

A Departure in Pleading is said to be when the second Plea containeth Matter not pursuant to his former, and which fortifieth not the same, and thereupon it is called Deceffus, because he departeth from his former Plea; and therefore whensoever the Rejoinder (taking one Example for all) containeth Matter subsequent to the Matter of the Bar, and not fortifying the same, this is regularly a Departure, because it leaveth the former, and goeth to another Matter. As if in an Issue the Tenant plead a Discent from his Father, and giveth a Colour, the Demandant intitleth himself by a Feoffment from the Tenant himself, the Plaintiff cannot say, That that Feoffment was upon Condition, and to shew the Condition broken; for that should be a clear Departure from his Bar, because it containeth Matter subsequent. But in an Issue, if the Tenant pleadeth in Bar, That I. S. was seised and infeoffed him, &c. and the Plaintiff sheweth, That he himself was seised in Fee, until by I. S. disseised, who infeoffed the Tenant, and he re-entred, the Defendant may plead a Release of the Plaintiff to I. S. for this doth fortify the Bar.

If a Man plead Performance of Covenants, and the Plaintiff reply, That he did not such an Act according to his Covenant, the Defendant saith, That he offered to do it, and the Plaintiff refused it; this is a Departure, because the Matter is not pursuant: For it is one Thing to do a Thing, and another to offer to do it, and the other refused to do it; therefore that should have been pleaded in the former Plea. Vide & Cave in a Quare impedit, what Plea shall be safely pleaded in primo placito.

When a Man in his former Plea pleadeth an Estate made by the Common Law, in the second Plea regularly he shall not make it good by an Act of Parliament. So when in his former Plea he intitleth himself generally by the Common Law; in his second Plea he shall not enable himself by a Custom, but should have pleaded it first.

If a Man plead an Estate generally, (as for Example a Feoffment in Fee) he in his second Plea shall not maintain it by other Matter tantamount in Law, as by a Disseisin and Release, or by a Lease and Release, or a Gift in Tail in Bar, and in the second Plea a Recovery in Value; for this is a Departure: But he in that Case shall count of a Gift, and maintain it in his Replication by a Recovery in Value, because he could have no other Count.

See more of this Matter, where the Plaintiff varying from Time or Place alledged in the Count of Actions transitory, shall commit no Departure.

The Plea that contains Duplicity or Multiplicity of distinct Matters to one and the same Thing, whereunto several Answers (admitting each of them to be good) are required, is not allowable in Law. And this Rule, you see, extendeth to Pleas perpetual or peremptory, and not to Pleas dilatory: For in their Time and Place a Man may use divers of them, and hereof ancient Writers speak notably; Sicut Actor una actione debet experiri saltem illa durante, sic oportet tenentem una exceptione, dum tamen peremptoria (quod de dilatoriis non est tenendum) quia si liceret pluribus uti exceptionibus peremptoriis simul & semel, sicut fieri poterit in dilatoriis, sic sequeretur, quod si in probatione unius defecerit, ad aliam probandam possit habere recursum, quod non est permittibile, non magis quam aliquem se defendere duobus baculis in duello, cum unus tantum sufficiat.

But where the Tenant or Defendant may plead a general Issue, there upon the general Issue pleaded, he may give in Evidence as many distinct Matters, to bar the Action or Right of the Demandant or Plaintiff, as he can.

A special Verdict may contain double or treble Matter, and therefore in those Cases the Tenant or Defendant may either make Choice of one Matter, and plead it to bar the Demandant or Plaintiff, or to plead the general Issue, and to take Advantage of all; or he may plead to Part one of the Pleas in Bar, and to another Part another Plea; and his Conclusion of his Plea shall avoid Doubtless; and hereby neither the Court nor the Jury is so much beguiled, as if one Plea should contain divers distinct Matters. And if the Tenant make Choice of one Plea in Bar, and that be found against him, yet he may resort to an Action of a higher Nature, and take Advantage of any other Matter. And the Law in this Point is by them that understand not the Reason thereof misliked, saying, Nemo prohibetur pluribus defensionibus uti.

And it is worthy of Observation, That in the Reigns of Edward the Second, Edward the First, and upwards, the Pleadings were plain and sensible, but nothing curious; evermore having chief Respect to Matter, and not to Forms of Words, and were often holpen with a Quæstio est, and then the Questions moved by the Court, and the Answers by the Parties, were also entered into the Roll. But even in those Days the Forms of the Register of Original Writs were then punctually observed, and Matters in Law excellently debated and resolved; and where any great Difficulty was, then it was resolved by all the Judges and Sages of the Law, (who were for Matters in Law called Concilium Regis) and their Assembly and Resolution was entered into the Roll. As for Example; In the great Case in a Quare impedit, between the King and the Prior of Worcester, concerning an Appropriation, whether it were a Mortmain, the Record saith, Ad quem diem venit prædictus Prior

Sid. 10, 77, 176.
Finch 391. 2 Cro. 264.
39 E. 3. 13. b. 39 H. 6. 15.
6 H. 7. 8. 21 H. 6. 32.
Pl. Com. 10. 1 Mar.
Dyer 97. 28 H. 8. 16. 31.
Doc. Pla. 119.
6 H. 7. 8. 3 H. 6. De-
parture 2.
1 Cro. 223, 229, 257.

8 El. Dy. 253. 23 El.
Dy. 271. 6 E. 3. 3.
46 E. 3. 32. 43 E. 3. 11.
1 E. 4. 4. 18 E. 3. 4. 24.
5 H. 7. 27. 8 H. 6. 11.
33 H. 6. 14.
+ 1 Saun. 83.
21 H. 7. 25. 27 H. 8. 3.
21 H. 7. 17. 37 H. 6. 5.
38 H. 6. 25.
+ 1 Lev. 31. S. C.
+ Raym. 60.
+ Sid. 142.
21 H. 7. 25. 1 E. 4. 4.
3 H. 7. 5. 7 H. 7. 2.

Pl. Com. 139, 142.

17 E. 3. 73.
Doc. Pla. 135.
39 H. 6. 27.

Ante 139. 2.

Hill. 32 E. 1. Cor. Reg.
in fine Rotul.