objected that the Title " is not to the Curate, but as an *Indemnity* to the Biſhop: " and that the Plaintiff was appointed Reader of *extra* " prayers in the ſaid Pariſh Church with Salary.

" The Court was of Opinion, that it was a *contract* " *to the Plaintiff*: from which, as a matter of Fact, " made known to the Biſhop, he derives, indeed, an " aſſurance of Indemnity: but this reſulting merely " from the undertaking in favor of the Plaintiff, cannot " be ſtated as an objection to his Action upon this " Title.

" The Court farther held, the *Readerſhip* was not " an *eccleſiaſtical preferment*.

" On *Aſſumpſit*, the Plaintiff declared that his " Wife's Father, being ſeiſed of certain Lands, ſince " deſcended to the Defendant, and about to cut 1000*l.* " worth of Timber from the ſaid Lands, the Defendant " promiſed to the Father that in conſideration, that he " would forbear to fell the Timber, he would pay " the ſaid Daughter 1000*l.*

Dutton v. Poole, Mic. 29. & Mic. 30 Car. II. 1 Ventr. 318 & 332. L. N. P. 133, 4.

" After Verdict, it was moved in Arreſt of Judg- " ment, that the Father ought to have brought this " Action; (and it may be obſerved, this ſeems to be " impoſſible, for till after the Father's Death, without " felling the Timber, the Conſideration could not " accrue);

" accrue); for the Husband was not party to the " *meritorious* Consideration. The Court was of opinion, " the Consideration was such as well to maintain the " Action brought by the Husband: and Judgment " was accordingly for the Plaintiff.

TITLE III.

2. *Money laid out and expended.*

Comm. III. 162.

" We now come to that species of *implied* ASSUMP- " SIT, which arises from *Money laid out and expended* " *to the Use of the Defendant.*

Moulsdale, v. Birchall.

" There is little occasion to instance in the ordinary " Cases of frequent occurrence, and which will easily " be perceived to fall under this Action: it will be " more advisable to advert to a few less obvious, or " illustrative of Principles.

T. R. 21. M. 26 G. III.

" On an Action for Money *paid, laid out, and ex-* " *pended to the Use of the Defendants*, the Case was " this:

" The Parish of *St. Vedast* and *St. Michael le Quern*, " became united Parishes by Act of Parliament after " the Fire of *London*, and since that time one set of " Officers had served in the two Parishes, the Election " of whom had been always made in a joint Vestry. In " the year 1759, the sexton's *salary* was settled at 20 *l.* " *per Annum*, which was paid *jointly* by both Parishes.

" The overseers of *St. Vedast*, had paid the Sexton " last chosen the entire sum: and brought this Action " to recover a Moiety.

" The

" The Defence of the Pariſh of St. *Michael le Quern* " was, that the laſt Election was not a *joint* one: that " they claimed a Right of chooſing a ſeparate Sexton: " and had given Notice to St. *Vedaſt*.

" The Court determined, that be the Merits of the " Election as they might, *this* Action would not lie. " For that Money laid out and expended, could not be " thus charged on a party againſt expreſs Notice to " the contrary.

" But it will lie on Money laid out and expended in " performance of an Act which I was under *moral* " *Obligation* to perform; if another perſon does it " without my requeſt, and I *after* promiſe to pay. But " of this more hereafter, when we ſpeak of the *Aſſump-* " *ſit* for work and labour done. L. N. P. 147.

" On Action of *Aſſumpſit*, the ſecond Count was for " Money *laid out and expended*. A Note was given in " *Evidence* in theſe Words:—This is to certify, that it is " my requeſt that you pay to Mr. *D.* on account of " Maſter *H.* (an *Infant*, Grandſon of the Defendant), " for the Workmens uſe, the Sum of 15 *l.* as Witneſs " my hand *S. H.*—Held that the Note ſupports the " Declaration. Harris v. Huntchback. 1 Burr. Manſf. 373.

TITLE IV.

3. MONEY HAD *and* RECEIVED.

" We now come to the moſt *equitable* and exten- " ſive of this Species of Action: every one of which " is founded in *Equity*, and directed by the Rules of " *ſubſtantial Juſtice*.

" Let

" Let us, firſt, therefore, ſee againſt *whom* an " Action for *money had and received* will *not* lie.

Par. 2.

Againſt whom it will not lie.

L. N. P. 133. Staplefield v. Ewd. Tr. 27 G. II. Sadler v. Evans. Tr. 6 G. III. Whitbread v. Brookſbanks. Cowp. 69. Campbell v. Hall. Cowp. 205. L. N. P. 133. Cowp. 566, 568. L. N. P. ut ſup.

" It will *not* lie againſt a *Receiver* or *Collector* to " recover an *over-payment*; for where a Man receives " Money for another, under Pretence of Right, and " *pays it over*, the Law will not ſuffer the Right of " the Principal, while he retains any Colour of Right, " to be tried in this Action againſt the *Receiver*; whe- " ther ſuch Receiver be a public or a private Agent: " otherwiſe if the Receiver have had *Notice* not to " pay over, and yet pays it over, notwithſtanding.

1 Raym. 742.

" But it will lie for Money paid in purſuance of " an evidently void Authority.

L. N. P. 133. Salk. 27. Mic. 2 A. Jacob v. Allen.

" *A.* took out Adminiſtration to *B.* and appointed " *J. S.* his Attorney, who received Money, and *paid* " *it* to the *Adminiſtrator:* afterwards a Will appearing " the Executor brought an *indebitatus aſſumpſit* againſt " the Attorney; and it was holden by *Trevor*, Chief " Juſtice, at *Guildhall*, that the Authority being void " it was a Receipt of ſo much Money for the Uſe of " the Plaintiff on an implied Contract, for which *in-* " *debitatus aſſumpſit* well lies.

I am happy to find that there is great Authority for this Doubt. See 4 Burr. Manſf. 1986.

" Yet perhaps it may be thought, that if the At- " torney was not privy to the exiſtence of the Will " afterwards diſcovered, and had no notice from the " Plaintiff touching the Payment over, that the Party " who ought to have been ſued was he who took out " Adminiſtration; the Principal, not the Agent.

" It

"It will not lie for Money paid for the releaſe of "Cattle diſtrained, as *damage feaſant:* becauſe it gives "no notice to the Defendant, whether the *Merits* or "the *Form* will be brought in queſtion; and if the "Merits, it is uncertain what juſtification the Plaintiff "will ſet up: whereas in *Treſpaſs* or *Replevin*, the "Right claimed for the Cattle to be on the ſpot where "taken muſt ſpecially appear on the Record.

* Lindon and Hooper. Hil. 16. G. III. Cowp. 414---9.

"Nor (for like Reaſons) is it a proper Action to try "a Warranty.

Power v. Wells. Cowp. 818, 9.

"It will not lie where a Contract is *open:* for there "the Right is not to the *whole* Money, but to the "*Damages*; and then he muſt ſtate the *ſpecial* Con-"tract.

Towers v. Barrat. Hil. 26 G. III. T. R. 133---6.

"It will not lie where a Perſon has paid Money, "which in *Conſcience* he *ought* to pay, though, by "availing himſelf of an advantage from a general "proviſion of Law, he might have *avoided* payment; "as in the Caſe of a *bonâ fide* Debt, which is barred "by the Statute of Limitations, or a Debt contracted "during Infancy, which in *Juſtice* he ſhould diſ-"charge.

Farmer v. Arundel. C. B. Tr. 12 G. III. Bl. R. 824, 5, 6. Bize v. Dickaſon. T. R. 286.

"Still leſs does it lie for Money which a Man has "has paid for an illegal and unjuſtifiable Conſidera-"tion: as Money to bribe a Sheriff's Officer to accept "Bail; or where the Keeper of a *Lottery Office* has "paid Money to the inſured, in conſequence of "Tickets inſured, contrary to the Statute.

Smith v. Stoteſbury. 2 Bl. 204.

Browning v. Morris. E. 18 G. III. 790---3.

"But it will lie to recover the Premium on ſuch "Inſurances.

Jaques and Golightly. 2 Bl. 1073---5.

Cowp. 116. Teſſons v. Brooke, 793--7.

" Nor where the demand, though in ſtrictneſs legal, " is hard and unconſcionable, and the Plaintiff might " have had a remedy more ſuited to the ſtrictneſs of " his Caſe; for this Action is analogous to a *Bill* in " *Equity*.

T. R. 399.

" It will not lie for the *Nominee* of a perpetual Cu- " racy till he is in poſſeſſion: and he is not in poſſeſſion " without *licence* from the Biſhop.

3 Wilſon, 355.

" Otherwiſe of a *Donative*.

Par. 3.

Caſes of a particular Nature where it is the proper Remedy.

" It is now time to conſider Caſes of a ſpecial Na- " ture, in which it will lie.

" It will lie for *Notes* or *Money* againſt a third per- " ſon into whoſe hands they are come *mala fide*, pro- " vided their *identity* can be aſcertained.

" The Facts upon the Caſe reſerved were the fol- " lowing:

Clarke v. Shee and Johnſon. Cowp. 197--- 200.

" *David Wood*, Clerk to the Plaintiff, a Brewer, " and receiving Money from the Plaintiff's Cuſtomers, " and alſo negotiable Notes for the Plaintiff's Uſe, in " the ordinary courſe of buſineſs, paid ſeveral ſums " *with the* SAID *Money and Notes*, at different times, " to the Defendants, upon the chances of coming up " of Tickets, in the State Lottery of 1772, con- " trary to the Act of the ſaid year.

" The Plaintiff and the ſureties of *Wood* gave " him a *releaſe*.

" The Queſtion was, whether *Wood* was an admiſ- " ſible Witneſs.

" 2. If

" 2. If admiſſible, whether on this Caſe the Plain-
" tiff is entitled to recover in this Action?

" It was decided, that *Wood* was an *admiſſible* Evi-
" dence.

" That this being a liberal Action, if the Defen-
" dant cannot in conſcience retain what is the ſubject
" of it, the Action will lie.

" That it is not a Caſe of *equal criminality*; where
" the rule* would prevail in favour of the Defen-
" dant. The Plaintiff does not ſtand in the Place of
" his Clerk: the money was all along the Maſter's,
" and the Property continuing unchanged, the Plain-
" tiff is well entitled to recover.

So 1 Burr. 452. and Golightly v. Reynolds. C. L. 88.

" On a *Conviction* of a Churchwarden for Neglect of
" Duty, the *Overſeers* levied the Penalty, but had *not*
" *paid it over*, or applied it to the Uſe of the Pariſh.

Feltham v. Terry. E. 13 G. III. C. L. 207, &c. and Cowp. 416. 419 S. C. cited.

" The Conviction being quaſhed, an Action for
" *Money had and received* was brought againſt the Over-
" ſeers to recover the Penalty. It was objected that
" the taking was *tortious*, and therefore *Trover* or *Treſ-*
" *paſs* ſhould have been brought.

" The Court was of opinion, that the Plaintiff might
" well *waive* the *Tort*, and that this Mode of Action
" was in *favour* of the Defendant. The Plaintiff could
" recover nothing but what was conſcientiouſly due;
" the Defendant loſt no defence which he could make
" *bona fide*.

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* In pari delicto potior eſt conditio defendentis.

L. N. P. 133. Salk. 28. Haſſer v. Wallis. Hil. 6 A. B. R.

" In *Aſſumpſit* for Money *had and received* to the Uſe " of the Plaintiff, *proof* that the Defendant was a " married Man, and that pretending to be ſingle, he " had married the Plaintiff, and made a Leaſe of her " Land, and received the Rent, would be ſufficient to " maintain the Action; for, though the Defendant not " having a Right to receive, the Tenants were not diſ- " charged by his Receipt, yet the Recovery in this " Action would diſcharge them.

L. N. P. 132.

" It will lie where Money has been *extorted*.

Aſtley v. Reynolds. Mic. 5 G. II. 2 Str. 915.

" Thus, on Action for Money *had* and *received*, the " Facts on the reſerved Caſe were, that about three " years before the Action the Plaintiff pawned plate to " the Defendant for 20 *l.* and at the three years end " came to redeem it, and the Defendant inſiſted to have " 10 *l.* for the *intereſt* of it, and the Plaintiff tendered " him 4 *l.* knowing 4 *l.* to be more than legal Intereſt: " the Plaintiff, however, at length, not being able other- " wiſe to obtain his Goods, paid the 10 *l.* and brought " this Action to recover the Exceſs beyond legal In- " tereſt.

" The Court thought this a payment by compulſion: " for that the Plaintiff might have ſuch neceſſity for " his Goods that *Trover* would not anſwer: and the " Plaintiff accordingly had Judgment, which was " ordered to be entered *nunc pro tunc*, the Defendant " dying during the Argument.

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† The implied Limits of the principle in the *Roman* Law—*Quod quis ſciens indebitum dedit, hac mente ut poſtea repeteret, repetere non poteſt.* D. XII. 6. 50. are therefore, *ultro*; ex malâ fide.

" So

" So where the Nurſe of the Plaintiff's inteſtate " went off with the Money he had about him; a " Caſe within a nice ſhade of difference from *ſtealing*. Thomas and Whip. Tr. 1 G. I. L. N. P. 130.

" *B.* owes Money to *A.* and pays it to *C.* as Attorney " of *A.* whereas in reality *C.* had no Authority from " *A. B.* is liable ſtill to *A.* for the Money, and his " Remedy is againſt *C.* by this Action. Robſon v. Eaton. T.R.62. M. 26 G. III.

" But the whole Doctrine of this ſpecies of *Aſſumpſit* " has no where been more clearly elucidated than in " the Caſe of MOSES and MACFERLAN: with which, " therefore, I ſhall cloſe this Title on the Action for " for Money *had and received*. The Caſe was this. E. 33 G. II. 2 Burr. Mansf. 1006--12. S. C. 1 Bl. 219---21.

Par. 4.

The leading Caſe, Moſes *and* Macferlan.

" The Plaintiff in *this* Action, *Moſes*, had indorſed " to the Defendant in the ſaid Action, *Macferlan*, four " ſeveral *promiſſory Notes* made to *Moſes* himſelf by one " *Chapman Jacob*, for 30 ſhillings each, for value re- " ceived, bearing date 7th *Nov.* 1758; and this was " done in order to enable the Defendant, *Macferlan*, to " recover the Money in his *own* Name againſt *Chap-* " *man Jacob*; but previous to the indorſing of theſe " Notes by *Moſes*, he was aſſured by *Macferlan* they " ſhould be of no prejudice to him; and there was an " AGREEMENT ſigned by *Macferlan*, whereby he en- " gaged *expreſsly*, *that* MOSES *ſhould not be liable to the* " *payment of the Money*, *or any part of it*; *and that he* " *ſhould not be prejudiced*, *or put to any Coſts*, *or any way* " *ſuffer by reaſon of ſuch his Indorſement*.

" Notwithſtanding this expreſs CONDITION and " AGREEMENT, the Defendant in this Action ſued " *Moſes* in the *Court of Conſcience* upon each of the " four Notes, as *Indorſer*.

" *Moſes*, by his ſolicitor, tendered the before-men-
" tioned *Indemnity* to the Court upon the firſt of the
" ſaid Cauſes, and offered to give *Evidence* of it, *and*
" *of the Agreement*, by way of Defence: this the Court
" of Conſcience *rejected*; and refuſed to receive Evi-
" dence in proof of the Agreement, thinking they
" had no power to judge of it: and gave Judgement
" againſt *Moſes*, on the Footing merely of his *In-*
" *dorſement*.

" This Decree was actually pronounced in only *one*
" of the *four* Cauſes: but the Agent of *Moſes* paid
" the Money into Court upon *all the four Notes*; and
" it was taken out of Court by *Macferlan*, by order of
" the Commiſſioners.

" The whole Matter, as ſtated, thus appearing in
" Evidence before Lord MANSFIELD, at *Guildhall*,
" there was no Doubt but that on the *Merits* the Plain-
" tiff was entitled to the Money; and accordingly a
" Verdict was there found for *Moſes*, for 6 *l.* (the
" whole ſum paid into the Court of Conſcience) ſub-
" ject to the opinion of the COURT of KING'S BENCH
" on the following Queſtion:

" Whether the Money could be recovered in THIS
" FORM *of Action*, or whether it muſt be recovered by
" an *Action brought upon the* SPECIAL AGREEMENT
" *only?*

" In delivering the Opinion of the Court, Lord
" MANSFIELD ſtated theſe Reſolutions.

" He

" He laid aſide the Objection intimated at the Bar, " though not included in the Grounds on which the " Caſe was reſerved, as if the Deciſion of the Court " of Conſcience had bound this Queſtion.

" That this was not a Caſe of again agitating a " Queſtion once decided by a competent Juriſdiction: " this Queſtion had never been decided by the Court " of Conſcience; the Ground of this Action is con- " ſiſtent with their JUDGEMENT: it diſputes not the " Deciſion of the Commiſſioners on the *Indorſement:* " it proceeds upon a point not included in their ſen- " tence.

" If the Commiſſioners had been wrong in waiving " Cognizance of this collateral Matter, it is ſufficient " that they did waive it: but they appear to have " done right in ſo refuſing: as otherwiſe, on Defence " againſt a promiſſory Note for thirty ſhillings, they " might go into Agreements and Tranſactions of a " great Value, and thus by their Judgement *indirectly* " conclude a Balance of a large Account.

" The Plaintiff comes therefore before the Court on " a Queſtion *entirely open*; the Ground of this Action " being, not that the Judgment is wrong (which never " could be brought over again in any ſhape) but that " for a Reaſon of which the Plaintiff in this Action " could not avail himſelf againſt that Judgement, the " Defendant ought not in Juſtice to KEEP the *Money*.

" Money may be recovered by a right and legal " Judgment: and yet the Iniquity of *keeping* the

" Money may be manifeſt upon Grounds which could " not be a Defence to that Judgement.

" As ſuppoſe the *Indorſee* of a promiſſory Note, " having received the Money from the *Drawer*, recovers " the ſame Money from the *Indorſer* who knew nothing " of the payment.

" Suppoſe a Man recovers upon a Policy for a " *Ship* preſumed to be *loſt*, which afterwards comes " *home*; or upon the Life of a Man preſumed to be " *dead*, who afterwards *appears*; or upon a Repreſen- " tation deemed to be *fair*, which comes out afterwards " to be groſsly *fraudulent*.

" The very Mode of ſtating the Queſtion for the " Opinion of the Court, *admits* that the Judgement is " no Obſtacle to the Application of the Plaintiff, " *Moſes*; for that, were it indeed affected, would be ſo " alike by an *Action* UPON *the Agreement* itſelf, or upon " the preſent one derived from the *Equity* of the Plain- " tiff's Caſe, ariſing *out* of the Agreement.

" That it remained therefore only, within the Terms " of the Queſtion ſaved at *Niſi prius*, whether the Plain- " tiff might elect to ſue by this Form of Action for the " *Money only*, or muſt be turned round to bring an " Action upon the Agreement.

" That the Action, as brought for Money had and " received, was equally beneficial to the *Plaintiff*, " whom it allowed to *declare generally*, and prove the " ſpecial circumſtances of his Caſe on the Trial, and

" to

" to the Defendant, who can be liable no farther than " for the Money he has received, and to that has every " equitable Defence on the general Iſſue: ſecure at " the ſame time againſt farther litigation; as Judge- " ment upon this favourable Action would be a *Bar* to " the Plaintiff's proceeding on the Agreement, though " upon that he might have recovered more.

" That it is not only thus on Principles of *Reaſon* " and of *public Utility*, but thus by many Precedents: " by one particularly, which was very ſolemnly con- " ſidered, when Sir PETER KING was *Chief Juſtice* " of the COMMON PLEAS: that was an Agreement in " Writing to transfer five ſhares in the *Welch* Copper " Mines, when the Books ſhould be opened: the " Books were opened: the party who had made the " Agreement refuſed to transfer, whereupon the Ac- " tion was brought for the Conſideration Money paid. " The objection then was, that this Action, for Money " *had and received*, to the Plaintiff's Uſe, would not " lie; but that an Action ſhould have been brought " for *Non-performance of the Contract*. This was over- " ruled by the *Chief Juſtice*, who notwithſtanding left " it to the Jury, whether they would not make the " Price of the ſaid Stock, as it ſtood when it ſhould " have been delivered, the *Meaſure* of the *Damages:* " which they accordingly did.

" And a Caſe being made for the Opinion of the " Court of *Common Pleas*, the Action was reſolved to " have been *well brought*, and that the Recovery was

" *right*;

It will lie for Money paid by Miſtake, Impoſition, or Extortion: but not for Money juſtly paid; or for more than has been paid unjuſtly.

"*right*; being not for the *whole* Money paid, but for "the *Damages*, in not transferring the ſtock at *that* "*time*, which was a Loſs to the *Plaintiff*, and an Ad- "vantage to the *Defendant*; who was a Receiver of the "*Difference* to the Plaintiff's Uſe.

"That the Damages recovered in that Caſe ſhew "the *Liberality* of this Action: for though the De- "fendant received conſiderably more, yet the DIF- "FERENCE MONEY only was retained *againſt Con-* "*ſcience:* and the Plaintiff, therefore, *ex æquo et bono*, "ought to recover no more: agreeably to the Rule of "the *Roman Law—Quod Condictio indebiti non datur* "*ultra quam locupletior eſt factus qui accepit.*

"And the Court there ſaid, that the *extending* of "theſe Actions depends upon the Notion of *Fraud:* "whence it is at the *Election* of the ſufferer either to "diſaffirm the Contract *ab initio*, by reaſon of the "Fraud, and bring an Action for Money *had and* "*received*, to recover a payment for which he has no "*Conſideration*; or to *affirm* the Contract, and bring an "Action for the *Non-performance of it.*

"That this equitable Action being *very beneficial* "ought *much to be encouraged*, as it lies for nothing "which *in Honour* and *Honeſty* has been rightly paid: "ſo that even on an *uſurious* Contract the Principal and "*legal* Intereſt ſhall not be refunded in this Action; "and as it will lie for Money paid by *Miſtake*, by *Im-* "*poſition*, under Oppreſſion, Extortion, or other undue "Advantage.

So of *Trover*, for the like Reaſon. T. R. 153.

"Our next is Goods ſold and delivered at a Price "certain.

"This

Is qui non debitum accepit, ab eo qui per errorem ſolvit re obligatur: daturque agenti contra eum propter repetitionem *condictitia* Actio: nam perinde ei *condici* poteſt, *ſi apparet eum dare oportere, ac ſi mutuum acceptſſet.*

I. III, 15. I. IV. 13.

Si

Title III.

4. *Goods ſold and delivered at a certain Sum.*

"This is not greatly different from the Action of "*Debt*, except in that circumſtance of its being clear "of the *Wager* of Law.

"We will firſt on this ſubject conſider Contracts, "which may be the ſource of this Action, when made "by a Wife, an Infant, a *Factor*, or other Agent.

Par. 2.

Contract *by the* Wife.

"Generally," the Wife cannot by Contract bind the Huſband: for the Huſband is the ſuperior and governing power; and the Law hath entruſted him with the Conduct of the whole Family: and therefore the Wife's Acts in bargaining are wholly void: and if found by ſpecial Verdict, are not ſufficient to bind the Huſband.

But the Act of the Wife contracting is *preſumptive* Evidence to perſuade the Jury of the Contract of the Huſband: for if the Huſband permits another to contract for him, it is his own Contract: and this, "as "will be ſeen, furniſhes a Ground of Action on the "implied Agency even in this Caſe of a ſtranger: "much more in this neareſt of Relations: therefore" where the Wife, cohabiting with the Huſband, takes up Goods in his Name, this *primâ facie* is the Con-

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Si *metu* coactus aut *dolo* inductus, aut *errore* lapſus *Titio* promiſiſti, iniquum eſt te condemnari; ideoque tibi datur exceptio metus causâ, aut doli mali; aut *in factum compoſita*, ad impugnandum actionem.

Si quis *indebitum* ignorans ſolvit per hanc Actionem condicere poteſt . . . . . nam hoc natura æquum eſt, *neminem alterius damno fieri locupletiorem.*

Si procurator tuus *indebitum* ſolverit et tu ratum non habeas poſſe repeti *Labeo* ſcripſit: quod ſi *debitum* fuiſſet non poſſe repeti, *Celſus*; quoniam cum quis procuratorem rerum ſuarum conſtituit, id quoque mandare videtur ut ſolvat creditori, neque poſtea expectandum ſit ut ratum habeat.

Judex ſi male abſolvit et abſolutus ſua ſponte ſolverit, repetere non poteſt. D. XII. 6. 1. 14.

Hæc Condictio ex bono et æquo introducta, quod alterius apud alterum SINE CAUSA *deprehenditur, revocare conſuevit.* § 6. Ibid. 28. 66.

Actione Condictionis EA SOLA *quantitas repetitur quæ* indebita *ſoluta eſt.* C. IV. 5.

Multo facilius quantitatis indebitæ interpoſitâ ſcripturâ condictio competit. Ibid. § 3.

Contract of the Husband: for it is to be presumed that the Husband will trust so near a Relation to act for him.

But if at the time of the Contract, the Wife were absented from the Husband, this is so far from being the Contract of the Husband, that it is rather the contrary: for it cannot be presumed that an Husband should trust a Wife eloped as his Agent to act for him: so that her contracting in his Name is no Evidence to charge him.

The usual Employment of the Wife cohabiting with the Husband is good Evidence: but this is no conclusive Evidence: for possibly she might have been always employed with ready Money: so that it is still a stronger Evidence, if the Husband has paid the Debts of the Wife where she has been entrusted.

Again, that the Things were necessary for the Husband and Wife and the Family is good Evidence of a Contract to bind the Husband: for though the Things are of Necessity, yet possibly that Necessity might be otherwise provided for: and they must be necessary not only for his Degree but to his Estate also, to make the Evidence nearer to conclusive.

Again,

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* *D'Alembert and Rousseau.*

Of this factitious Necessity— de la bienseance *—*as some of the best* French *Writers term it (adopting the popular Language, but restraining the Application within philosophic Limits)* SHAKSPEARE, *with the Energy of his style, sentiment, and expression of Character—*

LEAR.

O! reason not the need! our basest beggars
Are in the poorest thing superfluous:
Allow not Nature more than Nature needs,
Man's Life is cheap as beasts: thou art a lady;
If only to go warm were gorgeous,
Why, Nature needs not what thou gorgeous wear'st;
Which scarcely keeps thee warm.

In his sufferings he acquires an exacter sense of mere real Necessity, and of the inattention which Wealth and Power create to the absolute Wants of others, in minds occupied with their own *imaginary* ones.

Poor

Again, it is good Evidence to prove the Contract of the Husband, that the Things bought by the Wife came to the Use of the Husband and his Family: and yet this is not absolutely conclusive; "for though *primâ* "*facie* it presumes Notice," he possibly "may be able "prove" that he had no Notice that they were bought "on Credit, otherwise he would not have used them;" "and he may shew this by shewing a special warning "not to give Credit: for" if the Husband forbid any person to trust his Wife, and he do trust her, this is "conclusive" Evidence that the Husband never designed, "or could by him, after such Notice, be un-"derstood, to assent" to contract with him by means of his Wife; and therefore he cannot charge the Husband on any such Contract.

If the Husband be absent from the Family, and Goods are bought by the Wife, this is good Evidence to prove to the Jury, that the Wife did contract in the place of her Husband; but this is not absolutely conclusive; for possibly he left ready Money, or made some other Provision for his Family.

"But in this, and every similar instance," there is a great Difference between Evidence offered to the Jury, and Evidence offered to the Court on a special Verdict; "and the Contract in this Case is a Fact to be found by "the *Jury* from the Evidence before them: for it is a "Matter *en Païs*, of which they are the proper and "*sole* Judges. Thus" if they find that the Wife contracted

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Poor naked Wretches, wherese'er you are,
That bide the pelting of this pitiless storm,
How shall your houseless heads and unfed sides,
Your loop'd and window'd raggedness defend you
From seasons such as these. Oh, I have ta'en
Too little care of this! Take Physic, Pomp;
Expose thyself to feel what Wretches feel,
That thou may'st shake the superflux to them,
And shew the Heavens more just.

Actus necessarii pro legitimis habentur; modo justa sit Necessitas.

tracted for Neceſſaries in the Abſence of her Huſband, this is good *Evidence* to perſuade the *Jury* that the Huſband did contract, and that his Will was concurring and went along with her in this Tranſaction: but if this be found and offered to the Court, the Court cannot judge it is the Contract of the Huſband.

For the Jury are the only Judges of the Fact, and they are to make the Deductions and *Concluſions* as to the *Truth of the Fact* from the Evidence before them. But the Court cannot make any Deductions or Concluſions as to the Truth of the Fact, ("or, in other "Words, the Concluſion of Fact, as between the parties "involved in the Evidence") unleſs they flow neceſſarily and demonſtratively from the Evidence which the Jury have ſtated: for they are not Judges of *probable* or *improbable*, but of *lawful* and *not lawful*. If therefore the Jury do only lay before the Court ſuch "Evidence" as would induce a Man to believe that the Contract of the Wife was confirmed of the Huſband they cannot adjudge it to be ſo: "for the Jury, by not finding this, "have impliedly negatived it;" and "the Court" not being Judge of the Probability of Fact, but of the Law only, if the Jury do not lay before them the *infallible* ſigns of a Contract, the Judges, who are to intend nothing, cannot adjudge it to be a Contract.

"And this leading Principle ſhould be kept in "Mind wherever a ſpecial Finding on an Iſſue before "the *Jury* is to take place: it applies, upon Analogy "of Reaſon, to *Orders* of *Seſſion*.

"If,

" If, during the *Cohabitation*, a *Wife* contracts " Debts for *Neceſſaries* which the Huſband hath neg- " lected to provide, he is obliged to pay for them.

Comm. I. 442, 3. L. c. W. 66, 7. Salk. 118, 119.

" If a Man put his Wife out of Doors, this amounts " to a general Credit for Neceſſaries; and a perſon " who has ſupplied her with theſe, notwithſtanding a " Warning not to truſt her while ſhe lived with the " Huſband, ſhall recover againſt the Huſband.

L. N. P. 135. Longworth and Hachmorc. Ex. 10 W. III.

" If a married Woman lives oſtenſibly as a *Femme* " *ſole*, ſhe ſhall not be permitted to take credit in that " character, and defeat the remedy by pleading her- " ſelf a married Woman.

" Where the Huſband had *abjured* the Realm, under " the privilege of ſanctuary, to avoid ſuffering death " as a Felon, the Wife was liable to be ſued as a " *Femme ſole*. TRANSPORTATION hath been held to " render her ſuable in like manner.

Comm. IV. 332.

" And where there was a ſeparate maintenance, and " the Huſband reſident in *Ireland*, the Wife was held " ſuable as if ſole.

" Where there is a ſeparate maintenance, and the " Huſband lives in *England*, a Caſe in the *Common* " *Pleas* was determined on the ground of its being ta- " ken to be neceſſary that the Name to the Huſband " ſhould be joined for conformity. A later Caſe, how- " ever, ſeems to diſallow this Neceſſity.

Sparrow v. Caruthers. 2 Bl. R. 1197, 8. Ringſtead v. Laneſborough. Hil. 23 G. III. Lean v. Schutz. Bl. R. 1195.

" And in a preceding Caſe it was ruled that merely " to aver *Elopement* would not warrant a ſuit againſt " the Wife ſingly: for that Elopement had not the " ſame

Barwell v. Brooks. Hil. 24 G. III. B. R. Hatchett v. S. Baddeley. Bl. R. 1079.

" ſame legal ſenſe which modern Converſation ſeems " to annex to it; and implied no more than that ſhe " had abſented herſelf without his concurrence.

Par. 3.

Goods ſold and delivered to an Infant.

" Though an Infant may bind himſelf for *Neceſ-* " *ſaries*, yet a Contract for things otherwiſe allowable " under that Deſcription is not ſuable againſt an In- " fant living with the Parent, who is preſumed to pro- " vide his Child with ſufficient Neceſſaries: and if he " does not, it is the Parent ſhould be ſued."

V. Bambridge and Pickering. Mic. 20. G. III. Bl. R. 1325.

Upon *Non aſſumpſit* the Defendant may give Infancy in Evidence in Diſcharge of the Promiſe; but if a Man were at Iſſue upon *Non eſt Factum*, Infancy cannot be given in Evidence: but muſt (" as already has been " declared") be pleaded. For where the Iſſue relates to a ſolemn Contract, which Contract had a " pre- " ſumptive" Obligation at the time of making, that is a full Proof of the Iſſue; for " the" ſolemn Contract " carrying its own" Force, the Court ought to ſee that it is legally diſſolved: but where there is a Contract in Iſſue that " hath" not " ſuch preſumption in its " favour, being" not executed with " legal" ſolemnity, there a man may give in Evidence, on the general Iſſue, that it had no Obligation by reaſon of Infancy. For where there are not Solemnities of Contract exhibited to the Court, it is not neceſſary that the Court ſhould ſee the Diſcharge of that Contract: and therefore if the Plaintiff, on the Iſſue, proves himſelf an Infant, it amounts to the Proof that he could not *aſſume*, and therefore no *Aſſumpſit*.

" And

"And generally under this head it is proper to obſerve, "that the" Contracts of "an" Infant are not void, but voidable, "at his Election, when to his Prejudice: "and on this Principle where" an Infant brought an Action for ſix Pounds, for which the Defendant became indebted by a Contract to cut his Graſs, and carry it away, paying him ſix Pounds, it "was held" no Objection to ſay that the Plaintiff is an Infant, and ſo could give no ſuch permiſſion; "for the Infant" was entitled to an Action for cutting of his Graſs, "as it "ſhall not lie in the Mouth of the contracting Party to "ſay that the Act of the Infant was good to entitle "him to the Graſs, and yet not of force to ſubject "him to payment for it:" and therefore here is a good Conſideration, if the Infant will abide by his Bargain.

"And on the like Principle that Contracts by an "Infant are good when clearly for the eſſential Benefit "of the Infant, and that it is expedient parties ſhould "be encouraged thus to contract with one by the Cer-"tainty of ſuch Contracts being legally eſtabliſhed as "are fairly within this Deſcription, the Validity of his "Engagement for Neceſſaries under the Limitation "already ſtated depends; ſuch are meat, cloathing, "and requiſite inſtruction, and the Contract for theſe "ſhall bind the *Infant*.

"Some Acts alſo he is empowered to do for the benefit "of the Community: and this is not improper to be "here noticed, as it illuſtrates the reaſons of the Law "concerning the Contracts and other Tranſactions of "an Infant. Therefore it has been held that an Infant

"ſhall preſent to an Advowſon, leſt an Avoidance "ſhould be incurred, and this one ſhould have pre- "ſumed to mean the Guardian *jure Infantis:* but a "ſtrange Method has been preferred of executing "this Truſt in behalf of the public; for in the ex- "cellent Notes on the Firſt *Inſtitute* of *Coke*, it is re- "marked, that in another Work he extends this Doc- "trine ſo far as to ſay that the infant ſhall preſent, 3 Inſt. 156. "whatever his Age may be. But that ſome ſuppoſe "the Guardian to have the Right of preſenting in the "Name of the Infant; while others, again, admit the "Right of the Infant in general, but add, that if the "Infant be of ſuch tender years as not to have any Vin. Abr. Guardian. Q. pl. 2. "diſcretion, then the Guardian ſhould preſent for him: "but that however the Law now ſeems fully ſettled in "the Extent of Lord *Coke*'s opinion by a determina- "tion of Lord *Chancellor* KING, in a Cauſe before "whom an Advowſon had been conveyed to *Truſtees*, "on Truſt, to preſent ſuch perſon as the Grantor, his "heirs or aſſigns ſhould by deed appoint: and on the "principle that an Infant *of any Age* may appoint, "his Lordſhip confirmed an appointment by an infant "heir, though it appeared that the Child was *not a* "*year old*, and that the Guardian guided the Child's "pen in making his mark and putting his ſeal: yet "the learned Annotator well obſerves, that although 2 Eq. C. Abr. *Infant.* B. pl. 3. Vin. Abr. Collation. A. pl. 10. Watſon's Clergyman's Law. Ed. 1740. p. 140. 3 Atk. 710. "this Deciſion may remove all doubts about the legal "Right of an Infant of the moſt tender years to pre- "ſent, it remains to be ſeen whether circumſtances "would not induce a *Court of Equity* to controul the "exerciſe, where a preſentation is obtained from an "Infant without the concurrence of the Guardian.

"This,

" This, one may add, would be an Interpoſition " which could hardly fail of taking place: and indeed, " can it be ſuppoſed that the ſignature but now ſtated " was regarded other than as an aukward and burleſque " Mode, by which the Guardian did, in the Name of " the Infant, an Act neceſſary to be done, and which " the Infant was ſubſtantially incompetent to per- " form?

" *Aſſumpſit* for Goods ſold: the Defendant pleaded " *Non-age:* the Plaintiff replied, they were for his, " the Infant's, neceſſary livelihood, and Proviſion for " the Maintenance of his Family: the Defendant re- " joined, that he kept a Mercer's ſhop at *Shrewſbury*, " and bought thoſe Wares to ſell again, and traverſed " that he bought them for Neceſſaries: and *Demurrer* " thereupon. L. N. P. 154, 5. Cro. Ja. 494.

" And by the *Court*: This buying for the Mainte- " nance of his Trade, though he gain thereby his " living, ſhall not bind him: for an Infant ſhall not " be bound by his Bargain for any thing but for his " Neceſſity; *viz.* Diet and Apparel, and neceſſary " Learning. *

" But Mr. Baron *Clarke*, where the Defendant in " ſuch an Action before him gave his *Non-age* in Evi- " dence, directed the Jury to give a Verdict for the " Plaintiff; it appearing he had been ſet up in the " Farm, and bought the ſheep of the Plaintiff in the " way of farming; and ſaid, he thought the Law " ought not to put it in the Power of Infants to impoſe " upon the reſt of the World. And the *Scotch* Law Erſkine's Principles, L. I. T. 7. § 21. Str. 1083.

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* *With regard to the moral and religious Inſtruction of* Infants, *and others of the poorer Claſs, the Example of Mr.* RAIKES, *of* GLOUCESTER, *has extended far: two Objects, however, eſſential to the Perfection of the Plan, have not every where been equally regarded: that the Inſtruction be perfectly ſimple, free, uncircumſcribed to any Sect or Eſtabliſhment: that manual Induſtry be encouraged to go,* pari paſſu, *with intellectual Improvement.*

" is agreeable to this Determination. However, in " the Caſe of *Wyvall* and *Champion*, at Guildhall, " LEE, Chief Juſtice, would not ſuffer the Plaintiff " to recover for Tobacco ſent to the Defendant, who " ſet up a ſhop in the Country, he appearing to be an " Infant; for the Law will not ſuffer him to trade, " which may be to his undoing.

Evelyn, Bart. v. Chicheſter. B. R. Trin. 5 G. III. 3 Burr. Manſf. 1717.

" A *Copyhold* Eſtate devolved upon the Defendant " when he was an Infant of ſix Years of Age: a " Fine was aſſeſſed; and on his coming of Age, he " was admitted to the Eſtate. *Aſſumpſit* was brought " for this Fine: and, upon a Caſe reſerved, the Queſ- " tion was, whether *Aſſumpſit* would lie for the Fine, " which the Jury found to be a reaſonable one. The " Court held clearly the Action lay. And *per* YATES, " Juſtice, if *Aſſumpſit* had been brought againſt the " Infant *during his Minority*, it would have lain. *Debt*, " in this Caſe, may not lie againſt an Infant, becauſe " he cannot wage his Law; but if an Infant take a " Leaſe for Years, and hold, he may be charged in " Debt for that Rent. If an Infant be bound for Ne- " ceſſaries, he is for an old Fine, which is neceſſary to " entitle him to receive the Rents and Profits of his " Eſtate, thereout to provide Neceſſaries. But in this " Caſe it is clear beyond all Doubt: as he has con- " firmed the Contract by his Enjoyment ſince he came " of Age.

" Lord

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* *The Nature of an Exemption on account of Infancy, or from the Lapſe of Time, is juſtly and vigorouſly repreſented by a celebrated Author: and it is pleaſing to obſerve, that the ſtatement of a truth ſo frequently requiſite to be obſerved in common Life has not failed of that Attention which may contribute to diffuſe the knowledge, or awaken*

" Lord BACON, in his Maxim to illuſtrate his " eighteenth Rule, that *Proximity of Relation is equi-* " *valent to a perſonal Intereſt*, ſays, that if one under " Age contract for the nurſing of his *lawful* Child, the " Contract is good, and ſhall not be avoided by In- " fancy.

" We

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awaken the remembrance, of it in the Maſs of the Community. It deſerves to be here repeated, and with pleaſure I tranſcribe it,

As the Right of Property depends upon the Law of the Land, it ſeems to follow that a man has a right to keep and take every thing which the Law will allow him to keep and take, which in many Caſes will authorize the moſt flagitious chicanery. If a Creditor upon a ſimple Contract neglects to demand his Debt for ſix Years, the Debtor may refuſe to pay it. Would it be right *therefore to do ſo, where he is conſcious of the Juſtice of the Debt? If a perſon who is* under twenty-one Years *of Age, contract a Bargain (other than for neceſſaries) he may avoid it by pleading his minority: but would this be a fair plea where the bargain was originally juſt? The diſtinction to be taken in ſuch Caſes is this: with the Law, we acknowledge, reſides the diſpoſal of property; ſo long, therefore, as we keep within the deſign and intention of a Law, that Law will juſtify us, as well in* foro conſcientiæ *as in* foro humano. *But when we convert to one purpoſe a rule or expreſſion of Law, which is intended for another purpoſe, then we plead in our juſtification not the intention of the Law but the words; that is, we plead a dead Letter, which can ſignify nothing: for words* without *meaning or intention have* no *force or effect in Juſtice; much leſs words taken* contrary *to the meaning and intention. To apply this diſtinction to the examples juſt now propoſed: in order to protect men againſt demands from which it is not probable they ſhould have preſerved the Evidence of their diſcharge, the Law preſcribes a limited time to certain ſpecies of private ſecurities, beyond which it will not enforce them, or lend its aſſiſtance to the recovery of the Debt. If a man be ignorant or dubious of the juſtice of the demand made upon him, he may conſcientiouſly plead this limitation:* becauſe he applies the rule of Law to the purpoſe for which it was intended. *But when he refuſes to pay a debt, of the reality of which he is conſcious, he cannot, as before, plead the intention of the ſtatute and the ſupreme Authority of Law.*

Paley's Moral Philoſ. B. III Ch. 4.

Again, to preſerve Youth from the practices and impoſitions to which their inexperience expoſes them, the Law compels the payment of no Debts incurred within a certain Age, nor the performance of any engagements, except for ſuch neceſſaries as are ſuited to their condition and fortunes. If a young perſon, therefore, perceive that he has been practiſed or impoſed upon, he may honeſtly avail himſelf of the privi-

" We may add the Contract of an Infant to main-
" tain his illegitimate Child is alike good: and would
" have been ſo even prior to the ſtatutes for taking
" order concerning the maintenance of baſtard Chil-
" dren.

" So Neceſſaries for an Infant's Wife are Neceſſaries
" for him: but if provided only in order for the Mar-
" riage, he is not chargeable though ſhe uſe them after.

" But though Goods not neceſſaries be delivered to
" an Infant, if after full Age he ratify the Contract
" by a Promiſe to pay, he is bound.

Capper and Davenant. Tr. 29 Car. II. B. R.

" Yet where an Infant has given ſecurity, which by
" Law is null, it has been held that his Ratification,
" when of Age, could not have any effect: for that
" the Contract, otherwiſe voidable only, was ſo extin-
" guiſhed by giving the Bond, that nothing remained
" to raiſe a Conſideration for the Promiſe.

Borthwick v. Carruthers. T. R. E. 27 G. III. 648, 9.

" To an Action for Goods ſold and delivered the
" Defendant pleads *Infancy:* now the Plaintiff may
" allege, *that after the Defendant attained his Age of*
" *twenty-one, he ratified and confirmed the ſeveral Pro-*
" *miſes and Undertakings in the Declaration ſet forth:*
" and then if the Defendant rejoin that *he did not,* the
" Plaintiff has only to prove a Promiſe, and the De-
" fendant muſt prove he was under Age at the time of
" making ſuch Promiſe.

Zouch ex Dim. Abbot v. Parſons. 1 Bl. 575.

" On the Principles concerning legal incapacity,
" with relation to the Acts of Infants, much curious
" Learning is to be ſeen in the Caſe cited in the
" Margin.

" Where

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privilege of his non-age *to defeat the* circumvention; *but if he ſhelter himſelf under this privilege, to avoid a fair obligation, or an equitable Contract, he extends the privilege to a Caſe in which it is not allowed by intention of Law, and in which conſequently it does not in natural Juſtice exiſt.*

Par. 4.

FACTOR.

"Where a Factor beyond sea buys or sells Goods "for the Person to whom he is Factor, an Action will "lie against him in his own Name; for the Credit "will be presumed to be given to him in the first "Case, and in the last the Promise will be presumed "to be made to him, and the rather, as it is so much "for the Benefit of Trade.

L. N. P. 130. Gonsalez v. Sladen. Tr. 1 A. Guildh. Salk. M. 8.

"However, a Factor's sale does, by the general "Rule of Law, create a Contract between the Owner "and the Buyer: and therefore if a Factor sell for "payment at a future Day, if the Owner give Notice "to the Buyer to pay him, and not the Factor, the "Buyer would not be justified in afterwards paying to "the Factor.

"Yet under some particular circumstances this Rule "would not take place. As where the Factor sells the "Goods at his own Risque, being to answer to the "Owner for the Price, though it be never paid: for "in such Case *he* is the Debtor to the Owner, and not "the Buyer.

"Where a Factor is authorized to sell in his own "Name, though he is not answerable for the Money, "if not paid, yet he has a Right to receive the Money, "and to hold it in discharge of Money due from his "*principal* to him.

"He who buys goods of a Factor has not a right, "under such circumstances, to with-hold payment to "the Factor, on the ground that the *principal* is in-"debted to the Buyer in the same or a larger sum.

Drinkwater v. Goodwin. E. 15 G. III. Cowp. 256.

Par. 5.

SERVANT, *or other Agent.*

" A ſervant may be conſidered as an *Agent* or " *Factor* for his Maſter, and circumſtances will prove " with greater or leſs ſtrength that he is ſo.

" If the ſervant has been uſually employed in mak- " ing ſimilar Contracts, the Credit given to him is " juſtly deemed to be given to the Maſter.

" The Nature of the Employment in which the " Servant is retained, compared with that of the Ar- " ticle for which he is repreſented to have treated as " by Commiſſion from his Maſter, is to be regarded as " inducing a probability, or otherwiſe material to guide " the Diſcretion of the Jury.

Keb. 439. " It is" good Evidence againſt a Father that Phyſic was delivered to his Daughter on his Requeſt.

TITLE IV.

5. *A Sum certain for Work and Labour.*

" This has much Affinity to the *Indebitatus aſſumpſit* " firſt mentioned. It will lie for *Wages* aſcertained.

TITLE V.

6. *On Account ſtated.*

" The *Aſſumpſit* on *Account ſtated* will not lie againſt " an *Infant*.

L. N. P. 127,8. " This Action comes in the place of the ancient " and more ſpecial Action of Account, in which the " Judgement was that the Defendant *account*, and " then the Court aſſigned *Auditors*.

May and King. Ca. K. B. 537. " Though theſe Actions of general *Aſſumpſit* are " eminently liberal in their Form and in their Effect, " yet they have this in common with other Modes of " Suit, that the Plaintiff's Proof muſt tally with ſome

" of

" of the Counts of his Declaration. And therefore if, " in an Action for Work and Labour, and Money " lent, the Evidence were that there had been mutual " Dealings between the parties, and that they had " come to an *Account*, and that the Defendant, upon " the Balance, was indebted to the Plaintiff (*ex. gr.* 5 *l.*) " and had promiſed to pay, the Plaintiff ought to be " nonſuited, unleſs there were likewiſe a Count upon " an *inſimul computâſſet*.

" Till lately it was a received Notion, that in a " Count upon *inſimul computâſſet*, the Plaintiff was " obliged to prove the exact ſum laid. But this Idea " is now exploded; and the Plaintiff may recover part " of the ſum laid on this Count, as on a *Policy* of " *Inſurance*, or any other. Thompſon v. Spencer. B. R. E. 8 G. III. V. ſupra.

" In *Aſſumpſit* upon an *Account ſtated*, Proof that " the Defendant and the Plaintiff's Wife reckoned that " the Defendant had borrowed at one time 40 *s.* at " another time 40 *s.* and another time 4 *l.* and that " this came to 8 *l.* is good Evidence. 1 Show. 215.

Title VI.

7. *Goods ſold on a* quantum valebat.

" When Goods are ſold at a *certain* agreed Price, the " Remedy is by Action of *Debt*, or by the more uſual " and ſafer Action *indebitatus aſſumpſit*. But Goods " may be ſold, and many are daily, without any Agree- " ment, for a certain Price: and then the Law, from " the Nature of the Tranſaction, implies a Promiſe to " pay what they are reaſonably worth: of which the " ordinary Price of Goods of like Quality is Evi- " dence. Comm. III. c. 9. p. 161.

" And as to the ſale which founds the *Aſſumpſit*," Delivery of the Goods is Evidence of the ſale on the *Quantum meruit*: becauſe they ſhall be ſuppoſed to be delivered on the Bargain, and with Expectation of the Price of them.

TITLE VII.

8. Assumpsit *for Work and Labour done on a* Quantum meruit.

"Of much affinity to the preceding is this *Assumpsit*, which, for Industry and Skill employed on "my Account, assigns an adequate Consideration, "and presumes me to have engaged to pay it.

"And even a *tortious* service may acquire a Right to "this Consideration, as otherwise the injurious Party "would profit by his own *Wrong*. On this Principle "a curious and important Decision took place before "Sir GEORGE HAY.

High Court of Admiralty, 29 June, 1776. *Rogers* alias *Rigges* against *Jones*.

SHARP on SLAVERY. Append. 79.

"The Case was this:—*George Rogers* alias *Rigges*, a "Negro, aged about nineteen, had been a servant to "several Gentlemen in *England*; and in the summer of "1766, being then out of place, became acquainted "with *John Latter* and *John Seffins*, who contracted "with *Arthur Jones* for the sale of him: an Assign-"ment was accordingly drawn and signed by *John* "*Latter*, by which *Rogers* was transferred to Messrs. "*Mason* and *Jones*, as a slave, for the sum of twelve "Guineas.

"In *August*, 1766, some time after the sale, *Rogers*, "under some false Pretences, was carried on board the "*Britannia*, then lying at *Deptford*, of which *Mason* "and *Jones* were Owners, and was there against his "Will forcibly detained.

"When the ship set sail, he was so far enlarged as "to be suffered to go on deck, and not being entered "on the ship's Books as Mariner, nor having any "particular office or wages assigned, he was set to "work about the ship's Duty in general, till he was "appointed as Assistant to the Cook: in this employ-"ment he served sometimes as Assistant, and sometimes "as principal Cook, during the whole Voyage. The

"ship

" ſhip ſailed to the Coaſt of *Africa* in the SLAVE " TRADE, and from thence to *Porto Rico*, where he " was offered to ſale by the Captain of the *Britannia* " as a prime ſlave: but having found an opportunity " of making known his ſtory to the *Spaniſh* Merchants, " they refuſed to purchaſe him. He returned there- " fore with the ſhip, in which he ſtill acted in his " former capacity of Aſſiſtant Cook; and upon their " Arrival in the Port of *London*, in *May*, 1768, when " the other Mariners were paid and diſcharged, he was " ſtill detained on board againſt his Will.

" At length he made his eſcape, and by the aſſiſtance " and advice of Friends, applied to Mr. *Faulkner*, a " Proctor of Doctors Commons, to be enabled to " recover a recompence for his loſs of time and la- " bour. Mr. *Faulkner* accordingly wrote to *Arthur* " *Jones* for that purpoſe: a Meeting was appointed; in " conſequence of which *Jones*, *Seffins*, and another, " ſeized *Rogers*, forced him into a Coach, and carried " him away, removing him to another ſhip, and there " chaining him to the main-maſt till he was releaſed " by the Authority of the Court of *Admiralty*.

" In the beginning of 1774, Mr. *Torriano* was re- " tained to commence an Action againſt *Arthur Jones*, " as one of the Owners, for the purpoſe of recovering " the uſual Wages, or other recompence.

" The Cauſe was brought to a hearing on the day " ſpecified in the Margin, when the Facts being proved 29 June, 1776. " as ſtated, the principal Queſtion was, *How far the* " *Plea of* SLAVERY, *ſet up by the Defendant, could be* " *admitted in bar of the demand of Wages?*

" In

"In behalf of the Negro, it was urged that this "kind of ſlavery never, by the Law of *England*, had "exiſtence in this Country. They cited the Caſe of "*Knowles* and *Somerſet* before Lord MANSFIELD, in "which the Negro was *diſcharged*, who had been "brought up in obedience to the Writ of *Habeas Cor-* "*pus*, the Cauſe of his Detention on the return being "ſtated, which was a delivery of the ſaid Negro by "order of his Maſter, *Charles Stewart*, to the ſaid "Captain, on board the veſſel called the *Anne and* "*Mary*, then lying in the river *Thames*, at *London*, in "the pariſh of St. *Mary le Bow*, in the Ward of "*Cheap*, to be ſafely kept, carried, and conveyed "to *Jamaica*, there to be ſold as the ſlave and property "of the ſaid *Charles Stewart*.

Hargr. St. Tr. XI. 339.

"They alſo cited the Caſe of *Cay* and *Crichton*, in "which an exception to an Inventory was taken on "account of a Negro being omitted; where the Judge, "Dr. *Hay*, diſallowed this exception, for that a *Negro* "had been adjudged by the competent Juriſdiction not "to be the ſubject of Property in *England:* and there- "fore ordered the Article, charging defectiveneſs for "the omiſſion of the Negro, to be ſtruck out of the "exceptive Allegation.

Prerogative Court, 11 May, 1773. Sharp, ut ſupra. Append. 77.

"In the principal Caſe the Decree was ſubſtantially "as follows:

"There are, ſaid the Judge, two principal points "in this Caſe.

"1ſt. Whether ſuch a ſervice is proved, as ſtated in "the ſummary Petition, as to intitle the Plaintiff to "the Wages demanded.

"He

"He obſerved that the ſervice was proved by the "fulleſt Evidence: but that no Wages having been "ſtipulated, he could not be allowed a ſpecific ſum as "for WAGES aſcertained by Agreement: but that if "the Plea of *Slavery* would not interdict a Compen- "ſation, he would be intitled to a recompence *in quan-* "*tum meruit.* And that, with reſpect to the *ſecond* "point, whether the Plaintiff, being a SLAVE, could "be legally intitled to any reward for his ſervice, he "thus expreſſed himſelf:

"That the practice of buying and ſelling SLAVES "was certainly very common in ENGLAND before the "Caſe of SOMERSET in the Court of KING'S BENCH, "1772: but, however it might have been the Law "of the *Royal Exchange*, he hoped it never was *the* "*Law of the Land.*

"That the Opinions of Lord HARDWICKE and "of Lord TALBOT, when Attorney and Solicitor "General, had been quoted in ſupport of this prac- "tice, and had been formerly conſidered as giving too "much countenance to it; though ſeeming originally "to have only applied to the Queſtion, whether any "difference was created by Baptiſm.

"But that by a late Determination of one of the "ableſt Judges who ever preſided in this Kingdom, "theſe Opinions have been held to be miſtaken and "unſound; and there can be no farther doubt that "the claim of ſlavery is not maintainable by the "LAWS of ENGLAND.

"That

" That the Law, of courſe, was the ſame before " that opinion as ſince; and conſequently refers to all " ſales of this Nature, which are every one illegal; " and that therefore the pretended Sale, in the preſent " Caſe, in 1766, was an abſolute Nullity, and when " the Allegation, ſtating the Sale, was admitted, on " behalf of the Owners, had *Rogers* appeared under " proteſt, upon this point of Law, his Exception would " have been received in bar of the Plea.

" That the Owners ſeemed to have acted under a " miſtaken Notion of Right: but the Claim of SLA- " VERY being clearly againſt the Law of this Coun- " try, and it appearing that *Rogers* had always acted " in ſome uſeful Capacity during the whole time of " his having been on board, he was intitled to a QUAN- " TUM MERUIT for his ſervice; and this, on the cir- " cumſtances, he fixed at 15 *ſhillings per Month*, and " condemned the Owners in Coſts. *

Par. 2.

No Action for a Counſellor to recover his Fees.

Comm. III. 28. Davis Pref. O. A. S. 415.

" But a *Counſellor* cannot have this, or any other " Action, to obtain a pecuniary Conſideration for his " Advice; the Law of *England* concurring in this " point with the Delicacy of the *Roman* Law, in not " permitting a Price to be affixed to the performance " of this honourable Duty, in which ſo many and " arduous Queſtions muſt ariſe, where the ſpontaneous

* *By the Exertions of the* Pennſylvanian *Society, and of other public Bodies in the* AMERICAN STATES: *by the Progreſs of the* London *and* Mancheſter *Societies; by the view in which this ſubject appears to be now contemplated in* FRANCE; *and by the viſible general Tendency towards humanized Manners; there is reaſon to hope that the* Non-importation *of* NEGRO SLAVES *from* AFRICA *will be accompliſhed ſoon, and the* Negroes *at preſent under Slavery to States, profeſſing Chriſtianity and enjoying the Benefits of ſuperior intellectual* Cultivation, *become gradually free Servants under voluntary Contract: to the permanent Benefit of the Planters, and to the Recovery of the Honour, in this inſtance ſo long obſcured, of public Humanity and national Juſtice.*

" acknow-

" acknowledgement of the Client can alone be the " adequate, alone the ſatisfactory reward. *

Par. 3.

Delivery in Law.

" The following Caſe illuſtrates a point of ſome " importance, which will ſoon require to be more di- " ſtinctly inveſtigated. Menetone v. Athawes. Mic. 15 G. III: 3 Burr. Manſf. 1592.

" On *Aſſumpſit* for *Work* and *Labour done*, and *Ma-* " *terials* provided in repairing the Defendant's *ſhip*.

" The ſhip being damaged was obliged to put " back, and was to have gone out of the *Dock* on a " *Sunday*. The Dock was the Shipwright's own: but " the Owner had agreed to pay him 5 *l.* for the Uſe " of it. In the mean time, on the day precedent to " that when ſhe was to have ſailed, only about three " Hours work being wanted to complete the *Repairs*, " a Fire broke out in an adjacent Brewhouſe, which " communicated to the *Dock*, and the ſhip was *burnt*.

" And as the Dock became *quoad hoc* the Owner " of the Ship's by the Hire, the Court was of opinion, " on all the circumſtances of the Caſe, that the Action " was well brought.

" In treating of Bailments, ſimilar Conſiderations " will be hereafter to be noticed."

SECTION II.

General Observations *concerning* Assumpsit.

Condition performed.

One brings an *Aſſumpſit* for twenty Pounds, and gives in *Evidence* a Promiſe that if two would ſurrender their Right, he would pay them twenty Pounds a-piece, and that they did ſurrender their Right: this is good Evidence to maintain the Declaration: for though the Promiſe is laid *abſolutely* in the Declaration, and the Promiſe in Proof is upon Condition; yet when that Condition is *performed*, the Duty becomes *abſolute*, and ſo is a good Proof upon this Declaration. Styl. 461.

* Multa honeſtè accipi poſſunt quæ tamen honeſtè peti non poſſunt.
Noluerint rem tantam pretio vileſcere.

" Formerly

Par. 2.

Rent.

1. N. P. 138. "Formerly it was holden that *Aſſumpſit* would lie "for *Rent* on an *expreſs*, but not on the *implied* "Promiſe.

21 G. II. 19. § 14. "But now, where the Agreement is not by Deed, "the Landlord may bring an Action on the Caſe for "*Uſe* and *Occupation*, to recover a reaſonable ſatis- "faction; and if in Evidence on the Trial of ſuch "Action, any parol Demiſe or Agreement not by "Deed ſhall appear, whereby a certain Rent was re- "ſerved, the Plaintiff ſhall not therefore be nonſuited, "but may make uſe thereof as Evidence of the *Quan-* "*tum* of the Damages to be recovered.

Lewis and Wallace. Hil. 25. G. II. K. B. "In Caſe, for *Uſe* and *Occupation* of an Houſe by "Permiſſion of the Plaintiff, the Defendant pleaded "that the Plaintiff *nil habuit in Tenementis:* and upon "*Demurrer*, the Court held it not a good Plea; for if "the Plaintiff had an *equitable* Title or *no Title* at all, "yet if the Defendant have enjoyed by Permiſſion of "the Plaintiff, it is ſufficient: and it is not neceſſary "for the Plaintiff to ſay it is his Houſe any more than "in *Aſſumpſit* for Goods ſold to ſay they were the "Goods of the Plaintiff.

Par. 3.

Promiſe diſcharged or continued.

Hill v. Chaplin. Paſch. 1658. B. R. A Promiſe to marry *B.* within three Months, and after there is another Promiſe to marry her within a Fortnight: this does not diſcharge the firſt Promiſe: but if it had been a Promiſe to marry her within half a year, it would have diſcharged the firſt Promiſe; for by taking a later Promiſe of longer time, the Parties muſt be ſuppoſed to intend a diſcharge of the former, otherwiſe the latter Promiſe could have no manner of Intent.

"There

Par. 4.

Difference between ſpecial and implied Aſſumpſit.

" There is this" characteriſtic Difference between an *Aſſumpſit* in Deed and an *Aſſumpſit* in Law: in the *Aſſumpſit* in Deed, where the Contracts are mutual, and either ſide declares for Nonperformance, there he muſt ſet forth the *very* Contract, and if he miſtakes in Quantities or ſums he fails; becauſe his Injury is in the Nonperformance of the very Contract alleged in the Declaration, and if he does not ſhew ſuch a Contract, he does not entitle himſelf to a Recompence of the Breach of it.

But where he brings his Action for an *Aſſumpſit* in *Law*, if he ſhews part of the Goods delivered, or part of the Money lent, it is good: becauſe on every ſeveral Delivery of Goods, or Receipt of Money, *the Law implies* a *ſeveral* Contract for Reſtitution: and there the Giſt of the Injury is, not whether ſuch a particular Contract is broken, but whether the Goods were delivered, or Money paid to the Defendant; and the Quantity of the Goods or the ſum is no farther material than to increaſe or leſſen the Damages.

Dyer, 210. Al. 28. Styl. 62. Cro. Eliz. 292. 2 Sid. 236. Com. Rep. 373.

V. ſupra, 377.

" And therefore, where there is a ſpecial Agreement, " by which ſomething is comprized in the Contract " which the Law would not imply of courſe from the " general Nature of the Tranſaction and the common " Principles of good Faith eſſential to all Contracts", in every " ſuch" *Aſſumpſit* " this diſtinguiſhing" and ſubſtantial part of the Promiſe muſt be laid in the Declaration: as if a Man be to deliver Goods according to a ſample, " under ſpecific Terms of private " Contract between the parties, the party who means " to inſiſt on this Undertaking" muſt lay it ſo in the

Maidſtone Aſſ. 1700.

Declaration: for the Courts of Juſtice muſt go according to the *Allegata et Probata*; and it is not enough that a good Contract ſhould be proved, if it be not alleged. "And this is founded on that *univerſal* "*Logic*, which muſt pervade every rational ſyſtem of "Juriſprudence; for of this it is a neceſſary Prin-"ciple, that you cannot comprehend in the *Concluſion* "more than is contained in the *Premiſes*. Now the "*Premiſes* are the *Pleadings*, and the *Iſſue* taken on "them; Evidence therefore of Matter not comprized "in theſe will not maintain the *Iſſue*: for it goes be-"yond the Premiſes on which the legal Concluſion is "to be founded." And "therefore," if the Contract be proved otherwiſe than as alleged, that is not good Evidence to maintain the Declaration: for then it cannot be ſuppoſed the ſame Contract with the Contract alleged; and the party therefore muſt fail in the Proof of that *Aſſumpſit*.

Turner's Caſe. Hil. Aſſ. 1701. in Suſſex per Trant.

"Thus," an *Aſſumpſit* for fifteen Quarters of Malt; Evidence of fourteen *or* fifteen Quarters of Malt: and the Plaintiff nonſuited, becauſe not the ſame Promiſe: but an Obligation to deliver twenty Bales of Wool or twenty Pounds,—upon Non-payment by the Obligor, the Obligee may ſue on either.

Par. 5.

Variance, where fatal or otherwiſe.

Action on a Promiſe that the Defendant would not ſue the Plaintiff; and Evidence "that an Action was "commenced and the Defendant promiſed, on certain "conſideration," that he would *forbear* to ſue him on that Action; "Queſtion, whether this ſhall be" allowed to maintain the Declaration: becauſe the forbearing to ſue ſuppoſes the ſuit began; "and the Pro-"miſe

" miſe not to ſue, as laid in the Declaration, ſeems to " relate to an Action impending, and not yet com- " menced. However, it appears to be good; becauſe " an Action having been commenced is a Matter within " the Knowledge of the party ſued on this Promiſe, " being his own Act, and therefore no ſurprize on him " by the manner of declaring on the Promiſe: and the " material Point is the ſame; that he who ſues on the " breach of this engagement ſhould be free from legal " Moleſtation on the Matter.

If a Man aſſumes to pay ſo much money for Hops, if delivered well packed, picked, dried, and bagged, this is good Evidence on a *general Aſſumpſit:* becauſe ſo they ought to be whether "ſpecially" contracted for or not, for the party ought to make them merchantable Goods, and ſee them well delivered without any ſpecial Proviſion in the Contract, though there were no more than a general Sale of the Commodity; " and the " undertaking ſpecially to do what he was under a ge- " neral antecedent Obligation of doing, makes no Va- " riation as to the Right of ſuing on the general implied " Contract.

" But where the Contract turns on a ſpecific Agree- " ment between the Parties, there it muſt be ſtrictly " laid and proved accordingly. L. N. P. 145.

1 Raym. 735.

" Thus if an Agreement be to deliver *merchandiz-*
" *able* Corn, Proof of an Agreement to deliver good
" Corn of the *ſecond ſort* is not good.

At Salop, 1744.

" So where the Agreement declared upon was to ſell
" the Plaintiff all his *merchandizable* ſkins, and the
" Agreement produced by the Plaintiff, and ſigned by
" the Defendant, was ſo, yet the Agreement of the
" ſame Date, entered in the Defendant's Book, being to
" ſell all his merchandizable *Calves* ſkins, the Plaintiff
" was nonſuited.

" But ſome Caſes where, in reality, there may be
" deemed no Variance, ſeem to have been decided
" rather on temporary than ſettled Principles, and
" have been therefore juſtly diſcriminated from Autho-
" rities on which to rely as Precedents.

L. N. P. qua ſupra, 145.

" Such were theſe in relation to *South Sea* Con-
" tracts.

D. of Rutland v. Hodgſon. P. 12 G. I. per Raym. Ch. J.

" The Plaintiff declared upon a Promiſe to pay ſo
" much Money upon the Plaintiff's transferring ſo
" much *South Sea* Stock: at the Trial, the Note pro-
" duced appeared to be to pay on a Transfer to the
" Defendant or his Order: yet this was holden to be
" a Variance, and the Plaintiff nonſuited.

Payne and Hayes.

" The Contract declared on was, to deliver ſtock
" the 22d of *Auguſt*: the Contract in *Evidence* on the
" Trial,

" Trial, by entry in the Broker's Books, was a Con-
" tract for *opening*. It was notorious that the Books
" were to open on the 22d, and the Broker ſwore he Str. 74.
" took the 22d of *Auguſt* and *opening* to be *convertible*
" Terms. However, this was then taken to be a fatal
" Variance.

" In an Action upon a *ſpecial Agreement* to buy all Churchill v. Wilkins. T. R. Mic. 27 G. III.
" the Tallow which the Defendant ſhould have to diſ-
" poſe of, at 4*s.* per ſtone.

" The Agreement proved was, that the Plaintiff
" ſhould give 4*s.* per ſtone, and if he gave any other
" perſon more, he was to give the ſame to the De-
" fendant.

" *Eyre*, Baron, before whom this was tried, held
" this a Variance from the Declaration, and nonſuited
" the Plaintiff, and upon Cauſe ſhewn, the *Nonſuit*
" was confirmed.

" Though the Promiſe alleged be proved, yet if it Cro. El. 79
" appear to be made on a different Conſideration than
" mentioned in the Plaintiff's Declaration, it is not
" ſufficient: or if it was made on the Conſideration
" alleged and ſomething elſe beſide.

" Where in an *Aſſumpſit* two Conſiderations are al- Cro. Ja. 127.
" leged, the one good and ſufficient, the other idle
" and vain, if that which is good be proved, it ſuf-
" ficeth."

Godb. 154. In an *Aſſumpſit* the Plaintiff declares, that the Defendant, in Conſideration of Marriage, aſſumed to do ſuch a Thing: upon *Non aſſumpſit* the Plaintiff proves a Promiſe, in Conſideration of Marriage, to do three ſeveral Things: of which two were performed, and the third left undone, for which he brought this Action.

To this the Objection was taken that the Contract proved was ſubſtantially different from the Contract alleged, for to do three ſeveral things, and to do one thing, are not the ſame, but ſubſtantially different; and the Exception was allowed, and the difference taken, between a verbal Contract and a Deed: for if the Contract had been by Deed, the Plaintiff might have declared for Non performance of one only: becauſe it appears by the *Profert*, that the Contract alleged, and the Contract proved, are exactly the ſame; and therefore a Complaint for the Non-performance of one only will be well enough; but on a verbal Contract, you muſt prove the individual Contract you ſet forth in your Declaration: for if a Latitude were allowed that Contracts might be taken to be the ſame that ſubſtantially differ, no man by the Allegation could prepare any Defence; for "in" the great Variety of Tranſactions that are among Mankind, ſeveral Contracts might have a reſemblance one to another: and "therefore" men ought to be put to prove the ſame individual Contract.

"But

" But in an Action of *Aſſumpſit* againſt a common " Carrier for not ſafely carrying the Goods of the " Plaintiffs *Conſignors*, which he undertook to carry " for a certain hire and reward, to be paid by the " Plaintiffs, it was proved that the *Conſignee* had agreed " with the Plaintiffs to pay the Carriage, and it was " therefore urged that the Evidence did not maintain " the Declaration. The Judge who tried the Cauſe " being of that opinion, the Plaintiff was *nonſuited*. " On a Motion for a new Trial, the Judge candidly took " notice, that on conſidering the Queſtion, he found he " had miſtaken the point of Law: for that the (private) " Agreement between the Vendor and the Vendee " could not prejudice the (public) Right and Obliga- " tion between the *Carrier* and the Vendor, the latter " being in Law liable to the former for the hire.

Moore and others v. Wilſon. 659 T. R. E. 27 G. III.

TITLE II.

CONSIDERATION.

" A mere voluntary Contract will not raiſe a Con- " ſideration ſufficient to maintain an *Aſſumpſit*: but if " ſuch Courteſy were moved by requeſt of the Plain- " tiff, that gives an *Aſſumpſit*: and therefore, if the " Plaintiff declare, that whereas the Defendant had " differences with ſuch a Perſon, who threatened him " with an Action, and the Defendant requeſted him to " endeavour a Compromiſe, whereby a good Under-

Hob. 115. Cro. J. 18.

Res inter alios acta alteri nocere (vel præter Jus et æquum prodeſſe) non debet.

Actus privati Juri publico non intercedunt.

" ſtanding might be reſtored, and the expences of the " Law avoided; thereupon the Plaintiff did do his " endeavour, in riding, &c. for the furtherance of the " ſaid Deſire of the Defendant, who, in *conſideration of* " *the premiſes*, did promiſe to pay the Plaintiff 10 *l.* " it will be ſufficient, though the Plaintiff prove no " riding, if he prove any other effectual endeavour " according to the Requeſt: and if the Conſideration " were future, namely, that on a promiſe of 10 *l.* " from the Defendant, the Plaintiff would endeavour, " (in which caſe the Plaintiff muſt lay his endeavour " ſpecially,) and the Defendant would not deny the " Promiſe but the Endeavour; he muſt traverſe the " Endeavour in the general, and not the Riding in " the ſpecial.

" And this leads to a Diſtinction between Promiſes " upon a Conſideration executed and executory.

Par. 2.

CONSIDERATION *executed and executory.*

In Caſe of a Conſideration executed, the Defen- " dant cannot traverſe the Conſideration by itſelf; be- " cauſe it is incorporated with the Promiſe, and if it " were not then acted, it is *nudum pactum*. But if it " be executory, the Plaintiff cannot bring his Action " till the Conſideration performed: and if in Truth " the Promiſe were made, and the Conſideration not Salk. 22. " performed, the Defendant muſt traverſe the Per- " formance, and not the Promiſe, becauſe they are " diſtinct in Fact.

" Where

" Where the Action is brought upon mutual Pro- Hob. 88.
" miſes, it is neceſſary to ſhew that they were both
" made at the ſame time, or elſe it will be *nudum Pac-*
" *tum:* and though the Promiſes be mutual, yet if
" one Thing be in Conſideration of another, a per-
" formance is neceſſary to be averred, unleſs a certain
" day be appointed for it.

Par. 3.

LEADING CASE, *explaining the Nature of a* CONDITION *in Law.*

On *Aſſumpſit* the Plaintiff declared, that the 27th of *June*, 1712, at *Hoddeſden*, the Plaintiff bought of the Defendant, and the Defendant bargained and ſold to the Plaintiff *one hundred Quarters* of as good Barley as one *William Ford*'s was: to be delivered to the Plaintiff at *Hoddeſden*, between Harveſt and *Candlemas* in the ſame Year, where the Plaintiff ſhould appoint, after the Rate of ſixteen ſhillings *per Quarter*, to be paid by the Plaintiff to the Defendant; whereof the Plaintiff paid to the Defendant two ſhillings and ſixpence in hand, and agreed to pay the Reſidue at the times of the Delivery, according to the Quantity of the ſame at every time of Delivery, and according to the Rate aforeſaid: that the Defendant, after the ſaid Bargain, in Conſideration of the Premiſes, *aſſumed* that he would deliver to the Plaintiff the ſaid Barley ſo bargained and ſold, according to the Bargain. *Peeram v. Palmer.*

On *Non aſſumpſit* the Jury found four Pounds Damages, ſubject to the Determination of the Lord Chief Juſtice *Parker*, on a Caſe agreed between the Parties, which in ſubſtance is this:

The

The Defendant, on *Saturday*, the laſt of *January*, (*Candlemas Day* being the *Monday* following) in the Year 1712, and not before, delivered to the Plaintiff's Uſe, at Mr. *Plumer's* Malt-houſe at *Hoddeſden*, (where the Plaintiff appointed the Barley to be delivered) a Quantity of Barley; which was ſent for *twenty Quarters*, but when the ſame was meaſured by *Ford*'s buſhel, it was found to be but nineteen Quarters and an half according to that meaſure.

That the Plaintiff, at the time, paid to the Defendant's ſervant, who brought the Barley, *ten Pounds*, and no more; for although he had the Money, not only which the ſaid twenty Quarters of Barley, but likewiſe the one hundred Quarters came to, according to the ſame Agreement, ready by him in his Houſe; yet, becauſe the Barley did not hold out in meaſure, he paid only *ten* Pounds, and did not pay the other ſix Pounds at that time, but afterwards paid it to the Defendant before the Action brought,

That the Price of *Barley*, between the time of the Contract and the Delivery of the ſaid twenty Quarters, roſe about—&c.

"And" if, upon theſe Facts proved, the Plaintiff, upon this Declaration, hath good Cauſe of Action, or not, was referred to Determination.

In conſidering of this Matter, two Queſtions "were" ſtated.

First, whether the Plaintiff has a Right to the *Reſidue* of the one hundred Quarters of Barley, hav-

"ing

ing not paid the full Price for the *nineteen Quarters and a half within the time prefixed, but only* TEN *Pounds towards it?*

SECONDLY, *whether the Defendant can take any advantage of this Non-performance upon the Iſſue of* NON ASSUMPSIT?

"And it was argued:—

As to the *firſt* Point, whether the Plaintiff has a Right to the Reſidue of the one hundred Quarters of Barley, having not paid the full Price for the nineteen Quarters and a half within the time prefixed, but only ten Pounds towards it.

"That" here are to be laid down two or three Rules, which have been "applied" in adjudging ſeveral "Queſtions of" Law in the Books: and then this Caſe compared with thoſe Rules.

"That" the firſt Rule is, where there are ſeveral Promiſes mutually *executory* and independent of each other, that there the Promiſes are Conſiderations each of the other, and the Plaintiff may bring his Action for Breach of the Defendant's Promiſe, even though his Counterpromiſe be alike broken: becauſe in ſuch Caſe the Counterpromiſe, and the Remedy upon it, is the Conſideration of the Defendant's Agreement, and not the Plaintiff's performance of his Promiſe: according

7 Co. 9, 10, &c. Lord Raymond, 665, 6. Styl. 186. 2 Mod. 33, 4. 2 Mod. 62.

cording to *Juſtinian*'s Rule in the Civil Law, that "*he*[*] "*who hath an Action for the Recovery of a Thing is* "*deemed virtually to have the Thing itſelf*;" and upon this reaſon, concerning mutual Promiſes, there are ſeveral Caſes reſolved in the Books.

Hob. 88, 106. Roll. Rep. 335, 336.

"That" the *ſecond* Rule laid down in the Books touching theſe mutual Promiſes is,

That where there are any Words "uſed" in any Promiſe, Covenant, or Agreement, that do not import a *Condition*, they are never conſtrued to be *conditional*, "unleſs" elſe the party would be without all manner of Remedy without ſuch Conſtruction.

Hob. 41. Ow. 54.

This "is" laid down in *Hobart*, in the Caſe of *Cowper* and *Andrews*; and in *Owen*, and ſeveral other Books.

And it is in itſelf a Rule founded in the greateſt Reaſon: for where Words in themſelves do not expreſs a Condition, the Law will not frame any Conſtruction to make them conditional, unleſs ſuch Implication be abſolutely neceſſary, and it cannot be abſolutely neceſſary where the Parties have another Remedy.

If an Annuity be granted *pro Conſilio impenſo, vel impendendo*, there the word *pro* is conſtrued to be a Condition; becauſe the Party has no other Remedy for the Counſel than by ſtopping the Annuity.

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[*] *Qui actionem habet ad rem recuperandam, rem habere videtur.*

And

And if an Action be brought upon the common Covenant for quiet Enjoyment in a Leaſe, that the Leſſee ſhall quietly enjoy, paying the Rent and performing the Covenants; there though the word (*paying*) would make a Condition, if the party were without Remedy, yet it is not conſtrued to be conditional in this Covenant, but the Defendant is left to his Remedy upon the Reſervation of the Rent and Covenants in the Leaſe.

And ſo it was reſolved in the Caſe of *Allen* and *Babington*, and in the Caſe of *Hay* and *Bickerſtaff*. 2 Sid. 280. 2 Keb. 23. 2 Mod. 34, 5.

So is the Caſe in *Rolle's Abridgement*. There were Articles of Agreement made by *A.* in behalf of *B.* and *C.* and a Covenant that *B.* for the Conſideration aforeſaid in the Deed expreſſed, ſhall convey certain Lands to *C.* in Fee; and *C.* covenants, on his part, "FOR the ſaid Conſiderations," to pay *B.* one hundred Pounds: here though "FOR" would make a *Condition* in the Caſe of an Annuity, yet ſays the Book, that notwithſtanding *B.* doth not aſſure the Lands to *C.* yet *C.* is bound to pay the Money, and to take his Remedy againſt *A.* on his Covenant. Roll. Abr. 451

The ſame Law is laid down in the Caſe of *Nichols* and *Rainsbrede*. There *Nichols* brought an *Aſſumpſit*, in Conſideration that he *promiſed* to deliver to the Defendant, to his own Uſe, a Cow, the Defendant *promiſed* to pay him fifty ſhillings: adjudged that the Plaintiff need not aver the Delivery of the Cow; becauſe it is Promiſe for Promiſe. Hob. 88. cited in Lutw. 250. Ld. Raym. 665. and ſee Salk. 171, 2.

* *Thorpe* v. *Thorpe*, agreeably to the Diſtinction in the next Page.

But

But, "THIRDLY," if the Defendant's Promiſe do ariſe on the *Condition* of ſome Act to be done and performed, and not on a *Promiſe* to do and perform ſomething, there the Act muſt be firſt *executed*, and averred to be performed, before the Defendant's Promiſe can ariſe: for the Performance is here the Conſideration, and not a Counterpromiſe.

225, 336. So is the Caſe, *Roll's Reports.* In Conſideration of *ten* Pounds, I promiſe to deliver to you all the Books of the Law:—it is good without alleging the payment of it; for the other may have an Action for it: but if it be, that in conſideration that you *will* pay (in the future Tenſe) to me *ten Pounds*, I will deliver to you all the Books of the Law, it is not good without alleging the Payment of the ten Pounds: he muſt aver the Thing to be done: becauſe, ſays the Book, there is no Remedy on this Promiſe, ſince it does not ariſe untill the Money is paid; for the party does not promiſe to deliver the Books till after payment of the Money.

Hob. 106. 7 Co. 10 b. See Vin. Abr. 8, 9. 5 Vin. 57. pl. 1. So is the Caſe of *Hobart.*—If I promiſe, in Conſideration of a Man ſerving me a Year, that I will pay him *ten Pounds*, there the ſervice ought to be actually performed before he ſhall bring his Action for the Money; becauſe the Promiſe for the ten Pounds ariſes

It does not ſeem too much to aſſert, that about the Reign of Elizabeth, *ten Pounds would approach nearer to the Purchaſe of a complete* Engliſh *Law Library than* 1500 l. *at preſent.*

not from the Promiſe to ſerve, but from the actual ſervice.

So *Brocas*'s Caſe.—The Lord of the Manor covenanted with his Copyholder to aſſure to him and to his Heirs the Freehold and Inheritance of his Copyhold: and the ſaid Copyholder, in Conſideration of the ſame performed, covenanted to pay ſuch a ſum: the Court held that the Copyholder was not tied to pay the ſaid ſum before the Aſſurance made and the Covenant performed; but if the Words had been, *in Conſideration of the ſaid Covenants* TO BE *performed*, then he is bound to pay the Money preſently; and to have his Remedy over by Covenant. 3 Leon. 219.

In all theſe Caſes the *Conſideration* of ſuch Promiſes is not the *Counterpromiſe* or *Agreement*, but the *Performance:* but where the *Conſideration* is merely a *Promiſe* or Agreement to do ſomething, there the firſt Promiſe ariſes before ſuch Agreement on the Plaintiff's part is performed or fulfilled.

Now, to compare this Caſe to the precedent Rules:

FIRST, There are no Words that are conditional: for the Promiſe is not expreſſed in any conditional Terms, that if he be paid for the Delivery of the firſt Barley, he ſhall deliver the reſt:

But the Words of the Bargain are altogether abſolute: for they ſet forth, that the Plaintiff bought of the

the Defendant, and the Defendant bargained and ſold to the Plaintiff one hundred Quarters of Barley, according to the Rate of ſixteen ſhillings per Quarter for every Quarter, to be paid by the Plaintiff to the Defendant; and that the Conſideration of this Bargain was the Payment of two ſhillings and ſix pence in hand, which was the only Act *executed:* and the Act *executory* was the Agreement to pay the Reſidue at the Times of the Delivery of the Barley, according to the Quantity of the Barley at every time delivered, and according to the Rate to be paid.

Now in this executory Act there is nothing laid that is antecedently to be performed before the firſt Promiſe is to riſe: ſince the firſt Promiſe doth import a complete Bargain and Sale of the one hundred Quarters, and ſuch Promiſe is not to ariſe upon any *precedent Condition*, or Act to be firſt performed or done by the Plaintiff.

And if there be "not" Words in the Bargain, which import a Condition, and the Counterpromiſe is in its own Nature executory, the Law will not raiſe any Condition upon any Implication whatſoever, but leave the Parties to their mutual Remedies.

The rather in this Caſe, becauſe if the whole had been delivered at once, then plainly there had been nothing conditional in the Bargain: and if the Defendant provided himſelf that there ſhould be ſeveral Deli-

Deliveries, and does not actually provide, by an expreſs Condition, that if the Money be not paid for what he hath delivered at once, he ſhall not go on to deliver, the Law cannot create ſuch a Condition by Implication; ſince the Promiſe, on the Plaintiff's Part, is totally executory, and there is no Act executed, or ſtipulated to be performed, before the Promiſe riſes.

And if there were any ſuch Act *executed* that was neceſſary as a *precedent* Condition to the raiſing of the Promiſe on which the Plaintiff declares, it would be an Objection to the Declaration for not averring ſuch precedent Condition to be performed.

And for this there is the Caſe of *Betteſworth* and *Campion*. The Plaintiff, as Executor to his Father, declares there was a Communication and Agreement that the Defendant ſhould have all the Iron made at ſuch a Furnace, paying after the Rate of forty ſhillings *per* Ton; upon which the Teſtator did *aſſume* to the Defendant, that he ſhould have all the Iron made in that Furnace, in Conſideration whereof the Defendant promiſed to pay the Teſtator according to the Rate aforeſaid:—and ſhews, that the Defendant had ſo many Tons, which amounted to ſo much Money: and it was objected, in Arreſt of Judgement, that the Plaintiff had not ſhewn that the Conſideration was performed on his part, and that the Defendant had *all* Yelv. 133, 4.

the Iron made at the Furnace, which was the Conſideration that induced the Defendant to make his Promiſe: but it was anſwered, and reſolved by the Court, that the Conſideration, on the part of the Plaintiff, was, *not* that the Defendant ſhould have all the Iron as an Act *executed*, but that the Teſtator *promiſed* that the Defendant ſhould have all the Iron: ſo that the Conſideration on each part was the *mutual Promiſe*, the one to the other, for which there is a mutual Remedy.

So here, that which induces the Defendant's Promiſe to deliver the one hundred Quarters of Barley is *not the actual Payment* of any ſum more than the two ſhillings and ſix pence mentioned in the Declaration.

But it is the promiſe of paying the Reſidue which is undertaking for an Act *executory*, and ſo expreſſed in the future Tenſe that it ſhould be paid on the Delivery of each Quantity of Barley: wherefore it is the *Promiſe* to pay, and not the actual Payment, that makes here the Conſideration.

The SECOND Queſtion is, whether the Defendant can take advantage of this upon the Iſſue of *Non aſſumpſit*.

Hob. 106. Cro. Eliz. 250, (14).

And for this my Lord *Hobart* is expreſsly to the contrary. There the Conſideration was, that if a Man ſerved

ſerved me a Year, I ſhould pay him ten Pounds: there my Lord *Hobart* ſays that if the ſervice was not done, and yet the Promiſe, "as in the Declaration," the Defendant muſt not traverſe the *Promiſe*, but he muſt traverſe the *Performance* of the ſervice; becauſe they are diſtinct in Fact, though they muſt concur to the barring of the Action.

Roll. Rep. 43. (16). 401, (29). Roll. Rep. 391. (11).

And here the true Difference ſeems to be between an *Aſſumpſit* in *Deed* and an *Aſſumpſit* in *Law:* for an *Aſſumpſit* in Law, in Conſideration of Money received, creates, from the natural Juſtice, a Promiſe of Payment: here "therefore" the actual Payment, or ſatisfaction, or a Releaſe, or any other Matter that excuſes Payment, may be given in Evidence on *Non aſſumpſit.*

For when the natural Juſtice for Repayment of the Money ceaſes, there the Law no longer creates a Promiſe; and therefore thoſe Matters that go by way of Excuſe, are proper *Evidence* upon *Non aſſumpſit:* becauſe there is really no Promiſe when the Defendant can ſhew there is no Juſtice to pay the Money.

But where the Promiſe riſes by *Act of the Parties*, and the Defendant would ſhew any thing for an Excuſe for Non-performance, there he muſt ſhew it to the Court by proper *Pleading:* becauſe it confeſſes the

Being of ſuch Promiſe, or that ſuch Promiſe was actually made by the parties, and avoids it by ſhewing ſome *ſpecial Matter* or reaſon for not performing it.

2 Sid. 236. Mod. 210. All. 29.

This Diſtinction was taken in the Caſe of *Bedford* and *Clarke*, and in the Caſe of *Fitz* and *Freeſtone*.

It was argued by the Defendant, that ſuch Bargains are made for ready Money: and if the Plaintiff promiſes to deliver ſuch Goods, and the Defendant promiſes to pay for them; in common Underſtanding, if the Goods are tendered, and the party has not the Money, this ſhall excuſe: and for this they quoted 17 *E.* IV. fol. 1. where an Action of Treſpaſs was brought by the Plaintiff againſt the Defendant for breaking his Cloſe, and taking his Corn: and "the "Plea of Juſtification was," that a long time before the Treſpaſs ſuppoſed, the Plaintiff and Defendant bargained at ſuch a Place in *London*, that the Defendant ſhould go to a Place where the Oats were, and ſee them; and if they pleaſed him when he ſaw them, that then he ſhould take them, paying the Plaintiff three ſhillings and four pence an Acre one with the other.

That the Defendant went to ſee them, and was content with the Bargain, and for that Reaſon took the Corn, which is the ſame Treſpaſs.

It

It was there objected that this Plea was not good, becauſe he had not paid the Money according to the Bargain; and it would be miſchievous, if, upon ſuch Communication, a Man ſhould take another Man's property before the Money is paid: and *Littleton* there put a Caſe, that if a Man ſhould come to a Draper, and there demand of him how much he will have for ſuch a Piece of Cloth, and he ſays ſo much, upon which the other ſays he will give him ſo much for the Cloth, but does not give him the Money; if he takes the Cloth, the Draper may maintain an Action of Treſpaſs. So *Choke* put a Caſe, that if a Man ſhould aſk how much he ſhould give for my Horſe at *Smithfield*, and I ſay, ſo much; if the other does not pay the Money immediately, I may ſell the Horſe to whomſoever I pleaſe: for otherwiſe I ſhould be compelled to keep my Horſe againſt my own Contract until ſuch time as the Man ſhould pay it; which was certainly againſt the Intention of the Parties in their Agreement: and *Littleton* ſaid, that in all ſuch *forehanded* Bargains, there was a *Condition implied* in Law, that it ſhould be delivered upon Payment; and that if Payment did not follow, the whole Contract ſhould be void.

* *Fulbecke*, Dial. I.

Fulb. ut ſup. 6, Noy's Max. p. 87. Ch. 42.

And it was argued in this Caſe, that common Uſage implied ſuch a Contract where the Goods were to be delivered for ready Money: and that if the

Money was not paid, I ſhould not be obliged to part with my property.

PARKER, Chief Juſtice, "in the principal Caſe," reſolved, That the Non-performance of ſuch a Bargain might be properly given in Evidence upon a *Non aſſumpſit:* for now *Non aſſumpſit* is held to be the general Iſſue in this Action, though they formerly held the contrary.

But as to the Bargain itſelf, he ſaid that the Defendant having delivered nineteen Quarters and an half without ready Money, he had diſpenſed with the Condition as to that Quantity: for though he might have choſen whether he would deliver it untill paid; yet when he did deliver it upon Credit, and without the ready Money paid down, it was a diſpenſing with the Condition as to that Quantity.

"But" then there was no reaſon that he ſhould not go on with the Delivery of the Reſidue according to his Contract: for ſuppoſe a Condition ſhould go along with it, as it is "argued" for the Defendant, that upon every Delivery a ready Payment ſhould be made; yet if the Defendant has diſpenſed with the Condition as to the Quantity delivered, by letting the Plaintiff have it without prompt payment, that will be no reaſon why he ſhould not go on to make the Delivery of the Reſidue according to his Bargain: for if the

the Argument be good, that the Law implies a Condition, upon the Delivery of every Quantity, that there ſhould be prompt Payment made by the Plaintiff, yet it will not raiſe a farther Condition, that if he deliver the firſt Quantity upon Credit, he ſhould not go on to make a Delivery of the reſt for ready Money, which here the Defendant has not done.

And it " is" by no means to be admitted, that if the Defendant delivered part upon Credit, which was his own Folly, that it ſhould excuſe him from delivering the reſt for ready Money according to his Promiſe.

Par. 4.

Promiſe in CONSIDERATION *of* ASSETS *good to maintain an* ASSUMPSIT *againſt an Executor.*

" That ASSETS came to his hands is a good *Con-* Atkins & Uxr v. Hill. E. 15 G. III. B. R. Cowp. 284.
" *ſideration* for the *promiſe* of an *Executor* to pay
" whereon to ground an *Aſſumpſit.*

" But if the party be charged generally, as in his
" own right, and not ſpecially as *Executor*, and the pro- Hil. 22 G. III Hawkes & Ux v. Saunders. Cowp. 289
" miſe appear to have been made by him as Executor,
" in *conſideration* of *Aſſets*, the Judgement can only be
" *of the Goods of the Teſtator.*

SECTION III.

Non Assumpsit infra sex Annos.

We now come to the Issue of *Non assumpsit infra* "*sex Annos*," "that he did not undertake within six "Years."

Title II.

This Issue is founded on the Statute 21 *Ja. c.* 16. and lies in all Actions on the Case: and the reason of the Statute is, because the Debt must be supposed to be paid, if the Action be not brought within that Compass: "and it is for the Interest of the public, "as well as of Individuals, to defend against latent "Claims where the remoteness of the Evidence might "otherwise intercept a satisfactory Defence upon the "Merits:" for Witnesses may die or change their Abode, so that it may be a very hard thing to prove the payment of the Debt: and the *Law Wager* is avoided by *Assumpsit:* for if a Man were, in case of simple Contract, charged with a *Debt*, he would avoid it by Law Wager: but this charges a person with the *damage* for not performing that promise on which he depended; which being a charge that supposes Deceit and Injury, there was no Law Wager allowed.

This Issue does not lie on any *Assumpsit* between *Merchant* and *Merchant:* for they may have occasion to trust one another much longer; and therefore these persons are excepted by the Statute: "but how far "this Exception extends will hereafter be noticed."

This

This Iſſue is pleaded either by way of Negative to the Declaration, and then it is pleaded that the Defendant cometh and defendeth the Force and Injury when "and where he ought to do," and ſaith that he did not take on himſelf at any time within ſix Years before the day of the ſuing out of the original Writ, and for this he putteth himſelf on the Country.

Or elſe they may plead it by way of Bar, and then it is—and ſaith that the aforeſaid Plaintiff the Action aforeſaid hereof againſt him ought not to have, becauſe he ſaith that he did not undertake, &c. and this he is ready to verify.

And the Reaſon why either way of pleading is allowed, is, becauſe that it is a direct Negative to the Plaintiff's Declaration which is the *Giſt* of the Action: and therefore it may properly conclude to the Iſſue, there being a direct Negative contrary to the Plaintiff's Affirmation; and becauſe it exhibits a Statute Law to the Court in Diſcharge of the Plaintiff's Demand, it may be pleaded in Bar.

On the Iſſue of *Non aſſumpſit infra ſex Annos*, the Defendant proves a Debt of nine Pounds ten Years ago, and an Acknowledgement of the Debt within ſix Years, and an offer to pay five Pounds for the whole:

whole: the Plaintiff was nonſuit: for the Acknowledgement of the Debt is no more than he does by his Plea: but there muſt be a *new Promiſe* of the Debt within ſix Years to make the Action hold; and here the Promiſe or Offer to pay *five* Pounds, gives no Action for the *nine* Pounds.

But the *Confeſſion* of the Debt within the time is *Evidence* of a new Promiſe (though not of itſelf a new Promiſe, if found by a ſpecial Verdict): for that may be *Evidence* of a new Promiſe to a Jury, which, when ſpecially found to the Court, will not amount to a Promiſe in expreſs Words.

" And now a very ſlight acknowledgement is held " ſufficient to authorize a finding againſt the Defen- " dant on this *Iſſue*; and this agreeably to the ſenſe and " ſpirit of the Statute, which is not for preventing " Debts clearly proved from being paid on account of " the length of time they have been due, but to eſta- " bliſh a ſecurity againſt fraudulent Demands, when " Vouchers perhaps are loſt, or Witneſſes to a pay- " ment made without written proof are deceaſed, and " to guard againſt ſurprize upon Executors or other " Repreſentatives, by bringing forward Claims ob- " ſcure and ambiguous by the remoteneſs of the Pe- " riod to which they are referred:—to be a ſhield of " *Innocence*, not a ſcreen of *Evaſion*.

" If

" If the Defendant plead *Non aſſumpſit infra ſex* L. N. P. 148. 2 Ventr. 151. Heyling and Haſting. Salk. MSS.
" *Annos*, it is ſufficient for the Plaintiff to prove a
" *Promiſe* to pay within ſix Years, without any other
" *Conſideration*: for the Plea admits a Cauſe of Ac-
" tion before ſix Years. And if the Defendant ſay,
" *Prove it due, and I will pay it*, ſuch a Promiſe,
" with a Proof of the Debt, is ſufficient: but, as
" hath been intimated above, a bare Acknowledge- Salk. 29. S. C. Carth. 471. 1 Raym. 471.
" of the Debt, or of Delivery of Goods within ſix
" Years, is not in itſelf a new Promiſe, though it is
" *Evidence* of a Promiſe: a ſimilar Obſervation will
" be applied to TROVER.

" In an Action by an Executor for Money had and Owen and Wolley, *Salop*, 1751.
" received to the Uſe of his Teſtatrix, where upon
" this Iſſue the Defendant was proved to have ſaid,
" I acknowledge the Receipt of the Money, but
" the Teſtatrix gave it to me: Mr. Baron *Clive*
" directed the Jury to find for the Defendant: for the
" Qualification of the Acknowledgement was ſuch as
" to negative, inſtead of admitting a Promiſe to pay.

" In *Aſſumpſit* on a promiſſory Note, the Defendant L. N. P. 149.
" pleaded *Non aſſumpſit infra ſex Annos*: and it ap-
" peared on the Trial, that the Defendant was ſurety
" in a Note for *J. S.* and that *ſix Years* were elapſed
" ſince the Note was given: but that upon a Demand
" *within* ſix Years, the Defendant ſaid, You know I
" had

" had not any of the Money myſelf; but I am willing
" to pay half of it. The Judge was of opinion, at the
" Aſſizes, that this Promiſe took it out of the ſta-
" tute; but the Jury found for the Defendant: on a
Yea, Bart. v. " Motion for a new Trial, the Court clearly held that
" the Judge was right, that this Promiſe was ſuffi-
Mic. 1. G. III. B. R. " cient: and granted a new Trial. *

" In an *Indebitatus aſſumpſit*, on a promiſe to pay *on*
Ca. K. B. 444. " *Demand*, the Defendant pleaded *Non aſſumpſit infra*
" *ſex Annos:* the Plaintiff demurred, for that the Plea
" ſhould have been, that there had been *no Demand*
" within ſix Years; or, *Non aſſumpſit* within ſix Years
" after Demand. But the Court held that an *Indebi-*
" *tatus aſſumpſit* ſhews a Debt due at the time of the
" Promiſe; and therefore the Plea is good: but if
" the Promiſe had been of a collateral Thing, which
" would create no Debt till Demand, it might be
" otherwiſe. In ſuch Caſe the Plea is that which ſhall
" next be mentioned.

Title III.

Actio non accrevit *infra ſex Annos.*

" This is the proper Plea where the *Cauſe of Action*
" is *diſtinct* from the Promiſe: thus on *Aſſumpſit* in
" conſideration that the Plaintiff, at the requeſt of
" the Defendant, would receive *A.* and *B.* as his *Lodg-*
" *ers*, and diet them, whereupon the Defendant was
" charged with Promiſe to pay—The Defendant
" pleaded, *Non aſſumpſit infra ſex Annos:* and on De-
murrer

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3 Burr. Manſf. 1099.

HUME on the PRINC. of MORALS. Sect. III. P. 1. p. 264. Vol. II. Eſs. Lond. 1764.

* This ſeems to be *Yea* (Sir *W.*) v. *Fouraker.*

In addition to what has been precedently quoted from a late Work of eminence, it will not be diſpleaſing to attend to the remarks of a very acute and diſcriminative Writer.

Sometimes civil Laws, for uſeful Purpoſes, require a ceremony or form;

" murrer it was holden to be no Plea; for it is not " material when the Promiſe was made, if the *Cauſe* " *of Action* aroſe within ſix Years; therefore the Plea " ought to have been, that the Action accrued not " within ſix Years.

TITLE IV.

On *Action* on an Account current, *Effect of this Plea of* Non aſſumpſit infra ſex Annos.

" The Defendants were Executors of the Executor " of *W. W.* and in an Action of *Aſſumpſit* pleaded " *Non aſſumpſit infra ſex Annos:* the Plaintiff replied, " that on the third of *June*, 28 *G.* II. he ſued out a " Bill of *Middleſex* againſt the Defendants: and that " the *Teſtator*, in his Life-time, promiſed to pay the " Demand within ſix Years before the Bill of *Mid-* " *dleſex* ſued. On this two points were debated; the " firſt,

Cotes v. Harris & al. Guildhall; Tr. 29 & 30 G. II.

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form; and where that is wanting, their decrees run contrary to the uſual tenor of Juſtice; but one who takes advantage of ſuch chicanes is not commonly regarded as an honeſt Man.

Thus the intereſts of ſociety require that Contracts be fulfilled; and there is not a more material Article of natural or civil juſtice. But the Omiſſion of a trifling circumſtance will often, by law, invalidate a Contract: in foro humano, *but not* in foro conſcientiæ, *as divines expreſs themſelves. In theſe Caſes the Magiſtrate is ſuppoſed only to withdraw his power of* enforcing *the right; not to have* altered *the right.*

Here the general reaſoning meets the ſubject under conſideration: in another place the argument applies directly to the ſubject itſelf.

It is highly requiſite that preſcription or long poſſeſſion ſhould convey property: but what number of days, or months, or years, ſhould be ſufficient

Section III. P. 1. p. 263.

" firſt, whether on an Account current, of which part " was *within ſix Years*, ſuch part drew the whole out of " the Statute? *Denniſon* Juſtice was of opinion that the " Statute was a Bar to all *Items* of the Account beyond " the ſix Years.

" Another Queſtion on this Caſe was, whether it " came within the Deſcription of *Merchants Accounts* ſo " as to be excepted from the Statute.

" *Denniſon* held this Clauſe to relate only to mutual "" Accounts and reciprocal Demands between one per- " ſon and another in commercial Dealing: but that " ſimply a Demand of *A.* againſt *B.* in the common " Way of Buſineſs, as of a Tradeſman againſt a " Cuſtomer, could not be called a *Merchant's Ac-* " *counts.*

Title V.

Executors.

" If an Executor take out proper Proceſs within a " Year after the Death of his Teſtator, if the ſix " Years were not lapſed before the Death of the Teſ- " tator, though they be lapſed within that Year, yet " it will be ſufficient, under the Equity of *Section* the " *fourth*, to take it out of the Statute.

ſufficient for that purpoſe, it is impoſſible for reaſon alone to determine. Civil Laws *here ſupply the place of the natural* Code: *and aſſign different terms for preſcription according to the different Utilities propoſed by the Legiſlator. Bills of Exchange and promiſſory Notes, by the Laws of moſt Countries, preſcribe ſooner than Bonds and Mortgages, and Contracts of a more formal Nature.*

" If

" If an Executor bring *Aſſumpſit* on a Promiſe " made to his *Teſtator*, and the Defendant plead that " he made no Promiſe *to the Teſtator* within ſix Years, " if Iſſue be joined *thereon*, a Promiſe to the *Executor* " within ſix Years will not maintain the *Iſſue*. Green v. Crane, Hil. 5 A. B. R. Salk. MSS.

SECTION IV.

Of BAILMENT.

" The Conſideration of Actions founded on *Bail-* " *ment* properly has place here: as ſometimes the *ge-* " *neral*, ſometimes the ſpecial *Aſſumpſit* relates to them: " ſometimes the Caſe reſulting from them reſts in " CONTRACT, as the *preceding*, and ſometimes it is " founded on TORT, as the *ſubſequent* Claſs of Ac- " tions.

" We will obſerve on *Bailments* under the following " Diviſion, purſuant to the Analyſis:

" 1. *Mandate*,
" 2. *Loan of Hire*,
" 3. *Loan of Uſe*,
" 4. *Pledge*,
" 5. *Depoſit*.

TITLE I.

" 1. MANDATE, or *gratuitous Commiſſion*. L. B. 52—621

" A gratuitous Commiſſion, or *Mandate*, in the " ſenſe of the *Roman Law*, is one of the ſimpleſt,

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On like Principles a Debt gone by Statute is ſufficient conſideration for a promiſe (as in Bankrupt's *Certificate*) ſo that it ſhall not be *nudum Pactum*: as on a Deviſe to pay *Debts*, the benefit ſhall extend to creditors otherwiſe barred by the Statute of Limitations.

" and

" and at the ſame time one of the moſt unfrequent, in " the Order of BAILMENTS, being where a perſon " undertakes to perform an Act for another, without " reward or an antecedent Obligation.

" This was the Ground of the Caſe, in which the " Lord Chief Juſtice HOLT took occaſion to conſider " the ſeveral *ſpecies* of *Bailment*.

2 Ld. Raym. 909. Tr. 2 A. " In that Caſe, *Cogges* v. *Bernard*, of which a very " elaborate and intereſting Report is preſerved, the " Facts were theſe:

" The Plaintiff declared, that whereas *Bernard*, " the Defendant, had, on the *tenth* of *November*, " 13 *W.* III. at, &c. undertaken ſafely and ſecurely " to take up ſeveral hogſheads of Brandy then in a " certain Cellar in D. and ſafely and ſecurely to lay " them down again in a certain other Cellar in *Water-* " *lane*, the Defendant and his Servants and Agents " *negligently and improvidently* put them down into the " ſaid other Cellar, WHEREBY, *through Defect of Care* " of him, the Defendant, his ſervants and Agents, one " of the Caſks was ſtaved, and a great Quantity of " Brandy, *videlicet*, ſo many Gallons, ſpilt.

" After *Not Guilty* pleaded, and a Verdict for the " Plaintiff, there was a Motion in Arreſt of Judge- " ment: and the Caſe, however familiar in the *Roman* " Law, being deemed new in the *Engliſh*, it was argued " *ſeriatim* by the whole Court.

" The ſtreſs of the Objection was, that the Defen-
" dant was neither laid to be *a common Porter*, nor that
" he was to have any *Reward* for his labour.

" Holt, Chief Juſtice, after entering into the Di- 918, 9. Vinn. III. 27. § 684. Bract. III. 100. 2 H. VII. 11. 919, 20.
" ſtinctions and Principles of the ſeveral ſorts of *Bail-*
" *ments*, pronounced the Bailee, in this Caſe exerciſing
" a *gratuitous Commiſſion* for the benefit of the Plain-
" tiff, to be liable for the Damage occaſioned by his
" neglect and miſconduct: for that the Neglect is a
" *Deceit* to the *Bailor*, and a breach of *truſt* is a ſuf-
" ficient cauſe of action: and for that it is not *nudum*
" *pactum*; the *undertaking* itſelf, to which the Plain-
" tiff gave faith, being a ſufficient Conſideration.

" And the neglect, for which the *Mandatary* is an- L. B. 53.
" ſwerable, is according to the *degree* of ſkill and di-
" ligence which the Buſineſs he hath undertaken re-
" quireth.

" And for *Non-feaſance*, by which Damage accrueth, L. B. 567.
" a *Mandatary* may be chargeable equally as for Miſ-
" feaſance. Yet he is not liable in the ſame extent as
" if he contracted for a reward: for then he may not
" retract without conſent of the party who hath re-
" tained him; but in a *gratuitous Commiſſion*, if he
" withdraw his offered Aſſiſtance *before* any Damage
" incurred, and give notice that he cannot perform
" the Work, no Action at Law is maintainable to en-
" force him to the performance.

L. B. 59, 60. Ld. Raym. 910.

"It is juſtly obſerved, that however perhaps *ſup-*
"*poſed* new, the Caſe of *Bernard* was not new in rea-
"lity: and of this *Powell* was well aware, who cites
"the Writ in the Regiſter, of the *Pipe of Wine*, and
"of the *Cure* of the *Horſe*, as Authorities *in point*;
"with this remark, that in a Writ, as in a Declara-
"tion, no circumſtance *neceſſary* to found the Action
"may be omitted: and farther the Writ and Decla-
"ration in *Raſtel* for *negligently* and *improvidently* raiſing
"a Quickſet hedge, all without conſideration alleged.

"The obſervation of the learned and judicious
"Author of the excellent *Digeſt* now cited, and of
"which we ſhall avail ourſelves throughout this Title
"of the Work, appears perfectly well founded, that
"there was no neceſſity for a *ſpecial* undertaking to
"deliver ſafely and ſecurely, in order to have made
"the Defendant liable in *Bernard*'s Caſe: that indeed
"the Contract lying *in feaſance*, this Condition was
29 H. VI. "*implied* in the Nature of it: and that in the Caſe
"already cited in the Year Books, for *negligently* keep-
"ing the Plaintiff's *ſheep*, whereby they were *drowned*,
"neither *reward* nor *ſpecial* undertaking are ſtated.

"There may alſo be a *gratuitous Commiſſion* or *man-*
"*datary* Bailment of mere Cuſtody.

TITLE II.

2. LOAN *of* HIRE, *or Location.*

L. B. 85.

"The *locati-Conductio* of the *Roman* Juriſts, or
"*Loan* of *Hire* of our *Engliſh* Lawyers, is one of the
"moſt common of all Bailments, being of daily
"Utility in the general intercourſe of Life. It is
"*threefold:*

HIRE, 1. *Of* THINGS,
2. *Of* INDUSTRY *concerning* THINGS:

1. *Workmanſhip,*
2. *Carriage.*

"By

" By the Loan of THINGS the *Hirer* gains a *tran-* L. B. 86.
" *ſient* property in the thing hired, the Lender an ab-
" ſolute one in the ſtipend or hire: this conſequently,
" not like the precedent, is *onerous* to the Bailee, and
" *profitable* ſingly to the *Bailor*, but it is mutually ad-
" vantageous to both: a diſtinctive circumſtance not
" to be overlooked in determining the *degree* of care
" incumbent upon the *Hirer*.

" This hath been expreſſed in Terms grammati-
" cally *ſuperlative:* but GRAMMAR does not give Law
" to LOGIC: the ſound Conſtruction muſt be derived
" not from Words merely, but Things: from Rea-
" ſon, Analogy, and from conſiſtent Authorities.

" Therefore when JUSTINIAN deſcribes this care as 1. 3. 25, 5.
" that of the DILIGENTISSIMUS *Paterfamilias*; when Bract. 62 b.
" BRACTON, as uſual, adopts the expreſſion of *Juſ-* Ld. Raym. 916.
" *tinian*; when HOLT conſiders (incidentally) the
" Hirer as bound to the UTMOST Diligence; when a
" modern Publication demands of him *all* IMAGI- L. N. P. 72.
" NABLE Care: theſe ſtrong Terms will reſtrict them-
" ſelves, from the Nature of the ſubject, to a general
" import of *ſuch* Care as men of *common prudence*
" exert towards their *own* property: he is anſwerable
" therefore for *theft*, if ſuffered by *careleſsneſs*, but
" not for *robbery*, unleſs incurred by *groſs* or wilful
" neglect. And he is anſwerable no farther than as to
" thoſe particulars which the Owner hath not com-
" mitted to the Care of another: not, conſequently L. B. 86, 7.
" for the horſes, if the Owner of a *hired* Carriage ſend
" his own Poſtillion.

Tr. per Pais. 399.

Lesley's Case, cited in Mutraver's Case, 1651. B. R.

"And it is upon this Limitation of an Excuse for "Accidents, which the reasonable Care of the Party, "had the property been absolutely his own, could not "be expected to prevent, that on" a Promise to restore an Horse hired for a Journey, if the Defendant give in Evidence that the Horse died in the Journey, without the Rider's fault, the Obligation of his Promise is avoided: in as much as it becomes impossible by the ACT of GOD * without any fault of the Defendant: and no man's promise shall be supposed to extend to Impossibilities; "for what is not within his "power by fair and probable Intendment," is not the subject of any Man's "implied" Promise; "though it "may be of a Warranty.

Par. 2.

HIRE *of* INDUSTRY *concerning* THINGS.

"In civilized Life *Industry* in almost every instance "confers a manifold Value on the subjects of its Ex- "ertion, beyond their Utility or imaginary Estimation "as gross Materials: and at the same time, as many "Articles can be wrought only in a certain place to "their destined Perfection, or as a preference to a par- "ticular Artisan governs the Employer, this Industry "of *Manufacture* would not answer its Intention, and "indeed could itself be very imperfectly exerted with- "out the second branch of Labour, that of *Con-* "*veyance*. But in order of Time and dignity of Re- "lation, that of Workmanship hath an evident Pre- "cedency.

"Where

* I here transcribe the admirable Reflections of the Author of the Law of Bailments: though few Readers, studious of understanding the Analogies of Laws and Reason, will be without the Tract; such is the strength of Judgement and Accuracy of Distinction manifested in that Work; recommended by an Elegance of Arrangement, and illustrated by a Felicity of Style, which not more

"Where Things are bailed, that they may be *wrought* to a certain Form and Purpoſe for a *Reward*, "the *Bailee* is not only bound to the *workmanly per-* "*formance*, but to *ordinary* Care for the *preſervation* of "the thing committed to him. And this without an "expreſs Contract for a *Price*, or a *ſpecial* Undertak- "ing for their ſafe Cuſtody: ſince, on the one hand, "the delivery of Articles to a Perſon who profeſſes to "work for profit by his Trade is an implied engage- "ment to pay the cuſtomary and reaſonable Price, and "on the other hand, the acceptance of materials to "be wrought is equally an implied undertaking that "they ſhall be ſafely kept as well as properly manu- "factured for the Uſe of the Owner. L. B. 91, 2.

"A perſon may indeed, without any farther con- "cern relating to them, have the mere *keeping* of "Goods for *Hire:* and this *Cuſtody* engages him to "ſuch Care as the *Nature* of its *Object*, joined with "the Conſideration of the *Reward* ſtipulated for his "*attention* and *vigilance*, import. L. B. 96, 7.

"One ſpecies of *Depoſitaries* for *Hire* is indeed under "ſtricter Obligations from the views of *public Policy*, "in regard to their employment; and this is the *Inn-* "*keeper*,

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more adapts itſelf to the Flow of Fancy and the Embelliſhments of Fiction than to the preciſion of Law and the dignity of moral Science.

Although the ACT of GOD, *which the Ancients too call* Θεῖαι, *and* vim divinam, *be an expreſſion which long Habit has rendered familiar to us, yet perhaps on that very Account it might be more proper, as well as more decent, to ſubſtitute in its place* inevitable Accident. *Religion and Reaſon, which can never be at variance without certain Injury to one of them, aſſure us that* not a Guſt of Wind blows, nor a flaſh of Lightning gleams, without the knowledge and guidance of a ſuperintending Mind. *But this Doctrine loſes its dignity and ſublimity by a technical application of it, and may in ſome inſtances border even upon profaneneſs; and*

See the Preface to HAWKESWORTH's *Collection* of *Voyages*.

" *keeper*, who is *neceſſarily* as ſuch a general Depoſitary " of the Goods of Travellers reſorting to his Houſe; " and ſhall not, while he hath room, excuſe himſelf " on a *refuſal* to take charge of them; or that, not- " withſtanding his *Diligence* to prevent it, the Goods " have been *deſtroyed*, *damaged*, or *ſtolen* by any perſon " whatever.

" And this upon Principles exactly analogous to the " Caſe hereafter to be conſidered of a *common Carrier*, " and with ſimilar Limitations, where the Force is *ir-* " *reſiſtible* and *remedileſs*.

Bendl. 18. pl. 2. Dy. 158 b. pl. 32. Ander. 29. pl. 69. R. Abr. 3

" But the *Innkeeper* may diſcharge himſelf from this " *primâ facie* Liability, if" in an Action on the Caſe brought againſt him for ſuffering the Goods of the Plaintiff to be taken out of his Houſe, and *Not guilty* pleaded, he give in Evidence that he told the Plaintiff that his Houſe was full, and that he could not lodge him, " and prove the Truth of the Facts according " to ſuch Notice," and that notwithſtanding the Plaintiff went and lodged in his Houſe: for this *Evidence* falſifies the Declaration " by" proving that there was no Injury done to the Plaintiff as Gueſt to the Defendant.

Par. 3.

Hire of Carriage.

" A *private* Carrier for Hire is anſwerable for that " general good Faith which implies that he ſhall care- " fully convey the Goods entruſted to him, ſo as to " *deſerve* the recompence for which he hath undertaken " to carry them. The Degree of Care muſt be pro- " portioned to the Nature of the Goods when he is ap- " prized of them: that would be *groſs Negligence* with " reſpect to *Glaſs*, *China*, or a *Picture*, which would " be ſufficient care of leſs damageable Articles. Tra- " velling by Night, or through unfrequented Roads, " with a ſum of Money, might incur reſponſibility: " though with Goods not likely to be ſtolen or injured " in conſequence of being thus conveyed, the Caſe " would not have been ſo.

" The

Law, which is a practical ſcience, cannot uſe Terms too popular and perſpicuous.

Before, however, we leave the Train of Obſervations ſuggeſted by this, in itſelf awful, though too

Par. 4.

Of a common or public *Carrier.*

" The common Carrier is anſwerable for much " more: ſo far, that nothing ſhort of inevitable and " remedileſs Loſs, as by *Tempeſt*, or by public *Inſur-* " *gents*, can exempt him. L. B. 103, &c.

" This ſtrong univerſal Liability is believed to have " been eſtabliſhed when the *ſecurity* of *Trade* and *Com-* " *merce* became a grand object of Attention in the " Reign of Queen *Elizabeth*. 1 R. Abr. 2 pl. Woodlief and Curtis. Hil. 38 Eliz. B. R. L. B. 103, 4.

" It cannot (which has been well obſerved) be the " reward of Hire upon which this peculiar Liability " depends: for though ſo much ſtreſs has been laid on " this circumſtance by Lord *Coke*, it would in itſelf " oblige only to ordinary Care: the true Ground muſt " be derived from the extent and peculiarity of this " *public* employment, the danger of combinations, and " the great importance to the Community of a certain " Reſponſibility. 1 Inſ. 89, 2.

" Accordingly in a very recent inſtance, an Action " on the Caſe was brought againſt a *common Carrier* " for not ſafely carrying and delivering the Plaintiff's " Goods. It was tried at the *Dorcheſter* Summer Aſ- " ſizes, before Mr. Baron *Perryn*: when the Jury " found a Verdict for the Plaintiff, ſubject to the Opi- " nion of the Court on a Caſe reſerved, which was " this: Forward v. Pittard. M. 25 G. III. T. R. 27.

" That the Defendant was a *common* Carrier from " *London* to *Shafteſbury*. That on *Thurſday* the 14th of " *October*, 1784, the Plaintiff delivered to him on " *Weyhill* twelve pockets of Hops to be carried by " him to *Andover*; and to be by him forwarded to

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too familiarized mode of expreſſion, it will be pleaſing to advert to the Language of that glorious Fragment which thus, in a philoſophic Hymn* of almoſt unequalled Excellence, celebrates the univerſal Energy of the Supreme;

Ουδε τι γιγνεται Ἐργον επι χθονι σου διχα Δαιμον
Ουτε κατ αιθεριον θειον Πολον.

* CLEANTHIS.

" *Shafteſbury*, by his public Road Waggon, which " travels from *London* through *Andover* to *Shafteſbury*. " That by the courſe of travelling, ſuch Waggon was " not to leave *Andover* till the *Saturday* Evening fol- " lowing. That in the Night of the following Day, " after the Delivery of the Hops, a FIRE broke out " in a booth, at the diſtance of about 100 yards from " the booth in which the Defendant had depoſited the " Hops, which burnt for ſome time with inextinguiſh- " able violence, and during that time communicated " itſelf to the ſaid Booth, in which the Defendant had " depoſited the Hops, and entirely conſumed them, " *without any actual Negligence in the Defendant*. That " the Fire was NOT occaſioned by LIGHTNING.

P. 33. " Lord MANSFIELD, after ſtating the Caſe, thus de- " livered the opinion of the Court:

" The Queſtion is, whether the common Carrier is " liable in *this* Caſe of *Fire?* In all the Caſes for a " hundred years back, it is moſt clear that there are " Events for which the Carrier is liable *independent of* " *his Contract*. But there is a farther degree of Re- " ſponſibility by the Cuſtom of the Realm; that is, " by the COMMON LAW; a *Carrier* is in the Nature " of an INSURER. It is laid down that he is liable for " every Accident, except *by the* ACT *of* GOD, or *of* " *the King's Enemies*. Now, what is the ACT of GOD? " I conſider it to mean ſomething in oppoſition to the " Act

" Act of Man: for" otherwiſe " every thing is the " Act of GOD; it happens by his permiſſion or his " appointment. To prevent litigation, confuſion, and " the neceſſity of going into circumſtances impoſſible " to be unravelled, *the Law preſumes* againſt the *Car-* " *rier*; unleſs he ſhews it was done by the King's " Enemies; or by ſuch Act as could not happen by " the intervention of Man, as Storms, Lightning, " and Tempeſt.

" If an armed force comes to rob the Carrier of his " Goods" (ſo they be not Invaders or Rebels) " he is " liable: and a reaſon is given in the Books, which is " a bad one; that he ought to have a ſufficient force " to repell it: that would be impoſſible in ſome Caſes; " as, for inſtance, in the riots in the year 1780. The " true reaſon is, for fear it may give room to collu- " ſion;—that the Maſter may contrive to be robbed on " purpoſe, and ſhare the ſpoil.

" In this Caſe, it does not appear but that the Fire " aroſe from the Act of ſome *Man* or other. It cer- " tainly did ariſe from ſome Act of Man: for it is " expreſly ſtated not to have happened by Lightning. " The Carrier, therefore, in this Caſe, is liable: in as " much as he is liable for inevitable accident.

" Judgement was accordingly for the Plaintiff.

" The

L. B. 106, 7. Hob. ca. 30. 2 Cro. 330. Rich and Kneeland. 12 Mod. 480. 1 Str. 128. Palm. 548.

"And ſo early as the Reign of *Elizabeth*, the Law "thus far ſettled, the inference was obvious and ne- "ceſſary, that the circumſtance of *water-carriage* no "way eſſentially affecting the Caſe, an *hoyman* muſt be "equally liable.

W. Jo. 159. Vide alſo Dale v. Hall. Mic. 24 G. II. B. R. 1 Wilſ. 281.

"It was, however, ſtill contended, that neither the "Authority of Precedents, nor the juſt Extent of the "Principle, would apply to the Maſter of a SHIP. "This attempt to diſtinguiſh the reſponſibility in the "Caſe of a ſhip from that annexed to an *hoy* or *barge*, "after ſolemn Argument both of Civilians and com- "mon Lawyers, before one of the greateſt men of "his own or any Period,* was, as might naturally have "been foreſeen, completely unſucceſsful.

* *Mors* and *Slew.* 1 Ventr. 100. 238. Raym. 220. Ld. Raym. 920.

Par. 5.

LETTERS *ſent by the* GENERAL POST.

L. B. 109---12.

"There remains one Species of *Bailment* of *Car-* "*riage* of amazing comprehenſiveneſs with regard to "its objects;* of conſtant uſe and neceſſity, and con- "nected with the moſt important intereſts public and "private, the *conveyance* of LETTERS under the Eſta- "bliſhment of the POST OFFICE.

12 Car. II. c. 35.

"A *private* Poſt-maſter was ſubject to the ſame "liability as another Carrier: but reaſons not origi- "nally ſo much of Revenue, as of ſuppoſed State "Expediency, having annulled the liberty of employ- "ing a *private* Poſt where the *public* could be em- "ployed, a Caſe came to be debated, whether the Poſt- "maſter of the public Office was anſwerable for a "*Loſs* circumſtanced as it there was.

Carth. 487. E. 11 W. III. * *Lane* and *Cotton.* S. C. 5 Mod. 455, 6. and Ld. Raym. 646.

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* *By a late calculation it appears that the* weekly Average *of* Letters *iſſued from the* GENERAL POST OFFICE *in* LONDON *is more than* 100,000 *l.*

"The

" The Plaintiff brought this Action againſt the " Defendants as *General Poſt-maſters:* and on a ſpecial " Verdict, they were ſtated to have been in the Ex- " erciſe of that Office at the time of the Plaintiff's " ſending *Exchequer Bills* to the Value of 300 *l.* in a " Letter directed to a Perſon in *Worceſter*, and delivered " to the Defendants at their Office in *Lombard Street:* " and that this Letter with the Bills was *not* conveyed " to *Worceſter*; but *loſt* by the negligence of the " Defendants and their ſervants.

" For the Plaintiff it was contended, that the Sta- " tute, when it took away the liberty of ſending Let- " ters, and valuable Articles incloſed in them, by the " particular Poſts previouſly ſubſiſting, could not be " ſuppoſed to ſubject the individual to the hazard of a " Loſs incurred under a public Mode of Conveyance, " which he was not at liberty either to regulate or to " decline: that the *ſalary* of the Defendants ariſes out " of the Revenue created by the Poſtage of Letters, " and that the Revenue itſelf is a ſecondary Object of " the Act.

" On the other ſide, the *ſmallneſs* of the Poſtage was " argued as a proof that it was no *premium* for *riſque:* " the indefinite reſponſibility it would infer, if the " Poſt-maſters ſhould be anſwerable for all employed " under them by Sea and Land: that the ſecurity was " not given from the Under-officers to the Defendants, " but to the Crown: that *Exchequer Bills* were equiva- " lent to Money, and therefore not meant to be pro- " tected by the Act: but, unleſs *ſpecially* accepted by " the Poſt-maſters, muſt abide the hazard at the Peril " of the ſender.

" Three

Pleadings recited briefly.

"Three of the Judges, HOLT diſſentient, were for "the Defendant. The Caſe, with his Reaſons, and
Salk. 17. "thoſe of the Majority of the Bench, is very con- "ciſely but excellently reported in *Salkeld*.

* *Whitfield* v. Lord *Le Deſpencer et al.* E. 18 G. III. Cowp. 755.

"Afterwards the Queſtion of the Liability of the "*General Poſt-maſters* came to a ſolemn Inveſtigation "in the following Caſe:

"In CASE, the Declaration conſiſted of three Counts. "The *firſt* ſet forth the Statute of ANNE for eſtabliſh- "ing one General POST OFFICE through the King- "dom, and that one *Poſtmaſter-general* ſhould be ap- "pointed by Letters Patent under the Great Seal: "who and his deputy and deputies, and *no other Perſon*, "ſhould have the receiving, &c. of all Letters. That "by Virtue of the ſaid Act, one General Poſt-Office "was erected, and a Poſt eſtabliſhed between the City "of *London* and the Town of *Lewes*, in the County "of *Suſſex*: and that the *Defendants* were accordingly "appointed to the Office of *Poſtmaſter-general*, TO "HAVE AND TO HOLD the ſame, with all powers, &c. "during the King's pleaſure, reſerving always to his "Majeſty all *Duties* and Sums of Money payable "for the *Poſtage* of Letters: and that the King, by "the ſaid Letters Patent, of ſpecial grace and mere "motion, granted to the Defendants the ſalary of "2000 *l. per Annum*, PAYABLE OUT OF THE REVENUE "AFORESAID: that the Defendants were accordingly "poſſeſſed of the ſaid Office: and they holding and "exerciſing the ſaid Office, the Plaintiff, on the 24th of "*September*, 1774, being poſſeſſed of a Bank Note for "100 *l.*

" 100 *l.* incloſed it in a Letter, ſealed and directed to " one *John Moxham*, at *Lymington*, in the County of " *Hants*. That the Letter was carried from *Lewes* to " *London*, and there entruſted to the care of the *De-* " *fendants*, in order to be by them ſent and delivered " as directed: that nevertheleſs they, not regarding " the Duty of their Office, but wholly neglecting the " ſame, did not deliver, or cauſe to be delivered, the " ſaid Bank Note ſo incloſed: by reaſon of which " neglect the ſaid Bank Note was wholly loſt out of " the ſaid Letter.

" The *ſecond* Count ſtated a Loſs, by *negligence* of " the Defendants, through the *theft* of RICHARD " MICHEL, *ſervant of the Defendants, and a Letter-* " *ſorter, who converted it to his own Uſe.*

" The *third* charged generally, that by *negligence* of " the *Defendants*, the Note was *ſtolen.*

" The Jury found a SPECIAL VERDICT (after *ac-* " *quitting* the *Defendants* on the *firſt* and *third* Counts,) " ſetting forth the eſtabliſhment of the Poſt Office " under the Statute of ANNE; its actual exiſtence " between *Lewes* and *London*, and between *London* and " *Lymington*; the Statute in the beginning of the pre- " ſent Reign for carrying the Revenues of the Poſt " Office to the aggregate Fund; the appointment of " the *Defendants* POSTMASTERS, as in the Declaration;

" their power to appoint deputies, ſubſtitutes, *ſorters*, " &c. and to ſuſpend, &c. at diſcretion: and to take " ſecurity in the Name and to the *Uſe* of the Crown, " and to ſettle *ſalaries*, to be paid by the Receiver-" general.

" The Jury find farther the ſalary of 2000 *l. per* " *Annum* granted to the *Defendants*, payable by the " Receiver-general.

" And that the ſaid Letters expreſs that the *De-* " *fendants* ſhall not be *chargeable* for the *Revenue*, or " for the *Officers* by them appointed, ſave *only for* their " *own voluntary defaults* and *misfeazances*.

" They find the *Defendants* in the *exerciſe* of their " ſaid Office: and the *appointment* of *Richard Michel* " as a *ſorter* under them: and the *ſecurity* taken of " him to the King's *Uſe*. His *Oath* not to delay or " embezzle; his employment; his receipt of the " ſalary; the ſending of the BANK NOTE, as alleged " in the Declaration; the delivery of it at the GENE-" RAL POST OFFICE, in order to be *ſorted* and con-" veyed to *Lymington*; and its coming into the " hands of *Richard Michel*, as *ſorter*, and being by " him felonioufly ſecreted and *ſtolen*; and that he was " thereupon tried, convicted, and executed.

" The Caſe was *twice* argued, and Lord MANS-" FIELD delivered the Opinion of the COURT.

" His

" His Lordſhip ſaid, that the Caſe was to be con-
" ſidered,

" *Firſt*, as it ſtood in 1699, before the Determi-
" nation of *Lane* v. *Cotton*:

" And then, as it ſtood ſubſequent to that Caſe.

" That the POST OFFICE, as ſtated in Argument,
" was firſt erected by *Cromwell* during the Uſurpation;
" and afterwards regulated more fully by the Statute of
" *Charles*.

" That there never had been any Action brought,
" either on the ordinance or the ſtatute, prior to the
" Caſe of *Lane*: and the Mode of Action in that
" was the ſame as in the preſent. That by the *Form*
" of Action, which was the ſame in both, no de-
" mand appears to have been intended on the *Fund*:
" for this is a Form adapted to a demand on the POST-
" MASTER *perſonally*.

" That it appears indeed, both from the Terms and
" from the practice, that the Fund is not left anſwer-
" able under the ſtatute, nor was originally ſo deſigned
" to be. The whole is *appropriated*: and no *item* of a
" Loſs was ever charged as coming in under the *ap-*
" *propriation*.

" And in this Action clearly, the charge not apply-
" ing to the Fund, the Ground is, as in the Caſe of
" *Lane*

" *Lane* and *Cotton*, that the *Poſtmaſter* is liable for his " *Hire*. But whatever was argued at the *Bar*, Lord " HOLT, in that Caſe, does not extend the Liability " ſo far as that Principle would carry it; which muſt " apply to Loſſes wherever incurred: for he takes a
Ld. Raym. 650, 653. " difference between a Letter *loſt in the Office* by a ſer- " vant employed by the *Poſtmaſter*, and a Loſs *on the* " *Road*, or by *robbery* after the Mail has been ſent *out* " of the Office.

" That Lord HOLT compares a POSTMASTER to a " *common Carrier*, or Maſter of a *Ship* taking goods on " board for *freight*: but that the compariſon appears " not to hold: for that the *Poſtmaſter* has no *hire*, " enters into no *contract*, carries on no merchandize or " *commerce*: that his Office is a branch of the *Revenue*, " and of *Police*, created by Act of Parliament.

" That the ſecurity is given to the *Crown*: that they " take the oaths taken by all public officers; that they " are chargeable with *capital felony* under circumſtances " which in a *common Carrier* or other perſon would be " puniſhed only as a *breach of truſt*. That the Caſe is " remarkable, in which the *Poſtmaſter* is made liable: § 5. " it being for *not* finding *poſt-horſes*: and there too in " a Caſe where it is ſcarcely poſſible he ſhould be *per-* " *ſonally* in fault, his liability is very particularly re- " ſtricted.

" That

"That an Action on the Caſe would have lien "againſt the *Poſtmaſter*, or any of his ſervants, *ſorter* "or others, for a *perſonal* neglect in their ſeveral de- "partments, by which a Loſs was occaſioned to the "Plaintiff: but not ſo for mere *conſtructive* Neg- "ligence.

"That the *ſalary* is only for the trouble of execut- "ing an Office concerning the *Revenue* and *Police*, and "by no means either a *premium* of *inſurance*, or a con- "ſideration implying reſponſibility for Loſs happening "by default of others than the party charged.

"That the POSTMASTER, therefore, is like other "officers, the *Lords Commiſſioners of the Treaſury*; of "*Cuſtoms* and *Exciſe*; the *Auditors* of the *Exchequer*, "who were never thought to be thus reſponſible for "the negligence or miſconduct of the inferior of- "ficers.

"That thus upon Principles it ſtood in 1699, when "a ſolemn Judgement was given, that *an Action on the* "*Caſe would not lie againſt the* POSTMASTER *for a Loſs* "*in the Office by the negligence or crime of his ſervant.* "That the Nation underſtood it to be a Judgement: "the Bar had ſo underſtood it; the Parliament and "popular Uſage had ſo received it; and therefore it "made no difference if the *Writ* of *Error* was ſtopped "by paying the Money, as had been ſuggeſted. So,

" many times had the mail been *robbed*, yet no Ac-
" tion ever brought: Merchants dividing their Bills,
" and ſending them by different Poſts, was an expe-
" dient which argued they did not look to a Remedy
" againſt the Office.

" That if there could have been any previous doubt,
" the ſolemn Deciſion in the Caſe of *Lane* and *Cotton*
" put the Queſtion beyond diſpute.

" That therefore the whole Bench was clearly of
" opinion that the Action would not lie.

Par. 6.

SPECIAL ACCEPTANCE *in the Caſe of a* common Carrier.

" A common Carrier may ſpecially accept: and to
" a certain Extent, compatible with the Nature of his
L. B. 106. " Employ, *Evidence* that he has ſo accepted will diſ-
" charge him.

" And therefore" in an Action for ſafe Carriage, if no Price be ſet, it ſhall be intended for the common Price, " if no Diſtinction as to the Value or Nature of the " Goods be proved, it ſhall be taken generally;" but if a ſpecial Agreement be ſet out to carry for 4*s.* per hundred, it muſt be proved; and " if a *ſpecial Acceptance* " be pleaded, it muſt be proved alſo."

" And this *ſpecial* Acceptance, which ſhall diſcharge,
" will admit of other proof than abſolutely a direct
" perſonal Notice to the party individually.

" In *Gibbon* v. *Paynton and another*, the *Defendant*
4 Burr. Manſf. 2298. " was charged, as *Coachman* of the *Birmingham Stage*,
L. 9 G. III. " for 100 *l.* in Money, ſent by his Coach and *loſt*. It
" was ſent hid in hay in an old Nail Bag. The Bag
" and the Hay arrived ſafe, but not the Money.

" It

" It was proved that the *Coachman* had inſerted an " *Advertiſement* in the *Birmingham* Paper, with a *Nota* " *bene*, that the Coachman would not be anſwerable for " *Money*, or Jewels, or other valuable Goods, unleſs " he had *Notice* that it was Money, or Jewels, or other " valuable Goods, that were delivered to him to be " carried. He alſo proved diſtribution of *Hand-bills* " to the ſame effect.

" It was proved to be a Matter of Notoriety in that " Country, that the Price of carrying Money was " three pence in the pound, which is 1 ¼ *per Cent.*

" The *Plaintiff*, it appeared on the *Evidence*, was a " Dealer in *Birmingham*, and had frequently ſent " Goods from thence. It was proved that he had " been uſed for an Year and an half to read the *News-* " *paper* in *which* this Advertiſement was publiſhed; " though it could not be proved that he ever actually " read that individual Paper wherein it was inſerted.

" It was farther proved, by a Letter of the Plain- " tiff, that he knew the Courſe of this Trade, that " Money was not carried from that Place to *London* at " the ordinary Price of the Carriage of other Goods.

" The Jury found for the Defendant.

" On the Motion for a *new Trial* the Counſel for the " Plaintiff denied the Facts proved to amount to Evi- " dence of a ſpecial Acceptance.

" They contended that a *Carrier* is liable, though he " did not know it was *Money*; and cited the Caſe in " *Alleyne* and *Ventris*, and in *Carthew:* together with " that in *Strange*, where the Lord *Chief Juſtice* KING " held, that if a Box be delivered generally to a Car- " rier, he is anſwerable, though not told there was " Money in it: otherwiſe if he aſks, and is anſwered " in the negative, or accepts *conditionally*, provided " there be no Money.

Titchburne v. White. Str. 145.

" On the other ſide, they argued on the *Fraud* of " the *Plaintiff*, and on the *Advertiſement*.

" Lord MANSFIELD obſerved on the greater *Re-* " *ſponſibility* of a common Carrier for Hire than that " of a mere Bailee. And ſaid,

" This Action is brought againſt a *common Carrier*. " His *Warranty* and *Inſurance* is in reſpect of the *Re-* " *ward* he is to receive: and the Reward ought to be " proportionable to the Riſque. If he makes a " greater Warranty and Inſurance, he will take greater " Care, uſe more Caution, and be at the Expence of " more Guards and other Methods of Security: and

" there-

" therefore ought, in Reaſon and Juſtice, to have a " greater Reward. Conſequently, if the Owner of " the Goods has been guilty of a *Fraud* upon the Car- " rier, ſuch Fraud ought to excuſe the carrier.

" That as to the Caſes cited from *Alleyne* and *Ventris*; " in the former, the Judge allowed the Jury might con- " ſider the Fraud in the *Damages*; in the other, what- " ever might be thought of the reaſons on which the " Carrier was held liable, it was allowed, that with all " the other Facts of the Caſe remaining, the Carrier " would have been excuſed if he had ſaid, that he " dared not take charge of it, *if* it contained *Money*.

" That the Caſe in *Carthew* was determined upon " *true* Principles. There, two Bags were delivered to " the Carrier ſealed up. The ſervant of the Plaintiff " told the Defendant's *Book-keeper* it was 200 *l.* and " deſired a Receipt for the Money: the Book-keeper " gave a Receipt purporting accordingly, and pro- " miſing to deliver them to *T. Davis* at *Exeter*, on ſuch " a day, he paying 10 *per Cent.* for *Carriage* and *Riſque*.

Carth. 485. Sir Joſeph Tyley and others v. Morrice.

" The Carrier being robbed on *Hounſlow Heath* in " the *Night time*, paid 200 *l.* to *Davis* agreeably to his " Undertaking.

" The Plaintiffs in their Action declared for 450 *l.* " and proved that full ſum to have been in the Bags at " the time they were delivered to the Carrier as 200 *l.*

" The *Chief Juſtice* was of opinion that the *Carrier* " was anſwerable for no more than the 200 *l.* which he " had already paid; his *particular Undertaking* and " the *Reward* extending no farther than to that ſum: " and the Defendant had a Verdict accordingly.

" And in an Action againſt the ſame Carrier, in a " Caſe ſimilarly circumſtanced, there was the like Di- " rection and the like Verdict.

" That in the principal Caſe the *Fraud* is manifeſt: " and the *Advertiſement*, *Hand-bill*, Price of *Carriage* " of *Money* from *Birmingham*, were, together with the " Letters of the Plaintiff, circumſtances of *Preſump-* " *tion* of *Acceptance* proper to be left to the Jury: and " that, on the whole of this Caſe, the Plaintiff ought " not to recover: and in this the other Juſtices, *Yates*, " *Aſton*, and *Willes*, concurred; of whom the two " former gave their reaſons.

TITLE III.

L. B. 64---74. " We are now to treat briefly of the LOAN of USE: " and this is *lending* ſomething *gratuitouſly*, which is to " be *ſpecifically* returned: this being beneficial *only* to " the *borrower*, requires *extraordinary Care*.

TITLE IV.

" We are to conſider next that Species of BAILMENT " which is termed a PLEDGE.

Par. 2.

" A PLEDGE, or PAWN, is an engaging of Goods " by way of ſecurity for the payment of a Debt.

L. B. 75---9. " This conſequently is a *Bailment* of mutual Con- " venience: and the PAWNEE is anſwerable for *ordi-* " *nary* Neglect: of which the Pledge being *ſecretly* " taken from him by *Theft* is *preſumptive* Evidence: " but for *robbery* he is not reſponſible, if it be ſo loſt: " unleſs ſpecial circumſtances appear of his wantonly " expoſing the Pledge, as Jewels, for inſtance, to " the hazard of being thus forcibly taken from him: L. B. 79, 81, 2. " the Author of the Eſſay to which we have had ſuch

" con-

" conſtant recourſe upon this ſubject hath clearly ſhewn " the Doctrine of Lord *Coke* on this head to be nei- " ther conſiſtent with the nature of the ſubject, nor " with prior opinions: and that the ſubſequent ones " have not adopted it.

TITLE V.

" We are led now to the laſt Claſs of *Bailments*, " which is that by DEPOSIT: and the principles on " which this ſpecies of implied contract is ſtated by " Sir *William Jones* appear to be perfectly diſtinct and " ſatisfactory; though the old Caſes and Obſervations " of great Lawyers upon them were in no ſmall degree " confuſed.

Par. 2.

" A DEPOSIT is a Bailment of Goods to be kept for " the *Bailor*, without recompence. L. B. 117.

" As this is ſimply advantageous to the *Bailor*, and " neither beneficial to the Bailee as the bailment of *Uſe*, " of *hire*, or of *pledge*, nor implies ſkill as the *commiſ-* " *ſion* of *employment*, the Bailee is anſwerable only for " *good Faith*; in which is included the avoiding of " groſs Neglect: unleſs by voluntary application, or " by ſpecial Agreement, he either impliedly or ex- " preſsly obliges himſelf farther. L. B. 36, 52. L. B. 47, 8.

" On the whole, it appears that a *Bailee* of *Uſe* is " reſponſible for *ſlight Neglect*; a *Mandatory* of *em-* " *ploy* is anſwerable for the *ſkill* and *care* preſumed in " the Nature of the ſubject; an *Hirer*, *Pawnee*, *Work-* " *man* for *Hire*, and one who undertakes *cuſtody* or *con-* " *veyance* for reward, are anſwerable for Loſs by *or-* " *dinary* Neglect: a *Depoſitary* is liable in general for " *groſs Negligence* only. The Caſe of *Innkeepers*, and the " much ſtronger one of *Carriers*, depend upon the parti- " cular Nature of their reſpective Buſineſs; which is " reſtricted by public Policy from the temptation of " colluſive practices difficult to be detected, and is there- " fore ſubject to a peculiar Liability. L. B. 120, 1.

END *of the* FIRST VOLUME.

DIRECTIONS to the BINDER.

THE Portrait of the Chief Baron to face the Title.

The Monumental engraved Tablet, and the Latin Inſcription on a ſingle printed Leaf, to face the Copy of the Will, to front each other, p. xliii.

The Analyſis of the Law of Evidence, on a broad Sheet, to face the Introduction of the Law of Evidence, Signature B.

Half Title to be put before Signature B. of the Body of the Work. Vol. I.

Half Title of the ſecond Volume to be placed before Folio 441.

To follow the Folios in the Cancels.

