A TREATISE

OF

LEGAL TIME,

WITH ITS

COMPUTATIONS AND RECKONINGS.

BY

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PREFACE.

THE consideration of the subject of Legal Time, although frequently brought before the notice of the Courts, does not seem hitherto to have been sufficiently presented to the Profession in a separate Essay.

The Year, the Month, and especially the Day, have undergone strict ordeals of discussion. The reckoning, or mode of computation with regard to the intervals of Time between one period and another, has likewise given rise to questions of intricacy.

It has been often a matter for argument, whether a day should be counted exclusively or inclusively, and sometimes there is an entire interval;—the day from which a calculation is to proceed, and the day upon which an act is to be done, being, in both instances, shut out of the enumeration.

The decisions as to Calendar or Lunar Months are likewise deserving of attention. And there are expressions which have particular reference to "Time," and which have had their due interpretation,—such as "Forthwith," "Immediately," "In or about," "From," "Clear Days," with many others.

The law, in general, acknowledges no Fraction of a Day. But the same view of justice which influenced the Judges in laying down the general rule led them also to entertain exceptions to it. We shall, therefore, find several authorities which have recognised the doctrine of Fractions.

The particular kind of day, as Sunday, a Feast Day, or a Holiday, often makes a material distinction in coming to legal conclusions. The points, therefore, which relate to these days have not been omitted. Although it should be remarked, that the statute 29 Car. II. c. 7, which has been commented upon at length, is in hazard of being repealed by a new act of Parliament, a bill having been more than once introduced for that purpose. It may be said, however, that many of the decisions upon the subject will probably be applicable to any fresh provisions.

Hitherto the plan of the Work seems to have been sufficiently simple. The decisions as to Years, Months, Days, and fractions may be easily understood.

But it has been found difficult, on the one hand, to restrain

all questions concerning "legal Time" within these limits, and, on the other, to place, when travelling out of such limits, a proper bound to the inquiry.

It has appeared to be right, not entirely to overlook dates in pleading, both in civil and criminal cases. And yet, as the Books of Pleading are, for the most part, the best references on that head, we have, only by way of illustration, admitted some cases where *Time is of the essence of the matter*. So again, some of the cases of practice, connected with declarations, pleas, and other such matters, have been introduced.

There are other points, the introduction of which, it is hoped, will be found useful. As whether Time shall, on certain occasions, be deemed to be directory, whether prospective or retrospective.

To enumerate the whole of these incidents would be tantamount to a republication of the Table of Contents, to which the reader is referred. But it should be noticed, that the Statutes of Limitation have been carefully avoided, as well as the cases of special pleading,—being the subjects of distinct Treatises.

Should it, however, be advisable, at a future day, to extend, in any way, the limits of this little Work, an abler hand will probably improve its success, and mark out its proper boundary.

It must be remembered, that the chief object of the present plan is to give a full account of the *various periods of Time.* And it is hoped, that on this ground the Essay may claim the merit both of novelty and usefulness. The introduction of other points connected with legal Time must be looked upon as a secondary consideration, and more with a view to throw light upon the main subject, than to mention all the cases which have any reference to "Time." Such an undertaking would be far beyond the scope or intention of this Book.

HARE COURT, TEMPLE,
November, 1851.

CONTENTS.

*** *The Index to the Statutes will be found in the Index to the Principal Matters.*

SECTION I.

Of Legal Time generally.

SECTION II.

Of the "Year."

SECTION III.

Of the "Month."

SECTION IV.

Of the "Day."

SECTION V.

Fraction of a Day.

TABLE OF CASES.

C.

D.

E.

S.

T.

U.

ERRATA ET ADDENDA.

Page

6, *for* "Parnell *v.* Hodson," *read* "Hodson *v.* Parnel."

21, note *(l)*, *read as follows*:—1 T. R. 68, Johnson *v.* Picket. E. 25 Geo. 3, B. R. cited there. Id. 71, by Lord Mansfield in R. *v.* Aylett; and see likewise 1 Cr. & J. 391, Edge *v.* Strafford. 20 L. J., C. P., 120, Harris *v.* Phillips."

21, note *(o)*, *for* "6 T. R. 30," *read* "6 T. R. 460."

24, *after* "impossible day," line 9 from the bottom, *add*, "And by 6 & 7 Vict. c. 83, s. 2, no inquisition found upon any coroner's inquest, nor any judgment recorded upon such inquisition, shall be quashed, stayed, or reversed for (amongst other matters) 'omitting the time at which the offence was committed, where time is not the essence of the offence, nor for stating the time imperfectly.'"

25, note *(t)*, *for* "Ad. & El.," *read* "Cro. El."

29, " *(p)*, *for* "Pitt," *read* "Pott."

31, " *(d)*, *for* "Movard," *read* "Steward."

32, line the last, *dele* "a," and *read* "take time."

48, note *(v)*, *for* "Albury," *read* "Albany."

69, " *(t)*, *for* "34," *read* "24."

69, in the note * *for* "Cripps" *read* "Crepps."

70, line third from the bottom, *for* "s. 24," *read* "s. 14."

73, note *(y)*, *for* "Sanderson," *read* "Sandiman."

81, " *(y)*, *for* "Durden," *read* "Dearden."

87, " *(r)*, *for* "Harvey," *read* "Huans."

99, " *(m)*, *for* "*d*," *read* "*v*."

101, "Tuesday," line 13, *add* "Similar provisions are enacted by 6 & 7 Wm. 4, c. 59, with reference to acceptors for honour *supra* protest; only (sect. 2) if the day following the day when the bill becomes due should be Sunday, Good Friday, Christmas Day, or a Fast or Thanksgiving Day, presentment need not be made till the day afterwards."

103, add to note *(f)*, "The feast in our law commences in the morning, and ends at night, and the natural day begins *ad ortum solis*, and ends *ad occasum solis*." "But the feast, by the law of the church, commences at noon in the vigil, and continues till the next day at midnight." Keilw. 75, per Frowike, C. J.; see also Bro. Jours. pl. 5, citing 20 H. 6, 23."

106, note *(q)*, *for* "Harmer," *read* "Harman."

112, [Night in burglary], add See Keilw. 75.

138, note *(w)*, add See Bro. Jours. pl. 49, citing 7 H. 7, 5; and line 10, *after* "verdict," *add* "And by 1 Vict. c. 60, wrong references to his late Majesty and to the acts of his Majesty's reign in acts of the then present session, were declared not to invalidate those acts."

163, line 6 from bottom, *for* "made," *read* "make."

A TREATISE,

&c. &c.

SECTION I.

OF LEGAL TIME GENERALLY.

LEGAL TIME seems to be capable of two divisions, general and particular (*a*).

The general view of the subject may be said to comprise several considerations which are independent of calculations by Years, Months, Days, Feasts, &c., and the particular division is, where it becomes necessary to put a construction upon the reckoning by those periods. The general head embraces a variety of subjects relating to the times for performing certain acts, or in which the priority of such acts may come in question, or where it is proper to decide upon dates generally, without reference to any particular year, month, or day. The particular division will contain, with reference to the year, for example, any authorities concerning Leap Year, together with other matters respecting the *year;* as to the month; the distinction between lunar and calendar months, the usages of trade, where months form part of the contract, &c.; as to days, (amongst various other points), their exclusive or inclusive meaning in reckonings, the consideration of fractional parts of a day, discussions as to dates; together with many other questions of a like nature.

(*a*) Where two acts are to be done, to one of which a time is prefixed; to the other none; that which is limited to time shall be first done. Fort. 148, Turner *v.* Goodwin.

Terms.

We shall have more occasion hereafter to speak of Terms, considered as legal divisions of time, but it may be observed here, that formerly the Courts doubted whether they would take notice of the moveable Terms, as Easter and Trinity Terms, although they took judicial cognizance of the others (*b*). But since the statute 11 Geo. IV. & 1 Wm. IV. c. 70, s. 6, which fixed the exact days of every Term, such notice is of course the same as of a public statute.

In a case where the question was, whether a distress had been put in before sun set, Wilde, C. J., said, that the Court would take judicial notice of days but not of hours. It was shewn that the distress had been put in at ten minutes past four in November, and it was urged that the Court would take judicial notice of the calendar. But Wilde, C. J., said, that if the time was material, in this case, it must be proved (*c*).

Date of writ.

By 2 Wm. IV. c. 39, s. 12, every writ issued by the authority of that act (the act for Uniformity of Process in Personal Actions) shall bear date on the day on which the same shall be issued.

The *indorsement* of a day will not satisfy the statute (*d*).

So upon a summons to appear, it is imperative to insert the month and day (*e*). But a mere mistake of the month, where the *teste* bore out the date in other respects, has not been deemed fatal (*f*). And where a *latitat* was sued out before the date of the bond, respecting which it was issued, but was not made returnable until *afterwards*, the Court held, that there was no error (*g*). The eight days for appearance are reckoned from the day of the last attempt made to serve the defendant (*h*).

(*b*) See 1 Sid. 308. 1 Lord Raym. 354, &c.
(*c*) 2 Car. & K. 1012, Collier *v.* Nokes.
(*d*) 1 D. P. C. 654, Anon. See "Time directory," *post*, in this section.
(*e*) 4 Taunt. 751, Ingle *v.* Trotter. 2 Wm. 4, c. 39, Schedule, (No. 2).
(*f*) 1 Price, P. C. 58, Anon.
(*g*) Cro. Jac. 561, Pigot *v.* Rogers.
(*h*) 1 D. P. C. 642, Brian *v.* Stretton.

So again, under the head of the fraction of a day, the priority of *deeds* will be more fully considered, and, therefore, it may be sufficient to remark here, that with respect to such priority, where deeds are of the same date, and it becomes necessary to determine which was the first executed, and there are no direct grounds of guidance for the decision, the Court will judge of such priority, from all the circumstances of the case, the nature of the transaction, and the internal evidence of the instruments themselves (*i*).

There was a petition for a sequestration against a party domiciled in Scotland on the 25th of January, and the first deliverance, in that petition, was on the 26th of January. The sequestration was awarded by interlocutor on the 16th of August. On the 15th of March, however, a commission had issued upon an act of bankruptcy committed on the 4th of January. It was held, that the sequestration should have the priority (*k*).

Return of writ.

Where, in order to recover in an action, it becomes necessary to shew a writ sued out within a certain period, it is not necessary to prove likewise, that such writ, if there be but one writ, has been returned (*l*). But if two writs have been sued out, a failure to shew the return of that which is the foundation of the declaration will be fatal to the suit (*m*). It was, indeed, held, upon one occasion, that the issuing of *one* writ only was insufficient, unless returned to bar a statute of limitation (*n*), but this case appears to have been invalidated by the distinction above noticed. And the Court, some time afterwards, took a distinction between *Harris* q. t. v. *Woolford* and that before them, observing, that the second writ made all the difference, because, in order to make out that the second writ

(*i*) Cowp. 699, in Doe *d.* Atkyns *v.* Horde. As to the fraction of a day, see *post.* Sect. V.

(*k*) 1 Gl. & J. 414, *Ex parte* Geddes.

(*l*) See *infra*, and 4 Taunt. 555, Hutchinson *q. t. v.* Piper.

(*m*) 1 Lutwy. 256. 260, Kinsey *v.* Hayward. Id. 279, 280, Brereton and another *v.* Moyse. Willes, 255. 259, &c., Carver *v.* James. 6 T. R. 617, Harris *q. t. v.* Woolford. So is 6 Taunt. 141, Thistlewood *q. t. v.* Cracroft. S. C. 1 Marsh. 497.

(*n*) 2 Lord Raym. 883, Brown *v.* Babbington.

was a continuance of the first, the first must be shewn to have been returned (*o*). Subsequently to this, the diversity was again maintained where there were two writs (*p*). And the case of *Stanway* v. *Perry* was relied on by the Court of King's Bench at another time, in a case where there had been *two* writs, and no return shewn (*q*).

Although, in a penal action, the plaintiff may, nevertheless, shew that the suit was commenced within the year, as well after as before the objection made. So that the plaintiff was allowed to produce the writ after such objection, to shew that it had been sued out, in a case where the bill had not been filed within the year (*r*).

Amendments in declarations, &c.

Amendments in pleading are allowable, both at common law and by statute. These amendments extend to time, and, therefore, in ejectment, the time of the demise has been permitted to be altered (*s*).

So it was where the day of the demise had been laid before the title accrued, after the record was made up, and the order had been set down for trial (*t*). But the Court refused such an amendment, where the alteration prayed for was to a day subsequent to the delivery of the declaration (*u*). But, in a penal action, the term, (or the day, under the rules 1834), will not be suffered to undergo alteration, so as to bring the time within the limit allowed for the action, at all events, not without cause shewn (*v*).

Affidavit of defendant.

Under the old law, although it was necessary in an affidavit

(*o*) 7 T. R. 6, Parsons *v.* King.
(*p*) 2 B. & B. 157, Stanway *q. t. v.* Perry. S. P. Field *q. t. v.* Carrol, cited, Id. 158. By Bayley, Serjt.
(*q*) 14 East, 492, Weston *v.* Fournier. The statute 2 & 3 Wm. 4, c. 39, s. 10, and the cases decided thereon, may be referred to.
(*r*) Peake, 164, Maugham *q. t. v.* Walker.
(*s*) 4 Burr. 2447, Doe *d.* Hardman *v.* Pilkington and another.
(*t*) 1 Ch. Rep. 536, n., Doe *d.* Rumford and another *v.* Miller and another. S. C. Ad. Ej. 199.
(*u*) Ad. Ej. 200, Doe *d.* Foxlow *v.* Jefferies; and see 2 Sir Wm. Bl. 940, Roe *d.* Lee *v.* Ellis.
(*v*) 6 Taunt. 19, Woodroff *q. t v.* Williams. S. C. 1 Marsh. 419. See also 3 B. & P. 343, Manners *q. t. v.* Postan.

of debt, to shew that a bill of exchange was overdue, the particular day on which the bill became due was not a necessary ingredient in the affidavit (*w*).

Plea pleaded.

The time of considering a plea as pleaded, is when it is entered upon the record. It need not be limited to the period of delivery to the plaintiff. The date on the record being a mere fiction according to the pleading of those times, Willes, J. once said, that the actual delivery of the plea ought to govern the computation of time, but the rest of the Court were of a different opinion. A certificate from the Admiralty Court at Halifax, stating a probable cause of seizure was the matter of defence in an action of trespass. The plaintiff received the defendant's plea, and made up the record himself. That plea was delivered to the plaintiff on the 10th of June, 1777. But the plaintiff entered the plea as of Hilary Term 1778. In the interval between the 10th of June, and Hilary Term, 1778, the certificate, a bar to the action, was obtained. The question then arose as to the computation, because, if the time were calculated from the delivery, the certificate might have been pleaded *puis darrein continuance*, and could not have been given in evidence at the trial. The Court, however, said, that if they were to grant a new trial, the defendant must be let in to plead the certificate, and that was decisive. But further, the plaintiff could not contradict his own record, and that record shewed the time of plea pleaded to have been after the certificate. Judgment of nonsuit was accordingly entered (*x*).

And now by Reg. Gen., Hil. Term, 4 Wm. IV. every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall have no other time or date; and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge. And, moreover, all judgments,

(*w*) 1 Ch. Rep. 648, Elstone *v.* Mortlake.
(*x*) 1 Dougl. 106. 110, 111, 112, Sullivan *v.* Montague.

whether interlocutory or final, shall be entered of record of the day of the month and year, whether in Term or Vacation, when signed, and shall not have relation to any other day, provided that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*.

Hence the cases concerning special memorandums of the filing of bills need not be any longer the subjects of consideration. Yet it may be added here, that if a plea be delivered on a day different from its date, it is merely irregular, and does not become a nullity (*y*).

A judgment of discontinuance has relation back to the day when the rule to discontinue was taken out (*z*).

If a defendant compels security for costs from the plaintiff, upon terms to plead within seven days after such security given, but, subsequently craves oyer, he has seven days to plead from the time when oyer is granted, although the time for giving security may have expired, or the order may have been rescinded previously (*a*).

The four days allowed for putting in bail in error are counted from the day of signing judgment, where the writ of error is allowed *before* judgment (*b*), and from the time of the allowance where judgment has been already signed (*c*).

So where the *postea* was delayed for want of inserting the amount of the debt and costs, and bail in error was put in within four days from the time of such insertion, it was held to be a *supersedeas*, although judgment had been signed for many more than four days (*d*).

(*y*) 7 D. P. C. 208. 4 Mees. & W. 373, Parnell *v.* Hodson.
(*z*) 1 B. & C. 649, Brandt *v.* Peacocke. S. C. 3 Dowl. & R. 2.
(*a*) 4 Ad. & El. 1004, Cahill *v.* Macdonald.
(*b*) 1 T. R. 279, Jaques *v.* Nixon; and see 2 B. & P. 370, Meagher *v.* Vandyck. 5 East, 145, Somerville *v.* White. 1 New Rep. 298, Hill *v.* Tebb. 2 Ro. Ab. 492. Willes, 275.
(*c*) 1 B. & P. 478, Gravall *v.* Stimpson.
(*d*) 5 Taunt. 672, Blackburn *v.* Kymer. S. C. 1 Marsh. 278. See Tidd, 1197; and see 3 Taunt. 384, Stevens *v.* Ingram.

Judgments.

Formerly the judgment related to the first day of the term (*e*). But now, all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in Term or Vacation, when signed, and *shall not have relation to any other day* (*f*).

In bankruptcy, the term of twenty-one days allowed to a debtor arrested, committed, or detained, before he shall be affected with bankruptcy by lying in prison, is not to be construed retrospectively, but the act of bankruptcy attaches to the last of the twenty-one days (*g*). Unless he manifests his intent to commit such an act by escaping from prison or custody, in which case the act of bankruptcy is to be considered as committed upon the day of such arrest, commitment, or detention (*h*). But the old law, under 21 Jac. I. c. 19, and 6 Geo. IV. c. 4, was different, the act of bankruptcy, committed by lying in prison for two months, being referred, not to the last, but to the first day of the imprisonment (*i*).

Title to copyhold.

The title of a copyholder is complete before admittance; it relates back to the time of the surrender (*k*).

Charging in execution.

Where a defendant surrendered himself in Hilary Vacation after a verdict against him, the Court held, that Hilary Term ought not to have been counted as the first of the two Terms, within which it became necessary to charge him in execution (*l*). And Lawrence, J., took a distinction between a surrender after verdict and a surrender after final judgment, upon which, the rule for setting aside the defendant's *supersedeas*, was made absolute (*m*). Therefore, where a similar case

(*e*) 1 Bulst. 35. 3 Salk. 212. See Com. Rep. 547, King *v.* Harris. 2 Saund. 148 *d.*

(*f*) Reg. Gen. Hil. Term, 4 Wm. 4, 1834.

(*g*) 3 Y. & Jer. 1, Higgins *v.* M'Adam. 6 Bing. 556, Moser *v.* Newman. 3 C. & P. 85, Tucker *v.* Barrow; and see 2 Show. 253, 524, Duncomb *v.* Walter. Id. 512, Hill *v.* Shish. 1 Salk. 110, Smith *v.* Stracy. 1 Camp. 509, Barnard *v.* Palmer.

(*h*) 12 & 13 Vict. c. 106, s. 69.

(*i*) See *post.*

(*k*) 1 T. R. 600, Holdfast *d.* Woollams *v.* Clapham. 16 East, 208, Doe *d.* Bennington *v.* Hall; and see 5 Burr. 1952. 1959.

(*l*) 6 T. R. 776, Smith *v.* Jefferys. (*m*) Id. 777.

happened after final judgment, a rule for discharging the defendant was made absolute (*n*). Still the term must be calculated from the time of giving notice of the surrender, and, therefore, an action against an attorney for negligence was held to fail, because, although he had neglected to charge the defendant in execution in Easter Term, upon a surrender made in Hilary Vacation, yet there was this distinguishing fact, that no notified surrender had taken place (*o*).

There have been occasions where the omission of the month in the jurat of an affidavit has been deemed fatal (*p*). So, likewise, in the case of an omission of the day upon a motion for judgment against the casual ejector, unless an affidavit could be produced from the commissioner, stating his recollection of the day (*q*).

Appeal from orders of justices.

The time of appeal from orders of justices is to be calculated, not from the service, but from the making or signature of the order.

A writ of *certiorari* being permitted under certain statutes affecting silk manufacturers, provided it should be sued out within six months, it was held, in a case of appeal, that the time began to run from the affirmation of the conviction, and not from the day of the conviction by the justices below (*r*). So in the case of allotments, where an appeal was given within six months, it was held, that the time should begin to run from the day of the conclusive allotment, as by staking, or an award made, and not merely from the day of taking a preparatory step, as mapping (*s*).

Under 7 & 8 Vict. c. 101, s. 4, notice of appeal must be given within twenty-four hours after the adjudication and making of an order upon the putative father. Here the time is to be

(*n*) 8 Taunt. 674, Neil *v.* Lovelace.
(*o*) 3 B. & C. 738, Laidlaw *v.* Elliott. S. C. 5 Dowl. & R. 635.
(*p*) 3 Moore, 236, Wood *v.* Stephens.
(*q*) 1 Ch. Rep. 228, Doe *v.* Roe.
(*r*) 1 Dowl. & R. 436, *In re* Kaye.
(*s*) 13 East, 352, R. *v.* Wilts Justices. 1 Ch. Rep. 366, R. *v.* Middlesex Justices.

reckoned from the signature of the order (*t*). An order was made on the 24th of June, and dated on the 27th of June. Upon an objection to it for informality, the clerk said, that it made no difference, but another order was dated on the 29th of June, and was served. It was objected that the appeal had come too late, and the sessions were of that opinion, but the Court, although they recognised the rule, that the time should be counted from the signature and not from the service, said, that here the new order was on the 29th, and, consequently, notice had been given within the twenty-four hours, and the rule for a mandamus to enter continuances and hear the appeal was made absolute (*u*).

Again, under the act, 4 & 5 Vict. c. 59, a surveyor of highways was ordered to pay certain monies out of the highway rates, but he had six days, within which, notice of appeal might be given. Here again, the Court held, that the time for notice ran from the making of the order, not from the service of it (*v*). So in bastardy, where a verbal notice of appeal was given immediately after the adjudication, (17th of May), but the order was not signed till afterwards, *i. e.* on the evening of the same day, and was not received by the appellant till the 19th of May; it was objected, that the notice of appeal had not been regularly given, in as much as the time for giving notice of appeal had not commenced till the signature of the order. But the Court said, that the order, when formally drawn up and signed, might well be considered as contemporaneous with the judgment pronounced verbally. The *Queen* v. *Flintshire Justices*, only decided, that notice within twenty-four hours of the actual signature of the order would suffice. But here it was clearly intended, that the written order should have relation to the time of the verbal. It might, indeed, be impossible for the putative father to know the exact time of the signature of such an order. He might purposely be kept in ignorance till too late. And *R.* v. *Derbyshire* was referred to, and recog-

(*t*) 1 B. C. Rep. 47, R. *v.* Flintshire Justices. S. C. 15 L. J., M. C. 50.
(*u*) S. C.
(*v*) 7 Q. B. 193, R. *v.* Derbyshire Justices. 1 New Sess. Ca. 645, S. C.

nised as an authority in favour of reckoning, not from the service, but from the making of the order (*w*).

"Any thing done in pursuance of the act," when the time shall be said to run.

Several important questions have been raised as to the reckoning of time when an action against persons is not permitted, after the lapse of so many months or days after a fact committed, in pursuance of the provisions of a particular statute. We propose to advert to the authorities which have reference to calculation, but not to the question as to what shall be said to have been done "in pursuance of the act." The compliance of parties with the act, not having any relation to time, is not within this undertaking; but when it becomes necessary to fix a period from which the time of limitation is to run, the principle of computation attaches, and invites our consideration. And, although, as has been observed in the Preface, we carefully avoid the extensive subject of the Statutes of Limitation, it may be thought excusable to notice the comparatively few decisions which have proceeded upon a clause common to certain acts of Parliament.

It is usual to find the time of a limitation clause in acts of Parliament, referring to things "*done*" in pursuance of the act. The time, consequently, would seem to run from the doing of the act. And Gibbs, C. J., was heard to observe, that, however absurd it might be, yet, that the Legislature had directed these actions to be brought within six months *after doing* the thing complained of (*x*). However, the Court of King's Bench, in a case where surveyors had undermined a wall, which did not fall till three months after the digging up of the highway, decided that the *gravamen* was the falling of the wall. They distinguished this action, which was case, from trespass, and said, that the action could not have been brought till the specific wrong had been suffered, and a rule to set aside the plaintiff's verdict was refused (*y*). And Gibbs, C. J., had it been necessary to have settled the point, notwithstanding the

(*w*) 19 L. J., M. C. 127, R. *v.* Hunts. Justices. S. C. 4 New S. C. 101. 1 Pr. Rep. 78.
(*x*) 1 Marsh. 437.
(*y*) 16 East, 215, Roberts *v.* Read and others.

observations above referred to, would probably have acquiesced in this decision of *Roberts* v. *Read*, since he declared, that the King's Bench had followed the justice of the case (*z*). And upon a subsequent occasion, where a wall fell after the act done, Abbott, C. J., mentioned *Roberts* v. *Read* with much approbation, and adhered to it, and held, that the son might maintain the action, although the wall had been undermined in the life-time of the father (*a*). But where, in consequence of digging a sewer, the plaintiff's wall was cracked, it was held not to be competent for the plaintiff to sue at the expiration of six months from the time of the crack. The continuance of the crack was not a continuing damage, so as to prevent the time from running against the right of the plaintiff to recover (*b*). And where there is a cessation of injury, it cannot be said that there is a continuation of damage. So that, where an act gave a limitation of six months as the time for suing, unless there were a continuation of damage, although the cause of the injury remained, yet, as the mischief itself had ceased, the Court held, that no action lay after the specified limitation of time (*c*). And, upon another occasion, where an obstruction had ceased, and the time had been suffered to elapse, it was considered to make no difference, that there were certain penalties attached to the acts complained of, which had not been paid. The time of the demand of these penalties was not the time from which the limitation was to be reckoned (*d*).

So where a canal company took possession of certain land, in consequence of a representation to the occupier, which however turned out not to be true, whereby the Thames overflowed the neighbouring ground at every high tide, it was held, that an action, brought against the company six months after the taking of the land, but within six months from the flood of high tides, was not in time (*e*). So where a surveyor took some land, and built a wall upon it, it was held, that the time of three

(*z*) 1 Marsh. 437.
(*a*) Ry. & M. 161, Gillon v. Biddington. See Cowp. 738, Knight v. Bate.
(*b*) 6 Bing. 489, Lloyd v. Wigney. S. C. 4 M. & P. 222.
(*c*) 3 Y. & J. 60, Blakemore v. Glamorganshire Canal Company.
(*d*) 7 Q. B. 824. 4 Railw. Ca. 90, Kennet and Avon Canal Company v. Great Western Railway Company.
(*e*) 5 B. & Adol. 138, Lord Oakley v. Kensington Canal Company.

months ran from the taking of the land, and that, as the wall was not raised till the end of three months, the action was too late (*f*). Still, acts of trespass may be divisible, so as to give a right of action in respect of such as have been committed within the time limited, although the right with regard to other trespasses is barred (*g*).

The *capias ad respondendum* was held to have been rightly admitted to shew the commencement of a suit, although it was urged that the original should have been produced, for if the *capias* were sued out within six months, the original must have been presumed also to have been sued out within that time (*h*).

In *quare impedit*, the six months allowed for presentation shall count from the avoidance or death of the last incumbent, and not from the time of notice to the patron, of refusal (*i*).

In actions against Officers of the Customs or Excise, the seizure is deemed to be the wrongful act which furnishes a ground for proceedings. The time, therefore, runs from the seizure (*k*). Upon such an occasion it made no difference, that a suit in the Exchequer, brought by the defendants in order to procure a condemnation of the goods seized, was pending at the expiration of the time limited by the act (*l*). Subsequently it was decided, that an action of trover, for the recovery of the value of goods seized, was subject to the same limitation as an action of trespass for damages in respect of the seizure. And *Godin* v. *Ferris*, which was a case of trespass, was relied on by the Court (*m*). So, again, where an officer in the Preventive Service boarded a vessel on the 23rd of August, but, although he left armed men on board of her, did not seize her

(*f*) 1 B. & Adol. 391, Wordsworth *v.* Harley. See further upon the subject, 11 Moore, 459, Sellick *v.* Smith.
(*g*) 5 C. & P. 51, Trotter *v.* Simpson, case of a party wall.
(*h*) 3 Wils. 461. 465, Leader *v.* Moxon.
(*i*) 4 Mod. 134. 140, Hele *v.* Bp. of Exeter.
(*k*) 2 H. Bl. 14, Godin *v.* Ferris; recognised as law by Dallas, C. J., in Smith *v.* Wiltshire, 2 Br. & B. 622. S. C. 5 Moore, 322.
(*l*) S. C.
(*m*) 2 East, 254, Saunders *v.* Saunders and another; recognised by Dallas, C. J. 2 Br. & B. 622. 5 Moore, 322.

till the 25th. The Court held, that the time of limitation should be reckoned from the boarding, and that the action had not, in this respect, been brought in time; and *Godin* v. *Ferris* was again referred to as authority by the Court (*n*).

But a distinction is recognised between a seizure or forfeiture, which is, in its return, absolute, and a taking merely executory, and which may be avoided by the payment of a sum of money due in respect of such taking. As where the plaintiff's goods were seized under 53 Geo. III. c. 127, for the arrears of a church-rate. That statute (sect. 12) prescribed three calendar months as the limitation of time for commencing suits against persons acting in pursuance of its provisions, and it was contended for the defendant in trespass, that the time must be counted from the seizure, according to *Goding* v. *Ferris*, *Saunders* v. *Saunders*, and *Crooke* v. *Tavish*. But it was answered, that this case was quite distinguishable from that of a forfeiture by officers, and that the time must take effect from the sale, so that the action of limitation would, in that case, have been commenced early enough. And the Court determined in favour of the plaintiff, thus sanctioning the diversity above mentioned (*o*).

So where there was a mortgage of mines and barges: the mines were demised, and the barges assigned to A. The Swansea Canal Company seized the barges, and sold them. The plaintiff sued more than six months after the seizure, but within six months from the sale. *Godin* v. *Ferris*, and the other cases, were again relied on for the defendant, but unsuccessfully. For no injury was done to the plaintiff whilst the goods were in the possession of another. It was the sale which placed the property out of the plaintiff's reach, and inflicted the injury upon him (*p*).

But where actions are brought for unlawful detention or im-

(*n*) 1 Bing. 167, Crooke *v.* M'Tavish.
(*o*) 5 Mees. & W. 194, Collins *v.* Rose.
(*p*) 1 Ad. & El. 354, Fraser *v.* Swansea Canal Company. S. C. 3 Nev. & M. 391; and see to the same effect, 1 Ad. & El. 372, Jenkins *v.* Cooke.

prisonment, the rule of law applies, that the imprisonment, however lengthy, is one continued trespass—a duress extending over the whole period of illegal restraint (*q*). So where to trespass the defendant pleaded not guilty within four years, as to part of the imprisonment, and as to the rest, a plaint and capias, upon which the plaintiff demurred, it was held, that the plaintiff should have replied a continuance of the detention. The defendant well divided the time in his plea, but he could not have resisted a replication alleging that the duress extended beyond the period covered by the plaint and capias (*r*). So if a man be imprisoned under a justice's warrant on the 1st day of January, and kept in prison till the 1st day of February, he will be in time if he brings his action within six months after the 1st of February; for the whole imprisonment is one entire trespass (*s*). So although the early portion of an imprisonment may be beyond the term of six months allowed by the statutes yet if any part of it comes within the prescribed limit of time, damages *pro tanto* may be recovered; and thus the principle of identifying the whole imprisonment as one day was preserved upon another occasion (*t*).

Bail-bond. No bail-bond taken in London or Middlesex shall be put in suit until after the expiration of four days, exclusive from the appearance day of the process; nor if taken elsewhere, till eight days have elapsed (*u*).

Bills and Notes. Where days of grace allowable on bills are to be considered in calculation, the limitation of an action begins to run from the third or last day of grace (*v*).

Barren land. Under 2 & 3 Edw. VI. c. 13, s. 5, the seven years during

(*q*) Comb. 26, Aldrish *v.* Duke. S. P. by Bayley, J., 9 B. & C. 608.
(*r*) 1 Salk. 420, Coventry *v.* Apsley.
(*s*) Bull. N. P. 24, Pickersgill *v.* Palmer.
(*t*) 12 East, 67, Massey *v.* Johnson. S. P. 4 M. & S. 400. 407, Bailey *v.* Warden, (in error). 4 Taunt. 67, Warden *v.* Bailey.
(*u*) Reg. Gen. 1 D. P. C. 186. 8 Bing. 291. 1 M. & Sc. 418. 3 B. & Adol. 477. 2 Cr. & J. 174. 2 Tyr. 343. 4 Bligh. N. S. 595. See the old cases collected in Harrison's Digest, tit. Bail iii., Forfeiture of Bail-bond.
(*v*) 6 Bro. P. C. 276, Ferguson *v.* Douglas.

which certain unproductive lands were exempted from tithes, were computed from the time when some act was done to make the lands more productive, and not from the time when cattle were turned on there, without more (*w*).

Time, how regarded in equity.

Time is not regarded with such scrupulousness and exactitude in equity as at law (*x*). As in cases of mortgage, where a Court of equity will decree redemption, notwithstanding the terms of a special agreement to the contrary (*y*). And Courts of equity will lay down their own rules as to time in matters of practice, although the rule at law upon the same subject may be different (*z*). So where parties had agreed to an immediate delivery of an abstract of title (*a*), and that in default of the completion of the contract at a certain day it should be at an end and the purchaser released, the agreement was not considered as incapable of being waived. For the abstract was not delivered, and the contract was not completed in time; and yet it was held, that as the purchaser had continued his communications respecting the title until the end of the given period, the original stipulation had been waived. Although the Court added, that, as a general principle, time should still be regarded as the essence of an agreement, where the intention of the parties appears manifestly expressed to that effect, and no alteration has intervened to shew a change of their original intentions (*b*). In another case, where upon the sale of a public-house time was deemed to be of the essence of the contract, the nature of the trade, and of the property offered, and the conditions of sale, were considered to be fit subjects for consideration (*c*).

Upon a lease for lives, time is essential, and admits of

(*w*) 1 B. & Adol. 907, Ross *v.* Smith.
(*x*) 12 Ves. 326, Ratcliffe *v.* Warrington.
(*y*) 7 Ves. 289, Seton *v.* Slade.
(*z*) 1 Mer. 243, Mootham *v.* Waskett, *post.*
(*a*) See 1 Jac. & W. 419, Boehm *v.* Wood.
(*b*) 1 Y. & Coll. 401, Hipwell *v.* Knight.
(*c*) 2 Coll. Ch. C. 556, Seaton *v.* Mapp. See also 1 Russ. 376, Coslake *v.* Tilt. 1 Atk. 12, Gibson *v.* Patterson.

no delay (*d*). And so it is where there is fluctuation in value (*e*).

On the other hand, where time is not of the essence of a contract, specific performance will not be decreed, although the time has elapsed (*f*), and although the vendor may not have a good title till the hearing of the cause (*g*).

But although originally of the essence of a contract, the obligation may be waived, or otherwise varied,—as by a protracted treaty (*h*), or by improper delay (*i*), or general conduct (*k*), or mutual procrastination (*l*).

These questions as to waiver must be decided by the evidence and upon the hearing (*m*).

The Court likewise enlarged the time for payment of a sum of money, where a sister was bound by will to pay her younger sisters a certain amount within six months after the testator's death. And although the premises were demised over in case of default to another of the sisters upon the like condition, relief was, nevertheless, given by way of dispensation (*n*).

And if the instrument itself is void for want of compliance with legal time, the Court will not assist, as in the case of an annuity, where the enrolment was neglected during twenty days (*o*).

(*d*) 2 Ball & B. 370, Ormond *v.* Anderson.
(*e*) 1 Sim. & Stu. 590, Doleret *v.* Rothschild.
(*f*) 2 Ball & B. 94, Jessop *v.* King. 6 Ves. 349, Paine *v.* Mellor. 13 Ves. 287, Hearne *v.* Tenant.
(*g*) 7 Ves. 202, Wynn *v.* Morgan.
(*h*) 19 Id. 220, Wood *v.* Bernal.
(*i*) 6 Madd. 26, Morse *v.* Merest.
(*k*) 3 Madd. 440, Hasson *v.* Bertrum.
(*l*) 3 Anstr. 924, Jones *v.* Price. 2 Anstr. 527, Smith *v.* Burnam.
(*m*) 3 Mer. 81, Levy *v.* Lindo; where an injunction was granted to prevent the purchaser from recovering the deposit from the auctioneers.
(*n*) 2 Vern. 222, Woodman *v.* Blake. Whether, without any special stipulation, time, not originally essential, can be made so. *Quære?* 6 Madd. 26, Reynolds *v.* Nelson. Lord Thurlow used to think, that even the agreement of the parties could not effect such a change, but Lord Eldon did not go the full length of that opinion. 3 Mer. 84.
(*o*) 2 Ves. Jun. 138, Bolton *v.* Williams. 4 Bro. C. C. 297.

We do not, of course, propose to offer here more than a very general summary of the law of dates in pleading. The works on pleading will naturally be referred to as containing the best information concerning dates upon the record; and, indeed, it is scarcely within the scope of a Treatise upon the Computation of Time to enter at all upon the matter. It seems that where time is of the essence of the suit, it should be accurately stated on the record (*p*), for every material and traversable fact must be duly united with time (*q*); although the Judges will permit amendments in several cases (*qq*), and, after verdict, a matter defectively stated will be helped (*r*), though a defective title on the face of the record will be fatal even to a verdict (*s*). Dates in pleading.

Replevin was brought against the defendant, who avowed the taking as a commoner, damage feasant. The plaintiff, in answer, had occasion to set out a demise, which he stated in his pleading to have been of the date of March 30th, to have and to hold, from the feast of the Annunciation next before, for one year. The avowant traversed the lease *modo et formâ*. The jury found, that a lease was made for a year to the plaintiff on the 25th of March for one year; but the Court gave judgment for the plaintiff, for the substance of the issue was, whether the plaintiff had such a lease or not, as that by force thereof he might common at the time (*t*).

Hence if a date be presented in a plea in the shape of an immaterial traverse, the plea will be open to a demurrer,—as when the day of the surrender of a copyhold was traversed, but not the surrender. The day had been improperly made parcel of the issue (*u*). So it is held, that seisin in *quare impedit* may

(*p*) See Pearson's Chitty, 46, note (*c*); 473, note (*f*); 710, note (*y*); 787, note (*e*); Lat. 200, in Harvey *v.* Reynold.
(*q*) 2 Cr. & J. 418, King *v.* Roxborough.
(*qq*) See Pearson's Chitty, 79, note (*g*); 787, note (*e*).
(*r*) See 5 Mod. 286, Blackwell *v.* Eales. S. C. Carth. 389. See also Dougl. 684, by Lord Mansfield, and there are many other cases to the same effect.
(*s*) See Cro. El. 766, Douglas *v.* Shank. 10 Mod. 312, 313, Stafford *v.* Forcer.
(*t*) Hob. 72, Pope *v.* Skinner.
(*u*) Cro. Jac. 202, Lane *v.* Alexander. S. C. Yelv. 122. 1 Brownl. 140.

be alleged generally (*v*), and that being laid under a *scilicet*, if the defendant do not deny it, he is not to be bound thereby, the matter being immaterial (*w*).

So where an averment was made that a bill had been duly presented, to wit, on the 31st of March, the Court would not entertain even a special demurrer assigning for cause that the 31st of March was a Sunday (*x*).

It follows, that where time does not enter into the substance of the action, the day becomes immaterial,—as where certain leases were stated to have commenced on the 15th of May, 1785, but upon their production in Court, the *habendum* was *from* that date. There, although there was no *videlicet*, the Court held the day immaterial (*y*). So where the plaintiff states a different day in his replication, it is no departure. And so it has been held upon general demurrer (*z*).

And, after verdict, an insufficient date, unless it be of a material character, is cured by the Statute of Jeofails, 32 Hen. VIII. c. 30.

The omission of the month in the declaration was, in old times, held to be a ground of error, and not amendable (*a*). So it was held necessary to shew in what right an outlawry took place (*b*).

Dates under a *videlicet* in pleading.

Dates laid under a *videlicet* in pleading are subject to a very equitable construction. They are only binding when they conduce to the materiality of the subject at issue. They do

Yelv. 141, in Ewer *v.* Moile. Cro. Car. 501, Nevison *v.* Whitley, Statute of Usury. 1 Leo. 193, per Windham, J., in Dring *v.* Respass. 2 Leo. 11, Holbech *v.* Bennett. 2 Mod. 145, Brown *v.* Johnson. 3 Salk. 208; and see 1 Wms. Saund. 14. 269, *a*; and Id. note 2. Id. 312 *d*. 1 Str. 317, in Jernegan *v.* Harrison.

(*v*) Skin. 660. R. *v.* Bp. of Chester. S. P. 2 Mod. 184, Stroud *v.* Bp. of Bath and Wells.

(*w*) 2 Wils. 199, in Wolferstan *v.* Bishop of Lincoln. 3 Burr. 1509, in S. C. in error.

(*x*) 1 Bing. 23, Bynner *v.* Russell. S. C. 7 Moore, 267.

(*y*) 2 Moore, 378, Welch Assignees, &c. and another *v.* Fisher.

(*z*) 1 Str. 21, Cole *v.* Hawkins. S. C. Id. 251. 348. 1 Lev. 110, Lee *v.* Rogers.

(*a*) 2 New Rep. 152, Bicroft's case.

(*b*) 1 Lord Raym. 668, Fox *v.* Wilbraham.

not vitiate the count or plea if their presence is unnecessary, since they may, in that case, be rejected. They may be used by the opposite party for the purpose of traverse, and cannot be made the instruments of inconvenience under shelter of the *videlicet*. And, if wrongly laid under a *videlicet*, yet if the date be well stated in some one part of the pleading, no successful objection can be taken to the discrepancy. Dates thus laid are, therefore, useful guides, rather than causes of difficulty.

As to the first point, where the day is immaterial, the *videlicet*, however irregular in point of time, helps the pleading. It is not proposed to sum up all the authorities concerning these matters. Very few examples will suffice. *Indebitatus assumpsit* was brought, and the promise was laid on the 26th of March. The plea was a tender, under a *scilicet*. The replication was, that after making the promise, *scilicet*, on the 12th of February, he filed his bill, &c. It was objected that, by the plaintiff's own shewing, he had brought his action before the cause of it accrued, the promise being on the 26th of March, and the bill having been filed on the 12th of February. But the Court would not confine the plaintiff to the day named in his pleading; and they gave judgment for the plaintiff (*b*).

So where, in an action for a malicious prosecution, the plaintiff laid the day of his acquittal under a *videlicet*, being before the action brought, the Court held the date immaterial, although there was a variance between the day laid and that stated on the record (*c*). A statement that the defendant, between such a day and another day, (naming them), and on each and every of divers, to wit, twenty other days, between that day, &c., did adulterate certain beer, was held sufficient upon objection made (*d*). So, under the Post-horse Duty Acts, a hiring for a less period than twenty-eight days was alleged: thus—to wit, for eight days. But the witness, at the trial,

(*b*) 2 Str. 806, Matthews *v.* Spicer. Fort. 375. 1 Barnard. K. B. 54. 57, S. C.; and Cole *v.* Hawkins, 1 Str. 21, was cited. So is Comb. 361, Howard *v.* Jennison.

(*c*) 9 East, 157, Purcell *v.* Macnamara; overruling Pope *v.* Foster, 4 T. R 590.

(*d*) 11 Price, 183, Attorney General *v.* Freer.

expressed a doubt whether the hiring was for eight or nine days. And the defendant was allowed to take a verdict. But the Court made the rule for entering a verdict for the plaintiffs absolute, and they distinguished the case of usury, where the very contract is of the essence of the charge (*e*).

On the other hand, the date, if material, must be proved, although laid under a *videlicet*. As where an action was brought for the expenses of a journey, which was performed "afterwards, *scilicet* 15th April." The defendant pleaded (it was not then customary to plead *non assumpsit*), that the journey had been given up by consent, *viz.*, on the 16th of April. To this plea there was a demurrer, because the journey was alleged in the declaration to have been made before, according to the defendant's pleading, it had been abandoned. It was contended, that the *scilicet* was void, that is to say, the 16th of April, and that to allege the precise day was not material. But the Court said in answer, that in order to have availed himself of this, the defendant should have traversed the taking of the journey on the 15th of April; and the plaintiff had judgment (*f*).

An action was brought against the defendant for negligence as an attorney. A writ mentioned in the declaration was in fact sued out on the 24th of January, 1785, but, by a mistake, it was indorsed on the 24th of January, 1784. The return of the writ *had been laid under a videlicet*. Buller, J. held the return of the writ material, and nonsuited the plaintiff; and the Court refused a rule to set it aside (*g*). So, likewise, is the rule in the case of usury (*h*). So where, in bankruptcy, the date of a final order for protection became important, it was held no objection to the plea that the day was laid under a *videlicet*, for it must have been proved as laid (*i*).

(*e*) 16 East, 416, Sergeaunt and another *q. t. v.* Tilbury.
(*f*) Cro. Jac. 620, Treswaller *v.* Keyne. S. C. cited 1 Saund. 169.
(*g*) 1 T. R. 656, Green *v.* Rennett. 5 T. R. 71, by Buller, J., to the same effect, in R. *v.* Mayor of York. 6 T. R. 462, in Grimwood *v.* Barrit, by Lord Kenyon. See also 2 B. & P. 116, White *v.* Wilson. 2 Wms. Saund. 291, *e*.
(*h*) Ry. & M. 153, Partridge *q. t. v.* Coates. 1 C. & P. 574. 4 Esp. 152, Harris *q. t. v.* Hudson. See Cowp. 671, Carlisle *q. t. v.* Trears.
(*i*) 7 C. B. 584, Nash *v.* Brown. S. C. 18 L. J., C. P. 62.

Wherever an allegation is sensible and consistent, and not repugnant to antecedent matter, though laid under a *videlicet*, it must be considered as material (*k*). If time be material, it may be proved, though laid under a *videlicet*; and if immaterial, its being laid under a *videlicet* will not render it material (*l*). Upon an order in bastardy, it was urged, that the day of summons named in the order, and laid under a *scilicet*, must be taken to be the true date; but to this it was answered, that the rule concerning the materiality of dates did not apply in this case. The Court decided upon another ground (*m*).

It is always looked upon as an averment (*n*).

If, therefore, the day be once rightly stated, it will suffice. And it follows that such a statement, though laid under a *videlicet*, is traversable, and, therefore, right. As where the plaintiff counted, that an arbitrator, before the exhibiting of the bill, to wit, on the 16th of March, made his award, the Court held it to be a sufficient averment of the award having been made on that day. The counsel for the defendant had objected that there had not been a precise averment (*o*).

Again, the *videlicet* may be rejected where the justice of the case requires it, and a sufficient date can be found at another part of the record (*p*). Ejectment was brought upon a lease of the 6th of September, and the ouster was laid on the 4th of September. The ejectment, therefore, appeared on the record to be two days before the lease. But the Court said,

(*k*) 5 East, 244, R. *v.* Stevens and another. S. C. 1 Smith, 437.

(*l*) 1 T. R. 68, by Lord Mansfield, in R. *v.* Aylett, citing Johnson *v.* Rickett, E. 25 Geo. III. B. R.

(*m*) 19 L. J., M. C. 151. 153. 154, R. *v.* Evans and another, Justices, &c. Note, the counsel in support of the order cited the cases of Skinner *v.* Andrews, 1 Saund. 168. R. *v.* Baines, 2 Lord Raym. 1265. Ryalls *v.* Bramall, 1 Ex. 734.

(*n*) 1 Str. 232, Hayman *v.* Rogers.

(*o*) 1 Saund. 169, Skinner *v.* Andrews. 1 Lev. 245. 1 Sid. 370. 2 Keb. 361. 388, S. C. 2 Lord Raym. 1272, S. C., cited in R. *v.* Baines. S. P. 3 Burr. 1729, Bissex *v.* Bissex. See also 2 Lord Raym. 1189, R. *v.* Wyatt. 2 Wils. 335, in Knight *v.* Preston. 1 Wms. Saund. 169. 6 T. R. 70, Grimwood *v.* Barrit.

(*p*) Yelv. 94, in Wildbore *v.* Cogan, per Popham, C. J. Cro. Jac. 154, Brigate *v.* Short. Id. 550, Hall *v.* Bonytham. Hob. 172, in Stukeley *v.* Butler. 1 Saund. 290, *a*, Dakin's case. 1 Wms. Saund. 290, note (*a*).

that the day had been once well laid, *i. e.* on the 6th of September, and that the subsequent *scilicet*, 4th of September, was impossible and repugnant. The *scilicet* then, being rejected, the record would be "*postea ejecit*," which would be well enough (*q*). And the like doctrine was maintained in trover, the case of *Adams* v. *Goose* being referred to by the Court as a precedent (*r*). So, in the case of a bond (*s*). So, in covenant, a breach having been once well assigned, a false date, subsequently laid under a *scilicet*, was held to be harmless, even upon general demurrer; the day was an impossible day, and must be rejected (*t*).

"It has long been settled, that where anything is laid under a *videlicet*, the party is not concluded by it; but he is where there is no *videlicet*" (*u*).

Dates may be material upon demurrer. As where *assumpsit* was brought against the defendants as executors of J. B., and the plaintiff declared upon a writ issued May 14th, 1847. The defendants pleaded in abatement that the testator, heretofore, to wit, on the 13th of December, 1846, made his will, and appointed the defendants and one B. executors and executrix thereof; and afterwards, to wit, on the 16th of December, 1846, died, and that the defendants and B. afterwards, to wit, on the 23rd of January, 1847, proved the will, and B. administered divers goods and chattels of the testator as executrix, &c. To this plea there was a special demurrer, assigning for cause that B. was not shewn to have administered *before the commencement of the suit*. But the Court held the plea good, for dates may, on demurrer, be assumed to be material, where, if truly stated, they would support the plea, and the Court would intend that, as the date of the writ was stated, the ad-

(*q*) Cro. Jac. 96, Adams v. Goose; and 20 Hen. 6, 15, was cited, *per Cur.* as an authority.
(*r*) Cro. Jac. 428, Tesmond v. Johnson. See 1 Str. 232, Hayman v. Rogers.
(*s*) 2 Str. 954, Cowne v. Barry. Id. 1095, Webb v. Turner; a case of assault.
(*t*) 10 East, 139, Buckley v. Kenyon.
(*u*) 3 T. R. 68.

ministering of the assets was before the commencement of the suit. The administering of assets by B. was the material allegation (*v*).

When the date in an affidavit is essential, it must be stated positively (*w*). Dates in affidavits.

In general, the year of the reign of the sovereign is specified; but it is sufficient if the year be pointed out by any other means (*x*), even without adding "of his reign" (*y*). It is said, however, to be insufficient to state the month without the year (*z*). The day is also immaterial when it is not of the essence of the offence. In treason, an overt act may be proved on a day different from that stated in the indictment (*a*). In burglary, it is usual to specify the hour as well as some day (*b*), but the day is immaterial; and alleging the offence to have been committed "in the night," without mentioning the hour, seems to be sufficient (*c*). So that where one was acquitted upon an indictment for burglary on the 1st of August, it was held, that he could not be again legally tried upon an indictment stating the same burglary to have happened on the 1st of September, because a conviction might have been had on the first indictment (*d*). In other cases, the hour, where time is not of the essence of the offence, is immaterial, even if imperfectly alleged (*e*). Dates in criminal cases.

(*v*) 5 Dowl. & L. 753, Ryalls *v.* Bramall and another, Exors. S. C. 1 Exch. 734. On demurrer, the Court is presumed to have the writ of summons before them.

(*w*) 1 D. P. C. 498, Willes *v.* James.

(*x*) 1 St. Cr. P. 55, citing several Authorities.

(*y*) Ibid. And so it is in civil cases. It is considered in the light of a clerical error. As if a writ be tested in the reign of George the Fourth, bearing the name, however, of George the Third. This has been deemed no variance, the plaintiff having declared upon a writ of the King. 4 Bing. 278, Elvin and another *v.* Drummond. 1 M. & P. 88. 12 Moore, 523.

(*z*) Com. Dig. Ind. G. 2.

(*a*) Fost. C. L. 8. Stark. Cr. Pl. *ut supra*. And the prisoner may vary *his* day in order to shew an acquittal. See Stark. C. P. 62; and note (*q*).

(*b*) East P. C. 513, Waddington's case.

(*c*) Archb. Cr. Pl. 16.

(*d*) 2 Inst. 318, Syer's case. S. C. 3 Inst. 230.

(*e*) 1 Bulst. 203, per Williams, J., in Clarke's case. Otherwise in the case of appeals, now abolished.

Before the statute 7 Geo. IV. c. 64, an impossible day (*f*), or a future day with reference to the offence committed, or different days for the same crime, or a repugnant day, vitiated the indictment beyond the aid of a verdict (*g*). But by that act (sect. 20) no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed (amongst other things) for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time improperly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or exhibiting the information on an impossible day, or on a day that never happened.

But this statute does not apply to convictions. Where a conviction shewed a summons on a wrong day, it was deemed the same thing as though there had been no summons at all (*h*). So upon a coroner's inquisition, since the statute, the inquest was stated to have been held on the 5th of January, 7 Wm. IV. 1837, and stated that J. W., on the 28th of December, *in the year aforesaid*, made an assault, &c. This was held to be a bad statement, being on an impossible day (*i*).

In murder it is usual to state both the day of the stroke and of the death. It would seem to be incorrect to allege the stroke on the same day as the death, if the death happened on a future day (*k*). "The surest conclusion is:—and so he killed him in manner and form aforesaid" (*l*). But the modern practice is to state both days, and to conclude with the above form (*m*). Although, generally, where an offence is completed at a second time, or at subsequent times, it is competent to say that it has

(*f*) 1 T. R. 316, R. *v.* Fearnley.
(*g*) 1 Stark. Cr. P. 60.
(*h*) 6 Mod. 41. 1 Salk. 181. Holt's Ca. 157, R. *v.* Dyer. S. P. 2 Lord Raym. 1546, R. *v.* Kent.
(*i*) 7 C. & P. 800, Mitchell's case.
(*k*) Archb. Cr. Pl. 248.
(*l*) 2 Inst. 318. 4 Rep. 41, Heydon's case.
(*m*) See Archb. 249.

been done "then and there," *i. e.* at the *same* time (*n*),—as in high treason (*o*). On the other hand, where it is *material* to shew that two acts were done at the same time, the words "on the said day" will not be sufficient, because it would not appear that the offence was carried on continuously. A mere repetition, therefore, of the same day would be invalid (*p*). Neither will it be proper to lay the offence to have been committed on two days—as on the 1st *and* 2nd of May (*q*). So where killing was alleged on the feast of St. Peter, it was held to be badly laid, since there are five feasts of that Saint (*r*). But an indictment for murder charging the stroke to have been given on the 27th of May was held good as against aiders and abettors, although the death was laid to have happened on the 29th (*s*). The words "then and there" connect the action, and make it one,—as in charging an assault and wounding, it is proper to say that the prisoner made an assault, and then and there feloniously struck, &c. Without "then and there" the indictment would be faulty before verdict (*t*).

Mary Nicholson was indicted for poisoning Elizabeth Atkinson, and the indictment, which stated that she did wilfully, feloniously, and "of her malice aforethought" mix poison, &c., went on to allege: "*and*" the same did "then and there" deliver to the deceased. It was held, that the repetition of "wilfully, feloniously," &c. was not necessary, since the words "and" and "then and there" sufficiently connected the allegations (*u*). Although Mr. Starkie observes, that in misdemeanor it is enough to say "assault and battery," without "then and there" (*v*). Another point is, whether an offence can be said to have been committed *between* such a time and such a time,—

(*n*) Stark. Cr. Pl. 57. Leach, 575, Moore's case. East P. C. 582, S. C.
(*o*) Fost. C. L. 8.
(*p*) Leach, 529, Rhenwick Williams's case.
(*q*) Stark. Cr. Pl. 60, citing 2 Hale, 178; but see 7 Geo. 4, c. 64, s. 20.
(*r*) Ibid.
(*s*) 1 Den. C. C. 9, R. *v.* O'Brian.
(*t*) Stark. Cr. Pl. 58, citing 2 Hale, 178. 2 Hawk. c. 23, s. 88; and Ad. & El. 739, Wingfield's case.
(*u*) East P. C. 346, Nicholson's case.
(*v*) Stark. Cr. Pl. 60, citing 2 Hale, 178. Cro. Jac. 41, Baude's case. Dy. 69.

a mode of pleading long usual in informations upon penal statutes (*w*). The defendant was charged with killing ten deer between the 1st of July and the 10th of September, and, being convicted, the indictment was held good (*x*). And a conviction for keeping a gaming-house on a particular day, and on divers other days and times, was holden good, although only one penalty was allowed in respect of the day which had been particularly named (*y*). But the Court would not allow this latitude upon an information for divers extortions at "*certain times*," and the judgment was stayed (*z*).

Where there is an omission to do any act, and not a commission, it is not necessary to specify any time at all, as in an indictment for not securing a ditch (*a*). And, so it was again, upon an information against the defendant for disobedience of orders during the time of his being one of the Council at Madras (*b*).

Sometimes, however, as we have said, time is, in criminal cases, of the essence of the offence (*c*); but the time stated in the indictment shall be taken to be true time, unless it be otherwise proved.

An omission to mention the year in setting out evidence to support a conviction is fatal, where the prosecution under a statute is limited to a certain time, as to three months. And the Court would not be satisfied to refer the evidence to the information, which stated both the month and the year (*d*).

Brown and others were tried for making signals to smugglers. The statute 6 Geo. IV. c. 108, enacted, that no person should, after sunset and before sunrise, between the 21st day of Sep-

(*w*) Stark. Cr. Pl. 55 n.
(*x*) 1 Lord Raym. 581, R. *v.* Chandler. S. P. 10 Mod. 248. 341, R. *v.* Simpson.
(*y*) 10 Mod. 335, R. *v.* Dixon.
(*z*) 4 Mod. 101, R. *v.* Roberts. See however 7 Geo. 4, c. 64, s. 20.
(*a*) Stark. Cr. Pl. 57, citing 2 Hawk. c. 25, s. 79.
(*b*) 5 T. R. 620, by counsel, arg. in R. *v.* Holland; and see the observations of Buller, J. Ibid.
(*c*) See 7 Wm. 3, c. 3.
(*d*) 7 East, 146, R. *v.* Woodcock.

tember and the 1st day of April, or after eight P.M. and before six A.M. at any other time in the year, make, &c. any light, &c., or signal, for the aid of smugglers. The offence of doing so was declared to be a misdemeanor. The indictment stated that the defendants, between sunset on the 8th and before sunrise on the 9th of March, *i. e.* on the morning of the 9th, about three o'clock, did make, aid, and assist in erecting certain lights, fire, &c. This was proved in evidence. But it was objected, that there was here wanting a substantial averment of the time in question being between the 21st of September and the 1st of April, because the prosecutor was not bound to the day laid, but he might prove the offence to have taken place in any other day, or in any other month. Therefore, as time was of the essence of the offence, there should have been a distinct averment in the words of the statute. But Littledale, J., overruled the objection. The objection could only have been made properly (as indeed it was) in arrest of judgment, and even in that step judicial notice must be taken that the day averred in the indictment was, in fact, within the period mentioned in the statute. "What burden of proof that throws upon the prosecutor," said the learned Judge, "it is not necessary to inquire; upon the face of the indictment the offence is charged upon a day between September and April" (*e*).

An indictment upon 9 Geo. IV. c. 69, stated that the offence was committed "on the 7th day of October, in the year ——," but the objection being taken after verdict, it was held, that the fault was that of time imperfectly stated, and so was cured by verdict under 7 Geo. IV. c. 64, s. 20 (*f*).

Where a statute made an offence triable in the county where the prisoner was apprehended, it is not a good objection that the day laid in the indictment is before the day on which the statute came into operation, provided that the facts charged were in reality committed before that day (*g*).

(*e*) Moo. & M. 163, R. *v.* Brown and others. So it is as to place, 1 Moo. C. C. 44, Napper's case.
(*f*) 1 Lew. C. C. 232, R. *v.* Hall and another. By the Judges.
(*g*) 1 Moo. C. C. 298, R. *v.* Treharne.

But where, in a conviction under the Beer Acts, for keeping a house open at times prohibited by the order of justices, there was no mention of the time when the beer-house was irregularly kept open, nor, indeed, of the order of justices, the conviction was held bad. For time was of the essence of the offence (*h*).

It is observable, that the information and proceeding before the magistrate is the commencement of the prosecution, and not the indictment. And it was held to make no difference that the commitment was for counterfeiting the current money of the kingdom, and the indictment for colouring a piece of base coin. The variance was immaterial (*i*). But of course, if there be any doubt as to the *time* of apprehension, or as to the *nature of the charge* against the accused, when apprehended, the limitation as to time will prevail in favour of him (*k*).

A date of a license for a foreigner to trade was indorsed as on the 17th of September. The real date of the clearance was on the 20th. The condition was, that the date of the ship's clearance should be indorsed, and the defence upon the policy was, that it had not been truly indorsed. The Court seemed to be of opinion that the condition had been complied with (*l*). If a guarantee be dated on the 7th of a month, it is no objection that the contract for the goods, of which the payment is guaranteed, was made on the 6th, if there is no delivery of such goods until the 7th (*m*). Writs of inquiry, directed to be executed on a particular day of the week and month, will not be set aside if there be a discrepancy between the day and month, unless there be an affidavit that the defendant has been misled. As where the notice was for Tuesday, the 14th of January, whereas that day fell on a Thursday,—Tuesday was rejected as surplusage (*n*).

(*h*) 8 Ad. & El. 124, Newman *v.* Lord Hardwicke. 3 Nev. & P. 368, S. C.
(*i*) East P. C. 186, Willace's case. S. P. upon an indictment for night poaching, 1 Den. C. C. 217, R. *v.* Brooks and another, decided upon the authority of R. *v.* Willace.
(*k*) Russ. & R. 363, R. *v.* Phillips and another.
(*l*) 3 Taunt. 554, Morgan *v.* Oswald.
(*m*) 2 Stark. 426, Simmons and others *v.* Keating.
(*n*) 3 Bos. & P. 1, Batten *v.* Harrison, one, &c. S. P. 1 Chit. Rep. 11, Eldon *v.* Haig.

Measure of damage time.

With reference to the calculation by time, in the case of a broken contract, it has been held, that the amount must be ascertained by the difference between the price which the defendant contracted to pay, and that which might have been obtained on the day when the contract ought to have been completed (*o*). Hence, where the defendant gave notice on the 21st of October, that he would not take certain shares bought on the 20th (though after business hours), it was held that the measure of damages was limited to the time between the 20th and 22nd of that month (*p*).

Time directory.

In many cases, and especially where there are no negative words forbidding an act to be done at another time than that mentioned in a statute, or otherwise, the time need not be accurately kept, and the act is deemed directory. As where a mandamus to justices to appoint overseers was dated on June the 13th, although by 43 Eliz. c. 2, overseers are to be appointed within a month after Easter (*q*). So under the 54 Geo. III. c. 91, s. 1, which directs the appointment of overseers to be made on the 25th of March, or within fourteen days next after the said 25th day of March, an appointment made after the fourteen days was held to be a good appointment, the words of the act being directory, not mandatory (*r*). So the 5 Geo. IV. c. 84, s. 17, with reference to the continuance of a convict in prison, has been held directory only, and the convict was held not entitled to his discharge (*s*). So upon the election of an officer under a chapter, the House of Lords held the charter merely directory in this respect (*t*). A meeting of trustees to elect a clergyman was ordained to be within four months after the death of an incumbent. This provision was held not to prevent their meeting after that time (*u*). And the Lord Chief Justice cited the case of the borough of Lansdowne, in *Ro.*

(*o*) 9 B. & C. 145, Boorman *v.* Nash.
(*p*) 5 Railw. Ca. 85, Pitt *v.* Flather. S. C. 16 L. J., Q. B. 366.
(*q*) 7 Mod. 393, R. *v.* Sparrow and others. 2 Sess. Ca. 184, S. C. S. C. 2 Str. 1123. S. P. in the case of binding apprentices by justices, R. *v.* Morris, cited 7 Mod. 395. S. P. 2 Salk. 473, Anon.
(*r*) 2 D. P. C. 1001, R. *v.* Sneyd.
(*s*) 16 L. J., Q. B. 289, R. *v.* Brenan.
(*t*) 3 Bro. P. C. 167, R. *v.* Truro.
(*u*) 1 Ves Sen. 413, Attorney General *v.* Scott.

Ab., as an authority, where the election was to be by a select number within eight days, and they did not meet till long afterwards (*v*).

In holding sessions of the peace, the Court has held, that the time in statutes is merely directory. So that where, by 54 Geo. III. c. 84, the Middlesex quarter sessions were directed to be holden in the week next after the 11th of October, but it was not enacted that they might not be holden at any other time, the Court decided that the justices were not confined to the week above mentioned; and they referred to the statutes 12 Rich. II. c. 10, and to 2 Hen. V. st. 1, c. 4, and to Lord Hale's opinion (*w*), that the earlier statutes upon the subject were directory only (*x*).

Under the old statute of 25 Geo. II. c. 37, concerning the execution of murderers, the day of execution was held to be merely directory, and where a wrong day was awarded, the sentence, being amended during the assizes, was held correct (*y*).

The rule which requires an indorsement of the day of the month and year on writs is merely directory, and, for want of that indorsement, the Court would not set aside the service of process (*z*). Nor, under the statute, need the indorsement be dated (*a*). But by the rule of Court, 3 Wm. IV. the day of the week and month must be indorsed on the writ, otherwise the plaintiff will not be at liberty to enter an appearance.

A bond was conditioned for the assessment of damages by arbitration upon the working of a mine by the obligor,—the account of damages was to be made up every two months. The damage was not so calculated; and debt being brought

(*v*) 1 Ves. Sen. 415.
(*w*) 2 Hale P. C. 50.
(*x*) 7 B. & C. 6, R. *v.* Justices of Leicester.
(*y*) Russ. & Ry. 230, R. *v.* Wyatt.
(*z*) 1 Cr. & J. 563, Millar *v.* Bowden. 2 Tyr. 112. 1 Price P. C. 104.
(*a*) 1 Cr. & M. 806. 2 D. P. C. 81, Webb *v.* Lawrence; and see 1 Wils. 91.

upon the arbitration bond, it was urged for the plaintiff, upon a motion to set aside the nonsuit, that the submission was not imperative, but merely directory, in order to save the plaintiff the inconvenience of frequent calculations. But the Court were of a different opinion, considering that it was important for the defendant to know his assessment of damages as soon as possible after the alleged injury, and the rule was discharged (*b*). So where a public company were authorized and *required* to do certain acts within three calendar months, the statute became compulsory (*c*). The general principle running through these cases is the public benefit; other more recent authorities adhere to the same principle, whether the time be construed as directory or imperative (*d*).

Legal time, when construed retrospectively.

Where there is a retrospective date to a statute, and a certain act must have been done in order to incur the payment of a duty, the words "shall be," or "shall have been," refer back to the time to the retrospective date, so as to make the duty attach (*e*).

A pauper had been receiving relief continuously from 1843. The residence in the parish had been from April, 1839. The order of removal was in May, 1847, and the statute, respecting the irremovability of the poor after a residence of five years, passed in 1846. If the statute were to be construed retrospectively, it worked a disability as to the dwelling of this pauper in the parish. For by 9 & 10 Vict. c. 66, s. 1, the time during which any person, amongst other matters, shall receive relief from any parish, shall for all purposes be excluded from the computation of time therein before mentioned. This time in the act means the term of five years' residence before the warrant of removal. Hence, as the pauper had been at different periods continuously receiving relief from 1843—if those times were deducted from the residence, there would

(*b*) 9 Bing. 32, Stephens *v.* Lowe.
(*c*) 10 B. & C. 349. Conservators of the Rivers Tone *v.* Ash.
(*d*) See 5 Q. B. 310, Bosanquet *v.* Woodford. Dav. & M. 419. 13 L. J., Q. B. 93, S. C. 12 M. & W. 655, Movard *v.* Dunn. 1 Dowl. & L. 642. 13 L. J., Ex. 324.
(*e*) 8 Bro. P. C. 196, Hume *v.* Haig, in error.

not have been five years' residence in the whole between 1839 and the passing of the statute. This depended upon the construction of the act, whether retrospective or otherwise. If prospective, the disability introduced by its provisions would not touch the pauper, because the term of five years would have elapsed without being affected by the new interruption. The Court held, that the time should be reckoned retrospectively. They said, that the sessions ought then to omit the excepted portion from their calculation, and to cause an equal portion of preceding time to be brought into the term, so as to ascertain whether the whole would amount to five years. And they put this interpretation upon the word "shall,"—"shall receive relief," &c., that is to say, "it denotes rather the happening of the event on which the exception is to apply, than the future relation of such event to the time after the act passed." It would be more rightly understood in the sense of a subjunctive mood, as though it were "should," instead of "shall," rather than as a future tense (*f*). Therefore, a residence for five years down to the time of the application for the warrant for removal may be made up of different broken periods. And it is no objection that the person has received parochial relief within five years, if the residence has actually reached that limit prior to the application. The provisoes of the act deal with time which would otherwise have been reckoned, and exclude it, but do not hinder a previous residence from being added on, so as to make up the full amount (*g*). This statute, although prospective as to the removals therein mentioned, is retrospective with regard to the conditions of removal. Therefore, although the husband died before the passing of the act, the widow was held entitled to the benefits of sect. 2, and so irremovable until twelve calendar months should have expired after the decease (*h*).

A rule being applied for, the Court take a time to consider,

(*f*) 3 New Sess. Ca. 320, R. *v.* Christchurch. S. C. 12, Q. B. 149.

(*g*) 12 Q. B. 103, R. *v.* Harrow on the Hill. S. C. 3 New S. C. 232. 17 L. J., M. C. 148.

(*h*) 12 Q. B. 120. 3 New S. C. 262. 17 L. J., M. C. 172, R. *v.* St. Mary, Whitechapel. S. P. 12 Q. B. 129, R. *v.* St. Pancras. S. C. 3 New S. C. 262. 17 L. J., M. C. 172.

and at length, upon another day, grant it. It may be dated as of the day when it was applied for (*i*).

The jurisdiction of the Court of Requests was enlarged by an act passed in the reign of George III. from the 30th of September. The act passed on the 9th of the preceding July. A clause provided that the plaintiff who commenced an action in any other Court should not have any costs. It was held that the date, which must be looked to as the limitation, was the 30th of September; for otherwise the subject would have been without any remedy from the 9th of July until the 30th of September (*k*).

But the Court of Common Pleas would not construe the Bankrupt Act, 12 & 13 Vict. c. 106, s. 225, retrospectively, so as to deprive a creditor of a right to an action commenced before the act came into operation. By sects. 224 and 225 of that act, a deed of arrangement, signed by six-sevenths of the creditors in number and value, binds the other creditors after a notice of three months (*l*).

Consideration illegal. Time immaterial.

In commercial matters, there is a diversity between *bonâ fide* and illegal transactions, with reference to the time for commencing a suit; for where the contract is lawful, no proceedings can be had till the period has expired within which such contract is to be performed; whereas in the case of fraud or illegality, money may be recovered before the time stipulated for the accomplishment of the thing promised,—as in the case of an undertaking to procure a cadetcy within three months. Here the action was held to have been well brought before the end of three months; and Lord Kenyon said, he had so ruled upon other occasions in the case of goods sold on credit; in which case, if it appeared that there had been any fraud on the part of the buyer, though the time of credit was not expired, he

(*i*) 8 D. P. C. 145, Egan *v.* Rowley.
(*k*) 2 East, 135, Whitborn *v.* Evans.
(*l*) 19 L. J., C. P. 297, Marsh *v.* Higgins and another.

was of opinion that the party might consider the credit as void (*m*).

"Monthly." An annuity is given by will with a direction to pay it "monthly." The first payment is in this case to be made at the end of a month next after the death of the testator (*n*).

Apportionment. The subject of apportionment hardly comes within the limit of this book, but the reader is referred in the note to some of the statutes and authorities upon the subject, which may serve as a guide (*o*).

(*m*) 2 Esp. 522, Hogan *v.* Shee.
(*n*) 1 Sim. & Stu. 390, Houghton *v.* Franklin.
(*o*) Vin. Ab. tit. Apportionment. 11 Geo. 2, c. 19; 4 & 5 Wm. 4, c. 22. 2 Sir Wm. Bl. 1016, Howel *v.* Hanforth. 20 L. J., Canc. 66, Knight *v.* Boughton, and the cases there cited. 20 L. J., Q. B. 305, The Queen *v.* The Lords of the Treasury. Where a mandamus to apportion the annuity of the Queen Dowager, who died on the 2nd of December, was refused.

SECTION II.

OF THE "YEAR."

MUCH of the law relating to the "year" will be found in the next Section, where the distinction between lunar and calendar months is fully discussed. It is clear that where calendar months come in question, the matters at issue will have reference to the year. On the other hand, where there is no mention of calendar months in statutes, or contracts, or otherwise, the Courts, as we shall see by and by, endeavour at the present day to put such an interpretation upon the subject at large as will best conduce to the ends of justice.

Writers, speaking of the year, have called it "solaris, lunaris, artificialis, usualis"(*a*); and again, "astronomical, ecclesiastical, usual" (*b*).

Where time is expressed by the year, half year, or a quarter of a year, it is always computed in law by solar months, *viz.* twelve calendar months; but where months are mentioned in a statute, and not years, these are always computed by the moon, *viz.* four weeks to the month. Therefore every quarter of a year, legally speaking, contains in it ninety-one days, which make thirteen weeks; and half a year contains 182 days. "The quarter of the year after the feast of Michaelmas begins on the 30th of September, and ends on the 29th of December; the next quarter begins on the 30th of December, and ends on the last day of March; the third begins on the 1st of April, and ends on the last day of June; and the fourth begins on the 1st of July, and ends on the 29th of September." In the whole

(*a*) Bract. 359.
(*b*) Dug. Chr. Jur. Pref. 2.

year there are six hours over and above the 365 days, or fifty-two weeks, but "to the six hours over the law pays no regard" (*c*).

Agreements.

It was agreed between parties that no execution should be taken out till a year after the execution of a warrant of attorney. It was moved to set aside this instrument for irregularity, because a year had not elapsed. The plaintiff insisted that he had waited for a year, for the warrant was in the long Vacation, and the judgment was entered as of Trinity Term before, and the execution did not ensue till after Trinity Term following; therefore the plaintiff would rely upon the date of the judgment. But the question was, whether the reckoning should not have been from the date of the warrant, for if so, a year would not have elapsed. And the Court were not agreed, but on reference of the matter it was reported to the Court that no such agreement existed (*d*).

An agreement was made to take a house for six months from the 1st of January, and so on from six months to six months, until notice to determine the tenancy was given,—the first payment to be made on the 1st of July. The Court held this to be a sufficient taking for a year within 6 Geo. 4, c. 57 (*e*).

Where an agreement had been entered into that a lease should be granted for sixty-three years from the 1st of May, 1801, but three years should be allowed for "winning a colliery" without payment of rent, the Court held, that an arbitrator, to whom it was left to give such directions for a lease as he should think fit, had exceeded his authority by directing the commencement of the lease from the 1st of May, 1804, because the time which elapsed before the payment of rent formed part of the sixty-three years (*f*).

Declaration.

After many mutations, it at length became the rule, in con-

(*c*) Dy. 345.
(*d*) 6 Mod. 14, Dillon *v.* Browne.
(*e*) 1 Q. B. 247, R. *v.* Chawton. 4 Per. & D. 525, S. C.
(*f*) 1 Br. & B. 80, Bonner *v.* Liddell and others.

formity with the opinion of Mr. Justice Buller, that unless the defendant availed himself of the plaintiff's neglect by signing judgment of *non-pros*, the declaration may be delivered at any time within a year next after the return of the writ (*g*).

In availing himself of this rule, a defendant must not confound a year with four Terms; for where a summons was served to shew cause why the declaration should not be set aside on the ground of "four Terms" having elapsed, the Judge dismissed the summons. A second application was then made to another Judge, who refused to interfere, and upon a rule obtained in Court, it was held that the Judge was correct in so dismissing the summons. The summons was defective by not stating the lapse of a year instead of four Terms. Four Terms are not one year, and the party complaining ought himself to have been regular (*h*).

Scire facias.

In *scire facias*, the year is computed from the day of signing judgment, and as the stat. 13 Edw. I. c. 45 uses the words "*infra annum*," the year must be reckoned by calendar months, and not by Terms (*i*).

Leap Year.

With reference to the Leap Year, one difficulty was how the year and day allowed for certain legal purposes should be reckoned. The stat. 21 Hen. III. *De Anno Bis.*, therefore, provided, that the day increasing in the Leap Year should be accounted for one year (*i. e.* that such day should be included in the year); and further, that it should be taken to the same month out of which it grew, and that day and the day going before should be accounted for one day. Hence the 29th of February would be deemed to be included in the preceding year of days, and likewise included within the last legal month, and moreover the 28th and 29th of February would be calculated as *one day*. Whence it followed that the year, and day beyond the year, would remain unaffected by the Leap Year.

(*g*) Tidd. 424, citing 2 T. R. 112, Worley *v.* Lee. 3 T. R. 123, Penny *v.* Harvey. 5 Id. 36, Sherson *v.* Hughes. 7 Id. 7, Parsons *v.* King; Sykes *v.* Bauwens, 2 New R. 404, seems *contrà*, but the rule as stated in the text is now recognised.

(*h*) 18 L. J., Ex. 34, Chaplin *v.* Showler.

(*i*) Tidd. Pr. 1136.

In construing the law of hiring and service, the Leap Year, although consisting of 366 days, was not considered to confer an additional day beyond the year. So that a hiring on the 13th of October, 1807, till the 11th of October following, was held not to confer a settlement, although the year 1808 was Leap Year. Both days were considered inclusive, and yet one day was wanting to complete the year (*k*). The rule applied to the hiring extended also to the service under the hiring; so that there must have been a service for 366 days, the year being Leap Year (*l*).

A deed was made on the 29th of August, 1832, and therein the plaintiff (in *replevin*) covenanted to pay a certain sum, with interest, on the *29th of February* next ensuing. The question was, whether this should be construed to mean the 29th of February in the next Leap Year, or the 28th of February in the next year. The Court held, that a proviso for payment on the —— day of February next ensuing, would mean of the then next February; but some effect must be given to the words "the 29th of February," and, in order to do that, the 29th in the next Leap Year must be that day. Although Lord Denman seemed to intimate, that, ordinarily, the 29th of February, without more, might well be understood to mean the 28th, or otherwise, as the case might be. Besides, in this case the sense would be that the 29th should be referred, not to the *month*, but to the day (*m*).

Year continued.

A case nearly synonymous had occurred with reference to the current month many years since. It was in the matter of a bond, dated in March, and conditioned for payment on the 28th of March then next following. The Court held, that it should be understood the current month (*n*). And so where an award was dated on the 13th of October, 1840, and it was therein ordered that certain moneys should be paid

(*k*) 6 M. & S. 350, R. *v.* Worminghall. So was R. *v.* Ackley, 3 T. R. 250.

(*l*) 10 B. & C. 51, R. *v.* Roxby. The hiring was from the 13th of May, 1819, until 13th of May, 1820, but the service only lasted till the 12th of May, 1820.

(*m*) 3 Gale & D. 71, Chapman *v.* Beecham.

(*n*) 1 Mod. 112, Lister *v.* Stanley. S. C. 3 Keb. 291. But Sympson said, that a case of Read *v.* Alington had been decided the other way.

on the 28th of October next, it was held that the money was payable on the 28th of that *present* month of October (*o*). And it has been held, that a person *attains* to the next year of his age so soon as he has completed the last: for instance, A. *attains* to his twenty-fifth year when he has reached the end of his twenty-fourth, and need not wait till the end of the twenty-fifth before he can be said to have attained to it (*p*).

New style.

By 24 Geo. II. c. 23, s. 1, the year, instead of commencing on the 25th of March, was, after the 31st of December, 1751, declared to begin on the 1st of January, 1752, and so on from time to time. The days, however, would continue to be numbered as then until the 2nd of September, 1752, when eleven days were to be entirely dropt from the calendar, *i. e.*, the 3rd to the 13th of September, inclusive of both days, the 14th thus being made to succeed the 2nd. All acts, deeds, &c. were to be dated conformably to the new method of computation. And the same with respect to Hilary and Michaelmas Terms, sessions, &c.: courts held with fairs or markets being alone excepted. By sect. 2, for the purpose of preserving the calendar or method of reckoning, it was enacted, that the years 1800, 1900, 2100, 2200, 2300, or any other hundredth year of our Lord, except only every fourth hundredth year (whereof the year 2000 shall be the first), shall not be taken to be Bissextile, or Leap Year, but common years consisting of 365 days and no more; and that the years 2000, 2400, 2800, and every other fourth hundredth year from the year 2000, and also all other years at present being Leap Years, shall be taken to be Leap Years consisting of 366 days, in like manner as any fourth year is now considered. The 3rd section directed, that Easter and other feasts, &c., should be governed by the new rule. By sect. 4, the Courts of session in Scotland, the April meeting of the Governor of the Fens, and all markets, fairs, and marts, and Courts incident thereto, were to continue to be held on the same days, as though the act had not been made. The consequence of which would be, that such Courts, fairs, &c. would be postponed for eleven days, not in reality, but according to the

(*o*) 8 D. P. C. 867, Brown *v.* Smith.
(*p*) 4 Y. & C. 256, Grant *v.* Grant.

new computation of time; whereas, in other cases, the same periods of time would be anticipated by eleven days. The 6th section maintains the same exception with reference to the opening and inclosing of commons; and the 7th section excepts the times of payment or of the expiration of rents, annuities, &c.—of the delivery of goods—the commencement or expiration of leases—grants for terms of years in consequence of any deed, &c.—and the time of attaining twenty-one years, or other age of majority, whether appointed by law, or otherwise, for doing any act, or for the expiration or determination of any apprenticeship or other service (*q*).

The 25 Geo. II. c. 30 made some alterations as to the exceptions above mentioned. The 1st and 4th sections related to the election of certain officers, and the swearing of the Lord Mayor of London. The 2nd section brought the times for opening and inclosing commons, and for the payment of rents or for other payments, or for matters or things to be done upon particular days, into the new computation of the calendar, whenever such payments where to be made, or such things were to be done, upon any of the *moveable feasts*. But, by sect. 3, the titles to lands were not thereby to undergo alteration.

Misrecital. In pleading, if the year in which a public statute was passed be misrecited, as 22 Geo. III. for 27 Geo. III. it is insufficient to urge in reply that the title of the act has been rightly set forth. The misrecital cannot be rejected as surplusage (*r*). So where a statute was described as having been made 4 Ph. & M., whereas, on the production of the Parliament roll, the statute bore date in the 4th and 5th Ph. & M., it was held a fatal variance (*s*). So where an act was mentioned as having been passed in the second and third years of a reign, judgment was arrested: it might have been described as an act passed in a session holden in the two years (*t*). But where a conviction was alleged as having been made in the twenty-fifth year of the King's reign, whereas the Parliament which passed the act had

(*q*) See likewise the Law Dictionaries, tit. "Year."
(*r*) 2 T. R. 654, Watson *v.* Shaw and others.
(*s*) Cowp. 474, Rann *v.* Green.
(*t*) 1 Ad. & El. 327, R. *v.* Biers. S. C. 3 Nev. & M. 475. See 19 L. J., M. C. 178, R. *v.* Stacy.

been prorogued from the twenty-fourth to the twenty-fifth year of the reign, it was held that this was neither a misdescription nor a ground of objection (*u*). And if a statute has passed in a session belonging to one year of a reign and continued into another, it may be described as a statute passed in a *session* holden in both years, although not as a statute passed in both years (*v*).

Commencement of act.

In like manner as the statutes of a particular year have relation to the first day of the session, an act "to take effect" from its passing has legal relation to such first day (*w*). And in 1793, the year after the decision in *Latless* v. *Holmes*, it was by the 33 Geo. III. c. 13, enacted, that the clerk of the Parliaments should indorse the title of the act, and the day, month, and year of its passing and receiving the royal assent. Such indorsement shall be taken to be a part of the act, and the *date of its commencement*, where no other commencement shall be therein provided.* Since this statute the same doctrine of relation to the first day has prevailed (*x*). But if the statute direct the commencement from another day specifically, of course it is governed by that day (*y*).

The statute Secundo Jac. I. (*vulgo primo*), c. 15, should be pleaded as of the first year, because the act of Parliament relates to the first day of the Parliament (*z*).

So is the 29 Eliz. Statutes passed in that year relate to the first day of the session, which was in 28 Eliz., and must be pleaded as of 28 Eliz. (*a*).

(*u*) 2 Ch. Rep. 513, R. *v.* Windsor. So is Harmer *v.* Lane, 12 Moore, 523.

(*v*) 8 Mees. & W. 223. 9 D. P. C. 731, Gibbs *v.* Pike. 2 Lew. C. C. 57, Ratcliffe's case.

(*w*) 6 Bro. P. C. 486, Panter *v.* Attorney General. 4 T. R. 660, Latless, Executrix and another *v.* Holmes; and see note (*a*), 660, and note (*b*), 662. So an act made in the same session to amend an act has the like relation. 2 Price, 381, Attorney General *v.* Pougett.

* So that the words "from and after the 15th of March," will have reference to that date, although the act received the royal assent as late as the 16th of July. 1 Alc. & N. 375, Jamieson *v.* Attorney General.

(*x*) 14 East, 510, Nares *v.* Rowles.

(*y*) 1 Lord Raym. 371, R. *v.* Gall. S. C. Comb. 413.

(*z*) 2 M. & S. 123, Bryant *v.* Withers. 4 Inst. 25. 2 Rose, 8.

(*a*) 2 Sir Wm. Bl. 1102, Savage *q. t. v.* Smith. 2 Bing. 255. 257, Rumsey *v.* Tuffnell. S. C. 9 Moore, 425.

Artificial year.

However, business is not invariably regulated by the solar year. The year has been counted for the purpose of supporting a settlement by hiring and service from one moveable feast to another, as from Whitsuntide to Whitsuntide; although the number of days between each moveable period amounted only to 339 (*z*). So from statute fair to statute fair (*a*). But the Court would not allow the rule to be carried further; and, therefore, where a fair day was to be on old Michaelmas Day, except when that day should happen to be Saturday, on which occasion Monday was to be the fair day, the Court would not allow a hiring from the Monday till the following old Michaelmas Day to be considered a hiring for a year (*b*).

Again, there is the "*dies usualis*" of Bracton. An election to the mayoralty was ordanied by charter to take place every year on the Monday next before Michaelmas. This was the chartered year. A *quo warranto* was brought against the defendant, because, as the charter forbade him from being mayor twice within three years, he had taken upon himself that office within three *calendar* years. His answer was, that the prohibition extended only to *chartered* years, in which case he would be right as to time; and of that opinion were the Court, who said that "year" meant a "mayor's year," and that the intervention of three mayoralties satisfied the term "year;" and they added, that it was sufficient if three such mayoralties happened between the time when the defendant ceased to be mayor, and the time when he was *sworn into office* for the second time (*c*). So a tenant's half-year may well be from the 29th of September to the 25th of March, although it consists of only 179 days (*d*). So in the consideration of notices to quit, a customary half-year is deemed sufficient,—as a notice on the 28th of December to quit on the ensuing 25th of March (*e*).

But the Court would not permit usage to govern a case

(*z*) Burr. S. C. 669, R. *v.* Newstead, recognised in 10 East, 57; 10 B. & C. 491.
(*a*) Lofft. 54, Anon.
(*b*) 10 East, 576, R. *v.* Standen Massey.
(*c*) 10 B. & C. 486, R. *v.* Swyer.
(*d*) 4 Esp. 198, Doe *d.* Harrop *v.* Green.
(*e*) 6 Bing. 574, Roe *d.* Durant *v.* Doe. S. C. 4 M. & P. 391. 4 Esp. 198, Doe *d.* Harrop *v.* Green. 6 Esp. 53, Howard *v.* Wemsley.

of hiring and service. A hiring for three days less than a year, therefore, was held not to be a hiring within the statute (*f*). Although, on the other hand, they will not, in such cases, be governed by the ecclesiastical year; so that a service from Whitsuntide to Whitsuntide, with a service of 365 days, was, as we have seen, held sufficient (*g*).

Half a year.

Half a year and six calendar months are not synonymous. For six calendar months will be one or two days less or more than half a year, according as February is reckoned or not, one of the six (*h*). Half a year's notice is, therefore, necessary upon determining a tenancy from year to year, and six calendar months, unless they amount to half a year, are insufficient for the purpose (*i*). And upon this principle it is, that where a tenancy from year to year is determinable at a quarter's notice, it must expire at that period of the year when it commenced (*k*). So half a year's notice is necessary in the case of a tenant at will (*l*).

A notice, dated the 21st of October, 1842, to quit on the 13th day of May next, or upon such day or time as the current year for which you now hold the same will expire, is bad. The rent was due at Martinmas and May Day. The Court held, that this notice applied to the year 1842. A second notice might have been sent, but the year elapsed without that being done. The rule for setting aside the nonsuit was discharged (*m*).

Year and day.

The term "a year and a day" is frequently to be met with in the books. In the computation of this period, it seems that the day on which the act was done shall be reckoned the first (*n*).

(*f*) 2 Dougl. 439, R. *v.* Hanwood. Cald. 100; and see other cases cited. Id. 440. Burr. S. C. 87, R. *v.* Burnham; and see R. *v.* Worminghall, *ante*, p. 38.
(*g*) 7 T. R. 354, R. *v.* Ulverstone. Burr. S. C. 669, R. *v.* Newstead.
(*h*) 2 Com. 141, note (1), by Christian.
(*i*) 1 T. R. 159, Right *d.* Flower *v.* Darby and another.
(*k*) 2 Campb. 78, Doe *d.* Pitcher *v.* Donovan.
(*l*) 3 Wils. 25, Parker *d.* Walker *v.* Constable; and Tasker *v.* Burr, S. P. was cited.
(*m*) 7 Q. B. 577, Doe *d.* Mayor of Richmond *v.* Morphett. 14 L. J., Q. B. 345, S. C.
(*n*) East, P. C. 344, in Homicide.

This year and day, although little noticed in modern times, was formerly a subject of much attention, and was incident to several proceedings, both civil and criminal. As in murder, where proof was required that the deceased died within a year and a day after the stroke, and the day of the stroke was the first day of the computation (*o*). So a year and day is given to the owners of goods saved from wreck for the purpose of making their claim. By 3 Edw. I. (Stat. of West.), c. 4, if the owner of such goods prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him by the sheriff. Although if the goods be perishable, the sheriff may sell them within the year, by reason of the necessity, which is always excepted by the law (*p*). The reckoning of this year and day is to be from the time of the seizure, because that is the thing of which the owner would take the best notice (*q*).

A carucate of land was said to be as much as might be tilled in a year and a day by one plough (*r*).

(*o*) 1 Hawk. P. C. 79. East, P. C. 343. 4 Com. 197.
(*p*) 2 Inst. 168.
(*q*) Ibid. 5 Rep. 106. 108, Constable's case. 1 And. 86.
(*r*) See the Law Dictionaries.

SECTION III.

OF THE "MONTH."

SUBJECT to certain exceptions, and to the general statutory provision of 13 & 14 Vict. c. 21 (*a*), which is, however, confined to acts of Parliament, it is safe to lay it down as a rule, that where the word "month" is used, it is to be counted as a lunar month, or as comprehending twenty-eight days. The singular number, as a twelvemonth, includes all the year, according to the calendar, but twelve months shall be reckoned according to twenty-eight days to each month (*b*). As where there was a condition to re-enter if certain rent remained for three months unpaid. The number of days to the month was fixed at twenty-eight (*c*). So where the condition was to re-enter in default of payment for a month after a Christmas, a demand on the twenty-eighth day after Christmas was held sufficient (*d*). So a lease for twelve months, is only for forty-eight weeks, but a lease for a twelvemonth endures for the whole year (*e*).

So it was as to the inrolment of a bargain and sale under the stat. 27 Hen. VIII. c. 16. Any day of the six months, reckoning twenty-eight days to the month, although the last day, was considered to be sufficient (*f*).

So in the case of an insurance. The risk was for twelve

(*a*) See *post.*
(*b*) Dy. 218 *b*, Thomas *v.* Popham. 4 Leon. 4, S. C. Mo. 40. 6 Rep. 62, Catesby's case. Co. Litt. 135, *b.* Cro. Jac. 167. 4 Mod. 186. 3 Burr. 1455.
(*c*) 4 Leon. 179. 288, Wood *v.* Chivers.
(*d*) 2 Lutw. 1131. 1139, Kirby *v.* Green.
(*e*) 2 Com. 141.
(*f*) Thomas *v.* Popham, *supra.*

months. The vessel perished. If the time were reckoned by calendar months, the insurer must have made good the loss, if by lunar, he would be discharged. The Court held, that his bond had not been forfeited (*g*). So, again, there was a covenant, upon payment of so much money on such a day, and of a further sum (500*l.*) within one month following, to transfer certain shares in the Stock of the East India Company. The averment was, that the 500*l.* were tendered within the month, which was denied by the defendant, because twenty-eight days had passed from the date of the agreement. The plaintiff had tendered the money within the calendar, but not within the lunar month. The Court held, that the time should be computed as twenty-eight days to the month, and, therefore, the defendant became entitled to judgment (*h*). There was once, indeed, a kind of *obiter dictum* by Willes, C. J., in an action of covenant to pay monies at the end of six months, that these months should be deemed calendar, but the case was determined upon another point (*i*).

So, again, in all legal proceedings, a month means four weeks. Therefore a month's time to plead signifies the limit of a lunar month (*k*).

By 13 & 14 Vict. c. 21, s. 4, the word "month," shall mean calendar month, unless words be added shewing lunar month to be intended. But this provision is limited to future acts.

So, further, in the exposition of statutes, the general rule is to count twenty-eight days for each month (*l*), subject, nevertheless, to exceptions, and bearing in mind the statutory exception in 13 & 14 Vict. c. 21, as to future acts, and thus recognising the computation of lunar months. It need scarcely

(*g*) 1 Leon. 96, Dixie's case.
(*h*) 4 Mod. 185, Barksdale *v.* Morgan.
(*i*) Willes, 588, in Dyke *v.* Sweeting.
(*k*) 3 Burr. 1455, Tullet *v.* Linfield. 2 D. P. C. 237, Soper *v.* Curtis. 2 Car. & K. 9, per Pollock, C. B.
(*l*) 2 East, 333, Lee *v.* Clarke, (in error).

be added, however, that if the words "calendar month," be used in the statute, the act of Parliament, in that case, obviously points out how the reckoning shall be made.

There was an information for having retainers against the provisions of the Statute of Liveries, and the time laid was twelve months, *i. e.*, from the 12th of December, 42 Eliz. to the 10th of December, 43 Eliz. The verdict was, "Guilty for twelve months." But it was moved to arrest the judgment. For if the month be calculated at twenty-eight days, then from 12th of December to 10th of December, would be thirteen months, and as the jury had not found for which month they had acquitted the defendant, there could not be any judgment. On the other hand, if the months were accounted as calendar months, there would be a deficiency of two days, and, in that case, the information would be insufficient.* But the Court were of opinion that twenty-eight days should be the standard, and there then would be thirteen months in the year, and they held it not material, although it had not been found in which of the months the party had offended (*n*).

So, upon the Act of Uniformity, the commitment was for six lunar months only (*o*). So, where there was an information upon the Statute of Unlawful Games, the computation was limited to twenty-eight days, and the calendar reckoning was rejected (*p*). So, under the Stockjobbing Act (*q*), the six months mentioned mean lunar months, and it was held, that no discovery lay where the cause of action arose prior to the expiration of six lunar months (*r*). So it was where the Brewers of Exeter were charged with selling ale and beer, contrary to a rate put upon those commodities by the corporation for six months ensuing (*s*). So, in another case where, upon the stat. 1 Wm. & M. c. 8, s. 7, six months were appointed for ecclesiastical dignitaries to take the new oaths of allegiance and

* The report is "*sufficient*," but this must be a mistake.
(*n*) Cro. El. 835, Dormer *v.* Smith.
(*o*) 1 Show. 368, Holcroft's case, cited Mich. 32, Car. 2.
(*p*) 20 Vin. Ab. 271, C. pl. 3, Whethered's case, *per Cur.*
(*q*) 7 Geo. 2, c. 8, s. 1.
(*r*) 3 Bro. Ch. C. 11, Windale *v.* Fell.
(*s*) Id. 272, C. pl. 4, Case of Evans and others, Brewers of Exeter.

supremacy, the Court were inclined to reckon these months as lunar months, but they did not come to a decision (*t*). So likewise, the month for reading the Articles of Religion, after induction, was fixed to mean twenty-eight days (*u*). And so, again, where a person presented to a living was refused for insufficiency (*v*). So the time for recantation from Popery was fixed by the Chancellor of Ireland according to lunar months, and his opinion was confirmed on appeal (*w*). So where debt was brought for penalties for using a trade, from the 25th of February till the 23rd of the following January, that is, for eleven* whole months, there having been no apprenticeship: the Court would have given judgment for the defendant, but for the nature of the verdict: the jury found him guilty "of two months *lunar* next after the 23rd of February." And as there was a *scilicet*, this finding was sufficiently special to sustain the judgment (*x*). So, upon a motion to quash a conviction for deer stealing, under 3 & 4 Wm. & M. c. 10, it was held, that twelve lunar months having expired before the prosecution, it could not be supported, because, where "*months* are mentioned in a statute, and not years, these are always computed by the moon, *viz.*, four weeks to the month" (*y*).

So in the case of a month's absence from church, upon 25 Eliz. the Court held to the principle of the lunar month, because of the four Sundays, the absence upon each of which respectively would naturally create the offence (*z*).

It was, indeed, once urged, and with success, that where an offence, as a riot, was punishable at common law, a statute (13 Hen. IV. c. 7) which used the word "month," should

(*t*) 1 Show. 368. Skin. 313. 4 Mod. 95. Comb. 191, Burton *v.* Woodward.
(*u*) 1 Lev. 101, Brown *v.* Spence.
(*v*) 1 Leon. 31, Albury *v.* Bp. of St. Asaph.
(*w*) 5 Bro. P. C. 438, Farrell *v.* Tomlinson. But a *quære* is made whether these should not have been calendar months.
* The Report says "*duodecim*," but it must be "*undecim*."
(*x*) 12 Mod. 641, Stretchpoint *v.* Savage; and another case of King *v.* Stowbridge, Mich. 6 Wm. 3, was there cited.
(*y*) Carth. 406, R. *v.* Peckham.
(*z*) 2 Show. 205. 207, R. *v.* Spiller et Ux.

not be strictly construed as a penal statute. Consequently, it was held, that an almanac, or calendar month might be applied to the case (*a*). But it is doubtful whether this decision would now be regarded with favour, for the current of authorities, with certain exceptions, which will be presently mentioned, leans much towards the rule of calculation by twenty-eight days, unless the statute otherwise expresses it.

So where an attorney's bill was delivered on the 20th of July, and the action was commenced on the 18th of August, it was held by Lord Ellenborough, that as the statute spoke of months generally, lunar months must be intended (*b*). So an order in Chancery to amend in a month, means a lunar month (*c*).

So, under the Bankruptcy Act (12 & 13 Vict. c. 106), the three months' wages payable to servants or clerks may be said to be lunar months (*d*).

This rule of construction as to months appears at length to have been established as not admitting of controversy. In a case, which will by and by be cited upon another point, although three questions were reserved for consideration, this point as to the twenty-eight days was not doubted. On the contrary it was said, "A month, in law, is a lunar month, or twenty-eight days, unless otherwise expressed" (*e*). Some time afterwards a question arose, whether fourteen months, to be computed from the time of a ship's clearing out, should be

(*a*) 1 Sid. 186, R. *v.* Cussens and others. S. C. 3 Salk. 346. S. C. cited 4 Mod. 96; and see 1 Hawk. c. 65, s. 31.

(*b*) 5 Esp. 168, Hurd, Gent. *v.* Leach.

(*c*) 2 Sim. & St. 476, Creswell *v.* Harris.

(*d*) 12 & 13 Vict. c. 106, s. 168. 1 Mont. & Bligh. 413, *Ex parte* Humphreys. S. C. 3 Deac. & Ch. 114.

(*e*) 2 Dougl. 463, R. *v.* Adderley. See 3 T. R. 623, Castle and another *v.* Burditt and others. The 23 Geo. 3, c. 70, s. 30, enacts, that no action shall be brought against excise officers, unless one calendar month's notice in writing be previously given. It was said, that as three *lunar* months had elapsed since the seizure, the statute not mentioning calendar months in this respect, the action came too late. But the Court decided upon another point, in favour of the plaintiff whose articles had been seized, and they "avoided hinting any opinion on the second point." Id. 624.

called lunar or calendar months, and, although Lord Kenyon did not express himself pleased with the rule upon the subject, yet he said, (and the Court agreed to it), that the matter had been settled, and ought not again to be disturbed. Judgment was accordingly given in favour of the reckoning by lunar months (*f*). The same point was, again, submitted to without argument, where the bankrupt lay in prison for two months after his arrest. These months were deemed to be lunar months (*g*). So again, where an umpirage was to accrue, provided that the award by the umpire should be made within six months next after the date of his appointment, these months were held to be lunar. The umpirage was made, but not until after six lunar months, although within six calendar months. And the rule for setting aside the award was made absolute. For here there was nothing *ultrà* the expression itself to explain the meaning of the parties; and the Court distinguished the case from *Lang* v. *Gale* (*h*), where such an expression of meaning was evident (*i*).

It is observable, that an omission of the particular kind of month upon the record will not alter the character of the month which the justices intended. A covenant was made for the payment of two shillings in the pound within twelve calendar months from the date of the deed. But the word "calendar" was omitted from the record. And upon a verdict for the plaintiff, it was moved to enter a nonsuit, because, without more, the word "month" meant a lunar month, and thus there was a fatal variance. The Court, however, considered, that the meaning of that word must depend upon the intention of the parties, and in commercial matters, for example, they said that a calendar month was always intended, and they refused to disturb the verdict (*k*).

(*f*) 6 T. R. 224, Lacon *v.* Hooper and others. S. C. 1 Esp. 246.
(*g*) 3 East, 407, Glassington and others Assignees *v.* Rawlins, &c. and others.
(*h*) Lang *v.* Gale, *post*, p. 60.
(*i*) 6 M. & S. 226. In the matter of Swinford and Horn.
(*k*) 3 Br. & B. 186, Cockell and another *v.* Gray and another. S. C. 6 Moore, 482.

In another case, the plaintiff was an auctioneer, and the defendant made an agreement to gratify him with a certain amount of commission if a sale of property should be effected within two months. The question was, whether these should be construed to be calendar or lunar months. And it was held clearly, that months, without more, meant lunar months, but that the Judge might look into the instrument, or into the circumstances generally, in order to ascertain whether a calendar month might not have been intended, and that he was the proper person to decide upon such intention of the parties. And, moreover, the Court said, that the conduct of the parties would not, in itself, have the effect of withdrawing the consideration of the word "months" from the Judge. Nevertheless, they said that the usage of auctioneers as to months might be left to the jury; and in the present case the jury had found that calendar months had been intended (*l*).

An agreement was made between the plaintiff and the defendant that 60*l.* should remain in the defendant's hands for one year from the date, and so on from year to year, unless called in. A notice of twelve calendar months was required in order to call in the money, and instalments of 10*l.* were to be paid every three months, so as to clear off the debt in two years and six months. Notice was then given by the plaintiff of his intention to call in the money, and the Court held, that he was not bound to wait until the end of the current year for such notice, but that the notice might be given at any time of the year (*m*).

Nevertheless, it has been alleged, that there are exceptions to the rule as to this computation by lunar months.

Exceptions to the rule as to lunar months.

(*l*) The following cases were cited. 11 Q. B. 23, Simpson *v.* Margetson. S. C. 17 L. J., Q. B. 81. Smith *v.* Wilson, 3 B. & Adol. 729; where it was held, that evidence might be received of the custom of the county where a certain lease was made, that the number, "thousand," when applied to rabbits, meant twelve hundred.

Hutchinson *v.* Bowker, 5 Mees. & W. 235, where the jury were directed to give their interpretation of "good," and of "fine" barley, leaving the Court to decide upon the legal terms of the contract.

Nelson *v.* Harford, 8 Mees. & W. 806. That in contracts the surrounding circumstances of the case should be subject to the construction of the Court after the facts have been ascertained by the jury.

(*m*) 17 L. J., Ex. 278, Brown *v.* Hatill, Platt, B., *diss.* S. C. 2 Exch. 846.

1. The exception holds in *quare impedit.*

2. It obtains in commercial matters, where the custom warrants it, and the adoption of it is not contrary to good sense.

3. It is recognised in cases of civil contract, where the intention of the parties is manifest that calendar and not lunar months have been intended. And it may be added,

4. That wherever the word "year" is found in statutes, or such a term as will lead to the conclusion that calendar months are contemplated, the construction must be governed accordingly; and of course where the statute denotes calendar months, it is imperative.

1. *Quare impedit.*

1. The Statute of Westminster the 2nd, (13 Ed. I. c. 5), allows six months for the patron to present before a lapse. This period, in some of the books, is called *tempus semestre*, and the reason of the exception above mentioned in *quare impedit*, is because the construction of the statute, and the law upon the subject in general obviously points to an annual and not a monthly reckoning. Consequently it follows, that in such a case the calculation must proceed by calendar and not lunar time. This exception as to *quare impedit* is much adverted to and acknowledged throughout the authorities (*n*), although there certainly was one decision to the contrary;—*i. e.* in favour of the lunar month (*o*).

Catesby brought *quare impedit* against the Bishop of Peterborough and his nominee. The Bishop's defence was, that the benefice had remained vacant for six months after notice, whereupon he presented. The plaintiff replied that it appeared by the plea of the Bishop that he did collate "*infra tempus semestre proximum post diem notitiæ.*" The defendants severally demurred. If the six months were at the rate of

(*n*) See Co. Litt. 135, *b.* 2 Inst. 361, resolved in C. B. temp. Ed. 2, and H. 8. Jenk. 282, pl. 8. 2 Mod. 58, note (*a*). 4 Mod. 186. 3 Burr. 1455.

(*o*) 1 Leon. 31, Albany *v.* Bp. of St. Asaph. 27 Eliz. C. B.

twenty-eight days to the month, the ordinary had well collated: if they should be calendar months, the time of collation was premature. The Court held, that the computation must be by calendar months, inasmuch as the whole scope of the Statute of Westminster the 2nd was necessarily annual; the periods mentioned there were frequently annual, as two years, half a year; the books of authority commonly said, "That if a year and a half be part, title is devolved to the King to present by lapse;" and judgment passed for the plaintiff (*p*). A writ of error was brought, but the Court of King's Bench affirmed the decision of the Common Pleas (*q*). And Yelverton, J., said, he had seen in Justice Spelman's Reports,* a case between Doctor White and the Bishop of Lincoln, where it was resolved accordingly in a case of *quare impedit;* and that Walmesley, J., shewed him a precedent in the time of Edward the First, (which was immediately after the statute), where it was resolved that *tempus semestre* should be taken for the half year, and not for six months only (*r*). So in prohibition under 2 & 3 Ed. VI. c. 13, s. 14, it was resolved, that the six months there required for proof of the suggestion or surmise after prohibition granted, shall not be counted by twenty-eight days to the month, but according to the calendar (*s*). Nevertheless, Dolben, J., and Eyre, J., upon a subsequent occasion, were disposed to question the authority of this case in Hobart, and Holt, C. J., likewise felt himself in a difficulty concerning it, being reluctant to recognise it, and yet hampered by the decision.

The case above mentioned, however, did not come to a

(*p*) 6 Rep. 62, Catesby's case. S. C. Yelv. 100. S. C. Cro. Jac. 141.
(*q*) Cro. Jac. 166. Yelv. 100, Bp. of Peterborough *v.* Catesby.
* Spelman's Abridgment, 21 H. 8. Yelv. 100.
(*r*) Cro. Jac. 167. 3 Atk. 346, Franco *v.* Alvarez.
(*s*) Hob. 179, Copley *v.* Collins. S. P. Litt. Rep. 19, Doctor Clea *et son* Chaplain. Hetl. 32, S. C. but not S. P. 2 Show. 92, Thomas *v.* Gifford. Id. 308, Straker *v.* Baynes. 1 Salk. 554, Foy *v.* Lister. S. C. 2 Lord Raym. 1171. 2 Mod. 58, Sharp *v.* Hubbard. S. P. in 27 Car. 2. The six months were to be reckoned in term time, not in vacation. Mo. 573. And where the declaration is ordered to be amended, the returning is from the time of the amendment. 2 Barnes, 345, Malton *v.* Acklom. And the six months required by 2 Ed. 6, c. 13, were counted from the issuing of the prohibition. 1 Show. 308, Straker *v.* Baynes.

determination (*t*). And it is to be observed, that the case of *Sharp* v. *Hubbard*, which was decided sixteen or seventeen years previously to the same effect, did not seem to have been presented to the notice of the Court. The time shall begin to run from the *teste* of the prohibition, or if it be ordered to be amended, from the time of the amendment (*u*). Notwithstanding, it is not certain whether the Court, at the present day, would not restrain the rule to cases of *quare impedit*, or of a similar character, especially as the inclination of Lord C. J. Holt leant so strongly towards that view of the question. The law of tithes being nearly at an end, it is not likely that the point will be stirred again in this particular respect, but wherever the Courts regard any matter in a penal light, they are apt to extend a privilege, (and the more so if authority for so doing is not wanting), or to narrow the time for a prosecution (*v*).

2. Commerce.

2. The next exception to the rule of lunar months is in commercial reckonings, in cases where they can be adopted without infringing the rules of sense or justice.

It was indeed held upon one occasion, where a contract was made to deliver certain stock in the funds one month after, that a tender made according to the calendar month was too late. And the plaintiff was nonsuited, although he called several witnesses to prove that the custom of the Alley in such cases was to reckon by calendar months (*w*). But this case cannot now be relied upon.

Debt was brought upon a bond. The defendant pleaded

(*t*) Skin. 312, Woodward *v.* Hamersley, *ante*, p. 48, *nom.* Burton *v.* Woodward. "Holt said, that that case alone stuck with him," *i. e.* Copley *v.* Collins.

(*u*) 1 Salk. 554. 2 Lord Raym. 1171, Foy *v.* Lister, and the case in Mo. 573, which speaks of a distinction between term and vacation is denied.

(*v*) See also 3 Burr. 1456, *verba* Dennison, J., "There is a distinction between the temporal and ecclesiastical law, in interpreting this term, 'month;' the former understands it to be lunar, the latter to be calendar." 1 Com. Dig. "Ann." B. 2 Mod. 58, at the end of note (*a*). 1 M. & S. 118, per Le Blanc, J.

(*w*) 1 Str. 446, Jocelyn *v.* Hawkins.

that the money was lent from the 24th of August until the 24th of May following. The evidence disclosed a bargain for nine months, and the plaintiff objected that this must be held to be lunar months, and so that there was a variance. But Lord C. B. Gilbert remarked, that the general understanding was of calendar months in cases of this nature. The defendant had a verdict (*x*).

So respecting bills of exchange and promissory notes, a month means a calendar month, as if a bill be dated on the 10th of January; it becomes due, the three days of grace being allowed, on the 13th of February (*y*).

An action was brought upon a charter party, and the freight claimed was for twenty-two months, calculating them as lunar months. The defendant insisted that the reckoning should be by calendar months, whereby there would be a less amount of profit due. Lord Kenyon, upon this, left it to the jury to say how these contracts were esteemed amongst merchants, and the jury, which was special, replied, that the calculation was by calendar months, and, under the direction of the Court, they estimated the damages accordingly (*z*).

A similar doctrine has prevailed in more modern times. In a case where wines were sold at twelve months' credit, and spirits at four months' credit, Pollock, C. B., did not hesitate to acknowledge and lay down as a general rule, that in commercial dealings a month means a calendar month, as regularly as that a month in law matters must be intended to be a lunar month (*a*). The learned Chief Baron said, that the practice was thus with respect to bills of exchange, promissory notes, invoices, times of credit, &c., that he never knew an instance to the contrary. But we must accept this holding, subject to exceptions, as if the computation by calendar months should

(*x*) 1 Str. 652, Titus *v.* Lady Preston.
(*y*) 2 Com. by Christian, 141, n. (1); and see Id. 469, n. (25).
(*z*) 1 Esp. 186, Jolly *v.* Young.
(*a*) 2 Car. & K. 9, Hart *v.* Middleton. See also 10 Mees. & W. 331. Car. & M. 440, Brown *v.* Johnson.

happen to be contrary to good sense, to the manifest will of the parties, to recognised principles of law, or otherwise.

Again, goods were sold on the 5th of October. The contract was, that they should be paid for in two months. It appeared to be the usage in mercantile transactions, that the months should be calendar months upon such occasions, and likewise that the day of making the bargain should be excluded from the computation, and, accordingly, the Court of Exchequer held, that the 5th of December should have elapsed before any action could have been legally brought. The defendants had the whole of the 5th of December, wherein to pay the money. It was assumed here that calendar months were really meant by the parties, and the case went to the jury upon that assumption. Hence, upon a motion for a new trial, the defendant was not allowed to set up the presumption of law, that as there was no particular mention of lunar or calendar months in the contract, that, therefore, the Court must intend the months to have been lunar. The rule was discharged (*b*). So where the plaintiff sold wool to the defendant, "To be paid for by cash in one month less five per cent. discount:" the Court were of opinion that the buyer was entitled to the wool within one month without payment upon delivery, and *Webb* v. *Fairmaner* was cited by Wilde, C. J., as containing a contract nearly identical with this (*c*).

(*b*) 3 Mees. & W. 473, Webb *v.* Fairmaner. S. C. 6 D. P. C. 493. Parke, B., incidentally observed in this case, that Castle *v.* Burditt, 3 T. R. 623, had been overruled by Hardy *v.* Ryle. 9 B. & C. 603. 4 M. & Ry. 295; and likewise Clarke *v.* Davey, 4 Moore, 465, by which the opinion of Garrow, B., at the trial, as to the computation of the month in that case, was meant, inasmuch as the Court did not determine the particular point.

Note.—This case of Webb *v.* Fairmaner, was mentioned rather doubtfully in Blunt *v.* Heslop, 8 Ad. & El. 577. 579, and it was there said, that neither *Ex parte* Farquhar, Mont. & M. 7, nor Godson *v.* Sanctuary, 4 B. & Adol. 255, had been there cited. But it must be recollected that those were cases concerning acts of bankruptcy, which the Courts have always referred to the time of the act done, namely, the act of bankruptcy, whereas here, in Webb *v.* Fairmaner, *the usage of commercial transactions* was the principal question, and evidence was given, that both days, according to that usage, were to be exclusive.

(*c*) 19 L. J., C. P. 293, Spartali and others *v.* Benencke and others. The Court also held, that evidence was not admissible to shew, that by the usage of the trade, vendors were not bound under similar contracts to deliver wool without payment. Several cases were cited, but they relate rather to the

We may be allowed, under this exception, to mention a phrase used in commerce relating to month; *i. e.* "one month—money." Upon a motion for a new trial, the Court desired to know whether "one month—money" should be considered as importing only, that the buyer should pay for the goods in cash at the end of one month from the date of the contract; or that the buyer, whenever he should receive the goods, either at or before the month's end, should immediately give a bill for the amount of the price, so as to put the seller in cash for the same at a month's end from the date of the contract. The jury found, that the stipulation in the contract, "a month—money," meant, in the understanding of commercial men, payment at any time within a month, and they found that the payment might be made within the month by a bill of exchange, accepted by the buyer, and discounted by him, though the bill might have a longer time than a month to run before it became due (*d*). So, in the corn markets there is a custom, that the buyer may pay the factor upon discount, within the two months, which constitute the ordinary time of payment, either for his own accommodation, or for that of the factor. So that, where the factor stopped payment after the receipt of the money for corn sold, but before the two months had expired, it was held, that the buyer was discharged, and that the principal must look to the factor (*e*).

Evidence was given of a contract of sale of goods at two months and two months, *i. e.* to be paid for at two months by a bill at two months. This a witness considered to be cash at four months. An action was brought before the expiration of the four months, no bill having been given at the end of two months, but instead of declaring on a special contract, the plaintiff contented himself with an *indebitatus assumpsit* count. Chambre, J., upon this directed a nonsuit (*f*). Upon another occasion an agreement to pay in three months by a bill

usage of commerce than to legal time. See, however, 3 Camp. 426, Greaves *v.* Ashlin.

(*d*) 11 East, 36, Favenc and others *v.* Bennett and others.

(*e*) 5 C. & P. 471, Heisch *v.* Carrington.

(*f*) 4 East, 149, Miller *v.* Shawe, cited there.

at two months was held to be a contract for five months' credit. The plaintiff had sued before the end of five months, and had recovered upon the common count for goods sold and delivered, no bill for two months having been given, and three of the learned Judges adhered to the doctrine of Chambre, J., and made a rule to enter a nonsuit absolute (*g*). However, where the agreement was for three months' credit, and the vendor agreed to take a bill of exchange at three months; if the defendant, the vendee, wished for further time, Lord Ellenborough held, that the action was not premature, although brought before the end of six months. The defendant was to give the plaintiff his bill at three months, as the price of the indulgence promised, and a verdict passed for the plaintiff upon the common count (*h*). And after the full time of credit has expired, it was the opinion of Chambre, J., that *indebitatus assumpsit* would lie (*i*), and the Court of Common Pleas subsequently sustained the same doctrine (*k*).

And, speaking generally as to months of credit, it has been held, that where goods were sold at six months' credit, and payment was to be made by a bill at two or three months, at the option of the purchaser, there was, in effect, a credit for nine months (*l*).

Where the purchaser had an option of nine or six months' credit, by not paying at the end of six months, he was deemed to have made his election, without more, to pay at the end of the ninth month (*m*).

(*g*) 4 East, 147, Mussen *v.* Price and another, Lord Ellenborough, *diss.* S. P. 3 B. & P. 582, Dutton *v.* Solomonson. Lord Alvanley expressing his opinion, that had the matter been *res integra*, he should have agreed with Lord Ellenborough. But Lord Tenterden did not agree with this opinion of Lord Alvanley. 2 B. & Adol. 434. See also 1 New Rep. 331, per Mansfield, C. J. 7 Taunt. 188, Lee *v.* Risdon. S. C. 2 Marsh. 495.

(*h*) 2 Stark. 227, Nickson *v.* Jepson. See 1 Esp. 430, De Symons *v.* Minchwich.

(*i*) 4 East, 149.

(*k*) 1 New Rep. 330, Brooke and others *v.* White. 5 Esp. 269, Heron *v.* Granger. 5 East, 98, Marshall *v.* Poole.

(*l*) 2 B. & Adol. 431, Helps *v.* Winterbottom.

(*m*) 5 Taunt. 338, Price *v.* Nixon. S. C. 2 Rose, 438; and as to the discharge of sureties by an extension of the credit. See 8 Bing. 156, Combe

In a case, likewise, which will be cited hereafter at large, when we come to speak of the legal term "day," the Court, in giving judgment for the plaintiff, in an action for not accepting oil, intimated, that no usage of trade had been tendered in evidence to throw any light upon the transaction. Whence it seems, that they would have paid respect to an established mercantile custom, had any such been relied upon (*n*).

So again, in a case which we have already cited in a former page, the custom of auctioneers, with reference to months, was allowed to be presented to the jury, with a reservation, however, to the Judge of the right to expound the contract according to law, with reference to the surrounding circumstances of the particular transaction (*o*).

The third exception is in civil contracts, where the month is construed so as to give effect to the intention of the parties. As where there was a condition of re-entry for nonpayment of rent due at Michaelmas, or by the space of a quarter of a year after. It was moved, whether this should mean a calendar quarter of a year. And the Court held, that ninety-one days should be reckoned, being one-fourth part of the days of the year, and they said they would not pay attention to the six hours over. And Bendlowes shewed an old book of the Exchequer, to the end that every quarter of a year contains ninety-one days, or thirteen weeks, &c. (*p*). So where the tenant was always to be subject to quit at three months' notice, the months must be reckoned calendar months (*q*). 3. Civil contracts.

Assumpsit was brought against the defendant. The plaintiffs were entitled to an equity of redemption, and on the 24th of

v. Woolf. S. C. 1 M. & Sc. 241; or a variance between the contract proved and the guarantee. 5 Bing. 54, Holl and another *v.* Hadley; or in setting out the guarantee. 9 Bing. 618, Allan *v.* Kenning. S. C. 2 M. & Sc. 768.

(*n*) 6 Man. & Gr. 593. 7 Sc. N. R. 269, Startup *v.* Macdonald, (in error); and see 10 Mees. & W. 331. Car. & M. 440, Brown *v.* Johnson.

(*o*) 17 L. J., Q. B. 81, Simpson *v.* Margetson, *ante*, p. 51.

(*p*) Dy. 345.

(*q*) 3 Camp. 510, Kemp *v.* Derrett.

January they sold the fee simple of certain premises by auction. The abstract was to be returned to the purchaser within two months from the date of the conditions of sale, and a draft of the conveyance was to be delivered to the purchaser or his attorney within three months from the date of such conditions. The purchase-money was to be fully paid on the 24th of June then next. The breach alleged by the plaintiffs was, that after performing their part of the contract, the defendant, after the delivery of the draft, and before the 24th of June, by his attorney returned the same, and on the 24th of June refused to complete the purchase. It appeared at the trial, that the draft of the conveyance was delivered on the 24th of April, 1811. On the 30th, the defendant repudiated the contract. It was objected, that the computation ought to be by lunar, not calendar months, and, consequently, that the conveyance should have been tendered on an earlier day than the 24th of April, reckoning from the 24th of January preceding. A verdict was returned for the plaintiffs, subject to the opinion of the Court. The counsel in support of the verdict cited *Copley* v. *Collins* (*r*), and *Catesby's case* (*s*). And they argued that the parties had here made months their standard of calculation, and that the computation by calendar arose of necessity out of the contract. On the other hand it was urged, that on one occasion fourteen days was the time fixed for the delivery of the abstract, and that this circumstance repelled the inference relied on. But the Court gave judgment for the plaintiffs. They adopted the principle of decision according to the plain intention of the parties. The periods of two months and three months referred to, together with the fact of the completion of the purchase being fixed for the 24th of June, just five calendar months, demonstrated this intention. Besides, the construction would be favourable to the defendant, since he was allowed two months for examining the abstract, and one for the draft of the conveyance (*t*). And, in general, an agreement for the purchase of an estate will be construed so as to introduce the

(*r*) *Ante*, p. 53.
(*s*) *Ante*, p. 53.
(*t*) 1 M. & S. 111, Lang and another, Assignees of Bazeley *v.* Gale.

calendar month, where "month" appears in the contract, unless, indeed, the intention of the parties were evidently to the contrary (*u*).

So where a testator willed that the survivors of certain trustees should, within two months after a death or other vacancy in the number of trustees, appoint some fit person to be joined in the trust, it was objected, that the new trustee had not been appointed within two lunar months, although his nomination had taken place within two calendar months. But the Court overruled this objection to the completion of a purchase, (the agreement for which was entered into with the new trustee), with scarcely any comment (*v*).

It may just be added, that under the Irish Tenantry Act, the term of six months allowed to tenants to redeem for non-payment of rent, are to be deemed calendar months (*w*). And upon the foreclosure of mortgages, where time is allowed, as, for example, six months, these months shall be reckoned by the calendar (*x*).

4. Calendar month evidently intended.

The fourth exception would belong to the same class as the first, were it not that we have placed the proceedings in *quare impedit* entirely by themselves, by reason of their being so frequently cited as separate or isolated instances of the construction by calendar months (*y*). Where the words "year" or "half a year" are introduced into acts of Parliament, the fair conclusion is, that the reckoning should be by calendar months, in order that the corresponding *annual* time should be preserved. Because, as half a year consists of 182 days according to legal phrase (*z*), it follows, in the absence of any clause to the contrary, that the statute contemplated a calcula-

(*u*) 1 Y. & Col. 419, Hipwell *v.* Knight.
(*v*) 14 Sim. 622, Warburton *v.* Sandys.
(*w*) 1 Ball & B. 193. 196, Dowling *v.* Foxall. S. P. 2 Sch. & L. 521, Biddulph *v.* St. John.
(*x*) Barn. 324, Anon.
(*y*) See *ante*, p. 52.
(*z*) Co. Litt. 135 *b*.

tion which would agree with such days, and not one which would yield only 168 days, or lunar month days.

So the six months upon the Statute of Usury was accounted half a year according to the almanac, and not according to twenty-eight days in the month (*a*). The same may be said of the Statute of Labourers, and the reason is, because in those statutes the year is mentioned (*b*).

We have said that, as of course, where any statute speaks of calendar months, its direction is imperative. It may be added, that the Courts will take notice of the statute in that respect, although it is not pleaded, and that they will likewise refer in like manner to the interpretation clause, in order to explain the word "month." As where, in 6 & 7 Vict. c. 73, the bill of an attorney is ordered to be left with the client for one month before any proceedings are had thereupon; the interpretation clause declares that "month" shall mean calendar month, but the section above mentioned respecting the bill merely uses the word "month." Here the Courts will recognise the clause, although no reference is made to it in the pleading. And, therefore, in an indictment for perjury, where it was alleged that the prosecutor delivered his bill, and, after the expiration of one "month" from such delivery, one A. B. took out a summons before a Judge, under 6 & 7 Vict. c. 73, to shew cause why the bill should not be referred for taxation, the Court held, that inasmuch as each count referred to the statute, although no averment as to the calendar month appeared, yet that the word "month" should be construed, in conformity with the interpretation clause, to mean calendar month (*c*).

Nevertheless, a demurrer will not be set aside as frivolous because it uses the word "month," instead of "calendar month" (*d*).

(*a*) Noy. Rep. 37, by Popham, C. J., and none gainsayed it.
(*b*) Jenk. 282, pl. 2.
(*c*) 17 L. J., M. C. 93, Ryalls *v.* Reg., affirmed in error. 18 L. J., M. C. 69. S. C. 11 Q. B. 781.
(*d*) 5 Dowl. & L. 21, Parker *v.* Gill.

SECTION IV.

OF THE "DAY."

THE term "Day" has created as many difficulties in legal discussions as any other portion of time. We will consider this subject, first, with respect to the day itself; secondly, to the fractions of it. We shall shew, that although the law does not always recognise fractions of time—on the contrary, that it rather repudiates them,—yet that there are occasions when it becomes necessary to advert to such minute parts, in order to give effect to the justice of the particular case.

These legal days may be ranged under the heads of:—1. *Dies juridici et non juridici.* 2. Sundays and holidays.

1. *Dies juridici.* Term.

Lord Coke observes, that *dies juridici* are only in the Term, and that there are also in the Term *dies non juridici* (*a*). But an exception is mentioned, namely, that the days of the assizes may be considered to be *dies juridici* (*b*). The Sabbath Day is not such a legal day, for that ought to be consecrated to Divine Service (*c*). In Hilary Term, the day of the Purification, and the Feast of the Ascension, if in Easter Term, are not *dies juridici*, but were set apart for Divine Service by the ancient Judges and sages of the law (*d*).

(*a*) Co. Litt. 135 *a*, citing Brit. fol. 134 *a*. 2 Inst. 264. As to judicial cognizance of terms, see *ante*, p. 2, and as to the Terms before the alteration by the statute of 1 Wm. 4, c. 70. See 6 Mod. 250, Davy *v.* Salter. The almanac is good evidence to prove the day of the week by the day of the year; as that the 16th of January was on a Sunday. Cro. El. 227, Page *v.* Fawcet.

(*b*) Co. Litt. 135 *a*.

(*c*) Ibid.

(*d*) Ibid. 2 Inst. 265.

By 11 Geo. IV. & 1 Wm. IV. c. 70, s. 6, Hilary Term was fixed to begin on the 11th and to end on the 31st of January. Easter Term (formerly subject to the Feast of Easter), to begin on the 15th of April and to end on the 8th of May. Trinity Term (subject also, before the act, to the Feast of Easter, and shortened by reason of infection arising from the heats since the time of Littleton) (*e*), to begin on the 22nd of May and to end on the 12th of June; and Michaelmas Term (abbreviated by stat. 24 Geo. II. c. 48) (*f*), to begin on the 2nd and end on the 25th of November.

By 1 & 2 Wm. IV. c. 3, s. 3, should any Term end on a Sunday, then the Monday next shall be deemed and taken to be the last day of the Term.

By 11 Geo. IV. & 1 Wm IV. c. 70, s. 6, if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter Day, shall fall within Easter Term, there shall be no sittings in banc on any of such intervening days, but the Term shall in such case be prolonged, and continue for such number of days of business as shall be equal to the number of intervening days before mentioned, exclusive of Easter Day, and the commencement of the ensuing Trinity Term, shall, in such case, be postponed, and its continuance prolonged for an equal number of days of business.

Nevertheless, by 1 Wm. IV. c. 3, s. 3, in case any of the days between the Thursday before and the Wednesday next after Easter Day shall fall within Easter Term, then such days shall be deemed and taken to be a part of such Term, although there shall be no sittings in banc on any of such intervening days.

A whole Term is considered to be but one day in law (*g*), but this must be understood with some restriction. For, not to mention other examples, the date of a declaration is now

(*e*) Co. Litt. 135 *a*. 2 Inst. 265.
(*f*) Co. Litt. 135 *a*, by Harg. (n. 2).
(*g*) 3 Bulst. 114. Cro. Jac. 284.

directed to be the day on which it is filed, and no mention of the Court or Term is necessary. If, therefore, the declaration be filed in Term time, it has reference to the particular day, and not to the Term generally.

So where a seal in Chancery continues more than one day, the time is only viewed as a continuance of the first day (*h*).

The assizes are considered but one day in law. So that if a party should die on the first day of the assizes, the trial of his record may still be had, and the verdict in his favour will be sustained. But if he die on the day before the assizes, it is otherwise. Yet in such a case the Court refused to arrest the judgment, but left the defendant to his writ of error, in order that the point might be put in issue and tried by a jury (*i*). The assizes.

So the day of an assize writ purchased was considered in law to mean all the day of the plea, so that although the tenant aliened on that same day, the writ was not to abate. In such a case the demandant was awarded his seisin (*k*).

So, by fiction in law, the whole Term, the whole time of the assizes, and the whole session of Parliament may be, and sometimes are, considered as one day. Although a matter of fact may overturn the fiction occasionally, in order to do justice between parties (*l*).

So during the period when it was allowed to entitle declarations generally, a declaration intituled of the Term, related to the first day of the Term. And as ancient pleadings were conducted *ore tenus*, the breach laid in the declaration might well be presumed to have happened before the delivery of the declaration, because the parties could not declare until the

(*h*) 1 P. Wms. 522, Anon.
(*i*) 1 Salk. 8. 2 Car. & K. 200, *Re* Oxfordshire Sheriff.
(*k*) 17 Ass. pl. 21. See *post*, Fraction of a day.
(*l*) 3 Wils. 275.

sitting of the Court (*m*). And the Court is bound to take notice of its own course (*n*).

2. Sundays or Holidays.

Sunday.

Sunday, or the Lord's Day, was, during a considerable period, regarded with strictness by the Law of England. It was *dies non juridicus* (*o*)—it was statutably set apart from the service of process and legal proceedings generally—it was kept holy by acts of the legislature in respect of sports and pastimes, and likewise as to matters of secular business—acts of necessity permitted to be done, as exceptions, proved the vigilance of the rule;—and whilst there were punishments for not observing it in a temporal sense, there were penalties for neglecting to attend to its religious requirements. With the exceptive instances of works of necessity, and of the legal rule which prevents a person from advantaging himself of his own wrong by making the Sunday available to defeat the ends of justice, or to avoid his own contracts, the inclination of the English Legislature, conformably with the common law, has been to preserve the Lord's Day in its integrity. Latterly, however, not only have the fines and imprisonments connected with the non-observance of the public services of the Church of England been removed, whilst, again, there has been no addition to the stringency formerly adopted with reference to this day, but struggles likewise are being made to restrict the laws which now exist upon the subject within their narrowest circle.*

Attendance at church.

We will first mention, shortly, that the laws respecting the discipline of the Church on Sundays have been altogether repealed as to compulsory attendance there. They are now scarcely more than matters of history by reason of a statute, which bears the title of "An Act to relieve Her Majesty's Subjects from certain Penalties and Disabilities in Regard to

(*m*) 1 T. R. 116, Pugh *v.* Robinson. 2 Lev. 176, Dobson *v.* Bell, *acc.* See Sty. 72, Symons *v.* Low. 2 Bing. 469. 10 Moore, 194. M'Cl. & Y. 202, Ruston *v.* Owston, (in error).

(*n*) Dobson *v.* Bell, *supra*. 1 T. R. 118, per Buller, J.

(*o*) Co. Litt. 135 *a*. 2 Inst. 264, 265.

* And, moreover, it will be desirable for the reader to observe the proceedings in Parliament upon this subject, because a bill has been before Parliament for more than one session which contemplates some alteration in these laws.

Religious Opinions" (*p*). It may be sufficient to say that the statutes of Edward VI., Elizabeth, and James I., with reference to such attendance were repealed by the act just mentioned.

Secondly, as to sports and pastimes. By 1 Car. I. c. 1, there shall be no concourse of people out of their own parishes on the Lord's Day for any sports or pastimes, nor any bear baiting, bull baiting, interludes, common plays, or other unlawful exercises and pastimes used by any persons within their own parishes. The penalty is, upon conviction before one justice, or chief officer of any city, &c., on view, or confession, or oath of one witness, within a month, (*i. e.*, a lunar month, reckoning the day of the act done), 3*s.* 4*d.* for the poor, to be levied by the constable and churchwardens by distress; and in default of distress, the party shall be set in the stocks for three hours (*q*). The ecclesiastical jurisdiction is, however, saved. Sports and pastimes.

By 27 Hen. VI. c. 5, s. 1, it was enacted, that all fairs and markets upon feast days, or on Sundays, the four Sundays in harvest excepted, shall clearly cease on pain of forfeiture of the goods exposed to sale.

But this statute is repealed by 13 & 14 Vict. c. 23, as to the exception of the four Sundays in harvest, and the act of Hen. VI. is to be construed as if such exception were not inserted therein.

Thirdly, as to matters of secular business.* By 3 Car. I. c. 1, no carrier, nor waggoner, carman, or wainman, nor drover, shall travel on the Lord's Day under pain of 20*s.* A butcher killing or selling victual shall likewise forfeit 6*s.* 8*d.* But the conviction must take place within six months before one justice, or mayor, &c., on view, confession, or oath of *two witnesses*. The recovery may be by distress and sale by the constable and

(*p*) 9 & 10 Vict. c. 59, s. 1.
(*q*) Continued indefinitely by 3 Car. 1, c. 4, and 16 Car. 1, c. 4.
* Die Dominico nemo mercaturum facito id quod si quis egerit, et ipsa merces, et præterea 30 solidis mulctatur. 2 Inst. 220. Inter leges Ethelstani Regis.

churchwardens, or in any Court of record in any city or town corporate, before the justices in sessions, and the forfeiture is to go to the relief of the poor, the informer or prosecutor having one-third part, if the justices or mayor, &c., so order. An indictment upon this statute was held bad for want of laying the offence, "against the form of the statute," because it was no offence at common law to sell meat (*r*).

We come now to the consideration of a statute, 29 Car. II. c. 7, which is not only still in force, but is, on the one hand, enforced by those who adhere to the strict observance of the Lord's Day, although, on the other, its provisions are rather circumscribed than otherwise by the judgments of the respective Courts. But we have said it may be desirable to caution the reader that bills for the better observance of the Lord's Day are frequently before Parliament, and that it may happen that this statute of Car. II., and, perhaps, others, may be repealed*. The 1st section of the 29 Car. II. c. 7, after ordaining generally that the Lord's Day shall be kept both by abstinence from labour as well as by attendance upon the public services, upon pain of forfeiting 5*s*., if the offender be above fourteen years old, forbids persons from crying, or exposing to sale, any goods upon that day, upon pain of forfeiting the same. The material words are, "that no person shall do any worldly labour, or *work of their ordinary calling* on the Lord's Day (works of necessity and charity excepted); and, further, no person shall publicly cry, shew forth, or expose to sale any wares, merchandize, fruit, herbs, goods, or chattels upon the Lord's Day, upon pain of forfeiting the same. Then by sect. 2, drovers, horse coursers, waggoners, butchers, and higlers, are forbidden to travel or come into their town on the Lord's Day upon pain to forfeit 20*s*. And no person shall travel on that day with any boat, &c., except upon extraordinary occasion, to be allowed by a justice or head officer, on pain of forfeiting 5*s*.

The penalties above mentioned are recoverable by distress and

(*r*) 2 Str. 702. 2 Sess. Ca. 324, R. *v.* Brotherton. See 1 Saund. 249, Faulkner's case.

* Whether this act has not been repealed as to certain districts by 7 & 8 Geo. 4, c. lxxv. (local). *Quære.* See *post*, p. 73.

sale upon conviction before any justice or chief officer, or vicar, or confessor, or upon the oath of one witness. In default of distress the offender may be set in the stocks for two hours. The poor are to have the penalties, unless the justice, &c., should think fit to reward the informer with one-third of them. By sect. 3, the prosecution for these offences must be within ten days after the fact committed. By sect. 5, the hundred shall not be responsible for any robbery committed upon persons travelling on the Lord's Day. Nevertheless, after hue and cry, fresh suit and pursuit might be made upon pain of forfeiting as much money as might have been recovered against the hundred if the stat. 29 Car. II. c. 7, had not been enacted. However, the hundred is not now liable in case of robbery (*s*), the responsibility being limited to damage done by rioters by 7 & 8 Geo. IV. c. 31.

In the act for making Billingsgate a free market every day in the week (*t*), Sundays are excepted.

By 6 & 7 Wm. IV. c. 37, s. 14, bakers beyond the city of London or the liberties thereof, or beyond ten miles from the Royal Exchange, are prohibited from baking bread, rolls, or cakes on Sunday,* and likewise from selling, &c., any bread, &c., after half past one P. M., and likewise from baking and delivering, &c., any meat, pudding, pie, &c., after half past one P. M. Moreover no other act as a baker may be exercised on that day, except to set and superintend the sponge for the following day's baking. But bakings may be delivered out to customers until half past one in the afternoon.

With reference to the proceedings, any person offending

(*s*) 7 & 8 Geo. 4, c. 27.
(*t*) 10 & 11 Wm. 3, c. 34.
* Under 29 Car. 2, c. 7, it was held to be no offence to bake provisions or pies for customers, but it was not allowable under that statute to bake bread. 2 Burr. 785, R. *v.* Cox, Esq. 5 T. R. 449, R. *v.* Younger; and see Cowp. 640, Cripps *v.* Dearden. This act, 50 Geo. 3, regulates the time of delivering out the baked provisions, as well as prohibits the baking of bread and rolls, &c.

against these regulations, and being convicted before a justice within six days after the act done, upon view, or confession, or proof by one witness upon oath, shall forfeit for the first offence 10*s.*, for the second 20*s.*, and for any subsequent offence a fine not exceeding 40*s.*, with the costs. The penalty is to go to the poor, except any part thereof not exceeding 3*s.* a-day, which the justice may think fit to award, together with the amount of costs, to the prosecutor. If not paid forthwith after conviction, the penalty and costs may be recovered by distress, and, in default, the offender shall be committed for seven days for the first offence; for the second, for fourteen days, and for any subsequent offence, for one month, unless the penalty, costs, &c., be sooner paid.

By sect. 33, the rights of the Universities are saved.

The statute 3 Geo. IV. c. cvi., contains provisions of a like character. The London baker may not sell bread after *one* P. M., nor deliver bakings after half past one P. M.; and the penalties for the three respective offences are 10*s.*, 20*s.*, and 40*s.*, with costs, and seven days are allowed for payment. The penalty is to be levied by distress, and in default seven days imprisonment are awarded for the first offence, fourteen days for the second, and one month for the third or any subsequent offence.

There are, nevertheless, exceptions to the provisions regarding Sunday above set out. Works of necessity and charity are excepted out of 29 Car. II. c. 7; and by 29 Car. II. c. 7, s. 3, nothing in the act shall extend to the dressing of meat in families, or dressing or selling of meat in inns, or cooks' shops, or victualling houses, for such as cannot otherwise be provided, nor to the crying of milk before nine A. M. or after four P. M. By 10 & 11 Wm. III. c. 24, s. 14, nothing therein contained shall be construed to prevent the selling of mackarel before or after Divine Service on Sunday.

The statute 11 & 12 Wm. III. c. 21, s. 23, declares that it shall be lawful for the rulers, &c. of the Company of Watermen to appoint any number of watermen, not exceeding forty, to work on every Lord's Day between Vauxhall above London Bridge, and Limehouse below bridge, at convenient places, for carrying passengers across the river at 1*d.* each.

By 9 Ann. c. 23, s. 20, coachmen or chairmen, being licensed, may ply on the Lord's Day, notwithstanding the 29 Car. II. c. 7; and under 1 & 2 Wm. IV. c. 22, s. 37, a hackney carriage driver is compellable to ply on a Sunday.

By 2 Geo. III. c. 15, s. 7, fish carriages may pass on Sundays and holidays, whether laden or returning empty; and as we have seen, that under 50 Geo. III. c. 73, bread and bakings may be sold and delivered at certain hours on the Sunday.

Fourthly, as to legal process. By 29 Car. II. c. 7, s. 6, no person shall serve or execute, or cause, &c. any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace), but the service of such writ, &c. shall be void; and the person suing or executing such writ, &c. shall be liable to the suit of the party grieved, and to answer damages, as if there had been no writ, &c. Legal process.

Having now related the statutes against profaning the Sunday, and the exceptions contained in them, we proceed to give an account of the decisions which have taken place upon the subject. The principal discussions have arisen upon the construction of the 29 Car. II. both in respect of the exercising of worldly callings, and of the service of legal process.

But there have been some cases upon the other points. Thus, as to fairs (*t*). A prescription was alleged to hold a fair every year upon the 29th of August, and it did not except Sunday; wherefore it was contended that it was ill alleged. But the Court said, that a fair holden on the Sunday is well enough,

(*t*) See *Ante*, 27 Hen. 6, c. 5.

although by 27 Hen. VI. c. 5, a penalty is inflicted upon the party who sells upon that day, but it makes it not to be void (*u*). However, as far as the validity of any contract is concerned if made at such a fair, "the law is changed, and if any act is forbidden under a penalty, a contract to do it is now held void" (*v*).

So as to travelling, or making visits. Going to church is held not to be within the stat. 29 Car. II. c. 7. Therefore, where a person went to church in a carriage with his wife on a Sunday and was robbed, it was held that he might recover against the hundred. But Pratt, C. J., observed, that if they had been going to make visits, it might have been otherwise (*w*).

So as to carriages. The defendant, who drove a van between London and York, was convicted at Stamford under 3 Car. I. c. 1. He was convicted as a carrier for travelling on Sunday. It was said, that every mail coach which carried a parcel, or even a passenger, upon a Sunday, might be stopped, and the driver subjected to a penalty. But the Court replied, that the statute must have a literal interpretation, being for the better observance of the Lord's Day, and that a person who had the care of a van was a carrier within the act, and the rule for a *certiorari* was refused (*x*).

In the case just cited the Court had thrown out an intimation that they gave no decision as to stage or mail coaches, but, nevertheless, the question as to these vehicles soon came under consideration. The plaintiff booked himself in a stage coach from Clapton to London on Sunday, and paid half the fare. The defendant, finding that the plaintiff was the only passenger, refused to go; upon which the plaintiff hired a post chaise, and brought *assumpsit* for the expense. The defendant alleged at the trial that the contract was void, being made in contraven-

(*u*) Cro. El. 485, in Comyns *v.* Boyer.
(*v*) 1 Taunt. 136, per Mansfield, C. J.
(*w*) 1 Str. 406. Com. Rep. 345, Tashmaker *v.* Hundred of Edmonton; and see Godb. 280. Cro. Jac. 496. 2 New Rep. 59, Waite *v.* Hundred of Stoke.
(*x*) 3 B. & C. 164, *Ex parte* Middleton. S. C. 4 Dowl. & Ry. 824.

tion of the statutes 3 Car. I. c. 1, and 29 Car. II. c. 7. But the plaintiff had a verdict, with leave for the defendant to enter a nonsuit. A rule having been obtained, it was urged for the defendant that the words "other person or persons" would include drivers of stage coaches. But Lord Tenterden said, that "where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*." And as carriers of a particular description were mentioned in 3 Car. I. c. 1, and drovers, &c. in 29 Car. II. c. 7, these words "other person or persons" could not have been used in a sense large enough to include the owner and driver of a stage coach. The rule, therefore, was discharged (*y*).

With reference to the prohibition against travelling with boats, &c., it has been made a question whether that part of the statute has not been repealed by a local act for regulating the navigation of the Thames (*z*).

However, the Calder and Hebble Navigation Company thought fit to close their canal on Sundays by a chain drawn across it. They claimed to do this under a Local Act, which empowered them to make bye-laws for the good government of the company, and of the navigation, bargemen, &c., and to inflict reasonable fines upon offenders, not exceeding 5*l*. The company made a bye-law closing the navigation on Sundays throughout the year, and forbidding all works and business, except works of necessity,—and except leave for boats to go to a reasonable distance for the purpose of mooring, or for the purpose of going to or returning from Divine Worship, or otherwise upon great emergency. This bye-law was resisted, and the Court, after argument, held it to be illegal and void (*a*). It was, however, said by Rolfe, B., that it had been contended that by the Thames Act, (7 & 8 Geo. IV. c. lxxv.) the statute 29 Car. II. c. 7, s. 2, prohibiting the user of boats and barges on Sunday

(*y*) 7 B. & C. 96, Sanderson *v.* Breach. S. C. 9 Dowl. & Ry. 796.
(*z*) 7 & 8 Geo. 4, c. lxxv.
(*a*) 14 Mees. & W. 76, Calder and Hebble Navigation Company *v.* Spilling. S. C. 3 Railw. Cas. 735.

had been repealed, but this, added the learned Judge, is rather doubtful (*b*).

If a person, who enters into an engagement on a Sunday, is not acting in his ordinary worldly calling, he is not within the statute of 29 Car. II. The plaintiff was a banker, and had sent his horse to a commission stable to be sold by auction. The defendant came on a Sunday to try the horse, and the agreement between him and the plaintiff's agent was, that the horse should be returned to the stables by two o'clock on that Sunday, or that 100*l.* should be brought by that time. The horse was not produced till eight in the evening, when the agent refused to receive it. The verdict was for the plaintiff. It was moved to enter a nonsuit, principally because the contract occurred on a Sunday. But the Court discharged the rule. They did not countenance the agent's conduct in selling on a Sunday, but they said, that this agent had not sold as a horsedealer in his ordinary calling, but as a private person. Nor had the plaintiff sold the horse in his ordinary calling, and, consequently, the sale was good (*c*).

"But if a man in the exercise of his ordinary calling should make a contract on the Sunday, that contract would be void (*d*)." Upon this last passage Mr. Justice Bayley, upon one occasion, made the following commentary. "His (*i. e.*, the Chief Justice's) expression, that the contract would be void, probably meant only that it would be void so as to prevent a party who was privy to what made it illegal from suing upon it in a Court of law, but not so as to defeat a claim upon it by an innocent

(*b*) 14 Mees. & W. 89.

(*c*) 1 Taunt. 131, Drury *v.* Defontaine. Speaking of this case, Parke, J., observed, in Smith *v.* Sparrow, 4 Bing. 88. "The expression, *any worldly calling*," cannot be confined to a man's ordinary calling, but applies to any business he may carry on, whether in his ordinary calling or not." But this opinion was not seconded by the other Judges; and in the following Michaelmas Term the Court of King's Bench, in R. *v.* Whitnash, (*post*, p. 75), decided in favour of the principle of ordinary calling, and would not enlarge the provision of the statute. See also to the same effect, 4 Mees. & W. 270, Scarfe *v.* Morgan.

(*d*) 1 Taunt. 135, per Mansfield, C. J.

party; and so it was considered in this Court in *Bloxsome* v. *Williams*" (*e*).

So where there was a contract on a Sunday between a farmer and a labourer, the sessions confirmed an order of removal, thus sanctioning the contract. The Court confirmed the order of sessions. The hiring of a servant by a farmer on a Sunday is not work or business within the meaning of the act of Parliament. Neither is it labour, work, or business, of the ordinary calling of the farmer. The statute must be regarded as confined to the ordinary calling of a person (*f*).

So where the indorsee sued the acceptor of a bill of exchange, it was held, that the bill, although drawn on a Sunday, was not void under 29 Car. II. c. 7 (*g*).

So where a mare was sent to a farmer for the purpose of being covered by a stallion belonging to the farmer, and, moreover, on a Sunday, it was held, that the contract between the sender and the farmer was not affected by the statute, because this transaction was not in the farmer's ordinary calling (*h*).

So a guarantee given by one tradesman to another for the faithful services of a traveller to be employed by one of such tradesmen, was considered not to be an act done in the ordinary business of trade within the statute 29 Car. II. c. 7. Such a contract being declared upon, it was pleaded that it was within the Statute of Frauds, and was entered into upon a Sunday, and in the way of the plaintiff's ordinary business. The evidence was that the contract was signed and delivered by the defendant to the intended traveller on a Sunday, and that on a subsequent day the traveller delivered it to the plaintiff. This plea was held not to be supported by such evidence, and a rule for a new trial was refused (*i*). So, likewise, an enlistment on

(*e*) 5 B. & C. 408, per Bayley, J. Bloxhome *v.* Williams, 3 B. & C. 232. 5 Dowl. & Ry. 82. 1 C. & P. 294, *post*, p. 78.

(*f*) 7 B. & C. 596, R. *v.* Whitnash Inhabitants; and, therefore, the opinion of Parke, J., mentioned in a former page, was not encouraged.

(*g*) 1 C. & P. 180, Begbie *v.* Levi. 1 Tyr. 130.

(*h*) 4 Mees. & W. 270, Scarfe *v.* Morgan.

(*i*) 4 Man. & G. 42, Norton *v.* Powell.

Sunday of a person to be a soldier was held not to be within the ordinary calling of a soldier who was a non-commissioned officer in the recruiting service (*k*).

On the other hand, as soon as the transaction shews that the parties acted in their ordinary calling, the statute attaches. The plaintiffs were horse dealers, and the action was brought on the sale and warranty of a horse. Both the sale and warranty happened on a Sunday. The only ground for contending that this dealing was not vitiated by the statute was, that the act respected "manual labour and other work visibly laborious, and the keeping of open shops" (*l*). But the Court retreated from so narrow a construction of the act, and made the rule for entering a nonsuit absolute (*m*). So where an agent entered into a contract on Sunday, his act was esteemed the act of the principal so as to affect the contract, and the nonsuit was ordered to stand (*n*). It is true that, three years before, Mr. Justice Bayley had thrown out a doubt as to whether the statute of Car. II. should not be construed with reference to manual labour and other work of that nature, and to the keeping open of shops (*o*); but subsequently that learned Judge retracted his opinion, and observed, that such "would be a narrow construction of the act, and a construction contrary to its spirit, to give it such a restriction" (*p*).

The qualification or modification of these opinions and decisions is to be found in exceptions, which the Courts recognise as absolutely due to justice. If two parties, knowing each other's trade, engage in a contract on Sunday, the engagement is void, and neither party can profit by it.

If money be paid, or goods delivered on a Sunday by virtue of a supposed but illegal contract, the contract being void, such

(*k*) 20 L. J., Q. B. 73, Wotton *v.* Gavin.
(*l*) 3 B. & C. 234.
(*m*) 5 B. & C. 406. 8 Dowl. & Ry. 204, Fennell *v.* Ridler.
(*n*) 4 Bing. 84, Smith *v.* Sparrow. S. C. 12 Moore, 266. 2 C. & P. 544.
(*o*) 3 B. & C. 234, *supra.*
(*p*) 5 B. & C. 407.

money or goods might possibly be recovered under proper counts, because it would be against conscience for a man to retain that which had been paid in respect of an illegal consideration (*q*).

If an invalid agreement of this nature be entered into by two persons, cognisant of each other's worldly calling, it is competent for either party to impeach the integrity of it, for both are in *pari delicto, et potior est conditio defendentis.*

If an agreement be made between two, and if it relate to the worldly calling of either, it is void as against the party or parties who are privy to the facts.

If it has no reference to the worldly calling, it is, of course, not within the statute.

But if one party be in his worldly calling, and the other be ignorant of that circumstance, and a contract be made, it is clearly incompetent for him who is cognizant to enforce the claim, but the converse will not hold. The innocent person, as he is called, *i. e.* the party who is not cognizant, may pursue the contract, inasmuch as the other, who had the illegal knowledge, shall not be suffered to take advantage of his own wrong. This is one of the qualifications above adverted to.

Assumpsit was brought for the breach of a warranty of a horse. The defendant was a stage-coach proprietor and horse dealer. The plaintiff's son was travelling on a Sunday with the coach, and a verbal bargain was made for the defendant to sell a horse for thirty-nine guineas. There was no evidence to shew that the plaintiff's son knew of the trade or business of the defendant as a horse dealer. The horse was delivered on the Tuesday following, and the money paid. An action having been brought on a warranty given by the defendant on the Sunday, it was objected that the bargain was void, but the plaintiff obtained a verdict. The matter was then argued upon a motion for a new

(*q*) But see 3 Mees. & W. 240, Simpson *v.* Nichols, *post.* See also 6 Bing. 654, argument of Bompas, Serjeant.

trial; and, first, it was said, for the plaintiff, that the contract did not become complete till the delivery of the horse on Tuesday, because, being verbal, it rested in parol during the Sunday, under the Statute of Frauds. But supposing the contract to have been threatened in another direction by the 29 Car. II. c. 7, it might be answered, that here the plaintiff's son was ignorant of the defendant's ordinary calling. He did not concur in any breach of the law, and was, therefore, entitled to recover back his money thus paid upon a void contract. And of that opinion were the Court, notwithstanding the argument of the defendant's counsel, that the contract should be referred back to the Sunday, and thus, that it was void *ab initio*. The Court said, however, that they inclined to view the contract as *in fieri* till Tuesday, and so not void. But, at all events, assuming the contract perfect, and so void, on the Sunday, and that the defendant would have been hindered from suing upon it, the defendant should not be permitted to set up his own breach of the law as an answer to the action. "If the contract be void as falling within the statute, then the plaintiff, who is not a *particeps criminis*, may recover back his money, because it was paid upon a consideration which has failed" (*r*).

Upon a subsequent occasion, speaking with reference to a contract inchoate on Sunday, Best, C. J., said, "I do not say that the mere inception of a contract on a Sunday will avoid it, if completed the next day; but if most of the terms are settled on Sunday, and the mere signature be deferred till the next day, such a contract could scarcely be supported" (*s*). It did not, however, become necessary to decide the point. Care, however, must be taken to contract in writing, if, through mistake, the original agreement should be fixed for completion on a Sunday, and it should become necessary to make an alteration. As where goods were to be paid for by a bill at three months after delivery. The day settled for the delivery fell on the Sunday, and the delivery was postponed until Tuesday.

(*r*) 3 B. & C. 232. 5 Dowl. & Ry. 82. 1 C. & P. 294, Bloxsome *v.* Williams.

(*s*) 4 Bing. 87, in Smith *v.* Sparrow. See also 4 Mees. & W. Scarfe *v.* Morgan.

But the substituted arrangement was not reduced into writing, and it was objected that the Statute of Frauds had intervened to annul the bargain, and of that opinion were the Court. It was impossible to suppose that when the plaintiff had agreed to substitute the 24th for the 22nd of the month, either party imagined that an action could be brought for non-delivery on the 22nd, or that a delivery on the 24th would not be a performance of the contract. The statute intervened, and time was of the essence of the contract. A verdict was accordingly entered for the defendant, on the plea which alleged giving time under the Statute of Frauds (*t*).

But where both parties were *participes*, it was not allowed for the plaintiff to set up the objection that the defendant could not defeat his own contract, because here both parties were in their own wrong (*u*). *A fortiori*, if the contract be complete on the Saturday, a delivery or arrangement in connection with such contract on the Sunday will not vitiate it. As where the defendant agreed to purchase a carriage of the plaintiff. On Saturday the defendant requested the plaintiff to hire a horse and man for him, and to send the carriage to his house on the next day, that he might take a drive in it. The carriage was accordingly sent, and used on the Sunday, and was taken back to the plaintiff. But the defendant refused to take or pay for the carriage. The Court, nevertheless, sustained the plaintiff's verdict, being of opinion that there had been a sufficient acceptance before the Sunday within 29 Car. II. c. 3, s. 17, to entitle the plaintiff to recover upon a count for goods bargained and sold. The Court observed, that what took place on the Sunday was no violation of the statute, and that even if it had been, it would not the less serve to throw light upon the previous part of the transaction (*v*).

Another qualification of the statute of 29 Car. II. is, whether

(*t*) 10 Ad. & El. 57, Stead *v.* Dawber. S. C. 2 Per. & D. 447.
(*u*) 4 Bing. 84, Smith *v.* Sparrow.
(*v*) 5 C. B. 301, Beaumont *v.* Brengeri. Nearly all the authorities were reviewed in this case. Whether the statute 29 Car. 2, c. 7, would avoid a previous parol contract for the sale of goods, where the delivery and acceptance take place on a Sunday is made a *quære*. See 5 C. B. *ut supra*.

a subsequent promise has been made or can be implied, so as to give effect to a contract originally void. And the Courts will gladly avail themselves of a presumption of this nature to prevent the injustice which might arise if a party retained money or goods obtained under an illegal contract. Because the mode of pleading so as to reach such a case, in the absence of a renewed promise, is not always easy nor well adapted.

The plaintiff had a drover, who was journeying into Wales with his master's beasts. An agreement was made with the defendant to buy three cows and a heifer, in order to procure funds for the journey. The bargain was made on Saturday, but the defendant was to approve of the beasts on Sunday. This was done, and the cattle were left, to be paid for in three months. The defendant kept the beasts, but demurred as to the heifer, which he said was not that which he had bought. However, some time afterwards, he said he *would settle when the time agreed on was up*. The defendant did not pay for the heifer, and an action was brought. Bayley, J., held, that the defendant having kept the animal, and having promised to pay after the Sunday, was liable on a *quantum meruit*, though not for the price agreed on. Hence it seemed to have been admitted that the plaintiff knew of the defendant's calling. The Court of Common Pleas, upon a motion to enter a nonsuit, held, that the bargain was incomplete on the Saturday, and so void on the Sunday, but that the defendant became liable on his second promise. Here the defendant not only retained the animal, but made a new promise to pay. The *quantum meruit*, therefore, was sustained, and the rule discharged (*w*).

Again, the defendant pleaded the defence of ordinary calling on the Sunday to a count for goods sold and delivered. The replication was, that the defendant kept these goods, thus delivered, for his own use, without returning or offering to return them, and thus had become liable to pay upon a *quantum valebant*. The Court said that this plea could not be supported

(*w*) 6 Bing. 653, Williams *v.* Paul. Park, J., said, moreover, "We regret to be obliged to come to this conclusion, because it may have a tendency to defeat the statute." Id. 655.

for want of stating a subsequent promise, and held it bad on demurrer (*x*).

It is to be understood, that one offence only can be committed on the same day, in the exercise of the ordinary calling, under 29 Car. II. c. 7. There were four convictions in five shillings each, for selling small hot loaves of bread. An action of trespass was brought for taking the plaintiff's goods, and it was urged for the defendant, that supposing the convictions to be bad, that might be a ground for quashing the convictions, but not for an action. No priority appeared to give legality to one in preference to the other. But the Court answered, that if there were four convictions for one and the same offence, three must be bad, and, therefore, there was no jurisdiction. It mattered not which of the four was legal, or which illegal. Subsequently, judgment was given for the plaintiff. The Court said, that if a tailor sews on the Lord's Day, every stitch is not a separate offence. So of a shoemaker or carpenter. This was a single intention of the act of Charles, namely, to punish a man for exercising his ordinary trade and calling on a Sunday (*y*).

4. Legal Process.

Fourthly, as to legal process. We have already referred to the stat. 29 Car. II. c. 7, as to this matter. The several decisions proceeding from it shall now be set forth. And it will be found, that in like manner, as in the case of the worldly calling, there have been expositions, some favourable, others dissenting from the strictness of the statute. So with regard to the question of process, there has been a liberal amplification of the clause by the Courts, independently of the absolute exceptions which are contained in it. In many respects, however, it has been preserved in its integrity, and the proceeding is unlawful. As in the case of arrest, so that a person would, probably, have been convicted of manslaughter only by killing a bailiff who should have attempted to take him on a Sunday (*z*). So upon a *capias*

(*x*) 3 Mees. & W. 240, Simpson *v.* Nichols. 6 D. P. C. 355, S. C.
(*y*) Cowp. 640, Crepps *v.* Durden and others.
(*z*) 1 Hawk. P. C. c. 31, s. 58.

utlagatum (*a*). So for nonpayment of a penalty under the Lottery Act (*b*). Or in arrest upon a justice's order in bastardy (*c*). It was always considered that an arrest for debt on a Sunday was a void arrest, and that the person making it became liable to an action for false imprisonment (*d*). * And Kelyng, C. J., has said, that he had known many attachments for arresting a man upon a Sunday, the affidavit stating, that he might have been taken on another day (*e*)

And the original intention being unlawful, no subsequent act will qualify it. The plaintiff secured the defendant on a Sunday in his house, the defendant having come thither, and on Monday he sent for a sheriff's officer and arrested him. The Court would not listen to affidavits stating that the defendant had agreed to waive any benefit of the illegal detention. They could not distinguish this taking from an arrest upon a Sunday, which is purely void (*f*). *A fortiori*, where the defendant was taken upon a charge of assault, as a contrivance to get him into custody, the Court refused to sanction the proceeding. An arrest by means of criminal process is not a lawful contrivance (*g*).

An arrest on Sunday after a *voluntary* escape is void (*h*). So if a mistake be made by the sheriff, and a debtor be discharged, the party cannot be arrested on a Sunday in order to amend the mistake, because this is a *voluntary* escape. There was a detainer in the office against A., of which the sheriff was not aware when he discharged A. The arrest and discharge hap-

(*a*) Barnes, 228, Osbourne *v.* Carter. Id. 319.
(*b*) 1 T. R. 265, R. *v.* Myers.
(*c*) 2 Selw. N. P. 896 n., Taylor *v.* Freeman. As to bankruptcy, See 1 Atk. 54, *Ex parte* Kerney.
(*d*) 1 Salk. 78, Wilson *v.* Tucker. S. C. nom. Wilson *v.* Guttery. 5 Mod. 95. 1 Mod. 56, Anon.
* Before the 29 Car. 2, c. 7, an arrest being a ministerial and not a judicial act, was considered to be of necessity on a Sunday. 9 Rep. 66, Mackalley's case. Cro. Jac. 280. Godb. 280. See 2 Bulst. 72.
(*e*) 1 Mod. 56, Anon.
(*f*) 1 Anst. 85, Lyford *v.* Tyrrel.
(*g*) 8 B. & C. 769, Wells *v.* Gurney.
(*h*) Barnes, 373, Featherstonhaugh *v.* Atkinson.

pened on the same day. On the next day (Sunday), the sheriff again arrested A. But the Court held this to be an original taking on a Sunday, which must be void. Before the second arrest the defendant was in the sheriff's custody in the second action (*k*). Had this been a *negligent* escape, the party would have been still in the custody of the law, and he might then have been retaken at any time, either upon a fresh pursuit, or upon an escape warrant (*l*). And by 5 Ann. c. 9, s. 3, escape warrants are especially permitted on a Sunday. Had the sheriff noticed the detainer, made by virtue of a writ regularly issued, he would not have been justified in discharging A., because A. was originally in his custody upon an arrest by another party illegally made on Sunday. Unless, indeed, there were collusion between the two creditors (*m*). And the sheriff, moreover, may have a reasonable time for a search, if there be any grounds for suspecting that there really is a detainer. As where the order for a discharge reached the under-sheriff on a Saturday. The custody was at Cambridge, and the under-sheriff was at Wisbeach. On Sunday the gaoler received a warrant of detainer under a *ca. sa.*, issued the day before, and the Court said, that this service of the warrant on Sunday was not void. The writ was not issued on Sunday, and the sheriff was entitled to a reasonable time to search the office for writs, notwithstanding the order of discharge (*n*).

So, in bail cases, the defendant had the whole of Monday, where the *quarto die post* fell on the Sunday, the four days being calculated exclusively of the return day (*o*). So there were four days allowed for justifying bail exclusively of Sunday (*p*). So in *scire facias* against bail, Sunday upon one occasion was held not to be reckoned as one of the four days

(*k*) 5 T. R. 25, Atkinson *v.* Jameson.
(*l*) 2 Lord Raym. 1028, Sir Wm. Moore's case. 2 Salk. 626, Parker *v.* Sir Wm. Moore. 3 Salk. 148, S. C. 6 Mod. 95, S. C. Fort. 374. Willes, 460, n. Selw. N. P. 898, citing 2 Gundry, 14, MS.
(*m*) 15 L. J., M. C. 113, *Re* Ramsden.
(*n*) 1 Exch. Rep. 439. 17 L. J., Exch. 34, Samuel *v.* Buller.
(*o*) Lofft. 190, Anon.
(*p*) Reg. Gen. 2 B. & Ad. 788. 7 Bing. 782. 4 C. & P. 601. 1 Cr. & J. 469. 1 D. P. C. 102. 1 Tyr. 520. 5 M. & P. 813. 1 Price, Pr. C. 109. 4 Bligh. N. S. 581. 1 Price, Pr. C. 150, Jenkins *v.* Maltby.

allowed them for pleading (*q*). But subsequently, Best, C. J., said, that the practice of the Court of Common Pleas had been always to consider Sunday as one of the four days allowed before signing judgment after the return of the second writ of *scire facias*, and he mentioned *Creswell* v. *Green* (*r*), as directly contrary to the case in 11 East (*s*). Whereas in the Court of King's Bench again, upon a rule to appear to a *scire facias quare executionem non*, given by the defendant in error, Sunday was held by Abbott, J., to be excluded according to the usual practice (*t*).

Again, it was moved to set aside the proceedings against bail for irregularity, because the *ca. sa.* had not lain in the office four entire days, exclusively of the day on which it was lodged, and the return day. The lodging of the writ took place on Wednesday, the 21st of February. It was returnable on the following Monday. The matter in dispute was, whether Sunday was to be reckoned as one of the four days. Lord Ellenborough observed, that the bail should have four days allowed them to search the office, that they may know whether it be necessary or not to render their principal. But on Sunday no search could be made, and, therefore, to reckon Sunday would be to allow only three days to the bail. Bayley, J., took the distinction between cases where something may be done on the Sunday, as where bail may take (although they cannot render) their principal. Here, however, nothing could be done. The Court being agreed in the same opinion the rule was made absolute (*u*).

And where eight days were counted under the rule of Court (Trin. 1 Ann.) for bail to render their principal, the Court said, that Sunday must be reckoned. Sunday must be deemed

(*q*) 11 East, 271, Wathen *v.* Beaumont. See 1 D. P. C. 142, Anon. 2 Dowl. & Ry. 869, Dicas *v.* Perry.

(*r*) *Post*, p. 86.

(*s*) 3 Bing. 162, Combe and others *v.* Cuttill. S. C. 10 Moore, 534. Unless the Sunday be the last day.

(*t*) 6 M. & S. 133, Goodwin *v.* Lugar.

(*u*) 1 B. & Ald. 528, Howard *v.* Smith. S. P. 7 B. & C. 693, Furnell *v.* Smith. See also 1 Dowl. & Ry. 50, Cherry *v.* Powell. 7 B. & C. 800, Sandon *v.* Procter and another. 1 Deac. & Ch. lvii. Mem.

as much a day to occupy a space of time as any other day (*y*).

Nor can a rule *nisi* for an attachment for nonpayment of money under the Master's allocatur be served on Sunday. Lord Kenyon said, that the stat. of Car. II. was equally applicable to the case of the service of process as to an actual arrest, and the rule for an attachment was discharged (*z*). Nevertheless, care must be taken to distinguish between an attachment for contempt, which is in the nature of a criminal proceeding, as we shall presently see, and the case above mentioned. Indeed, if a person keeps out of the way on every week day, a service on the Sunday may be good, so as to found an attachment for contempt upon it in case of disobedience (*a*).

Upon a rejection of bail, four days' notice for fresh bail, excluding Sunday, were awarded (*b*).

Again, as a general rule, legal services cannot be executed on the Sunday. There was some doubt, at one time, as to the service of a declaration (*c*), but the Courts came, at length, to the conclusion, that such proceedings are absolutely void (*d*). And although, again, at one time it was held that a waiver by the defendant, of the irregularity, as an appearance, or a default and the execution of a writ of inquiry with notice, would cure the

(*y*) 14 East, 537, Creswell *v.* Green; and see 11 East, 272, n., Roberts *v.* Quickenden. "The practice appears to be thus:—In rules to plead, in actions in general, a Sunday or a holiday reckons as a day, except it be the last; but in rules for judgment a Sunday or a holiday does not reckon, though it be not the last day; and in proceeding in *scire facias* against bail the rules for pleading are assimilated to, and operate in this respect as rules for judgments, and are entered as such in a separate book in the office." Ibid.

(*z*) 8 T. R. 86, M'Ileham *v.* Smith.

(*a*) Comb. 462. 12 Mod. 158, Anon.

(*b*) 1 Price, Pr. C. 140, Topham *v.* Calvert.

(*c*) 12 Mod. 606, Waldegrave's case. Gould, J., and Powys, J., doubted. Holt, C. J., *contrà*. Comb. 21, Anon. Holloway, J., ruled that the service was bad. *Contrà*, Id. 286. 462. Fort. 375. Declaration in ejectment held rightly delivered on Sunday. See also 2 Lord Raym. 1528, R. *v.* Gumley. 2 Str. 811, S. C. 12 Mod. 667, Taylor's case. Barnes, 300, Walker *v.* Town. 2 H. Bl. 29, Loveridge *v.* Plaistow, where the *capias* was returnable on Sunday. 20 Vin. Ab. (Sunday) (C. 6), Jamet *v.* Voyer.

(*d*) Comb. 21, *ut supra*.

defect (*e*), the rule now is, that such a waiver cannot be made, and that the process or proceeding on Sunday vitiates the writ or other matter *ab initio*. Thus, the defendant accepted a notice of declaration, knowing that it was irregular, because it had been served on a Sunday, but subsequently moved to set aside the declaration and all subsequent proceedings. *Walgrave* v. *Taylor* (*f*), was cited for the plaintiff, but the Court made the rule absolute, being clearly of opinion that there could not be a waiver (*g*). Sunday being the essoin day of a term, the plaintiff gave notice of declaration on the Saturday preceding, and upon a motion to set aside the judgment, the plaintiff's counsel admitted that the process could not have been served on the Sunday, but he said that the defendant came too late, not having applied until notice of a writ of inquiry had been given. The Court, however, replied that the notice of declaration was a nullity, that the plaintiff had applied to be relieved as early as it was necessary, that is, as soon as he received notice of an effectual proceeding (*h*). So in the King's Bench, the defendant was served with a copy of the latitat on a Sunday, and upon a motion to set aside the proceedings, the plaintiff urged, that the defendant had applied to settle the debt, and for an account for the debt and costs, which was sent to him, so that additional expense had been incurred. But Lord Ellenborough said, that the regularity, or irregularity of such proceedings, could not depend on the assent of the party afterwards to waive an objection to such proceedings, which were in themselves absolutely avoided by the statute (*i*). So where a writ of *capias* was returnable on a Sunday, and the arrest took place on Monday, when the plaintiff renewed the writ, the Court discharged the defendant (*k*).

A declaration, in ejectment, was left at the house of the tenant on Saturday night. He received it, by his own acknow-

(*e*) 1 Lord Raym. 705, Walgrave *v.* Taylor.
(*f*) *Supra.*
(*g*) 1 H. Bl. 628, Morgan *v.* Johnson. See 1 Vent. 7. S. P. by counsel, *arg.* in Vaughan *v.* Lloyd.
(*h*) 2 New Rep. 75, Moffat *v.* Carter. See 20 Vin. Ab. (Sunday) (C. 6), citing Rep. of Pract. in C. B. 105, 106, Jamet *v.* Voyer.
(*i*) 3 East, 155, Taylor *v.* Phillips.
(*k*) 2 H. Bl. 29, Loveridge, one, &c. *v.* Plaistow.

ledgment, on the Sunday. This was held to be service of process on Sunday, and void (*l*).

The same law prevails with reference to the notice of a plea filed. The plaintiff's counsel said, that this service of notice was not process, and he cited *Walgrave* v. *Taylor* (*m*). But Lord Ellenborough said, that all notices on which rules are made, are process in respect to the subject-matter; not indeed process with respect to the writ, but process in respect of the rule (*n*).

So it was as to a judgment before the statute (*o*).

So it is with reference to a *subpœna* in Chancery (*p*).

So a writ of *distringas* is a nullity if made returnable on a Sunday (*q*). So it was in *scire facias*, where the writ was made returnable on a Sunday (*r*). So it is of the jurat of an affidavit, if its date is Sunday (*s*). So a writ of inquiry, made returnable on Sunday, is null, and will be reversed, not only upon error assigned in that particular (*t*), but likewise upon a writ of error, although that especial error be not assigned (*u*). So as to a *venire facias juratores* (*v*).

There seems to be an exception with reference to a waiver of

(*l*) 5 B. & C. 764, Doe *v.* Roe. Rule for judgment against the casual ejector refused. 2 Dowl. & Ry. 232, S. C. nom. Goodtitle *d.* Mortimer *v.* Notitle. 8 Dowl. & Ry. 342. 592, S. P.; and see 1 Cr. & J. 483. 1 D. P. C. 63.

(*m*) *Ante*, p. 86.

(*n*) 8 East, 547, Roberts *v.* Monkhouse. See also 3 New Sess. Ca. 152. 2 B. C. Rep. 271. 17 L. J., M. C. 111, R. *v.* Middlesex Justices.

(*o*) Cro. El. 227, Page *v.* Faucet.

(*p*) 19 Ves. 367, Mackreth *v.* Nicholson.

(*q*) 1 Dowl. N. S. 773, Morrison *v.* Manley.

(*r*) 11 Mod. 120, Prime *v.* Mason. See 1 Show. 60, Whitmore *v.* Manucaptors of Wheeler. 3 Keb. 260, Rod *v.* Huans. 1 Lev. 196, Courtney *v.* Philips.

(*s*) 3 Dowl. & L. 328, Doe *d.* Williamson *v.* Roe.

(*t*) W. Kel. 59, Minor *v.* Wilson.

(*u*) 6 Mod. 196, Harvey *v.* Broad. S. P. Id. 250, Davy *v.* Salter, where the writ was executed on Monday. S. C. 2 Salk. 626. S. P. Fort. 373, Lord Cornwallis *v.* Hoyle.

(*v*) 4 Dowl. & L. 77, R. *v.* Gregory. S. C. 1 Str. 387.

irregularity or laches in a case of a *copy*. Thus, if the copy of a writ of summons (the writ itself having been rightly tested) bears the appearance of having been tested on a Sunday, and service be made of such copy so incorrectly tested on another day than Sunday, the defendant's subsequent assent or laches will cause a waiver of the irregularity. It is true that a writ tested on a Sunday is void, but here the copy only bore the mark of incorrectness (*w*). Otherwise a writ of summons dated on Sunday cannot stand good, although some time has elapsed since it issued. And the Court is bound to take judicial notice that a certain day of the month was Sunday (*x*).

A common recovery was held void where the writ of summons was returnable on Sunday, and the vouchee died upon the Sunday (*y*).

So in a sheriff's tourn or Court leet, the day whereon an indictment was taken was necessary to have been set forth in order to shew that it had not been so taken on a Sunday (*z*).

So again, notice of appeal against an order of affiliation is process within the 29 Car. II. c. 7, and void if served on a Sunday. Hence it follows, that the party, against whom such an order has issued on Saturday, is not deprived of his remedy because he cannot take any steps on the Sunday. Service on that day would be void, and, consequently, he has Monday for the purpose of giving the notice required by the statute within twenty-four hours after the order (*a*). So a notice, under the act for the Registration of Electors, is not valid if served on Sunday, and in such a case the rule to enter continuances was made absolute (*b*).

But where there are no more intervening days, the rule is not

(*w*) 2 B. C. Rep. 262. 5 Dowl. & L. 590, Corrall *v.* Foulkes. See Cro. Jac. 64, Dolphin *v.* Clerk. 20 Vin. Ab. (Sunday) (B. 4).
(*x*) 4 D. P. C. 48, Hanson *v.* Shackleton.
(*y*) 3 Burr. 1595, Swan *v.* Broome. 1 Sir Wm. Bl. 496. 526.
(*z*) 2 Hawk. P. C. 56, s. 9.
(*a*) 2 B. C. Rep. 271. 5 Dowl. & L. 580, R. *v.* Middlesex Justices. Stat. 7 & 8 Vict. c. 101, s. 4.
(*b*) 2 C. B. 72, Rawlins *v.* Overseers of West Derby.

so, so that where the last of six days allowed for a notice of appeal fell on a Sunday, the Court held, that notice on Monday was too late, and seemed to think that the notice could not have been served on the Sunday (*c*).

It has been shewn, however, that the statute of 29 Car. II. c. 7, contains certain exceptions to the rule as to process, namely, treason, felony, and breach of the peace, and the Courts have given a large construction to the exception clause, in order to prevent any failure of justice under cover of the Sabbath.

An information was exhibited against the defendant for engrossing butter; and, amongst other errors, it was assigned that the information was laid on Sunday. But the Court held, that although Sunday was not *dies juridicus* to award judicial process, or to make entry of a judgment of record, nevertheless, that it was good to accept of an information upon a special law (*d*). This case, however, happened before the statute 29 Car. II. c. 7, and as an information of this nature is not for treason nor felony, nor for a breach of the peace, it probably will not now be of much avail. Of treason and felony the instances are so obvious, that it has not been thought necessary to raise any question upon these matters. And it has always been usual to grant warrants as well as a search warrant upon a Sunday, although doubts have been expressed as to the legality of the practice (*e*). And in order to prevent any difficulty from arising under the act relating to the duties of a justice of the peace, it is ordained by 11 & 12 Vict. c. 42, s. 4, that any warrant mentioned therein or any search warrant may be granted or issued on a Sunday as well as on any other day.

By sect. 1, of the same statute, such warrants may be granted for any treason, felony, or any indictable misdemeanor or other indictable offence whatsoever.

(*c*) 12 L. J., M. C. 59, R. *v.* Middlesex Justices.
(*d*) W. Jo. 156, Bedoc *v.* Alpe. As to ecclesiastical citations, see Carth. 504. 5 Mod. 450. 12 Mod. 275. 2 Salk. 625.
(*e*) Jervis's Acts, by Archbold, p. 17.

By sect. 2, warrants may be granted in all cases of indictable crimes or offences committed on the high seas, or in any creek, harbour, &c., or other place within the Admiralty jurisdiction, or on land beyond the seas.

By sect. 3, warrants may be issued to apprehend any party against whom an indictment has been found, or to detain such party, if he be in prison and charged with some other offence than that for which he is confined.

Warrants, therefore, in pursuance of informations for offences, punishable on summary conviction, are not within the statute, nor warrants to enforce orders of justices on summonses in summary cases.

And, consequently, the statute is limited to warrants for treason, felony, and indictable offences, and to search warrants.

And the stat. 29 Car. II. c. 7, embraces treason, felony, and *breach of the peace.*

Whatever processes, therefore, are allowable on a Sunday, independently of such as are above mentioned, are sanctioned by the Courts, (as we shall presently see), from the necessity of the case.

The phrase "breach of the peace" has received a liberal construction. A person was arrested on a Sunday for a rescue, and it was moved to discharge him; and Willes, C. J., reports, that the Court of Common Pleas held a contempt of their Court to be a breach of the peace. The attachment was for a rescue, which is certainly a great breach of the peace (*f*). So Holt, C. J., has ruled, that an ordinary contempt punishable by attachment might be proceeded upon notwithstanding Sunday. It partakes of the nature of process upon an indict-

(*f*) Willes, 459, Anon. Prinsor's case, Cro. Car. 602, was cited; but that was not only before the statute, but also in that case the constable had arrested the complainant on a Sunday after a *certiorari* granted to remove the process of the sessions.

ment (*g*). It is of no great consequence whether the breach of the peace be actual or constructive, for the officer cannot be a judge of these distinctions. It is sufficient if the charge be for an indictable offence (*h*). So in the case of a warrant for the good behaviour. In trespass and battery, upon not guilty pleaded, and a special verdict, it appeared that the constable executed such a warrant on Sunday. The defendant had judgment. For a warrant for the good behaviour is a warrant for the peace and more, and the statute is to be favourably extended for the peace (*i*). So a person who has been guilty of a contempt of an order of the Court of Chancery has committed a breach of the peace, and may be taken on a Sunday under an attachment (*k*). So it was held, that a citation to a woman for living incontinently was good, although fixed to the church door on a Sunday, as notice to her on that day (*l*).

We have seen that an arrest on Sunday upon fresh pursuit has been considered merely as an adjunct to the original legal imprisonment, and, consequently, allowable (*m*). The better opinion, likewise, is that bail can take their principal on Sunday and render him on the next day; because it is not a service of process, but rather like an arrest on Saturday by virtue of a process of Court, whereon if a party escapes he may be taken on the Sunday, for that is only a continuance of the former imprisonment (*n*). There appears, however, to have been a determination to the contrary, but it was a case of *sheriff's bail* (*o*).

(*g*) 12 Mod. 348, Sir —— Cecil *v.* Others of the Town of Nottingham.
(*h*) 16 Mees. & W. 172. 16 L. J., Exch. 5, Rawlins *v.* Ellis.
(*i*) Thos. Raym. 250, Johnson *v.* Coltson. Before the Stat. of Charles, hue and cry might be made on a Sunday after robbers; and an action lay on the Stat. of Winton, 13 Ed. 1, st. 2, for neglect in that matter. (Godb. 280, Cro. Jac. 496. 2 Ro. Rep. 59, Waite *v.* Hundred of Stoke). But the Stat. of Winton was repealed by 7 & 8 Geo. 4, c. 27, and the proceedings against the hundred have not been renewed in the case of *robbery*.
(*k*) 1 Atk. 58, *Ex parte* Whitchurch.
(*l*) Carth. 504, Alanson *v.* Brookbank. S. C. 2 Salk. 625. 5 Mod. 549. 12 Mod. 275.
(*m*) *Ante*, p. 83, where the cases are collected.
(*n*) 6 Mod. 231, Anon. 2 Salk. 625, note, Judge Blencowe's case. Mich. 3 Ann. 1 Atk. 239, *Ex parte* Gibbons. 1 B. & Ald. 529, per Bayley, J.
(*o*) 2 Sir Wm. Bl. 1273, Brookes *v.* Warren.

But denial to a creditor calling on Sunday for payment by the debtor's appointment was not deemed an act of bankruptcy under the old law (*p*).

If a person is illegally in custody under a process executed on a Sunday, it seems that he will, in general, be discharged (*q*). But, at one time, the Courts did not afford this summary relief, but left the party to his action for false imprisonment (*r*); and we have seen, that attachments have been granted for arresting a person on Sunday (*s*).

Thus far of the statute 29 Car. II.

However, Sunday is to be taken into consideration with reference to legal proceedings, independently of that statute.* The calculation of day rules throughout the progress of a suit at law affords an ample illustration of this observation, or, to use the words of the Court, "We reckon [holidays and Sundays] not *juridici* as to matters to be transacted in Court, and therefore Sundays and holidays are no days to move in arrest of judgment. But as to business done out of Court, as rules to plead within four days, &c., Sundays are reckoned the same with the other days," except the first or last day happen on a Sunday (*t*). And the distinction is between cases where the defendant or other party must have done something on the Sunday, if the Sunday has been allowed to count, and those where the Sunday is reckoned silently with other days, no business or act being required on that day. So that if the defendant even appeared to an original writ dated on Sunday, the irregularity would not be helped (*u*).

(*p*) 2 Rose. 21, *Ex parte* Preston. S. C. 2 Ves. & B. 311.
(*q*) 1 Antr. 85, Lyford *v.* Tyrrell. 2 H. Bl. 29, Loveridge *v.* Plaistow. 5 T. R. 25, Atkinson *v.* Jameson. 8 B. & C. 769, Wells *v.* Gurney.
(*r*) 5 Mod. 95, Wilson *v.* Guttery, 6 Mod. 96, Lidford *v.* Thomas.
(*s*) *Ante*, p. 82.
* As under the old law of recovery, where the writ of summons to warranty was returnable on Sunday, and the vouchee died on that day, the recovery was held void. 6 Bro. P. C. 333, Broome *v.* Swan, (in error). 3 Burr. 1595, Swan *v.* Broome. 1 Sir Wm. Bl. 496. 526, S. C.
(*t*) 2 Salk. 625.
(*u*) 1 Ventr. 7, in Vaughan *v.* Loyd.

It was indeed held, in *Lord Coningsby's case*, that in the case of a rule on Thursday to plead in four days, a plea filed in the office on the following Tuesday should be received, Sunday being excluded (*v*); but this case is not sanctioned by subsequent practice and authorities (*w*).

So, as the matter is one which must be transacted in Court, a motion in arrest of judgment is allowed to exclude the Sunday. The defendant has four juridical days (*x*).

Thus in an action on the case brought against the *custos brevium*, the declaration was delivered on Friday morning, and rules given to plead within four days, whereas holidays and Sundays were not juridical days, but the Court considered that the Sunday should be counted (*y*).

So in the case of a bail bond, where the writ was returnable on the 30th of January, and a Sunday intervened between that day and the end of the four days: in such a case the bail bond was held to have been well assigned on the 4th of February (*z*). Whereas had the 4th of February been Sunday, the bond would not have been assignable until the Monday (*a*). So a plea in abatement was received on the fifth day, because the fourth day happened to be Sunday (*b*). *Lord Coningsby's case*, therefore, cited above, seems scarcely to be supported. If the offices of the Court are open, as on the 2nd of February, a rule to plead or other rule may take effect (*c*); but on Sunday the offices are not open, it not being a day of business (*d*). Therefore, the expiry of time on a Sunday

(*v*) 8 Mod. 46; and also in West *v.* West, 1 Lord Raym. 674.
(*w*) See *post.*
(*x*) 2 Salk. 625, Hales *v.* Owen. 13 East, 21, Roberts *v.* Stacey. 1 Ch. Rep. 562, Bromley *v.* Foster, and *post.*
(*y*) 2 Salk. 624, Ashmole *v.* Goodwin. Id. 517, Pasmore *v.* Goodwin.
(*z*) 1 Str. 86, Anon., *i. e.* "If the rule be given upon a Sunday it goes for nothing, but if it expires upon a Sunday, the defendant has all the next day to plead in." Ibid. 2 Str. 782, Studley *v.* Sturt. Id. 924, Bullock *v.* Lincoln.
(*a*) 2 Str. 782, Studley *v.* Sturt. S. C. 1 Barnard. K. B. 21. 2 Str. 914, Bullock *v.* Lincoln. S. P. 2 H. Bl. 617.
(*b*) 3 T. R. 642, Lee *v.* Carlton. See 5 T. R. 210, Harbord *v.* Perigal.
(*c*) 2 H. Bl. 616, Mesure *v.* Britten.
(*d*) Id. 617, by the L. C. J.

naturally throws over the matter in question till the next or a subsequent day. But this does not prevent the Sunday from counting silently where nothing is to be done on that day. As where the writ was returnable in eight days from St. Hilary, and the notice was to appear on Sunday the 20th of January, the Court said that the Sunday was the true day of the return, and that it was right (*f*); and, moreover, where the notice upon a like occasion was for Monday the 21st of January, the Court held it bad, for Sunday was the true day of the return (*g*). The defendant would not have appeared till Monday, and, therefore, nothing was done on the Sunday. So when Sunday happened to be the *quarto die post*, the holding of the Term of necessity went over to Monday. And so if Sunday be the essoin day, the time is postponed (*h*). So where a plea in abatement, as to the jurisdiction, might be pleaded within the first four days inclusive of the subsequent Term, Sunday was ruled to be one of those days (*i*). It was not the last day, and so fell silently within the rule. So on a *clausum fregit*, returnable on Sunday the 20th of April, the defendant did not appear on the Wednesday following, and the plaintiff, on Thursday, sued out a *distringas:* on that day the defendant entered an appearance: on Friday the plaintiff's attorney levied 40*s.* on the goods of the defendant. It was moved that the money should be returned because of Sunday, the defendant having until Thursday to appear. But it was argued that the defendant was bound to appear within four days after the return of the writ, which are inclusive both of the return day and the *quarto die post*, and that Sunday was to be considered like any other return day. The Court then consulted the secondaries as to the practice, and discharged the rule, being of opinion

(*f*) 20 Vin. Ab. (Sunday) (C. 4), citing Notes in C. B. 205, Jenner *v.* Oatridge. Id. C. 5, citing Notes in C. B. 207, Lloyd *v.* Beeston.

(*g*) Id. C. 4, Note in Marg. Citing Notes in C. B. 207, Lloyd *v.* Beeston.

(*h*) 2 Salk. 626, per Holt, C. J.

(*i*) 1 T. R. 278, note, cited in Jennings *v.* Webb. And this note was distinguished in Lee *v.* Carlton, where it was cited and relied on for the plaintiff, because in Lee *v.* Carlton the time *expired* on the Sunday, and thus the defendant had one day more, which was not the case in the note above mentioned.

against the defendant (*k*). So where a plea was delivered on *Saturday*, Sunday was reckoned in the computation of the days for pleading (*l*), and in three days' notice of an order for the examination of witnesses *de bene esse* (*m*).

So in commercial matters, as in the case of days of demurrage, Sunday is to be calculated in the reckoning, unless there be a custom to the contrary. In the absence of such custom, therefore, running days will include Sundays (*n*).

So a notice of objection sent by the post under the act for the Registration of Voters (6 Vict. c. 18), and which has been delivered by the post on a Sunday, in the ordinary course, is valid (*o*). By the same statute (sect. 4), notice of a claim to be inserted in the registration list, must be sent to the overseers on or before the 20th of July, in writing. A notice which reached the officer on the 20th of July, but on a Sunday, was held legal (*p*). No act was to be done on that day, no process served; there was merely the reception of a letter unconnected with work, and the letter would have lost none of its validity as a notice had it even not been opened on that day.

On the other hand, if any thing is to be done by the defendant or other person which would happen on the Sunday, the Sunday must then be excluded. The defendant has four *law* days, when the Court is actually sitting, in which to do it (*q*). As where a party has four days on which he may move to arrest that judgment. These days must be *dies juridici*, and as he cannot move on a Sunday, that day must be not reckoned (*r*). So that if the first day were Friday, the defendant would have until the rising of the Court on the ensuing Tuesday. Otherwise there would not be four juridical days. There must be an interval of four days between the rule to sign judgment and the

(*k*) 1 H. Bl. 9, Fano *v.* Cocken.
(*l*) 6 D. P. C. 125, Shoebridge *v.* Irwin.
(*m*) 6 Jur. 454, Mackintosh *v.* Great Western Railway Company.
(*n*) Car. & M. 440. 10 Mees. & W. 331, Brown *v.* Johnson. 2 New Rep. 267, by Chambre, J.; and see *post*.
(*o*) 1 Bar. & Arn. 608. 2 C. B. 60, Colville, App., Lewis, Resp.
(*p*) 2 C. B. 72. 15 L. J., C. P. 70, Rawlings, App., West Derby, Resp.
(*q*) 3 T. R. 642, per Buller, J.
(*r*) 2 Salk. 625, Hales *v.* Owen.

signature of such judgment, because the party should have that time to bring a writ of error if he think fit (*s*). Consequently, where judgment was given on the 6th and signed on the 11th, and a Sunday intervened, the rule for setting aside the judgment, &c. and for discharging the defendant out of custody was made absolute (*t*). So, again, the four days must be calculated exclusively of the first and last day of Sunday, and also of Midsummer day (*u*). So where a plea was demanded on Saturday night at six o'clock, it was impossible for the defendant to file a plea on Sunday, and therefore he had until Monday at six to plead. At two o'clock on Monday he pleaded the general issue, and the Court said he had twenty-four hours clear after the demand of the plea exclusive of Sunday, and they made the rule absolute to set aside the judgment for irregularity (*v*).

A countermand of notice of trial must not be on Sunday (*w*).

So, in Chancery, where the eighth day after the service of an order nisi for confirming a report happens to be Sunday, that day is not to be reckoned (*x*).

So where notice of a motion is to be made on Monday, it was held, that it ought to be served on Friday, inasmuch as for that purpose Sunday is no day (*y*).

An appointment of overseers on a Sunday has been held good (*z*). But where collusion was discovered, a *mandamus* was granted by the Court to set aside such an appointment, and to make a new appointment (*a*).

(*s*) 3 Salk. 212.
(*t*) 13 East, 21, Roberts *v.* Stacey. Imp. Pr 420.
(*u*) 1 Ch. Rep. 562, Bromley *v.* Foster; and *sembl.* of other *dies non.* See Marginal Note of Reporter.
(*v*) 4 T. R. 557, Solomons *v.* Freeman.
(*w*) Ca. Pr. C. B. 15, Deighton *v.* Dalton.
(*x*) 5 Sim. 565, Milburn *v.* Lyster.
(*y*) 6 Vin. Ab. Supp., Sunday (B.), Maxwell *v.* Phillips. *Quære*, whether an affidavit, which appears by the *jurat* to have been sworn on a Sunday in Court, is void. 3 Dowl. & L. 328. 15 L. J., Q. B. 39, Williamson *v.* Roe.
(*z*) 1 Bott P. L. 29, R. *v.* Merchant.
(*a*) Cowp. 139, R. *v.* Overseers of Bridgwater. S. C. Lofft, 618.

And where a *venire facias* was tested on a Sunday, the mistake was held to be helped by the Statute of Jeofails (*b*).

By 9 Geo. IV. c. 31, s. 23, to arrest any clergyman upon any civil process, while he shall be performing Divine Service, or shall, with the knowledge of the party arresting, be going to perform the same, or returning from the performance thereof, is declared to be a misdemeanor, and punishable by fine or imprisonment, or by both, as the Court shall award. This prohibition, it will be observed, although especially applicable to the Sunday, extends to protect the officiating minister on any other day (*c*). And it is no answer to say that the arrest was not authorized by the plaintiff nor by his attorney. Being in custody when going to the altar to officiate, without more, was deemed a sufficient circumstance to warrant the discharge, and if the concurrence of the plaintiff or his attorney had clearly appeared, the Court would have made the rule absolute with costs (*d*).

Several holidays were ordained by 5 & 6 Edw. VI. c. 3, s. 1. They were intended to be days sanctified and hallowed separated from all profane uses, and dedicated and appointed not unto any Saint or creature, but only unto God and his true worship. These are:—All Sundays, The Circumcision, The Epiphany, The Purification, Saint Matthias, The Annunciation, Saint Mark, Saint Philip and Saint James, The Ascension, Saint John the Baptist, Saint Peter, Saint James the Apostle, Saint Bartholomew, Saint Matthew, Saint Michael, Saint Luke, Saint Simon and Saint Jude, All Saints, Saint Andrew, Saint Thomas, Christmas Day, Saint Stephen, Saint John the Evangelist, Innocents' Day, Easter Monday and Tuesday, Whitsun Monday and Tuesday. Holidays.

But many of these holidays have been subtracted from observance in the Courts of the common law by 3 & 4 Wm. IV. c. 42, s. 43, as we shall presently see.

An arrest, on Christmas Day, of a person as he was going to

(*b*) Cro. El. 467, Willoughby *v.* Gray.
(*c*) See 2 Bulst. 72, Pit *v.* Welby.
(*d*) 7 Bing. 320, Goddard *v.* Harris. S. C. 5 M. & P. 122.

church, in the church-yard, was considered by Richardson, C. J., to be an act answerable in the Star Chamber (*e*).

If a rule to plead expires on a non-juridical day, as on the day of the Purification, the Court will not excuse the defendant, because the offices are open on that day. Sunday must not be confounded with such days as these, and, therefore, a judgment was ordered to stand, which has been signed on the 3rd of February, for want of a plea (*f*).

It seems that judgment for want of a plea may be signed on a holiday (*g*), but not on a *dies non juridicus* (*h*).

Days in practice.

By a Reg. Gen., in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last shall happen to fall on a Sunday, Christmas Day, or Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also (*i*).

This rule, however, is affected by the ensuing statute, 2 Wm. IV. c. 39, s. 11, which awards eight days after which certain process may be executed; and there is this proviso:—If the last of such eight days shall in any case happen to fall on a Sunday, Christmas Day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter Day, then in every such case the Wednesday after Easter Day shall be considered as the last of such eight days.

(*e*) Hetl. 19.
(*f*) 2 H. Bl. 616, Mesure *v.* Britten.
(*g*) 2 Cr. & J. 622, Bennett *v.* Porter.
(*h*) 9 B. & C. 243, Harrison *v.* Smith.
(*i*) Reg. Gen. K. B., C. P., & Exch., 2 Wm. 4. 1 D. P. C. 200. 8 Bing. 307. 1 M. & Sc. 433. 3 B. & Adol. 393. 2 Cr. & J. 201. 2 Tyr. 352. 4 Bligh. N. S. 608.

The rule and the statute do not correspond, and, therefore, where a defendant was arrested on the 1st of April, Monday,—Easter Monday and Tuesday being the 8th and 9th, the plaintiff was held to be too early in taking an assignment of the bail bond on the 10th, Wednesday,—and the writ was set aside. He was one day too soon under the statute, although by the rule he would have been justified. And it made no difference that the writ against bail was not *served* until the 11th (*k*).

Easter Sunday fell on the 15th of April: a demurrer was delivered on the 18th to a replication dated on the 11th. The Court held it to be in time (*l*). But service in ejectment on a day between Thursday before and Wednesday after Easter, when such day falls within Easter Term, is insufficient (*m*). And if a statute requires that a *certiorari* shall be sued out within six months, the Easter holidays will not prevent the time from running out; so that, although no Judge was in attendance during Easter, and although the application for a *certiorari* was made on the first day after the Easter holidays, it was held to be too late, for the six calendar months allowed had expired (*n*).

The defendant was served on Monday, April 6th. Good Friday fell on the 10th, and on the 16th the plaintiff entered an appearance for the defendant. The Court held that he was right, and that the 15th, Wednesday, had been the last of the eight days allowed; for the rule of Court 2 Wm. IV. had been overridden by the stat. 2 Wm. IV. c. 39, s. 11. And Tindal, C. J., observed, that *Harrison* v. *Tait* was a case to which the statute did not extend, inasmuch as the statute applied only to appearances (*o*).

By 3 & 4 Wm. IV. c. 42, s. 43, "Whereas the observance of holidays in the *Courts of common law* during Term time, and in the offices belonging to the same, on the same days on which

(*k*) 3 Tyr. 427. 1 Cr. & M. 492, Alston *v.* Underhill.
(*l*) 4 Bing. N. C. 443, Harrison *v.* Tait. 6 D. P. C. 611, S. C.
(*m*) 7 Jur. 628, Doe *d.* Grace.
(*n*) 1 B. C. Rep. 75, Rex *v.* Anglesea Justices.
(*o*) 2 C. B. 908. 3 Dowl. & L. 813, Harris *v.* Robinson. 15 L. J., C. P. 208. The rule was discharged with costs.

holidays are now kept, is very inconvenient, and tends to delay in the administration of justice;" none of the several days mentioned in the stat. 5 & 6 Edw. VI. (*p*), intituled "An Act for keeping Holidays and Fast Days," shall be kept in the said Courts, or in the several offices belonging thereto, except Sundays, the Day of the Nativity of our Lord and the three following days, and Monday and Tuesday in Easter week.

After this, a general rule proceeded from the Courts of King's Bench, Common Pleas, and Exchequer respectively, appointing the following holidays in addition to the above, and directing that none others should be observed or kept in the several offices belonging to the said Courts:—Good Friday, Easter Eve, and such of the five following days as may not fall in the time of Term, but not otherwise:—the King's birthday, the Queen's birthday, the day of the King's accession, Whit Monday, and Whit Tuesday (*q*). None of the holidays thus newly revived or created by the general rule are mentioned in the statute of Edw. VI. excepting Whit Monday and Whit Tuesday. As far, therefore, as Whit Monday and Whit Tuesday are concerned, the rule of the Courts appears to enlarge upon the provisions of the act of Parliament. But, on the other hand, this rule of 2 Wm. IV. is much qualified by the statute 3 & 4 Wm. IV. c. 42. So that a declaration being filed on the 24th of December, with notice to plead in four days, a judgment signed on the 29th was set aside for irregularity (*r*). It has been held, that the sealer of a writ was not guilty of any contempt in refusing to seal a writ upon a holiday, but it was intimated that he ought not to take an extra fee for doing so: he ought not to "sell the holiday" (*s*).

By 39 & 40 Geo. III. c. 42, bills and notes due on Good Friday are payable, and may be noted and protested on the preceding day, as in the case of bills or notes falling due on Sunday or

(*p*) Cap. 3, *ante*, p. 95.
(*q*) Reg. Gen. Hil. Term, 6 Wm. 4. 4 Ad. & El. 743.
(*r*) 7 D. P. C. 194, Wheeler *v.* Green.
(*s*) 7 Taunt. 182, Martin *v.* Bold. Id. 186, Tweedale *v.* Fennell, cited there. Several cases will be found in 7 Taunt, *ut supra*, but they relate to particular days claimed as holidays, and since 3 & 4 Wm. 4, c. 42, are unimportant. S. C. 2 Marsh, 487. See also Harrison's Digest, tit. "Officer," and "Holidays."

Christmas Day. So it is with reference to fast and thanksgiving days by 7 & 8 Geo. IV. c. 15, s. 2. And by sect. 3, Good Friday and Christmas Day, and fast and thanksgiving days, are to be considered as Sundays with reference to bills and notes; and by 7 & 8 Geo. IV. c. 15, s. 1, if the bill or note becomes due on the day preceding Good Friday or Christmas Day, notice of dishonour need not be given till the day after Good Friday or Christmas Day. And if Christmas Day happens to fall on Monday, the bill or note being due on Saturday, notice may be given on Tuesday.

By 12 & 13 Vict. c. 106, s. 276 (the Bankrupt Act), time is to be reckoned exclusive of the first and inclusive of the last day, unless such last day be Sunday, Christmas Day, Good Friday, Monday or Tuesday in Easter week, or a fast or thanksgiving day; in which case the time must be reckoned exclusive of that day also.

Nevertheless, these three days following Christmas Day are to be reckoned in legal proceedings. They are not to be excluded because they are declared to be holidays. A writ of summons bore date the 16th of December, and on the 24th, a notice of eight days was given for the defendant to plead to the declaration. Hence, the 24th and Christmas Day being excluded, the eight days would end on the 2nd of January, and on the 3rd, the plaintiff could sign judgment if no plea were tendered. On the 3rd of January, the plaintiff's solicitor proposed to have the judgment signed in default of a plea, but the Master doubted whether the three days following Christmas Day were not to be omitted, and if so, the judgment would be premature. He forbore to sign, and the solicitor did not press him, but went away. On that day, the 3rd, the defendant died. It was moved to enter the judgment *nunc pro tunc*, and the Court would probably have acceded if the Master had *refused*, but here the plaintiff's solicitor acquiesced in the Master's doubts, and instead of doing any act towards perfecting the signature of the judgment, he abandoned the point without either soliciting compliance, or gaining a refusal. The motion, therefore, was denied (*t*); but it was evident that the three days should have been reckoned.

(*t*) 5 Man. & Gr. 376, Wilkes *v.* Perks. S. C. 6 Sc. N. R. 42.

It seems that a *sci. fa.* lay at the office of the sheriff of Middlesex during Whit Monday, Tuesday, and Wednesday. These were half holidays, but business was transacted at the office between eleven and two, and the book might be searched between these hours. The Court held that these days should be counted as searching days (*u*).

The Queen's birthday claims exemption from strict legal time. As where the time for pleading expired on the 25th of May, the Queen's birthday was kept on the 25th, and all the offices were closed. A judgment signed on the opening of the office on the 26th, was held regular (*v*).

Long Vacation.

The Long Vacation is not to be excepted out of the computation of time (six days) allowed to refer a bill for impertinence (*w*). So as to other Vacations, where the answer must be deemed sufficient before the Vacation, and the plaintiff has obtained no order to amend, that Vacation may be counted as part of the two months, at the end of which, according to the Chancery Orders, the defendant may move to dismiss the bill for want of prosecution (*x*). And the plaintiff has till twelve at night to file his replication. He is not restricted to the hour when the office closes. For the precise time at which the day ends is twelve o'clock. A motion, therefore, to dismiss, founded upon a notice by the defendant given at half-past seven in the evening, was refused, with costs (*y*).

So the eight days within which a demurrer must be entered with the registrar, are eight office days, not counting holidays (*z*). So where eight days were allowed for cause to be shewn before a report was confirmed, it seemed to be the impression of the Court, that if the eighth day were a holiday, another day should be allowed. The defendant, however, was one day too late at all events (*a*).

(*u*) 5 Ad. & El. 76, Armitage *v.* Rigby.
(*v*) 1 Sc. N. R. 348, Wilkinson *v.* Britton. S. C. 1 Man. & Gr. 557. 8 D. P. C. 825.
(*w*) 12 L. J., Canc. 16, Sloggett *v.* Sorel.
(*x*) 2 Hare, 639, Goldsworth *v.* Crossley. 13 L. J., Canc. 98, S. C.
(*y*) 20 L. J., Canc. 228, Preston *v.* Collett.
(*z*) 1 Sim. 481, Bullock *v.* Edington.
(*a*) 1 Myl. & K. 455. 5 Sim. 147, Manners *v.* Bryan.

Feast day.

The legal meaning of a feast day is governed by the new style. Notice to quit was given on the 24th of March, for the 11th of October following being Old Michaelmas Day. But the holding was from the feast of St. Michael, and that must be taken to mean New Michaelmas, and could not, by parol evidence, be explained to mean Old Michaelmas. It was, therefore, objected that the notice was wrong, but the Judge directed a verdict for the plaintiff with leave to move to enter a nonsuit. He said that the tenant had had more than six months' notice to quit, so that no injustice was done to him. Yet the objection was held to have been well founded. The Court said, that no explanation could have been given by parol with reference to a tenancy by deed, and that as the tenant's year was to end at Michaelmas, that must mean New Michaelmas, and so the notice for Old Michaelmas was bad. Indeed, if the notice might be given to quit twelve days after New Michaelmas, it might as well be at any other time. The landlord could not, by his notice, alter the period of quitting. This was given specifically as a notice to determine the tenancy at Old Michaelmas, and not as a liberty to the tenant to remain at his option for so long after his tenancy expired (*a*). So where Martinmas was mentioned in a plea, New Martinmas was intended by the Court, although under a *videlicet*, the defendant had averred a taking on the 23rd of November, which was old Martinmas day (*b*). On the other hand, where the holding was from old Michaelmas, a notice to quit at Michaelmas was held good (*c*). However, where there is a custom, as in Kent, that all demises to hold from Michaelmas begin at Old Michaelmas, the Court will allow evidence of such custom to prevail (*d*), and this, whether the holding be, or not, by deed. If there were to be a dispute as to the custom, probably the Court would adhere strictly to their rule in favour of the new style (*e*). And a similar decision was come to concerning Lady Day (*f*).

(*a*) 11 East, 312, Doe *d.* Spicer *v.* Lea.
(*b*) 8 Bing. 235, Smith *v.* Walton. S. C. 1 M. & Sc. 380.
(*c*) 2 Campb. 256, Doe *d.* Hinde *v.* Vince; and see Id. 258, n.
(*d*) 1 Esp. 198, Furley *d.* Mayor, &c. of Canterbury *v.* Wood.
(*e*) Id. 199.
(*f*) 4 B. & Ald. 588, Doe *d.* Hall *v.* Benson. 3 Dowl. & Ry. 507, Denn *d.* Peters *v.* Hopkinson. In pleading it is not necessary to state the excep-

Days in commercial matters.

Sometimes there is a particular custom in certain commercial transactions with reference to the reckoning of time (*h*). At other times, in the absence of evidence of custom, the interpretation of these calculations is left to the Court, who will direct the jury accordingly. Yet the Court will overrule a custom if it be inconsistent with the law or with good sense.

If stock be bought for the 27th of February, which is the settling day, it is no variance that the declaration mentions the 27th of February, and the proof is to deliver stock on the settling day (*i*).

Days connected with demurrage, working or running days.

The reckoning of days during which demurrage may be claimed, according to the ordinary dealings amongst merchants, is from the time when the vessel arrives at her place of discharge. She may arrive at the port, but may yet consume some time before she gains the usual place of unloading. She may at length arrive at her berth, but the days of demurrage are not to be postponed till her arrival there. The rule is, that when the ship has attained to that place where she may be able to unload in the customary manner, the days allowed before demurrage is claimed shall be deemed to have commenced. Demurrage is calculated to be due from the expiration of the lay days calculated from the time of the ship's being ready to discharge her cargo (*k*).

Assumpsit was brought upon a charter party. The vessel was chartered from Hamburgh to Wells, or as near thereto as she could safely get, and fourteen lay days were allowed for shipping and unloading cargo. Eight lay days were exhausted at Hamburgh, but in due time the ship reached Wells and un-

tions of feast days, where such days are excluded by law from certain matters of business, as the holding of markets, &c. 7 B. & C. 40, Mosley *v.* Walker. S. C. 9 Dowl. & Ry. 863.

(*h*) See amongst other cases, 3 Esp. 121, Cochran *v.* Retberg. 10 Mees. & W. 331. Car. & M. 440, Brown *v.* Johnson. 6 Man. & Gr. 593. 7 Sc. N. R. 269, Startup *v.* Macdonald; and see also 3 T. R. 653, Cooke *v.* Oxley. 16 East, 45, Humphries *v.* Carvalho.

(*i*) 2 B. & Ald. 335, Wickes *v.* Gordon. S. C. 1 Ch. Rep. 60; and Payne *v.* Hayes, Bull. N. P. 145, was overruled.

(*k*) 4 Campb. 161, Harman *v.* Mant.

loaded the cargo. By the custom of the port of Wells the lay days for unloading do not commence running till the vessel arrives at the quay. The vessel arrived at the *port* of Wells on the 16th of November, but did not come up to the quay till the 27th. The unloading was completed on the 4th of December. If the reckoning was to take place from the 16th of November, a considerable sum was due for demurrage; if from the 27th, eight days having been employed in the discharge must be added to the eight exhausted at Hamburgh, making sixteen, or two days over the time allowed. But as the defendant had paid the amount of these two days' demurrage into Court, he would be entitled to have a verdict entered for him if the calculations were to run from the 27th. And of that opinion was the Court. They said that the inconvenience of any other construction would be great, as in the ports of London or of Hull, which are of considerable extent. The rule was made absolute to enter a verdict for the defendant (*l*). So it was where the freighter was allowed the usual and customary time to unload the ship (*m*).

On the other hand, the time is to run before the ship arrives at her berth in the absence of any express agreement. A freighter ordered a vessel to Hull: she got into the *docks* there on the 1st of February, and was put into the charge of the officers of the dock company, but she was not put into her berth until the 4th, when she began to unload. The question was, whether the lay days were to count from the 1st or the 4th. The learned Judge directed the jury that the period from which the lay days were to commence was the day of the ship's coming into the dock, and not of her coming to her berth. And the jury found accordingly, and gave a verdict for the plaintiff for demurrage; and the Court were of opinion that this ruling was correct (*n*).

(*l*) 7 Bing. 559, Brereton and others *v.* Chapman. S. C. 5 M. & P. 526. See 12 East, 179 and 181, n., Randall *v.* Lynch; and Id. 578, White *v.* Parkin, and "Sunday," *ante*. 4 Bing. 455, Benson *v.* Hippius. 1 M. & P. 246. 3 C. & P. 186.

(*m*) 2 Campb. 483, Rodgers *v.* Forrester. Id. 488, Burmester *v.* Hodgson.

(*n*) 10 Mees. & W. 331. Car. & M. 440, Brown *v.* Johnson.

So where, in consequence of the crowded state of the London Docks, a detention of the ship ensued, the freighter was held liable for the delay, there being a *specific period* of forty days allowed. Had the contract been that the usual and customary time should be permitted, the plaintiff would not have been entitled to the excess (*o*). So an illegal seizure by a custom-house officer does not arrest the right to demurrage (*p*). And this is different from any question relating to the stowage of goods; for if the cargo be so stowed away as that the consignee cannot obtain its delivery at once, a *reasonable* time is allowed for that purpose, and demurrage cannot be claimed until the expiration of such reasonable time, * although a certain number of running days should appear to be allowed by the contract. Whilst, on the other hand, if *unnecessary* delay should take place, demurrage may be recovered even before the close of the running days permitted, *if such days are to be counted from the time when the discharge of the goods could have commenced;* it being understood, that such number of days has fully elapsed from the time of the ship's arrival (*q*). The blockade of a vessel by frost has been held by Lord Kenyon and Gibbs, C. J., to be a defence to an action for demurrage (*r*).

There are two other questions connected with this subject; the first is, whether Sundays should be computed. This point has, however, been already disposed of (*s*). The other is, whether the days allowed should be deemed consecutive or working days, *i. e.*, whether holidays, or other such feasts, as well as Sundays, should be considered in the reckoning. On this

(*o*) 2 Campb. 352, Randall *v.* Lynch.

(*p*) 4 Campb. 131, Bessey *v.* Evans.

* But where the contract is to remove goods in a month, it is a fatal variance to declare that they were not removed in a reasonable time. Peake, 42 *a*, Hore *v.* Milner.

(*q*) Moo. & M. 63, Rogers *v.* Hunter. Leer *v.* Yates, 3 Taunt. 387, where the Court of Common Pleas came to a different conclusion upon similar premises, is shaken by this decision of Lord Tenterden, who, in Rogers *v.* Hunter, had Leer *v.* Yates under his consideration. So also Harmer *v.* Gandolph and others, Holt, N. P. C. 35, decided by Gibbs, C. J., is equally shaken. See also on this subject, 3 B. & P. 295, n., Blight *v.* Page; and S. C. Abb. on Shipping. 4 Campb. 333, Barret *v.* Dutton and another.

(*r*) 4 Campb. 333, Barret *v.* Dutton and another.

(*s*) *Ante*, under "Sunday."

point the opinion of a special jury was invited by Lord Eldon in 40 Geo. III. His Lordship said the question resolved itself into one of usage: if it was left to the construction of law, the days would be reckoned consecutively, but if the evidence of usage were to be considered as clearly made out (and that evidence was brought forward and was contradictory), then Sundays and holidays would be excluded; and whereas, on the one hand, the plaintiff would have a verdict, on the other, *i. e.*, if the Sundays and holidays were not reckoned, or, in other words, if the days were to be counted as *working* and not running days, the defendant would be entitled to recover. And the jury found for the defendant (*t*). Many years afterwards, the case of *Brown* v. *Johnson* (*u*) occurred, and there appeared to be an absence of evidence as to the custom; upon which the Court were remitted to the original construction, which was, that the days should be considered as running, or consecutive, and not working days. The plaintiff, consequently, had a verdict for his demurrage (*v*).

Twenty running days in the whole, without any expressions to the contrary, would mean twenty running days at the port of freightage, and the same number at the port of discharge (*w*); and intermediate places must not be imported into the meaning of the contract (*x*).

If there be an agreement to dispatch a ship with the first convoy within fourteen working days after her cargo is ready, and yet the freighter be allowed fifteen days of demurrage: this latter proviso places the freighter, if he avails himself of the demurrage, in the same position at the end of the twenty-nine days as he would otherwise have been at the end of the fourteen, and the plaintiff cannot recover for more than is due upon the days of demurrage (*y*).

(*t*) 3 Esp. 121, Cochran *v.* Retberg and others.
(*u*) *Supra.*
(*v*) 10 Mees. & W. 331. Car. & M. 440, Brown *v.* Johnson.
(*w*) 2 Chit. Rep. 578, Stevenson *v.* York.
(*x*) 1 Esp. 367, Marshall *v.* De la Torre. 2 Ch. Rep. 578, Stevenson *v.* York.
(*y*) 5 Taunt. 654, Connor *v.* Smythe. S. C. 1 Marsh. 276.

A contract for demurrage in the case of a delivery of coals was held to include working days only, and not a wet day, during which no part of the cargo could be discharged (*z*).

Nevertheless, when the usage of commercial men cannot be satisfactorily ascertained, the Courts will interpose and give their view of the matter at issue. Liberty was given to cruise for six weeks. The action in question was brought upon a policy of insurance, upon a ship licensed as aforesaid with letters of marque. It appeared that the ship had been bound from Liverpool to Antigua, and that the captain had not been guilty of any extravagant delay. But he had broken the continuity of the cruise. He had cruised and then given notice of discontinuance, and had then recommenced his cruise. And the Court held, that these six weeks were to be understood as in strict succession from the beginning of the cruise, otherwise the voyage might last for years. It was not said for forty-two days, but for six weeks. The verdict, therefore, which had passed against the underwriters, was set aside (*a*). So it was where an insurer was held liable who had insured a life from the day of the date. It was contended for him that this day must be exclusive, and Sir B. Shower offered to give evidence of the custom that policies should be so construed, but the Court overruled it, and judgment was given against the insurer (*b*).

Time may also in commercial transactions, form the subject of a condition precedent. As where so much sponge was to be delivered upon condition of the defendant's delivery of ochre on or before the 24th of April. The plaintiff having failed to deliver the ochre, was held incompetent to sue for the non-delivery of the sponge (*c*).

What shall be said to

Bills of exchange must be presented within the usual banking

(*z*) 2 New Rep. 258, Harper *v.* McCarthy.

(*a*) 2 Dougl. 527, Syers and others *v.* Bridge.

(*b*) 1 Lord Raym. 480, Anon. S. C. 2 Salk. 625, nom. Sir Robert Howard's case. Holt's Ca. 195. 12 Mod. 256, nom. Fanshaw *v.* Harris.

(*c*) 4 Bing. 280, Parker and another *v.* Rawlings. S. C. 12 Moore, 529. See 4 C. & P. 275, Maryon *v.* Carter, where a delay of four days, although the weather was bad, was held to prevent the plaintiff from receiving a sum of money agreed to be paid for a certain pavement.

hours (*d*). The presentment must be made at such seasonable hours as a man is bound to attend, by analogy to the *horæ juridicæ* of the Courts of justice (*e*). The exception to this rule is, where a person has been stationed at the bank to give an answer to any application by presentment, in which case it might almost be considered, that, *quoad hoc*, the bank was not shut. Indeed, Lord Ellenborough likened such a case to a presentment at a merchant's, and observed, moreover, that if a person were in special attendance, a presentment might be made at any time before twelve at night. The bill in question had been presented after banking hours, between seven and eight, and a boy returned for answer, "no orders" (*f*). At a counting-house, a presentment between six and seven in the evening was held reasonable, although no one was present but a girl to take care of it (*g*). So was a presentment at half past seven, *although no one answered*, and Littledale, J., said, he thought it was, at least, quite in time up to eight o'clock (*h*). A common trader is different from bankers, having no peculiar hours for paying or receiving money. Eight, in the evening, cannot be considered an unseasonable hour for demanding payment at the house of a private merchant who has accepted a bill (*i*). So at the office of an attorney between eight and nine in the evening (*k*).

What shall be "day" for the purposes of business.

On the other hand, if a bill be dishonoured, notice at an early hour is a reasonable notice (*l*).

(*d*) 6 Esp. 41, Parker *v.* Gordon. S. C. 7 East, 385. S. C. 3 Smith, 358. S. P. 15 East, 275, Hopley *v.* Dufresne. 1 M. & S. 28, Elford *v.* Teed. So is 2 Taunt. 224, by the Court. See 4 T. R. 170, Leftley *v.* Mills, *contrà*, but overruled.

(*e*) 1 M. & S. 29, Lord Ellenborough, citing Marius.

(*f*) 1 Stark. 475, Garnett *v.* Woodcock, and others. A rule for a new trial was refused. 6 M. & S. 44. S. P. 2 Ch. Rep. 124, Henry *v.* Lee.

(*g*) 1 Stark. 114, Morgan *v.* Davison.

(*h*) 1 Moo. & Rob. 41, Wilkins *v.* Jadis. A rule for a new trial was refused. 2 B. & Adol. 188.

(*i*) 2 Campb. 527, Barclay *v.* Bailey, by Lord Ellenborough. 1 C. & P. 631, Triggs *v.* Newnham. S. C. 10 Moore, 249. Holt, N. P. C. 476, Bancroft *v.* Hall, a case of notice of dishonour.

(*k*) Triggs *v.* Newnham, *ut supra*.

(*l*) 19 Ves. 216, *Ex parte* Moline. As to bills of exchange, &c. becoming due on holidays. See *ante*, p. 101.

Where there was a contract for stock, and the plaintiff tendered it on the day agreed upon, it was held, that he need not wait till the end of the day before he could sell it legally to a third person (*m*).

If the condition of an obligation to abide by an award, so that it be made before the 1st day of May, and the award be accordingly made between six and seven o'clock, after sunset, this is within the condition. It is sufficient for the award to be ready within the natural day, and it is not like the payment of money to bind men to attend it (*n*). Indeed, the day for such a purpose is said to have continuance till midnight (*o*). So it was urged in argument, that although the payment of money must be before sunset, yet that an award would be good if made between ten and eleven at night (*p*); and it would be no objection that the condition was to deliver to the parties requiring the same, and that the night was not a reasonable time to require it (*q*).

It was the opinion of Treby, C. J., that the day of payment of a bill of exchange, payable one day after sight, should commence after midnight, and that there should be thenceforth an entire complete day, consisting of twenty-four hours, to pay the bill. For, said the Chief Justice, a day to this purpose commences always at midnight, and always consists of twenty-four hours (*r*). And now, according to the custom of merchants, the time allowed is till five o'clock in the afternoon of the day when the bill is due (*s*).

(*m*) 1 Smith, 420, Dorrien *v.* Hutchinson.

(*n*) 20 Vin. Ab. Time, (A.), pl. 11, Church *v.* Greenwood. S. P. Raven *v.* Lytwin, 18 & 19 El. cited there. Cro. El. 43, Franklin *v.* Davies, cited. Ibid. case of Samms and others, cited Pasch. 26 Eliz., and admitted by the Court there in Green *v.* Ardene, Id. 42. S. P. Cro. El. 676, Withers *v.* Drew, 41 El. Sparrow's case, *acc.* is cited, Ibid., 33 El. But a summons upon a process *quod reddat* was held bad after sunset. Id. 42, Green *v.* Ardene.

(*o*) Vin. Ab. *ut supra.*

(*p*) 2 Andr. 39.

(*q*) Vin. Ab. (Night).

(*r*) 2 Lutw. 1593, by Treby, C. J., in Bellasis *v.* Hester; but the majority of the Court were against him concerning the computation as to bills payable at sight. See 1 Lord Raym. 280, S. C.

(*s*) 2 T. R. 61.

And livery made in the night under a letter of attorney to deliver seisin, has been said to have been adjudged good (*t*).

Still where personal attendance is required, the night must be excluded. A tenant must be on the land all day in order to pay his rent, but he need not attend at night (*u*). And, therefore, a distress for rent service, or for a rent charge, must not be made in the night (*v*). Still it must be shewn that a tender was made at a convenient time before sunset (*w*). So it is of an attachment of cattle (*x*). Although, for damage feasant, a distress may be then made by reason of the necessity of the thing (*y*).

If a tender be made at any period of the day to him who ought to receive it, and he refuse, the condition is for ever saved, and there need not be another tender before the last instant in order that the money may be counted before sunset (*z*).

Under the 8 & 9 Wm. III. c. 27, s. 9, which required the Marshal of the King's Bench to produce a prisoner taken in execution after one day's notice in writing, it was held, that the Marshal had the whole of the day for the purpose, (no particular time being specified), and that he was not limited to twelve at noon (*a*).

So it is in the case of a body rule. The sheriff has the whole of the day exclusive to bring in the body (*b*).

There was a contract for the sale of certain tallow to the plaintiff, to be delivered *in all December*. The plaintiff succeeded upon

(*t*) Cro. El. 43, per Fleetwood, arg.
(*u*) 9 Rep. 66.
(*v*) Co. Lit. 142. 7 Rep. 7.
(*w*) See 1 Lutw. 590, Keating *v.* Irish. 2 C. & K. 666, Tunnicliffe *v.* Wilmot, and *post*, "Fraction of a Day."
(*x*) Vin. Ab. (Distress), (O. 2), pl. 14.
(*y*) 7 Rep. 7. 9 Rep. 66.
(*z*) 5 Id. 114, Wade's case; and see 1 And. 252, Fabyan *v.* Rewmston. 2 Lutw. 1139, S. C. cited.
(*a*) 10 Mod. 394, Parks *v.* Crawford.
(*b*) Pr. Ca. 213, K. B. Anon. 6 D. P. C. 164, R. *v.* Sheriff of Middlesex. Tidd, 7th ed. 334.

a point which does not belong to this work, but in the course of the judgment Dallas, C. J., made the following remarks with reference to "all December." "The defendant had a right to deliver the tallow before twelve at night on the 31st of December; he had all that month to deliver it in, and the plaintiff was bound to receive it at any moment until after the 31st" (*c*).

Assumpsit was brought for not accepting oil. It was to be "free delivered by the plaintiffs to the defendant within the last fourteen days of March, 1838, and paid for at the expiration of that time in cash, deducting a per centage for discount." The plaintiffs declared that, on the 31st of March, they were ready and willing to have delivered, and that they requested the defendant to accept the oil, &c. The plea was, that the tender of the oil was made at a late time on the 31st of March, to wit, at nine o'clock of the night time of that day, the same being an unreasonable and improper time, &c. 2. A traverse of the plaintiffs being ready and willing to deliver. 3. Non assumpsit. The replications were,—1. *De injuriâ;* and, 2 and 3. Issue. There was a special verdict, that the plaintiffs did, at half past eight on Saturday night, the 31st of March, make the tender of the oil, and that there was full and sufficient time before twelve o'clock of that night for the plaintiffs to have delivered, and for the defendant to have examined and weighed, and to have received into his possession the same, and that the defendant refused to receive it by reason of the lateness and unreasonableness of the hour. The jury then found that the hour of half-past eight was a late and unreasonable hour, and negatived any prior tender on the part of the plaintiffs. Judgment was given for the plaintiffs, as upon a verdict, upon the second issue, but the plaintiffs insisted upon judgment *non obstante veredicto*, on the first issue. And the Court of error held, that in the absence of evidence of any usage of trade, (and none was given), the tender had been sufficient. The plaintiffs had until twelve o'clock at night, on the 31st of March, to deliver this oil, and the finding of the jury affirmed the fact that there was time for

(*c*) 8 Taunt. 540, 541, Leigh *v.* Paterson.

the defendant to have completed his contract before the end of the natural day (*d*).

If a thing be to be done at or before such a day, the last instant of the day before that day is the time allowed (*e*).

If a man insist upon a tender, he must shew at what time of the day he was at the place, and how long he staid (*f*). And, in the event of his not being in a condition to aver a refusal to accept which would satisfy any time of the day, he should shew on the record that his tender was at the last convenient time (*g*). However, there may be an usage upon some occasions confining a tender to particular hours of the day. As where a transfer was to have been made in the book of the Hudson's Bay Company who had set hours for keeping open their books. The averment, therefore, of a tender at the last convenient time of the day, would, in such a case, be unavailing (*h*).

Except in the cases of treason or felony, doors cannot be broken open in the night. Neither the spiritual nor temporal Courts can enforce their process after sunset, as it seems, unless in the events above mentioned (*i*).

Night in burglary.

By 1 Vict. c. 86, s. 4, as far as the same is essential to the offence of burglary, the night shall be considered, and is hereby declared to commence at nine in the evening of each day, and to conclude at six in the morning of the next succeeding day.

In offences

By 9 Geo. IV. c. 69, s. 12, for the purposes of that act the

(*d*) 6 Man. & Gr. 593. 7 Sc. N. R. 269, Startup *v.* Macdonald.
(*e*) Mo. 143, Androse *v.* Eden.
(*f*) 2 Salk. 6 Salk. 624, Lancashire *v.* Killingworth. S. C. 3 Salk. 342.
(*g*) S. C. 12 Mod. 530, 531. S. C. Com. Rep. 116. 1 Lord Raym. 686. See Say. Rep. 189. And as to the averment of refusal. See 2 Str. 833, *infra*.
(*h*) 12 Mod. 533, Shales *v.* Seignoret, cited. See also 2 Str. 832, Bowles *v.* Bridges and another.
(*i*) Cro. El. 741, Smith *v.* Smith.

against the Game Laws.

night is declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise (*k*).

It is sufficient to allege that the offence was committed "by night," without mentioning the hour of sunset or of sunrise (*l*). Some precedents have certainly contained such an allegation (*m*), but the general description has been held to suffice.

It will not be right, however, to omit the words "by night" altogether. And the word "night" must be so introduced as to govern the substantial parts of the statement of the offence. There is a great difference between a count which charges that the defendants "did, by night, unlawfully enter," &c., "and were then and there armed," &c., and one which has this variation,—"*by night* did unlawfully enter," &c.

In the first case, the count is bad in arrest of judgment, for A. might on a certain day, on the night of that day, have entered upon a close; which is not unlawful under this act, without more. Whereas A., although charged with being then and there armed, under this count, might have been so on the *morning* of the same day. But if it had been proved that A., on the 17th day of December, by *night* entered, the Court would have carried on the expression, "by night," and would have connected it with the arming. The judgment was reversed (*n*).

Day of date, how far identical with day of delivery.

A deed dated on a particular day is not necessarily to be reckoned as completed on that day, because a deed takes effect from the day of its execution. If a deed purports to bear date on the 20th of November, for instance, and is executed on the

(*k*) With reference to night poaching, see 9 Geo. 4, c. 69, ss. 1. 9; and see 7 & 8 Vict. c. 29, s. 1.
(*l*) 1 Lew. C. C. 149, Riley's case. Id. 154, Pearson's case.
(*m*) 1 Lew. 154, R. *v.* Lee and others.
(*n*) 10 B. & C. 89, Davies *v.* The King (in error).

16th by one of two defendants, and by the other on a previous day, the discrepancy is immaterial (*o*).

Where a special verdict stated that a bond was dated on the 15th of November, but that it was not sealed nor delivered until the 18th of November; this was held by the Court to be a verdict for the plaintiff in an action of debt brought by him upon the obligation (*p*). So where there was a covenant to enfeoff at Easter, free from all former incumbrances, *leases, &c. excepted*, and a lease was made after the date, but before the delivery of the deed of covenant, it was held no breach of the covenant (*q*). So an award which directed an act to be done within a certain time from the date of the award, was held good, though the award was not dated, inasmuch as the award had been delivered, and thus the delivery of the deed was the same as if the day of the date had been mentioned as that same day (*r*). So it was in the case of a bond, neither the date of which, nor the sealing and delivery were shewn (*s*).

On the other hand, where there is no proof to the contrary, every deed shall be intended to be delivered on the same day when it bears date (*t*). Indeed, it is a general principle that, *primâ facie*, the date which appears on the face of a document is its true date (*u*).

And a party is held to his pleading, and is estopped from a departure in respect of it. As where a deed was declared upon with the date of the 9th of October. Here the Court said, that as far as the plaintiff was concerned, he was bound by his statement, and the deed must be considered to have been delivered on the 9th. Because, *primâ facie*, a deed is presumed to have

(*o*) 6 Moore, 482, Cockell *v.* Gray. 2 M. & S. 434, Ramsbottom and others *v.* Tunbridge.
(*p*) Cro. Jac. 136, Lady Lane *v.* Pledall.
(*q*) Dy. 139, Earl of Huntingdon *v.* Lord Clinton.
(*r*) 1 Salk. 76, Armitt *v.* Breame. S. C. 1 Lutw. 382. 6 Mod. 244. 2 Lord Raym. 1076. Holt, Ca. 212.
(*s*) 6 Mod. 306, Woodcock *v.* Morgan. See also 1 Sid. 30, Jenkins *v.* Hancock.
(*t*) 2 Inst. 674. 1 Lord Raym. 335, 336, Crumwell *v.* Grumsden.
(*u*) 2 Exch. 191, Potez *v.* Glossop. 19 L. J., Q. B. 435, Malpas *v.* Clements.

been delivered on the day of the date. But they held that the *defendant* might plead specially, that the deed had been in reality sealed and delivered on the 28th of October, (which made all the difference as to the facts of the case), for although the plaintiff was estopped to allege a different day for *his* purpose, the defendant was under no such restriction (*v*). So where it was stated, in pleading, that an arbitrator had made his award on such a day, the presumption was that the award had been made and delivered on that day (*w*). So in ejectment. It was on a demise on the 9th of June, *habendum à die datûs*, and there was a verdict for the plaintiff. It was moved to arrest the judgment for want of stating the day of the date or of sealing the indenture. But the Court said it should be intended that the indenture bore date and was sealed and delivered on the day mentioned in the declaration (*x*).

Nevertheless, a deed with an impossible date may be stated to have been made at any time, because some day must be stated in the declaration, and that day shall be intended to mean the day of the delivery. But it must not be alleged to *bear date* on the impossible day. On the one hand, it is no objection to state the delivery on a particular day, though the date be on a prior day, whereas, on the other, a party is estopped from saying that a bond bears date subsequently to the delivery (*y*). And if the plaintiff states that his bond is dated on the 27th of November, and the defendant pleads a release on the 28th of November, the plaintiff may not reply that the release was delivered before the date of the bond. He is estopped (*z*).

The old distinction between the making of a deed and the day of the date has now yielded, as we shall see presently, to

(*v*) Cro. Jac. 263, Oshey *v.* Hicks. 3 Lev. 348, Stone *v.* Bale. 4 East, 477, Hall *v.* Cazenove. 1 Smith, 272. See however Dy. 167, *b.*, Taw *v.* Bury.

(*w*) Cro. Jac. 285, Baspoole *v.* Freeman.

(*x*) Cro. Jac. 646, Heaton *v.* Harleston. S. P. Cro. El. 773, Hall *v.* Denbigh and others. 1 Lord Raym. 349. 354, Pullein *v.* Benson. But see 1 Lord Raym. 335, Crumwell *v.* Grumsden.

(*y*) 1 Lord Raym. 335, Crumwell *v.* Grumsden. S. C. 1 Salk. 462. Comb. 477. Holt, Ca. 502. 5 Mod. 281. 12 Mod. 193.

(*z*) Comb. 85, Hardesty *v.* Hardesty.

more sound law. Those cases, therefore, which bear upon this point, are not now much to be relied on. As where there was an obligation dated and delivered on the 1st of May, and a release *delivered* on the 1st of June, by which all actions were released until the date of the release. But that date was the 1st of March previous, and the Judges held that the obligation survived (*a*). But the following cases are not affected by any such change of interpretation by the Courts.

There was a covenant in a lease to save harmless from evictions during the term. This was held not to be restricted to the time of the delivery of the lease, but to refer to the date, and there would seem here to be no inconsistency, because the Court regarded the date in this case as the true commencement of the term (*b*).

So where an indenture was dated the 24th of December, 1822, whereby the plaintiff leased to the defendant premises for ninety-seven years, subject to an agreement to A. for twenty-one years, and the defendant covenanted that he would within twenty-four calendar months, next after the date of the indenture, procure A. to accept a lease of the premises for twenty-one years from Christmas, 1822, and that if A. would not accept the lease, then the defendant would, within one calendar month next after the expiration of the twenty-four calendar months, pay to the plaintiff a certain sum of money, the Court held, that the deed took effect from the day of the date, and that the payment accrued due at the end of twenty-five calendar months from the date of the deed (*c*).

Calculation of day according to completion of act.

It appears to be settled, that when an act is finally complete on a particular day, and it becomes necessary to calculate from that day, the day on which the act was so completed must be reckoned. As where a release was made on the 27th of July of all debts, &c. due "until the making of these presents," and

(*a*) Cro. El. 14, Sir Wm. Drury's case. So is 2 Brownl. 300, by Coke, C. J. S. P. 2 Ro. Rep. 255, Green *v.* Wilcocks. S. P. Ow. 50.
(*b*) 1 Sid. 374, Lewis *v.* Hillard.
(*c*) 4 B. & C. 908, Styles *v.* Wardle. S. C. 7 Dowl. & Ry. 507.

was delivered on the same day, here the 27th was counted as the first day of the discharge (*d*). So where a lease for years was delivered on the 20th of June, it was held that it should end on the 19th of June (*e*). So where the stat. 27 Eliz. c. 13 limited the time for proceeding against the hundred to one year next after the robbery, the Court recognised the principle respecting acts done, and reluctantly decided against the plaintiff, who had sued out a writ, tested October 9th, in respect of a robbery committed on the 9th of October of the last preceding year (*f*). So in the case of an award, where the submission was that the award should be made six days after the submission, the day of the award was, by Rolle, C. J., held to be inclusive, and, therefore, if the award be made on the same day as the submission, it is a good award (*g*).

And the general principle above mentioned was recognised in 9 Wm. III., and *Clayton's case* was cited (*h*). But this point came to be considered very much upon a rule to shew cause why a *supersedeas* should not be granted upon an attachment issued against the defendant for not obeying a rule to return a writ which had been directed to him when sheriff of Warwickshire. The defendant went out of office on the 12th of February at four P. M., and he was not served with the rule till the 30th of July. By 20 Geo. II. c. 37, s. 2, the time for limiting

(*d*) Dy. 307, (*a*), Headley *v.* Joans. Co. Litt. 46, (*b*), n. (8), Rooke *v.* Richards. See 29 Ass. pl. 47. Lat. 93. 20 Vin. Ab. (Time) (A.) pl. 5. 3 Ja. B. It is said "*dubitatur.*" However, in the case last mentioned, two deeds or obligations were made on the same day, and in order to give them effect respectively, it would become necessary to enter upon the fraction of a day, in order to ascertain the priority, and in this consists the difference of the two cases. See *post*, "Fraction of a Day." But Nichols *v.* Ramsel, 2 Mod. 280, is *contra*, where a release of all demands *till* the 26th of April, was held *not* to release a bond dated on that day.

(*e*) 5 Rep. 1, Clayton's Case. Co. Litt. 46, *b*, *acc.* See Cro. Jac. 135, Osbourn *v.* Rider, *post*; and several cases nearly connected with this point, *ante.*

(*f*) Hob. 139, Norris *v.* Hundred of Gawtry, per Hobart, C. J., and Winch, J.; Warburton, J., *diss.* 2 Ro. Ab. 520, pl. 8. Mo. 878. 1 Brownl. 156; and in the same case it was agreed, that in the cases of protection, and of deeds enrolled, the year should be counted from (*i. e.* exclusive of) the day of the date. Hob. 139; and see 20 Vin. Ab. (Time) (A.), and *post.*

(*g*) Sty. 382, Clark's case. Lat. 14, Anon., per Doderidge, J. Dal. 41, pl. 18; and see Lat. 59, Bp. of Norwich *v.* Cornwallis, *acc.* "So of a bargain and sale enrolled the same day." Lat. 14, citing 4 El. Dal. Rep.

(*h*) 1 Lord Raym. 280, Bellasis *v.* Hester, *post.*

the obligation on a sheriff to return any process after the expiration of his office is six months. Hence, months being lunar months, if the day on which the office expired was to be reckoned, the rule upon the sheriff was served too late. And, at first, the Court were inclined to hold, that as the law permits no fraction of a day, and as the sheriff might be called upon to act in the course of that day, the six months should be counted to begin on the 13th of February. Subsequently, however, they referred to the cases of *Bellasis* v. *Hester* and *Norris* v. *The Hundred of Gawtry*, and observing, moreover, that the stat. 20 Geo. II. c. 37, was passed for the ease of sheriffs, they gave their judgment in favour of the *supersedeas*, and considered the vacating of the office by the sheriff as the act done from whence the computation was to be estimated (*i*). Notwithstanding the change of opinion which occurred in this case, and some diversity of judicial sentiment upon former occasions with reference to points of the same nature with that above discussed, *R.* v. *Adderley* is now the established authority. Thus, trespass was brought for taking tobacco, and the defendants justified their conduct under the authority of the Board of Excise. Notice of action was given on the 28th of April, and the writ was sued out on the 28th of May. It was objected that the writ ought not to have issued till the 29th, and that the 28th of April should have been excluded. The Judge directed a nonsuit, conceiving that the writ had been sued out too early. But the Court referred to *R.* v. *Adderley*, and the cases there mentioned, and made the rule absolute to set aside the nonsuit (*k*). Again, some years subsequently, it became necessary to consider whether an act of bankruptcy grounded upon the lying in prison for two months after an arrest for debt was complete at the time of issuing the commission. If either the day of the arrest or of the issuing the commission should be reckoned inclusively, the time would amount to two lunar months, and the plaintiffs, the assignees, would be entitled to recover. The Judge directed a nonsuit, but it was set aside, and *R.* v. *Adderley* was again referred to. The computation of the two months was to be made from an act done, and that act

(*i*) 2 Dougl. 463, R. *v.* Adderley.
(*k*) 3 T. R. 623, Castle and another *v.* Burditt and others.

was the arrest of the trader; and, therefore, the day on which the arrest was made ought to have been included in the reckoning (*l*). So under the 6 Geo. IV. c. 16, the first and last days of the imprisonment were put together to make the twenty-one days (*m*). It appears that Lord Raymond had previously held, that lying in prison for two lunar months would make the party a bankrupt from the time of the first arrest, *including the day of arrest* (*n*). And the same law was recognised by Lord Eldon upon another occasion (*o*). So where an act of bankruptcy was committed on the 18th of February, 1826, and the commission was issued on the 18th of April, 1826, the Vice Chancellor said that the two calendar months, under 6 Geo. IV. c. 16, s. 81, had expired on the 17th of April (*p*).

The law of bankruptcy was altered by 6 Geo. IV. c. 16, as to the time, and again by 12 & 13 Vict. c. 106, s. 68; and the decisions under 6 Geo. IV. c. 16, establish that the act of bankruptcy should have relation to the last day of the imprisonment, except (by 12 & 13 Vict. c. 106) in cases of escape by the debtor, when the reckoning is to be made from the first day.

The point was much considered in a case where a *fi. fa.* had been sued out on a judgment upon a warrant of attorney. It appeared that the sheriff had seized the goods before ten A. M. on the 13th of August, and that he had sold them ten days afterwards. On this 13th of August an act of bankruptcy was committed by the owner of the goods. On the 13th of October following, about noon, a commission of bankruptcy issued, and

(*l*) 3 East, 407, Glassington and others, Assignees, &c. *v.* Rawlins and others.

(*m*) 3 Y. & Jer. 1, Higgins *v.* M'Adam. See 4 Esp. 225. 3 Stark. 72, Saunderson *v.* Gregg.

(*n*) 1 Co. B. L. 97. 1 Ves. & B. 53.

(*o*) 1 Ves. & B. 52, in *Ex parte* Dufresne. See to the same effect, 1 Burr. 437, Rose *v.* Green. 2 Burr. 814, Coppendale *v.* Bridgen and another. 2 T. R. 143, by Ashurst, J., in King *v.* Leith. 8 T. R. 508, by Lord Kenyon, in Gordon *v.* Wilkinson. 2 Ves. 280, *Ex parte* Lee. M. & M. 145, by Lord Tenterden, in Cowie *v.* Harris.

(*p*) Mont. & M. 7, *Ex parte* Farquhar.

the question was, whether the execution or the commission should have the priority. And the Court held that the execution should prevail in this instance. For, first, it was a sufficient seizure, so as to be within the statute 6 Geo. IV. c. 16, s. 81. Secondly, more than two calendar months had elapsed between the execution and the issuing of the commission, whence the first day was evidently referred to the day of the act of bankruptcy, and that day was accordingly included in the two calendar months. And, thirdly, the execution was not invalidated by the 108th section of that act, since the proviso there would seem to apply to executions within two calendar months before the issuing of a commission (*r*). The same principle continued to hold in bankruptcy matters. Thus, under 1 & 2 Vict. c. 110, s. 8, an affidavit of debt was directed to be filed against the debtor, being a trader, and if on the twenty-second day after personal service of such affidavit the debt should remain unliquidated or unprovided for, the party owing the same should be deemed to have committed an act of bankruptcy, provided that a fiat in bankruptcy should issue against such trader within two calendar months after the filing of such affidavit, but not otherwise. It happened that an affidavit of this nature was filed on the 27th of April, and the fiat resulting from it issued on the following 27th of June. The Court held that it had come too late. The act must be expounded for the benefit of the trader, and the day on which the act is done must be included in the two calendar months. Here the affidavit of debt was made on the 27th of April, and the two calendar months would therefore have expired on the 26th of June. It did not signify whether the fiat had issued earlier in the day than the making of the affidavit of debt. Any fraction of the 27th of June would be more than the two calendar months (*s*).

Another question has arisen on this clause. It has been above mentioned, that personal service of the affidavit is required. Notice in writing likewise was directed to be given at the same time, and twenty-one days allowed for obedience to the order. It was made a question whether the day of service was

(*r*) 4 B. & Adol. 255, Godson *v.* Sanctuary. S. C. 1 Nev. & M. 52.
(*s*) Mont. & Ch. 671, *Ex parte* Whitby. S. C. 4 Deac. 139.

to be reckoned in the twenty-one days. If so, then the party would have committed an act of bankruptcy. If that day were excluded, the debtor would have had another day for the completion of his obligation before the arrival of the twenty-second day. The case, however, presented other features of difficulty, and this point, consequently, was not determined (*t*).

A distress was made on the 6th of June, by a constable. The stat. 24 Geo. II. c. 44, s. 8, ordains, that no action shall be brought against any justice or constable, &c., unless it be commenced within six calendar months after the act committed. The action in question was not commenced till the 6th of December, and the case of *Norris* v. *The Hundred of Gawtry*, was relied on as in favour of the defendant, the computation flowing from the day of the act committed. But as the Court gave judgment for the defendant upon another point, it became unnecessary for them to pronounce any opinion concerning the time (*u*).

"From henceforth."

The words "from henceforth," when introduced into an instrument, make but little difference in the rule above illustrated. For if a lease be made *habendum* from the making thereof, or *from thenceforth*, it shall begin on the day when it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or "from henceforth," take their first effect (*v*). So if a lease be made on the 1st of December, *habendum* henceforth, the ejectment may be alleged the same day (*w*). Whereas where the lease was made on the 25th of March, *habendum abinde*, or *thenceforth*, the 25th of March was held to be exclusive, because the *reddendum* was to be at the Feast of Saint Michael and at The Annunciation (*x*).

(*t*) 4 Man. & Gr. 161, Gibson *v.* Muskett. S. C. 3 Sc. N. R. 429. The same point had been raised in *Ex parte* Rhodes, 4 Deac. 125. Mont. & Ch. 319; but it was not decided.

(*u*) 4 Moore, 465, Clarke *v.* Davey.

(*v*) Co. Litt. 46, *b.*

(*w*) Cro. Jac. 258, Llewelyn *v.* Williams and others. Id. 646, Heaton *v.* Harleston.

(*x*) 20 Vin. Ab. Time, (A.) pl. 10, between Benedict, Hall, and Dewe.

So where the terms, "now last past," were used in a lease,— "Now last past."
for instance, the lease was dated 25th of March, 1783, *habendum* from the 25th of March *now last past*, for thirty-five years,— *but the deed was not delivered till some time afterwards:* the Court held, that the words, "now last past," should not mean the 25th of March, 1782, so as to exonerate the tenant from the payment of rent between the 25th of March, 1817, and the 25th of March, 1818. The Court looked for evidence that this lease had been executed after the 25th of March, 1783, and thought there was abundant proof of that fact, and therefore said, that the term began to run from the Lady Day preceding the delivery of the deed (*x*); and Bayley, J., referred to *Clayton's case* (*y*).

So again, the same doctrine was fully supported upon the discussion of a rule to set aside a judgment given under a warrant of attorney. This warrant was given with the date of the 24th of February, 1847, but was not executed till the 20th of March following. The defeazance stated the security to be for the repayment of money "on the 20th of March next." Judgment was signed and execution issued on the 30th of March then instant. But the Court said, that the date must not be brought into competition with the time of execution, that the deed was evidently not to be enforced until the 20th of March, 1848, and that execution had issued too soon. And the rule in *Clayton's case* was referred to as binding, and, moreover, Lord Denman mentioned *Steele* v. *Mart*, as precisely in point (*z*).

So in a case under the Irish Tenantry Act, the Court said, that where a right would be divested, or a forfeiture incurred by including the day of the act done, the computation should be made exclusive of it (*a*).

However, a slight difference of expression was at one time *From the*

(*x*) 4 B. & C. 272. 6 Dowl. & R. 392, Steele *v.* Mart.
(*y*) 4 B. & C. 278.
(*z*) 5 Dowl. & L. 289. 2 B. C. Rep. 220, Brown *v.* Burton.
(*a*) 1 Ball & B. 193. 196, Dowling *v.* Foxall.

date, or *from the day of the date.*

allowed to create a corresponding difference of interpretation. As where a lease was drawn to take effect, not from the making, but *from the day of the date*, or *from the date*. Here, during a considerable period the Courts were accustomed to hold, that the word "from," had the force of excluding the day of date if the expression, "from the day of the date," was used (*b*). And they likewise came to the conclusion that the words "from the date," were equivalent to "from the day of the date" (*c*). Although certainly, in some instances, "from the date," was said to include the day, and, "from the day of the date," to exclude it (*d*). And Fleming, C. J., in one case took a diversity between matters of account, and matters involving the passing of an interest. He said, that in matters of account, both "from the date," and "from the day of the date," were the same (*e*). And so it was "*usque diem dati.*" Here a release of all actions "*usque*," &c., did not discharge a bond bearing the same date as the release (*f*).

These rulings, however, gave but little satisfaction. It appeared hard that the principle of law, *ut magis res valeat quàm pereat*, should be departed from upon many occasions where the technicality of "from the day of the date," excluded the day, and thus avoided a valuable and honest instrument.

(*b*) See 5 Rep. 93, Barwick's case, by which certain letters patent were adjudged void. 1 And. 273, (Lease), Harcourt *v.* Pole. 20 Vin. Ab. 267, pl. 9, Umble *v.* Fisher. Palm. 531, Bligh *v.* Trefrey. Debt for rent upon a lease. 1 Sid. 8, in Goodgaine *v.* Wakefield. Cro. Jac. 258, Llewelyn *v.* Williams. See 2 Cowp. 719. 3 Mod. 198, Evans *v.* Crocker. Declaration in ejectment. Al. 77, Cornish *v.* Causey. S. C. Sty. 118. The case of a lease, and More *v.* Musgrave, Id. 119, is cited there. 8 Mod. 54, Macdonell *v.* Weldon. 1 Lord Raym. 480, Anon. Case of an Insurance where the exclusive construction was in favour of the insured. S. C. 2 Salk. 625, *nom.* Sir Robert Howard's case. S. C. 12 Mod. 256. 1 Wils. 176, Doe *d.* Warren *v.* Fearnside. Case of a Lease for Lives. Cowp. 723, The Countess of Portland's case, cited. Case of a Lease. Cowp. 189, Doe *d.* Bayntun *v.* Watton and another. Case of a Lease.

(*c*) 3 Bulst. 203, Bacon *v.* Waller. 1 Ro. Rep. 387, S. C. Sty. 382. Co. Litt. 46, (*b*), n. (8).

(*d*) 1 Bulst. 177, by Fleming, C. J.; but this was merely a question propounded. Cro. Jac. 135, Osbourne *v.* Rider. 2 Wils. 168. See Co. Litt. 46, (*b*), n (8).

(*e*) 1 Bulst. 177. That is to say, as it would seem, that both should, in matters of *account*, have been deemed *inclusive*.

(*f*) Ow. 50, Newman *v.* Beaumond.

Some cases of importance likewise intervened, and at length that which was not conceded at first to the severity of the case became at length so much a measure of common justice as to cause a revolution in the decisions upon the subject. So early as the reign of Queen Elizabeth it had been determined that the time for enrolling a bargain and sale under 27 Hen. VIII. c. 16, should be exclusive of the day of the date (*g*). This case, although free from technicality in respect of the date, was nevertheless a good example to support instead of to vitiate an instrument. So it was where the Court would have the reckoning to commence from the day of *delivering* seisin, rather than impugn a deed which was to take effect from the day of the date (*h*). Still, according to the authorities above cited (*i*), the words, "from the day of the date," were often construed unfavourably to the deed. But at length, upon a question concerning the commencement of a freehold lease, there appeared to be symptoms of a change. It arose upon the point of law that a freehold could not be created to commence *in futuro*. A lease was made on the 14th of April, 1675, to hold from the date, for lives, upon which it was objected that "from the date," was equivalent to "from the day of the date." And to this it was answered, that a matter of interest was different from an account, and that a lease for years might be construed differently, because there would be no prejudice in comparison of the present case. The Judges differed, but three were of opinion in favour of the deed, because, in conformity with the argument, they would have the word "date" understood the same as though it had meant making or giving the deed. Taken in that sense, the decision would harmonize with the established principle, because it would sanction the reckoning from an act done. Lord Chief Justice Treby dissented, and

(*g*) Dy. 218, *b*, Thomas *v.* Popham. 2 Inst. 674, *acc.* 5 T. R. 287, acc., per Buller, J.

(*h*) Mo. 636, Mellow *v.* May. Id. 759, Banks *v.* Brown, S. P. See Palm. 30, Dean and Chapter of Worcester's case cited. But if it turned out that the livery was not made after the day of the date, the Courts would not then help the deed. See Cro. Jac. 158, Hennings *v.* Pauchard. Hob. 314. 1 Ro. Rep. 224, Butler *v.* Fincher. S. C. 2 Bulst. 302. See also 5 T. R. 283, *Ex parte* Fallon. 2 Campb. 294, Watson *v.* Pears. 9 D. P. C. 544, Williams *v.* Burgess, *post*, *acc.*

(*i*) *Supra*.

held the lease bad (*k*). In this sense also we may understand another case in which it was objected as a variance that certain articles used the term, "from the day of the date," and the declaration, "with the day of the date." The Court overruled this objection, and whilst Holt, C. J., would have distinguished between "the date," and "*the day of the date*," Powell, J., remarked, that both expressions had been adjudged to be the same in the Common Pleas (*l*). Lord Hardwicke, some time afterwards, intimated a strong opinion that each case of this kind must be determined according to the nature of the thing, but no resolution was come to upon the point (*m*). However, in 1763, this matter was argued, and a decision arrived at conformably to the new rule. A lease for lives was made to hold from the *day* of the date. It was, of course, objected, that this was a lease of a freehold to commence *in futuro*, and was, therefore, void. And the Court quite agreed as to this principle, but pressed with the desire of adhering to the other principle *ut res magis valeat quàm pereat*, they resolved that, as seisin was to be delivered afterwards, the freehold should be considered as remaining in the grantor *till livery* (*n*). Nevertheless this case did not come quite up to the mark. The Court avoided discussion as to the term, "from the day of the date," and merely laid hold of an expedient to prevent the hardship which would otherwise have arisen. And, further, the authority of this case was questioned in *Doe* v. *Bayntun*, already referred to. The case in *Wilson* was said, in *Doe* v. *Bayntun*, to be a mistake. And in this case of *Doe* v. *Bayntun*, it was held, for the last time, that an instrument made to commence from the day of the date must, of necessity and according to law, exclude the day of the date (*o*).

We have not thought it necessary to set out at length the

(*k*) 1 Lord Raym. 84, Hatter *v.* Ash. S. C. 3 Lev. 438. S. C. 2 Salk. 413.
(*l*) 2 Lord Raym. 1241, Seignorett *v.* Noguire.
(*m*) Cowp. 722, Thompson *v.* Vanbeck, cited.
(*n*) 2 Wils. 165, Freeman *d.* Vernon *v.* West.
(*o*) Cowp. 189, Doe *d.* Bayntun *v.* Watton and another, referred to, *ante*, p. 124. Id. 715, Doe *d.* Gearing *v.* Shenton, cited, decided in the next year, but not reported.

cases whose authority has now been abrogated. They have been cited in a recent page, and we now proceed to give the leading decision which ratified the new principle, and which has even since been recognised as the most proper rule.

A lease was made by G. E. to the plaintiff's wife in pursuance of a power. This power was to lease for any number of years not exceeding twenty-one, in possession, and not in reversion. It was to hold *from the day of the date* of the said indenture for twenty-one years. If the day of the date were to be deemed exclusive, according to many decisions, then the power was ill executed, because it did not create a lease in possession,—on the other hand, if the day of the date here could be called inclusive, then, there being upon this occasion, no fraction of a day, the lease would not be a reversionary, but a present lease, and so a good instrument. It seemed to be admitted, that the intention of the parties had been to execute a lease in possession, and, consequently, the counsel for the plaintiffs urged that every intendment should be made in favour of the deed. And so pressed was he with the adverse determinations of other days, that he suggested how the Court might consistently presume this lease to have been made on the last moment of the day. As there would be no fraction of a day, and no *punctum temporis*, no interval of rest between the end of one day and the beginning of another, the deed might thus be saved. The counsel on the other side relied on the cases anteriorly decided as to the exclusiveness of the day. But Lord Mansfield, who, in *Doe* v. *Watton*, was highly discontented with the former rulings to which he felt at that time compelled to submit, and especially with the case of the *Countess of Portland*, now declared that he should adopt the legal principle, *ut res magis valeat quàm pereat*. The learned Lord reviewed the authorities, and cited several on the one side and on the other. Had this been a new question, the word "from," should have been regarded solely with reference to the context. Whether it should be construed as inclusive or exclusive would depend upon the subject-matter. Grammatically speaking, there were many instances where "from" might be found both exclusive and inclusive in its meaning. The learned Chief Justice then commented upon the

clear intention of the parties to make a good lease, and he denounced the idea of allowing a blunder to defeat an express direction. He then went over the authorities, and, finally held, that "from" might mean exclusive or inclusive, and that Courts of justice should so construe deeds as to effectuate, not destroy them, more especially where the words themselves, abstractedly, may admit of either meaning. Judgment was, therefore, given for the plaintiff upon the issue which had been directed (*p*).

This case of *Pugh* v. *Duke of Leeds* was cited, with an understanding that it had become the guiding case, by Lord Ellenborough—where a question arose concerning the enrolment of a specification. The enrolment was ordained to be "within one calendar month next, and immediately after the date thereof." The date was the 10th of May; the enrolment the 10th of June. It was said, that two days of the same number could not be comprehended within one calendar month. But this was a fallacy, inasmuch as one of the days should be reckoned exclusive of the month, and *Thomas* v. *Popham* (*q*) was relied on in favour of the enrolment. The learned Lord observed, that "the rule of good sense has been established, that such words shall be construed according to the meaning of the parties who use them." And Lord Ellenborough considered the case of *Thomas* v. *Popham* to be expressly in point, and that the month began on the 11th of May, and included the 10th of June (*r*).

And another case subsequent to *Pugh* v. *Duke of Leeds* had been decided to the same effect, where it was sought to set aside an annuity deed for want of time by enrolment within 17 Geo. III. c. 26, s. 3. The annuity was granted on the 6th, and enrolled on the 26th of June. The statute allowed twenty days for the enrolment. If the day of the grant was to be

(*p*) Cowp. 714, Pugh *et Ux.* *v.* The Duke of Leeds. See Lofft. 275, Anon. 1 Dougl. 53, and n. (15) there. 2 Moore, 378, Welch *v.* Fisher; and *ante*, p. 18. 4 B. & C. 272. 6 Dowl. & R. 372, Steele *v.* Mart, *ante*, p. 123; and refer generally to 2 East, 376, Doe *d.* Allan *v.* Calvert.

(*q*) *Ante*, p. 125.

(*r*) 2 Campb. 294, Watson *v.* Pears.

reckoned as inclusive, then the statute would not have been complied with. But the Court were clear against the objection. They said that it would be straining the words to construe the twenty days all inclusively. Suppose the direction of the act had been to enrol the memorial within one day after the granting of the annuity, could it be pretended that that meant the same as if it were said, that it should be done on the same day on which the act was done. If not, neither could it be construed inclusively, where a greater number of days was allowed. And Buller, J., cited 2 *Inst.* 675, as decisive against the objection. And that learned Judge referred to *Pugh* v. *Duke of Leeds*, as an authority to shew that the time should be taken exclusive or inclusive, as would best effectuate the act intended to be done by the parties. The rule, therefore, for setting aside the warrant of attorney to confess judgment was discharged (*s*). So where a lease was dated on the 17th of February, *habendum* from the 25th of March ensuing the date thereof, for twenty-one years, but it was not executed and delivered till after the 25th of March,—the Court held that reference should be had to the date of the 17th of February. Consequently, the grant was of property in possession and not in reversion, and a verdict for the plaintiff in ejectment was set aside (*t*)*. So where the stat. 3 Geo. IV. c. 39, directed, that any warrant of attorney executed by a bankrupt should be void as against his assignees,

(*s*) 5 T. R. 283, *Ex parte* Fallon and Wife.

(*t*) 10 East, 428, Doe *d.* Cox *v.* Day and another. 4 Dougl. 306, Doe *v.* Roberts.

* Although not exactly in agreement with this Treatise, a case may here be cited, of an unsuccessful attempt to substantiate a release for rent. "Replevin. Cognizance for half a year's rent due March, 1841, for rent payable at Lady Day and Michaelmas. Plea in bar. An indenture made between the defendant and plaintiff purporting to have been made February 1, 1841, but made in fact after Michaelmas, 1841, and after the rent became due, and containing a release to the plaintiff from the rent. The replication set out this indenture, which bore date the 1st of February, 1841, being a lease from the defendant to the plaintiff, to hold from the 30th of July, 1840, for fourteen years, at a rent payable at Lady Day and Michaelmas, the first payment to be made at Lady Day then next." This was held not to be a release of the rent for which the cognizance was made; and by Parke, B., "There is nothing to exempt the plaintiff from this payment under a previous contract of rent due before the execution of the indenture. The term in the lease only designates the time for which it is to run, by way of calculation, not as conveying any interest. It is but a different way of saying that it is a term for twelve years and eight months to come." The deed did not operate to discharge the defendant from liability. 10 Mees. & W. 694, Cooper *v.* Robinson.

unless filed within twenty-one days after execution; a warrant executed on the 9th of the month, was held to have been filed in time on the 30th, the day of execution being excluded. And Lord Denman referred to *Ex parte Fallon* as authority (*u*). So under the stat. 12 & 13 Vict. c. 106, s. 134, which protects *bonâ fide* purchases from bankrupts, unless a fiat or petition shall be sued out or filed within twelve months * after the act of bankruptcy, the day of the bankruptcy is excluded (*v*)†. And by sect. 276 of the same act, in all cases in which any particular number of days is described by the act, or mentioned in any rule or order of Court made thereunder, the reckoning, if not otherwise expressed, is to be exclusive of the first and inclusive of the last day, unless the last day should happen to fall on a Sunday, Christmas Day, Good Friday, Monday or Tuesday in Easter week, or a Fast or Thanksgiving day, in which case the time shall be reckoned exclusive of that day also.

But all the cases came again, some years afterwards, under full review, and before a most able Judge, and one whose particular judgment upon the occasion has met with approbation from subsequent Judges. There was a bequest in favour of the children of A. of a sum of money, provided that she should give security, within six calendar months after the decease of the testator, that she would not marry B.; in that case, and not otherwise, certain monies were to be paid over to A.'s children. There was another proviso that the money should go over if the security was not forthcoming. The testator died between eight and nine P. M. on the 12th of January. On the 19th of June, A. gave a written notice that she would not give security. On the 6th of July, she asked what security would be required and offered her bond, but refused, on the 11th of July, to execute the bond. There were three trustees, two of

(*u*) 12 Ad. & El. 635. 4 Per. & D. 443. 9 D. P. C. 544. 1 Arn. & H. 65, Williams *v.* Burgess.

* These months are calendar, 12 & 13 Vict. c. 106, s. 276.

(*v*) See also s. 143 of the same act.

† Still under 6 Geo. 4, c. 16, s. 6, a fiat sued out on the 4th of May, after a declaration of insolvency on the 5th of March, was held to be correct, although the fiat was not delivered to the solicitor who struck the docket till the 6th of May. 3 Jur. 1022, *Re* Rowe.

whom gave their approbation in favour of the sufficiency of the security on that same day, the 11th of July,—the third did not express his consent till some time afterwards. At length A. gave the required security on the 12th of July, at about nine P. M. The question was, whether the day of the testator's death should be reckoned. If so, the bond had not been executed in time. If otherwise, the six months would not have expired; and as the testator died at nine P. M., and the bond was executed at nine P. M., it might, at all events, have been a question whether this was not a case in which the Court would admit the fraction of a day to be available in favour of the children. On behalf of the bequest to A.'s children the statute of 7 Edw. I. was cited, which enabled the lord to enter after an alienation in mortmain within a year. Here the calculation excluded the day of alienation. So in commercial matters, the exclusion of the day was relied on, and *Bayley on Bills* was referred to. So in giving oyer of a deed, two days were allowable, and both exclusive, after the demand, and *Page* v. *Divine* (*v*) was cited to that effect. The Master of the Rolls (Sir Wm. Grant) then mentioned *Mercer* v. *Ogilvie*, where a man had died sixty days after the making and granting of a deed. Here the day on which the deed was made and granted was excluded in the reckoning. The learned Judge added, that our law rejects fractions of a day more generally than the civil law. He would not consider the hour of the testator's death as the time of his death. The day of death must be the time, and the death and that time must be past before the six calendar months could begin to run. Nevertheless, the rule contended for would have the effect of throwing back the event into a day upon which it did not happen. It would go the length of assuming that the testator was dead on the 11th instead of on the 12th of January, on which day he really died; for it is said that the whole of the 12th of January must be computed as one of the days subsequent to his death, in order to get out of the difficulty of the fractional part of the day. However, without entering upon the fraction, it would be better to lay down a rule, that whenever an act is to be done by a party on a particular day,

(*v*) 2 T. R. 40.

that day should be included. Consequently, according to this rule, A. had the whole of the 12th of July, and it followed that the day of the testator's death must be considered as legally excluded from the six calendar months. Judgment was accordingly given in favour of the bequest to A.'s children (*w*).

Notwithstanding this elaborate decision, which was come to after a consultation of all the authorities, the present leaning of the Courts would undoubtedly be to countenance the doctrine of a fraction of the day, rather than that an instrument should perish which had been executed under such circumstances. The morality and equity of the case were with A.'s children; and were it necessary, there is little doubt but that the Court would now adhere to the maxim—"*ut res magis valeat quàm pereat.*"

The following case will illustrate in some degree the idea just suggested. It was one in which it was attempted to employ ir Wm. Grant's rule in hostility to a reasonable and equitable claim. It is true that the doctrine of including the day of the act done might have been unfriendly to the claim of A.'s children in *Lester* v. *Garland*, had both days been reckoned, but by excluding the day of the testator's death, this rule worked no injury. To carry out the principle generally would have been productive, as we shall now shew, of some inconvenience. On Saturday morning, July 9th, a fire broke out in the hundred of Wonford, Devon. There was no doubt but that the fire was maliciously done. It destroyed several premises belonging to the plaintiff. On Monday, the 11th of July, before two o'clock, the plaintiff gave notice of the offence to four of the inhabitants of the hundred, and complied in other respects with the directions of the stat. 9 Geo. I., upon which he grounded his action against the hundred. There was a nonsuit; but four points were submitted to the Court in the shape of objections to the right of the plaintiff to recover. It is with one only of these that we are at present concerned. It was said on behalf of the hundred that the notice had not been

(*w*) 15 Ves. 248, Lester *v.* Garland.

given in time. The hundred insisted that the notice should have issued on the Sunday, and *Norris* v. *The Hundred of Gawtry*, amongst other cases, was relied on. The counsel for the plaintiff (*x*) referred to a note in *Williams's Saunders* (*y*), where this case of *Norris* v. *The Hundred of Gawtry* is cited, and said that the objection was founded on that note. But he added, that the case of *Nesham* v. *Armstrong* (*z*) had passed through the Court, but that this objection had not been surmised upon that occasion (*a*). The Court gave judgment for the plaintiff, holding the sufficiency of the notice. They did not overrule any of the decisions; but Lord Tenterden, noticing *Lester* v. *Garland*, remarked, that it was impossible to reconcile them all, or to deduce from them any clear rule or principle to govern all cases. Lord Tenterden then observed upon the rule laid down by Sir Wm. Grant concerning the inclusion of the day where an act was to be done by a party, but he said that the case here was quite distinct. The computation was to be made from an act not done by the party, and of which at the time he was wholly ignorant. Here also only two days were allowed for giving notice: if those two days expired on the Sunday, when would the time have expired had one day only been allowed? It could hardly have been said that the notice must be given on the very day when the fire happened; and if one day would have extended the time to Sunday, two days must extend it to Monday. The Master of the Rolls had thought that the Court was at liberty to look at the particular circumstances of each individual case, and that the rule for deciding whether a certain day should be considered as excluded or included was, that where a computation is to be made from an act to be done by the party, the day of doing the act shall be included, *but not otherwise.* The learned Lord concluded by applying the rule thus tendered by the Master of the Rolls, and said, that according to that rule the notice was in time. The *postea* was accordingly awarded to the plaintiff (*b*).

(*x*) 9 B. & C. 139.
(*y*) 2 Wm. Saund. 375, n. (3).
(*z*) 1 B. & Ald. 146.
(*a*) Hob. 139, *ante*, p. 118.
(*b*) 9 B. & C. 134, Pellew *v.* The Hundred of Wonford. S. C. 4 Man. & Ry. 130. As to "Sunday," see *ante*. Norris *v.* The Hundred of

Again, a justice had committed the plaintiff to prison, and the discharge took place on the 14th of December. The writ against the defendant, the justice, issued on the 14th of June. It was objected at the trial, that as the imprisonment continued during a part of the 14th of December, that day must be excluded from the computation of the six calendar months within which the action might be brought. The learned Judge, however, finding that the damages to be awarded would only be one farthing, directed a nonsuit. But the Court, upon a motion to enter a verdict for the plaintiff, gave judgment in favour of excluding the day, and consequently were of opinion that the action had been commenced in time. And it appeared that several of the leading authorities had been brought under their notice. Bayley, J., who delivered judgment, referred to *Lester* v. *Garland*, and *Pellew* v. *The Hundred of Wonford*, and said that the Court would, in this case, act upon the rule laid down by Sir W. Grant (*c*). This rule was, "that where the act done, from which the computation is made, is one to which the party against whom the computation runs, is privy, the day of the act done may reasonably be included, but where it is one to which he is a stranger, it ought to be excluded" (*d*).

The date of a patent, indeed, may seem at first sight to interfere with the rule above sought to be established, but we shall find that in the case about to be noticed, the Court pronounced in favour of the patent, and consequently the subject-matter of the discussion did not perish.

This was a case in which an action had been brought for the infringement of a patent. The defence was that the original patent was at an end, and that the renewed letters patent were granted after the expiry of the old term, which was for four-

Gawtry can hardly be said to be touched by this decision, because there a whole year was allowed for prosecuting the hundred, whereas in the present case Lord Tenterden adverted to the fact of there being a notice of *two days only*. That circumstance would seem to make a particular distinction between the two cases. And, in effect, the Court intimated their approbation of the well received principle, that the particular circumstances of each case should be inquired into, in order to arrive at a righteous decision.

(*c*) 9 B. & C. 603, Hardy *v.* Ryle.

(*d*) Id. 608.

teen years, and, therefore, that they were void. It appeared that the first patent was dated the 26th of February, 1825. It was to endure for fourteen years, and the first question was whether the term was complete on the 25th of February, 1839, or on the 26th of February of that year. The second patent bore date the 26th of February, 1839. At the trial the defendant was successful. It appeared to the Judge that the term had ended on the 25th,—that the day of the date of the first patent was inclusive, and it was surmised that new letters patent could be granted after the expiry of the first. A verdict was accordingly entered for the defendant. But a rule was obtained for judgment *non obstante veredicto*, and the Court made it absolute. Not that they overruled the opinion as to the expiry of the term. They held that the patent was at an end on the 25th, but they said that the new patent might well ensue after such expiry, provided the conditions of the statute (5 & 6 Wm. IV. c. 83, s. 4) were obeyed. And as it had been attempted for the defendant to urge that the fraction of a day might be made available for him, Parke, B., observed, that the law never takes notice of the fraction of a day, except where there are conflicting rights between subjects. Nevertheless, the defendant succeeded on the grounds above mentioned, and the judgment of the Exchequer was confirmed in error (*e*).

No date at all, or impossible date.

Cases have happened where there has been no date at all, or an impossible date, which is equivalent to a nullity. As where justification was made under a precept alleged to bear date on the 26th of February, but issuing out of a Court held on the 24th of February. Here the process was held void, not voidable, and the justification bad (*f*). So if a condition becomes impossible, as by death, the party originally bound by it is discharged (*g*). Unless, indeed, he might well have performed it before the death, in which case he becomes liable to the executors (*h*). But a defective or impossible date is, by no means, on all occasions a nullity. Thus, if a lease bear date on the 30th of February

(*e*) 14 Mees. & W. 574, Russell *v.* Ledsam. 16 Mees. & W. 633, (in error).
(*f*) Willes, 122. 125, Morse *v.* James and others.
(*g*) 2 Rep. 79. 2 Mod. 234, Shipley *v.* Chappel.
(*h*) 1 Lutw. 694.

or the 40th of March, it shall not be void, but commence from the day of the delivery (*h*). Although in *pleading* it should not be alleged to bear date on the impossible day. Some other day should be selected, and that day will be construed to be the day of the delivery (*i*). So, *after verdict*, in ejectment, it was moved to arrest the judgment, because neither the day of the date nor of the sealing and delivering of the indenture was mentioned in the deed. But the Court said, that they would intend that the indenture bore date, and that it was sealed and delivered on the day mentioned in the declaration (*k*). A lease was promised under an agreement for the same as soon as certain repairs should be completed, but blanks were left for the commencement. The lease being tendered upon completion of the repairs, to commence *from that time*, the tenant refused to take it, and, upon bill filed, contended, that the new lease ought not to commence until the expiration of the old. And the Court decreed in favour of this objection by the tenant (*l*).

After verdict, it appeared that the defendant had pleaded payment of a bond upon the 31st of September,—and the verdict was that he did not pay. This was held, upon error brought, a good verdict, and not a void nor idle issue, for the jury, in effect, found that the defendant did not pay (*m*). Again, the time upon a bill or note payable within a limited time after the date, where there is no date, must be computed from the day it issued (*n*). In the Common Pleas a notice for the defendant's appearance was fixed for an impossible day, the writ being tested on the 28th of November, 1808, to appear on the 20th of January, 1808; but the Court would not set aside

(*h*) Co. Litt. 46, *b*. 2 Rep. 4, *b*, 5, Goddard's case. 2 Lord Raym. 1076, Armitt *v*. Bream. "And that is one sense of *datus*," Id. 1082, *i. e.* the delivery. 4 B. & C. 911. As to cases of misrecital, see Dy. 116, Mount *v*. Hodgkin and another. S. C. 1 And. 3. S. C. Bendl. & D. 38. Cro. Car. 400. 1 Sid. 460, Foot *v*. Berkley. "For misrecital a lease shall commence immediately." 6 Rep. 34, *a*, Bp. of Bath's case. Co. Litt. 46, (*b*), n. (10).

(*i*) 1 Lord Raym. 335. 1 Salk. 462. Comb. 477. Holt's Ca. 502. 5 Mod. 288. 12 Mod. 193, Cromwell *v*. Grumsdale.

(*k*) Cro. Jac. 646, Heaton *v*. Harleston.

(*l*) 3 Ves. 34, Pym *v*. Blackmore.

(*m*) Cro. Car. 78, Purcase *v*. Jegon. S. P. Comb. 443, by Holt, C. J., in Prince *v*. Moulton, the 30th of February.

(*n*) Bayley on Bills, 112.

the proceedings (*o*). Yet in the Court of King's Bench, where the appearance was to be on Thursday the 27th of May, instead of Friday the 27th, the proceedings were set aside (*p*). And where notice at the foot of common process, returnable on the first day of Term, directed the defendant to appear on Friday the 6th of November, instead of Saturday the 6th, it was held irregular, and the proceedings were set aside, but without costs, for though there were two inconsistent parts in the writ, yet perhaps they might amend one by the other (*q*). So where a notice to quit at Lady Day, 1795, was delivered at Michaelmas, 1795; the Court held it to be a notice to quit at Lady Day, 1796 (*r*). So where an award appeared to have been made betwixt the —— day, and the —— day of ——, or, in the Scottish form, any other day to which the submission might be prorogated, it was held immaterial that a vacancy in the date was disclosed, inasmuch as a general authority to execute the award within a reasonable time was implied (*s*). So where there was a warrant from the Palace Court to imprison the defendant for thirty-five days, but no date was mentioned in the instrument from whence the imprisonment was to commence, it was contended that this was a void warrant. But the Court would not entertain the objection (*t*), and two previous decisions were cited, one by the plaintiff's counsel, that the imprisonment must be reckoned from the date of the arrival in gaol (*u*), and the other by the Court;—that a warrant without a date was good, and that the imprisonment dated from the time of the party being imprisoned under it (*v*).

If a date, though partly impossible, be partly correct, it will suffice. As where the year of the King was wrongly stated, but

(*o*) 1 Taunt. 424, Steel *v.* Campbell.
(*p*) 1 Price, P. C. 31, Stockin *v.* Manners.
(*q*) 1 Ch. Rep. 615, Abraham *v.* Noakes.
(*r*) 7 T. R. 63, Doe *d.* Duke of Bedford *v.* Kightley. See Barnes, 425, Elliott *v.* Barrett.
(*s*) 2 Y. & Jer. 11, Macdougall *v.* Robertson, (in error).
(*t*) 19 L. J., Exch. 1, Braham *v.* Joyce. S. C. 4 Exch. 487. *Sed vide* 1 Dowl. & L. 726. 13 L. J., M. C. 16, *Ex parte* Fletcher.
(*u*) 15 Mees. & W. 612. 15 L. J., Exch. 300, *Ex parte* Foulkes. S. P. per Jervis, C. J., 20 L. J., C. P. 70.
(*v*) 17 L. J., Q. B. 43, *Re* Bowdler. S. C. 11 Q. B. 612.

the year of our Lord and the day of the month was right (*w*). And where a bond was declared upon as having been made on the 26th of August, 13 Wm. III., and upon oyer, it appeared to bear date the 26th of August, 1701, the Court held, that those days were the same, and a plea in abatement was overruled, for though it was not said in the deed—Anno Domini 1701, yet the Court would intend 1701 to be the year of our Lord 1701 (*x*). So where a deed bore date in the 22nd year of Charles the Second, A. D. 11,671, it was held good, for the year of the King was certain (*y*). And a trespass laid in the time of King William, but against the peace of Queen Anne, though bad on demurrer, is good after verdict (*z*). So, if in a summons for further time to plead, the day of the month be correct, it will be no objection that the year is wrongly stated (*a*), or even omitted (*b*). So where a mistake in inserting the year in the declaration, caused it to bear date three months before the issuing of the writ of summons, it was held not to be irregular, especially as in the notice of the plaintiff's demand the proper year and right day and month appeared (*c*)*.

An affidavit of service purporting to be made on the day of the date, there being no date, except that of the jurat, is insufficient (*d*). And so is a writ of *capias* where there is neither day nor year in the teste (*e*). And the jurat of an affidavit (*f*).

(*w*) Cro. Jac. 266, Dobson *v.* Keys; and see to the same effect, Dy. 95, Whitton *q. t. v.* Marine. Id. 203.

(*x*) 2 Lord Raym. 791. 794, Holman *v.* Barrow.

(*y*) 6 Mod. 44, Ford *v.* Lord Grey. 1 Lord Raym. 639, R. *v.* Everard. 1 Salk. 195, S. C.

(*z*) 2 Salk. 640, Day *v.* Muskett. S. C. 6 Mod. 80. 2 Lord Raym. 985. See also Ca. temp. Hardw. 131, Fisher *v.* Sowerby. Com. Rep. 12, Blackall *v.* Heal and others. S. C. 3 Salk. 8.

(*a*) 7 D. P. C. 459, Solomons *v.* Nainby.

(*b*) 2 Str. 1233, Weavers' Company *q. t. v.* Forrest.

(*c*) 2 Man. & Gr. 313, Coates *v.* Sandy. S. C. 2 Sc. New R. 535. 9 D. P. C. 381.

* The Courts will, in general, refuse a rule for judgment against the casual ejector, where the declaration is wrongly entitled, especially where the notice at the foot is defective as to date, or where it has no date at all. See the Digests, tit. Ejectment, and the Books of Practice, for the numerous cases on this point.

(*d*) 1 Dowl. & L. 788. 7 Sc. N. R. 527, Hughes *v.* Brown.

(*e*) 2 Dowl. & L. 947, Rennie *v.* Bruce. 14 L. J., Q. B. 207.

(*f*) 7 Mees. & W. 146, Blackwell *v.* Allen. 14 Law Times, 222, Duke of Brunswick *v.* Sloman. 19 L. J., Q. B. 456, Duke of Brunswick *v.* Harmer. See also 3 Moore, 236, Wood *v.* Stephens, where the month was omitted, and the error was held fatal, *ante*, p. 8.

So, in bankruptcy, the omission of the day of the month and of the year in the certificate has been held immaterial (*g*). So where the year was omitted in one of the signatures, but there were dates precedent and subsequent to the last examination (*h*). So an omission of the year and of the word "next" at the foot of a bill of Middlesex was held immaterial (*i*).

An order of removal dated in blank as to the day is good, or at least helped by an appeal to the quarter sessions (*k*).

But this excuse will not avail where there is an omission of the date in a *capias* (*l*). Nor will "Wm. IV.," instead of "Victoria," in the copy of a writ suffice (*m*).

Hence we have two clear principles; one, that a calculation of time is to be made inclusively of the day of doing an act, and the second, that such an interpretation is to be put upon words of time carrying two meanings, as will carry out the intention of the parties who make an instrument. Therefore, whether the phrase be,—from the day,—or, with the day,—or, from the date,—or, from henceforth,—or, otherwise,—the intention of the persons interested, and the consequent validity of the deed, are to be the primary objects of regard. There is one other principle connected with this point, and that is custom. The law will take notice of custom, as the custom of merchants, &c. Thus, if a bill of exchange be payable ten days after sight, the day of sight, which is the day when the bill is presented for acceptance, is excluded. It is the day certainly on which the event happens, but the custom of merchants allows the party the whole day to view the bill. This was the opinion of Lord Chief Justice Treby, in the reign of William the Third, and although his brethren did not agree with him upon that occasion (*n*),

(*g*) 1 Glyn & J. 148, *Ex parte* Laing. 2 Glyn & J. 80, *In re* Davis.
(*h*) 1 Deac. & Ch. 531, *Ex parte* Shoults. S. C. nom. *Ex parte* Moult, 1 Mont. & Bl. 262.
(*i*) 1 Chit. Rep. 384, Humphries *v.* Collingwood, and see note (*a*) there.
(*k*) 2 Smith, 277, R. *v.* Brimpton.
(*l*) 6 D. P. C. 90, Smart *v.* Johnson.
(*m*) Id. 162, Drury *v.* Davenport.
(*n*) 1 Lord Raym. 280, Bellasis *v.* Hester. S. C. 2 Lutw. 1589.

yet it was subsequently recognised (*o*), and the modern practice is conformable to it, the party being allowed until five o'clock in the afternoon to pay the bill. So a banker is allowed until five o'clock to return a check, and accidentally cancelling it before five, will not fix the banker if he return it at five (*p*). Unless, indeed, payment be refused to a creditor with a view to delay the creditor. That act was held to be an act of bankruptcy, although the bill was actually paid at a subsequent period of the day, and before five o'clock (*q*).

An arbitration in respect of a corn rent was permitted, provided it were applied for at the Easter Quarter Sessions next after the expiration of twenty-one years from the making of the award,—and so on from time to time *at the end* of any twenty-one years for ever. An award was made in August, 1803. In January, 1825, another arbitration took place, so that the term of twenty-one years would then be completed in 1846. No application was made at the Easter Session of 1846, but the landowners applied at Easter, 1847, and contended that they were not compellable to give notice until the January after the period of twenty-one years had expired. But the Court held, that the prosecutors of the *mandamus* were too late, and Lord Denman added, that if they were correct in their construction of the act, the alteration could only be made at the end of every twenty-two years, whereas the act had fixed it at the end of twenty-one years (*r*).

From one feast day to another.

The same law will prevail when the calculation required depends upon the construction of the expression, "from one feast day to another," as from Michaelmas to Michaelmas, &c., according to circumstances.

Formerly, there were difficulties and inconsistencies upon this head. As where one made a lease for years, rendering

(*o*) Fort. 376, May *v.* Cooper. 1 Barnard. B. R. 303, Coleman *v.* Sayer.
(*p*) 1 Campb. 426, n., Fernandez *v.* Glynn.
(*q*) 2 T. R. 59, Colkett and others, Assignees *v.* Freeman and another.
(*r*) 18 L. J., Q. B. 163, R. *v.* Lindsey Justices.

rent for one whole year, *viz.*, *à festo Sancti Michælis usque ad finem termini prædicti.* Here, according to one report it is said, that the feast of St. Michael was not excluded, *i. e.* the last mentioned feast, and, therefore, that the rent became due on the feast day itself, because the premises of the reservation were general. According to this rule, the first feast should be excluded, for, taking it inclusively, the words, "*à festo*," &c., would be void as being repugnant to the premises (*s*). However, without impeaching the principle just mentioned, the Court, according to another report, decided against the plaintiff, because if the words, "*à festo*," &c., were rejected, it would not appear when the year should begin (*t*). Some years afterwards (3 Jac. I.) it was insisted, and with success, that "*à festo Michælis usque ad festum diem*," would exclude both days, and, therefore, that there wanted a day of the occupation for a year (*u*). And, so again, the same holding by the Court occurred in 4 Car. I. (*v*). But in 27 Car. II., it was the opinion of the Court, upon considering a lease made from the 20th of February, 1661, *until* Michaelmas, 1668, that Michaelmas Day, 1668, was included. There was a demurrer, because Michaelmas, 1668 had been alleged as within the aforesaid term. However, the case was adjourned (*w*). Yet it seems, from the report in *Ventris*, that the Court were clearly in favour of the plaintiff. They are there reported to have said, "It is true, in pleading *usque ad tale festum*, will exclude that day, but in case of a reservation, the construction is to be governed by the intent" (*x*). And so at this day the construction is according to common sense, that is to say, according to the meaning of the parties, with a leaning to support the validity of an instrument if it be possibly consistent with the rules of law to do so. Still, if there be a palpable mistake, the Judges cannot assist in remedying that; as where rent was reserved half-yearly from Michaelmas, without more. In such a case an action for half a year's rent, due on the 25th of March, upon the

(*s*) 20 Vin. Ab. (Time) (B.) pl. 9, Umble and Fisher.
(*t*) Cro. El. 702, Umble *v.* Fisher. 41 & 42 El. But Gawdy, J., said, that if the feast day had stood first, and then the words "for one year" had followed, the declaration would have sufficed.
(*u*) Yelv. 73, 74, Carpenter *v.* Colins.
(*v*) Palm. 531, Bligh *v.* Trefrey.
(*w*) 3 Keb. 534, Biggin *v.* Bridge.
(*x*) S. C. 1 Ventr. 292, nom. Pigot *v.* Bridge.

lease at Michaelmas, was held not to be sustainable, for half a year had not elapsed. "Otherwise when the rent is payable at such and such feasts, quarterly or half-yearly; there, though in reality the quarter or half-year be not then expired, yet as to the reservation and payment it is (*y*). And the reason is, because where no special days are fixed, and so the reservation is general, as quarterly or half-yearly, the rent must be computed according to the *habendum*,—to have and hold from such a day. On the other hand, where special days were mentioned, as to pay upon the most usual feast days, that is to say, at the feast of St. Michael the Archangel, &c., it was held, that the rest should be computed agreeably to the *reddendum* (*z*). The *reddendum* explains any apparent obscurity. So that where a lease was made on the 25th of March, *habendum* from thenceforth for a year, and the *reddendum* was to be on Michaelmas and Lady Day following, the good sense of the matter required that the first 25th day of March should be exclusive; and it was so held accordingly in an action for the rent due at the said two feasts. The objection was, that if the first 25th of March was to be reckoned inclusively, the lease would end before the next 25th of March, and so the rent would be reserved after the expiration of the term (*a*).

Again, in a lease, the *habendum* was for twenty-one years, from the 25th of March, 1809. The *reddendum* upon one of the days was the 25th of March. It was held, that the lease expired in this case at the end of the 25th of March, 1830. Lord Denman observed, that terms of years last during the whole anniversary of the day from which they are granted. If this were otherwise, the last day on which rent is uniformly made payable would be posterior to the lease. The case of *Hatter* v. *Ash* (*b*), alone applies, added the Lord Chief Justice, but that case has been disposed of by* *Pugh* v. *Duke of Leeds* (*c*).

(*y*) 7 Mod. 97, Parker *v.* Harris, cited there. Id. 96, Thomkins *v.* Pincent, to the same effect. S. C. 2 Lord Raym. 819. 1 Salk. 141.
(*z*) 2 Lord Raym. 819. 1 Salk. 141.
(*a*) 20 Vin. Ab. (Time) (A.) pl. 10, Benedict's case.
(*b*) 1 Lord Raym. 84, Hatter *v.* Ash, *ante*, pp. 125, 126.
* Pugh *v.* Duke of Leeds, Cowp. 714, *ante*, p. 127.
(*c*) 9 Ad. & El. 879, Ackland *v.* Lutley. S. C. 1 Per. & D. 636.

So upon another occasion, the Vice Chancellor observed, that where a term was created to commence from a certain day, that day is excluded (*d*). Where a lease was made to begin for thirty years after the lease made by J. S., and there was no such lease *in esse*, it was held, that the lease should begin presently (*e*).

Illustration of the word "from."

Where "from" is used, without any expression or legal grounds to qualify or limit it, it will have given to it an exclusive meaning (*f*). As in the case of a lease, where the words, "to hold *from*" such a day will exclude that day (*g*). And ejectment on a demise on the 22nd of May, *habendum* from the 1st of May, by virtue of which the lessor entered, until afterwards, that is to say, on the same day and year, the defendant ejected the plaintiff; was held good, upon error assigned that the ejectment was alleged before the lease was made, for the entry refers to the day of the lease made, *i. e.*, the 22nd of May, and the judgment was affirmed (*h*).

The day of payment in the case of bills and notes is exclusive (*i*).

So where an award was to be made within five calendar months after the appointment of an umpire. The appointment took place on the 29th of June. Here the Court deemed the 29th to be exclusive, and an award on the 28th of the following November was consequently in time (*k*).

A testator directed that his property should be suffered to accumulate for twenty-one years *from* his death. He died on the 5th of January, 1820. Certain dividends, arising from stock, became due on the 5th of January, 1841, and the question was, whether these dividends belonged to the trust fund, or to the persons entitled at the end of twenty-one years. If the day of death were included, the trust fund would lose the

(*d*) 11 Sim. 434.
(*e*) Carter, 156, Foot *v.* Berkley.
(*f*) 2 Mod. 146, Brown *v.* Johnson.
(*g*) Cro. Jac. 662, Rutter *v.* Mills.
(*h*) S. C.
(*i*) 15 Ves. 254, Lester *v.* Garland.
(*k*) 9 D. P. C. 203, *Re* Higham and Jessup.

dividends. But the Vice Chancellor held, that the day of death was exclusive, and that the dividends would go to the accumulation (*l*).

On the other hand, where it is forbidden by any statute to do an act *from* such a day *to* such a day, as to kill game, it seems that either *from* or *to* must be understood inclusively, else the offence might be committed with impunity on both days (*m*).

So where rent was made payable quarterly, commencing *from* the 25th of March, then instant, the Court considered the word "from" to be inclusive,—that the first payment became due on that same 25th of March, and that the rent in question was a "beforehand rent." Otherwise the last payment would accrue after the expiration of the term.

And by Lord Denman,—"The defendant has contracted to pay 285*l.* in each year. One year wanting seven days is one of the years in popular language. Take this as a forehand rent, then there will be an equal quantity payable on each of the four days on which rent is payable in each year, beginning with the 25th of March, 1828. That will reconcile the whole." And by Littledale, J.,—"The payments may be considered to commence on the 25th of March, 1828, by reading the words commencing '*from* the 25th of March,' then instant, as if the words were '*on* the 25th of March,' &c. I do not say but that this may be a forced construction" (*n*).

One day inclusive, and one exclusive.

It is seldom an ingredient in legal time to find both days incidental to a particular act inclusive*. Neither at common law nor in statutes will this element be often detected. It is not uncommon to allow one day to be inclusive, but the leaning both of the Courts and of the Legislature is towards the exclusion of *both* days, for the natural disposition of persons is so prone to delay or excuse, or mistake, that the law wisely and

(*l*) 11 Sim. 434, Gorst *v.* Lowndes.
(*m*) 5 East, 257, n. (*a*). Stark. Cr. Pl. 61, n. (*n*), Campbell *v.* Cumming. See also Prac. Ca. 39. 1 Deac. & Ch. lvii Mem.
(*n*) 8 Ad. & El. 463, Hopkins *v.* Helmore. S. C. 4 M. & P. 453.
* See the N. B. 2 Str. 849, in Whitlock *v.* Humphreys.

considerately provides a sufficient interval for reflection or exertion where an act is ordained to be performed within a given period.

In *scire facias*, by original, indeed, the rule formerly was, that there should be fifteen days *inclusive* between the teste and return (*o*), or, eight days, where there was only one writ (*p*); but by Reg. Gen. Hil. T., 2 Wm. IV. (81), judgment in *sci. fa.* may be signed by leave of the Court or a Judge after eight days *from* the return of the *sci. fa.*, and the word "from" will, probably exclude one of those days according to the usual rule of construction and the decisions upon the subject previous to 1832 (*q*).

In Chancery, it has been held that an attachment returnable within eight days after the Purification, may be executed on the eighth day after the feast. The Lord Chancellor said, that whatever the practice might be in the Courts of Law, the Court of Chancery reckons the eight days, in this case, as eight entire days (*r*). So where eight days were allowed within which cause might be shewn against confirming a report, the day on which the order nisi was served, was held to be included in the reckoning (*s*).

So under 11 Geo. IV. & 1 Wm. IV. c. 36, s. 11, (an act for altering and amending the law regarding commitments by Courts of equity for contempts, and the taking bills *pro confesso*), the Vice Chancellor decided, that the notice of fourteen days mentioned there, should be reckoned inclusively of the first, and exclusively of the second day (*t*).

(*o*) Carth. 468, Goodwin *v.* Beakbean. 2 Salk. 599, pl. 4. 7. Holt's Ca. 759. Tidd, 7th ed. 1160. See also 1 Lutw. 26, Naers *v.* Countess of Harrington. Sir Thos. Jones, 228, Levingston *v.* Stoner. 2 Str. 1139, Elliot *v.* Smith.

(*p*) 2 Salk. 602, Bell *v.* Manucaptors of Russel.

(*q*) See 2 Sir Wm. Bl. 922, Peale *v.* Watson, where four days exclusive were deemed sufficient in *sci. fa.*, where the proceedings were by bill. 4 T. R. 663, Bell *v.* Jackson. There being only one *scire facias*, four days exclusive between the teste and return, were held sufficient.

(*r*) 1 Mer. 243, Mootham *v.* Waskett.

(*s*) 5 Sim. 147. 1 Myl. & K. 455, Manners *v.* Bryan. So is Grubb *v.* Perry; another case in Chancery. 13 L. J., Canc. 39. 7 Beav. 375.

(*t*) 6 Sim. 356, Ansdell *v.* Whitfield.

Holidays are occasionally excepted, but we have already entered upon this point in a former part of the work (*t*).

By Reg. Gen. 2 Wm. IV., in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day.*

Formerly, likewise, in a case of distress and sale under the act 2 Wm. & M., sess. 1, c. 5, s. 2, which allows five days, during which the tenant might make replevin, the time was reckoned exclusively of the day of the distress but inclusively of the day of sale. Therefore, where goods were seized on the 12th of May, a sale on the 17th was held to be regular (*u*). But this doctrine is now repudiated, as we shall have occasion to see presently, although Lord Denman is reported to have yielded with reluctance to the change of doctrine (*v*).

Six days were allowed under an act of Parliament, within which a party might appeal, amongst other matters, against a conviction. A conviction under the act took place on the 2nd of May, and notice was given on the 9th of May. This notice was held too late, for one day was to be reckoned inclusive and the other exclusive (*w*). The same law prevails in notices of appeal, where the word "days" appears, without more, in acts of Parliament. One day is included, and the other laid out of the computation (*x*).

So it was where an act required the filing of a warrant of attorney within twenty-one days after its execution, in order to

(*t*) Page 97, *et seq.*

* There then follows a proviso concerning Sundays and holidays, which has been already adverted to as having been overridden by the statute 2 Wm. 4, c. 39, s. 11, *ante*, p. 98.

(*u*) 1 H. Bl. 13, Wallace *v* King. S. P. 6 C. & P. 166, Harper *v.* Taswell.

(*v*) *Post*, p. 150.

(*w*) 2 Dowl. N. S. 719, R. *v.* Middlesex Justices.

(*x*) 4 B. & Adol. 685. 1 Nev. & M. 426, R. *v.* West Riding Justices. 2 Ad. & El. 463, R. *v.* Goodenough. S. C. 4 Nev. & M. 378, nom. R. *v.* Cumberland Justices.

be valid as against the assignees of a bankrupt. A warrant executed on the 9th, was accordingly held to have been filed in time on the 30th of the month (*y*).

Where a statute allowed seven days for the payment of a penalty before it became lawful to issue a distress warrant, the Court held that one day should be reckoned exclusively and the other inclusively. This was a decision under the Beer Act, 1 Wm. IV. c. 64. The words "full days," or "clear days," are not employed, but merely "seven days." And it was held to be no objection that the warrant of distress bore too early a date, upon proof being given that it had not been issued too soon (*z*).

In Courts of law also, it is not unusual to find one day reckoned inclusively, and the other exclusively. As in the case of the assignment of a bail bond (*a*). So in the case of perfecting bail after exception taken, the first of the four days is reckoned exclusively, and the second inclusively. An exception on Wednesday, the 2nd of May, therefore, would not exhaust the time for perfecting bail till Tuesday, the 8th of May. Wednesday being exclusive, and Sunday no day (*b*). So the sheriff, when ruled to bring in the body, has four days, exclusive of the day when the rule issues, and is served on him (*c*).

By Reg. Gen. 2 Wm. IV. (66), judgment for want of a plea after demand may, in all cases, be signed at the opening of the office in the afternoon of the day after that in which the demand was made, but not before; and (67), after the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return, and, after a verdict or nonsuit, on the day

(*y*) 9 D. P. C. 544. 12 Ad. & El. 635. 4 Per. & D. 443, Williams *v.* Burgess.

(*z*) 8 Ad. & El. 124, Newman *v.* Lord Hardwicke. S. C. 3 Nev. & P. 368. See 10 Mod. 212, R. *v.*. Green. An act of Parliament gave three days for prosecuting the offence. The information was in the 8th day of the month for an offence done on the 5th. The point was not decided.

(*a*) 2 Str. 914, Bullock *v.* Lincoln. See 1 Str. 86, Anon. 2 Str 782, Studly *v.* Sturt.

(*b*) 2 H. Bl. 35, North *v.* Evans.

(*c*) Lofft. 631, Anon.

after the appearance day of the return of the *distringas*, or *habeas corpora*, without any rule for judgment (*c*).

So in cases of hiring and service, a hiring from the day after Old Martinmas Day until the Old Martinmas Day following, has been deemed to include the second feast of Martinmas, and thus, coupled with the service, has been held to confer a settlement (*d*).

So it is where a term's notice of trial is required, no proceeding having been taken for four terms after issue joined. The fourth term, exclusive of the term of notice, is inclusive of that in which issue was joined (*e*).

A week's order to examine is said not to be exclusive of the day sen'night in Irish Courts. But here it would be otherwise (*f*).

Both days exclusive; instances of.

There are several instances, both at common law and by statute, in which both days are reckoned exclusively, as in the case of notice to plead, upon which occasion, both days are exclusive (*g*). So (not to mention all the numerous instances) the notice to the Master of three days, according to the rule of Hil. Term, 6 Wm. IV. of an application to be admitted an attorney, must be exclusive of both the day of notice and of the first day of the term (*h*).

The plaintiff demanded oyer and a copy of a certain deed on Sunday evening. On Monday, the demand not having been complied with, he signed judgment, but the Court said, that the defendant had two days for this purpose, and both were to be reckoned exclusively. Sunday was not a day to be considered in this matter, and, therefore, judgment had

(*c*) See 6 Mod. 241, Reignots *v.* Tipping. 3 Salk. 212. Id. 215, Standfast *v.* Chamberlaine.
(*d*) Cald. Ca. 19, R. *v.* Syderstone. 1 T. R. 490, R. *v.* Skiplam; and *post*, under the word "*Until.*"
(*e*) 6 Mod. 18, Anon.
(*f*) 2 Moll. Ir. Rep. 337, Donovan *v.* Keatinge.
(*g*) Tidd. Pr. Imparlance, 478.
(*h*) 4 Ad. & El. 781, *Ex parte* Prangley.

been signed before the expiration of two days, and the rule for setting aside the interlocutory judgment for irregularity was made absolute (*k*).

By 2 Geo. II. c. 23, s. 23, no attorney or solicitor shall bring any action or suit until the expiration of one month or more after the delivery of his bill. It became necessary to determine how the time should be computed, *i. e.* whether the day of the delivery of the bill should be excluded from the month, and whether the day of bringing the action should also be omitted, so as to leave one month clear for the client to pay the money. The month mentioned would, of course, be a lunar month according to the rule in such cases. And the Court of Queen's Bench held, that the time allowed should be twenty-eight days, exclusively of both the day of delivering the bill and of commencing the action: twenty-eight days and so many hours over, as there may happen to be of the day when the act takes place after it is performed (*l*).

So under the statute 24 Geo. II. c. 44, which requires that a justice shall have a calendar month's notice before an action is brought against him for any thing done by him in his office, it is the rule, that the day upon which the notice is given, and the day of suing out the writ, are to be excluded from the month. Notice of action was given on the 26th of March, to the magistrate. Here he had the whole of the 26th of April, wherein he might tender amends (*m*).

It used formerly to be the rule to reckon one of the five days between a distress and sale of goods as inclusive and the other exclusive. As where goods were distrained on the 12th of May: in this case the sale proceeded on the 17th, thus making the day of distress inclusive, and excluding the day of sale, or

(*k*) 2 T. R. 40, Page *v.* Divine and others.

(*l*) 8 Ad. & El. 577, Blunt, Gent. *v.* Heslop. S. C. 3 Nev. & P. 553. 9 D. P. C. 982.

(*m*) 6 Mees. & W. 49. 8 D. P. C. 212, Young *v.* Higgon. In this case Castle *v.* Burditt, 3 T. R. 623, was mentioned as wanting in authority; and Morley *v.* Vaughan, 4 Burr. 2525, was referred to. As to *scire facias*, see Rule, H. T. 2 Wm. 4, No. 81, 7 Ad. & El. 261. 2 Nev. & P. 84, Saunderson *v.* Brown. S. C. 6 D. P. C. 9. 5 Ad. & El. 76, Armitage *v.* Rigbye.

vice versâ. An action being brought, it was objected, that the distrainee should have had five full* days in which he might make replevin, and that both the days of the distress and sale should have been excluded. But the Court said, that on the *afternoon* of the 17th, five days from the time of the distress had completely expired, upon which the counsel for the plaintiff proceeded to another point. There was ultimately judgment of nonsuit (*n*). It is observable, in the decision just cited, that the Court evidently contemplated the fraction of a day, by speaking of the Thursday afternoon, or afternoon of the 17th of May. In conformity with this doctrine, where a distress was made on Friday, at two P. M., and the sale ensued on the Wednesday following, at eleven A. M., the Court held, that the sale was wrongful, because the distrainee had not waited five whole days, *i. e.* five times twenty-four hours. This was a distress for rent (*o*).

But the rule is now changed and made to agree with the principle of excluding both days. The plaintiff was tenant to T. On the 25th of September a distress was made upon his goods; on the 30th of the month they were sold in the afternoon. The verdict was for the defendant. But upon a motion to have a new trial, Lord Denman observed, that the Court very reluctantly yielded to later authorities,† which appeared to have produced a revolution in the state of the law on this point. And the rule for a new trial was made absolute (*p*).

There must likewise be fifteen clear days between the test and return of a writ of distringas (*q*).

"*At Least.*" "*Clear Days.*"

There are likewise other cases where both days are to be

* The stat. 2 W. & M. c. 5, s. 2, uses the word "five days."
(*n*) 1 H. Bl. 13, Wallace *v.* King.
(*o*) 6 C. & P. 166, Harper *v.* Taswell.
† Wallace *v.* King, Harper *v.* Taswell had been cited.
(*p*) 18 L. J., Q. B. 250, Robinson *v.* Waddington.
(*q*) 12 Mees. & W. 2, Chambers *v.* Smith, under the Uniformity of Process Act, 2 Wm. 4, c. 39, s. 3; and see 4 B. & Ald. 522, Zouch *v.* Empsey, *post*.

reckoned exclusively. The modern rule is to exclude both days when the expressions "at least" or "clear days" are found in statutes. The words "full days" are liable to the same interpretation. Four clear days are four days exclusive of the first and last (*r*). As where bail in error was allowed to be put in within four clear days: here judgment signed on a Monday, and execution issued on Friday, were considered incongruous, for four *clear* days had not elapsed; and the execution was, therefore, set aside (*s*).

Under the Lord's Act, 32 Geo. II. c. 28, notice to the creditor of fourteen days *at least* is directed before the presentation of the petition for discharge. A notice having been served on the creditor, it was contended for the prisoner that the fourteen days might be reckoned inclusive of the day of service, or of that on which the petition was presented. But the Court said, that fourteen days at least must mean fourteen *clear* days, and they refused the rule to bring up the prisoner (*t*).

By 49 Geo. III. c. 68, s. 5, ten *clear* days' notice of an intention to appeal is required. Notice of appeal was served on the 9th of October, in the morning. The sessions were holden on the 19th, and the Court held the notice insufficient. A rule having been obtained for a *mandamus*, it was contended that the word "clear" meant only complete days; but the Court said, that ten clear days meant ten perfect intervening days between the act done and the day of the sessions, so that the notice was defective; and the rule was discharged (*u*). Had the word "clear" been omitted, one day would have been in-

(*r*) 4 T. R. 121, Bennet *v.* Nichols.

(*s*) 13 East, 21. See 9 Price, 88, Reg. Gen. Ex.

(*t*) 4 B. & Ald. 522, Zouch *v.* Empsey. In Morley *v.* Vaughan, 4 Burr. 2525, Yates, J., in construing this act, said, he thought that the Court might, in favour of liberty, make the computation so as to include *one* of the days. But he added, that he would lay hold of a circumstance which offered, namely, that above fourteen days' notice had been given in a former term, although nothing had been done upon it in consequence of an objection which now proved invalid. Nevertheless, as to the computation of time, Zouch *v.* Empsey, must be considered as overruling the opinion of Mr. Justice Yates.

(*u*) 3 B. & Ald. 581, R. *v.* Herefordshire Justices. The Court referred to Roberts *v.* Stacey, 13 East, 21, *ante*, p. 96.

cluded, and the other excluded, and the appeal would have been in time (*v*).

The Poor Law Act, 4 & 5 Wm. IV. c. 76, s. 81, has the words "fourteen days at least" in a clause which requires a statement of the grounds of appeal to be given under such a limitation. Here, again, the Court laid down the rule, that where an act is required to be done before a given event so many days "at least," both the day of the act and of the event must be excluded; and they applied the rule to the case then before them. So that the fourteen days were construed to mean fourteen clear days, and thus exclusive both of the day on which the statement was sent and the first day of the sessions. So that where the grounds of appeal were served on the 19th of December, 1836, and the sessions were on the 2nd of January, 1837, the appeal was dismissed, and the rule to enter continuances discharged, although in that particular case Lord Denman regretted the decision, but stated his opinion that it was better not to shake former decisions (*w*).

Again, the stat. 4 & 5 Wm. IV. c. 51, s. 19, prescribes, that in informations before commissioners of excise or justices a summons shall previously have been served ten days at the least before the time appointed in such summons. A summons under the act issued on the twentieth day of a particular month to appear on the thirtieth. In order to make ten clear days either the twentieth or thirtieth must be included. If both should be shut out, there would be only nine clear days. The defendant did not appear, and, in default, was convicted. It was held, that the justices had no jurisdiction, because both the twentieth day (that of serving the summons), as well as the thirtieth (that of convicting the defendant), should have been omitted in the calculation (*x*). So, under a local act, an appeal

(*v*) 4 B. & Adol. 685. 1 Nev. & M. 426, R. *v.* West Riding Justices. 4 Nev. & M. 378, R. *v.* Cumberland Justices, *ante*, p. 146.
(*w*) 8 Ad. & El. 173. 2 Nev. & P. 286, R. *v.* Shropshire Justices.
(*x*) 12 Ad. & El. 472. 4 Per. & D. 150. 9 D. P. C. 527, Mitchell *v.* Foster.

was allowed, provided that a notice of seven days at least should previously be given. Notice was served at half-past nine A. M. on the 31st of December. The sessions began at ten A. M. on the 7th of January. The hearing of the appeals was then, as usual, adjourned till the 31st of January. The Court held this notice of appeal too late, inasmuch as the words, "at least," had the effect of excluding not only the day of giving the notice, but the first day of the sessions likewise. And the fraction of a day could not be entertained in order to make the service of the notice good (*y*). A notice, likewise, on Sunday, appointing a vestry meeting for the Wednesday following was held insufficient to satisfy the stat. 58 Geo. III. c. 69, s. 1, which requires a notice of three days *at the least* (*z*). So again a notice was to be given at least sixteen days before such meeting, and no act, &c. of commissioners should be valid unless made or done at a meeting held in pursuance of the act.—Notice was given on the 27th of January for a meeting to be held on the 12th of February. Here were only fifteen days. It was said that the newspaper, although dated on the 27th, was, in reality, in circulation on the 26th; but the Court would not entertain this suggestion, for the day of the newspaper's date was the day of its general circulation (*a*).

Sometimes a power is given to the Court to decide whether a reasonable time has been allowed, notwithstanding the allowance of ten days *at the least* (*b*).

"*Forthwith.*" "*Immediately.*"

If an act of Parliament requires that a recognizance shall, after notice of appeal, to be entered into "forthwith;" a period

(*y*) 2 New Sess. Ca. 75, Rex *v.* Middlesex Justices. 3 Dowl. & L. 109. 14 L. J., M. C. 139, S. C.

(*z*) 2 B. & C. Rep. 90, R. *v.* Best, or Surrey Justices. S. C. 2 New Sess. Ca. 65. 5 Dowl. & L. 40.

(*a*) 19 L. J., Q. B. 250. 257, R. *v.* Aberdare Canal Company, and R. *v.* Shropshire Justices was cited by the Court.

(*b*) As under 6 Vict. c. 18, s. 64, Registration of Voters. 6 C. B. 51, Palmer, App., Allen, Resp. 18 L. J., C. P. 257, where the Court decided that reasonable time had not been given within the proviso.

of nine days, without cause assigned for the delay, is too long. "Forthwith" means a reasonable time (*c*). *A fortiori*, twenty-eight days are beyond the term "forthwith" (*d*). In a case of bastardy, seventeen days have been considered to preclude the right of appeal (*e*). But if the respondent's attorney admits due service of the notice, it becomes then too late to enter an objection. So that where the Quarter Sessions overruled an objection that the notice* was too late, the Court refused a rule for a *certiorari* to bring up the order of sessions to be quashed, because of the admission which had been made (*f*).

Whether a notice has been given in a reasonable time so as to satisfy the word "forthwith," in a statute, is a question for the jury. The Judge should not express his opinion on this point, but should leave it entirely with the jury (*g*). On the other hand, where it is evident that under the word "forthwith," no reasonable time at all has been allowed, the Judge should then interfere and direct a nonsuit (*h*). As where an overseer was required to shew a rate-book. The Court held, that a reasonable time and place were necessary for the purpose (*i*).

Immediate notice, means "prompt and expeditious notice" (*k*).

So the giving of a certificate immediately after the verdict, means "within a reasonable time afterwards" (*l*). So it is in the case of a certificate to be given immediately after the trial. This means "before any extraneous matter, presented subse-

(*c*) 7 D. P. C. 789, R. *v.* Worcestershire Justices. 12 Ad. & El. 672, R. *v.* Robinson. 4 Per. & D. 391, S. C. See 16 L. J., M. C. 57, R. *v.* Gloucestershire Justices.

(*d*) 11 Jur. 170, R. *v.* Cheshire Justices.

(*e*) 3 Dowl. & L. 737, *Ex parte* Lowe.

* The order for maintenance under 8 & 9 Vict. c. 10, s. 3, was made on the 13th June. The notice was delivered on the 22nd.

(*f*) 16 L. J., M. C. 57, R. *v.* Gloucestershire Justices.

(*g*) 9 Q. B. 684, Tennant *v.* Bell. S. C. 16 L. J., M. C. 31. 2 Car. & K. 641, Nelson *v.* Patrick, per Wilde, C. J.

(*h*) 3 B. & C. 662, Abbott, C. J.

(*i*) Id. 658, Spenceley *v.* Robinson.

(*k*) 5 Dowl. & R. 588, R. *v.* Hunts. Justices.

(*l*) 10 Mees. & W. 688, Christie *v.* Richardson.

quently to the award of the Judge could operate to influence his mind (*m*).

But "immediately after the verdict," has been held not to be satisfied by a certificate given some weeks afterwards. A certificate for a special jury was promised under 6 Geo. IV. c. 51, s. 34, by the Judge before the verdict was delivered. The verdict was given whilst the Judge was trying another cause, and his signature to the indorsement was not then applied for, and some weeks elapsed before it was obtained. The Court set aside the certificate, for this could not be called a certifying immediately after the verdict (*n*).

Again, upon a conviction at petty sessions under 6 Geo. IV. c. 129, which gives a power of appeal if recognizances are *immediately* entered into, the Court held, that the sureties need not appear at the time of the conviction. A conviction took place on the 2nd of May, and on Monday the 6th, the defendant applied to be allowed to make his appeal. But the justices thought it too late, upon which a rule was moved for, and the Court made it absolute. It appeared, however, that on the Saturday, the defendant had been prepared with sureties, but that there was no meeting of justices on that day, and, prior to that, the defendant, being in prison, could not take any step. The Court, therefore, made this rule absolute upon a consideration of all the circumstances of the case (*o*). "It was suggested, however," said Mr. Justice Wightman, "that a difficulty would arise from this construction, as the act says, that the execution of the judgment shall be 'suspended;' and that, in case of the judgment being affirmed on appeal, the party shall be committed to the common gaol or house of correction, according to such conviction, for the space of time 'therein' mentioned. It was said, that that must intend that the bail should be tendered before the sentence is executed; but, I think, that upon the same reasonable construction before adopted, the words,—'shall be committed for

(*m*) 8 Mees. & W. 211, Thompson *v.* Gibson. S. P. 9 D. P. C. 815, Ross *v.* Pearce.
(*n*) 4 Q. B. 606, Grace *v.* Clinch. S. C. 3 Gale & D. 591.
(*o*) 19 L. J., M. C. 236, R. *v.* Aston. S. C. 1 Pr. R. 491.

the space of time therein mentioned'—may mean such portion of it as is unexecuted, and not the entirety" (*p*).

"*Next ensuing.*"

Where the words, "next ensuing," are used, it sometimes became a question whether the day or the month should be referred to as the measure of reckoning. The better opinion is, that the month, and not the day, should have the preference. This, however, was not always the law. Debt was brought upon an obligation, and the condition was to pay 140*l.*, on the 15th of May, *next ensuing*. The date of the bond was the 1st of May. It was discussed, whether this meant the month of May next following that 1st of May, and, consequently, a year afterwards, or the month in which the bond was made. The Court, probably swayed by the idea that the day of the date was immaterial, held, that reference should be made to the 15th day of the same month, *i. e.*, fourteen days after the date. A writ of error was brought notwithstanding, but the matter was arranged (*q*).

But in 5 Geo. II., a bond was produced dated the 12th of May, and the condition was to pay so much money on the 13th of May "next following." And here the Court held, that the month and not the day should be regarded, and, therefore, they considered the month to be May in the ensuing year (*r*).

An exception to this rule, as to the month, would be, as of necessity, where leap year intervenes. As where a bond was made in a leap year to pay so much money on the "29th of February next ensuing." In order to give effect to this expression of time, the Court held, that it meant the 29th of February in the next leap year, and they said that the 29th should be referred not to the month, but to the day (*s*).

(*p*) 19 L. J., M. C. 240, per Wightman, J.
(*q*) Cro. Jac. 646, Prescot *v.* ——.
(*r*) 3 Bac. Abr. 711.
(*s*) 3 Gale & D. 71, Chapman *v.* Beecham.

The words, "last past," are said to have reference to the month, and not to the day. So that where one was charged, under the statute 23 Eliz., at a sessions held on the 13th of January, with absenting himself from church, *i. e.*, from the 1st of January *last past*, and for six months afterwards, the Court refused to quash the indictment, and according to the report in *Shower* (*t*), were against the objection (*u*). But *Raymond* says, the fault was enough to have quashed the indictment if the defendant had conformed, and so they left him to his remedy in the Exchequer (*v*). "Last past."

The force of the word, "until," has already been shewn, in some measure, in the cases concerning feast days, especially those where the days of *habendum* and *reddendum* in leases have come before the consideration of the Courts. But it seems proper to enter more generally into the examination of this word here, with reference to the decisions which have taken place concerning its meaning. Although it may be mentioned at the outset, that the ruling authority of *Pugh* v. *The Duke of Leeds* has been referred to in interpreting the word "until," so as to manifest the resolution of the Court to hold, as far as may be, to the liberal opinion of Lord Mansfield expressed in that case. So that where such a word occurs in a contract, and it appears to have been used in an inclusive sense, the Court will come to a conclusion in furtherance of the intention (*w*). "Until" or "to."

Thus an award was to be made on or before the first day of Michaelmas Term. It was enlarged *until* the first day of Hilary Term. An award made on the first day of Hilary Term was held good (*x*). An arbitrator enlarged an award *until* a certain day. The party who had been ordered to pay a sum of money

(*t*) 2 Show. 160, R. *v.* Forbin.
(*u*) Thos. Raym. 433, R. *v.* Phorbes. S. C.
(*v*) Id. 434.
(*w*) 5 East, 257, by Lord Ellenborough, citing Burr. S. C. 719, R. *v.* Navestock. Cald. Ca. 19, R. *v.* Syderstone; and 1 T. R. 490, R. *v.* Skiplam.
(*x*) 3 Bro. C. C. 358, Knox *v.* Simmonds.

mentioned in the award, refused to do so, because he contended that the word "until" was exclusive, and consequently, as the award was not made till the day to which it had been extended, its powers failed to come into action. But Williams, J. held, that the day to which the award had been enlarged, must be deemed inclusive upon the principle *ut magis res valeat quàm pereat*, and Patteson, J., subsequently referred to *Pugh* v. *Duke of Leeds*, as an authority (*z*). And it seems that a similar opinion had been entertained upon a former occasion, although the point was not there expressly decided (*a*).

The same doctrine had been solemnly adjudged many years before upon an information against the defendant for receiving bribes from certain natives of India. The information stated, that the defendant Stevens, being a British subject, on the 1st of January, 1794, and for a long time thence next ensuing, to wit, *until* the 29th of November, 1795, held and exercised the office of supervisor, &c., and during *all that time* resided in the East Indies, and, moreover, that he did, on the 29th of November, 1795, receive 100,000 rupees as a gift and present, &c. The same word "until" was applied to the residence of the other defendant. The defendants were found guilty, but it was moved to arrest the judgment, on the ground that if time be alleged to any material fact which is inconsistent with other facts and times alleged in the information, so as to make the information repugnant to itself, it is void. Here the word "until" would exclude the 29th of November, and a receipt of the present was alleged to have been on that day, and, consequently, after the residence had ceased, the information would necessarily fail. It was urged that "until" had the same meaning as to time which "unto" had to place, and *R.* v. *Gamlingay* (*b*), was cited. But it was answered, that an adjournment until such a day, would of course include that day. And *Pugh* v. *Duke of Leeds* (*c*), and *R.* v. *Syderstone* (*d*), were relied upon. Finally,

(*z*) 1 Dowl. N. S. 538, Kerr *v.* Jeston.
(*a*) 3 D. P. C. 538, Dakins *v.* Wagner.
(*b*) 3 T. R. 513.
(*c*) Cowp. 714.
(*d*) Cald. Ca. 19.

it was contended, that the 29th of November, might be rejected as surplusage. The Court, after much consideration, were of opinion, that the word "until" by no means implied exclusion *ex vi termini;*—that where a matter is clearly capable of different meanings, that meaning shall be taken which will support, and not the other which would defeat it; and that the word "until" was capable here of receiving an inclusive meaning. They accordingly rejected the notion of repugnancy, and the rule for arresting the judgment was discharged (*e*). And Lord Ellenborough observed, that the word "to" might be used, according to circumstances, either in an inclusive or exclusive sense (*f*).

So, in murder, the indictment charges the stroke on one day, and then adds, that the deceased languished and languishing did live from that day *until* another day, on which day he died (*g*). Even where Lord Hardwicke seemed on one occasion to lean towards the exclusiveness of this word, it did not become necessary for him to decide the point absolutely. There was a writ of error upon an amercement in a manorial Court for selling drink by an unlawful measure. The declaration stated, that the defendant from —— continually, till 27th of October, was an inhabitant, &c., that a Court leet for the manor was held within one month after Michaelmas, viz., on the said 27th day of October, and that the defendant was then and there amerced. It was contended, for the defendant, that the pleading was worse than if there had been no averment of inhabitancy at all. But Lord Hardwicke, who delivered the judgment of the Court, said, that it was carrying the point too far to say, that the words "till the 27th of October," carried absolutely a negation. The most that can be said is, that it is too narrow, and short of the day. Therefore, as the day was laid under a *scilicet*, it was not material, and thus the inhabitancy might be referred to some day *before* the 27th. So the judgment was affirmed (*h*). Never-

(*e*) 5 East, 244, R. *v.* Stevens and another. S. C. 1 Smith, 437.
(*f*) 5 East, 256. See 2 Mod. 280, Nichols *v.* Ramsel.
(*g*) See 4 Rep. 41, Heydon's case. 5 East, 246, citing several cases to the same effect.
(*h*) Ca. temp. Hard. 117, Wicker and Norris.

theless, this opinion of Lord Hardwicke as to the narrowness and shortness of the statement concerning the day, would hardly now be recognised, inasmuch as the Court will reserve to themselves the right of an equitable determination as to the exclusiveness or inclusion of the day, to which "until" is allied.

Nevertheless, the word "until" *in a lease*, as "until Michaelmas," excludes that feast day (*i*).

Another case, decided in 1846, places the construction of the word "until" in a very clear light. The declaration stated, that on the 15th of October, 1845, in consideration that A. would serve B., that is to say, *from the day and year aforesaid, until* the service should be determined, by due notice, &c. B. promised to retain and employ A. It was then averred, that A. afterwards, to wit, *on the day and year aforesaid*, did enter B.'s service, and that he was always ready and willing to continue therein, &c.: but that B. did not so continue him, but on the contrary, afterwards, to wit, *on the day and year aforesaid*, refused to suffer A. to contiuue in the service, and wrongfully discharged him without notice. The Court held, that the contract sufficiently included the day on which it was made, and that it sufficiently appeared that A.'s discharge took place *after* the commencement of the service (*k*).

Hence it is evident that "*until*" was deemed inclusive, because the whole transaction was one of unity,—confined to one day, which of necessity contained the word of time under discussion.

"In or about."

The words "in or about" are sometimes too loose to meet the object for which they have been used; as in an examination touching the settlement of a bastard child. It was stated, that the child had been born "in or about" 1833. But as the

(*i*) 3 Leon. 211.
(*k*) 9 Q. B. 157, Wilkinson *v.* Gaston. 15 L. J., Q. B. 340, S. C.

Poor Law Act had its commencement upon the 16th of August, 1834, it might be material that the birth should have taken place before that date. The supposition that the child might have been born later was not excluded by the words "in and about," and, therefore, the Court held, that these words did not give the meaning intended with sufficient precision (*l*).

(*l*) 7 Q. B. 232, R. *v.* St. Paul's Covent Garden. No settlement had been gained since the birth.

SECTION V.

FRACTION OF A DAY.

THE law does not acknowledge, as a general principle, that there is any fraction of a day. Thus the fourth part of the days of the year, which are ninety-one days, make a quarter, and to the six hours over (*i. e.*, the six hours of the quarter) the law pays no regard (*a*).

It is not necessary to bring forward many authorities to ratify this rule. It was said, a long time since, that "the law will never count by minutes or hours to make priorities in a single day, unless it be to prevent a great mischief or inconvenience; as if a bond be made on the first day of January, and this bond is released the same day, the bond may be averred to be made before the release" (*b*). Thus, if a *feme sole* binds herself in a bond, and marries on the same day, it may be averred that she married after the bond was delivered (*c*). The law admits not of portions in time but in case of necessity (*d*), as if a third person would be prejudiced (*e*). For if no exceptions to the rule concerning fractional parts of time were to be suffered, the mischief and inconvenience alluded to in the case in Lord *Raymond* would accrue. We will draw the attention of the reader to some cases where it has become expedient to recognise a deviation from the principle.

(*a*) Dy. 345, *a*. Co. Litt. 135. 2 Dougl. 463.
(*b*) 1 Lord Raym. 281. Yelv. 87. Sty. 119.
(*c*) 2 Lord Raym. 281.
(*d*) Sty. 119, per Rolle, C. J.
(*e*) Orl. Bridg. 8, Hemmings *v.* Brabazon.

The mayor of Lynn committed a person to gaol, who brought an action for false imprisonment. The defendant pleaded that he was chosen mayor, and as *custos gaolæ* he imprisoned, &c. It appeared that he was chosen on the 29th of September, and that the imprisonment, as alleged on the record, would have happened between the 28th of September and the 14th of October. Hence it was argued for the plaintiff, upon demurrer, that the imprisonment might have occurred on the 29th of September, at a time of that day *before* the election of the defendant to be mayor, and if so, the trespass was left uncovered. But the Court overruled the demurrer, and gave judgment for the defendant. And Coke, who was the defendant's counsel, answered to the plaintiff's objection, that it shall be intended a justification for the whole day, for there shall be no division of a day. And then he added, "If he imprisoned him *before* he was mayor, the plaintiff must shew it, for, *primâ facie*, it shall be intended to go to the whole day" (*f*). So in debt for rent, the plaintiff declared that C. made a lease for years to the defendant, with a *reddendum* half-yearly. C. granted the reversion to the plaintiff, and on that day, the day on which the rent was due, the defendant attorned. The rent for which the action was brought was included in the day of the attornment. It was objected, that this rent was payable to C. before the attornment, for that should be taken to be after sunset. But the Court disallowed the objection; and the Judges said, that if a writ abate one day, and another writ is purchased which bears teste the same day, it shall be intended after the abatement of the first (*g*). So if a man seal an obligation on the 10th of June to A., and A. made a release on the same day to the obligor, an inquiry shall be made as to the priority (*h*). So, *ex indulgentiâ legis*, the law, in some cases, will in construction consider two distinct times in one instant (*i*). Two writs of *fieri facias* were delivered to the sheriff on the same day, and a bill of sale was forthwith made out upon one of them, and the authorities of *Co. Litt.* and 6 *Rep.* 33, were brought for-

(*f*) Cro. El. 167, Smith *v.* Hillier and another; and see 15 Ed. 4, 23.
(*g*) Al. 33, 34, Com. Northumb. *v.* Green. 23 Car. 1.
(*h*) Ibid., per Levinz, arg.
(*i*) 6 Rep. 33.

ward in argument, and the question of a fraction of a day was raised. But as both writs were delivered on the same day, the Court were obliged to ascertain the priority; and they held that, as there must have been a *prius* and a *posterius*, the writ last delivered should have the preference (*k*). However, where two *judgments* have been signed on the same day, the Court will not allow the priority of one to be averred, for this is a judicial proceeding (*l*). Again, an action of *assumpsit* was brought upon a promise, made on the 11th of September, to detain certain goods if no claim should be made to them after the 11th until the 14th of September. The plaintiff alleged no claim made. After verdict it was moved to arrest the judgment, because there might have been a claim made on the same day, *viz.* on the 11th of September and since the promise on that day. Hence the declaration should have stated no claim since the promise, and not after the 11th of September, &c. But the Court said, that such a proof should have come from the defendant, thus acknowledging the division of the day, had the defendant sought to shew, which he failed to do, that a claim had been made on the 11th of September subsequently to the *assumpsit*. And a parallel instance was put. Suppose a trespass to be done in the morning, and a release made at noon of the same day of all trespasses, and then another trespass is committed after the release and on the same day: here, upon a declaration in trespass, the defendant may plead the release generally, and it would be on the plaintiff to shew the particular case on his side, and to divide the time of the day so as to make out the latter trespass to have happened after the release (*m*). Any agreement or direction to suspend the first writ may alter

(*k*) 5 Mod. 376, Smallcomb *v.* Buckingham. S. C. 12 Mod. 146, cited arg. 6 Mod. 292, as Smallcombe *v.* Crosse. S. C. Comb. 428, nom. Smallcorn *v.* Vic. Lond. Carth. 419. 1 Salk. 320. 3 Salk. 159. Holt's Ca. 402. 1 Lord Raym. 251. Com. Rep. 35, S. C.; and see 1 Term Rep. 729, Hutchinson *v.* Johnson. 4 East, 544, S. C. cited. 1 T. R. 731, n., Rybot *v.* Peckham. 2 Marsh. 375, Rowe *v.* Atherton, to the same effect. There are other cases as to the priority of writs, but we have for the most part, to do here with writs issued on the same day.

(*l*) 1 T. R. 117, Lord Porchester's case, cited there.

(*m*) Mo. 596, pl. 812, Plaine *v.* Bynd. 1 Leon. 220, S. C. But S. P. not mentioned. S. C. Cro. El. 218, where the point is not mentioned. Cro. El. 301, S. C. (in error), nom. Bind *v.* Plain; and see an instance of an award cited there by Popham, C. J.

the preference due to the first execution, as where a writ of execution was sent in with directions that it should not be carried into effect unless a second writ were delivered. A second writ was delivered, and the sheriff executed both on the same day, giving precedence to the last. There being a deficiency of goods to answer both executions, the sheriff returned part payment to the first writ, and *nulla bona* as to the residue; and the Court held, that no action lay against him for a false return (*n*). A person, looking forward to an execution, assigned his property to trustees, with power to retain certain monies in order to liquidate the costs of a previous action. The deed of assignment was executed at nine A. M. on the 25th of February. A writ of *fi. fa.* having been delivered on the 24th of February to a sheriff's officer, was by him handed over to the undersheriff at ten A. M. on the 25th. It was held, that the deed had priority over the *fi. fa.* that the goods could not be taken under it, and that the proviso to retain made no difference (*o*).

So in actions, the declaration related to the first day of the term, when entitled generally, as it might formerly have been (*p*). But notwithstanding, a cause of action would be presumed by the Court to have occurred before the delivery of the declaration, inasmuch as the Court would take notice of their ancient practice of hearing pleadings *ore tenus*, and the delivery of the declaration could not have been before their sitting. Therefore, there was a necessary fraction of the day (*q*). So again, a plaint was entered upon the same day when certain words, the subject of the plaint, were spoken. And error was assigned, inasmuch as the action ought not to have been brought

(*n*) 11 Price, 445, Pringle *v.* Isaac.
(*o*) 6 C. & P. 140, Bowen *v.* Bramidge.
(*p*) See now Reg. Gen. 4 Wm. 4.
(*q*) 2 Lev. 13, Fatlow *v.* Batement. Id. 176, Dobson *v.* Bell. 1 T. R. 116, Pugh *v.* Robinson. 2 Bing. 469. 10 Moore, 194. McCl. & Y. 202, Ruston *v.* Owston (in error). But the defendant might have shewn that the cause of action arose after the first day of term, which would have been cause of nonsuit, unless the writ itself were produced with a subsequent date in order to cure the objection. 5 Esp. 163, Rhodes *v.* Gibbs. See Cowp. 454, Foster *v.* Bonner. 2 East, 333, Lee *v.* Clarke, (in error), surplusage. 4 East, 75, Swancott *v.* Westgarth. 2 Dowl. & Ry. 868, Law *v.* Pugh. But now the declaration must be specially entitled of the day of the month and year when the same is pleaded.

until after the words had been spoken. For the law, admitting of no fractions of time, there must have been one hour supposed when the words were spoken, and, another hour when the plaint was entered. But Holt, C. J., held, the plaintiffs should, notwithstanding, have judgment (*r*). And Buller, J., cited this case with approbation in *Pugh* v. *Robinson* (*s*). The same law was adhered to in *scire facias* (*t*). So, at whatever hour of the day a writ of error is allowed, it operates as a *supersedeas* (*u*), whether the plaintiff have notice of it or not, although in some cases the Court will withhold costs upon setting aside an execution (*v*).

In an action upon the case, it appeared that the plaintiff had delivered certain clothes to the defendant for so much money, and thus the defendant became indebted, and, *afterwards*, in consideration thereof, did promise to pay in a year afterwards. It was objected, that here was a promise founded upon a past consideration, so that a promise could not be raised, and, therefore, as debt would lie the judgment in assumpsit ought to be arrested. But Coke, C. J., answered, that in such a case as this, the law would imply a tacit consideration. And by Houghton, J., here was a continuing debt, and hence arose a good consideration (*w*). And Rolle, C. J., upon another occasion cited the case of *Hodge* v. *Vavisor*, to shew that a little distance of time, (though the same day), alters the intendment of law (*x*).

The law is the same with respect to the priority of informations. An information for usury was exhibited against the defendant, and he pleaded that another such information had been exhibited against him in the same (Michaelmas) Term for the same usury, and that judgment had passed against him.

(*r*) Sty. 72, Symons *v.* Low.
(*s*) 1 T. R. 118.
(*t*) 3 Wils. 154. Sir Wm. Bl. 735, Ward *v.* Gansell.
(*u*) See amongst other cases, 1 Chit. Rep. 241, —— *v.* Butler. 3 Moore, 83, Cleghorn *v.* Des Anges and another. S. C. Gow. 66.
(*v*) And see likewise on the subject of priority, 3 Bulst. 222. 1 Ro. Rep. 413, Hodge *v.* Vavisor, *infra*. 1 And. 301, Mathew *v.* Johnson and another.
(*w*) 1 Ro. Rep. 413. 3 Bulst. 222, Hodge *v.* Vavisor.
(*x*) Al. 70, in Read *v.* Palmer. See Sty. 106. 117, S. C.

But the informer demurred, because, without more, both informations would refer to the first instant of the Term. The defendant should have pleaded that an information had been exhibited against him *on such a day*, naming it, and that another had, previously in the same Term, been so laid, and that judgment had been obtained upon the last information (*y*). Upon a subsequent occasion a distinction was attempted to be made between pleas in bar and pleas in abatement. Therefore, in an action of debt for corrupting voters, the defendant pleaded in abatement, that a bill had already been exhibited against him in the same Term for the same cause of action, and for the same identical offence. The various proceedings were then set out in the replication, rejoinder, and surrejoinder; but the Court passed over these, upon demurrer to the surrejoinder, and held the plea bad for want of specifying particularly the day on which the latter action was brought, and they referred to the cases in *Levinz* and *Strange* as authorities. For, although the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And the same with respect to the hour. The defendant was ordered to answer over (*z*).

At one time, indeed, it seems to have been held, that where two informations were exhibited for the same offence at the same time, the defendant need not answer either, and the case was likened to that of two replevins for one taking (*a*). But the better course is to distinguish the days upon the record according to the decisions just mentioned.

Thus, again, in the matter of judgments, as soon as the law said that judgments should bind only from the signing, it followed, that in the case of purchasers, the time of signing might be shewn (*b*).

(*y*) 2 Lev. 141, Hutchinson *v.* Thomas. 2 Lutw. 1591, per Levinz, arg. S. P. 2 Str. 1169, Jackson *q. t. v.* Gisling. S. C. cited 3 Burr. 1428. See 8 Mod. 188.
(*z*) 3 Burr. 1423, Combe *v.* Pitt.
(*a*) Mo. 864, Pye *v.* Cook. S. P. Hob. 128.
(*b*) 2 Burr. 967.

So, if there be two judgment creditors, without an *elegit*, the prior judgment shall be first satisfied (*c*).

So it is in bankruptcy. If an act of bankruptcy be committed at one period of the day on which the commission has issued, and the completion of such act can be shewn on that day, the commission is valid, however imprudent it might be not to wait to the next day (*d*). So as to the priority of a judicial act of attachment in Jersey, on an act of bankruptcy, the Court said, that whether *on the same or any other day*, the assignees might hold against the creditors if they proved their priority, or, on the other hand, the creditors might keep their attachment if the judicial act had been completed before the act of bankruptcy (*e*). A commission of bankruptcy was issued at eleven A. M., and the party was declared a bankrupt at three P. M., and an assignment was executed at six P. M. The bankrupt died at one P. M., but the commissioners did not have notice until the time of the assignment. These proceedings were held valid (*f*).

The particular hour of the day may be noticed for all purposes connected with a right of property (*g*). And thus, in trover by assignees, the hour at which wine was delivered to the bankrupt was inquired into (*h*), and Abbott, C. J. said, that the whole of the day of the arrest might be taken into account in calculating the two months' imprisonment necessary to constitute the act of bankruptcy (*i*).

The sheriff seized certain goods at five P. M. On the same evening, at seven P. M., the bankrupt denied himself to a creditor. Lord Ellenborough said, that, under these circumstances, where the execution and act of bankruptcy were on the same day, it

(*c*) Dick. Ch. Rep. 152, Rowe *v.* Bant.
(*d*) 14 Ves. 87, Wydown's case. 1 Ves. & B. 54, per Lord Eldon, in *Ex parte* Dufrene. Id. 53, *Ex parte* Dufrene. See Mont. & M. 7, *Ex parte* Farquhar, *ante*, p. 120. Mont. & Ch. 671, *Ex parte* Whitby, *ante*, p. 12.
(*e*) 8 Ves. 82, *Ex parte* D'Obree.
(*f*) Cas. temp. Talb. 184, Warrington *v.* Morton.
(*g*) 3 Stark. 73, per Abbott, C. J.
(*h*) Id. 72, Saunderson and others, Assignees *v.* Gregg.
(*i*) Id. 73.

was open to inquire which had the priority, so that here, if no act of bankruptcy were proved before five P. M., the action of trover by the assignees could not be maintained (*k*). Another case occurred subsequently, when the authorities above mentioned were adverted to. The sheriff seized between one and two P. M., and the bankrupt surrendered in discharge of his bail between six and eight in the evening of the same day, and lay in prison for two months. Abbott, C. J. held, at the trial, that, the day, as it respects the interest of third persons, ought to be divided. And the Court were of opinion that this was the correct doctrine, and refused a rule for a nonsuit (*l*).

So in the case of a permit. The document ran thus: "this permit to be in force for one hour from the time of being taken out of Mr. Hicks's stock, and two days more for being delivered into the stock of Mr. John Cooke, granted 18th of July, morning, nine." A seizure being made on the 20th of July, between three and four in the afternoon, the party receiving the permit contended that the permit continued in force during the whole day. He brought trover, accordingly, for the wine seized, and recovered, but the defendant's counsel insisted, that here was an obvious fraction of a day, and that it would be nugatory to express in the permit the exact time of the day in which it was granted, if the time mentioned were not to be computed from thence. And the Court held it to be quite clear that the time was out when the seizure was made, and a verdict was entered for the defendant (*m*).

So the Court will pay attention to the particular hour at which a defendant has died, in order to take notice whether execution issued prior to his decease (*n*).

So it is in the case of rent due. Rent is said not to be due until the last minute of the day on which it is payable. Consequently, if a death happens on the rent day before midnight, the executor is not entitled to the rent. It is true, that in order to

(*k*) 4 Campb. 195, Sadler and others, Assignees, *v.* Leigh.
(*l*) 2 B. & Adol. 586, Thomas and another, Assignees, *v.* Desanges.
(*m*) 5 T. R. 255, Cooke *v.* Sholl.
(*n*) 8 D. P. C. 337, Clinch *v.* Smith.

take advantage of a condition of re-entry, the rent should be demanded before sunset,* yet notwithstanding a demand before sunset, if the lessor dies before midnight, the heir, and not the executor, shall have the rent, inasmuch as the rent is not due until the last minute of the natural day (*o*).

So again, where the tenant for life, under a leasing power, died at nine P. M., on the 29th of September, it was held, that the remainderman should have this rent (*p*). Whereas, where the death occurred *before* sunset, as where the lessor died between three and four in the afternoon at Michaelmas, the jointress of the lessor was considered to be entitled to the rent. And it was admitted, that if the tenant had paid before sunset the payment would have been good, but that the executors, nevertheless, must have accounted to the jointress (*q*).

An annuity was payable half-yearly at Midsummer and Christmas. It was secured upon land. The annuitant died between Lady Day and Midsummer, and the representative obtained an order for payment of a quarter up to Lady Day (*r*).

So where a half-yearly payment of maintenance was due at Lady Day and Michaelmas, until the portion became payable, *i. e.*, at eighteen, or marriage, and the lady became eighteen on the 16th of August, the Court directed an apportionment from Lady Day *pro ratâ* (*s*).

* Or perhaps such period before sunset as leaves an interval sufficient for the payment. (1 Sw. 343, in the note). Although a demand of rent pleaded without shewing how long the plaintiff remained before or after sunset, was held good as to a claim of 5*l.* rent. For being a small sum it required not much time for the telling thereof. (Cro. Jac. 499, Thomson *v.* Field).

(*o*) 1 Saund. 287, in Duppa *v.* Mayo, by Hale, C. B. Dal. 114, in Butler *v.* Wilford See Mo. 122. Plowd. 172. Cro. Jac. 423, Furser and another *v.* Prowd. Gouldsb. 98, pl. 17. Thos. Raym. 419, Crouche *v.* Fastolfe. 4 T. R. 173. 3 Cru. Dig. 296.

(*p*) 2 Madd. 268, Norris *v.* Harrison; and Clun's case was cited, 10 Rep. 127, *b.* Cro. Jac. 309, nom. Clun *v.* Fisher.

(*q*) 1 P. Wms. 178, Lord Rockingham *v.* Penrice and another. S. C. 2 Salk. 578, nom. Lord Rockingham and others *v.* Oxenden and others.

(*r*) 11 Ves. 361, Webb *v.* Lord Shaftesbury.

(*s*) 2 P. Wms. 501, Hay *v.* Palmer.

There is no apportionment of dividends in the public funds (*r*), and the statute 4 & 5 Wm. 4, c. 22, has made no difference in this respect (*s*).

In the case of the Crown, it has been said, that payment if made to the King's tenant on Christmas Day, and the tenant dies the same day, the rent must be paid again, this payment not being classed amongst the voluntary payments (*t*). For although the payment might be a good satisfaction against the heir, or *vice versâ*, against the executor, as the case might be, it would not be good as against the Crown, who would be entitled to the rent (*u*). And it is said, that if a bishop collates on the same day on which he dies, his successor shall present (*v*).

But where a tenant for life leased for years, before the statute 11 Geo. II. c. 19, the rent being payable half-yearly, and then died in the middle of the half-year, the Court refused to apportion, this matter being *casus omissus* out of the several remedial statutes for rents (*w*). So it was where the tenant for life of lands to be purchased with South Sea Annuities, died in the middle of a quarter. The Court would not apportion, and said moreover, that if the land had been purchased there would have been no apportionment (*x*).

A modification of this rule was where, owing to circumstances, the rent would be lost unless the executor were to have it. As where a lease was made by a bare tenant for life, which determined at his death; here, if the person entitled to the rent lived to the beginning of the day on which it is payable, it would vest in his representative (*y*). As where one granted a rent-charge for life, payable at Lady Day and Michaelmas, and the grantee died on Michaelmas Day after sunset, and before midnight. Here the administrator was declared to be entitled to the rent (*z*). So where leases for years were made, and a *lease*

(*r*) 2 Ves. Jun. 672, Wilson *v.* Harman. S. P. 3 Atk. 260, Pearly *v.* Smith. S. P. Id. 502, Sherrard *v.* Sherrard.
(*s*) 4 Beav. 549, Michell *v.* Michell. See also 17 L. J. Canc. 440, Warden *v.* Ashburner.
(*t*) Bro. Pres. pl. 4, per Thorp. 18 Vin. Ab. Rent (Z. a.)
(*u*) 10 Rep. 127, *b.* citing 44 E. 3, 3, (*b*).
(*v*) 13 Vin. Ab. Fractions (C.) (5), citing Hardr. 24, arg. See also 4 Rep. 8, Bevil's case.
(*w*) 1 P. Wms. 292, Jenner *v.* Morgan; but see 11 Geo. 2, c. 19, *infra*.
(*x*) 2 Ves. Jun. 672, Wilson *v.* Harman.
(*y*) 3 Cru. Dig. 296.
(*z*) 1 P. Wms. 179, Southern *v.* Bellasis; Bellasis *v.* Cole.

at will rendering rent, and the person reserving the rent died at noon on Michaelmas Day; the Court held, that as the death had determined the lease, the rent would be lost unless the executor should have it, especially as a voluntary payment might have been made. But Lord Macclesfield said, that as to the other leases which continued in existence, the rent went with the reversion, because the tenants had till the last instant of the day to make their payments (*a*).

However, the statute 11 Geo. II. c. 19, s. 15, enacts, that where any tenant for life shall die before or on the day when the rent shall become payable by virtue of any lease ending upon the decease of the tenant for life, the executors, &c., of such tenant for life may recover the whole rent if such tenant has died on the day when the rent became payable, or, if before, a proportion thereof.

It is observable, that this statute only extends to rents reserved or leases determining by the lessor's death (*b*), and, therefore, in other cases, some of which have already been cited, the operation of the common law continued.

For where the lease did not determine on that event, the person in remainder or reversion became entitled to the whole rent due from the day of payment preceding the death of the tenant for life (*c*).

And this statute did not touch cases where the lease was made under a power, the further execution of which could be sanctioned in a Court of equity by the particular circumstances of the case (*d*).

After a considerable lapse of time, therefore, it was thought right by the Legislature to give very extended powers in the case of apportionment of rents.

By 4 Wm. IV. c. 22, the stat. 11 Geo. II. c. 19, was partly recited. The preamble states that 'doubts have been 'entertained whether the provisions of the said act apply to

(*a*) Prec. Ch. 555, Lord Strafford *v.* Lady Wentworth. S. C. 9 Mod. 21.
(*b*) 3 Cru. Dig. 324. (*c*) Ibid.
(*d*) 1 Sw. 337, *Ex parte* Smyth; and see the elaborate note at p. 338.

'every case in which the interests of tenants determine on 'the death of the person by whom such interests have been 'created, and on the death of any life or lives for which such 'person was entitled to the lands demised, although every such 'case is within the mischief intended to have been remedied and 'prevented by the said act; and it is therefore desirable that such 'doubts should be removed by a declaratory law: And whereas, 'by law, rents, annuities, and other payments due at fixed or 'stated periods are not apportionable (unless express provision be 'made for the purpose), from which it often happens that persons '(and their representatives) whose income is wholly or principally 'derived from these sources by the determination thereof before 'the period of payment arrives are deprived of means to satisfy 'just demands, and other evils arise from such rents, annuities, 'and other payments not being apportionable, which evils 'require remedy.'

The statute then goes on to enact and declare, that rents reserved upon any demise or lease of lands, &c., which leases or demises determined or shall determine on the death of the person making the same (although such person was strictly not tenant for life thereof) or on the death of the life or lives for which such person was entitled, shall be apportioned according to the provisions of the recited act.*

By sect. 2, all rents-service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under a power (after the passing of the act), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in Great Britain and Ireland †, due at fixed periods under any instrument executed after the passing of the act, or (being a will or testamentary instrument) that shall come into operation after the act, shall be apportioned, including the day of the death of such person, or determination of the interest, all just allowances, &c., being made. And all parties entitled shall, when the entire portion becomes due, and not before, have the same remedies for recovering the portion as in the case of an *entire* rent, annuity, &c., but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically, but the entire rents of which such portions

* That is, the 11 Geo. II. c. 19.

† It extends to Scotland. 1 H. L. Ca. 1, Fordyce *v.* Brydges.

shall form a part shall be received and recovered by the person or persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act in any action or suit at law or in equity.

By sect. 3, these provisions shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to any annual sums made payable in policies of assurance of any description.*

It has been held, that this act does not apply to rents payable by tenants from year to year, but not reserved by any instrument in writing (*h*). Nor to dividends in the public funds, although arising from the sale of an estate in realty (*i*). Nor to the case of a tenant in fee, nor to the apportionment of rent between the real and personal representative of such person, *whose interest is not terminated at his death* (*j*).

Lands were settled for life in 1828 by indenture, with a power of leasing. After 1834, the tenant for life granted leases under the power, and died in 1849. It was held, that as these were instruments subsequent to the act, the personal estate of the tenant for life was entitled to apportionment (*k*). An estate was left to a trustee, upon trust to pay, amongst other things, 5-8ths of certain net rents to his wife for her life. The wife died on the 24th of July. The will under which the wife received the rents was made in 1836. It was contended, that the rents were fixed at certain periods by instruments made *before the act*, and, therefore, that the case fell short of the act, but the Master of the Rolls held that the wife was entitled by virtue of the will, and decreed an apportionment (*l*).

Assumpsit was brought on a promise to run a horse at such *time* and place as the plaintiff should appoint. The declaration stated that the plaintiff did appoint such a *day*. The question was whether the word "day" would answer to "time," which is more certain and determinate than a day. But the Court said,

* As to policies of assurance, see 15 Sim. 473, Price *v.* Anderson.
(*h*) 4 Myl. & Cr. 484, *In re* Markby. It was in the case of a lunatic's estate.
(*i*) 4 Beav. 749, Michell *v.* Michell.
(*j*) 3 Hare, 173, Browne *v.* Amyot.
(*k*) 20 L. J. Canc. 384, Lock *v.* De Burgh.
(*l*) 19 L. J. Canc. 66, Knight *v.* Boughton.

that by appointing a day the law will supply the rest, and fix it to the most usual and convenient time of the day (*f*).

Cases where the Courts will not allow the fraction of a day.

But, on the other hand, there are cases where the Court, in conformity with the rules of sense and consistency, will entirely reject the idea of a fraction of a day. As if a devisor be born on the 1st of February, at eleven at night, and at one in the morning, of the last day of January, he makes his will of lands and dies, it is a good will, for he was then of age (*g*). This was recognised by Holt, C. J., as having been adjudged, and the case happened in 15 Car. II., where the Court said, that a person born on the 16th of February, 1608, became of age on the 15th of February, 1629, and that at whatever hour he was born was immaterial, there being no fraction of days (*h*). And Lord C. J. Holt had laid down the same doctrine in the case of an insurance some years previously (*i*). A policy was made to insure a loss for one year from the day of the date thereof. The policy was dated on the 3rd of September, 1697. The insurer died on the 3rd of September, 1698, about one in the morning. And Holt, C. J., held the insurer liable, for the 3rd of September, 1697, must be excluded from the computation. Then, the law making no fraction of a day, and the death happening after the commencement, and before the end of the last day, *i. e.*, the 3rd of September, 1698, the answer was liable, because the insurance was for a year, and the year was not complete till the 3rd day of September was over. And the Lord Chief Justice added: "Yet if A. be born on the 3rd day of September, and on the 2nd day of September, twenty-one years afterwards he makes his will, this is a good will, for the law will make no fraction of a day, and by consequence he was of age" (*k*). In this case, Sir Barth. Shower would have given evidence: that by the custom, and in the understanding of insurers, policies begin from the

(*f*) 3 Salk. 346, Scott *v.* Hogson.
(*g*) 1 Salk. 44, Anon., Holt, C. J. To the same effect. 2 Lord Raym. 1096. 6 Mod. 260.
(*h*) 1 Keb. 589, Herbert *v.* Turball. S. C. 1 Sid. 162. S. C. Thos. Raym. 84.
(*i*) 2 Salk. 625, in Sir Robert Howard's case.
(*k*) 2 Salk. 625, Sir Robert Howard's case. S. C. Holt's Ca. 195.

day that they bear date, though they were mentioned to begin from the day of the date, but it was overruled (*l*).

In another case the ancestor of the lessor of the plaintiff appeared to have died on the 1st of January, 1771, at five o'clock in the morning. The demise, in a declaration in ejectment, was laid on the same 1st of January, to hold from the 31st of December then last past. It was objected that the lessor of the plaintiff had no title, because the demise appeared to have been made whilst the ancestor was living, since he did not die till five o'clock on the 1st of January, and so was alive on that day. A verdict, under the direction of the Judge, having passed for the plaintiff, the objection was renewed. It was said, that there was no fraction of a day, so that the lessor's title did not accrue until the 2nd of January. But the Court replied, "If my ancestor die at five o'clock in the morning, I enter at six, and make a lease at seven, it is a good lease." And they added, that "*fictio juris neminem lædere debet;*" but "aid much it may;" and "this is seen in all matters where the law operates by relation and division of an instant, which are fictions in law." Therefore the rule for setting aside the verdict was discharged (*m*).

So where one was born on the 16th of August, at five or six A. M., and died at eleven A. M. on the 15th of August, so that, in reality, the age of the deceased was not more than twenty years and certain fractional parts, a will made by him was declared to be valid, although he had not arrived at the full age of twenty-one. For the law will not recognise in such a case the fraction of a day (*n*). So in *Lester* v. *Garland*, which has been already set out at length (*o*), the Master of the Rolls said, he would not consider the particular hour at which the testator had died in a given day, as by so doing he would be

(*l*) S. C. as reported in 1 Lord Raym. 480, Anon.
(*m*) 3 Wils. 274, Roe *d.* Wrangham *v.* Herse, in C. B.
(*n*) 1 Bro. P. C. 468, Toder *v.* Samsam.
(*o*) *Ante*, p. 132.

invalidating a deed entered for the benefit of parties according to the express wish of the testator (*p*).

So where a ship was warranted well on a particular day, and the policy was underwritten between one and three in the afternoon, but the ship was lost at about eight in the morning: the Court held, that if the ship were well at any time of that day it was sufficient, and a rule for setting aside a nonsuit was made absolute (*q*). Arbitrators were to make their award at or upon the 27th of March, and failing to do so, an umpirage was to succeed. The arbitrators had the whole of the 27th for the purpose of their award (*r*).

Again, in another case, Holt, C. J., said, that the last day of seven years was the end of the seven years, for there could be no fraction of a day, and before twelve o'clock at night is after the seven years. The beginning and end of the thing is part of the thing (*s*).

So in hiring and service, if a part of the day is included, the service is complete, as there is no fraction of a day (*t*).

Under the old bankrupt law, where the time for the bankrupt's last examination was enlarged, he was held to be protected from arrest during the whole of the last day (*u*).

So where an extent from the Crown and a commission of bankruptcy came into collision on the same day, the extent takes precedence, there being no division of the day as against the Crown (*v*).

(*p*) 15 Ves. 248, Lester *v* Garland.
(*q*) 3 T. R. 360, Blackhurst *v.* Cockell. See 1 B. & Ald. 672, Kirby *v.* Smith.
(*r*) 2 Vern. 100, Pring *v.* Pring.
(*s*) 2 Lord Raym. 1095, in Fitzhugh *v.* Dennington. S. C. 6 Mod. 259, cited and recognised 3 Wils. 274. See also 1 Lord Raym. 280.
(*t*) 1 T. R. 491, in R. *v.* Skiplam.
(*u*) Buck. 33, B. C. 424, Simpson's case.
(*v*) Bunb. 33, Rex *v.* Earl, this case is mentioned arg. 3 Moore, 748. 750.

An act of record will not admit any division of a day, but is said to be done the first instant of the day (*w*). So under the rule (*x*), that before taxation of costs one day's notice shall be given to the opposite party, a notice given before nine P. M. of one day, for the following day at twelve, was deemed a sufficient one day's notice (*y*).

Fraction of a Quarter of a Year.

The defendant having held over after the 24th of June, when the term ended, the rent being reserved quarterly, the plaintiff made his claim for double rent, but failed to do so till the 11*th of August* following. The plaintiff obtained a verdict for the double rent from the 24th of June to the 3rd of November, and for one year's single rent up to the 24th of June. But it was objected, that he could not have the double rent between the 24th of June and the 11th of August, for want of notice, and the defendant's counsel also insisted, that the plaintiff had been too late altogether in his demand for the double rent. On the other side it was admitted, that the double rent could not commence till the day of notice,—the 11th of August; but it was said, that the plaintiff ought to have the single rent from the 24th of June till the 11th of August. The Court held, that if the plaintiff took his verdict for the double value from the 11th of August, he could not recover the single rent, as upon an implied tenancy, with reference to the former holding, for the fraction of the quarter, between the 24th of June and the 11th of August. The verdict was, therefore, directed to be altered, and the rule for entering a verdict for the defendant was then discharged (*z*).

(*w*) Mo. 137. 141, Shelley's case.
(*x*) T. T. 1 Wm. 4, 1831.
(*y*) 4 Mees. & W. 66. 6 D. P. C. 667, Edmunds *v.* Cates.
(*z*) 8 East, 358, Cobb *v.* Stokes.

INDEX

OF THE

PRINCIPAL MATTERS AND STATUTES

MENTIONED IN THIS WORK.

A.

I.

J.

L.

M.

N.

P.

Q.

R.

S.

STATUTES—*continued.*

Y.

THE END.

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